

2002

Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?

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Recommended Citation

87 Iowa L. Rev. 615 (2002)

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Applying *Apprendi* to the Federal Sentencing Guidelines: You Say You Want a Revolution?¹

Susan N. Herman*

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1. THE BEATLES, *Revolution*, on THE WHITE ALBUM (EMI Records 1968).

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I. APPRENDI AND ITS AFTERMATH

One result of the Supreme Court's decision in *Apprendi v. New Jersey*² is that Charles Apprendi may have gained two years of freedom. Apprendi pleaded guilty to possession of a firearm for an illegal purpose under a state statute subjecting him to a maximum penalty of five to ten years.³ The trial court then sentenced him to twelve years imprisonment when the judge found, under a separate hate crimes sentencing enhancement statute, that his offense—firing a gun into the home of an African-American family—had been motivated by a purpose to intimidate the residents of the home on the basis of their race.⁴

The ground on which the Court reversed Apprendi's sentence, that the factual findings on which the sentence was based should have been made by a jury rather than the sentencing judge,⁵ could lead to a far more dramatic result: a revolutionary reconstruction of our procedures for determining guilt and punishment. As soon as *Apprendi* was decided, at the very end of the October 2000 Term, commentators characterized the case as possibly the greatest blockbuster in a term of blockbuster decisions.⁶ The dissenting Justices characterized the decision as a "watershed" rule of criminal procedure.⁷ Talking heads and their writing counterparts predicted that, because of *Apprendi*, federal criminal law would be radically remodeled, jailhouse doors would open, and legislatures would resort to redrafting statutes to evade the case's far-reaching consequences.⁸ Some criticized the revolutionary regime,⁹ while others thought the Court had acted

2. 530 U.S. 466 (2000). For a detailed description of the holding, see *infra* text accompanying notes 34-43.

3. *Apprendi*, 530 U.S. at 469-71.

4. *Id.* at 471.

5. *Id.* at 490-97.

6. See Erwin Chemerinsky, *Supreme Court Review: A Dramatic Change in Sentencing Practices*, TRIAL, Nov. 2000, at 102 (describing *Apprendi* as "one of the most important U.S. Supreme Court decisions in years"); J. Stephen Welch, *Apprendi v. New Jersey: Watershed Ruling for the New Millennium?*, S.C. LAW, Apr. 2001, at 37 (describing *Apprendi* as "truly . . . a watershed ruling," possibly a "dividing line," changing the direction of constitutional law for years to come).

7. *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting). Justice O'Connor's opinion thus suggested that *Apprendi* should be applied retroactively under the standards of *Teague v. Lane*, 489 U.S. 288, 311 (1989), to allow claims of *Apprendi* violations to be raised in a wholesale wave of habeas corpus petitions.

8. See Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1488-89 (2001) (predicting possible legislative reactions to *Apprendi*).

9. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1100-01 (2001).

appropriately as long as its actions would not upset the Federal Sentencing Guidelines.¹⁰

The apocalyptic predictions came true in part. *Apprendi* caused a great flurry of activity in and around the federal courts,¹¹ including a proliferation of seminars,¹² an avalanche of pro se habeas corpus petitions and motions for resentencing, and a steadily increasing stream of scholarly articles. Lawyers, pro se litigants, and judges have spent many hours trying to determine *Apprendi*'s scope.¹³ Most cases, however, have not resulted in revolutionary reversals of convictions, largely because federal direct appeals and collateral attacks bristle with defensive procedural limitations. Reading the lower federal court cases applying *Apprendi* is like watching the construction of a barricade: case after case selects from a dazzling array of procedural excuses to explain why each particular defendant should not reap *Apprendi*'s benefits. The courts tell petitioners who were sentenced before *Apprendi* that: (1) *Apprendi* is not retroactive;¹⁴ (2) petitioners cannot show cause and prejudice sufficient to overcome a failure to object to their sentence in a timely manner;¹⁵ (3) petitioners' failure to have filed their collateral attack within a year of sentence is fatal;¹⁶ or, (4) petitioners' failure to have raised the new *Apprendi* claim in a previous petition precludes raising the issue in a new petition.¹⁷ If *Apprendi* is considered to be a "new rule" of

10. King & Klein, *supra* note 8, at 1483-84; Andrew J. Fuchs, *The Effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399, 1401-02 (2001).

11. The impact of *Apprendi* on the state courts has so far been of lesser magnitude, perhaps partly because many state legislatures have left more decisions to juries. See *infra* text accompanying note 52 (describing the highly graded New York drug laws).

12. For example, in 2001, the Federal Judicial Center devoted six sessions at its educational seminar for Federal Defenders to discussion of *Apprendi* issues.

13. The Administrative office does not yet have data available on *Apprendi*'s impact on the federal docket, but searching the Westlaw federal court database for references to "*Apprendi*" yielded 1723 cases.

14. See *United States v. Sanders*, 247 F.3d 139, 146 (4th Cir. 2001) (holding *Apprendi* not to be retroactive under *Teague v. Lane* standards); *Jones v. Smith*, 231 F.3d 1227, 1236 (9th Cir. 2000) (same). But see *Darity v. United States*, 124 F. Supp. 2d 355, 363-65 (W.D.N.C. 2000) (applying *Apprendi* retroactively); *United States v. Murphy*, 109 F. Supp. 2d 1059, 1063 (D. Minn. 2000) (applying the *Apprendi* principle retroactively as "implicit in the concept of ordered liberty" under *Teague*).

15. See *United States v. Smith*, 241 F.3d 546, 548-49 (7th Cir. 2001) (finding that the defendant "procedurally defaulted his *Apprendi* claim when he failed to raise it at his trial in 1992," because the "foundation" for *Apprendi* claims was laid even before then); *Sanders*, 247 F.3d at 145-46 (same logic). But see *Darity*, 124 F. Supp. 2d at 365 (questioning the applicability of the cause and prejudice standard to a new rule made applicable under *Teague*, but finding cause and prejudice).

16. *Sanders*, 247 F.3d at 142-44; see 28 U.S.C. § 2255 (1994 & Supp. II 1996) (including a one-year statute of limitations).

17. See 28 U.S.C. § 2255 (1994 & Supp. II 1996) (allowing courts of appeal to permit filing of a second petition if the new petition contains "a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously

constitutional law, petitioners lose because it is not retroactive. If it is not considered “new,” petitioners lose because the courts usually find that they have defaulted on the claim. Courts tell direct appellants, who confront fewer procedural obstacles,¹⁸ that *Apprendi* errors are harmless as long as the sentence imposed upon them was within the statutory maximum, regardless of how their sentence might have changed under the Federal Sentencing Guidelines.¹⁹ Operating in lockstep, the courts of appeals have all but unanimously concluded that *Apprendi*, despite the contrary supportive comments of one concurring Justice²⁰—and alarmed predictions of four dissenting Justices²¹—does not apply to the Federal Sentencing Guidelines.²²

To be sure, *Apprendi* has had a significant prospective impact, primarily

unavailable”); *Tyler v. Cain*, 121 S. Ct. 2478, 2482-85 (2001) (holding that a ruling is not retroactive within the meaning of AEDPA unless the Supreme Court has actually found the case to be retroactive prior to the petitioner’s filing of the successive petition).

18. Although direct appellants have the benefit of the law that applies at the time of their appeal and of the plain error rule, forgiving their failure to have raised the issue at sentencing, application of the plain error rule has not always favored *Apprendi* appellants. See *United States v. Nordby*, 225 F.3d 1053, 1060-61 (9th Cir. 2000) (discussing the application of various facets of the plain error rule as elaborated in *Johnson v. United States*, 520 U.S. 461, 466-67 (1997), including whether defendant’s “substantial rights” are affected under *Apprendi*, or whether an *Apprendi* error “seriously affects the fairness, integrity, or public reputation of judicial proceedings”).

19. Under some facets of the plain error rules described *supra* note 18, *Apprendi* claims raised on appeal may be subject to harmless error analysis, as in *Neder v. United States*, 527 U.S. 1 (1999), if the sentence imposed falls within the statutory maximum, see *United States v. Williams*, 235 F.3d 858, 863 (3d Cir. 2000); *United States v. Garcia-Guizar*, 234 F.3d 483, 488-89 (9th Cir. 2000), or if the fact allegedly at issue was not seriously in question, see *United States v. Swatzie*, 228 F.3d 1278, 1284 (11th Cir. 2000). Similarly, *United States v. Page*, 232 F.3d 536, 542-45 (6th Cir. 2000), found an *Apprendi* error harmless where the same sentence could have been achieved by imposition of consecutive sentences.

20. *Apprendi v. New Jersey*, 530 U.S. 466, 523 n.11 (2000) (Thomas, J., concurring).

21. *Id.* at 544 (O’Connor, J., dissenting, joined by Rehnquist, C.J., Kennedy, J., & Breyer, J.). The *Apprendi* majority opinion notes that this is an open question, without speculating about how the question should be resolved. *Id.* at 497 n.21.

