JUDICIAL FACT-FINDING IN THE WAKE OF *ALLEYNE*

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INTRODUCTION

On February 28, 2013, Juan Duran pled guilty to harboring an alien, in federal court.[1] His defense counsel likely advised him that under the guidelines,

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1. Minute Entry for Proceedings, United States v. Duran, No. 5:12-cr-00251-1 (S.D. Tex. Feb. 28, 2013) [hereinafter *Minute Entry*]. Pursuant to 8 U.S.C. § 1324 (2012), it is against the law

the base offense level is twelve for an individual without prior felonies, which carries a range of ten to sixteen months.[2] However, the statutory maximum for such an offense is much higher at 120 months.[3] The defense counsel could have told his client that the average sentence for alien harboring offenses, as calculated by the Sentencing Commission, is 17 months.[4]

Along with harboring an alien, there were also allegations that Duran sexually assaulted one of the individuals he harbored.[5] Duran had not been charged with or pled guilty to a sexual assault or rape charge,[6] but the judge may readily consider these factors under a preponderance of the evidence standard.[7] Factors like these may double or triple a defendant's sentence above what the defendant might have otherwise received for the underlying offense.[8] Indeed, after being afforded an evidentiary hearing and allocution, Duran was ultimately sentenced to 57 months.[9]

The Supreme Court has articulated that as long as judicial fact-finding does not raise the defendant's sentence above the statutory maximum, the sentence will not violate its pivotal holding in *Apprendi.* The Court cautioned in *Apprendi*

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to "encourage[] or induce[] an alien to . . . reside . . . knowing or in reckless disregard of the fact that such . . . residence is . . . in violation of law."

2. U.S. SENTENCING GUIDELINES MANUAL § 2L1.1(a)(1)–(3) (2013).

3. 8 U.S.C. § 1324(a)(1)(B)(i) (2012).

4. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, PART C: IMMIGRATION OFFENSES (2012), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C8_Immigration_Offenses.pdf.

5. Oral Hearing, United States v. Duran, No. 5:12-cr-00251-1 (S.D. Tex. Feb. 28, 2013). In full disclosure, I was a law clerk for Judge Keith Ellison, the sentencing judge on this case. The oral hearing was open to the public; however, no transcript was produced.

6. *See Minute Entry*, *supra* note 1.

7. The scenario in the Duran case is similar to a number of other cases. *See* Press Release, U.S. Att'y's Office, Southern Dist. of Tex., Smuggler Gets Enhanced Sentence Due to Rape of Undocumented Alien (Mar. 25, 2013), *available at* http://www.justice.gov/usao/txs/1News/Releases/2013%20March/130325%20-%20Alviso-Gonzalez.html; Press Release, Fed. Bureau of Investigation, Man Accused of Sexual Assault During Harboring Sentenced to 15 Years in Prison (Oct. 26, 2009), *available at* http://www.fbi.gov/phoenix/press-releases/2009/px102609a.htm. *McMillan* held that the legislature can authorize a judge to find a traditional sentencing factor on the basis of a preponderance of the evidence. McMillan v. Pennsylvania, 477 U.S. 79, 80 (1986).

8. For example, an enhancement could likely be added for "serious bodily injury," (a +4 enhancement, U.S. SENTENCING GUIDELINES MANUAL § 2L1.1(b)(7) (2013)). Enhancements might be added if the defendant had a weapon (a +2 enhancement, *id.* § 2L1.1(b)(5)(C)), if the victim was involuntarily detained through coercion or threat (a +2 enhancement, *id.* § 2L1.1(b)(8)(A)), and if the defendant knew the victim was a member of a vulnerable group (a +2 enhancement, *id.* § 3A1.1(b)(1)). Additionally, if the defendant disputes the victim's allegations regarding sexual assault, even if he admits to the harboring offense, the defendant may lose any downward adjustment he would otherwise be given for acceptance of responsibility (up to –3). A defendant's offense level may be reduced by two levels if "the ⌈d⌋efendant clearly demonstrates acceptance of responsibility for his offense." *Id.* § 3E1.1(a). Upon motion of the government, an additional level decrease may be granted if the defendant qualifies for the two level decrease and his total offense level is greater than sixteen. *Id.* § 3E1.1(b).

9. *See Minute Entry*, *supra* note 1.

that: (1) constitutional limits existed as to a state's authority to define away facts necessary to constitute a criminal offense, and (2) a state scheme that keeps facts from the jury that "expos[e] [defendants] to greater or additional punishment," may raise serious constitutional concern.[10] The *Apprendi* Court stated that a sentencing enhancement was acceptable, as long as it did not become the "tail that wags the dog."[11] A "tail that wags the dog" is a factor found by the judge that "changes the nature or magnitude of the penalty to an extent that is disproportionate to the penalty imposed for the underlying substantive offense."[12]

In the cases following *Apprendi*, the Court attempted to develop a coherent jurisprudence that would guide its analysis in determining whether a particular enhancement was a "sentencing factor" or an "element." In *United States v. O'Brien*, the Supreme Court analyzed whether the fact that a firearm was a machine gun (which increased the minimum sentence from five years to thirty years) was a sentencing factor, to be decided by the judge at sentencing, or an element, to be decided by the jury.[13] Similarly, in *Harris v. United States*, the Court was asked to consider whether "using" versus "brandishing" a firearm was a sentencing factor or a fact.[14] These cases, and other similar cases, have resulted in insufficient constitutional protections for defendants who, due to sentencing enhancements, are punished for a crime fundamentally different from the crime for which they were convicted, or worse yet, punished for crimes that they have been acquitted of.

This article argues that the Supreme Court's recent sentencing holding in *Alleyne v. United States* signals a shift in the availability of constitutional challenges in cases where sentencing factors become "the tail that wags the dog."[15] *Alleyne* commands both district and appellate courts to subject uncharged relevant conduct to a higher degree of scrutiny. This article proceeds in five parts. Part I briefly reviews the history of the case law regarding sentencing enhancements. Part II discusses the relevance of *Alleyne v. United States* to sentencing reform. Part III demonstrates the dramatic impact that uncharged conduct has had on sentencing. Part IV discusses the challenges with line-drawing and uncharged conduct. And Part V suggests improvements to the

10. Apprendi v. New Jersey, 530 U.S. 466, 467 (2000) (citing *McMillan*, 477 U.S. at 85–88).

11. *See McMillan*, 477 U.S. at 88 (upholding a statute in part because it "gives no impression of having been tailored to permit the [sentencing factor] to be a tail which wags the dog of the substantive offense"); Frank O. Bowman, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 378 (2010) (saying the "tail that wags the dog" occurs when judicially found facts rival the elements of the crime itself in their impact on a defendant's actual sentence).

12. *See* Vega v. People, 893 P.2d 107, 116 (Colo. 1995).

13. United States v. O'Brien, 560 U.S. 218, 221 (2010).

14. Harris v. United States, 536 U.S. 545, 556 (2002) (holding that brandishing a firearm or discharging a firearm are sentencing factors), *overruled by* Alleyne v. United States, 133 S. Ct. 2151 (2013).

15. *See Alleyne,* 133 S. Ct. 2151.

current sentencing scheme based on state and federal models that are working well.

I.
THE DEVELOPMENT OF JUDICIAL DISCRETION IN SENTENCING ENHANCEMENTS

A. Before Apprendi*—Elements of the Crime Defined*

Apprendi was a distinct milestone in defining the intersection between the Sixth Amendment jury right and judicial fact-finding; however, the story begins earlier when the Supreme Court held in *In re Winship* that defendants had a right to have "elements" of a crime proven beyond a reasonable doubt.[16] But *Winship* did not make clear what constitutes an element. Shortly thereafter, the *Mullaney v. Wilbur* Court confronted this question when interpreting a Maine murder statute.[17] The Maine statute defined murder as an "unlawful and intentional killing."[18] The jury was instructed that, if the prosecutor proved that the defendant killed unlawfully and intentionally, it should find him guilty of murder, unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion.[19] The Court focused on the historical significance between murder and manslaughter and found that this formulation unconstitutionally shifted the burden of proof of an element to the defendant, violating *Winship*.[20] The Court explained that it was more concerned with substance rather than formalism in deciding which facts constituted an element of the crime.[21]

In contrast, two years later, the Court found in *Patterson v. New York* that a statute defining murder as an intentional killing, with "extreme emotional disturbance" as an affirmative defense, was constitutionally permissible.[22] Justice White attempted to reconcile the two cases by pointing to the different definitions of murder in the statutes.[23] Functionally, however, the two laws were the same, since both laws placed the burden to prove mitigation on the defendant. Thus, whether an element violated *Winship* became a question of formulation, rather than one about the effect and severity the factor had on the defendant's punishment.[24] But, at the same time, the Court indicated a possible limit to the legislature's ability to redefine elements as affirmative defenses,

16. *In re* Winship, 397 U.S. 358, 364 (1970).
17. Mullaney v. Wilbur, 421 U.S. 684, 685 (1975).
18. *Id.* at 685.
19. *Id.* at 685–86.
20. *Winship*, 397 U.S. at 364.
21. *Mullaney*, 421 U.S. at 698–99.
22. Patterson v. New York, 432 U.S. 197 (1977).
23. *Id.* at 213.
24. Bowman, *supra* note 11, at 380–81.

although leaving the question of defining the "constitutional limits beyond which the [legislature] may not go" unanswered.[25]

B. McMillan*: The* Patterson *Principle Evolves*

A decade later, in *McMillan v. Pennsylvania*, the Supreme Court held that a mandatory minimum could be imposed by a judge, under a preponderance of the evidence standard.[26] The *McMillan* Court considered the constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act.[27] Under the statute, the judge was required to impose a prison sentence of at least five years if she found, by a preponderance of the evidence, that the convicted person had visibly possessed a firearm. The Court found that, because the Act neither altered the maximum penalty for the crime committed nor created a separate offense calling for a separate penalty, it operated solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it.[28]

The *McMillan* Court also differentiated between an "element" and a "sentencing factor."[29] The Court stated that elements, unlike sentencing factors, are "included in the definition of the offense" and must be proved beyond a reasonable doubt.[30] The Court determined that a judicially determined mandatory minimum is a sentencing factor rather than an element, because it does not expose the defendant to greater or additional punishment.[31] As in *Patterson*, the Court alluded to a permissible limit, a point to which a judge could alter a sentence. The Court then found that Pennsylvania's statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense."[32]

After *Patterson* and *McMillan*, the legislature can statutorily define "elements" of a crime. Facts that were not elements could be defined as a "sentencing factor." Once defined in these terms, a sentencing factor can be found by a judge and is subject to a lower standard of proof. Interestingly, *McMillan* cautioned that elements, unlike sentencing factors, were included in the definition of the offense. But the Court did not comment on the practice of charging a defendant with one offense and finding elements from *other* offenses as a basis for imposing sentencing enhancements. Without clear direction in this regard, the United States Sentencing Commission set to work at crafting federal sentencing guidelines.[33]

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25. *Patterson*, 432 U.S. at 210.
26. McMillan v. Pennsylvania, 477 U.S. 79 (1986).
27. *Id.*
28. *Id.* at 87–88.
29. *Id.* at 85–86.
30. *Id.* at 85 (citing *Patterson*, 432 U.S. at 210).
31. *Id.* at 88.
32. *Id.* at 87–88.
33. *See* U.S. SENTENCING GUIDELINES MANUAL (1988).

C. The Sentencing Guidelines

The year after *McMillan* was published, the Sentencing Commission found itself contemplating two different types of sentencing regimes—a pure "charge offense" system and a "real offense system."[34] In November 1987, Justice Breyer, who at that time was a judge on the First Circuit, explained the difference between the two systems—a pure "charge offense" system would tie the punishments directly to the offense for which the defendant was convicted, while a "real offense" system would base punishment on the specific circumstances of the case.[35] Both systems carry drawbacks. One of the drawbacks of a charge offense system is that it overlooks the fact that crimes may be committed in many different ways.[36] The real offense system, on the other hand, lacks procedure. Justice Breyer recognized that while "some experts have argued for guidelines close to a pure 'real offense' system" he warned that "the proponents of such a system, however, minimize the importance of the *procedures* that the courts must use to determine the existence of the additional harms."[37] Eventually, the Sentencing Commission was able to reach a compromise between the two regimes. The Commission looked to the offense charged to secure a "base offense level" and then modified that based on aggravating or mitigating sentencing factors.[38]

The Sentencing Commission drafted a "relevant conduct" provision, section 1B1.3, allowing courts to sentence the defendant for conduct that was broadly related to the charge.[39] The Commission, however, did not directly address the use of acquitted conduct[40] or delineate precisely how far judges were permitted to go in considering uncharged conduct.[41] The Court instead further defined these limits in the cases that followed.

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34. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9–11 (1988) (footnotes omitted).

