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The Search for Equality in Criminal Sentencing

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For the last two terms, the United States Supreme Court has been rocked by the aftershocks of two independent yet equally significant criminal sentencing revolutions. The first, brought on by the Court itself in the 1970's, was the constitutionalization of capital sentencing procedures pursuant to the Eighth Amendment's Cruel and Unusual Punishments Clause. This death-penalty jurisprudence has had the laudable goal of attempting to reduce, if not eliminate, discrimination and disparity in the selection of those defendants to receive the ultimate penalty. Though initiated with cautious optimism, this revolution has been a dismal failure. State schemes have not significantly reduced sentencer discretion at the penalty phase of capital trials, and the results of such schemes have not been demonstrably more consistent than those obtained in the era preceding federal judicial regulation. A concurrent revolution with a

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similar goal occurred in the non-capital area, though this one was instituted legislatively. Congress passed the Federal Sentencing Act in order to impose rationality and to reduce discrimination and other disparities in criminal sentencing for non-capital cases. Almost half of state legislatures subsequently followed suit. Unlike the capital context, however, this revolution has enjoyed considerable success in ensuring similar treatment for similarly situated defendants.

These parallel efforts to enhance equality in capital and non-capital criminal sentencing have not been discussed together in the academic literature. In Part I of this essay, we will trace this parallel development in the capital and non-capital arenas, evaluate their success in ensuring equality, and determine whether any lessons can be transferred from one context to the other.

The current approach to non-capital sentencing represents a striking departure from early American history practice. Although the English practice in colonial times approached sentencing as a largely ministerial task, this approach soon gave way to a system of indeterminate sentencing in which judges, later aided by parole boards, enjoyed essentially unguided discretion in selecting an appropriate sentence

within a wide range prescribed by the legislature.

The Federal Sentencing Commission in 1984 replaced the pure judicial-discretion paradigm with an administrative-sentencing system. In this regime, the selection of those facts regarding the offender and her offense that are relevant to setting the punishment, as well as the weight to be given to each fact, are supplied by a statutorily-authorized Sentencing Commission, and the sentencing hearing is conducted without the full panoply of criminal procedural guarantees afforded a criminal defendant at trial. The move from the judicial-discretion model to the administrative model for sentencing has been largely successful in insuring equality of similarly situated, non-capital defendants in a relatively efficient manner. A shift back to pure judicial discretion or to the criminal procedural model, where the jury must find all facts relevant to sentencing, would halt the sentencing reform movement.

A determinate sentencing system employing the administrative model offers two significant advantages over the system it replaced: it enhances the opportunity for equality in non-capital sentencing, and transparency in sentencing decisions. Only through comprehensive guidelines implemented by judges can we promote similar treatment for similarly situated non-capital defendants. Judges, rather

than jurors, view a sufficient number of cases to determine which defendants warrant harsher or more lenient sentences, and produce decisions that establish precedent and provide a basis for factual and legal review on appeal. Moreover, without a guidelines system, judges (or juries) are free to implement whatever particular punishment theory to which they subscribe, or, worse, to indulge in invidious discrimination. A published guidelines system, even one developed by an unelected sentencing commission, is more democratic than discretionary judge or jury sentencing because it publishes in advance all information relevant to sentencing determinations. If the public believes a particular penalty or sentencing factor is inappropriate, it can make revisions through the democratic process in a way not possible when these factors were hidden.

In capital sentencing, states have historically conferred virtually unfettered discretion on juries to choose between life and death. Although the Court first rejected constitutional challenges targeting such unguided discretion, the Court subsequently held that states must offer some structure to capital sentencing if they are to retain the death penalty. Over the past thirty years, states have attempted to rationalize the death penalty decision through detailed sentencing instructions. But the resulting statutes

still confer substantial discretion on capital decisionmakers, and the effort to ensure consistency across cases has been notably less successful than in the non-capital context. In fact, federal constitutional regulation of the death penalty has arguably produced a less desirable capital sentencing regime, because contemporary instructions often obscure the ultimate moral choice capital sentencers must confront.

In Part IIA, we will discuss the most recent threat to the administrative model in the non-capital context: the holding in *Apprendi v. New Jersey* that any fact, other than a prior conviction, that increases the prescribed maximum penalty for an offense must be found by a jury beyond a reasonable doubt.[1] The broadest application of this rule would have foreclosed the Federal Sentencing Guidelines and their state guideline counterparts as a matter of practice because it is simply too cumbersome to have juries make all factfindings necessary to apply the guidelines. Moreover, even if it were feasible to have juries administer guidelines, juries could not be relied upon to implement such guidelines in a consistent fashion. The Supreme Court's rejection of this broad *Apprendi* theory last term in *United States v.*

[1]530 U.S. 466 (2000) (Stevens, Scalia, Souter, Thomas, and Ginsburg, J.J., writing for the majority, Thomas and Scalia, separately concurring, and Rehnquist, C.J., O'Connor, Kennedy,

Harris[2] insures the continued viability of the administrative model in the non-capital context.

In Part IIB, we will discuss the failure of the administrative model in the death penalty context. Meaningful equality across cases cannot be secured through a guideline-like approach to capital sentencing. The success of the guidelines approach in the non-capital area cannot be recreated for capital sentencing for a number of reasons. In non-capital cases the guidelines establish different penalty ranges, whereas in the capital context the choice is binary: death or not death. Moreover, unlike in the non-capital context, it is extraordinarily difficult to quantify factors deemed relevant in a death penalty proceeding, particularly on the mitigating side. Finally, because there is less need in the capital area for judges as sentencers, *Apprendi* is less of a threat to equality values in death penalty law than it was to equality values in non-capital sentencing. Thus, the Court's extension of the *Apprendi* rule, in *Ring v. Arizona*,[3]

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and Breyer, J.J., dissenting).

[2] ___ U.S. ___ , 122 S.Ct. 2406 (2002) (Kennedy, O'Connor, Scalia, J.J., Rehnquist, C.J., writing for the plurality, Breyer, J., concurring, and Thomas, Stevens, Souter, and Ginsburg, J.J., dissenting).

[3] ___ U.S. ___ , 122 S.Ct. 2428(2002) (Ginsburg, Scalia, Kennedy, Souter, and Thomas, J.J. writing for the majority,

to aggravating circumstances in capital cases will not undermine reform. In addition, there are independent reasons in the capital arena to prefer jury to judge sentencing, such as sustaining the connection between the community and those imposing the death penalty.

We conclude with some final thoughts regarding the tension between equality norms and the commitment to jury sentencing. The Court's decisions in *Apprendi*, *Harris,* and *Ring* reflect an appropriate accommodation of these competing norms. In the non-capital context, *Apprendi* sufficiently protects the role of the jury, while *Harris* justifiably elevates practice over theory to ensure equality. In the death penalty context, equality has been the focal point of contemporary regulation, but, unfortunately, the sentencing phase of capital trials is perhaps the aspect of the capital sentencing system least amenable to systemization through guidelines.

I. Parallel Developments in Sentencing Reform from the 1970s to The Present

A. Successful Reform in Non-Capital Sentencing

The English practice at the time of our nation's founding

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with Breyer, J., concurring, O'Connor, J., Rehnquist, C.J.,

was determinate sentencing of those convicted of a felony offense; there was one possible sentence for each offense, imposed after a jury verdict based on proof beyond a reasonable doubt of every element constituting that offense.[4] Thus the particular sentence (usually death) followed inexorably from the face of the felony indictment and the jury verdict. It made no difference whether judge or jury pronounced that certain judgment, or whether the offense was created by common law or statute.[5] This system never fully took hold in colonial America. After only a few years, amid the widespread view that whipping and capital punishment had lost their deterrent power, the desire to mitigate "pious perjury," the belief that death was a disproportionate penalty for some crimes, and the new philosophy that solitude and hard labor in a penitentiary would reform the criminal, the trend toward mandatory capital offenses began to reverse.[6] In the

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dissenting).

[4]*Apprendi*, 120 S.Ct. at 2356; J. Archbold, *Pleading Evidence in Criminal Cases* at 44 (15th ed. 1862).

[5]See, e.g., *Apprendi*, 120 S.Ct. at 2356-58.

[6]See generally Morton J. Horwitz, *The Transformation of American Law 1780 - 1860* (1977); Nancy J. King & Susan R. Klein, *Essential Elements,* 54 Vand. L. Rev. 1457, 1506 – 07 (2001) (noting that decades later England followed the American trend); Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rule,* 79

late eighteenth century, Massachusetts decreased the number of crimes punishable by death. Within several decades, Massachusetts initiated an experiment looking to newly-built penitentiaries for crime control and the reform of offenders, and many states[7] and the federal government soon followed.[8] These new sentencing regimes provided minimum and maximum sentencing ranges and allowed judges, at their discretion, to set the penalty within the range.[9] By the nineteenth century, most of these discretionary sentences in non-capital cases were imposed by a judge, although several non-federal jurisdictions did practice jury sentencing.[10]

Beginning in the late nineteenth century and ending in

Cornell L. Rev. 299 (1994).

[7]See Adam J. Hirsch, *The Rise of the Penitentiary; Prisons and punishment in Early America* at 11-12 (1992); David Rothman, *The Discovery of the Asylum; Social Order and Disorder in the New Republic* at 49 (1990); Kate Stith & A. Jose Cabranes, *Fear of Judging: The Sentencing Guidelines in the Federal Courts* at 16 (1998).

[8]For example, of the 22 crimes enacted by the first Congress in 1790, six were punished by hanging, 13 provided only a maximum sentence, and two set the punishment at four times the value of the property involved. See 1 Stat. 112 (1790).

[9]Hirsch, supra n. 7, 8-14, 57; Lawrence M. Friedman; *Crime and Punishments in American History,* 77 - 82 (1993).

[10]See Charles O. Betas, *Jury Sentencing*, 2 Nat'l Parole & Probation Ass'n J. 369 (1956); Note, *The Admissibility of Character Evidence in Determining Sentence,* 9 U. Chi. L. Rev. 715 (1942).

about the 1970s, both state and federal judges exercised their discretion pursuant to the rehabilitative or medical approach to sentencing, under the belief that experts in correction would "treat" the criminal.[11] The judge depended upon the parole office to determine when a felon had been sufficiently reformed to warrant release.[12] This highly discretionary, indeterminate sentencing regime was necessary to implement the "prevalent modern philosophy of penology that the punishment should fit the offender, and not merely the crime."[13]

The rehabilitative model began to unravel in the 1960s and 70s. Two concurrent concerns led to its demise and precipitated the sentencing reform movement. First, liberals and conservatives alike increasingly regarded the rehabilitation model as a failure.[14] Three-quarters of a

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[11]See, e.g., George Fisher, *Plea Bargaining's Triumph,* 109 Yale L. J. 857, 1055 (2000); Alan Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm,* 123 U.Pa. L. Rev. 297 (1974); Comment, *Considerations of Punishment by Juries,* 17 U. Chi. L. Rev. 400, 401, n. 6 (1949) (explaining that many states limited jury sentencing in non-capital cases during this period because the "disposition of offenders is a problem for specialists in criminology and psychiatry.").

[12]*Mistretta v. United States*, 488 U.S. 361 (1989); Sandra Shane-Dubow, et al., *Sentencing Reform in the United States: History, Content, and Effect* (1985); Francis A. Allen, *The Decline of the Rehabilitative Ideal*, 3-7 (1981).

[13]*Williams v. New York*, 337 U.S. 241, 247-48 (1949).

century of data appeared to confirm that parole authorities were unable to identify whether and when any particular offender had been reformed, and studies indicated that the programs offered in penitentiaries were unable to reign in the rampant recidivism rate.[15]

Second, experience revealed that the broad judicial discretion required by the rehabilitation model resulted in unwarranted disparities in sentencing similarly situated defendants, with such factors as geography,[16] race,[17] gender,[18]

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[14]See Jay Miller et al., *Sentencing Reform,* 1-6 (1981); Allen, supra n. 12; Senate Report No. 98-225 (1983) (referring to the "outmoded rehabilitation model" for federal criminal sentencing).

[15]See, e.g., Miller, *Sentencing Reform* at 6-12; Dale G. Parent, *What Did the United states Sentencing Commission Miss?,* 101 Yale L.R. 1773 (1992); Douglas Lipton, et. al., *The Effectiveness of Correctional Treatment; A Survey of Treatment Evaluation Studies* 523 (1975); Robert Martinson, *What Works - Questions and Answers About Prison Reform,* Public Interest, Spring 1974 at 22.

[16]Roszel C. Thomsen, *Sentencing in Income Tax Cases*, 26 Fed. Probation 10 (1962); Ilene H. Nagel & John L. Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 Mich. L. Rev. 1427, 1453 (1982). The Eastern District of New York, which employed sentencing councils, nevertheless displayed disparity both within itself and in relation to the rest of the Circuit. Shari Seidman & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. Chi. L. Rev. 109, 145 (1975) (finding 30 - 40% disparity between individual judges, and that sentencing councils were able to reduce roughly 10% of this disparity).

[17]See, e.g., Beverly Blair Cook, *Sentencing Behavior of Federal*

socio-economic status,[19] and judicial philosophy[20] accounting for much of the difference. An enormous and inexplicable disparity was found in pre-Federal Sentencing Guidelines indeterminate sentencing regimes on both the state[21] and federal[22] levels, whether the sentencer was judge or jury,[23] and

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Judges: Draft Cases 1972, 42 U. Cin. L. Rev. 597, 615 (1973); William W. Wilkins, Jr. et al., *The Sentencing Reform of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem,* 2 Cin. L.F. 355, 359-62 (1991).

[18]Ilene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines,* 80 J. Crim. L. & Criminology 883, 895-97 and nn. 73-84 (1990) (reviewing the empirical studies documenting the sentencing impact of race, gender, and socioeconomic status).

[19]Id.

[20]Paul J. Hofer et al, *The Effect of The Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. Crim. L. & Criminology 239, 240 (1999); Kevin Clancy et al., *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. Crim. L. & Criminology 524, 542 (1981) (reporting the results of evaluation by 264 federal judges of 16 hypothetical cases and finding that only in three cases did a majority of the judges seek the same sentencing goal).

[21]William Austin & Thomas A. Williams III, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. Crim. L. & Criminology 306 (1977) (performing analysis similar to that of the Second Circuit study on Virginia state district court judges' hypothetical sentences and finding disparity both in type and magnitude of sentence).