22. *United States v. Baltas*, 236 F.3d 27, 40-41 (1st Cir. 2001); *United States v. Garcia*, 240 F.3d 180, 183-84 (2d Cir. 2001); *United States v. Williams*, 235 F.3d 858, 862-63 (3d Cir. 2000); *United States v. Doggett*, 230 F.3d 160, 164-66 (5th Cir. 2000) (summary rejection); *United States v. Corrado*, 227 F.3d 528, 542-43 (6th Cir. 2000); *United States v. Nance*, 236 F.3d 820, 825 (7th Cir. 2000); *United States v. Alguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1026-27 (9th Cir. 2000); *United States v. Heckard*, 238 F.3d 1222, 1235-36 (10th Cir. 2001); *United States v. Gerrow*, 232 F.3d 831, 834-35 (11th Cir. 2000) (summary rejection); see also *United States v. Layeni*, No. 00-3031, 2000 U.S. App. LEXIS 29351 (D.C. Cir. Oct. 18, 2000) (per curiam) (denying certificate of appealability in habeas case where petitioner sought to raise a claim under *Apprendi* but sentence did not exceed statutory maximum).

The Fourth Circuit has had more difficulty in reaching a resolution of this issue. See *United States v. Kinter*, 235 F.3d 192, 200 (4th Cir. 2000) (finding the argument “colorable”); *United States v. Angle*, 230 F.3d 113, 121-24 (4th Cir. 2000), *aff’d in part & rev’d in part*, 254 F.3d 514, 517-19 (4th Cir. 2001) (en banc) (not reaching merits because defendant had not demonstrated plain error).

in the area of federal drug prosecutions. Section 841 of Title 21 of the U.S. Code, the principal federal drug statute, conditions penalty levels on the quantity of drugs involved.²³ Of the relatively small number of defendants whose drug convictions were pending direct appeal when *Apprendi* was decided, a few did have their sentences vacated.²⁴ The United States, which conceded in some cases that this statutory scheme violates *Apprendi* by allowing the sentencing judge to increase sentences beyond what otherwise would be the statutory maximum,²⁵ began to include the drug quantity in drug indictments.²⁶ *Apprendi* also arguably applies to various other federal statutes that predicate increased liability on proof of additional facts.²⁷ While these consequences are far from insignificant, if *Apprendi* were applied to the Federal Sentencing Guidelines, the result would be truly revolutionary.²⁸

In determining that *Apprendi* does not apply to the Federal Sentencing Guidelines, the lower courts had to contend with the gaping disparity

23. 21 U.S.C. § 841 (1994). Section 841(b)(1)(A) prescribes a sentence of ten years to life, § 841(b)(1)(B) a sentence of five to forty years, and § 841(b)(1)(C) a sentence of zero to twenty years, depending on the type and quantity of drugs possessed with intent to disseminate.

Since deciding *Apprendi*, the Supreme Court has granted certiorari, vacated, and remanded a number of convictions under § 841, without opinion, for reconsideration in light of *Apprendi*. See *United States v. Norris*, No. 97 CR 705-01, 2001 U.S. Dist. LEXIS 5449, at *11-12 (E.D.N.Y. Apr. 27, 2001) (listing representative cases); *Jones v. United States*, 530 U.S. 1271, 1271 (2000), remanded to *United States v. Jones*, 235 F.3d 1231, 1235-38 (10th Cir. 2000) (reconsidering a § 841 argument after *Apprendi* and vacating sentence).

24. The Ninth Circuit recently held § 841(b) unconstitutional, in light of *Apprendi*, in *United States v. Buckland*, 259 F.3d 1157, 1162-68 (9th Cir. 2001), *reh'g granted*, 265 F.3d 1085 (9th Cir. Sept. 14, 2001).

25. See *United States v. Meshack*, 225 F.3d 556, 575 (5th Cir. 2000) (noting the government's concession of applicability).

26. *Bibas*, *supra* note 9, at 1148-80. Because the vast majority of federal criminal prosecutions is resolved by plea, the chief result of this change of practice may be to require defendants at plea allocutions to describe in more detail what they are admitting to have done. See *United States v. Rebmann*, 226 F.3d 521, 522-25 (6th Cir. 2000) (discussing what should have been an element of the crime under *Apprendi* where the defendant pled guilty).

27. See *United States v. Pavelcik*, No. 99-50316, 2000 U.S. App. LEXIS 20983 (9th Cir. Aug. 11, 2000) (unpublished decision) (granting relief under *Apprendi* where the defendant received enhancement under a mail fraud statute, 18 U.S.C. § 2326 (1994 & Supp. IV 1998), for fraud involving telemarketing); see also 8 U.S.C. § 1324(a)(1)(B)(1) (1994 & Supp. V 1999) (enhancing a sentence for alien smuggling if undertaken "for the purpose of commercial advantage or private financial gain"); 18 U.S.C. § 3147 (1994) (imposing a consecutive sentence if the offense had been committed while the defendant was released on bail); 18 U.S.C. § 2261 (1994) (increasing a sentence depending on the degree of harm to the victim of interstate domestic violence). See generally Alan Ellis et al., *Apprehending and Appreciating Apprendi*, CRIM. JUST., Winter 2001, at 16, 20, 22 (listing additional federal statutes arguably covered by the theory of *Apprendi*); Jon M. Sands & Steven G. Kalar, *An Apprendi Primer: The Virtues of a "Doubting Thomas,"* CHAMPION, Oct. 2000, at 18, 23-24 (same).

28. See *United States v. Norris*, 143 F. Supp. 2d 243, 248 (E.D.N.Y. 2001) (describing *Apprendi* as a "dead letter" if the courts finding the theory inapplicable to the Guidelines prevail).

between *Apprendi*'s rationale and its holding.²⁹ The Court's decision raises more questions than it answers about the role of the jury in fact finding and the necessary relationship between elements of a crime and sentencing factors. Lower courts have taken advantage of their status by remaining within the letter of the holding, leaving the Supreme Court to decide whether to sweep away any of the procedural barriers to postconviction *Apprendi* relief and whether to apply *Apprendi* to the Federal Sentencing Guidelines. Most lower courts have contented themselves with only superficial analysis of whether the holding can logically be so limited, thus providing the Supreme Court little assistance with the decision that will ultimately have to be made.³⁰ There is little sign of struggle, except in an occasional District Court opinion.³¹ Commentators seeking to provide a rationale for distinguishing the Guidelines have relied heavily on Justice Breyer, whose dissenting arguments sounded not in logic, but in pragmatism.³² Applying *Apprendi* to the Guidelines, Breyer argued, would undo the Guidelines' sentencing reform, and would challenge the way in which federal courts are currently handling their criminal law business.³³ In other words, applying *Apprendi* to the Guidelines would be revolutionary, and therefore should be avoided.

With this Article, I hope to promote a fuller discussion about whether sentencing under the Guidelines is indeed distinguishable from the regime that troubled the Court in *Apprendi*. More broadly, I explore whether *Apprendi* has upset or restored the proper balance between courts and legislatures in making decisions about the criminal process, and between judges and juries in implementing those decisions.

Apprendi is a fascinating microcosm of recent issues surrounding constitutional interpretation. In the next section, I will describe how the majority, concurring, and dissenting opinions in *Apprendi* approach the problem of constitutional interpretation presented: when should courts override a legislative decision about what to treat as an element of a criminal

29. See *United States v. Smith*, 223 F.3d 554, 565-66 (7th Cir. 2000) (asserting that *Apprendi*, under Justice Thomas's rationalization, should apply to increases in potential sentence under the Guidelines, but adhering to the literal holding); see also Bibas, *supra* note 9, at 1147-48 (agreeing with Justice Thomas that *Apprendi*'s rationale undermines the choices made in the Guidelines); *infra* text accompanying notes 34-43 (discussing disparity between *Apprendi*'s rationale and its literal holding).

30. See cases cited *supra* note 22.

31. *Norris*, 128 F. Supp. 2d at 739 (E.D.N.Y. 2001); *United States v. Norris*, No. 97 CR 705-01, 2001 U.S. Dist. LEXIS 5449 (E.D.N.Y. Feb. 1, 2001) (Nickerson, J.).

32. King & Klein, *supra* note 8, at 1483-84; Fuchs, *supra* note 10, at 1419-26. Others have agreed with Justice Thomas and concluded that the Guidelines are not distinguishable. Bibas, *supra* note 9, at 1148-49.

33. *Apprendi v. New Jersey*, 530 U.S. 466, 555-66 (2000) (Breyer, J., dissenting) (maintaining that the real world of criminal justice "can function only with the help of procedural compromises, particularly in respect to sentencing").

offense and what to treat as a sentencing factor? All three opinions seem to assume that an unequivocal answer to this question can be found in history, although their versions of history's answers differ starkly. As I explain, the history of how the guilt and punishment phases have been treated throughout American history does not settle the question of whether the *Apprendi* holding should be extended to the Federal Sentencing Guidelines, under which significant increases in punishment are effected by sentencing judges operating on a standard of proof less rigorous than proof beyond a reasonable doubt. I then discuss an alternative approach to this question, looking to the historical role and function of the jury. The true center of the debates in *Apprendi* is whether or not the jury will be empowered to serve as a meaningful second locus of democratic input in the criminal justice system, even if that prospect disadvantages criminal defendants. Finally, I discuss the reason why the Court is unlikely to apply *Apprendi* to the Federal Sentencing Guidelines regardless of what history might show or what juries should be permitted to decide: the Court's continuing adherence to a positivist view of the liberty of anyone convicted of a crime. This misguided approach, although not surfacing in any of the *Apprendi* opinions, has enabled the Court to avoid decisions that would upset legislative will in other areas and threatens to do the same here.