35. *Id.*

36. *Id.* at 9–10.

37. *Id.* at 10–11.

38. *Id.* at 11–12 (footnotes omitted).

39. Under subsection (a)(1)(A), relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A) (2013).

40. For example, in *United States v. Watts*, 519 U.S. 148, 636–37 (1997), the Court found that the use of acquitted conduct violated neither the Double Jeopardy Clause nor the Due Process Clause.

41. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2013).

D. Element or Sentencing Factor: Almendarez-Torres*,* Castillo*,* Jones*, and* O'Brien

The Court then faced a series of cases in which it had to resolve whether a particular fact was an element or a sentencing factor. Although the decision of whether a fact is an element is ultimately a "question for Congress,"[42] the Court has frequently intervened, utilizing both statutory interpretation and policy arguments, to resolve the question.

In *United States v. O'Brien*, the Court formalized a series of factors to determine whether Congress intended a particular provision to be an element or a sentencing factor. The factors are: "(1) [the statute's] language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history."[43] *O'Brien* indicated that once the *Apprendi* test had been met, that is, as long as the sentence had not been increased beyond the statutory maximum, these five factors could be applied to determine whether a factor was a sentencing enhancement.

Almendarez-Torres v. United States[44] stands apart because it outlined an exception to the general rule that any fact that increases the maximum must go to the jury. The defendant was a deported alien who returned to the United States in violation of 8 U.S.C. § 1326.[45] A subsection of the statute increased the statutory maximum on the sentence from two years to twenty years, if the defendant had been previously convicted of a felony. The Court held that a judge, rather than a jury, could decide whether a prior conviction should increase a defendant's sentence.[46] The Court explained that recidivism was not an element of the offense but was a "penalty provision."[47] The Court has since considered *Almendarez-Torres* a narrow exception to the general rule that any fact that increases the maximum sentence for a crime must be put before the jury and proved beyond a reasonable doubt. Although *Almendarez-Torres* has not been explicitly overruled, it has been sharply questioned by subsequent Supreme Court decisions, including *Apprendi*.[48] The *Apprendi* Court acknowledged that

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42. United States v. O'Brien, 560 U.S. 218, 225 (2010).

43. Before *O'Brien*, the Court had not specifically delineated this approach; rather, these factors organically developed across *Almendarez-Torres*, *Castillo*, and *Jones*. *See, e.g.*, *id.* (citing Castillo v. United States, 530 U.S. 120, 124–31 (2001)). While *Castillo* utilized these factors, it was the *O'Brien* case that explicitly laid out and formalized these factors. For an in-depth discussion of the application of these factors, see Lindsay Calkins, *Is Drug Quantity an Element of 21 USC § 841(b)? Determining the* Apprendi *Statutory Maximum*, 78 U. CHI. L. REV. 965, 968–72 (2011).

44. Almendarez-Torres v. United States, 523 U.S. 224 (1998).

45. 8 U.S.C. § 1362 (1952).

46. *Almendarez-Torres*, 523 U.S. at 224.

47. *Id.* at 226.

48. *See* Apprendi v. New Jersey, 530 U.S. 466, 487 (2005) (stating that *Almendarez-Torres* "represents at best an exceptional departure from the historic practice that we have described"); *see also* Shepard v. United States, 544 U.S. 13, 27 (2005) (Thomas, J., concurring) ("*Almendarez-*

there is considerable doubt on the constitutionality of ruling that a sentencing factor that increases the maximum penalty is not an element.[49] Still, *Almendarez-Torres* can be seen as a predecessor to the exception that was eventually carved out in *Apprendi*: sentencing enhancements for prior convictions do not have to be given to the jury, because those prior convictions have already been subject to the jury trial and reasonable doubt requirements.

The Court moved away from *Almendarez-Torrez* in *Jones v. United States*, *Castillo v. United States*, and *United States v. O'Brien*, a triad of cases which presented similar fact patterns.[50] *Jones* and *Castillo* predated *Apprendi*—and both determined that district courts had incorrectly labeled elements, which greatly increased the statutory maximums, as sentencing factors. In *Jones v. United States*, the defendant was indicted for violating the federal carjacking statute, in violation of 18 U.S.C. § 2119, which carries a maximum sentence of fifteen years. But if serious bodily injury occurs during the carjacking, the maximum penalty is twenty-five years of imprisonment. At the sentencing hearing the judge determined, by a preponderance of the evidence, that serious bodily injury had resulted from the carjacking and therefore increased the statutory maximum to twenty-five years. The question before the Supreme Court was whether the presence of serious bodily injury was an element of the offense or a sentencing factor. The Supreme Court acknowledged that, while the three different subsections of the statute might first appear to be sentencing provisions, they provided for steeply higher penalties and conditioned those penalties on further facts (like injury or death) that seemed as important as facts that were considered elements in the statute (e.g., force and violence, intimidation).[51]

In *Castillo*, the defendants were indicted for conspiracy to murder federal officers and faced an enhanced sentence under 18 U.S.C. § 924(c) for carrying a firearm.[52] The Court examined the five-factor test concluding that all five factors made the case "a stronger 'separate crime' case than either *Jones* or *Almendarez-Torres*."[53] After *Castillo*, Congress amended the statute, which was also at issue in *O'Brien*. Similar to the *Castillo* Court, the *O'Brien* Court concluded that the machine gun provision was an element rather than a sentencing factor.[54]

Torres . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.").

49. *Apprendi*, 530 U.S. at 488.

50. United States v. O'Brien, 560 U.S. 218 (2010); Castillo v. United States, 530 U.S. 120 (2000); Jones v. United States, 526 U.S. 227 (1999).

51. *Jones*, 526 U.S. at 233.

52. 18 U.S.C. § 924(c) (1968).

53. *Castillo*, 530 U.S. at 131.

54. However, because *O'Brien* was decided after *Apprendi*, the Court expressed less constitutional doubt that Congress *could* choose to draft a statute making the machine gun mandatory minimum a sentencing factor. The *O'Brien* Court stated that, aside from the constraint in *Apprendi*, Congress may choose any fact to be an element or a sentencing factor. *O'Brien*, 530 U.S. at 225. In contrast, the *Castillo* Court expressed more doubt on the issue, holding that the machine gun provision was an element, but openly stating that deciding otherwise "would give rise

The lower courts use the five-factor test to examine particular statutory provisions, but these factors are not applied to sentencing enhancements for relevant conduct under the Guidelines. For example, in *Jones*, a defendant cannot, through a judicial determination, be subject to a higher sentence for serious bodily injury because a jury must find a fact that is in an element in the statute. But under section 2B3.1 of the Sentencing Guidelines, a four level enhancement for serious bodily injury is a valid sentencing enhancement. Practically speaking, these enhancements can create significant increases but are not considered "elements" of a statute.

E. Apprendi *and the Development of the Determinate Guideline System*

Against this background, the *Apprendi–Booker* line of cases further defined a judge's role in sentencing. In 2000, the Court decided *Apprendi v. New Jersey*. The case arose when the defendant, Charles Apprendi, pled to three felony firearms charges for shooting the home of his African-American neighbors. Under its hate crime statute, the government reserved the right to enhance the statutory maximum of ten years—if the judge found, by a preponderance of the evidence, that Apprendi committed the crime with a biased purpose. Based on a finding that Apprendi had acted with racial animus, the judge sentenced him to twelve years in prison—two years beyond the maximum authorized by the statute to which Apprendi pled guilty.[55] The Supreme Court split 5-4 and found a violation of Apprendi's rights under the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment guarantee of trial by jury. The Court articulated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[56]

The *Apprendi* Court did not utilize the *O'Brien* factors.[57] Rather, the Court indicated that instances in which a fact increases the maximum statutory penalty, "the elusive distinction between 'elements' and 'sentencing factors' is unimportant."[58] The Court noted that "the relevant inquiry is one not of form, but of effect"—whether the required finding exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict.[59] Additionally, Justice Thomas in his concurrence explained that, "if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime

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to significant constitutional questions." *Castillo*, 530 U.S. at 124. For further analysis on this point, see Eli K. Best, *Elements, Sentencing Factors, and the Right to A Jury Trial: An Analysis of Legislative Power and Its Limits*, 29 YALE L. & POL'Y REV. 633, 637 (2011).

55. Apprendi v. New Jersey, 530 U.S. 466, 469–71 (2005).

56. *Id.* at 490.

57. *Id.* If the Court had used the *O'Brien* factors, it is not clear that an increase of only two years would have been sufficient for the Court to declare that the fact had to be an element rather than a sentencing factor.

58. *Id.* at 494 (citing McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986)).

59. *Id.*

based on some fact . . . that fact is also an element. No multi-factor parsing of statutes, of the sort that we have attempted since McMillan is necessary."[60] In choosing not to use the *O'Brien* factors, the Court indicated that a category of cases exist in which facts, as an absolute matter, cannot be construed as sentencing factors—even if a multi-factor analysis would indicate that the legislature intended them to be dealt with in sentencing.

Apprendi did not explicitly address determinate sentencing. Instead, the Court raised doubts regarding the constitutionality of judicial sentencing enhancements and set the stage for *Blakely v. Washington* and *United States v. Booker*.[61] In *Blakely*, the defendant was charged with first-degree kidnapping but ultimately pled guilty to second-degree kidnapping involving domestic violence and the use of a firearm.[62] The trial judge sentenced Blakely to 90 months—37 months beyond the standard maximum—finding that Blakely had acted with "deliberate cruelty."[63] Even though the judge did not increase Blakely's sentence beyond the statutory maximum, the Supreme Court held that Washington State's mandatory sentencing scheme violated the Sixth Amendment by mandating judges to increase sentences based on information not found by the jury or confessed by the defendant.[64] The *Blakely* decision, however, left open the question of whether determinate sentencing was unconstitutional per se.

The Supreme Court revisited the constitutionality of determinate sentencing in *United States v. Booker* and applied the *Blakely* holding to the federal sentencing scheme.[65] The Sentencing Guidelines require a sentencing judge to increase a sentence if the judge finds a basis for relevant conduct.[66] To the extent a sentencing judge, rather than jury, finds facts that under the Guidelines increased the sentence, the judge's fact-finding violates the defendant's constitutional right to a jury trial. The Court held that the remedy to the unconstitutionality of the guidelines is to render them "effectively advisory . . . [which] requires a sentencing court to consider Guideline ranges . . . [but] permits the court to tailor the sentence in light of other statutory concerns as well."[67]

After *Blakely*, the possibility of a true and total revamping of the sentencing system existed. *Blakely* raised doubts about the continued validity of the federal guidelines and also put into question many state guidelines that shared attributes

60. *See also id.* at 501 (Thomas, J. concurring).

61. United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004).

62. *Blakely*, 542 U.S. at 298–99.

63. *Id.* at 300.

64. *Id.* at 313.

65. *Booker*, 543 U.S. at 221.

66. 18 U.S.C.A. § 3553(b)(1) (Supp. 2004) (requiring the sentencing judge to impose a sentence of the kind and within the range set forth in the Guidelines unless the judge found there were aggravating or mitigating circumstances not adequately reflected in the Guidelines).

67. *Booker*, 543 U.S. at 245–46.

of the Washington system. But *Booker* made clear that as long as the guidelines were advisory, and a judge did not increase a sentence over the maximum authorized by the jury, the judge was free to find sentencing elements to increase the sentence.[68]

F. Harris*: The Court's First Post-*Apprendi *Consideration of Mandatory Minimums*

After *Blakely*, the question of whether the Court's analysis in *Apprendi* would apply to mandatory minimums as well remained unanswered. Two years after *Apprendi,* the Court faced this question in *Harris v. United States*, in which it upheld judicial fact-finding to establish a mandatory minimum. The facts in *Harris* were similar to those in *McMillan*. Harris was indicted for distribution of marijuana and carrying a firearm in relation to a drug-trafficking offense. Harris pled guilty to the marijuana distribution charge and went to trial on the firearm charge.[69] The jury found that Harris was guilty of carrying a firearm under 18 U.S.C. § 924(c)(1)(A). The indictment did not list the subsections in § 924(c)—whether Harris used, brandished, or discharged the weapon—three conditions which triggered different mandatory minimums.[70] The baseline mandatory minimum is five years, but it moves up to seven years if the firearm is "brandished" during the course of the offense, and ten years if the firearm is "discharged" during the course of the offense. The judge at Harris's sentencing hearing determined that he had brandished the firearm during the commission of his drug-trafficking offense, thus triggering a mandatory minimum sentence of seven years.[71]

Justice Kennedy, writing on behalf of a four-Justice plurality, began by reasserting the difference between an element and a sentencing factor:

> [N]ot all facts affecting the defendant's punishment are elements[,] . . . and are thus not subject to the Constitution's indictment, jury, and proof requirements. Some statutes also direct judges to give specific weight to certain facts when choosing the sentence. The statutes do not require these facts, sometimes referred to sentencing factors, to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt.[72]

Applying a number of statutory construction canons, the Court found that Congress's intent in delineating carrying, brandishing, and discharging was to

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68. *Id.* at 267.