[22]Beverly Blair Cook, *Sentencing Behavior of Federal Judges: Draft Cases - 1972*, 42 U. Cin. L. Rev. 597 (1973) (examining all 1,852 draft-dodging convictions and finding sentence disparity based on environment, geography, and individual

whether the study was historical[24] or simulated.[25] This welter of empirical data by researchers led to a rallying cry of conservative and liberal judges and policymakers behind Judge Marvin Frankel, the father of the modern sentencing reform movement. Judge Frankel, viewing the status quo as "lawlessness of sentencing," insisted that the unchecked and sweeping powers given to judges in the fashioning of sentences was "terrifying and intolerable for a society that professes devotion to the rule of law."[26]

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judge).

[23]George William Baab & William Royal Furgeson, Jr., Comment, *Texas Sentencing Practices: A Statistical Study*, 45 Tex. L. Rev. 471 (1966) (performing a regression analysis on 1,720 state felony sentences from 27 different districts and finding evidence of disparity based not only on gender and individual judge but also on whether pretrial release occurred and whether counsel was appointed or retained).

[24]See, e.g., Nagel, supra n. 18, 895-97; Norval Morris, *Towards Principled Sentencing*, 37 Md. L. Rev. 267, 272-74 (1977) (reviewing historical studies and finding that "the data on unjust sentencing disparities have indeed become quite overwhelming").

[25]See Sandor Frankel, *The Sentencing Morass, and a Suggestion for Reform*, 3 Crim. L. Bull. 365 (1967) (recounting an early simulation study carried out at a 1961 workshop of the Sixth, Seventh, and Eighth Circuits, which resulted in widely disparate sentences); Anthony Partridge & William B. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (1974) (describing study where each judge delivered sentence on approximately twenty real and ten hypothetical pre-sentence reports).

[26]Marvin E. Frankel, *Criminal Sentences: Law Without Order*

Out of this perception of the ineffectiveness of rehabilitation programs and the unfairness of sentencing practices, the Federal Sentencing Guidelines[27] and the 17 state sentencing guidelines regimes[28] were born. Concomitant with the advent of judicial guidelines was the reduction in the number of states permitting juror sentencing, from one quarter of the states down to five.[29] Jurors sentence offenders with greater disparity than do judges, even judges not utilizing guidelines, "primarily because laypersons bring no experience to the task of sentencing and bear no continued responsibility for it."[30] Just as pre-Federal Sentencing Guidelines judges

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(1973).

[27]Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984). The Act garnered the support of Senators Joseph Biden (D-Delaware), Orrin Hatch (R-Utah), and Strom Thurmond (R-SC). See Stith & Cabranes, *Fear of Judging,* pp. 43-47.

[28]See Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 St. Louis U. L. Rev. 425, 446 (2000) (listing the 17 states currently using guidelines systems and the eight states considering the adoption of such guidelines).

[29]See Note, *Statutory Structures for Sentencing Felons in Prison*, 60 Colum. L. Rev. 1134 at 1154, and nn. 136-37 (1960) (citing to the jury sentencing statutes in 13 states); Note, *Jury Sentencing in Non-Capital Cases: An Idea Whose Time Has Come (Again)?*, 108 Yale L.J. 1775, n. 65 (1999) (citing to jury sentencing statutes in Arkansas, Kentucky, Missouri, Texas and Virginia).

[30]Robert A. Weninger, *Jury Sentencing in Non-Capital Cases: A Case Study of El Paso County*, Texas, 45 Wash. U.J. Urb. &

were free to impose any sentence for any reason, juries are not compelled to provide reasons for their sentences.

The Federal Sentencing Commission,[31] following marching orders from Congress, crafted the Federal Sentencing Guidelines, which establish a range of determinate sentences for categories of offenses and offenders according to various specified factors. These objective factors concern offense characteristics that make the particular crime more or less serious (such as the use of a firearm, the value of the property involved, and any harm to or provocation from the victim), and offender characteristics that make the particular

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Contemp. L. 3, 292 (1994) (regression analysis of random sample of 1,395 felony prosecutions commences between 1974 and 1977, finding greater severity for jury sentencing and greater disparity for almost every offense type); William A. Eckert and Lori E. Exstrand, *The Impact of Sentencing Reform: A Comparison of Judge and Jury Sentencing Systems* (1975) (unpublished manuscript cited in Note, *Jury Sentencing in Non-Capital Cases*, supra n. 29) (comparing sentences before and after Georgia introduced judge sentencing and finding evidence of systematic jury sentencing disparity for aggravated assault offenses); Brent L. Smith and Edward H. Stevens, *Sentence Disparity in the Judge-Jury Sentencing Debate: An Analysis of Robbery Sentences in Six Southern States*, 9 Crim. J. Rev. 1, 4 (1984) (finding the standard deviation in all three jury sentencing states was higher than in the three judge sentencing states).

[31]The Commission has seven voting members appointed by the President with the consent of Congress. At least three must be federal judges, and no more than four members can be from the same political party. 28 U.S.C. sections 991-994 and 18 U.S.C. section 3553(a)(2). Congress must disapprove of any amendment offered by the Commission or it becomes law, so long

defendant more or less culpable (such as whether the defendant chose a vulnerable victim, whether he was a leader or follower, whether he accepted responsibility or obstructed justice, and whether he was a career or first-time offender).[32] The Commission compromised between a harm-based, retributive model and a crime-control, deterrence scheme, basing offense levels primarily on an empirical assessment of past sentencing practices.[33] Most states implementing guidelines systems have also incorporated a guidelines manual devised by a sentencing

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as consistent with other Congressional statutes.

[32]Sentencing Reform Act of 1984, supra n. 27, 98 Stat. 1987 (1984). The most recent Guidelines Manual (West 2002), all 1,626 pages of it, attempts to list every offense and offender characteristic that can play any role in sentencing a defendant. Most personal characteristics of the offender unrelated to the offense, such as her age, education and vocational skills, mental and emotional conditions, physical condition (including drug or alcohol dependency or abuse), employment record, communities ties, family ties and responsibilities, military service, charitable contributions, and lack of guidance as a youth are not relevant factors in determining a sentence, and are "discouraged" as a grounds for departure. U.S.S.G. sections 5H1.1-5H1.6; 5H1.11 - 12. Congress has forbidden the Commission from considering the "race, sex, national origin, creed, and socioeconomic status of offenders." 18 U.S.C. section 994(d); U.S.S.G. section 5H1.10.

[33]See, e.g., Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon which They Rest,* 17 Hofstra L. Rev. 1 (1988); Paul H. Robinson, *Dissent from the United States Sentencing Commission's Proposed Guidelines*, 77 J. Crim. L. & Criminology 1112 (1986).

commission.[34]

Guidelines transform a judge's job from using her discretion to select a particular sentence from a very broad range to making those factual findings, usually mandated by a Commission, that dictate the particular sentence she must impose. In the federal system, these factual findings are made by a judge employing the preponderance of evidence standard at an informal sentencing hearing, and the findings establish a defendant's place on a 258 box-sentencing grid. The defendant's place along the horizontal axis which consists of 43 offense-level categories is determined by selecting the appropriate offense level from the Sentencing Guidelines Manual. The offense level can then be adjusted upward or downward depending on factual findings of those aggravating and mitigating circumstances listed in the manual, such as whether defendant brandished a weapon or accepted responsibility for the offense. The defendant's place along the vertical axis is determined by the defendant’s criminal

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[34]See, e.g., Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty Year Retrospective,* 12 Fed. Sent. Rptr. 69, 72 (2000); U.S. Dept. of Justice, Bureau of Justice Assistance, National Assessment of Structured Sentencing 14-17 (1996) (detailing sentencing guideline regimes in the states as of February 1994); Andrew Von Hirsch et al., *The Sentencing Commission and Its Guidelines,* 177-88 (1987)(Appendix, A Summary of the

history. Under this rather mechanical process, the judge's discretion is limited to selecting the sentence within the very narrow range offered by the defendant's place in the grid.[35]

Although everybody loves to hate the Federal Sentencing Guidelines,[36] determinate sentencing guidelines regimes have contributed to two important goals: uniformity and transparency. The Federal Sentencing Guidelines have achieved their highest level of success regarding Congress' stated goal

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Minnesota, Washington, and Pennsylvania guidelines).

[35]This discretion is limited to a matter of months of prison time, as within each grid the sentence can vary by only 25%. However, in those rare instances where an aggravating or mitigating factor was not taken into account by the sentencing commission or was present to a degree not reflected in the manual, the judge may depart upward or downward, subject to appellate review. See U.S. Sentencing Guidelines § 5K2.0 (authorizing departures); United States Sentencing Commission, 2000 Sourcebook of Federal Sentencing Statistics 51, Figure G (noting that, in 2000, 17.9% of defendants received downward departures for substantial assistance, 17% of defendants received downward departures based upon other grounds, and .7% of defendants received upward departures); *Koons v. United States*, 518 U.S. 81 (1996) (departures reviewed for abuse of discretion).

[36]See, e.g., Michael Tonry, *Sentencing Matters* (1996); Alschuler, infra n. 39; Schulhofer, infra n. 39; Luna, infra n. 47; Stith and Cabranes, supra n. 7; Federal Judicial Center, *The United States Sentencing Guidelines, Result of the Federal Judicial Center's 1996 Survey,* Washington (Federal Judicial Center, 1997) (1997 survey concluding that more the two-thirds of federal judges wish to scrap the Guidelines).

- the reduction of unwarranted disparity in sentencing.[37] Empirical studies indicate that since the Federal Sentencing Guidelines were implemented differences in sentences are now based primarily on relevant factors such as an offender's criminal history and the particular manner in which the offense was committed, and not unwarranted factors such as the geographic area in which the offense was committed or the sentencing philosophy of the judge.[38] Even those scholars most

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[37]See, e.g., U.S. Sentencing Commission, *Sentencing Guidelines and Policy Statements* (1987). The disparity at sentencing must hinge solely on relevant factors such as criminal history and the severity of the offense.

[38]See, e.g., Paul J. Hofer, Kevin R. Blackwell, and Barry Rubach, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. Crim. L & Criminology 239, 243 (1999) (claiming some success for the guidelines at reducing inter-judge disparity); James M. Anderson, Jeffrey R. Kling, & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & Econ. 271 (1999) ("Our study indicates that the Guidelines [and concomitant statutory minimum sentences] have been successful in reducing interjudge nominal sentencing disparity."); A. Abigail Payne, *Does Inter-Judge Disparity Really Matter? An Analysis of the Effects of Sentencing Reforms in Three Federal District Courts*, 17 Int'l Rev. L. & Econ. 337 (1997) (reviewing drug and embezzlement/fraud/theft cases and finding a reduction of disparity for drug cases post-Guidelines and finding more modest success in some district in reducing embezzlement, fraud, theft disparity); U.S. Sentencing Comm'n, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecution Discretion and Plea Bargaining* (1991) (comparing pre- and post-guidelines sentences for four major offense types and finding that disparity decreased

critical of the Federal Sentencing Guidelines on the grounds of loss of judicial flexibility and prosecutorial evasion admit modest success in reaching the goal of equality.[39] While we could find fewer studies regarding the success of state sentencing guidelines in reducing disparity, what we do know suggests the experience in the states has been similar.[40]

We are not apologists for the Federal Sentencing Guidelines, nor do we suggest that any present guidelines system is without significant room for improvement. Rather, we claim that an administrative guideline regime enhances the prospects for consistency across cases in the non-capital

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significantly in all categories).

[39]See, e.g., Joel Waldfogel, *Does Inter-Judge Disparity Justify Empirically Based Sentencing Guidelines*, 18 Int'l Rev. L. & Econ. 293 (1998) (arguing that the reduction of inter-judge disparity, while statistically significant, does not justify the loss of proportionality in sentencing); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 Nw. U. L. Rev. 1284, 1286 (1997) (finding that the Guidelines have reduced disparity in cases going to trial and in 65 - 80% of cases resolved by plea); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation,* 58 U.Chi. L. Rev. 901 (1991) (admitting that the Guidelines impose uniformity in regard to those factors listed, such as harm, but arguing that the Guidelines are faulty because they ignore situational and offender characteristics that reflect culpability and therefore should influence sentences).

[40]State sentencing guidelines in Minnesota have had similar success in limiting disparity. See Hofer et al., supra n. 38, at 262 n. 74 (collecting studies).

context, and that much of the scholarly criticism applies to facets of sentencing that are either not part of the guidelines regime, or are parts that could be divorced from the guidelines. In other words, the criticism is primarily directed at federal statutes or particular aspects of the Federal Sentencing Guidelines, rather than at problems inherent in a guidelines regime.

For example, one serious criticism levied against the Federal Sentencing Guidelines is that federal prosecutors can circumvent equality by manipulating offense levels through charge bargaining, thus giving favorable plea agreements to sympathetic defendants while preventing judges from doing the same.[41] Although this is a genuine problem, the perception of unwarranted disparity generated by fact bargaining in negotiating guilty pleas might exceed the reality.[42] The

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[41]See, e.g., Douglas A. Berman, *Does Fact Bargaining Undermine the Guidelines?,* 8 Fed. Sent. Rep. 299 (1996); Gerald W. Heaney, *The Reality of Sentencing Guidelines: No End to Disparity,* 28 Am. Crim. L. Rev. 161, 194 (1991) (concluding on the basis of anecdotal evidence that "the guidelines have the potential to produce a new breed of sentence disparity hidden from view and controlled primarily by the pressures of the prosecutor's caseload"). But see Judge William Wilkins, *Response to Judge Heaney,* 28 Am. Crim. L. Rev. 795 (1992) (critiquing Judge Heaney's methodology and finding that prosecutors do not control the Guidelines process).