II. THE FUTURE SCOPE OF *APPRENDI*: HOLDING VS. RATIONALE

A. *APPRENDI* AND THE FEDERAL SENTENCING GUIDELINES

According to Justice Stevens's majority opinion, expanding *Apprendi*'s sentence by two years beyond the original statutory maximum was unconstitutional because it increased the prosecutor's entitlement beyond the original charge.³⁴ Therefore, *Apprendi* should have been entitled to have the precipitating fact—that his crime was motivated by racial intimidation—found by a jury, operating under a standard of proof beyond a reasonable doubt.³⁵ The Sixth Amendment right to trial by jury and the due process right to proof beyond a reasonable doubt trump the state legislature's intent to have the precipitating fact (racial intimidation) found by a judge as part of the sentencing decision. As Justice Stevens explained, quoting his own concurring opinion the previous year in *Jones v. United States*:³⁶ “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.”³⁷ Similarly, the legislature cannot avoid the Due Process Clause's requirement that all “elements” of a crime be proven

34. *Id.* at 491-97.

35. *Id.* at 490.

36. 526 U.S. 227 (1999).

37. *Apprendi*, 530 U.S. at 490 (quoting *Jones*, 526 U.S. at 252-53 (Stevens, J., concurring)).

beyond a reasonable doubt³⁸ by relegating proof of some of those elements to sentencing, where a lesser standard of proof may be employed.³⁹

The actual holding of *Apprendi* is more limited than some of the statements made in its support would suggest: "Other than the fact of 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."⁴⁰ Justice Thomas, in a concurring opinion, defended the broader proposition that the statutory maximum should not matter. Any aggravating fact, Thomas maintained, that "is by law a basis for imposing or increasing punishment," should be subject to the *Apprendi* rationale.⁴¹ As Justice O'Connor's dissent noted, Justice Thomas's formulation would almost certainly call into question the constitutionality of the Federal Sentencing Guidelines, which subdivide the sentencing consequences of conviction under each statute by creating a series of narrow sentencing ranges, with the appropriate range to be selected depending on facts found by the sentencing judge.⁴² These sentencing factors, like the enhancement in *Apprendi*, can be described as providing a basis for imposing or increasing punishment.⁴³

The facts of *United States v. Meshack*,⁴⁴ one of the first cases finding *Apprendi* inapplicable to the Guidelines, provide a typical example of the operation of the Guidelines. In that case, a jury convicted defendant Thomas of possession of crack cocaine with intent to distribute.⁴⁵ The available sentencing range under § 841 was from zero to twenty years.⁴⁶ At sentencing, the judge decided, over the defendant's objection, that the relevant quantity of drugs involved was 245.73 grams, placing defendant's crime at base offense level thirty-four and resulting in a sentence of 168 months.⁴⁷ The judge, not the jury, made the finding on this disputed fact without the benefit of trial rules of evidence and on a reduced standard of

38. See *In re Winship*, 397 U.S. 358, 374 (1970) (requiring the prosecution to convince the finder of fact of all essential elements of guilt beyond a reasonable doubt).

39. *Apprendi*, 530 U.S. at 490.

40. *Id.* (emphasis added).

41. *Id.* at 501 (Thomas, J., concurring).

42. *Id.* at 544 (O'Connor, J., dissenting).

43. For a discussion of the counterargument that the Guidelines do not "increase" punishment because defendant has already been convicted of a crime entitling the government to the maximum amount of time provided under the statute of conviction, see *infra* text accompanying notes 121-47.

44. 225 F.3d 556 (5th Cir. 2000).

45. *Id.* at 565.

46. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) (1994).

47. *Meshack*, 225 F.3d at 565-66. Had the judge found a smaller quantity, the resulting base offense level might have prescribed a sentence shorter by years. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (1994) [hereinafter U.S.S.G.] (Drug Quantity Table and Sentencing Table at § 5A) (listing the Guidelines range for various quantities of controlled substances).

proof.⁴⁸ The defendant did not win resentencing after *Appendi*, however, because his Guidelines sentence was within the maximum of the applicable statute.⁴⁹

Unlike the New Jersey legislature in its hate crime legislation, Congress did not itself decide how to treat drug quantity, the relevant sentencing factor here. Congress delegated the authority to structure sentencing decisions to the United States Sentencing Commission, a body created to be politically insulated.⁵⁰ Shortly after the Guidelines were enacted, I asked why, given the Sentencing Reform Act and the Guidelines' new narrow focus on offense-related factors, it was necessary or appropriate to treat factors like drug quantity as sentencing factors rather than as elements of the offense.⁵¹

In New York, by way of contrast, drug laws are graded according to the type and quantity of drug involved in a defendant's offense.⁵² The jury is asked to decide the relevant drug quantity as an element of the offense, using the proof beyond a reasonable doubt standard, and thereby circumscribes the range of possible punishment. No one in the federal system ever really took responsibility for deciding whether treating drug quantity as an element would have been preferable to the Sentencing Commission's drug quantity table. The Sentencing Commission, having been delegated only the power to structure sentencing discretion, did not have the power to rewrite the underlying criminal law itself. Therefore, it had no need to discuss which of the facts in question could more appropriately have been treated as elements of the underlying offense, or what factual determinations jurors could handle. Congress showed by its delegation, and the decision not to review the Sentencing Commission's initial work,⁵³ that it had either too little will or too much self-knowledge to rewrite the federal criminal code.⁵⁴

48. 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, 295-99 (1992) [hereinafter Herman, *The Tail that Wagged the Dog*] (describing how lowered standards of proof at sentencing are considered constitutionally permissible and critiquing this result).

49. *Meshack*, 225 F.3d at 576-77.

50. See *Mistretta v. United States*, 488 U.S. 361, 380-412 (1989) (holding that the creation of the hybrid Sentencing Commission did not violate separation of powers principles).

51. See Herman, *The Tail that Wagged the Dog*, *supra* note 48, at 289, 295-99 (discussing the Guidelines' treatment of drug quantity as a sentencing factor).

52. N.Y. PENAL LAW §§ 220.00-65, 221.00-55 (McKinney 2001); see Susan N. Herman, *Measuring Culpability by Measuring Drugs?: Three Reasons to Reevaluate the Rockefeller Drug Laws*, 63 ALB. L. REV. 777 (2000) (discussing New York's exclusive focus on drug quantity and type as a grading device).

53. Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania*, 22 SEATTLE U. L. REV. 1057, 1061 n.21 (1999).

54. There are several ways in which disputes about drug quantity, now decided by the sentencing judge, arise under the Sentencing Guidelines. First, defendants are sentenced not just for the conduct for which they have been convicted, but for their "real offense." See U.S.S.G. § 1B1.3(a)(1) (1994) (addressing the relevant conduct within a charged offense); § 1B1.3(a)(2)

In any event, even if Congress intended to make drug quantity a sentencing factor rather than an element of the offense, this intent would be of no greater constitutional consequence than the New Jersey legislature's decision to have judges decide on the existence of a purpose to intimidate. The central question is whether the Guidelines escape *Apprendi*'s constitutional rule because the sentencing ranges provided operate within a preexisting statutory maximum sentence. While it seems likely that Justice Thomas would conclude that the Guidelines "increase punishment," it is not clear how many other members of the five-Justice majority would agree to this formulation. Justice Scalia quite pointedly refused to join the section of Thomas's concurrence where the rationale supporting this position is set forth.⁵⁵ So far, there has been a majority only for the more limited holding, making the statutory maximum the ceiling of *Apprendi*'s reach.

In her dissent, Justice O'Connor attacked the majority's holding as an illogical and formalistic compromise. If the Court is willing to second-guess legislative decisions about allocation of fact finding, O'Connor asked, what reason is there to distinguish between facts that aggravate a punishment beyond a statutory maximum and facts that aggravate a punishment within a statutory maximum, or even facts that mitigate a punishment?⁵⁶ She observed that the New Jersey legislature could achieve the result they sought in their enhancement statute without violating the Court's holding by

(addressing discrete acts or omissions); § A4(a) (explaining the modified real-offense approach); David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993) (critiquing the Guidelines' real-offense approach). In *United States v. Silverman*, 889 F.2d 1531, 1532-35 (6th Cir. 1989), for example, a defendant was sentenced on the basis of possession of one kilogram of cocaine rather than the quarter ounce alleged and proven at trial. The decision about whether a defendant is sufficiently connected with a shipment of drugs to justify holding defendant culpable for the entire shipment, as opposed to just the amount the defendant has actually sold or disseminated, might be decided differently by a jury reflecting community mores rather than a judge, who presumably manifests a professional viewpoint.