69. Harris v. United States, 536 U.S. 545, 573 (2002) (Thomas, J., dissenting), *overruled by* Alleyne v. United States, 133 S. Ct. 2151 (2013).

70. *Id.* at 573.

71. *Id.* at 551 (majority opinion).

72. *Id.* at 550.

create sentencing factors, not distinct elements.[73] The incrementally increasing penalties were "consistent with traditional understandings about how sentencing factors operate."[74] The plurality concluded that "basing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments."[75] The Court reasoned that only a statutory maximum exposed a defendant to a longer sentence than the law would otherwise permit.[76] In other words, because a sentence with a mandatory minimum would always be lower than the statutory maximum, the Court found that a judge could lawfully impose such a sentence.

Still, the plurality failed to consider cases in which the authorized mandatory minimum might be much higher. Additionally, the Court did not comment on whether there would be a point at which the judicially imposed mandatory minimum would become the tail that would wag the dog. The question remained whether such a determination would be based on a proportionality analysis (i.e., a comparison of the judge's sentencing enhancement to the jury determined sentence) or whether a hard limit existed (when a mandatory minimum was above ten years, for example, a judge would no longer be permitted to make that finding). The five-member majority in *Harris* included Justice Breyer. Rather than agreeing with the proposition that a sentencing floor is distinct from a ceiling for constitutional purposes, Breyer disagreed with *Apprendi* as a whole and stated that he had "yet [to] accept [*Apprendi*'s] rule."[77]

Justice Thomas, joined by Justices Stevens, Souter, and Ginsburg, dissented in *Harris*. The dissent argued that *McMillan* (which found that a mandatory minimum can be imposed by a judge) should be overruled in light of *Apprendi*.[78] The dissent argued that the Court's "fine distinction" between a mandatory minimum versus a maximum could not "withstand close scrutiny."[79] "Whether one raises the floor or raises the ceiling, it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed."[80] In *O'Brien*, Stevens had urged the Court to harmonize *Apprendi* with *McMillan*, noting the significance of mandatory minimums:

> Mandatory minimums may have a particularly acute practical effect in this type of statutory scheme, which contains an implied statutory maximum of life. There is, in this type of case, no ceiling; there is only a floor below, which a sentence cannot

73. *Id.* at 553.
74. *Id.* at 554.
75. *Id.* at 546.
76. *Id.* at 568.
77. *Id.* at 569 (Breyer, J., concurring in part and concurring in the judgment).
78. *Id.*
79. *Id.* at 574 (Thomas, J., dissenting).
80. *Id.* at 579.

> fall. Indeed, it appears that, but for those subject to the 30–year mandatory minimum, no defendant has ever been sentenced to a sentence anywhere near 30 years for a § 924(c) offense.[81]

The strong disagreement among Justices signaled that the law in this area was still tenuous, as the Justices struggled to find a coherent theory of elements versus sentencing factors.

II.
THE COURT REVISITS MANDATORY MINIMUMS

A. Alleyne v. United States

In 2013, the Court once again returned to the question of mandatory minimums in *Alleyne v. United States*, looking at the same statute which was at issue in *Harris*. Petitioner Allen Ryan Alleyne and an accomplice devised a plan to rob a store manager as the manager drove the daily deposits to a local bank.[82] Alleyne and his accomplice feigned car trouble and tricked the manager into stopping his car.[83] Alleyne's accomplice then approached the manager with a gun and demanded the store's deposits, which the manager surrendered.[84] Alleyne was later charged with multiple federal offenses, including robbery affecting interstate commerce[85] and using or carrying a firearm in relation to a crime of violence.[86] The jury convicted Alleyne and indicated on the verdict form that Alleyne had "[u]sed or carried a firearm during and in relation to a crime of violence"; however, the jury did not indicate a finding that the firearm had been "[b]randished."[87] Alleyne conceded that *Harris* was controlling but objected nonetheless to the fact that "brandishing" had not been determined beyond a reasonable doubt by the jury. The district court rejected Alleyne's argument and, under *Harris,* sentenced Alleyne to seven years.[88] The Fourth Circuit affirmed on appeal. In its brief opposing certiorari, the Solicitor General urged the Court to deny Alleyne's petition, emphasizing that petitioner had provided no reason to reconsider *Harris* and that courts had long been authorized to find mandatory minimums.[89] The Court, however, granted certiorari, and reversed *Harris*.

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81. United States v. O'Brien, 560 U.S. 218, 238–39 (2010) (Stevens, J., concurring).
82. Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013).
83. *Id.*
84. *Id.*
85. 18 U.S.C. § 1951(a) (2012).
86. 18 U.S.C.A. § 924(c)(1)(A) (2006).
87. *Alleyne*, 133 S. Ct. at 2156.
88. *Id.*
89. Brief for the United States in Opposition, *Alleyne*, 133 S. Ct. 2151 (No. 11-9335), 2012 WL 4750324.

Justice Thomas, writing for the majority, began the opinion by discussing the common law and early American definitions of a crime.[90] The Court noted that facts used as a basis for imposing or increasing punishment had traditionally been included in the indictment.[91] Given that mandatory minimums expose the defendant to a higher sentence, the Court found that it could no longer reconcile *Alleyne* with *Apprendi*:

> *Apprendi*'s definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.[92]

The Court's arguments still appealed to logic, tradition, and fairness, to demonstrate that this is an *Apprendi*-like issue, rather than one calling for *O'Brien's* multi-factor analysis. The Court's opinion first explains that the logic of *Apprendi* requires a jury to find all facts that determine the penalty range of a crime. According to the Court, the sentencing floor is just as significant as the ceiling in changing the penalty range,[93] "because the legally prescribed range is the penalty affixed to the crime" and "increasing either end of the range produces a new penalty and constitutes an ingredient of the offense."[94] Logically, both maximums and minimums cabin a judge's discretion, and both can be equally important to a defendant's sentence.[95]

The Court's opinion appeals to tradition, in two senses: the structure of the statute and the role of the jury. The Court first expresses that "criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty."[96] Second, considering mandatory minimums as part of the substantive offense "preserves the historic role of the jury as an intermediary between the State and criminal defendants."[97]

The risk of unfairness is a crucial third factor driving the Court's analysis. Increasing the low end of the punishment through sentencing factors impairs a defendant's ability to predict from the indictment what punishment he will

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90. *Alleyne*, 133 S. Ct. at 2158.

91. *Id.* at 2159.

92. *Id.* at 2158 (citing Harris v. United States, 536 U.S. 545 (2002) (Thomas, J., dissenting)).

93. *Id.* Without a finding of brandishing, the penalty is five years to life in prison. With a finding of brandishing, the penalty becomes seven years to life. The maximum of life marks the outer boundary of the range; seven years marks the floor.

94. *Id.* at 2160.

95. Indeed, many statutes are written to maximize a judge's discretion at the upper end, such as the statute *Alleyne* was sentenced under, allowing for sentences up to life. Thus, the minimum may take on particular significance.

96. *Alleyne*, 133 S. Ct. at 2160–61.

97. *Id.* at 2153 (citing United States v. Gaudin, 515 U.S. 506, 510–11 (1995)).

ultimately serve.[98] Furthermore, it contravenes the purpose of the sentencing guidelines, to create more predictable, consistent sentencing.[99]

Chief Justice Roberts filed a dissenting opinion in *Alleyne*, which Justices Scalia and Kennedy joined.[100] Following the *Harris* line of reasoning, the dissent argued that the Sixth Amendment is not implicated as long as a defendant's sentence is below the maximum authorized by the jury. There is no risk of judicial overreaching once the jury has found the defendant guilty, and the entire range is accessible for the judge.[101] The dissent argued that the issue of whether Alleyne "brandished" a firearm was not "essential" to the punishment and thus did not require a jury finding beyond a reasonable doubt. But to the majority, the fact that the trial judge could have sentenced the defendant to 7 years without judicial fact-finding was beside the point, because the mandatory minimum aggravated the sentence by altering the prescribed penalty.

Prior to *Alleyne*, the Court used the *O'Brien* factors to determine that slight sentence increases by the judge were acceptable. Larger increases indicated that the legislature had intended the fact to be an "element," requiring a jury determination. The question of whether a finding of fact increases the sentencing floor by two years, as opposed to twenty years, has long been a strong determinant for its classification as an element or a sentencing factor. For example, in *Harris*, the Court distinguished between facts that created "incremental changes" and those that lead to "steeply higher penalties."[102] The fact that the mandatory minimum in *Harris* increased by only two years with a finding of brandishing certainly motivated the Court's finding that brandishing could be considered a sentencing factor. By contrast, the mandatory minimum in *O'Brien* shot up from five years to thirty years if a judge found that a machine gun was used in furtherance of the crime. In *O'Brien*, the Court argued that the "drastic, six-fold increase" linked to the machine gun provision "strongly suggests a separate substantive crime," not a mere sentencing factor.[103] Similarly, in *Jones*, the Court considered a federal carjacking statute, which provided three clauses establishing maximum sentences: fifteen years for the base offense, twenty-five years upon a finding of serious bodily injury, and life

98. *Id.*

99. Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749*,* 765–68 (2006); *see also* 28 U.S.C. § 991(b)(1)(B) (2012) (stating that the purpose of the Sentencing Commission is to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

100. A dissent by Justice Alito argued that stare decisis was violated when the Court overturned *Harris*. *Alleyne*, 133 S. Ct. at 2173 (Alito, J., dissenting) ("[O]ther than the fact that there are currently five Justices willing to vote to overrule *Harris*, and not five Justices willing to overrule *Apprendi*, there is no compelling reason why the Court overrules the former rather than the latter.").

101. *Id.* at 2169 (Roberts, C.J., dissenting).

102. Harris v. United States, 536 U.S. 545, 554 (2002).

103. United States v. O'Brien, 560 U.S. 218, 229 (2010).

imprisonment upon a finding that death resulted from the offense. The Court suggested that the steeply higher penalties attached to the latter clauses indicated that they were elements rather than sentencing factors.[104]

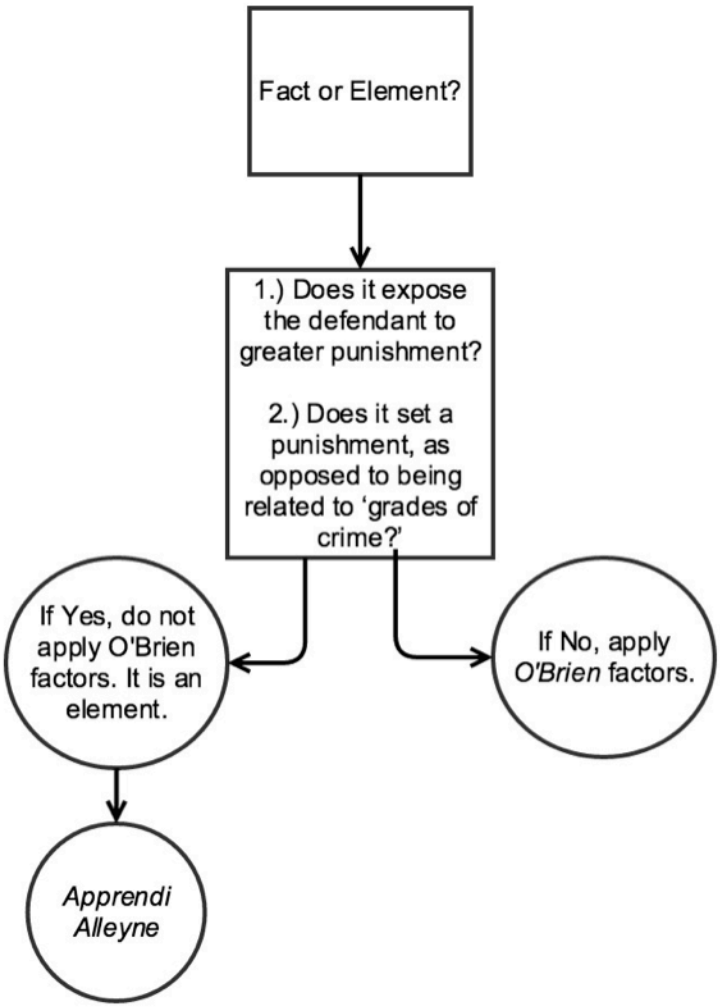
Alleyne—like *Apprendi*—is a more significant holding, because it recognizes that there is inherent unfairness present when a judge increases the bottom of the penalty range, regardless of the extent by which the mandatory minimum could increase the sentence. *Alleyne*, unlike *Castillo*, *Jones*, and *O'Brien*, followed *Apprendi* in not applying the multi-factor test. Instead, *Alleyne* held, as a more categorical matter, that mandatory minimums could not be considered sentencing factors. Before *Alleyne*, *Apprendi* was the only case in which the Court had found a categorical bar determining that the establishing of a statutory maximum was always a matter for the jury and could never be a sentencing factor. This categorical bar is significant because it meant that a legislature could not simply word a statute differently and bypass the jury. *Alleyne* demonstrated that, in order to determine whether a fact was an element or sentencing factor, there was a question to be asked prior to applying the O'Brien factors—a meta-factor of sorts. In *Apprendi*, the majority articulated that, rather than applying the *O'Brien* factors, the meta-factor was simply whether the required finding exposed the defendant to a greater punishment than the jury's guilty verdict authorized.[105] Similarly, Justice Thomas articulated that there is no need for the *O'Brien* test when the facts do not relate to grades and instead set the punishment based on the facts.[106]

104. Even though serious bodily injury is used as a sentencing factor in other federal statutes, the *Jones* court found that the high penalties and the appearance of the statute suggested that the three clauses listed sentencing factors. Jones v. United States, 526 U.S. 227, 232–33 (1999).