[42]See Molly Treadway Johnson & Scott A. Gilbert, *The U.S. Sentencing Guidelines, Results of the Federal Judicial*

problem is ameliorated to some extent by the fact that federal judges are required to sentence defendants for related uncharged or dismissed conduct so long as that sentence is within the statutory maximum for the crime to which defendant pled guilty,[43] and by the Thornburg memorandum, which prohibits federal prosecutors from accepting pleas except to the most serious readily provable offense.[44] While prosecutors and

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Center's 1996 Survey Report to the Committee on Criminal Law of the Judicial Conference of the United States (1997) (reporting that large majorities of district judges and chief probation officers believe that "plea bargains are a source of hidden unwarranted disparity in the Guidelines system"). However, in the only empirical work on disparity in plea situations, Professor Schulhofer and Commissioner Nagel found that Guideline evasion occurred in only 20 - 35% of guilty plea cases. See supra n. 39. Our intuition matches that of a former U.S. Attorney who served as chair of the Subcommittee on Sentencing Guidelines of the Attorney General's Advisory Committee, who wrote that prosecutors follow the Guidelines even in plea negotiations "in the vast majority of cases," and that evasion will decrease because the principal offenders were older AUSAs who feel that they know what each case is worth. Joe B. Brown, *The Sentencing Guidelines Are Reducing Disparity,* 29 Am. Crim. L. Rev. 875, 880 (1992).

[43]One of the many Guidelines compromises was between a "real offense" system, where a defendant is sentenced for whatever she actually did, and a "charge offense" system, where a defendant is sentenced only for the crime of conviction or plea. See U.S.S.G. section 1B1.3; *United States v. Watts*, 519 U.S. 148 (1997) (holding that judge is required to sentence for related uncharged conduct, even if the defendant was acquitted of that conduct by a jury). Information regarding related uncharged conduct is found from reviewing the reports of the federal agents working on the case, and a probation department interview with defendant. Such conduct is difficult to hide from the judge.

defense attorneys may attempt to evade a mandated guidelines range for that conduct actually engaged in by misrepresenting the facts of the offense, the case agent and the probation department are not easily fooled. Based upon the Presentence Investigation Report prepared in every criminal case, federal judges should reject any plea agreement that does not reflect the seriousness of the actual offense behavior, or that offers a sentence below the applicable guidelines range, unless other legitimate considerations (e.g., problems of proof) justify the agreement.[45]

Another frequent criticism is that the increased length of sentences under the federal guidelines, coupled with significant reduction in prison time that a defendant receives for "accepting responsibility" (which is accomplished primarily through pleading),[46] gives prosecutors undue leverage

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[44]Reprinted in 6 Fed. Sent. Rep. 347 (1994). This memorandum was moderated by the 1993 Reno Memorandum, reprinted in 6 Fed. Sent. Rep. 352 (1994). See also U.S.A.M. 9-27.400 (Sept. 1997).

[45]See U.S.S.G section 6B1.2 (permitting court to accept plea agreement only if it adequately reflects the seriousness of the actual offense behavior, does not preclude the dismissed conduct from being considered as relevant conduct, or departs from the applicable guidelines range for a justifiable reason); Fed. Rules of Crim. Proc. 11(e)(1)(C) (authorizing judge to reject a binding plea that incorporates a sentencing range contrary to the Guidelines).

[46]See U.S.S.G. section 3E1.1, offering a two or three level decrease in based offense level for accepting responsibility

to coerce guilty pleas.[47] In fact, much of the ability of prosecutors in the federal system to coerce guilty pleas from favored or disfavored defendants stems from the threat of mandatory minimum sentences,[48] and from prosecutors' ability to offer essentially unreviewable downward departures to particular defendants based upon substantial assistance to authorities.[49] This power, confined to the federal system,

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for one's criminal conduct. For a defendant with a base offense level of 30, this can translate into a reduction from 97 - 121 to 70-87 months imprisonment.

[47]See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas,* 110 Yale L. J. 1097 (2001); Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing Policy Analysis No. 458* (Nov. 1, 2002).

[48]See, e.g., Paul D. Borman, *The Federal Sentencing Guidelines*, 16 Thomas M. Cooley L. Rev. 4 (1999) (distinguishing the Guidelines from a separate and independent federal sentencing phenomena - mandatory minimum sentences); U.S. Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties and the Federal Criminal Justice System* (1991) p. ii-iv (1991 report from the U.S. Sentencing Commission to Congress criticizing mandatory minimums as producing unwarranted disparities among offenders and transferring power from judges to prosecutors).

[49]See 18 U.S.C. section 3553(e); 28 U.S.C. section 994(n); and U.S.S.G. section 5K1.1 (allowing court to depart below guideline range and below a statutorily required mandatory minimum sentences upon motion of the government stating that the defendant has provided substantial assistance to the authorities); *Wade v. United States*, 504 U.S. 181 (1992) (holding that court can review prosecutor's refusal to file a substantial-assistance motion only if based upon unconstitutional motive). Nationwide, about 19% of federal defendants received such departures in 1998. United States Sentencing Commission 1998 Sourcebook of Federal Sentencing

exists regardless of the implementation of the Guidelines. We are sympathetic to critics of the present Federal Sentencing Guidelines regime bemoaning the decline of jury trials over the last ten years.[50] However, the Guidelines are not the primary culprit here: mandatory minimums and the prosecutorial leverage stemming from reductions for substantial assistance are to blame. These sorts of provisions, and the acceptance of responsibility reduction could, and perhaps should, be reassessed.[51] The issue, though, is clearly one of degree. It is neither realistic as a matter of practice nor desirable as a matter of policy to wholly remove incentives for defendants to cooperate and to acknowledge guilt (and waive trial). Rather Congress should

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Statistics (Table 26), United States Sentencing Commission website, <http://www.ussc.gov/ANNRPT/1998/sbtoc98.htm> (visited on January 15, 2003).

50 George Fisher, *Plea Bargaining's Triumph (*Chapter Nine, *The Balance of Power to Bargain),* Stanford Univ. Press (forthcoming 2003) (suggesting that the Federal Sentencing Guidelines have contributed to the decline in jury trials by reducing the availability of judicial leniency).

[51]See, e.g., Frank O. Bowman, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Undiscipline,* 29 Stetson L. Rev. 7 (1999) (noting judicial backlash against use of substantial assistance, and predicting that unless the DOJ exercises greater self-discipline, Congress might repeal the provision). Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform,* 81 Calif. L. Rev. 61 (1993).

ensure that the incentives strike an appropriate balance without reintroducing unaccountable discretion on the part of prosecutors or placing undue coercive pressure on criminal defendants.

A third common criticism of the Federal Sentencing Guidelines is that they offer insufficient procedural protections at sentencing.[52] The Court has held open the possibility of heightened procedures at sentencing hearings for facts triggering particularly long sentences,[53] a possibility about which we offer no opinion. Yet again, this criticism applies even more appropriately to non-Guidelines discretionary systems, where there is no pretense of factual findings, and no appellate review of sentences.

The most serious criticism of the Federal Sentencing Guidelines is that they have not succeeded in eliminating racial discrimination.[54] While unwarranted inter-judge

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[52]See, e.g., Sara Sun Beale, *Procedural Issues Raised by Guideline Sentencing: The Constitutional Significance of Single "Elements of the Offense,"* 35 Wm. & Mary L. Rev. 147 (1993) (advocating clear and convincing evidence standard of proof for certain sentence enhancements, and affording the defendant an opportunity to confront and cross-examine witnesses).

[53]*See Almendarez-Torres v. United States*, 523 U.S. 148, 149 (1998).

[54]See, e.g., David B. Mustard, *Racial, Ethnic, and Gender*

disparity might have been the most potent source of pre-Guidelines disparity, unwarranted racial disparities is the most pernicious. There are two aspects of this claim; the first has nothing to do with the guidelines, and the second is severable from the administrative model. The primary cause of higher overall sentences for non-whites is that certain federal crimes committed disproportionately by African-Americans are punished more severely than crimes committed disproportionately by whites.[55] For example, the sentence disparity caused by the penalty differential between powder and crack cocaine is the choice of Congress, and has nothing to do with the Federal Sentencing Guidelines. The second claim is that the grant of authority to federal prosecutors to request judicial reduction of sentences below guidelines ranges (and even below mandatory minimums) based upon

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Disparities in Sentencing: Evidence From the U.S. Federal Courts, 44 J. L. & Econ. 285, 311 (2001) (arguing that a large difference in the length of sentence exist on the basis of race, gender, education, income, and citizenship).

[55]Douglas McDonald and Kenneth Carlson have demonstrated that the average-sentence disparity between blacks and whites relies extensively on the 100-1 ratio between crack and powder cocaine.
Douglas C. McDonald & Kenneth E. Carlson, Bureau of Just. Stats., *Sentencing in the Federal Courts: Does Race Matter?* 182 (1993); Heaney, supra n. 41. The Sentencing Commission's two attempts to change the ratio were both, regrettably, rejected by Congress. See Norm Abrams and Sara Sun Beale, *Federal Criminal Law*, 3d ed., 308-10 (West 2000).

substantial assistance to authorities has resulted in some continued racial discrimination.[56] This problem, again, must be placed at the door of Congress and not the Commission. This authority is statutory, and hence would remain even if the Federal Sentencing Guidelines were repealed.[57] Most state sentencing regimes based upon the administrative model do not grant such power to prosecutors.

In fact the racial discrimination criticism, along with the equally common charges from scholars that the Federal Sentencing Guidelines have eliminated all moral judgment from the sentencing process[58] and have offered no coherent philosophy of punishment,[59] are criticisms not of a determinate sentencing regime based upon the administrative

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[56]See *Substantial Assistance: An Empirical yardstick Gauging Equity in Current Federal Policy and Practice* (1998), United States Sentencing Commission website, <http://www.ussc.gov/research.htm> (last visited on January 15, 2003) (report by two Commission staff members finding inequities by judges and prosecutors concerning downward departures for substantial assistance; factors such as gender, race, ethnicity, and citizenship were statistically significant in explaining such departures); Mustard, supra n. 54.

[57]18 U.S.C. section 3553(e); 28 U.S.C. section 994(n).

[58]Stith & Cabranes, supra n. 7.

[59]See, e.g., Marc Miller, *Purposes at Sentencing,* 66 S.Cal. L.Rev. 413 (1992); Paul Robinson, 41 Crim. L. Rep. 3174 (1987) (resigning from Commission in frustration over perceived

model, but rather of policy choices made by legislatures. Moral judgments are still being made, but they are now made by the legislature and are applicable to all potential offenders, rather than being made on an ad hoc basis by judges to apply to individual defendants. That the Federal Sentencing Guidelines sytem is neither flawlessly coherent nor shares the same normative commitments as its detractors is insufficient reason to dismantle it.

This brings us to the second advantage of a determinate sentencing regime - transparency. While many castigate the Federal Sentencing Guidelines as anti-democratic,[60] we believe just the opposite is true. The Sentencing Commission publishes a manual containing the precise sentence to be imposed for each particular crime committed in a particular manner, listing those factors that are relevant or forbidden in determining that sentence, and providing the weight to be given each factor. These guidelines are later ratified or rejected through the political process. Thus, if one believes it is unjust to sentence more harshly for drug offenses than for violent offenses, or that the 100 to 1 ratio of punishment of crack to powder cocaine in the federal system is racially discriminatory, one can invoke the democratic process to

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failure to develop a coherent sentencing rationale).

[60]See, e.g., Luna, supra n. 47.

change the statutory sentence, and the Guideline change would follow automatically.[61] If one believes, for example, that family circumstances should play a role in sentencing decisions,[62] the present ban against its consideration in the federal system[63] is now visible in a written document and open to discourse, rather than hidden in a judge- or jury-imposed sentence without an articulated, reviewable rationale.

B. Failed Reform in Capital Sentencing

Constitutional regulation of the death penalty is a relatively modern development. Four decades ago federal constitutional rulings placed essentially no restraints on state death penalty practices distinct from those applicable

[61]One could do this by voting for representatives who will change the law, or by persuading the judiciary that the punishment is unconstitutional. See, e.g., David A. Sklansky, *Cocaine, Race, and Equal Protection,* 47 Stan. L. Rev. 1283 (1995) (suggesting that the crack:powder ratio violates the Equal Protection Clause).

[62]Compare Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines,* 20 Pepp. L. Rev. 905 (1993) (arguing that, as a normative matter, the Guidelines should take account of whether felons are single parents) with Ilene H. Nagel & Barry Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines,* 85 J. Crim. L. & Criminology 181, 207 (1994) (suggesting that the just deserts and crime control principles of the Guidelines outweigh the "exogenous utilitarian concerns" of the impact on children).

[63]See supra n.32.

to all state criminal proceedings.[64] A confluence of events in the 1960s brought substantial popular and legal attention to American death penalty practices. The Civil Rights Movement and the dramatic upheaval in constitutional criminal procedure wrought by the Warren Court emboldened opponents of capital punishment to seek reform or abolition of the death penalty through the courts.[65]

Although the assault against the death penalty was multifaceted, an important theme in the popular and legal critique focused on the apparent arbitrariness and inequality of state capital schemes in the United States. The number of persons sentenced to death and executed in the mid- to late 1960s represented a small fraction of persons eligible for the death penalty under state law. Many critics suspected that those selected to die were chosen for arbitrary or even invidious reasons.[66]

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[64]See, e.g., Hugo Bedau, *The Courts, the Constitution, and Capital Punishment*, 1968 Utah L. Rev. 201, 228-29 (stating, as late as 1968, that "not a single death penalty statute, not a single statutorily imposed mode of execution, not a single attempted execution has ever been held by any court to be 'cruel and unusual punishment' under any state or federal constitution").

[65] See Stuart Banner, *The Death Penalty: An American History,* 247-66 (2002); Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (1973).

[66] See Banner, *The Death Penalty* at 243-44 (discussing concerns about racially discriminatory aspects of the American death penalty system).