Second, sometimes there is doubt about the quantity of drugs involved in a defendant's own activity. See *United States v. Beaulieu*, 893 F.2d 1177, 1179-81 (10th Cir.), *cert. denied*, 497 U.S. 1038 (1990) (describing a sentencing hearing in which the judge determined the relevant quantity of drugs by referring to a transcript of the testimony of a witness at the earlier trial of the defendant's brother); see also Herman, *The Tail that Wagged the Dog*, *supra* note 48, at 354 n.270 (describing a drug trial where the government had inspected some but not all of the electrical tape-wrapped packets of drugs that the defendant was found to have smuggled and then derived the quantity on which sentencing would be based by extrapolating and multiplying the quantity found in the inspected packages). This casual approach was later questioned by the Second Circuit, which held in *United States v. Shonubi*, 103 F.3d 1085, 1090-93 (2d Cir. 1997), that specific evidence of drug quantity is required before a defendant is sentenced under a guideline setting penalties on the basis of that quantity.

Some of these creative techniques of establishing drug quantity, thought to pass muster under the looser standard of proof applied at sentencing, might well fail to provide proof beyond a reasonable doubt.

55. *Apprendi*, 530 U.S. at 498-99 (Scalia, J., concurring).

56. *Id.* at 542-44 (O'Connor, J., dissenting).

shuffling a few words. They could simply redraft their statute to set one maximum penalty for possession of a firearm, and then provide that, within that maximum, only those defendants found by a judge at sentencing to have acted with a purpose to intimidate on the basis of race would be eligible to receive a sentence greater than ten years.⁵⁷ At least for the purposes of her dissent, Justice O'Connor joined Justice Thomas in believing that the statutory maximum should not be dispositive, especially when it creates such a malleable line. However, she also resisted Thomas's attempts to defend his own rule on the basis of history.⁵⁸

B. APPENDI AND THE TECHNIQUES OF CONSTITUTIONAL INTERPRETATION

1. The History of Sentencing Discretion

The range of viewpoints in the *Appendi* opinions demonstrates that invoking our collective traditions and common law practice as a basis for constitutional interpretation is not a simple or objective enterprise. Not only did the Justices bicker about sources (Is the third or fourth edition of *Blackstone's Commentaries* the superior reference? How are the treatises of Archbold and Bishop to be read?),⁵⁹ but they also disagreed on methodology (Must a source date from the eighteenth century to count as relevant history?).⁶⁰ Justice Thomas claimed that common law history supported his broad rule;⁶¹ Justice O'Connor claimed that it did not, although without providing a counter-history.⁶² Justice Stevens used history to defend only the holding's narrower proposition.⁶³ These three accounts of history result in a stand-off with respect to the broader question of how far the holding might extend. One might agree with O'Connor's statement that "the history cited by Thomas does not require, as a matter of federal constitutional law, the application of the rule he advocates,"⁶⁴ and at the same time agree with Thomas's statement, "I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment."⁶⁵ In other words, history does not settle the argument.

The common law cannot provide a conclusive answer to the procedural

57. *Id.*

58. *Id.* at 527 (O'Connor, J., dissenting).

59. *See, e.g., id.* at 479 n.6 ("[T]he principle dissent would chide us for this . . . citation to Blackstone's third volume, rather than to his fourth . . ."); *id.* at 481 n.8 (noting that the dissents take issue with the Court's reliance on Archbold).

60. *See infra* text accompanying notes 67-69 (describing the historical debate between Thomas and O'Connor).

61. *Appendi*, 530 U.S. at 521 (Thomas, J., concurring).

62. *Id.* at 527 (O'Connor, J., dissenting).

63. *Id.* at 479-82.

64. *Id.* at 527-28 (O'Connor, J., dissenting).

65. *Id.* at 521 (Thomas, J., concurring).

question of how to divide the roles of judge and jury with respect to determinations of guilt and punishment because the substantive questions asked of judge and jury have fluctuated over time and place. First, the nature of crime itself, particularly of federal crime, has expanded dramatically. While it may be possible to measure today's homicide law against homicide law as it existed at the framing of the Constitution,⁶⁶ it is not so simple to measure today's federal regulatory and drug offenses against common-law counterparts. It is often the case that no true parallels exist.

Second, as sentencing philosophies have shifted, so have the relative roles of the sentencing judge and jury. Courts trying to capture the criminal justice tradition of the federal government and the states in one snapshot called "tradition" are like the fabled blind men trying to describe an elephant: the picture depends on what part of history is being observed, and the nature of criminal justice policy in that time and place.

Justice Thomas, arguing for the broad rule that courts may require legislatively designated sentencing enhancements to be treated as elements of the offense, cited cases from the mid-nineteenth century that, he contended, rejected legislative attempts to funnel significant fact-finding to the sentencing judge.⁶⁷ Justice O'Connor protested that these cases were not contemporaneous with the framing of the Constitution, and therefore did not count.⁶⁸ Thomas rejoined that the legislatures did not create such sentencing enhancements during the eighteenth century, and so the courts had no opportunity to make such rulings at the earlier date. He nevertheless believed they obviously would have done so had the occasion arisen.⁶⁹ The difficulty for an originalist is deciding whether these rulings should count in interpreting the Due Process Clause.

The relative roles of courts and legislatures in setting sentencing policy have also varied substantially. Justice O'Connor argued that, at various points in history, judges have been permitted to find the facts on which sentence is based—even offense-related facts—and, therefore, concluded that there is no basis for voiding legislative decisions about when to allocate such fact-finding to sentencing judges rather than juries.⁷⁰ Why should it be unconstitutional, she asked, for a legislature merely to codify sentencing

66. See generally *Patterson v. New York*, 432 U.S. 197 (1977) (analyzing whether the Due Process Clause, in light of the history of homicide law, prohibits a legislature from shifting the burden of proof on a mitigating fact in a homicide statute); *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (holding that the Due Process Clause requires prosecutors to prove beyond a reasonable doubt the absence of a mitigating fact in a homicide prosecution, and prohibiting the use of presumptions).

67. See *Apprendi*, 530 U.S. at 502 (Thomas, J., concurring) (referring to mid-nineteenth century cases).

68. *Id.* at 527-28 (O'Connor, J. dissenting).

69. *Id.* at 502 n.2 (Thomas, J., concurring).

70. *Id.* at 553-54 (O'Connor, J., dissenting).

discretion, and to tell judges how much weight to give various factors?⁷¹ The history underlying her reasoning, however, consisted of a citation to a commentary referring to early sentencing discretion afforded federal judges,⁷² and another alluding to “the age of broad judicial sentencing discretion,” without pinning down the limits of that age, or attempting to canvass the activities of state courts and legislatures.⁷³

On the other hand, Justice Stevens’s historical response, that juries have always decided facts that increase punishment beyond the statutory maximum (an argument O’Connor dismissed as based on questionable sources),⁷⁴ is sufficient only to anchor the narrow holding of *Apprendi*.⁷⁵ Dipping into the argument between Thomas and O’Connor, Stevens observed that at common law before and immediately after the Constitution was drafted, statutes tended to be sanction specific and so the courts possessed little explicit sentencing discretion.⁷⁶ But Justice Stevens also announced that this history hardly proves that sentencing discretion is impermissible, citing a twentieth-century case, decided during the heyday of indeterminate sentencing, which allowed sentencing judges to make decisions with few procedural safeguards.⁷⁷ He did not attempt to reconcile these two observations, which seem to point in different directions, a problem if “history” must bear one consistent message. Instead, Stevens acknowledged that our recognition of judges’ sentencing discretion has been “periodic.”⁷⁸ He did not attempt to isolate those periods relevant to a constitutional historical analysis. This lack of historical precision was less significant in *Apprendi*, where there was no real challenge to Stevens’s assertion that judges have never been allowed to select sentences above the applicable statutory maximum, than it will be when the Court is called upon to decide whether *Apprendi* applies to the Guidelines.

Does history suggest that the Guidelines may appropriately be characterized as a mere codification of traditional sentencing discretion,

71. *Id.* at 544-50.

72. *Apprendi*, 530 U.S. at 544-45.

73. *Id.* at 545; see KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998) (contrasting the broad discretion afforded federal judges during the early years of our nation with state courts, where juries often exercised sentencing authority).

74. See *Apprendi*, 530 U.S. at 526, 481 n.8 (setting forth O’Connor’s attack and Stevens’s defense); Bibas, *supra* note 9, at 1123-28 (siding with O’Connor). But see King & Klein, *supra* note 8, at 1477-85 (siding with Stevens).

75. See King & Klein, *supra* note 8, at 1471-85 (approving Stevens’s use of history to support the holding).

76. *Apprendi*, 530 U.S. at 479-80.