105. *See supra* note 59 and accompanying text.

106. Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas, J., concurring) ("If the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact . . . that fact is also an element. No multi-factor parsing of statutes, of the sort that we have attempted since *McMillan* is necessary.").

B. Uncharged Conduct: How Alleyne *Sets the Stage for Judicial Fact-Finding*



A narrow view of *Alleyne*'s holding is simply that facts increasing mandatory minimums must be submitted to a jury. The Court's dicta indicate, however, that the case may come to stand for a much larger principle and that there may be additional cases in which the *O'Brien* factors are not an appropriate litmus test. The presence of a meta-factor in the Court's analysis in *Apprendi* and *Alleyne* indicates that there is a fundamental issue of fairness when a punishment goes beyond that which is authorized by a jury's verdict. Furthermore, *Alleyne* indicates that there are at least two ways that a punishment could be unauthorized by a jury's verdict. First, a jury authorizes a specific *range* of punishment—anything beyond that range is unauthorized. Allowing a judge to shift the minimum or maximum of the range, by a preponderance of the

evidence, changes the range of punishment the defendant could be exposed to, thus violating the jury's verdict. Scholars and courts, interpreting *Apprendi* after cases like *Harris*, deemed that *Apprendi* was focused only on the maximum authorized by jury.[107] After all, "*Harris* relied on the fact that the 7-year minimum sentence could have been imposed with or without a judicial finding of brandishing, because the jury's finding already authorized a sentence of five years to life."[108] This reading of *Apprendi* and *Alleyne* is narrow and formulaic.

The *Alleyne* Court squarely rejected this formulaic reading of *Apprendi*. After noting that "the essential Sixth Amendment inquiry is whether a fact is an element of the crime," the Court stated that, if a fact aggravates a punishment, it must be submitted to the jury. The Court further reasoned that:

> It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that *a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical.* One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.[109]

This reading of *Apprendi* and *Alleyne* is a second, broader understanding. Based on this interpretation, the cases stand for the proposition that a sentence should not punish a defendant for a crime he has not been convicted of. From a common sense perspective, it may be obvious that a defendant should not be convicted for assault if he has only been charged with larceny, even if his sentence remains below the statutory maximum. That is precisely what the current sentencing regime permits. Duran's story, the defendant from the introduction of this article, is not an isolated incident of the tail wagging the dog.[110] Prosecutors can charge and convict the defendant for a lesser offense and

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107. *See, e.g.*, United States v. Garcia, 240 F.3d 180, 184 (2d Cir. 2001) (finding that it is unnecessary to extend *Apprendi* to a Guidelines case in which "a judge increases a sentence within a statutory range, not above the maximum, and not below a mandatory statutory minimum"); United States v. Pratt, 239 F.3d 640, 647 (4th Cir. 2001) (citing United States v. Aguayo-Delgado, 220 F.3d 926, 933–34 (8th Cir. 2000)); United States v. Baltas, 236 F.3d 27, 41 (1st Cir. 2001); United States v. Williams, 235 F.3d 858 (3d Cir. 2000); United States v. Nance, 236 F.3d 820, 825 (7th Cir. 2000); United States v. Doggett, 230 F.3d 160, 164–65 (5th Cir. 2000); United States v. Hernandez-Guardado, 228 F.3d 1017, 1026–27 (9th Cir. 2000); *Aguayo-Delgado*, 220 F.3d at 933–34 (8th Cir. 2000); Robert Batey, *Taking Florida Further into "*Apprendi-*Land,"* FLA. B.J. 26, 30 (2003); Benjamin J. Priester, *Structuring Sentencing:* Apprendi*, the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 867 (2004).

108. Alleyne v. United States, 133 S. Ct. 2151, 2153 (2013) (citing Harris v. United States, 536 U.S. 545, 561 (2001)).

109. *Id.* at 2162 (emphasis added).

110. *Supra* note 5.

then present uncharged, more serious conduct at sentencing.[111] Under a preponderance of the evidence standard, a judge is free to increase the defendant's sentence.[112] Thus, sentencing enhancements can increase the original guideline recommendation.

III.
THE DRAMATIC IMPACT OF UNCHARGED CONDUCT

One illustration of a significant sentencing enhancement comes from the Ninth Circuit case *United States v. Fitch*.[113] In *Fitch*, the defendant had been indicted on sixteen counts of fraud against his missing wife, Maria Bozi. Bozi had disappeared four years prior to the case, under suspicious circumstances. Among other fraudulent activities, Fitch was indicted for using his wife's credit card and health insurance account. The applicable Sentencing Guidelines range was 41–52 months. During sentencing, the prosecution requested an upward departure based on uncharged relevant conduct that Fitch had killed his wife in order to commit the fraud offenses. No murder charges had ever been filed, and no evidence of the murder had been presented to the jury. The district judge found by clear and convincing evidence that Fitch had murdered his wife. Relying on that finding, he imposed a sentence of 262 months. The Ninth Circuit affirmed, finding that a substantive reasonableness review requires due deference—even for a non-guideline sentence.[114] Since Fitch's sentence was still below the statutory maximum for the fraud counts, the Ninth Circuit found that it did not violate *Apprendi*.[115] The court found the sentence to be reasonable based on the facts in the presentence report.[116]

Fitch is not as aberrational as it might seem. A judge may even consider acquitted conduct, contravening the finding of a jury. In *United States v. Concepcion*, the defendant, Frias, was convicted on two weapons charges (for which the Guidelines range was twelve to eighteen months).[117] Although Frias had been acquitted of a drug charge,[118] the trial judge disregarded the jury's acquittal, found that Frias had committed the drug offense, and increased the prescribed imprisonment range from twelve to eighteen months to 210–262

111. *See* Witte v. United States, 515 U.S. 389, 406 (1995) (acknowledging that the use of uncharged conduct to impose a sentence greater than that of the underlying offense does not constitute punishment for the uncharged conduct and is therefore permissible).

112. *See* United States v. Fitch, 659 F.3d 788, 794–97 (9th Cir. 2011) (explaining that sentencing judges possess extraordinarily broad post-conviction powers to find facts that drive sentences, which *may*, but do not necessarily, require finding upon clear and convincing evidence).

113. For a greater discussion of *Fitch*, see Robert Alan Semones, *A Parade of Horribles: Uncharged Relevant Conduct, the Federal Prosecutorial Loophole, Tails Wagging Dogs in Federal Sentencing Law, and* United States v. Fitch, 46 U.C. DAVIS L. REV. 313, 348 (2012).

114. *Fitch*, 659 F.3d at 798 (citing United States v. Carty, 520 F.3d 984, 993 (9th Cir. 2008)).

115. *Id.* at 790.

116. *Id.* at 790.

117. United States v. Concepcion, 983 F.2d 369, 389 (2d Cir. 1992).

118. *Id.* at 376.

months. Frias was still sentenced to twelve years, even though the Second Circuit ordered the trial judge to consider a downward departure from the original sentence of approximately twenty years. Similarly, in *United States v. Lombard*, the defendant was given a life sentence for a firearm offense based on a murder that he had been acquitted of in state court.[119]

It is true that acquittals may not indicate a jury's belief of actual innocence but, rather, an inability to agree on guilt or the requisite burden of proof. Overriding jury verdicts in this manner diminishes the public's trust in the judicial system and the integrity of their decisions. Moreover, the Framers found the jury right so important it is mentioned in no fewer than three places in the Constitution.[120] In fact, the fight for the right to jury trial was a factor leading to the American Revolution.[121] The role of the jury has unfortunately become a "shadow of its former self,"[122] with sentencing practices placing increasing power in judges, despite constitutional jury provisions which suggest that the jury was intended to be the main vehicle for deciding a judgment.[123] In our current system, a judge can impose additional years of punishment or lifetime registration requirements and other collateral consequences, even if the jury acquits on the relevant charge.[124]

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119. United States v. Lombard, 102 F.3d 1, 2 (1st Cir. 1996) (affirming sentence on appeal from remand). The appellate court first vacated sentencing and remanded to the district court to consider a downward departure, disturbed by the sentencing enhancement becoming the tail wagging the dog. United States v. Lombard, 72 F.3d 170, 172 (1st Cir. 1995). On remand, the district court acknowledged it was aware it could depart downward but declined to do so. The second panel affirmed the district court's decision.

120. *See* U.S. CONST. art. III § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); U.S. CONST. amend. VII ("The right of trial by jury [in civil cases] shall be preserved . . . ."); AKHIL R. AMAR, THE BILL OF RIGHTS: CREATION & RECONSTRUCTION 83 (1998).

121. The Declaration of Independence condemned the Crown for "depriving us, in many cases, of the benefits of trial by jury" and "transporting us beyond Seas to be tried for pretended offenses," while protecting government officials "by a mock Trial" (i.e., without local juries) for murders they committed against the colonists. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776), *cited by* Roger Roots, *The Rise and Fall of the American Jury*, 8 SETON HALL CIRCUIT REV. 1, 3 (2011).

122. AMAR, *supra* note 120, at 83.

123. *See* Roots, *supra* note 121, at 5.

124. Judicial fact-finding can also have severe collateral consequences for offenders. Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 963 (2013). Because these collateral consequences—like losing housing, being deported, or lifetime registration consequences—are not considered "punishment" for Sixth Amendment purposes, they do not have to come before a jury. In *People v. Mosley*, 116 Cal. Rptr. 3d 321, 322 (Ct. App. 2010), *invalidated by* 247 P.3d 515 (Cal. 2011), a California trial court found that defendant Mosley was subject to register as a sex offender based on the trial court's own factual findings. The jury had acquitted Mosley of any sexual offense and found him guilty only of misdemeanor assault. *Id.* Yet the court ordered the defendant to register based upon its own factual findings about his motivations. While the appellate court reversed the trial court's imposition of registration, the case is currently on appeal to the California Supreme Court. In the meantime, other trial courts have imposed registration requirements without

This is not to say that judges should not consider relevant conduct and offender characteristics in sentencing defendants. After *Booker*, a district court retains the flexibility to vary from the guideline ranges "to individualize sentences where necessary," and to tailor the sentence in light of statutory concerns other than the advisory guidelines.[125] Indeed, this flexibility is one of the great benefits of a system with advisory guidelines. An advisory guideline system can work to the benefit of defendants, allowing judges to consider treatment, rehabilitation, and lower sentences when the offender's characteristics urge consideration of such a sentence. *Booker*, however, recognized that the flexibility of an indeterminate system had to be balanced with some level of uniformity.[126] The Supreme Court made clear that the application of a reasonableness standard by appellate courts was intended to further the statutory objectives of achieving "honesty," "uniformity," and "proportionality" in sentencing and help avoid "excessive sentencing disparities."[127]

The question becomes how to separate judicial discretion from judicial overreach in sentencing. The *Fitch* and *Concepcion* opinions are instructive in this regard because the courts go beyond the consideration of relevant conduct. Together the cases highlight two different but interrelated problems, implicating the Fifth and Sixth Amendments. The Fifth Amendment provides, in relevant part, that no one will lose life or liberty without due process of law.[128] Due process includes both a substantive component, which prohibits arbitrary interference with a person's fundamental rights, and a procedural component, which ensures that there will be sufficient notice and process before any infringement of rights.[129] Due Process ensures that charges be proven beyond a

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a requisite jury finding. *See In re S.W.*, G042321, 2010 WL 3760256 (Cal. Ct. App. Sept. 28, 2010). Such results are not restricted to California alone. *See* State v. Chambers, 138 P.3d 405 (Kan. Ct. App. 2006) (defendant convicted of burglary and ordered to register under the Kansas Offender Registration Act as a sex offender); State v. Young, 183 P.3d 860 (Kan. Ct. App. 2008) (defendant convicted of aggravated assault, state did not furnish additional information on whether the crime was sexually motivated, ordered to register). It is not that the judicial finding of discretionary registration is always inappropriate. Rather, imposing discretionary registration may be inappropriate when a jury has acquitted a defendant of sexual conduct, in the same way that imposing additional years of punishment based on judicial fact-finding in *Concepcion* was inappropriate.