The constitutional challenge based on arbitrariness focused on the failure of states to articulate any criteria for determining who should live or die. Virtually all states afforded sentencers absolute discretion in deciding punishment. When the Court first addressed the constitutional attack on "standardless discretion" under the Due Process Clause in *McGautha v. California*,[67] it emphatically rejected the claim. Justice Harlan, writing for the Court, famously insisted that the effort "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can fairly be understood and applied by the sentencing authority," were tasks "beyond present human ability."[68]

Surprisingly, just a year later the Court revisited the arbitrariness claim, this time under the Eighth Amendment, in *Furman v. Georgia*.[69] Perhaps even more surprisingly, a bare majority concluded that all of the capital statutes before the Court[70] (and by implication, nearly all of the capital statutes

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[67] 402 U.S. 183 (1971).
[68] Id. at 204.
[69]408 U.S. 238 (1972).
[70]Along with *Furman*, the Court reviewed three other cases: *Jackson v. Georgia*, *Branch v. Texas*, and *Aikens v. California*. See 403 U.S. 952 (1971) (granting certiorari).

then in force[71]) violated the Eighth Amendment. The five Justices in the majority wrote separate opinions identifying various, and, to some extent, conflicting rationales for the Court's judgment. Despite their important differences, the opinions of the Justices in the majority centered on arbitrariness: notwithstanding the broad death-eligibility established in most state schemes, relatively few persons were sentenced to death and fewer still were executed in the decade before *Furman*.[72] The paucity of executions in relation to broad death-eligibility was troubling to several members of the Court because there was no reliable evidence indicating that those executed (or sentenced to death) were in any sense the most deserving of death among the death-eligible.[73] Worse

[71]Of the forty state statutes in effect at the time of *Furman*, all but Rhode Island's suffered from the defect of "standardless" discretion and were thus unenforceable in light of the decision. Rhode Island's mandatory death penalty provisions were later effectively struck down when the Court held that the Eighth Amendment requires "individualized" sentencing in capital cases. See *Woodson v. North Carolina,* 428 U.S. 280 (1976) (invalidating nondiscretionary death penalty statute).

[72]See, e.g., *Furman*, 408 U.S. at 291 (Brennan, J., concurring) ("The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it."); id. at 309 (Stewart, J., concurring); id. at 311 (White, J., concurring).

[73]See, e.g., id. at 309 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."); id. at 313 (White, J., concurring) ("the death penalty is exacted with great infrequency even for the most atrocious crimes and []

still, some members of the Court, particularly Justice Douglas, feared that the few individuals caught in the death penalty web were selected for discriminatory, morally irrelevant reasons, such as race or class.[74]

These shared concerns about the alarming chasm between the death penalty in theory and the death penalty in fact led the Court to condemn the absence of legislative guidance in state schemes. Despite Justice Harlan's eloquent rejection of the petitioner's claim in *McGautha* that the death-penalty decision could be rationalized through detailed sentencing instructions, the *Furman* Court seemed to suggest that just such guidance was necessary to save the death penalty in light of the apparent arbitrary and discriminatory aspects of prevailing death-penalty practices.

The apparent hope of the Court was that legislative guidance would ensure that individual sentencing decisions reflect the values of the larger community, because the states would announce in advance their respective "theories" of when death should be imposed.[75] Such guidance promised to address

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there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

[74]Id. at 257 (describing the pre-*Furman* capital statutes as "pregnant with discrimination" in their operation).

[75]Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of*

two distinct problems. First, clear standards would limit the risk that "undeserving" defendants would be sentenced to death because their particular juries concluded, contrary to the values of the community as a whole, that the defendant before them was among the truly worst offenders. Second, clear standards would ensure that all potentially "deserving" defendants would be subject to the same sentencing criteria rather than the ad-hoc criteria adopted on a case-by-case basis by juries afforded absolute and unguided discretion. Legislative guidance thus held out the possibility that like cases would be treated alike. Not only would all undeserving defendants escape the death penalty; the hope was that clear legislative direction would ensure as well that all (or most) deserving defendants received it.

States responded to *Furman*'s critique of standardless discretion in two ways. Some states appeared to read *Furman* as requiring the removal of sentencing discretion altogether and accordingly enacted mandatory statutes that required the death penalty for certain offenses.[76] Most states, however, revamped their statutes to substantially increase the

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Capital Punishment, 109 Harv. L. Rev. 355, 365 (1995).

[76]See *Woodson v. North Carolina,* 428 U.S. 280 (1976) (invalidating North Carolina's mandatory statute); *Roberts v. Louisiana,* 428 U.S. 325 (1976) (invalidating Louisiana's mandatory statute).

structure of the sentencing decision while at the same time preserving some sentencer discretion to choose between life and death.[77] In these states, previously broad instructions to jurors to decide punishment in accordance with their "most profound judgment"[78] or their "dictates of conscience"[79] were replaced with formulas involving consideration of "aggravating" and "mitigating" factors or "special issues." These latter statutes have emerged as the sole constitutionally permissible vehicles for deciding punishment in capital cases.[80] Having invalidated the poles of standardless discretion and discretionless standards, the Court has directed most of its regulatory efforts in the death penalty area to fine-tuning the permissible middle ground of "guided discretion."[81]

The effort to secure equality in capital cases through guided discretion statutes has proven elusive for several

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[77]See, e.g., *Gregg v. Georgia,* 428 U.S. 153 (1976) (reviewing Georgia's post-*Furman* approach); *Proffitt v. Florida,* 428 U.S. 242 (1976) (reviewing Florida's post-*Furman* approach).
[78]This was the standard instruction given in Ohio and challenged in *Crampton v. Ohio,* the companion case to *McGautha*. See *McGautha*, 402 U.S. at 290 (Brennan, J., dissenting) (quoting *State v. Caldwell,* 135 Ohio St. 424, 425, 21 N.E. 2d 343, 344 (1939)).
[79]*Baugus v. State,* 141 So.2d 264, 266 (Fla.), cert. denied, 371 U.S. 879 (1962).
[80] See Steiker & Steiker, *Sober Second Thoughts,* supra n. 75, 109 Harv. L. Rev. at 371-403.
[81] Id.

reasons.[82] To begin with, states have promiscuously used subjective aggravating factors that significantly undermine the effort to limit or constrain discretion. The Model Penal Code death penalty provision, which received little attention pre-*Furman*, led many states down this path post-*Furman* by including as its last aggravating factor that "[t]he murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."[83] Asking a sentencer to separate the "especially" heinous from the "ordinarily" heinous crimes is not a promising means of ensuring consistent outcomes. This aggravating factor operates as a catch-all, allowing the sentencer to find death-eligibility if none of the objective criteria (such as the presence of an accompanying violent felony, or commission of the offense during an escape from custody) is satisfied. Part of the problem, no doubt, is that subjective notions such as "heinousness" and "depravity" capture a genuine, if amorphous, community sentiment about what characterizes the "worst" murders. But the use of such criteria, as well as the Court's willingness to tolerate hopelessly indeterminate factors (such as Idaho's factor,

[82] Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 Mich. L. Rev. 2590, 2624 (1996) (arguing that the effort to achieve consistency across cases "has proven not merely unachievable but counterproductive").

which asks whether "the defendant exhibited utter disregard for human life"[84]), certainly undermines any pretense to equal treatment. Unlike the Federal Sentencing Guidelines, which by and large rely on strictly objective criteria,[85] state death penalty statutes often include factors that invite sentencters to give voice to their impressionistic responses to the offender and offense.[86]

Moreover, many states have adopted numerous aggravating circumstances.[87] Thus, even in state schemes that rely primarily on objective, non-vague aggravating circumstances, such as committing the murder in the course of a felony,[88] or killing a police officer,[89] the factors collectively suffer

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[83]Model Penal Code § 210.6(3)(h) (1980).

[84] *Arave v. Creech,* 507 U.S. 463, 468 (1993) (sustaining limiting construction by Idaho Supreme Court that the defendant displayed the attitude of a "cold-blooded, pitiless slayer").

[85] See supra n. 33 and accompanying text.

[86] See *Walton v. Arizona,* 497 U.S. 639, 655 (1990) (upholding use of "especially, heinous, cruel or depraved" aggravating factor).

[87]See, e.g., Ariz. Rev. Stat. Ann. § 13-703(F)(1989) (listing 10 aggravating circumstances); Colo. Rev. Stat. § 16-11-103(5) (Supp. 1994) (listing 13 aggravating circumstances); Fla. Stat. Ann. § 921.141(5) (West. Supp. 1995) (listing 11 aggravating circumstances); Utah Code. Ann. § 76-3-202(1) (West. Supp. 1992) (listing 17 aggravating circumstances).

[88]See, e.g., N.J. Stat. Ann. § 2C:11-3.c(4)(g) ("[t]he offense was committed while the defendant was engaged in . . . flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping").

[89]See, e.g., Fla. Stat. Ann. ch. 921.141(5)(j) (Harrison Supp. 1991); S.C. Code Ann. § 16-3-20(C)(a)(7) (Law. Co-op. Supp. 1991).

from the same defect as individual factors that are impermissibly vague. Instead of guiding sentencers toward a particular "theory" of the worst murders, such factors taken together describe the circumstances surrounding most murders. Empirical work reflects this dynamic, as virtually all persons sentenced to death in Georgia before *Furman* would have been deemed death-eligible under Georgia's post-*Furman* statute.[90]

In addition, the Supreme Court's recognition of a broad individualization requirement limits the effectiveness of articulating criteria on the aggravating side. When the Court rejected mandatory death penalty schemes in 1976, it suggested that a defendant must be able to offer any evidence regarding his background, character, or circumstances of the offense.[91] This is exactly the opposite of the practice under the Federal Sentencing Guidelines, where most personal characteristics of the defendant are specifically excluded from sentencing consideration.[92] Subsequent decisions expanded this individualization right in the capital context,[93] basically

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[90]David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 268 n.31 (1990).
[91] *Woodson v. North Carolina*, 428 U.S. 280 (1976).
[92] See supra n. 32.
[93] *Lockett v. Ohio,* 438 U.S. 586 (1978); *Eddings v. Oklahoma,* 455 U.S. 104 (1982).

foreclosing any significant state efforts to channel or limit consideration of the factors a defendant might offer in support of a sentence less than death.[94]

The breadth of the individualization requirement is evident in *Skipper v. South Carolina,* [95] a revealing case in which the Court held that a state could not prevent a defendant from presenting evidence of his post-crime good behavior in prison.[96] The state had argued that the individualization requirement should be limited to evidence relating to moral blameworthiness - evidence that actually *mitigates* the severity of the crime. The Court, though, defined "mitigating" not as a corollary to blameworthiness, but as any "basis for a sentence less than death." This diluted conception of mitigation explains, for example, the current ubiquitous practice of a defendant's loved ones testifying about the loss his death would bring to family members and friends. There might be good reasons to allow such a practice, but it certainly undermines the pursuit of

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[94] See Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing,* 102 Yale L.J. 835 (1992) (book review).
[95] 476 U.S. 1 (1986).
[96] The result under the Federal Sentencing Guidelines would be just the opposite. See *United States v. Harrington,* 947 F.2d 956 (D.C. Cir. 1991) (holding that the defendant's successful participation in a drug treatment program during his pre-trial release and post-trial incarceration was not an appropriate

equality, as death will often turn on the eloquence (or attractiveness) of those speaking on a defendant's behalf. The enormous breadth of the individualization requirement also contributed to the Court's decision to reverse its ban on the introduction of victim impact evidence.[97] The Court indicated that states should not be barred from offering a "quick glimpse of the life which a defendant chose to extinguish"[98] if "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."[99]

As a result of the Court's unconstrained individualization requirement, states are essentially forbidden from developing a cabined theory of the death penalty. A state could not, for example, successfully pursue a purely retributivist approach to capital sentencing. If a state were to enumerate aggravating factors solely focused on moral culpability, the individualization requirement would compel the state to afford a vehicle for the sentencer's consideration of future dangerousness and incapacitation

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grounds for a downward sentencing departure).

[97] *Payne v. Tennessee,* 501 U.S. 808 (1991) (overruling *Booth v. Maryland,* 482 U.S. 496 (1987), and *South Carolina v. Gathers,* 490 U.S. 805 (1989)).

[98] *Payne,* 501 U.S. at 822 (internal quotation marks and citations omitted).

[99] Id.

should the defendant choose to argue against death based on his projected behavior. In short, the effort to provide sentencers with a focused set of criteria cannot secure meaningful equality if sentencers are in the end told that they can, indeed *must*, consider any evidence a defendant offers for a sentence less than death. Thus, unlike the Federal Sentencing Guidelines, the "guidance" in contemporary death penalty schemes is illusory. The sentencer is guided only to arrive at a point in which anything and everything else must be considered. The individualization requirement operates as a permanent, powerful "downward departure" mechanism that renders the previous guidance a mere prelude to absolute, unreviewable discretion.

Moreover, even if state schemes were able to limit and codify discretion on the "mitigating" side, their ability to secure consistency across cases would be undermined by their failure to provide any guidance as to the relative weight of various aggravating and mitigating factors. The Federal Sentencing Guidelines are significant not only for their enumeration of sentencing factors, but also for the assignment of weights to the various aggravating and mitigating considerations.[100] It is not enough to say what factors

[100] The "weight" of each factor translates into a specific number of months by which a sentence is either increased or

matter; consistency requires that sentencing considerations play similar roles in similar cases. In the death penalty context, no state has sought to establish a hierarchy of aggravation and mitigation; sentencers must consult their own consciences to assess whether, for example, a defendant's prior conviction for a dangerous felony matters more or less than a defendant's minimal participation in the instant offense.

The refusal of states to assign weights to relevant factors reflects an important, distinctive feature of capital sentencing. In the non-capital context, the sentencer's role is to set a term of years based upon the legislative determination of the severity of the particular crime the defendant committed and the manner in which he committed it. The sentencer judges the defendant's conduct at the relevant time, not his moral worth, his value to the community, or his capacity for redemption. Death penalty decisions, by contrast, necessarily involve a more global assessment of the defendant's moral culpability and worth as a human being. The Court's insistence on individualized sentencing in capital cases, though perhaps expanded beyond its logical reach, is essential to just capital sentencing. If evidence of a defendant's reduced blameworthiness would make his execution

excessive in the eyes of the community, a procedure that precluded consideration of such evidence would impermissibly sever the connection between the death penalty and society.

In non-capital sentencing, the federal government and the states justifiably enjoy greater latitude to restrict consideration of mitigating factors and to focus primarily on the criminal conduct. It is appropriate and constitutional, when life is not at stake, to allow for categorical treatment of mitigation doctrines in substantive criminal law. A state can choose, in short, to assign no weight at sentencing to a mitigating factor that fails to meet some significant threshold. A defendant satisfies the requirements for perfect self-defense, insanity, or duress, or is subject to a particular sentence based primarily upon aggravating factors. To require a full assessment of reduced blameworthiness in the non-capital context would entail overwhelming and unacceptable costs. Not only would criminal sentencing become more difficult and time-consuming, but sentencers would invariably differ in their assessment of the significance of all potential mitigating facts (except for those few addressed in the guidelines regimes themselves). The elusive quest for "perfect" justice in the individual case would inevitably lead to unwarranted disparities. When the choice, though, is whether a particular defendant should die, it is imperative

for the sentencer to affirm that the defendant deserves death.