77. See *id.* at 481-82 (citing *Williams v. New York*, 337 U.S. 241 (1949)); Herman, *The Tail that Wagged the Dog*, *supra* note 48, at 317-21 (exploring the extent to which the rationale of *Williams* depends on the context of indeterminate sentencing).

78. *Apprendi*, 530 U.S. at 481.

thereby escaping *Apprendi*'s preference for jury determination of facts on which punishment will be based? Thomas's and O'Connor's accounts are no more conclusive than Stevens's dabs of history.⁷⁹ Some lower court judges, trying to apply *Apprendi*, have described judicial discretion in sentencing as "traditional," but have not tried to establish how deep the roots of this tradition might be.⁸⁰ Although federal judges just before the advent of the Guidelines were permitted to find facts on which sentences might be based, including offense-related facts like drug quantity, this level of judicial discretion in sentencing has not been a consistent tradition.

My own review of the history of judicial discretion in sentencing has led me to conclude that the Guidelines amounted to a significant break with preceding practices, rather than a mere codification of what judges had been deciding on an individual basis.⁸¹ Before the nineteenth century, there was relatively little room for separate discretionary decisions with respect to sentencing.⁸² The questions of guilt and punishment became sharply bifurcated during the nineteenth century, when the notion of adopting a medical model of punishment came into vogue and generated greater use of indeterminate sentencing.⁸³ The role of sentencer began to grow and diverge from the role of fact-finder at trial as courts were obliged to consider additional matters in the context of the new, predictive sentencing decision that would not have been relevant or appropriate to consider during the trial phase.⁸⁴ Sentencing began to focus more on the offender, while the trial continued to focus on the offense.

Judicial discretion has been "traditional" only when and where the prevailing philosophy of punishment left room for significant second stage decisions. In some instances, as in federal court before the advent of the Guidelines, judges essentially had discretion to select their own sentencing philosophy.⁸⁵ They could choose whether to impose a heavier sentence based on what they perceived to be the harm done by the defendant, or based on what they perceived to be the equities in the defendant's personal situation. Under this bifurcated decision-making process, if the judge could

79. See Bibas, *supra* note 9, at 1128-33 (criticizing Thomas's use of history).

80. See *United States v. Garcia*, 240 F.3d 180, 183-84 (2d Cir. 2001) (referring to sentencing judges' "traditional" authority to decide facts relevant to sentence).

81. Herman, *The Tail that Wagged the Dog*, *supra* note 48, at 300-04.

82. *Id.*

83. See *Apprendi*, 530 U.S. at 481-82 (describing the shift in sentencing philosophy during the nineteenth century); STITH & CABRANES, *supra* note 73, at 17-18 (explaining that the rehabilitative model required deferring decisions about length of incarceration to parole authorities).

84. See Herman, *The Tail that Wagged the Dog*, *supra* note 48, at 302-03.

85. Federal statutes provided only a maximum sentence and thus allowed judges to choose whether to sentence on the basis of the circumstances of the offense, the offender's history or personal characteristics, or a combination of both. See STITH & CABRANES *supra* note 73, at 9-11 (noting that federal judges had wide discretion).

choose what facts are relevant to sentencing, a jury could not make the relevant factual determinations during trial. Personal questions about the offender's past or future, like prior criminal history, could not appropriately be injected into a proceeding to determine guilt. Questions relating to the offense, like the precise quantity of drugs involved, might not matter, depending on the individual judge's predilections. With the Guidelines's choice of sentencing philosophy and renewed focus on the offense itself, there was less reason to save offense-related factors for the sentencing judge. The Guidelines tell us that precise drug quantity is relevant to sentencing so, as in New York, the pre-Guidelines reason for reserving this determination for sentencing no longer exists.⁸⁶

Justice Thomas's opinion proceeds as if the entirety of history can be condensed into one uniform account of our collective American traditions with respect to sentencing.⁸⁷ The division of authority between federal judges and juries, as well as federal judges and Congress, has certainly varied over time. Sentencing traditions have been no more uniform over place. Justice Thomas tried to draw a picture of what the state courts have done, for example, in recounting his history of the common law of sentencing.⁸⁸ But state legislatures may, and do, differ from their courts, from one another, and sometimes from their own predecessors, on the issue of how separate the sentencing phase should be, and what its subject matter should include. States might choose to follow New York's approach of making drug quantity an element; they might choose to adopt sentencing guidelines; or they might retain a discretionary model of sentencing and continue to allow sentencing judges to choose not only the sentence for a drug offender, but the philosophical basis for that sentence. As the above discussion illustrates, a one-size-fits-all account of history is likely to be either myopic or misleading.

Basing a constitutional rule on the historical dominance during certain periods of time of one philosophy of sentencing deprives state legislatures of free choice in adopting sentencing policies, perhaps unnecessarily. Sentencing judges had substantial freedom to choose their own sentencing philosophies when legislatures did not do so.⁸⁹ Today's legislatures often choose to preempt decisions about appropriate bases for sentencing. Just because some legislatures, at some points in time, delegated sentencing philosophy to judges should not mean that they must be required to

86. There may be practical reasons for wishing to defer decisions on aggravating factors to sentencing. See *infra* text accompanying notes 117-19, for a discussion of those reasons.

87. See *supra* text accompanying notes 67-69 (describing Thomas's approach to common-law cases).

88. *Appendi*, 530 U.S. at 503 (Thomas, J., concurring).

89. See STITH & CABRANES, *supra* note 73, at 23 (noting that no real "common law" of sentencing developed because sentencing was not even subject to appellate review, and so sentencing priorities were set by individual judges).

continue whatever patterns their courts then chose. Any limit on the ability of the legislatures to enhance the role of the judge at the expense of the jury should be derived not from what sentencing judges have done in the past (often without examination of the constitutionality of their actions), but, as the next section will argue, on what juries should be permitted to do.

2. The History of Jury Trial: Toward a Functional Approach

By its holding, the *Apprendi* majority declared that the Constitution does not allow legislatures the last word in making policy decisions that result in reducing the role of the jury. Ironically, it then formulated a holding that allows the legislature the last word. Part of Justice Thomas's argument from history was based on descriptions of lower court decisions taking an active role in maintaining the jury's power.⁹⁰ But as Justice O'Connor pointed out, the Supreme Court itself had traditionally ceded such decisions to legislatures.⁹¹ Until the last few years of the twentieth century, in fact, the only case in which the Court had even considered whether there should be any constitutional limitation on the prerogatives of legislatures to designate elements and sentencing factors was *McMillan v. Pennsylvania*.⁹²

In the statutory scheme at issue in *McMillan*, sentencing judges, operating on a lesser standard of proof, decided whether or not defendants were armed during the commission of their offense.⁹³ A mandatory minimum sentence followed an affirmative finding. The Court's constitutional analysis focused almost exclusively on the due process question of whether proof beyond a reasonable doubt of this fact was required, even when considering whether this fact should have been treated as an element.⁹⁴ The Court ruled that proof beyond a reasonable doubt was not constitutionally required, although it left room for an exception if sentencing decisions became the "tail which wag[ged] the dog" of conviction.⁹⁵

Even if proof beyond a reasonable doubt were required at a sentencing hearing,⁹⁶ the jury would be left out. *Apprendi* is notable for putting

90. See *supra* notes 67-69 and accompanying text (discussing Justice Thomas's historical analysis).

91. *Apprendi*, 530 U.S. at 529-39 (O'Connor, J., dissenting).

92. 477 U.S. 79 (1986). For a full discussion of the other Supreme Court cases leading up to *Apprendi*, see Bibas, *supra* note 9, at 1102-15.

93. 477 U.S. at 81-82.

94. *Id.* at 84-93.

95. *Id.* at 88. Ironically, given the legislature's ability to overcome *Apprendi*, *McMillan*'s exception could in the long run turn out to be the more reliable protection against a willful or cost-conscious legislature.

96. The exception *McMillan* provides has not been held to require proof beyond a reasonable doubt, even in extreme cases. See *United States v. Kikumura*, 918 F.3d 1084, 1101 (3d Cir. 1990) (requiring proof by clear and convincing evidence of facts found at sentencing that had the effect of increasing the defendant's Guidelines range from a maximum of thirty-

questions about the role of the jury at the center of the debate. In *McMillan*, the right to jury trial is not mentioned by either the majority or dissent.

Another way of supporting Thomas's thesis would be to interpret the history of the Sixth Amendment as creating a presumption that juries should be permitted to decide any facts leading to increasing or imposing punishment, unless there is a compelling reason why the jury cannot be asked to make a particular decision at trial.⁹⁷ This somewhat functional approach would treat history on a more generalized level, rather than trying to forge federal and state court case law into one historical imperative. It would examine past allocations of decision-making authority for their soundness rather than their consistency.