125. United States v. Booker, 543 U.S. 220, 264–65 (2005).

126. *Id.* at 224.

127. *Id.* at 264 (quoting U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 cmt. (2004)).

128. U.S. CONST. amend V.

129. Substantive due process prohibits governmental conduct that either (a) interferes with rights that are deemed fundamental or (b) "shocks the conscience." United States v. Salerno, 481 U.S. 739, 746 (1987) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)). Procedural due process requires that such government action be implemented in a fair manner. *Id.* (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). Procedural due process also requires notice and the opportunity to be heard prior to depriving a person of his or her protected property interest. Wolf v. Fauquier Cnty. Bd. of Supervisors, 555 F.3d 311, 323 (4th Cir. 2009); Ardito v. Providence, 263 F. Supp. 2d 358, 368 (D.R.I. 2003); Bluitt v. Houston Indep. Sch. Dist., 236 F. Supp. 2d 703, 733 (S.D. Tex. 2002).

reasonable doubt;[130] however, the sentencing phase is distinct from trial and defendants do not receive the "full panoply of due process rights"[131] that they are entitled to during trial.[132]

Under the Sixth Amendment jury right, an individual should not be punished for an uncharged offense just because he has been convicted of another offense. The Sixth Amendment, as interpreted by *Booker*, stands for the proposition that any fact used to impose a sentence longer than the longest sentence supported by the jury finding or guilty plea must be proved to a jury or admitted by the defendant.[133] In *Fitch*, the issue manifested when the government failed to indict or convict the defendant of murder, until he was in front of the sentencing judge. In *Concepcion,* the judge contravened the jury's ruling, acquitting Frias by imposing punishment for the drug charge anyway. What is disturbing about both scenarios is not that the judge considered background information beyond the conviction, but that a new, uncharged, or acquitted offense was brought up at sentencing—without the due process and notice guarantees of the Fifth Amendment. Additionally, this uncharged conduct

130. Patterson v. New York, 432 U.S. 197, 210 (1977) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense."); *In re* Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

131. *See, e.g.*, United States v. Mobley, 956 F.2d 450, 455 (3d Cir. 1992) (explaining that defendants receive the "full panoply" of due process rights at trial but not at sentencing); *see also Patterson*, 432 U.S. at 214 (holding that the applicability of the reasonable doubt standard is dependent on how a State defines an offense); McMillan v. Pennsylvania, 477 U.S. 79, 92 n.8 (1986) ("[S]entencing courts have always operated without constitutionally imposed burdens of proof."); *Winship*, 397 U.S. at 363 (holding that elements must be proven beyond a reasonable doubt).

132. Depending on the circuit, a defendant is not required to have notice as to whether a judge will vary upward from the guideline recommendation. Before *United States v. Booker*, sentencing courts were mandated to impose sentences that fell within the sentencing ranges assigned by the Guidelines, unless a specified exception existed. 543 U.S. 220, 259 (2005). When a sentencing court found such an exception, and added or subtracted from a guideline calculation, based on a specific Guideline departure provision, the court was said to be engaging in a "departure" from the Guidelines. *Id.* In contrast, "variances" are discretionary changes to a guidelines sentencing range, based on a judge's review of all the 18 U.S.C.A. § 3553(a) factors. United States v. Brown, 578 F.3d 221, 225–26 (3d Cir. 2009). Additionally, defendants do not have a constitutional right to an evidentiary hearing, which may be provided at the sole discretion of the judge. *Sentencing Guidelines*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 721, 774 (2012); *see, e.g.*, United States v. Sabhnani, 599 F.3d 215, 257–58 (2d Cir. 2010); United States v. Quintero, 618 F.3d 746, 753 (7th Cir. 2010); United States v. Cotto, 347 F.3d 441, 442 (2d Cir. 2003); United States v. Perez, 526 F.3d 1135, 1138–39 (8th Cir. 2008); United States v. Berry, 258 F.3d 971, 976 (9th Cir. 2001); United States v. Rowe, 202 F.3d 37, 41 (1st Cir. 2000); United States v. Love, 134 F.3d 595, 606 (4th Cir. 1998); United States v. Gines, 964 F.2d 972, 978 (10th Cir. 1992); United States v. Parson, 955 F.2d 858, 873 (3d Cir. 1992); United States v. Pologruto, 914 F.2d 67, 69 (5th Cir. 1990). *But see, e.g.*, United States v. Greene, 41 F.3d 383, 386 (8th Cir. 1994) (finding that an evidentiary hearing was required when defendant objected to alleged factual inaccuracies in presentence report because court is required to make finding on dispute based on evidence unless court states it will not take disputed fact into account).

133. *Booker*, 543 U.S. at 244.

proceeded to drive the ultimate sentence, violating the Sixth Amendment as well. The challenge arises in line-drawing to permit suitable judicial discretion while cabining the ability of judges to punish uncharged and acquitted conduct.

IV.
CHALLENGES: JUDICIAL DISCRETION AND LINE-DRAWING

Maintaining the balance between the jury and judge is essential to the functioning of our judicial system. In *Blakely v. Washington*, the Court, recognizing and protecting the jury's role in finding an aggravating factor, acknowledged, "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."[134] Juries bring fresh eyes and a multiplicity of views to judging the defendant's case, tend to be more diverse than the judiciary, and may be better able to represent the conscience of the community.[135] Some scholars have gone as far as suggesting that the logical (and preferred) extension of *Apprendi* is jury sentencing in non-capital cases.[136]

The proposition of jury sentencing, however, goes too far in ignoring the relative competencies of judges and juries. First, trial courts are well-positioned to use their "vantage point and day-to-day experience" to compare the defendant's criminality to other defendants who have come before the court.[137] Second, if the concern is greater variability in sentencing, then studies suggest that jury sentencing would create greater variability, perhaps reflecting the relative inability of juries to situate a case since they have no way to be aware of

134. Blakely v. Washington, 542 U.S. 296, 308 (2004).

135. English writer and philosopher G.K. Chesterton wrote, in 1909, about the fresh eyes juries provide: "[T]here shall upon every occasion be infused fresh blood and fresh thoughts from the streets. . . . Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men." G.K. CHESTERTON, TREMENDOUS TRIFLES 85–86 (1909). *See also* Lisa E. Alexander, *Vicinage, Venue, and Community Cross-Section: Obstacles to a State Defendant's Right to a Trial by a Representative Jury*, 19 HASTINGS CONST. L.Q. 261, 261 (1991) ("'The jury's legitimacy has always rested in its capacity to express fairly the community's conscience . . .' [by acting] . . . as a buffer between government and defendant." (quoting JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 9 (1977))); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314 (2003); Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1776 (1999); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 919 n.192 (1999) ("[F]ederal judges tend to fit a certain profile (white men over the age of 50), the jury potentially reflects a much more diverse group.").

136. *See Booker*, 543 U.S. at 265–65; Vikram David Amar, *Implementing an Historical Vision of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines*, 47 S. TEX. L. REV. 291, 294 (2005).

137. This reasoning also explains why district courts are given deference in sentencing by appellate courts. *See* Koon v. United States, 518 U.S. 81, 98 (1996).

the larger framework of cases that exist.[138] Additionally, turning over sentencing to juries would not necessarily cure the sentencing issue highlighted here nor require prosecutors to bring "uncharged" conduct to the jury during the guilt phase of the case. Even if a jury were deciding Fitch's sentence, for example, there is nothing preventing a prosecutor from delaying mention of the murder until the sentencing phase, when the jury could punish Fitch for the "uncharged" conduct under a lower burden of proof.

An appellate review of reasonableness would be difficult, if not impossible. The jury is often described as the black box of the judicial system,[139] and part of the jury's strength is the ability to make a decision, while knowing that it is protected and inscrutable. Review of a jury's sentence could likely focus only on the extent of the divergence from a guideline sentence, not on the reasons why the divergence exists.

Judicial discretion is an inescapable aspect of legal decision-making. The Court has instructed lower courts in *Apprendi*, and now *Alleyne*, that it is the jury's role, rather than the judge's, to find any facts that lead to the mandatory minimum or maximum of the statutory range. The Court has also been attentive in applying the *O'Brien* factors when examining whether a statutory provision is intended to be an element or a sentencing factor.[140] When the risk of unfairness is too high, the Court has opted to preserve the jury's function in that respect.[141] However, the Court has not articulated a similar test for sentencing enhancements under the Guidelines, which can influence a sentence as much, if not more, than statutory provisions.[142]

I would like to propose a test the courts should use in these circumstances. When it is difficult to discern the constitutionality of considering uncharged conduct courts should conduct an *O'Brien*-like test. The *O'Brien* factors, intended for statutory interpretation, are not perfectly suited for an analysis of sentencing enhancements. However, two of the five factors in the *O'Brien* test, "risk of unfairness" and "severity of the sentence,"[143] are similar to factors that courts can use to examine enhancements.

More specifically, courts should first consider the nexus between the sentencing factor and the charges affirmed by the jury's verdict (or pled to by the defendant). Second, courts should consider the "severity of the sentence" or, in other words, the length the sentence has been increased because of the

138. *See, e.g.*, Charles W. Webster, *Jury Sentencing—Grab-Bag Justice*, 14 SW. L.J. 221, 226 (1960); Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 30–32 (1994).

139. Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1049 (1991).

140. *See supra* Part I(D).

141. *See, e.g.*, Jones v. United States, 526 U.S. 227, 227 (1999); Castillo v. United States, 530 U.S. 120, 131 (2000).

142. *See supra* Part II(B).

143. *See* United States v. O'Brien, 560 U.S. 218, 225 (2010).

enhancement.[144] An analysis of a sufficient nexus must come first because, if no connection exists between the uncharged conduct and the charged offense, it would be unfair to impose even an incremental increase in sentencing. Once a "sufficient nexus" is established, the court should consider the quantity of the increase (in both proportional and absolute terms). Even if a sufficient nexus exists, a sentencing enhancement cannot be the main basis of the sentence.[145]

District courts should use this analysis, further clarified below, to help determine whether a sentencing enhancement is appropriate to impose. For appellate courts, this would create much-needed guidance to conduct a reasonableness review. Most importantly, these factors already exist in the Supreme Court's jurisprudence, within the principles that: 1) a defendant cannot be charged with one crime and sentenced for another, even if it is within the statutory range, and 2) a sentence cannot be the tail the wags the dog. Thus, sentencing enhancements should be subject to an analysis similar to the inquiry the Court conducts in examining whether a fact is an element or a sentencing factor. This framework makes clear that: 1) considering acquitted conduct should be categorically impermissible, 2) the uncharged conduct considered must bear a sufficient nexus to the charged offense, and 3) the extent of the deviation from the Sentencing Guidelines must be reasonable on both a relative and absolute scale.

A. Analysis

1. Clear Cases

Alleyne and *Apprendi* suggest that some uncharged facts are so-called "clear cases," in which no weighing of factors is needed to determine that they *must* go to the jury. Recall that *Alleyne* and *Apprendi* create a meta-factor in the Court's jurisprudence, where the Court has stated no evaluation of any factors (the *O'Brien* factors) is necessary. This is because *Alleyne* and *Apprendi* discuss situations where the jury has not authorized the punishment being sought by the sentencing enhancement. In addition to minimums and maximums, I would argue that acquitted conduct falls into this category. Acquitted conduct is analogous to the situations in *Alleyne* and *Apprendi*, in which no examination of factors—no *O'Brien*-like test—is necessary, because the punishment for acquitted conduct is not authorized by the jury's verdict.[146]

144. The sufficient nexus step would help spell out for courts what a "risk of unfairness" might entail in the sentencing enhancement context.

145. A sentencing scheme in which the enhancement has a disproportionate impact on the sentence or essentially "creates a separate offense calling for a separate penalty" can be fairly characterized as the "tail that wags the dog" of the substantive offense. *See* McMillan v. Pennsylvania, 477 U.S. 79, 80 (1986).

146. The language from *Apprendi* reads, "[i]t does not matter how the required finding is labeled but whether it exposes the defendant to a greater punishment than that authorized by the

2. Sufficient Nexus

As the law currently stands, a trial court may consider both uncharged and acquitted conduct that is proven by a preponderance of the evidence.[147] The Sentencing Guidelines' relevant conduct provisions require consideration of "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" and "all harm that resulted from the acts and omissions."[148] According to the commentary, offenses constitute a common scheme or plan if they are "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi."[149] As we know from the example of Juan Duran, and the cases of *Fitch* and *Concepcion*, "at least one common factor" is not sufficient to show that a charged offense and an uncharged offense are "substantially connected."[150] Both Duran and Fitch had common victims, but the uncharged acts were distinct crimes. The Sentencing Guidelines' relevant conduct provisions fall short in protecting defendants' due process rights.