Moreover, the death penalty context involves an all-or-nothing decision. The effort to systematically assign weights to aggravating and mitigating factors is more acceptable when such assignments operate along a spectrum, because such a process implicitly acknowledges the tentativeness of the weighting process. To assign weights to aggravating and mitigating factors in the death penalty context would communicate a false sense of precision. Indeed, establishing a hierarchy of aggravation and mitigation would distort a system that already tilts unacceptably in the direction of obscuring the moral responsibility of capital sentencers.[101]

In the end, modern death penalty law does little to ensure consistency across cases. At most, states have articulated an unexhaustive list of relevant considerations, leaving sentencers free rein to decide what other facts might be relevant and how they should be weighed.Notwithstanding the absence of meaningful guidance, state death penalty scheme still manage to confuse and obscure the ultimate moral decision sentencers must make. "Guidance" in the post-*Furman* statutes often comes in the form of mind-numbing details about

[101] See Steiker, supra n. 82, at 2624 (“Instead of clarifying and distilling the relevant issues in capital cases, the jargon and complexity that pervade contemporary punishment-phase instructions obscure the fundamental moral role that

the respective burdens of proof in establishing or disproving the existence of aggravating and mitigating factors.[102] Such instructions, along with highly technical directions about how to reach the ultimate verdict,[103] are neither easily understood

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capital sentencers should be expected to assume.").

[102]See, e.g., Ala. Code § 13A-5-45(g) (1982) ("When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence."); N.C.P.I. - Crim. § 150.10, at 27 ("The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence, taken as a whole must satisfy you - not beyond a reasonable doubt, but simply satisfy you - that any mitigating circumstance exists. . . . A juror may find that any mitigating circumstance exists by a preponderance of the evidence whether or not that circumstance was found to exist by all the jurors."); 42 Pa. Cons. Sat. Ann. §9711(c)(iii) (requiring proof beyond a reasonable doubt for aggravating circumstances and proof by a preponderance of the evidence for mitigating circumstances).

[103]See, e.g., Fla. Stat. Ann. ch. 921.141(2) (Harrison Supp. 1991) ("After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matter: (a) Whether sufficient aggravating circumstances exist as enumerated []; Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death."); Tenn. Code Ann. § 39-13-204 (1991) ("(f) If the jury unanimously determines that no statutory aggravating circumstances have been proven by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the sentence shall be life imprisonment. . . . (g) If the jury unanimously determines that: (A) At least one statutory aggravating circumstance or several statutory aggravating circumstances

nor particularly helpful in rationalizing the death penalty decision. The complexity of current instructions is likely to steer sentencers away from the core issues they are expected to decide.

Perhaps more importantly, the net effect of casting the death penalty decision in complicated, math-laden vocabulary is to obscure for many jurors the fact that they retain the ultimate moral decisionmaking power over who lives and dies. Because contemporary statutes invariably fail to instruct jurors in affirmative terms about the scope of their moral authority and obligation, guided discretion can easily (and wrongly) be experienced as no discretion at all. As one commentator has aptly framed the problem, "giv[ing] a 'little' guidance to a death penalty jury" poses the risk that "jurors [will] mistakenly conclud[e] that they are getting a 'lot' of guidance" thus diminishing "their personal moral responsibility for the sentencing decision."[104]

II. The *Apprendi* Revolution As Applied to Capital and Non-Capital Sentencing

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have been proven by the state beyond a reasonable doubt; and (B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt; then the sentence shall be death.").

[104]Joseph L. Hoffman, *Where's the Buck? - Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L. J. 1137, 1159 (1995).

A. The Constitutional Threat to the "Administrative Model" in Non-Capital Sentencing

In a series of cases beginning in the 1950s, the Court has rebuffed constitutional challenges that would have slowed legislative sentencing reform.[105] The most direct threat to utilizing the administrative model to control judicial discretion and promote equality in sentencing came in a 1989 case challenging the constitutionality of the Federal Sentencing Guidelines. Eight members of the Court rejected the following contentions: first, that the delegation of sentencing authority from Congress to the Federal Sentencing Commission violated the constitutional non-delegation doctrine, and, second, that the Sentencing Reform Act of 1984 violated the constitutional principle of separation of powers.[106]

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[105] See, e.g., *William v. New York*, 337 U.S. 241 (1959) (concluding that due process does not forbid judicial findings of fact at sentencing without extending compulsory process or the right to cross-examine witnesses to the defendant); *Witte v. United States*, 515 U.S. 389 (1995) and *United v. Watts*, 519 U.S. 148 (1997) (per curiam) (holding that neither the due process standard of proof beyond a reasonable doubt nor the Fifth Amendment's Double Jeopardy Clause apply at sentencing). A few basic protections have been extended to sentencing, however, these do not threaten the guidelines regime. See *Mempa v. Rhay*, 389 U.S. 128 (1967) (extending the right to counsel); *Mitchell v. U.S.*, 526 U.S. 314 (1999) (preserving the self-incrimination clause).

A more recent and credible threat to federal and state guidelines systems was a case from the 1999 Term, *Apprendi v. New Jersey*,[107] in which the defendant challenged judicial fact-finding at sentencing on Sixth Amendment and due process grounds. Apprendi plead guilty to a state weapons offense punishable by a maximum of ten years in prison. Pursuant to a state statute permitting enhanced sentencing for "hate-crimes," the New Jersey trial judge, after finding by a preponderance of evidence that Apprendi "acted with a purpose to intimidate an individual . . . because of race," sentenced him to a twelve-year term.[108] In a five-four ruling generating five separate opinions, the majority reversed Apprendi's

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[106] *Mistretta v. U.S.*, 488 U.S. 361 (1989). But see 488 U.S. at 413 (Scalia, J., dissenting).

[107] 120 S.Ct. 2348 (2000). The outcome of this case was foreshadowed by *Jones v. United States*, 526 U.S. 227 (1999), where the Court held, 5-4, as a matter of statutory construction, that provisions of the federal carjacking statute which established higher penalties for the offense when it resulted in death or serious bodily injury were elements of the offense rather than sentencing factors, and thus must be proven to a jury beyond a reasonable doubt.

[108] *Apprendi*, 120 S.Ct. at 2351. The state "hate-crime" statute at issue permitted the judge to raise a second-degree felony to a first-degree felony, potentially doubling the length of the sentence. On remand, Judge Rushdon H. Ridgway reduced Apprendi's sentence to seven years because prosecutors "showed by [only] a 'preponderance of the evidence' that Apprendi's act was racially motivated." Brenan Schurr, *Sentence Cut After Court Reverses Hate-Crime Ruling,* Rec. N. N.J., July 21, 2000, at A06.

sentence, declaring that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum [other than the fact of a prior conviction] must be submitted to a jury, and proved beyond a reasonable doubt."[109]

The narrowest holding of *Apprendi*, and the one we endorse, applies the Sixth Amendment jury right, the due process right to proof beyond a reasonable doubt, and the Fifth Amendment requirement of a grand jury indictment[110] to only those facts that could increase the otherwise applicable statutory maximum penalty permitted for an offense. Such an interpretation is not a radical transformation of current criminal law practice. A relatively limited number of federal and state statutes permitted judges, rather than juries, to

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[109] *Apprendi*, 120 S.Ct. at 2362-63. Justice Stevens, writing the opinion for the Court, was joined by Justices Scalia, Souter, and Ginsburg. The majority excepted the pre-*Apprendi* practice of allowing a judicial finding of recidivism, even when such findings increase the otherwise applicable statutory maximum for the offense, by refusing to reverse *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (5:4) (upholding 8 U.S.C. § 1326(b)(2), which authorizes the twenty term of imprisonment for alien re-entry if the initial deportation was for commission of an aggravated felony, despite an otherwise applicable statutory maximum of two years imprisonment). That decision is unstable, however, because Justice Thomas, who joined the majority opinion in *Almendarez-Torres*, admitted in his *Apprendi* concurrence that he had made a mistake. *Apprendi* at 2379 (Thomas, J., concurring).

[110] A unanimous Court held this term that *Apprendi* "facts must also be charged in the indictment." *United States v.*

find those facts that could raise the otherwise applicable statutory maximum sentence for an offense.[111] This narrow rule also leaves unaffected affirmative defenses, statutes imposing mandatory minimum penalties, and determinate sentencing guideline schemes where factual findings increase or decrease sentences within a statutorily authorized range. While all of those devices potentially increase a defendant's sentence, they all do so within the prescribed statutory maximum penalty.

However, the four dissenting *Apprendi* justices, along with two of the five justices in the majority, contended that *Apprendi*'s rule could not be so limited. Justice Thomas, in a concurring opinion joined by Justice Scalia, suggested that

> "if the legislature . . . has provided for setting the punishment of a crime based on some fact . . . that fact is also an element. . . one need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element."[112]

Based upon this reasoning, Justice Thomas openly advocated the

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Cotton, 122 S.Ct. 1781 (2002).

[111] See King & Klein, *Essential Elements*, supra n. 6, 54 Vand. L. Rev. 1467, 1547 - 1555 (2001) (Appendices B and C, listing selected federal and state statutes subject to *Apprendi* challenges).

[112] *Apprendi*, 120 S.Ct. at 2369 (2000) (Thomas, J., concurring).

reversal of *McMillan v. Pennsylvania*,[113] a 1986 split decision allowing a judicial finding of a fact triggering a mandatory minimum sentence within the applicable statutory maximum penalty.[114] The sentencing enhancement in *McMillan* should have been considered an element because

> the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum "entitl[es] the government . . . to more than it would otherwise be entitled (five to ten years, rather than zero to ten years. . .)"[115]

Justice O'Connor, in a dissent joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer, agreed that the holding in *Apprendi* is irreconcilable with *McMillan*, and insisted "it is incumbent upon the Court . . . to admit that it is overruling *McMillan*."[116]

It seems to us that the same broader interpretation of *Apprendi* would undermine *New York v. Patterson*,[117] an earlier

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[113] 477 U.S. 79 (1986) (five-four) (due process did not forbid the imposition of a five year mandatory minimum sentence based upon a judicial finding that the defendant visibly possessed a firearm, where the total sentence imposed did not exceed the ten year statutory maximum penalty for the underlying felony of aggravated assault).

[114] *Apprendi,* 120 S.Ct. at 2378-80 (Thomas, J., concurring).

[115] 120 S.Ct. at 2379.

[116] Id. at 2385 (O'Connor, J., dissenting).

decision permitting a legislature to transform what was formerly an element of a criminal offense into an affirmative defense, thus relieving the prosecutor of the burden of proving that fact beyond a reasonable doubt. That Patterson may have committed his homicide under the influence of extreme emotional distress, subjecting him to a manslaughter rather than a murder penalty, clearly changed the "range of punishments to which the prosecution is by law entitled."[118] Unless the legislative label of a fact as a mitigator or aggravator controls (and both Justice Stevens in his majority opinion and Justice Thomas in his *Apprendi* concurrence suggested that the legislative label of the fact as a sentencing factor or an element cannot control),[119] there is no

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[117] 432 U.S. 197 (1977) (5:3) (holding that New York statute permitting affirmative defense of acting under extreme emotional distress to mitigate crime from murder to manslaughter can, consistent with due process, impose the burden of proving that affirmative defense by a preponderance of the evidence on the defendant).

[118] Justice Thomas, while not mentioning *Patterson*, attempted to escape the clear implication of his test on the viability of affirmative defenses by arguing that "a single 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with the fact that mitigates punishment)." *Apprendi*, 120 S.Ct. at 2368.

[119] Were the legislative label of a fact to control, the Court could police neither the element-sentencing factor nor the criminal-civil divide. See *Seling v. Young*, 121 S.Ct. 727, 734 (2001) (concluding that only the "clearest proof" that an act denominated civil is punitive in purpose or effect can

obvious way to determine whether the defendant's provocation in *Patterson* should be characterized as an aggravator which increased his punishment from manslaughter to murder or a mitigator which decreased his punishment from murder to manslaughter. As Justice O'Connor astutely noted in her *Apprendi* dissent, whether a fact increases or decreases punishment rests "in the eye of the beholder."[120] Thus this broader interpretation would have transformed dozens of common affirmative defenses and mitigators, such as insanity, self-defense, diminished capacity, ignorance of the law, and intoxication, into elements of a prosecutor's case-in-chief.[121]

Likewise, Justice Thomas does not deny that his broader interpretation of the elements rule in his *Apprendi* concurrence would invalidate the Federal Sentencing Guidelines and similar state schemes. They clearly contain facts provided by the legislature that establish the punishment to

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override legislative label to the contrary).

[120] *Apprendi*, 120 S.Ct. at 2390 (O'Connor, J., dissenting).

[121] See, e.g., *Leland v. Oregon*, 343 U.S. 790 (1952) (holding that it does not violate due process to require a defendant to prove insanity beyond a reasonable doubt); *Martin v. Ohio*, 480 U.S. 228 (1987) (5:4) (holding that it does not violate due process to require a defendant to prove self-defense by a preponderance of the evidence); *Montana v. Egelhoff*, 518 U.S. 37 (1996) (5:4) (holding that it does not violate due process to eliminate voluntary intoxication as a consideration in determining mens rea).

be imposed on a defendant, yet these facts are not committed to a jury or subject to the reasonable doubt standard.[122] In their separate dissents, Justices O'Connor and Breyer both predicted that the broader rule they believed to be mandated by the majority opinion applies

> not only to schemes like New Jersey's, under which a factual determination exposes a defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (e.g., the Federal Sentencing Guidelines).[123]

Not surprisingly, *Apprendi* generated an immediate circuit split on the issue of whether facts triggering mandatory minimum sentences were subject to its element rule.[124] The

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[122] Justice Thomas suggested that the Guidelines must constitutionally be considered elements of criminal offenses when he opined they "have the force and effect of laws." *Apprendi*, 120 S.Ct. at 2380, n. 11, (Thomas, J., concurring) (citing Justice Scalia's dissent in *Mistretta v. United States*, 488 U.S. 361 (1989)).