It is by now a commonplace that over the last two centuries juries have lost much of their initial constitutional power.⁹⁸ Nevertheless, in a variety of recent cases, the current Court has exalted the jury as a second locus of citizen participation in the justice system. In the *Batson*⁹⁹ line of cases, for example, the Court has been more concerned with the right of prospective jurors to play their civic role than with the impact of jury selection on defendants.¹⁰⁰ In these and other cases, like *Singer v. United States*,¹⁰¹ the Court has promoted the power of the jury as a representative of the community, and not necessarily as a benefit for individual defendants. In *Singer*, the Court decided that defendants who do not wish to have a trial by jury have no constitutional right to make that choice if the prosecution does not concur.¹⁰² Either party may require a jury trial to legitimate the outcome. In all of these cases, the Court has treated the right to a jury trial as part of the Constitution's prescribed structure for decision-making, rather than as a defendant's prerogative.

Since very few cases today actually go to jury trial,¹⁰³ Professor Bibas deplores the attention that courts and commentators extend to the role of

three months, to 360 months).

97. For a discussion of what reasons might justify deferring factual determinations to sentencing see *infra* text accompanying notes 117-19.

98. See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 89-90 (1994) (arguing that as the jury has been democratized, it has lost much of its power).

99. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (holding that a prosecutor must justify peremptory challenge of prospective juror with a race-neutral reason). For a discussion of the cases expanding on *Batson*, see Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1813-14 (1993) [hereinafter Herman, *Batson*] (describing post-*Batson* cases).

100. See *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (describing jury service as a contribution to civic life, rather than as a procedural protection for defendants); Herman, *Batson*, *supra* note 99, at 1813-14, 1829-41.

101. 380 U.S. 24 (1965).

102. *Id.* at 34-36 (upholding federal rule requiring prosecutor's consent to a jury trial waiver).

103. See Bibas, *supra* note 9, at 1150 (estimating that fewer than four percent of felony defendants have jury trials).

the jury.¹⁰⁴ But the Court's appraisal of the significance of the jury's role has more validity than Professor Bibas allows. Although jury trials are relatively rare in practice, the prosecutors' and defense attorneys' estimation of how a jury might decide a case becomes the benchmark against which plea bargaining takes place. Where both sides agree in their estimation, a bargain is struck. It is in cases where the two sides have different expectations of a jury—perhaps because there is a serious disagreement about the facts, or perhaps because of a perceived prospect of jury nullification in the case of an unpopular law or a popular defendant—that a trial will occur. It may be that the jury plays its most crucial role in such contentious cases. But the jury also plays a role in the system even when it is not convened. Even if jury trials are not in common usage, they set a gold standard of value. Gold does not become worthless because we use paper money in our daily commerce.

The true center of the debate *Apprendi* reopens is not just about how to parcel out the roles of judge and jury, but how to allocate the power of citizen participation in the criminal justice process between the legislature and the jury. Professors Nancy King and Susan Klein, who fear legislative overreaction to *Apprendi*, nevertheless argue that courts should keep the weight of *Apprendi* to a minimum in order to allow for "robust democratic debate" in the legislatures.¹⁰⁵ But treating the legislature as the only locus of democratic participation conveniently ignores the jury's role in the constitutional scheme as another occasion for democratic input.¹⁰⁶ Legislatures are a fairly professionalized and indirect vehicle of citizen participation. Sometimes they are the very generators of the law against which citizens may want protection.¹⁰⁷ Juries are the democracy of last resort.

In his majority opinion, Justice Stevens speculated that the holding of *Apprendi* will make legislative decisions transparent. It will become obvious that in setting their statutory maximum sentences, legislatures are also allocating power between judges or juries, and this transparency will, according to Justice Stevens, provide sufficient political accountability so that courts may then defer to legislative decisions about what sentencing judges are to do.¹⁰⁸ Against the background of the Federal Sentencing Guidelines, the idealistic notion that legislatures engage in robust and informed debate on allocating sentencing factors and elements of crime appears to be a greater myth than the Hollywood notion of jury trials that

104. *Id.* at 1100, 1149-52.

105. King & Klein, *supra* note 8, at 1481.

106. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183-99 (1991) (describing the jury's prominent role in the original scheme of the Constitution).

107. Justice O'Connor credits the jury with providing protection against overzealous prosecutors and judges, but never includes the legislature on the list of those who might overreach. *Apprendi*, 530 U.S. at 547-48 (O'Connor, J., dissenting).

108. *Id.* at 490 n.16.

Professor Bibas debunks.¹⁰⁹ Congress created the United States Sentencing Commission, a politically insulated body,¹¹⁰ precisely because federal representatives evidently believed themselves incapable of rational and informed debate on sentencing policy. It is ironic that so many lower courts are applying the *Apprendi* dissenters' call for deference to legislative decisions about what should be sentencing factors so off-handedly to maintain the balance of power under the Guidelines. After all, interposing the Sentencing Commission completely changed the balance of political accountability in the federal criminal law.¹¹¹

The Guidelines take a double bite out of democracy. First, they reduce legislative accountability. Then they minimize jury participation, despite the fact that the theory of punishment reflected focuses more on the offense than the offender, which could allow the jury to play a greater role. Justice O'Connor's argument for legislative deference, therefore, is better suited to the legislature involved in *Apprendi*. The New Jersey state legislature, at least, evidently decided quite consciously to make the fact found in *Apprendi*'s case a sentencing factor and not an element.¹¹²

The jury is also at the center of the debate in *Apprendi* in that observers' views about how great a role the jury must be allowed to play seem to correlate with their level of confidence in jurors. Justice Breyer, a member of the original Sentencing Commission,¹¹³ claimed that most of the factors on which the Guidelines base sentences are too sophisticated and complex for jurors to apply.¹¹⁴ He did not take issue with the history or logic of Justice Thomas's argument that the Constitution should be understood to assign more decision-making power to jurors, but argued that such a principle must sometimes, as in the case of the Guidelines, give way to pragmatism and compromise.¹¹⁵ Professor Bibas, echoing this idea, noted that *Apprendi*, even if taken no further than its holding, is likely to disadvantage defendants.¹¹⁶ In other words, both argue for interpreting *Apprendi* narrowly

109. Professor Bibas is dismissive of Stevens's reliance on the prospect of political accountability. Bibas, *supra* note 9, at 1136-39. King and Klein are sympathetic to Stevens's notion. King & Klein, *supra* note 8, at 1486-87, 1489.

110. See *Mistretta v. United States*, 488 U.S. 361, 368-69 (describing the features and method of appointing the Commission).

111. See *id.* at 422-27 (Scalia, J., dissenting) (arguing that by lodging sentencing policy decisions in the judicial branch, Congress violated the separation of powers).

112. See Knoll & Singer, *supra* note 53, at 1061 n.21 (arguing that the fact that Congress did not formally adopt the Guidelines means that they should not be treated as legislation for purposes of analyzing an offense's elements).

113. See STITH & CABRANES, *supra* note 73, at 49-50, for an account of Breyer's appointment.

114. *Apprendi v. New Jersey*, 530 U.S. 466, 557-58 (2000) (Breyer, J., dissenting).

115. This approach is defended in Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-31 (1988).

116. Bibas, *supra* note 9, at 1143-45.

in order to save defendants from jury decision-making.

Justice Breyer may have been right in maintaining that the professionals of the Sentencing Commission and the bench would make wiser decisions than legislators and juries, but taking this point of view to the extreme of minimizing the jury's role is in tension with the Constitution's persistent choice of democratic decision-making.¹¹⁷ Justice Breyer's pragmatic approach overgeneralizes and, in the name of protecting defendants against poor jury decisions, prevents defendants from preferring juries. A presumption allowing juries to decide offense-related facts might be overcome in circumstances where there really is a pragmatic reason to defer a factual decision to sentencing—if the facts to be decided at trial would prove particularly prejudicial to a defendant in a particular case, for example—or perhaps if the defendant preferred to waive a jury decision. Most offender-related characteristics, including the prior convictions for which the Court has already allowed an exception to *Apprendi*,¹¹⁸ would fall into this category and therefore might appropriately be deferred to sentencing.¹¹⁹

A second circumstance that might overcome a presumption in favor of juror fact finding might be where a legislature has made a legitimate policy choice respecting sentencing that inherently requires giving judges a greater role. For example, a state legislature might disagree with Congress's decision to select its own sentencing philosophy and wish instead to allow politically insulated judges to decide for themselves, in individual cases, what factors should be relevant to sentencing. The Guidelines make an extreme set of choices against democracy for the sake of a particular criminal justice philosophy. Perhaps there is room for a state legislature to make a different choice.¹²⁰

117. See *Apprendi*, 530 U.S. at 498-99 (Scalia, J., concurring) (describing the Constitution as favoring a more robust role for the jury).

118. There is, of course, considerable doubt about the continued validity of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the case that inspired this exception. See *Apprendi*, 530 U.S. at 489-90 (expressing doubts about the correctness of the *Almendarez-Torres* decision); *id.* at 520-21 (Thomas, J., concurring) (regretting his "error" as the fifth and decisive vote in *Almendarez-Torres*).

119. Deferring decisions to the sentencing phase does not, of course, require giving those decisions to the judge. Jury decision-making could be bifurcated, as in capital cases. Discussing the feasibility of such a procedure is beyond the scope of this Article.