In 2000, the Sentencing Guidelines were amended to add section 5K2.21 in order to address a circuit conflict "regarding whether a court could base an upward departure on conduct that was dismissed or not charged as part of a plea agreement in the case."[151] Section 5K2.21 states:

> The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for

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jury's verdict, as does the sentencing 'enhancement' here." Apprendi v. New Jersey, 530 U.S. 466, 467 (2000).

147. *See* United States v. Watts, 519 U.S. 148, 157 (1997) ("[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence.").

148. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A) (2013).

149. *Id.* § 1B1.3 cmt. n.9(A). The commentary further states that:

> [O]ffenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity.

Id. § 1B1.3 cmt. n.9(B).

150. *Id.* § 1B1.3 cmt. n.9(A).

151. *Id.* § 5K2.21 (2013).

> any other reason; and (2) that did not enter into the determination of the applicable guideline range.[152]

Even with this amendment, section 5K2.21 does not clarify whether a factual relationship is required between the uncharged or dismissed charges and the offense of conviction. Certain circuits, however, have required a stronger factual relationship.[153] For example, in *United States v. Kim*, a Second Circuit panel emphasized that a temporal connection between charged and uncharged conduct is insufficient.[154] The panel provided the example of a defendant committing fraud and engaging in a barroom brawl with someone having no connection to the fraud.[155] The panel expressed that the Commission did not intend such conduct to be taken into account.[156]

Other circuits, like the Fifth Circuit, have rejected the "stringent reading" of section 5K2.21 that "[u]pward departures are allowed only for acts of misconduct not resulting in conviction, as long as those acts . . . relate meaningfully to the offense of conviction."[157] Allowing a remote connection to suffice permits a backdoor method of prosecuting a case. Prosecutors can essentially prosecute a defendant for a crime without charging it, or even worse—charge an offense, have a jury acquit the conduct, and punish the defendant anyway without the protections of a plea or trial offer.[158] There is little incentive to charge an offense that is more complicated to prove (or more difficult to have the defendant plead to), if you can bring it up in sentencing and

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152. *Id.* app. C (2000).

153. *See* United States v. Ellis, 419 F.3d 1189, 1193 (11th Cir. 2005) (finding that defendant could not be subject to upward departure for witness tampering and suspected civil rights violations where guilty plea was for making false statement to FBI); *see also* United States v. Smith, 267 F.3d 1154, 1164 (D.C. Cir. 2001) ("[T]he conduct forming the basis for the departure must be descriptively or logically, and not merely temporally, connected to the crime for which the defendant was actually convicted."). However, the Eighth and Fifth Circuits have stated that "even a remote relationship will suffice." United States v. Rogers, 423 F.3d 823, 828 (8th Cir. 2005) (affirming a severe upward departure for physical injury and extreme conduct based on two counts of possession of child pornography); *see also* United States v. Newsom, 508 F.3d 731, 734–35 (5th Cir. 2007) (finding a sufficient connection between a charged explosives offense and uncharged drug and firearms offenses).

154. United States v. Kim, 896 F.2d 678, 683 (2d Cir. 1990).

155. *Id.*

156. *Id.*

157. *Newsom*, 508 F.3d at 735 (declining to adopt the "stringent reading" of section 5K2.21, that "upward departures are allowed only for acts that relate meaningfully to the offense of conviction" (quoting United States v. Amirault, 224 F.3d 9, 12 (1st Cir.2000))).

158. Another way to frame the issue is that prosecutors "wrest considerable discretion from the trial court." United States v. Skodnek, 933 F. Supp. 1108, 1111 (D. Mass. 1996). In *Skodnek*, the trial court commented that, "even in making charging decisions, prosecutors may decide what claims to expose to the most strenuous trial standard, beyond a reasonable doubt, and what claims to expose to the most minimal standard, more probable than not, what allegations to test by the standards required by the Bill of Rights, and what allegations to expose to less searching review." *Id.* at 1111–12.

urge the judge to punish the offense as if the crime had been charged.[159] It is much easier to bring something up during sentencing where there is a lower burden of proof and no jury. In sharp contrast to the preponderance of the evidence standard, the reasonable doubt standard requires the fact-finder to enter "a subjective state of near certitude of the guilt of the accused."[160] The rules of evidence need not apply; the sentencing courts may consider hearsay, so long as the court is satisfied that it has other adequate indicia of reliability.[161] Thus, the Guidelines seem to permit, and even incentivize, prosecutors to use uncharged conduct in sentencing, instead of securing the same sentence through the trial process.

When remote connections guide sentencing decisions, this practice contravenes the Commission's "carefully explained compromise between 'charge offense' sentencing and 'real offense' sentencing."[162] As the Second Circuit explained, if a "sentencing judge could make an upward departure for any act of misconduct, regardless of relationship to the offense of conviction . . . [t]hat approach would be pure 'real offense' sentencing, not the 'modified real offense' system the Commission adopted."[163] Recall Justice Breyer's warning that, if a system closer to a pure "real offense" system were adopted, sufficient procedures would also have to be adopted.[164] These are procedural protections that the current sentencing system does not have in recognition of the fact that the most significant determination affecting the defendant's sentence should have already taken place.

A real case example that demonstrates the shortfall of a remote connection standard is *United States v. Newsom*.[165] In *Newsom*, the defendant became involved in a plan to steal explosives from his friend's employer.[166] When agents searched Newsom's home, they did not find any explosives, but they did find six firearms that were completely unrelated to the explosives scheme.[167] Newsom violated his parole by possessing these firearms.[168] Newsom agreed to cooperate and helped the agents find the stolen explosives.[169] Despite Newsom pleading guilty to "aiding and abetting the theft of explosive materials in

159. Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1379 (1997) ("[M]any commentators conclude that this creates a strong incentive for prosecutors to nullify constitutional process guarantees and subject weak cases most in need of rigorous examination to testing under the relaxed procedures prevailing at sentencing.").

160. Jackson v. Virginia, 443 U.S. 307, 315 (1979).

161. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) (2013).

162. United States v. Kim, 896 F.2d 687, 683 (2d Cir. 1990).

163. *Id.*

164. *See* Breyer, *supra* note 34, at 10.

165. United States v. Newsom, 508 F.3d 731 (5th Cir. 2007).

166. *Id.* at 732.

167. *Id.* at 732–33.

168. *Id.* at 732.

169. *Id.*

interstate commerce," the sentencing judge considered the firearms and sentenced Newsom to double what the guidelines recommended.[170] Newsom's situation is a stark example of a court sentencing for conduct unassociated with the underlying offense, simply because the court found a "remote connection" between the uncharged conduct and the underlying conviction.

Not all relevant conduct is created alike. Under the Court's doctrine, relevant conduct falls along a spectrum because it is difficult to draw the line at the margins. At one end of the spectrum is the consideration of acquitted conduct, which is easier to identify as violating the Sixth Amendment and therefore easier to set aside within the sentencing context. Although the Supreme Court has sanctioned the consideration of acquitted conduct with its decision in *United States v. Watts*,[171] many judges in the federal system have called into question the continued validity of *Watts*. These judges believe, post-*Booker*, that sentencing based upon acquitted conduct is unconstitutional;[172] "to consider acquitted conduct trivializes 'legal guilt' or 'legal innocence'—which is what a jury decides—in a way that is inconsistent with the tenor of the recent case law."[173] The American Bar Association, American Law Institute, and many states have recognized that sentencing based on acquitted conduct is an affront to the Sixth Amendment.[174] Scholars reviewing the use of acquitted conduct in sentencing have predicted that acquitted conduct is "the next major front in the sentencing battle."[175] *Alleyne* increases the tension between *Watts*, which

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170. *Id.*

171. United States v. Watts, 519 U.S. 148 (1997).

172. *See, e.g.*, United States v. Faust, 456 F.3d 1342, 1352 (11th Cir. 2006) (Barkett, J., specially concurring) ("When a sentencing judge finds facts that could, in themselves, constitute entirely free-standing offenses under the applicable law—that is, when an enhancement factor could have been named in the indictment as a complete criminal charge—the Due Process Clause of the Fifth Amendment requires that those facts be proved beyond a reasonable doubt."); United States v. Coleman, 370 F. Supp. 2d 661, 671 (S.D. Ohio 2005) ("[T]he jury's central role in the criminal justice system is better served by respecting the jury's findings with regard to authorized and unauthorized conduct.") (emphasis omitted).

173. United States v. Pimental, 367 F. Supp. 2d 143, 152 (D. Mass. 2005).

174. *See* United States v. White, 551 F.3d 381, 394 (6th Cir. 2008) (Merritt, J., dissenting); State v. Cote, 530 A.2d 775 (N.H. 1987) (finding that a trial court may not consider criminal conduct for which the defendant was acquitted for purposes of sentencing and stating that it is "disingenuous at best to uphold the presumption of innocence until proven guilty . . . while at the same time punishing a defendant based upon charges in which that presumption has not been overcome") (citation omitted); People v. Black, 821 N.Y.S.2d 593, 595 (N.Y. App. Div. 2006) (finding resentencing required on the weapons possession count because the trial court erroneously relied on the counts of which defendant was acquitted in making its sentencing determination); NORA V. DEMLEITNER, DOUGLAS BERMAN, MARC MILLER & RONALD F. WRIGHT, SENTENCING LAW AND POLICY 284 (2d ed. 2007). A handful of states permit the consideration of acquitted conduct at sentencing. *See* State v. Leitner, 646 N.W.2d 341 (Wis. 2002); State v. Huey, 505 A.2d 1242 (Conn. 1986); State v. Woodlief, 90 S.E. 137 (N.C. 1916).

175. *See* Steven G. Kalar & Jon M. Sands, *An Object All Sublime—Let the Punishment Fit the Crime*, CHAMPION, Mar. 2008, at 27 (reviewing *Gall* and *Kimbrough* and predicting that acquitted conduct is "the next major front in the sentencing battle"); *see also* United States v. Ibanga, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) ("Sentencing a defendant to time in prison for a

condones the consideration of acquitted conduct, and the current trajectory of the Court's jurisprudence, which emphasizes the role of the jury's verdict in authorizing the sentence. In light of these rulings, the continued use of acquitted conduct allows the jury's determination to be ignored and circumvented. Drawing the line at acquitted conduct is relatively easy compared to evaluating uncharged conduct.

On the other end of the spectrum, there is uncharged conduct that does not implicate constitutional considerations. The Committee on Federal Criminal Procedures of the American College of Trial Lawyers ("Committee"), in proposing changes to the Sentencing Guidelines in 2001, noted that most Chapter Three adjustments and many specific offense characteristics in Chapter Two comfortably fit the description of "enhancements."[176] The three factors used to evaluate whether an adjustment of characteristics should be classified as an enhancement are whether it (1) was not defined in congressional statutes as a crime in and of itself, (2) in common-sense terms, reflected the "manner" in which the offense of conviction was committed, and (3) was limited in extent.[177] While the third factor pertains to the deviation of the increase of the sentence, a subject taken up in the next section, the first two factors are good indicators that the relevant conduct bears a sufficient nexus to the charged offense. And while the Committee's factors provide a useful road map, an examination of the way "sufficient nexus" is already being used in the case law is instructive for understanding what adjustments must be made to the current use of the standard.

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crime that the jury found he did not commit is a Kafka-esque result."); James J. Bilsborrow, *Sentencing Acquitted Conduct to the Post*-Booker *Dustbin*, 49 WM. & MARY L. REV. 289, 292 (2007) (arguing that the Supreme Court's recent Sixth Amendment jurisprudence has rendered the use of acquitted conduct in sentencing unconstitutional); Farnaz Farkish, *Docking the Tail That Wags the Dog: Why Congress Should Abolish the Use of Acquitted Conduct at Sentencing and How Courts Should Treat Acquitted Conduct After* United States v. Booker, 20 REGENT U. L. REV. 101, 121–23 (2008) (proposing that the use of acquitted conduct in sentencing should be abolished through legislative reform, and suggesting ways for federal courts to avoid such use in the interim); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1714 (1992) (noting that most "ordinary citizens . . . are astonished to learn that a person in this society may be sentenced to prison on the basis of conduct of which a jury has acquitted him"); Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 182–83 (1996) (stating that the use of acquitted conduct in sentencing undermines the Fifth and Sixth Amendments' underlying policies); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 243 (2009) (arguing that federal judges should use the discretion afforded to them by *Booker*, *Gall*, and *Kimbrough* to reject the use of acquitted conduct in sentencing).

176. Comm. on Fed. Criminal Procedures of the Am. Coll. of Trial Lawyers, *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1463, 1480 (2001).