[123] 120 S.Ct. at 2394 (2002) (O'Connor, J., dissenting) (the majority opinion "will have the effect of invalidating sentencing reform accomplished at the federal and state levels in the past three decades"). Justice Breyer likewise noted: "the Court's rule suggest the principle-jury determination of all sentencing related facts-that, unless restricted, threatens the workability of every criminal justice system (if applied to judges) or threatens efforts to make those systems more uniform, hence more fair 'if applied to commissions'." Id. at 2402.

[124] See Nancy J. King & Susan R. Klein, *Aprés Apprendi*,

issue arose most frequently in prosecutions under two federal statutes: the drug trafficking statute, which triggers mandatory minimum and statutory maximum sentences based on drug quantity; and the federal firearms statute, which triggers mandatory minimum sentences based upon such facts as weapon type and use. The Court granted *certiorari* last term in *United States v. Harris* to determine whether a trial judge finding, by a preponderance of the evidence, that a defendant "brandished" his firearm, leading to a seven year mandatory minimum sentence under 18 U.S.C. § 924(c), violated the Sixth and Fourteenth Amendments after *Apprendi*, where the statute prescribed no maximum penalty.[125]

Harris was the Court's second encounter with § 924(c) in the last three years. The 1988 version of the statute provided that:

> whomever, during and in relation to any crime of violence . . ., uses or carries a firearm,

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Federal Judicial Center website, <http://www.fjc.gov> (May 2002 version) (listing cases) (originally published at 12 Fed. Sent. Rtpr. 331 (2000)).

[125] Every circuit interpreting 18 U.S. C. § 924(c) since *Apprendi* has held that the unstated statutory maximum is life imprisonment, and the firearm type and use are mandatory minimum sentences not subject to *Apprendi*. See, e.g., *United States v. Harris*, 243 F.3d 806 (4th Cir. 2001), cert. granted 122 S.Ct. 663; *United States v. Carlson*, 217 F.3d 986 (8th Cir. 2000); *United States v. Sandoval*, 241 F.3d 549 (7th Cir. 2001); *United States v. Pounds*, 230 F.3d 1317 (11th Cir. 2000).

> shall, in addition to the punishment provided for such crime of violence . . ., be sentenced for five years, and if the firearm is a short-barreled rifle [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machine gun, or a destructive device . . ., to imprisonment for thirty years.[126]

The term prior to *Apprendi*, a unanimous Court in *Castillo v. United States* held, as a matter of statutory interpretation, that the type of firearm used is an element of a substantive crime that must be proven beyond a reasonable doubt to a jury, and not a sentencing factor to be assessed by the trial court.[127] Congress amended the statute after Castillo's trial but prior to the Court's decisions in *Castillo* and *Apprendi*. The current version of the statute is similar to the previous version, though subsection numbers are added before each term of years, all mandatory penalties throughout the statute are converted to mandatory minimums, "possession" is added as an *actus reus*, and no maximum term of imprisonment is provided.[128] The legislative history of the 1998 amendment indicates Congress's intent to reverse *United States v. Bailey*, a Supreme Court case making it more difficult to prove that a

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[126] 18 U.S.C. § 924(c)(1) (West 1988 ed. Supplement V).

[127] 530 U.S. 120 (2000) (reversing Branch-Davidian defendant's 30-year mandatory sentence based on judicial finding that firearm used in relation to a crime of violence was a "machinegun").

defendant used or carried a firearm[129] and to increase the mandatory penalty, not to shift what were elements of the crime into sentencing factors.[130] Nevertheless, the Court gave short shrift to the statutory argument; it granted *certiorari* to resolve the constitutional issue.

This was as attractive a case as possible for the defense. The defendant pled guilty to one count of distributing marijuana, and, after a bench trial, he was found guilty of carrying a firearm in relation to his marijuana offense. Harris sold marijuana out of his pawnshop with an unconcealed semi-automatic pistol at his side. The district judge accepted that it was Harris' ordinary practice to wear this gun, and that he unholstered it only at the undercover agent's request. The district judge also noted that the issue of whether the gun was merely carried, triggering a five year mandatory minimum sentence, or was brandished, triggering a seven year mandatory minimum sentence, was a "close question."[131] Had the *Apprendi* elements rule applied and the

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[128] 18 U.S.C. § 924(c)(1) (West 2002).

[129] 516 U.S. 137 (1995) ("using" a gun requires active employment).

[130] The legislative history of this statute is discussed thoroughly in *Harris v. United States*, Brief for Petitioner 15 - 17, 2002 WL 113846.

judge been required to use a beyond a reasonable doubt standard, the defendant's sentence may well have been the lower one. In a four-one-four decision, a plurality led by Justice Kennedy, joined by Justices O'Connor, Scalia and Chief Justice Rehnquist, and concurred in by Justice Breyer, held that "whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proven beyond a reasonable doubt."[132] Thus, voting to limit *Apprendi* in *Harris* were the four *Apprendi* dissenters along with Justice Scalia.[133]

After lamenting in their *Apprendi* dissent that the decision could not be cabined in such a way that it would exclude mandatory minimums and the Federal Sentencing Guidelines, four members of the *Harris* plurality found just such a way. Citing seventeenth century cases and treatises, they noted the dearth of historical evidence showing that

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[131] *United States v. Harris*, 243 F.3d 806 (4th Cir. 2001) (affirming district the judge's factual finding in favor of the government and imposition of seven year sentence for gun offense, to run consecutive to six month sentence for underlying drug offense).

[132] *Harris v. United States*, ___ U.S. ___ ,122 S.Ct. 2406, 2418 (2002).

[133] Justice Scalia, for once, had nothing to say, and offered no explanation as to why he switched sides.

facts increasing a defendant's minimum sentence but not affecting the maximum have been treated as elements.[134] While this is no doubt true, it also begs the question. There can be no historical evidence on these types of statutes because they simply did not exist. A reversion to common law practice does not resolve the issue. Moreover, as Justice Thomas noted in his *Harris* dissent, mandatory minimum statutes limit the jury's role in exactly the same fashion as did the increased statutory maximum in *Apprendi*, by imposing mandatory higher penalties based upon facts not even submitted for their consideration - in this case the penalty of five years to life increased by 40% to a penalty of seven years to life.[135] That these mandatory minimum penalties do not alter the statutory maximum sentence is irrelevant; the defendant actually receives the mandatory minimum sentence; never higher or lower.[136] Justice Breyer appeared to agree with Justice

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[134] *Harris*, 122 S.Ct. 2406 at 2416.

[135] As Justice Thomas noted in his *Harris* dissent, the logic of the plurality would describe as constitutional a statute where the mandatory minimum without a judicial finding of brandishing is five years but the mandatory minimum with such a finding is life imprisonment. *Harris*, 122 S.Ct. at 2424 (Thomas, J. dissenting).

[136] Id. at 2425 (Thomas, J., dissenting) (citing to the United States Sentencing Commission, 2001 datafile, USSCFYO01, Table 1).

Thomas, though he concurred rather than joined Justice Thomas' dissent. "I cannot easily distinguish *Apprendi v. New Jersey* from this case in terms of logic. . . . And because I believe that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences I cannot *yet* accept its rule. I therefore join the Court's judgment."[137]

Justice Breyer's reasoning unfortunately makes the *Harris* holding unstable, and puts us in the odd position of hoping that he continues to refuse to "buy his ticket to *Apprendi*-land."[138] Justice Breyer's eventual acceptance of *Apprendi*, coupled with his belief that it should logically be extended to mandatory minimums, may lead in a future term to five votes in favor of the broader elements rule.[139]

Divorced from competing concerns about equality, and ignoring all practical considerations regarding the workings of our criminal justice system, the dissenting and concurring Justices in *Apprendi* and *Harris* make a strong case for insisting that the elements rule is applicable to factual

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[137] Id. at 2420-21 (Breyer, J., concurring) (emphasis added).

[138] *Ring v. Arizona*, ___ U.S. ___ , 122 S.Ct. 2428, 2445 (Scalia, J., concurring).

[139] On the other hand, Justice Breyer's strong allegiance to the Federal Sentencing Guidelines, which he helped create, may

findings relevant to sentencing guidelines, mandatory minimum penalties, and affirmative defenses alike.[140] All are facts provided by the legislature which, if found, require that an increased penalty be imposed. However, while perhaps not compelled by strict logic, we believe *Harris* strikes the appropriate compromise between the Sixth Amendment value of a jury trial and important equality concerns.

Had the dissenters in *Harris* prevailed, the cost would be considerable - the experiment with sentencing reform would have come to an ignoble halt, despite some plausible arguments to the contrary. Sentencing guidelines arguably differ from mandatory minimums in two related respects. Whereas sentencing guidelines preserve a court's discretionary authority to deviate from the prescribed range, mandatory minimums retain less flexibility for the sentencer. In addition, the Federal Sentencing Guidelines could be viewed as less binding because, unlike mandatory minimums, they were

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lead him to our position - compromise over consistency.

[140] See, e.g., Scott Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence,* 40 Hastings L.J. 457 (1989) (arguing that any fact identified by the legislature as controlling the sentence must be treated as an element); Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog"; Finding "Elements" in the Wake of McMillan v. Pennsylvania,* 22 Seattle U. L. Rev. 1057 (1999); Andrew M. Levine, *The Confounding Boundaries of "Apprendi-land": Statutory Minimums and the Federal Sentencing Guidelines,* 29 Am. Journal of

promulgated by the Sentencing Commission. However, neither of these distinctions persuasively limits the reasoning of *Harris*. Though the Federal Sentencing Guidelines permit a federal judge to depart upward or downward where a mitigating or aggravating fact exists not adequately considered by the Sentencing Commission, the difference between this discretion and the discretion exercised by federal judges in regard to mandatory minimums is one of degree and not kind. The existence of some infrequently used discretion[141] to lower a determinate sentence under the guidelines is matched by the like authority to lower a mandatory minimum sentence by invoking the safety valve provision,[142] to decrease any

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Criminal Law 377 (2002).

[141] The vast majority of those convicted of federal offenses do not receive departures, nor is the refusal to depart appealable. See supra n. 37. However, where a judge does depart on an invalid ground, the sentence is reversed unless the error was harmless. *Williams v. United States*, 503 U.S. 193 (1992).

[142] As noted by the Department of Justice in oral argument in *Harris*, judges do retain some discretion to depart below statutory minimum sentences making them, again, indistinguishable from Guidelines departures. Oral argument in *Harris v. United States*, Michael R. Druben, esq., Deputy Solicitor General, p. 35, lines 3-12, 3/25/02. See 18 U.S.C. § 3553(f), U.S.S.G. section 5C1.2 (the safety-valve provision); 18 U.S.C. section 3553(e), U.S.S.G. section 5K1.1 (departure below mandatory minimum for substantial assistance to prosecutor).

sentence on Eighth Amendment grounds,[143] or to overturn a jury's failure to find an affirmative defense as against the weight of the evidence. Moreover, with both mandatory minimum penalties and guideline ranges, there is no discretion permitted the factfinder in reaching the initial sentence; she is required to hold a hearing and find that the triggering fact either exists or does not. In both cases that fact, once found, mandates a higher sentence.

Second, one could attempt to distinguish the Federal Sentencing Guidelines from mandatory minimums because they were not enacted by Congress as part of the criminal code, but were instead promulgated by an independent Commission in the judicial branch. However this attempt likewise fails, as both involve legislatively ratified factual circumstances, binding on the judge, that expose defendants to additional punishment without a jury finding beyond a reasonable doubt.[144]

Thus a broad reading of *Apprendi* in *Harris* would have

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[143] *Harmelin v. Michigan*, 501 U.S. 957 (1991) (Eighth amendment imposes a proportionality limit on criminal sentences).

[144] In fact, both mandatory minimum sentences and the guidelines play a much more important role in defendant's sentence than do statutory maximum penalties. A defendant rarely receives the statutory maximum, she receives the Guidelines sentence, unless trumped by a higher mandatory minimum. *Neal v. United States*, 516 US 284 (1996) (mandatory

meant the eventual application of the element rule to factors relevant in determinate sentencing schemes. This would have foreclosed the employment of the Federal Sentencing Guidelines and their state counterparts for two reasons. First, as a matter of practice, it simply would have been too cumbersome to have juries make all the fact-finding necessary to apply the Guidelines. In a world where we depend upon at least 90% of our criminal defendants' pleading guilty,[145] we could not survive a system in which juries have to make all the findings of fact regarding an offender and his offense necessary to apply federal or state sentencing guidelines. If federal and state prosecutors had to include in the indictment and present to the jury every affirmative defense, statutory mitigator, and guideline fact presently determined by a judge at sentencing, trials would lengthen to the point of unmanageability. Justice Breyer effectively makes this point in his *Apprendi* dissent, where he notes that were a jury required to make every one of the twenty or more factual findings that the Federal Sentencing Guidelines presently require the judge to make in every case, trials would become

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minimum sentence for LSD trumps the lower guidelines).

[145] Wayne R. LeFave, et al., *Criminal Procedure* § 1.3q at 21 and n. 226 (1999).

absurdly long and complicated.[146]

This process would be cumbersome not only because twelve people would have to unanimously agree beyond a reasonable doubt on every factor previously ruled upon by the judge at the sentencing hearing, but because each of these new "elements" would be subject to full constitutional criminal procedural guarantees at trial. Unlike sentencing hearings, that are conducted quickly and informally, each fact would now have to be proven using the Federal Rules of Evidence, calling witnesses (rather than relying on the hearsay testimony of the case agent), and providing defendant full opportunities to cross-examine and confront such witnesses. Thus, instead of hours, we can anticipate days or perhaps weeks for each sentencing hearing. Moreover, we would lose the valuable assistance of the probation department, which presently interviews the defendant, case agent, and other pertinent parties and provides a report to the judge suggesting a certain Guidelines sentence. Under the new regime, defendants would have nothing to gain by consenting to the interview.