120. This idea may simply be another way to restate the *Apprendi* question, but it is more consistent with the Court's treatment of legislative policy determinations in previous cases than the actual holding in *Apprendi*. See *infra* text accompanying notes 121-47 (comparing the Court's treatment of legislative policy decisions in other cases with *Apprendi*).

In suggesting, while stopping short of fully endorsing, novel lines to govern interpretation of the right to trial by jury, I recognize that I am not being solicitous of some of the Court's recent precedents. For example, *Edwards v. United States*, 523 U.S. 511 (1998), concluded that a sentencing judge may determine the type and quantity of drugs at a sentencing hearing as long as the sentence imposed does not exceed the applicable statutory

In any event, the line drawn by the *Apprendi* holding does not have any relationship to the question of what jurors can or should decide, either as a matter of history or as a functional analysis. Empowering jurors to find facts only where legislatures have drafted their statutes in one particular way (providing two different statutes grading drug offenses) and not if they have drafted them in another way (providing one statutory ceiling) cannot fairly be understood as returning to a traditional American practice rooted in our collective history and customs, or to our original understanding of the significance and competence of juries. If the Court decides to dig in at the line of the holding in *Apprendi*, that decision will be attributable to another recent theory of constitutional interpretation not debated in the *Apprendi* opinions—a positivist approach to rights most familiar from the Court's procedural due process cases.

3. Hybrid Rights—Partial Legislative Deference

One of the Court's favored approaches to defining rights in recent decades has been to declare itself in partnership with legislatures in the creation of constitutional rights. This positivist¹²¹ approach carves out some space for judicial interpretation of constitutional provisions, but allows legislatures to make the critical value judgments by deciding whether or not to create "entitlements." Attempting to avoid the extremes of judicial subjectivity on the one hand and abdication on the other, the Court treats legislative policy decisions as a condition precedent for rights-creation and then applies modest doses of judicial power to implement the rights allegedly generated by democratic decision. A paradigmatic example of this technique is the Court's interpretation of the Fourteenth Amendment's guarantee that no one may be deprived of "life, liberty or property without due process of law."¹²² The Court might have held that this language

maximum. *Id.* at 515. *Edwards* makes it more difficult to argue that the division of decision-making under the Guidelines is unconstitutional.

Professors Nancy King and Susan Klein have proposed a modest multifactor test to review legislation for *Apprendi* violations, designed to nestle within the Court's precedents. See King & Klein, *supra* note 8, at 1535-44 (articulating standards). I regard many of the precedents they try to accommodate as overly deferential to legislative decisions, and so I am not attempting to weave them into my analysis.

121. In a previous article, I described and critiqued the Burger Court's positivist approach to the liberty interests of prisoners and how that approach was derived from procedural due process cases concerning property. Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984) [hereinafter Herman, *The New Liberty*]. That article, defining "positivism" as the specific acts of legislators and administrators, *id.* at 484 n.2, examined the notion that positive law creates "entitlements" to property and liberty by establishing criteria for decision-making and thus limiting the discretion of administrative officials. The article discusses whether this linkage between procedure and discretion might be understood as serving values of fairness, efficiency, or democracy. *Id.* at 543-55.

122. U.S. CONST. amend. XIV, § 1.

requires state and federal governmental actors to provide procedural safeguards before depriving an individual of any significant form of wealth or freedom.¹²³ But instead of deciding for itself what forms of wealth or freedom are significant, the Court left that evaluative part of the decision-making process to elected officials, holding that the Due Process Clause only applies to governmental actors if the state has created an "entitlement" to property or liberty by limiting the discretion of the relevant decision-making officials.¹²⁴ If state positive law creates such an entitlement, then courts will wield the Due Process Clause to mandate an appropriate level of process, regardless of the legislature's procedural specifications.¹²⁵ On the other hand, if state officials reserve the right to make discretionary decisions, no constitutional right to due process exists because no entitlement has been created. I have previously explained this series of cases as the Court's attempt to defer value judgments about which decisions are important enough to warrant expenditures of time and money to democratically elected officials.¹²⁶ If the Court deems this judgment to have been made by elected officials, the Court then demands what it considers to be appropriate procedural protection under the circumstances.¹²⁷

Similarly, the Court has held that the protections of the Fifth Amendment's Double Jeopardy Clause, which prohibits being put twice in jeopardy for the same "offense,"¹²⁸ depend on a legislative definition of what constitutes an offense.¹²⁹ The Court has chosen not to enlist the Double Jeopardy Clause to limit the actions of state or federal legislatures in deciding what to define as two separate offenses.¹³⁰ But if the Court deems the legislature to have created two separate offenses on the basis of how the elements of the offenses are defined and arrayed, the legislature cannot then authorize that those "same" offenses be tried or punished twice.¹³¹ Ultimately, the procedural consequence rests on a legislative choice.

Sixth Amendment rights have also been made contingent on legislative

123. See *Meachum v. Fano*, 427 U.S. 215, 229-35 (1976) (Stevens, J., dissenting) (arguing that procedural protection should accompany grievous losses of freedom); *Board of Regents v. Roth*, 408 U.S. 564, 587-92 (1972) (Marshall, J., dissenting) (arguing that procedural protections should accompany the loss of a government job).

124. *Roth*, 408 U.S. at 576-78.

125. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985) (holding that an entitlement may be created even if a legislature does not provide for procedural protection).

126. Herman, *The New Liberty*, *supra* note 121, at 552-55.

127. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (providing that particular requirements of due process depend on a balancing test).

128. U.S. CONST. amend. V.

129. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (holding that two offenses are not the "same" if each requires proof of a fact that the other does not).

130. See *Missouri v. Hunter*, 459 U.S. 359, 359 (1983) (holding that the legislature has discretion to decide how many offenses to create).

131. *Blockburger*, 284 U.S. at 304.

decisions. Any legislature can either avoid the provision of counsel by making a particular offense punishable only by fine, or create the conditions under which an indigent defendant will be entitled to assigned counsel by providing for punishment by incarceration.¹³² Similarly, the Sixth Amendment right to trial by jury springs into being only if the legislature has decided that the offense in question is punishable by incarceration of six months or more.¹³³

This positivist technique for defining rights works better in some areas than in others. The Sixth Amendment cases are based on a simple and appealing logic: if a defendant is not subject to a particularly onerous punishment, then the availability of full-scale procedures like the right to counsel and right to jury trial is less consequential. The legislature can eliminate an individual's opportunity to be tried by a jury or to have counsel assigned only by actually reducing the defendant's exposure to punishment. The legislative decision to impose a lesser punishment automatically reduces the need for expensive procedural protections.

With respect to the Due Process and Double Jeopardy Clauses, however, I have argued that logic does not support the Court's approach, and that the Court is simply being too deferential to its legislative partners.¹³⁴ For example, if a prisoner is denied parole in a state where positive law has created criteria for parole release, that prisoner has a constitutional right to have the parole decision made with due process.¹³⁵ But a prisoner who has been denied parole in a state where no criteria have been announced will not be entitled to notice, an opportunity to be heard, or even reasons for a decision denying parole, even if that prisoner has just as many years of freedom at stake.¹³⁶ Ironically, states willing to be careless about such decisions are allowed the freedom to make their own decisions about what process to offer, while states that try to regularize their decision-making

132. See generally *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that the right to assigned counsel attaches in misdemeanor cases involving possibility of incarceration); *Scott v. Illinois*, 440 U.S. 367 (1979) (finding that the right to assigned counsel attaches only when defendant has actually had a sentence of incarceration imposed).

133. *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970).

134. Herman, *The New Liberty*, *supra* note 121, at 543-75; Susan N. Herman, *Autrefois Double Jeopardy*, *THE JURIST*, Jun. 1999 (reviewing GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* (1998)); see also Susan R. Klein, *Double Jeopardy's Demise*, 88 CAL. L. REV. 1001, 1002 (2000) (agreeing that the Court has been too deferential in its Double Jeopardy cases). Other commentators have approved of this level of deference to the legislature. See THOMAS, *supra*, at 6, 272-75 (arguing for total deference to legislative intent in Double Jeopardy Clause cases); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 114, 126-49 (1995) (espousing a similar approach).

135. See *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 11-12 (1979) (finding germane limitations on discretion to grant parole in the structure and language of the Nebraska law).

136. See *Booth v. Hammock*, 605 F.2d 661 (2d Cir. 1979) (finding that a New York parole statute creates no liberty interest).

thereby subject their procedural decisions to an extra layer of federal court scrutiny.

The Court seems willing to assume that political accountability nevertheless will lead legislatures to make sensible determinations about what decisions are important enough to warrant the costs of process, even if legislatures cannot be trusted to provide for the expensive process itself. Unfortunately, legislatures are least likely to create an entitlement in exactly those cases where politically powerless people are most in need of judicial solicitude. In fact, welfare recipients and prisoners have borne the brunt of the Court's deferentially positivistic due process law.¹³⁷

The holding of *Apprendi*, like these positivist cases, asks how each legislature arrays its statutory maximum punishments, and then makes the resulting procedural rights depend on the answer to that question. This approach shares both the theory and the flaws of the prior cases.