177. *Id.* For illustrations of such enhancements, see, for example, U.S. SENTENCING GUIDELINES MANUAL § 2E5.1(b)(1) (1998) (mandating a two-level increase if defendant was a fiduciary); *id.* § 3B1.1 (mandating a two- to three-level increase for aggravating role in the offense). Section 3C1.1, however, provides for a two-level increase for obstruction of justice—clearly a separate crime. *Id.* § 3C1.1 (1998).

The language of 'sufficient nexus' can be credited to the First Circuit,[178] which has been slightly more attentive than others to what types of uncharged relevant conduct can be considered. In *United States v. Castellone*,[179] the First Circuit overturned a sentence because the sentencing judge had erroneously factored in the amounts of marijuana sold by a coconspirator, unbeknownst to the defendant. The court found that the district court incorrectly ascribed to the defendant a managerial role in the offense.[180] The court first found a procedural defect, since the district court had incorrectly calculated Castellone's adjusted offense level.[181] The district court had improperly used an offense level of 16, resulting in a sentence between 21 and 27 months, whereas the correct range would likely be closer to 0 to 6 months.[182] Next, the court proceeded to review the substantive issues and found that Castellone did not have knowledge of his codefendant's marijuana sale and was not present when the sale occurred.[183] Thus, the court applied the sufficient nexus standard and found that the uncharged conduct was not adequately connected to earlier sales that Castellone had conducted.[184] The First Circuit also found the enhancement for a managerial role legally unsupportable since there was no evidence that Castellone was responsible for organizing others for the purpose of carrying out the crime.[185]

Castellone is remarkable because the First Circuit truly engaged in both procedural and substantive review.[186] The appellate court found legal error even though, as an absolute matter, the sentencing enhancement was not as high as the enhancements found to be reasonable in many other cases. Unfortunately, the First Circuit has used the sufficient nexus in less desirable ways. For example, the circuit used uncharged drug conduct from months, or years, prior to increase a defendant's sentence, allowing the uncharged conduct to drive the sentence up.[187]

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178. *See* United States v. Sklar, 920 F.2d 107, 110 (1st Cir.1990).

179. United States v. Castellone, 985 F.2d 21, 25–26 (1st Cir. 1993).

180. *Id.*

181. *Id.* at 23–24.

182. *Id.* at 24. In making its sentencing calculation, the district court should have started with a base offense level of eight (given that the amount of marijuana was around 900 grams after subtracting the third marijuana deal), increased by two levels for the firearm, and then decreased by two levels for acceptance of responsibility. Instead, the district court began with a base offense level of twelve after finding Castellone responsible for the third marijuana sale, increased the offense level by two levels for the firearm, and increased by an additional two levels for a managerial role before agreeing he was entitled to a two-level reduction for acceptance of responsibility.

183. *Id.* at 25.

184. *Id.*

185. *Id.* at 26.

186. Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 967 (2009–2010) (noting the lack of rigorous substantive reasonableness analysis across appellate courts).

187. *See, e.g.*, United States v. Young, 78 F.3d 758, 763 (1st Cir. 1996) (sentencing Young for the equivalent of 649 kg of marijuana although only 17 kg were from the charged offense); United States v. Reyes, 3 F.3d 29, 31–32 (1st Cir. 1993) (including, as relevant conduct for

The Tenth Circuit has offered glimmers of hope in its application of a "relatedness principle," which it utilized in *United States v. Allen*.[188] In *Allen*, the defendant pleaded guilty to possession of methamphetamine with intent to distribute.[189] The guidelines' range for the offense was 120 to 135 months of imprisonment. But the district court varied upward to 360 months of imprisonment, because of evidence that the defendant told a woman that he desired to kidnap, rape, and murder young girls. He also asked her to assist him in doing so and had taken preliminary steps to act on his desires.[190] Without enough evidence to prosecute Allen for attempted rape and murder, the prosecutor took a shortcut and introduced these facts at sentencing. The Tenth Circuit vacated and remanded the case, citing that the "relatedness principle" required a "strong relationship" between the uncharged conduct and the convicted offense,[191] and requested the district court to "fashion a sentence that reflects Mr. Allen's actual crime."[192] But, many courts within the Tenth Circuit have declined to extend *Allen*.[193] Given the foregoing discussion, it is clear that no particular circuit's application of a relatedness/sufficient nexus principle has worked perfectly. The variability even intra-circuit to applying its own standards only further cements the need for the Supreme Court to step in.

Determining at what point a sufficient nexus is established is not an exact science and still has its own problems. But the current system of determination does not escape the line-drawing problem. The Supreme Court would do well to shift the line up from allowing "remote connections" to "sufficient nexus," a standard that better protects the Fifth and Sixth Amendment rights of defendants. This sufficient nexus standard would encourage transparency in the charging

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calculating defendant's guideline sentencing range, transactions involving codefendant that were subsequently dropped pursuant to plea agreement).

188. United States v. Allen, 488 F.3d 1244, 1255 (10th Cir. 2007). The Tenth Circuit has been praised by other scholars as a leader among circuits for insisting upon a connection between an offense and the resulting sentence. *See, e.g.*, Gerald Leonard & Christine Dieter, *Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing*, 17 BERKELEY J. CRIM. L. 260, 288 (2012).

189. *Allen*, 488 F.3d at 1248–49.

190. *Id.* at 1245–48.

191. *Id.* at 1255.

192. *Id.* at 1262.

193. *Allen*'s principle has been cabined, if anything, to one concerning extent, rather than relatedness. "The question posed by this case, however, is not whether consideration of Mr. Allen's unrelated, unadjudicated, and dissimilar actions was improper, but whether the weight given to those actions was excessive." *Id.* at 1259, *cited in* United States v. Welch, 433 F. App'x 676, 677 (10th Cir. 2011) (affirming sentencing enhancement for assault of a marshal, where the original charge was possessing ammunition as a felon and the assault occurred en route to the pre-sentencing interview); *see also* United States v. Herget, 499 F. App'x 743, 745 (10th Cir. 2012) (distinguishing *Allen* and affirming using sadistic chat messages to enhance defendant's pornography charge); United States v. Montgomery, 550 F.3d 1229, 1237 (10th Cir. 2008) (distinguishing *Allen* and affirming enhancement for a possession of firearms charge because weapon was used in wife's suicide).

process, rather than incentivizing blindsiding defendants with uncharged conduct at sentencing.

When looking at the line-drawing problem, one might ask, why have courts not shifted the line all the way and avoided line-drawing all together? Why not submit everything to a jury? Wouldn't that ensure more due process, notice, and fairer sentencing? The dissent in *Blakely* considered this very question and reasoned why such a system would have "intolerable costs."[194] While at first glance simple determinate sentencing may have the virtue of treating like cases alike, it simultaneously fails to treat different cases differently.[195] The dissent in *Blakely* recognized that "when dramatically different conduct ends up being punished the same way, an injustice has taken place."[196] There are so many considerations in how a crime is committed—how a defendant conducts himself, what his motives were, his prior conduct, how many people were present, and what the particular damage might be. Insisting on a pure charge offense system would create a cumbersome penal code (or legislators attempting to distill all possible behavior into an offense), and it would be next to impossible to perfectly capture a defendant's conduct. And we also know that juries and judges have different competencies.[197] As long as we acknowledge a role for judges, some line-drawing is inevitable.

It is also vital to consider how a pure charge offense system would affect most cases, which end in plea bargains and not trials.[198] After *Apprendi*, sentencing scholar Stephen Bibas predicted that the rule of *Apprendi* would hurt defendants by depriving them of sentencing hearings, which were "the only hearings they were likely to have."[199] The *Apprendi* rule would also force defendants to surrender sentencing issues like drug quantity when they agree to the plea, thereby transferring power to prosecutors.[200] Because the courts read *Apprendi* far more formalistically than perhaps first predicted, defendants—within the statutory maximum—retained most of their ability to have sentencing hearings to negotiate enhancements. A sufficient nexus standard would allow defendants to retain bargaining power at sentencing hearings, while promoting notice and due process guarantees.

A pure charge system would also exacerbate the "sledgehammer justice of mandatory minimums" currently afflicting the federal court system.[201] A chorus of commentators, including a number of judges, have lamented that the threat of

194. *Blakely*, 542 U.S. at 330 (Breyer J., dissenting).

195. *See id.*

196. *Id.* at 330–31.

197. *See supra* notes 137–39 and accompanying text.

198. *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001).

199. *Id.* at 1100–01.

200. *Id.* at 1100.

201. *See* George Will, *The Sledgehammer Justice of Mandatory Minimum Sentences*, WASH. POST, Dec. 25, 2013, at A23.

high mandatory minimums are being used by prosecutors "to extort guilty pleas . . . effectively vitiating the right to a trial" and turning prosecutors into sentencers.[202] The Sentencing Commission voted unanimously in August 2013 to address concerns with mandatory minimums and advocate for Congress to reduce the severity and scope of mandatory minimums.[203] In the meantime, the reality of high mandatory minimums gives us yet another reason to reject a pure charge offense system. If *all* of a defendant's behavior had to be distilled into chargeable offenses, this might drive up the powerful threat of mandatory minimums, since even more offenses would factor into the calculation of a defendant's sentence.

Opponents of the "sufficient nexus" standard might also contend that shying away from a real offense system means that defendants will not face the full penalty for their actions. If some enhancements are off-limits, then defendants are not held responsible for the entire harm they have caused victims and society. If Newsom actually had been collecting weapons and violating his parole, shouldn't he be punished? Shouldn't Fitch and Duran be held culpable[204] for the serious harm their victims were caused by their actions?

Although it may be counter-intuitive, a more restrictive standard like sufficient nexus will better secure justice for victims. If prosecutors can no longer wait until sentencing to bring up charges disguised as relevant conduct, then they are more likely to charge it initially, allowing for defendants to be held fully to the charges at issue. Victims are better served when their harms are seen as significant enough to charge, rather than simply as "tack-ons" to the charges that are actually indicted.

Arguably, victims might be frustrated with a system that cannot hold defendants responsible for acquitted conduct when victims perceive that an acquittal was unjustified. This argument, however, fundamentally ignores the meaning of an acquittal. Punishing acquitted conduct undermines the essential values undergirding the Fifth and Sixth Amendments, allowing the jury to speak for the community and be the final and single trier of fact in a case.[205] In

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202. *See, e.g.*, *id.*

203. *See Sentencing Commission Votes to Address Mandatory Minimum Penalties*, HUFFINGTON POST (Oct. 15, 2013), http://www.huffingtonpost.com/2013/08/15/sentencing-commission-mandatory-minimums_n_3763928.html.

204. This is assuming, of course, that they were responsible for the alleged conduct. I would argue that a preponderance of the evidence standard is simply insufficient to verify the veracity of the prosecutor's serious claims in these cases. As discussed earlier in this article, this responsibility should only be placed on defendants who are charged with such conduct and have the option to go to trial, having the conduct proved beyond a reasonable doubt. Even for defendants who plead, there are benefits to early notice of the charges they are facing.

205. In *United States v. Watts*, Justices Stevens and Breyer particularly questioned the wisdom of the use of acquitted conduct in sentencing. Justice Breyer suggested that, "[g]iven the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future." 519 U.S. 148, 159 (1997) (Breyer, J., concurring). Justice Stevens was more generally critical, stating that "[t]he notion that a charge that cannot be sustained by proof beyond

entertaining this argument, we must also face the very real loss of confidence in a system that essentially overthrows jury verdicts by imposing sentences as if a guilty verdict had been reached. Second, many crimes have parallel state criminal statutes, and defendants can be (and often are) prosecuted through that channel. A reform to federal sentencing would not affect state prosecutions.

A more nuanced approach is possible—one that encourages prosecutors to consider what conduct is chargeable as an offense, and what is properly saved as an enhancement for the sentencing stage. Both victims and defendants benefit from a system that maintains aggravating factors to some degree but regulates the introduction of relevant conduct. Victims would also be taken more seriously by charging conduct initially. Defendants are afforded a number of sentencing enhancements, which can work as bargaining chips to give defendants leverage to contest some issues without exposing them to the risks of trial.[206] No parties, with the exception of prosecutors, benefit from our current system in which sentencing hearings allow for unrelated charges that lack a sufficient nexus. The higher burden and evidentiary rules of trial exist for serious uncharged conduct. Serious charges also present the greatest danger of punishment that constitutes the tail wagging the dog—punishment that is a result of sentencing enhancements instead of charged crimes.