Of course some of these time-consuming factual disputes would be resolved by plea, but not many. Certainly in those 6% or so of the cases where no plea agreement can be reached

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[146] *Apprendi v. New Jersey*, 120 S.Ct. at 2398 (Breyer, J.,

and the defendant puts the government to its burden of proof at trial, we would not expect to see any of these additional factual disputes resolved by plea. Thus, each criminal trial we presently conduct would require even greater resources and time. Second, under current practice some portion of the more than 93% who do resolve their cases by plea are unable to reach agreement with the government on all issues. In these circumstances a defendant pleads guilty to a basic criminal offense with a statutory maximum high enough to please the prosecutor and statutory minimum low enough to please the defendant, and both sides agree to resolve the many factual issues that will determine the defendant's actual sentence at the sentencing hearing.[147] There is no reason to believe that any of these issues would become easier to resolve should *Apprendi* apply globally to the Federal Sentencing Guidelines. Thus, those Guideline issues formerly resolved at an informal sentencing hearing would instead be resolved through a jury trial. Third, we would expect to see an increase in the number of unresolved issues with a broad interpretation of *Apprendi*, and therefore fewer guilty pleas. An extension of

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dissenting).

[147] Nancy J. King & Susan R. Klein, *Acceptance of Responsibility and Conspiracy Sentences in Drug Prosecutions after Apprendi*, 14 Fed. Sent. Reporter 165 (2002).

Apprendi to the Federal Sentencing Guidelines would give a new bargaining chip to the defendant (by raising the burden of proof, excluding hearsay evidence, and applying criminal procedural guarantees to what used to be relaxed sentencing procedures) and thus decrease the prosecutor's chance of successfully convincing the defendant to admit to any particular fact.[148]

Perhaps most importantly, a broad application of *Apprendi*'s rule requiring jury findings as to what used to be sentencing factors under the Guidelines would eliminate much of the equality gained through the administrative model. Federal and state judges personally hear hundreds of criminal cases, and read hundreds of additional reported decisions of their brethren. This provides a basis for comparison in making the determination as to whether a particular defendant was a ringleader,[149] whether he abused his position of trust,[150]

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[148] See Nancy J. King & Susan R. Klein, *Apprendi and Plea Bargaining*, 54 Stan. L. Rev. 295 (2001).

[149] See U.S. Sentencing Guidelines Manual, § 3B1.1 providing for a three-level increase based on defendant's aggravating role in the offense, and § 3B1.2, providing for a four-level decrease based on defendant's mitigating role in the offense.

[150] U.S. Sentencing Guidelines § 3B1.3 permitting a two-level increase for abuse of position of trust or use of special skill.

whether he used or carried a weapon,[151] whether he foresaw a particular quantity of narcotics,[152] whether his crime was committed with a sexual motivation,[153] or whether a victim was particularly vulnerable.[154]

In addition to having the appropriate data points, these judges will have been exposed to a wide variety of criminal behavior, and thus not be surprised or outraged by the conduct of any particular defendant. On the other hand, most jurors

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[151] See, e.g., U.S. Guidelines Manual § 2A5.2 (providing for a five-level increase if a firearm was discharged during the crime of interference with a flight crew); 2A4.1 (providing for a two-level increase if a dangerous weapon was used during a kidnapping); *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501 (1995); (using a gun requires active employment); *Muscarello v. United States*, 524 U.S. 125, 118 S.Ct. 1911, 1918 (1998) (possessing a firearm in relation to a crime of violence or drug trafficking crime prohibits "prosecution where guns 'played' no part in the crime."); *State v. Chotes*, 772 A.2d 1. (N.J. Sup. Ct., App. Div. 2001) (requiring a defendant to serve 85% of his sentence if defendant used a weapon); *People v. Rhodes*, 723 N.Y.S.2d 2 (App. Div. 2001).

[152] 12 U.S.C. §§ 841 and 846 (triggering enhanced sentences for particular drug quantity); U.S.S.G. § 1B1.3(a)(1)(B) (providing that a conspirator's sentence be based on the quantity she knew or should have known was involved in the conspiracy).

[153] *Grant v. State*, 783 So.2d 1120 (Fla. Dist. Ct. App. 2001); *State v. Grossman*, 622 N.W.2d 394 (Minn. Ct. App. 2001).

[154] See, e.g., U.S.S.G. § 3A1.1 (providing for two-level increase for a crime committed against vulnerable victim); *State v. Gould*, 23 P.3d 801 (Kansas 2001) (abuse of child); *People v. Chanthaloth*, 743 N.E.2d 1043 (Ill. App. Ct. 2001)

hear one or perhaps two criminal matters in their lifetimes, and thus have no basis for adequately comparing and contrasting the defendant before them with other defendants. Moreover, lay people are more likely to be distressed and mortified by the types of criminal behavior that they may see, or influenced by whatever particular crime is being decried in the press at that moment. Thus a sentence given to a particular defendant by a judge or a jury, even when both factfinders are using the same sentencing guidelines, is likely to be quite different. Similarly situated defendants in the administrative model will receive similar sentences, while similarly situated defendants in the individual rights model will receive sentences that depend upon which jury they drew and where they drew it. This proposition is well supported by the numerous studies showing wide disparity in jury sentencing cited in Part I of this essay.[155] Finally, it would be practically impossible to establish a system for reviewing jury sentences on appeal, as there will be no written opinion and hence no record of how and why the jury reached a particular sentence.

Apprendi was a sound constitutional decision in several

(brutality to elderly and physically handicapped victim).

[155] See *supra* nn. 23 and 30.

respects - as a matter of doctrine, policy, and Fifth and Sixth Amendment jurisprudence. Without a jury finding beyond a reasonable doubt as to every fact considered important enough by the legislature to increase the statutory maximum penalty to be imposed, the jury's role is relegated to that of a "low-level gatekeeper."[156] This is contrary to common law practice, where the jury made every factual finding necessary to impose the particular punishment. Moreover, the elements rule recognized in *Apprendi*, though not strictly compelled as a matter of logic, is not "meaningless and formalistic."[157] Structural democratic restraints prevent legislatures from redrafting criminal statutes to circumvent *Apprendi* by providing very high maximum punishment for all offenses. As one of us has argued elsewhere, while legislatures have responded in the past to cues from the Court on how to circumvent criminal procedural guarantees through changes in substantive criminal law, the response to *Apprendi* in this regard has not been overwhelming.[158] Moreover, the elements

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[156] *Jones v. United States*, 526 U.S. 227, 245 (1999); *Apprendi*, 120 S.Ct. at 2357, n.5.

[157] *Apprendi*, 120 S.Ct. at 2390(O'Connor, J., dissenting).

[158] King & Klein, *Essential Elements,* supra n. 6 at 1490 and Appendix A. To date, to our knowledge, there has yet to be a criminal statute designed to circumvent *Apprendi*.

rule fosters transparency in punishment theory and decisions. If the legislature attempts to evade *Apprendi*, it must do so in a public proceeding by changing the law. Many citizens will protest draconian sentences for shoplifting, simple assaults, or drug possession. Finally, the Court has suggested that additional constitutional limits might be imposed if legislatures were to attempt such evasions.[159]

The criminal justice system has absorbed the *Apprendi* decision with no significant changes in any of its institutions or assistance from the legislative branch. Justice O'Connor's description of *Apprendi* as "a watershed change in constitutional law"[160] that threatened to "unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part"[161] has not been borne out in practice. In actuality, a relatively small number of federal and state statutes are subject to *Apprendi* challenges.[162] For those statutes that are affected,

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[159] *Apprendi*, 120 S.Ct. at 2363, n. 16. King & Klein, *Essential Elements*, supra n. 6, 1535-42 (suggesting multi-factor test to police element-nonelement divide where legislature redrafts criminal statutes to eliminate elements).

[160] *Apprendi*, 120 S.Ct. at 2380 (O'Connor, J., dissenting).

[161] 120 S.Ct. at 2395.

[162] King & Klein, *Aprés* Apprendi, supra n. 124, Appendix A

prosecutors have accommodated *Apprendi* by charging those elements in the indictment for submission to the jury. The floodgates of habeas have not opened, as the rule has not been applied retroactively, and those cases on direct review have been largely disposed of using harmless and plain error analysis.[163]

However, should the Court apply the *Apprendi* rule to mandatory minimum statutes and determinate sentencing regimes, the criminal justice system would collapse and Congress and state legislatures would be forced to take action. The most likely result would be a retreat to the nineteenth century model of sentencing approved by the Court in *Williams v. New York*.[164] Legislatures would provide high statutory maximum sentences, to accommodate the worst offenders, as well as a relatively large penalty range, to accommodate the least culpable offenders, but would be unable to provide any guidance to the judge on selecting the appropriate sentence within this range. Perhaps foreseeing this possible reaction, the Supreme Court wisely rejected theoretical seamlessness in

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and B.

[163] King & Klein, *Aprés Apprendi*, supra n. 124.

[164] 337 U.S. 241 (1959) (holding that due process does not forbid judicial findings of fact at sentencing without extending compulsory process or the right to cross examine

favor of protecting sentencing guideline systems and the equality they promote.

B. The Revolution that Wasn't: *Apprendi*'s Minimal Impact on Capital Jurisprudence and the Search for Equality in Capital Cases

Throughout this country's history, judge sentencing has been the norm in the non-capital context and jury sentencing has been the norm in capital cases. When the Supreme Court initiated the modern era of judicial regulation of the death penalty in 1972,[165] virtually all death penalty jurisdictions assigned the decision of life or death to juries.[166] But the Court's insistence that states limit arbitrariness in capital cases led several jurisdictions to enhance the role of judges in capital sentencing.[167] Several states made judges the sole decisionmakers at the punishment phase of capital trials,[168] while others adopted hybrid systems in which judges were authorized to override jury recommendations of life or

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witnesses to the defendant).

[165] *Furman v. Georgia,* 408 U.S. 238 (1972).

[166] *Spaziano v. Florida,* 468 U.S. 447, 472 (1984) (Stevens, J., concurring in part and dissenting in part).

[167] Stephen Gillers, *Deciding Who Dies,* 129 Pa. L. Rev. 1, 18 (1980) (stating that "each of the eight states currently opting for judge sentencing made that choice after *Furman*" and that "[t]heir adoption of judge sentencing [was] an apparent attempt to meet *Furman*'s unclear commands").

[168] See Ariz. Rev. Stat. Ann. §13-703 (West Supp. 2001); Colo. Rev. Stat. §16-11-103 (2001) (three-judge panel); Idaho Code §19-2515 (Supp. 2001); Mont. Code Ann. §46-18-301 (1997); Neb. Rev. Stat. §29-2520 (1995).

death.[169]

When the Court considered several of the new post-*Furman* statutes in 1976, the Court sustained the three "guided-discretion" statutes it reviewed,[170] including Florida's scheme, which authorizes a judge to override an advisory jury's recommendation. The death-sentenced inmate in *Proffitt v. Florida*[171] did not challenge directly the judicial override provision because in his case the advisory jury had recommended death.[172] The Court nonetheless remarked that a judge-sentencing scheme might better ensure equal treatment across cases in capital proceedings.[173]

Eight years later, in *Spaziano v. Florida*, the Court confronted the question left open by *Proffitt*: whether the exercise of a judicial override in a case in which a jury has recommended life violates the Constitution.[174] Although Spaziano contended that the Florida procedure violated the

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[169] See Ala. Code §§13A-5-46, 13A-5-47 (1994); Del. Code Ann., Tit. 11, §4209 (1995); Fla. Stat. Ann. §921.141 (West 2001); Ind. Code Ann. §35-50-2-9 (Supp. 2001).

[170] See *Gregg v. Georgia,* 428 U.S. 153 (1976) (reviewing and sustaining Georgia's post-*Furman* "guided discretion" approach); *Jurek v. Texas,* 428 U.S. 262 (1976) (same); *Proffitt v. Florida,* 428 U.S. 242 (1976) (same). The Court invalidated the schemes of those states that provided for a mandatory death penalty. See *Roberts v. Louisiana,* 428 U.S. 325 (1976); *Woodson v. North Carolina,* 428 U.S. 280 (1976).

[171] *Woodson,* 428 U.S. 242 (1976).

[172] Id. at 246.

[173] Id. at 252 (opinion of Stewart, Powell, and Stevens, JJ.).

Sixth Amendment jury trial right,[175] the focus of his claim (perhaps in light of *Proffitt)* was that the Eighth Amendment requires jury sentencing in capital cases to preserve a connection between death sentences and community values. The Court, acknowledging the "appeal" of this claim,[176] concluded that the Eighth Amendment does not prohibit states from empowering judges to make the final decision about the appropriateness of the death penalty and to override a contrary recommendation from a jury.[177]

In *Walton v. Arizona*,[178] the Court appeared to lay to rest the final challenge to judge sentencing in capital cases. It sustained Arizona's sentencing scheme in which trial judges make all of the findings of fact regarding death eligibility without the advice or participation of juries. The Court found unpersuasive the effort to distinguish Florida's hybrid scheme which it had repeatedly endorsed[179] from Arizona's

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[174] *Spaziano v. Florida,* 468 U.S. 447 (1984).
[175] Id. at 458.
[176] Id. at 461.
[177] Id. at 463-65.
[178] 497 U.S. 639 (1990).
[179] In addition to *Spaziano*, the Court had rejected a challenge to Florida's advisory jury scheme in *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*) (holding that, under *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), aggravating factors in Florida's scheme are not elements of the offense but sentencing factors and thus are not subject to the Sixth Amendment jury trial right).

"pure" judge-sentencing approach.[180] It also found further ammunition against the Sixth Amendment claim in *Cabana v. Bullock*,[181] which sustained the ability of appellate courts to make the so-called "*Enmund* finding"[182] in cases in which a non-triggerperson is sentenced to death.

Apprendi cast doubt on all that the Court had said before about the permissibility of judge sentencing in capital cases. The *Apprendi* majority found no clear contradiction between its previous capital decisions, including *Walton*, and its conclusion that any fact increasing the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.[183] Indeed, the Court argued rather lamely that aggravating factors do not increase the potential penalty a defendant faces even though the failure to find at least one aggravating factor renders the defendant ineligible for death.[184] At least five justices

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[180] 497 U.S. at 648.
[181] 474 U.S. 376 (1986).
[182] *See Enmund v. Florida,* 458 U.S. 782 (1982) (holding that the Eighth Amendment prohibits as disproportionate the application of the death penalty to a defendant who has neither killed, attempted to kill, or intended to kill). The Court substantially narrowed *Enmund* in *Tison v. Arizona*, 481 U.S. 137 (1987), by sustaining the death penalty for persons who do not satisfy the *Enmund* test but who nonetheless are major participants in dangerous felonies and exhibit reckless indifference to human life.
[183] 530 U.S. 466, 496-97 (2000)
[184] Id.

in *Apprendi*, though, expressed substantial doubts about whether *Walton* remained good law. Justice Thomas, concurring, recognized the tension between *Apprendi* and *Walton*, but suggested that the Constitution's separate demands on the death penalty (both in requiring states to narrow the class of the death eligible and in forbidding mandatory death penalty schemes) might somehow exempt states from the Sixth Amendment requirement in that context.[185] Justice O'Connor, writing for four justices in dissent, insisted much more persuasively that *Walton* and *Apprendi* could not coexist because, under Arizona's death penalty statute, the finding of an aggravating circumstance clearly "'exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'"[186] Justice O'Connor rather pointedly observed that "it is inconceivable" that "a State can remove from the jury a factual determination that makes the difference between life and death" and yet "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."[187]

Given the expression of these doubts in *Apprendi*, the

[185] Id. at 522-23 (Thomas, J., concurring).
[186] Id. at 537 (O'Connor, J., dissenting) (quoting majority opinion, id. at 483 (emphasis in majority opinion)).