In prison due process cases like *Meachum v. Fano*,¹³⁸ the Court adopted the view that once a person has been convicted, that person has no "liberty" interest for the maximum period of time provided by the statute of conviction.¹³⁹ From that definitional starting point, the Court has reasoned that if the state wishes to consider giving back some portion of that forfeited liberty, in the form of parole or a lesser sentence, that decision is a matter of grace, and does not necessitate procedural rights.¹⁴⁰ I have previously explained why this highly positivist treatment of an individual's freedom is misguided.¹⁴¹ *Apprendi*'s formal holding seems to rest on the same assumption—that once a defendant has been convicted under one particular statute, the government is entitled to claim the maximum number of years of incarceration designated in that statute, and need not provide any particular process for a sentencing judge to follow in deciding whether to "give back" a part of that time. According to the holding of *Apprendi*, it is only when two different statutes are involved that the government increases the prosecutor's "entitlement" and therefore must provide the process appropriate to initial deprivations of liberty, including jury fact-finding and a heightened standard of proof.

Relying on this highly formalistic approach to decide when defendants must be afforded trial process is just as problematic here as it is in the procedural due process cases, where the safeguards of freedom also depend on the geography of statutes. The *Apprendi* holding shares with the procedural due process cases the consequence of allowing the legislature to eliminate rights simply by wording their statutes or regulations cannily, as

137. Herman, *The New Liberty*, *supra* note 121, at 533-43, 554.

138. 427 U.S. 215 (1976).

139. *Id.* at 224.

140. Chief Justice Rehnquist explicitly described the *McMillan* holding as resting on this positivist theory. *McMillan v. Pennsylvania*, 477 U.S. 79, 92 n.8 (1986).

141. Herman, *The New Liberty*, *supra* note 121, at 528-63.

Justice O'Connor suggested.¹⁴² That this rewriting is so easy to accomplish, and so cost-free to the legislature, suggests that the distinction the Court has drawn so far is not a very meaningful one.

Justice Stevens's speculation that the transparency of legislative decisions after *Apprendi* will provide a political check on bad decisions¹⁴³ is at odds with his own earlier recognition that political accountability is no more likely to protect criminal defendants in this area than it is to protect welfare recipients and prisoners.¹⁴⁴ The Federal Sentencing Guidelines provide a perfect example of legislative neglect, leaving enormously consequential fact-finding decisions concerning defendants' punishment to sentencing judges operating on a lesser standard than proof beyond a reasonable doubt.¹⁴⁵

As in the procedural due process cases, if the Court limits itself to the narrow holding in *Apprendi*, the Court will be declining to make its own decisions about the value of freedom or the value of process. This deferential posture blithely ignores the fact that political accountability is not likely to provide an effective safeguard in a context where the people whose freedom is at stake, like Charles Apprendi, are unpopular figures.¹⁴⁶ But unlike some of the other cases espousing a positivist approach, *Apprendi*'s attempt to share decision-making authority with the legislature has no compelling logic behind it. Unlike the Sixth Amendment cases described previously, legislative decisions about the geography of statutes do not affect a defendant's exposure to punishment. A defendant faces the same potential loss of freedom regardless of whether the choice of sentence is contained within one statutory maximum or spread over two. Unlike decisions about how heavily to punish certain conduct or what conduct should be criminalized, a legislative decision to create one statutory maximum rather than two does not reflect the type of policy decision about criminal justice philosophy that legislatures need to be allowed to make. Unlike the double jeopardy cases, the legislature is not making a decision to

142. *Supra* text accompanying notes 56-57.

143. *Supra* text accompanying note 108.

144. *McMillan*, 477 U.S. at 95, 101-102 (Stevens, J., dissenting).

145. It is ironic that Stevens, probably for the sake of cobbling together a majority, became an apologist for the positivist view of liberty, because in his dissenting opinion in *McMillan* he maintained that appropriate due process protections should be afforded whenever a decision will increase either the stigma or the level of punishment involved, regardless of the maximum penalty provided by statute. *Id.* at 103; *see also* *Meachum v. Fano*, 427 U.S. 215, 231-32 (1976) (Stevens, J. dissenting) (arguing that any grievous loss of a prisoner's freedom should trigger some measure of procedural protection under the Due Process Clause). Neither the majority nor dissenting opinions in *McMillan* and *Meachum* discuss the right to trial by jury.

146. Convicted felons are at the nadir of political power as they may literally be disenfranchised. *See* *Richardson v. Ramirez*, 418 U.S. 24, 41-56 (1974) (holding that California did not violate the Equal Protection Clause by disenfranchising convicted felons even after they had completed their sentences and paroles).

create two different offenses.¹⁴⁷ Instead, the legislature is essentially grading one offense and then deciding whether to have the aggravating factors decided by judge or jury.

This legislative decision has no bearing on the question of what decisions jurors can or should be making, either as a historical or a functional matter. A better application of the hybrid rights approach might be to ask some variant of the question suggested above: has the legislature adopted a legitimate sentencing philosophy that requires deferring factual decisions to sentencing and, perhaps, confiding those decisions to judges? As it stands, *Apprendi*, with its focus on the layout of statutes, draws a line to explain where legislatures will receive deference and where they will not. But the line is difficult to defend, except as an outright compromise.

C. DUE PROCESS AND PROOF BEYOND A REASONABLE DOUBT

Even when a court allows a legislature to assign a significant offense-related factual finding to the sentencing judge, the question remains whether the Due Process Clause requires the judge to employ the same careful procedures that apply at trial, including the standard of proof beyond a reasonable doubt. I have argued elsewhere that the assumption that informal procedures are appropriately employed at sentencing is a holdover from the more "traditional" sentencing hearings held under indeterminate sentencing regimes.¹⁴⁸ Where judges enjoy complete sentencing discretion, their factual decisions at sentencing might concern how best to rehabilitate a defendant and, therefore, might entail hearing from witnesses testifying about the defendant's childhood, diagnosis, and prognosis. Formal rules of evidence and a heightened standard of proof might indeed be inappropriate at a sentencing hearing where a judge is hearing testimony relevant to a predictive sentencing decision, including testimony concerning the offender's history or prognosis.¹⁴⁹ However, the factual decisions on which a sentence is based under the Guidelines generally concern the offense itself, including the offender's role in the events in question.

Rules of evidence are not ill-suited to determine the quantity of drugs involved in a defendant's offense, and they are no less worthwhile than at trial when, in either case, years of a person's freedom may depend on this factual determination. If conviction of any drug crime, no matter how small the sentence imposed, must be proven beyond a reasonable doubt, why shouldn't a decision about the quantity of drugs involved, which can

147. According to *Blockburger v. United States*, 284 U.S. 299 (1932), distinct offenses exist only when each offense requires proof of a fact which the other does not, so cumulative offenses are considered, for constitutional purposes, to be the "same offense." *Id.* at 304.

148. Herman, *The Tail that Wagged the Dog*, *supra* note 48, at 307-09, 314-16.

149. See *Williams v. New York*, 337 U.S. 241, 251 (1949) (maintaining that judicial discretion at sentencing needs to be broad).

increase a sentence by years or even decades, be treated just as seriously? The narrowed focus of attention under both the Sentencing Reform Act and the Guidelines could and should have led to a minimization of the difference between the procedures offered at trial, where some of the facts concerning the offense are found, and at sentencing, where other similar facts concerning that same offense are found. This did not happen, because under the positivist theory described above, the defendant is viewed as having already forfeited the maximum amount of liberty upon conviction. This legal fiction has compromised the freedom of people who are not favored by legislatures for long enough.

III. CONCLUSION

While some commentators express impatience with *Apprendi*'s focus on the jury, I think that Justice Scalia is correct in asserting that the determinative issue here is the extent to which the courts will preserve or reinstate the power of juries—the other form of political accountability. Instead of speculating or engaging in wishful thinking about what legislatures will do, or whether political accountability will lead to sound legislative decisions, the Court could take the revolutionary approach of holding legislatures, prosecutors, and even judges accountable by empowering juries. Such an approach would not be a new revolution, but a continuation of the one that started in the eighteenth century.

My guess is that the Supreme Court, still caught in the grip of a positivist view of the liberty of convicted people and susceptible to the dissenters' call for legislative deference and laissez-faire federalism, will likely agree with the courts of appeals that *Apprendi*'s formalistic holding should represent the doctrine's outer limits. But if the Court expands *Apprendi*'s holding to meet its rationale, it will be because the Justices are more attracted by the romantic image of juries as a locus of democratic action than by Justice Breyer's antirevolutionary pragmatism. If the Court does apply *Apprendi* to the Guidelines, defense attorneys who have argued for that expansion may relearn the truth of the old adage that one must be careful what one wishes for. Is the empowerment of juries worth the risk to defendants? Will the Court continue the revolution? I will give Lennon and McCartney the last word:

You say you want a revolution . . .

You say you'll change the Constitution . . .

*You say you've got a real solution,
Well, you know,*

*We'd all love to see the plan*¹⁵⁰

150. THE BEATLES, *supra* note 1.