Court's decision in *Ring v. Arizona*[188] to plainly overrule *Walton* came as no surprise. The central question here, though, is whether *Ring*'s extension of Sixth Amendment protections to the capital context undermines the Eighth Amendment values, particularly the concern for equality, which the Court has sought to promote in its ongoing regulation of the American death penalty. For a variety of reasons, *Ring* does not pose a significant threat to such goals.

First and foremost, states' efforts to achieve equality through intricate sentencing instructions have been notably unsuccessful. Unlike in the Federal Sentencing Guidelines context, the range of considerations in capital sentencing remains essentially unregulated. As argued above, the Court's broad conception of individualization – extending far beyond truly "mitigating" factors (in terms of reducing moral culpability) - prevents states from developing any consistent theory of the goal or goals behind their capital statute; a defendant must be free to argue against the death penalty on the basis of any plausibly relevant consideration, including evidence of familial sympathy, good character traits, and future good behavior. At the same time, the enumerated criteria in state death penalty schemes are often amorphous

[187] Id.

and subjective, with the result that contemporary sentencing schemes afford sentencers substantial discretion.

Given the lack of clear standards in capital sentencing, judicial involvement in sentencing is unlikely to contribute to equality across cases. Judges cannot, as in the Federal Sentencing Guidelines context, ensure that criteria are evenly applied when the criteria simply do not exist. Moreover, capital trials remain relatively rare events, such that individual state judges are unlikely to encounter sufficient numbers of decisions to develop an internal consistency (much less consistency state-wide). As one commentator observed, even in Florida, one of the most active death penalty jurisdictions, each of the 300 or so circuit trial is unlikely to be involved in more than a handful of capital sentencing decisions.[189]

In addition, the transparency and democracy gains from judicially declared findings under the Federal Sentencing Guidelines are not available in the capital context, because judges are not obligated to explain the steps leading to their decisions to the same extent as federal judges applying the Guidelines. In the end, state judges in capital sentencing often retain the same kind of standardless discretion

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[188] ___ U.S. ___ , 122 S.Ct. 2428 (2002).

[189] Gillers, *Deciding Who Dies,* 129 U. Pa. L. Rev. at 58-59

exercised by jurors, and are similarly free to decide what facts matter to their ultimate decision and the weight that they should be assigned. Given the lack of criteria for judges to apply, appellate review of judicial sentencing in capital cases is necessarily truncated; in the absence of any rule-like limitations on sentencing discretion, appellate courts are hard-pressed to second-guess judicial sentences. Moreover, consistency would in any event require the availability of appellate review for both death sentences and sentences less than death. But unlike the Federal Sentencing Guidelines cases, in which prosecutors can appeal unfavorable judicial applications, state laws do not permit prosecutors to appeal decisions by trial judges not to impose death.

Lastly, it is important to note that state judges face unusually strong political pressures in capital cases.[190] In most death penalty jurisdictions, state judges must stand for election,[191] and the death penalty remains a significant factor in the election, retention, and promotion of judges.[192] Given such pressures, judicial sentencing appears less an opportunity for careful calibration of evidence than a vehicle

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(1980).

[190] Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital* Cases, 75 B.U.L. Rev. 759 (1995).

[191] Id. at 776-85.

for giving voice to real or imagined popular outrage. The experience with jury overrides in Florida and Alabama, in which judges are much more likely to override toward death than life,[193] reflects the unique pressures of capital litigation. Accordingly, judicial involvement in capital sentencing is less central to, and may actually undermine, the pursuit of sentencing equality.

As a practical matter, *Ring*'s significance is limited because the practice of judge sentencing is quite limited. Only five states have committed the ultimate sentencing decision in capital cases entirely to judges, and of those states, only one - Arizona - has a significant death row population.[194] The four others, Colorado, Idaho, Montana, and Nebraska, have a collective death row of about forty[195] (just over 1% of the national death row[196]) and have accounted for

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[192] Id. at 784-94.
[193] Id. at 793. For further discussion of jury overrides, see Michael L. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida* 18 U.C. Davis L. Rev. 1409 (1985); Mike Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 Fla. St. U. L. Rev. 31 (1985); Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 Ala. L. Rev. 5 (1994).
[194] Death Row U.S.A. (NAACP Legal Defense and Educ. Fund, Inc.), Fall, 2002, at 23 (listing Arizona's death row population as 125).
[195] Id. (listing Colorada's death row population as 5, Idaho's as 22, Montana's as 6, and Nebraska's as 7).
[196] Id. at 1 (listing total death row as 3,697).

less than ten executions over the past thirty-five years.[197]

Moreover, it remains unclear whether *Ring* will apply to the four other states, including Florida and Alabama, which operate "hybrid" systems in which the jury renders an advisory verdict but the judge makes the ultimate sentencing decision. Although Justice Breyer's concurrence argued for a broad right to jury sentencing in capital cases,[198] the Court maintained that Ring's claim was "tightly delineated"[199] and did not require the Court to revisit *Proffitt*'s conclusion that the Sixth Amendment does not require jury sentencing in capital cases.[200] Instead, the Court held only that juries must make the factual findings essential to death eligibility, leaving open the possibility that judicial overrides remain a permissible means of allocating sentencing responsibility in capital cases.

The practical reach of *Ring* is further limited by federal habeas doctrines that potentially preclude relief even for those defendants for whom death eligibility was established by a judicial finding. The new standard of review under the Anti-Terrorism and Effective Death Penalty Act permits relief

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[197] Id. at 6-7 (stating that Colorado and Idaho have each carried out one execution, that Nebraska has carried out three executions, and that Montana has carried out two executions).
[198] 122 S.Ct. 2446, 2446-48(2002).
[199] 122 S.Ct. at 2437 n.4.

only if a state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[201] Given the Court's abrupt departure in *Ring* from its prior endorsements of judicial sentencing in capital cases, it is unlikely that many habeas petitioners will receive the retroactive benefit of the decision (especially given that the Court's judicially-crafted, non-retroactivity doctrine independently limits the availability of relief for defendants whose convictions became final prior to an intervening decision).[202]

Ultimately, the Court's extraordinary focus on controlling sentencer discretion at the moment of decision has proven an ineffective means of ensuring equality in our system of capital punishment. Instead of attempting to tame the death penalty determination at the punishment phase of capital trials, the Court would have done better to ensure equality of opportunity throughout the entire conduct of a capital proceeding. Equality, in short, seems an elusive goal when in the end the sentencter must be permitted to consider all facets of the defendant facing the ultimate punishment; but

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[200] Id.

[201] See § 104, 110 Stat. at 1218-19 (codified as 28 U.S.C. § 2254(d) (Supp. IV 1998)).

fairness, defined by reasonable access to investigation, effective trial representation, and adequate postconviction review, is both a desirable and obtainable aspiration in capital proceedings. These sorts of interests, though, have not been required by the Court's death penalty jurisprudence, which has been notoriously non-interventionist in states' systems for assigning and policing counsel in death cases. The Court reviews deferentially the performance of trial counsel[203] and has refused to require (much less review for competency) counsel in state postconviction proceedings.[204]

Along these same lines, the Court's efforts to impose minimal proportionality limitations concerning the availability of the death penalty have been more successful in reducing arbitrariness than its efforts to rewrite punishment phase sentencing instructions. Given that the Court cannot ensure equal outcomes via the penalty phase, it is sensible to reduce "over-inclusion" by eliminating death eligibility for those persons whose crime or characteristics make them unlikely candidates for the ultimate sanction. The Court's few proportionality limitations, such as its decisions

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[202] *Teague v. Lane,* 489 U.S. 288 (1989).
[203] *Strickland v. Washington,* 466 U.S. 688 (1984).
[204] *Murray v. Giarrantano,* 492 U.S. 1 (1989) (finding no constitutional right to appointed counsel for indigent defendants in state postconviction proceedings).

precluding the death penalty for persons convicted of rape,[205] for relatively minor participants convicted as accomplices,[206] and for persons with mental retardation,[207] actually contribute substantially to equality, because they prevent persons with relatively low moral culpability from being grouped with, and treated identically to, the most culpable offenders. The Court should continue down this path, and similarly exempt other groups of offenders, such as juveniles, whose personal moral culpability is ordinarily lower than the "worst of the worst" for whom the death penalty, as a matter of practice, appears to be reserved.

Conclusion

Not since the Warren Court era has the Court embarked on a significant revolution in constitutional criminal procedure. When the Court decided *Apprendi* two Terms ago, it had all the earmarks of a watershed decision. The Court had reversed settled case law and called into question the constitutionality of an emerging core practice in the criminal justice system – the use of judges to make critical findings in capital and non-capital sentencing proceedings. At first blush, one might be tempted to regard this past Term as a

[205] *Coker v. Georgia,* 433 U.S. 584 (1977).
[206] *Enmund v. Florida,* 458 U.S. 782 (1982); *Tison v. Arizona,* 481 U.S. 137 (1987).

mixed victory for the incipient revolution. In *Harris,* the Court refused to extend *Apprendi*'s elements rule to factual findings triggering mandatory minimum penalties. But in *Ring,* the Court again reversed settled cases by striking down Arizona's "pure" judicial sentencing approach to capital decisionmaking that it had previously – and unequivocally - embraced.

These two decisions, though, are not of equal significance, and together they represent a victory for the status quo. The stakes in *Harris* were extraordinarily high: the Court's willingness to tolerate judicial factfindings in that context effectively precludes any global Sixth Amendment challenge to federal and state guidelines regimes and thereby curtails *Apprendi*'s revolutionary potential. *Ring*, on the other hand, represents only a modest footnote to contemporary constitutional regulation of the death penalty.

The irony in this revolution that wasn't is the Court's apparent priority. Despite strong logical claims for extending *Apprendi*'s Sixth Amendment requirements to the factfindings in *Harris*, the Court appeared to appreciate that this decision was tantamount to a referendum on sentencing guidelines and ultimately balked at the notion of casting

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[207] *Atkins v. Virginia,* 122 S.Ct. 2242 (2002).

aside the new guidelines regimes. Such regimes, though, are the product of relatively short-lived, legislatively initiated experiments to eliminate unwarranted disparities in non-capital sentencing. The effort to secure equality in capital sentencing, on the other hand, has been the core concern of the Court's own, also relatively short-lived, Eighth Amendment regulation of the death penalty. And the Court had previously indicated that judge sentencing in capital cases might be an effective means of securing the equality that the Eighth Amendment requires.

Why would the Court preserve the national experiment with guidelines regimes and yet invalidate a state sentencing practice that itself was adopted in response to Court-identified constitutional commands? We believe it is because the Court recognized that the legislative experiment with guideline schemes is already deeply embedded in contemporary practice and holds substantial promise for enhancing equality in non-capital sentencing. At the same time, the use of judges in capital cases never fully took hold despite the obvious flaws of the pre-*Furman* regime, and perhaps more importantly, has never emerged as an obviously preferable or more effective means of achieving the elusive goal of equality in capital cases. Implicit in the Court's decisions is a

pragmatic balancing – ubiquitous in contemporary constitutional interpretation – between the Sixth Amendment trial right and competing concerns for efficiency and equality. Given that the scope of the jury sentencing right was not obviously or clearly established by common law practice, the Court in *Harris* reasonably chose to draw a line between findings necessary to increase the maximum punishment for the offense and findings necessary to trigger mandatory minimum punishments. The Court's conclusion in *Ring* to require jury determination of factors necessary for death eligibility represented a similar sort of prudential balancing. The purported values served by judicial involvement in capital sentencing were simply insufficient to justify overriding the competing claims for the Sixth Amendment jury trial right. Accordingly, the Court followed the logic rather than the letter of *Apprendi* and refused to indulge *Apprendi*'s unpersuaive suggestion that the jury right need not apply to the capital context.

Our endorsement of the Court's decisions in *Ring* and *Harris* is qualified by our significant reservations regarding current capital and non-capital sentencing regimes. Guidelines will not themselves ensure equality in non-capital sentencing. Substantive choices within guidelines regimes must not unfairly

reward or disadvantage particular groups or individuals. Now that guidelines regimes that preserve a judicial role in administrative sentencing appear less vulnerable to global constitutional attack, critics of the Federal Sentencing Guidelines should refocus their attention on those features of federal criminal law that contribute to inequality, such as disproportionate punishment for crack cocaine, prosecutorial overuse and abuse of downward departure authority, excessively punitive mandatory minimum penalties, and other provisions that inappropriately coerce defendants to plead guilty. The existence of guidelines regimes do not obviate the need for sound moral judgements, but instead provide a useful vehicle for giving life to such judgments once made.

In the capital context, the extension of *Apprendi* to the sentencing phase should be understood as a confirmation of the truly modest aspirations of current federal judicial regulation of the death penalty. Precisely because the Court has not and cannot tame the death penalty decision through significant guidance, the Court rightly refused to protect an administrative regime of sentencing in the capital context. *Ring*, then, underscores the weakness of the Court's longstanding but flawed focus on achieving equality through the refinement of capital sentencing instructions. The Court should now redirect its

regulatory efforts away from the punishment phase of capital trials to those aspects of capital punishment systems that are both in need of and amenable to reform. Ensuring quality representation, meaningful post-conviction opportunities, and robust proportionality review are much more promising means of improving our capital system. Fairness, in short, should replace equality as the overriding goal of constitutional regulation of the death penalty.