3. Quantity of Sentence Increase

There is little to no guidance on the reasonable amount to increase a sentence based on a sentencing factor. Since *Booker* the standard of review on appeal is reasonableness;[207] however, the meaning of reasonableness is a source of much debate and discussion. In *Gall v. United States*, the Court was asked to evaluate the extent to which trial judges were required to express precise reasons for choosing a particular sentence.[208] The Supreme Court indicated that, once the district court has correctly calculated the applicable Guidelines range, the district court must make an individualized assessment based on the facts presented.[209] If the court decides that an outside-Guidelines sentence is warranted, the court must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.[210] The *Gall* Court found it "uncontroversial that a major departure should be supported by a more significant justification than a minor one."[211] And although the Supreme Court instructed courts to examine the extent of the deviation and

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a reasonable doubt may give rise to the same punishment as if it had been proved is repugnant to [constitutional] jurisprudence." *Id.* at 170 (Stevens, J., dissenting).

206. *See* Bibas, *supra* note 198, at 1164.

207. *See* United States v. Booker, 43 U.S. 220, 224 (2005).

208. *See* Gall v. United States, 552 U.S. 38, 49–50 (2007).

209. *Id.*

210. *Id.*

211. *Id.*

the justification provided for the departure, it also cautioned courts not to use a "rigid mathematical formula that uses the percentage of a departure."[212] And even though *Gall* states that major departures require a more significant justification than minor ones, appellate courts must review a sentence, "whether inside, just outside, or significantly outside the Guidelines range," under the same "deferential abuse-of-discretion standard."[213]

There is no doubt that the lack of clear instructions and mixed messages have left courts with little guidance on how to appropriately quantify a sentencing enhancement. There is a circuit split on whether a relative calculation of percentages can be used in a reasonableness review. The Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have accepted an interpretation of *Gall* that supports the use of percentages as a component of reasonableness review in federal sentencing, but the Second, Third, Fifth, Eighth, and D.C. Circuits disavow percentages.[214]

The definition of a "reasonable" increase can vary greatly, and sentences that increase the guideline by a factor of double, triple, or even quadruple have been upheld.[215] This is likely because circuits differ in how they consider the "extent of the deviation," that is, whether it should be simply an absolute calculation or also a relative one.[216] If an individual has a base offense level of eight (forging immigration documents[217]), with no criminal history, this would result in a recommended guideline range of zero to six months. A judge can impose a higher sentence after stating appropriate reasons on the record.[218] A twelve-month increase in absolute terms seems very small compared to the

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212. *Id.* at 47.

213. *Id.* at 41.

214. See Nicholas A. Deuschle, *Fun with Numbers:* Gall*'s Mixed Message Regarding Variance Calculations*, 80 U. CHI. L. REV. 1309, 1310–11 (2013), for a full discussion on this issue. Deuschle finds that the Fourth, Sixth, Ninth, and Eleventh Circuits have accepted an interpretation of *Gall* that supports the use of percentages as a component of reasonableness review in federal sentencing. *See id.* at 1311 n.13. He finds that the Second, Third, Fifth, Eighth, and D.C. Circuits disavow percentages. *See id.* at 1311 n.15. Although Deuschle does not consider the Tenth Circuit, it seems to affirm the use of percentages. *See* United States v. Herget, 499 F. App'x 743, 749 (10th Cir. 2012) (comparing a 160% increase to a 15% increase over the top of the guideline range).

215. *See, e.g.*, United States v. Manns, 491 F. App'x 77, 78 (11th Cir. 2012) (sentencing defendant to 168 months although guideline range based on offense level and criminal history category was 57 to 71 months); United States v. Wilson, 340 F. App'x 562, 563 (11th Cir. 2009) (sentencing defendant to 69 months when guideline range was 27 to 33 months); United States v. Brantley, 537 F.3d 347, 348 (5th Cir. 2008) (upholding variance, increasing sentence from a guideline range of 41 to 51 months to 180 months); United States v. Jones, 444 F.3d 430, 433 (5th Cir. 2006) (sentencing Jones to the statutory maximum prison term of 120 months, beyond the 46 to 57 month range).

216. *Supra* note 214.

217. *See, e.g.*, United States v. Zapete-Garcia, 447 F.3d 57, 58 (1st Cir. 2006).

218. *Gall*, 552 U.S. at 50 ("After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.").

average prison sentences most inmates are serving in federal prison.[219] Recall that *Gall* states that a "major departure should be supported by a more significant justification than a minor one."[220] But if a departure is only considered major if it is major in the absolute sense, then a deviation of eighteen months would require very little explanation at all, even though in relative terms it is three times higher than the highest guideline sentence.[221]

A calculus that considers only the absolute deviation leads to constitutionally defective results.[222] If only absolute increases are considered, it is more likely that punishment for an uncharged crime will slip through the cracks. One example of this issue is found in *Alleyne*, where a judge punishes a defendant for assault when a jury has only found evidence of larceny.[223] The sentencing enhancement the judge would apply in that scenario, in absolute terms, would likely be smaller than the increase the *Fitch* court found for murder. As a much more serious uncharged offense, however, from a constitutional perspective the consideration of the conduct would be no less egregious.[224] If our inquiry is whether the enhancement is the "tail that wags the dog," one must look at how big the dog is. An absolute inquiry is insufficient to see if the sentencing enhancement is unconstitutionally eclipsing the sentence.

V.
SOLUTIONS: CASE STUDIES FROM FEDERAL AND STATE COURTS

A. Makeshift Solutions by Courts

Recognizing that current federal sentencing guidelines impermissibly punish defendants for uncharged or acquitted crimes, a number of courts have already attempted to implement more sentencing protections in their courts. In *United*

219. Almost 50% of inmates are serving sentences between five and fifteen years. *Sentences Imposed*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp (last visited Jan. 26, 2014).

220. *Gall*, 552 U.S. at 50.

221. A sentence of sixty months is thirty percent longer than a sentence of forty-six months (the top of the applicable guidelines range in this case), and a thirty percent increase is large in relative terms. *See* United States v. Castillo, 695 F.3d 672, 673 (7th Cir. 2012). In contrast, the D.C. Circuit does not consider relative increases. *See, e.g.*, *In re* Sealed Case, 527 F.3d 188, 198 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("Because a nine-month additional sentence is not a particularly significant increase, there is no basis to require the District Court to give any more detailed explanation than in an ordinary outside-the-Guidelines case.").

222. In contrast, Deuschle advocates an absolute variance approach. "Absolute variance calculations both reconcile the seemingly contradictory text of *Gall* and provide fewer opportunities for manipulation and mischaracterization of Guidelines variances." Deuschle, *supra* note 214, at 1345. While acknowledging that a relative calculation may create more complications in sentencing, I would argue that Deuschle ignores the constitutional consequences of allowing an absolute variance approach to suffice. Under such an approach, uncharged conduct could very well drive the sentence.

223. Alleyne v. United States, 133 S. Ct. 2151, 2162 (2013).

224. United States v. Fitch, 659 F.3d 788, 794 (2011).

States v. Astronomo, Astronomo was indicted by a federal grand jury on one count of money laundering conspiracy and one count of attempted money laundering.[225] The government argued that, notwithstanding the allegations in the indictment, Astronomo was responsible for much more money laundering.[226] The government also wished to enhance Astronomo's sentence because he was allegedly an organizer, and his criminal history (though he had never been arrested) severely underestimated his involvement in other uncharged crimes, such as murders and assaults.[227] The court expressed concern with the requested enhancements:

> Sentencing, with more perfunctory procedures [as compared to trials and pleas], arguably should resolve the more typical sentencing issues, like the defendant's background or the significance of his formal criminal record. Not so here. Instead, I was asked to try other very serious crimes—money laundering with other suspects, murders and assaults—crimes that were not investigated, confirmed or corroborated.[228]

The court embarked upon "three days of testimony, myriad tapes and videotapes (which [she] played and replayed), and arguments of counsel" and found that all three enhancements the government requested were insufficiently supported, even under a preponderance of the evidence standard.[229] The *Astronomo* court is not alone in finding that procedural safeguards, like an evidentiary hearing with witnesses, are necessary.[230] During the pre-*Blakely* era and when faced with significant enhancements, some courts applied a clear and convincing standard of proof—closer to the standard the defendant would have been entitled to if the charge had been raised earlier and she had chosen to proceed to trial.[231]

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225. United States v. Astronomo, 183 F. Supp. 2d 158, 164 (D. Mass. 2001).

226. *Id.* at 160.

227. *Id.* at 165.

228. *Id.* at 180.

229. *Id.* at 181.

230. *See* United States v. Dean, 414 F.3d 725 (7th Cir. 2005) (reasoning that the lower court's refusal to hear testimony by a police officer at the sentencing hearing about uncharged criminal conduct was error); United States v. Sumlin, 8 Fed. App'x 575 (8th Cir. 2001) (hearsay proffered at sentencing did not bear sufficient indicia of reliability, believing that a "more probative" evidentiary hearing was warranted); United States v. Bowman, 926 F.2d 380 (4th Cir. 1991) (holding that, when the reliability of evidence is an issue at sentencing, the court should conduct an evidentiary hearing); United States v. Wright, 908 F.2d 978 (9th Cir. 1990) (remanding case for resentencing on other grounds and reminding the district court that "[a]n evidentiary hearing may . . . be the only reliable way to resolve disputed issues").

231. A number of pre-*Blakely* cases increased procedural protections for defendants. In United States v. Kikumura, 918 F.2d 1084, 1085 (3d Cir. 1990), *overruled by* United States v. Grier, 449 F.3d 558 (3d Cir. 2006), *abrogated by* United States v. Fisher, 502 F.3d 293 (3d Cir. 2007), the court of appeals held that greater procedural protections involving the standard of proof and the admissibility of evidence are required if a proposed departure from the Guidelines is so great that the sentencing hearing becomes "the tail that wags the dog" of the substantive offense.

It is heartening to observe the creative procedural solutions that judges, faced with the threat of uncharged crimes, have implemented within the confines of their courts. The law itself does not require many of these procedural safeguards. The decision of one trial court judge to hold hearings and require notice of uncharged conduct does not need to be adopted by others.[232] Furthermore, imposing a higher burden of proof during sentencing is no longer an option for district courts—the Supreme Court explicitly took away this procedural remedy in *Blakely*.[233] Procedural protections—while helpful in allowing defendants a chance to defend themselves against enhancements—do not address the substantive constitutional issue with allowing this conduct to enter the sentencing calculus in the first place. *Alleyne* suggests that certain crimes—specifically those that are distinct and separate from the crime charged—cannot be alleged for the first time in sentencing, regardless of procedural protections. These crimes must be found by the jury or resolved during the plea colloquy.

B. Solutions for the Future

This article calls for substantive, rather than simply procedural, solutions. First, in light of the Sixth Amendment case law that has developed since 1997, the Supreme Court should start by reconsidering and reversing *Witte*. Second, the Court must resolve the circuit split regarding what level of connection is necessary between uncharged and charged conduct. The "sufficient nexus" standard can help assure that sentencing enhancements comport with Fifth and Sixth Amendment protections, without completely removing judicial discretion. Third, the Court must further clarify that *Gall*'s language is best read to indicate that both an absolute and relative inquiry are necessary. It is both myopic and misguided to read *Gall* as forbidding a relative inquiry altogether, since it is the

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The Second Circuit also concurred in that approach, finding that:

> The dramatic increase in the importance of the sentencing phase in relation to the conviction stage has caused many trial judges . . . to adopt a sliding-scale burden of proof analysis at sentencing under which determinations of greater consequence are made pursuant to standards that are higher than a preponderance of the evidence, and sometimes as high as beyond a reasonable doubt.

United States v. Cordoba-Hincapie, 825 F. Supp. 485, 525 (E.D.N.Y. 1993).

232. A number of circuits have found that the district court is not required, by either the Due Process Clause or the Federal Sentencing Guidelines, to hold a full-blown evidentiary hearing in resolving sentencing disputes. *See, e.g.*, United States v. Herrera, 466 F. App'x 409, 426 (5th Cir. 2012); United States v. Galvon-Manzo, 642 F.3d 1260 (10th Cir. 2011); United States v. Phillips, 431 F.3d 86, 93 (2d Cir. 2005); United States v. Stein, 127 F.3d 777 (9th Cir. 1997); United States v. Olvera, 954 F.2d 788, 792 (2d Cir. 1992).

233. United States v. Grier, 449 F.3d 558, 570 (3d Cir. 2006) (overruling *Kikumura* because the jurisprudential basis of using a clear and convincing standard in sentencing hearings was disavowed by the Supreme Court). *See* Blakely v. Washington, 542 U.S. 296, 307–08 (2004) (*citing* McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).

relative inquiry that ultimately determines whether the enhancement has become the tail that wags the dog.

Other scholars have suggested a hard line maximum increase for uncharged conduct: "the maximum sentence should be twice the upper limit of the Guidelines range for the underlying charged offense."[234] Rather than simply theorizing if this limit would work, federal courts can look to states as laboratories of sentencing reform. In Minnesota, state courts have adopted a standard that the upper limit of a sentence should be, at most, double the presumptive sentence length, except in unusually compelling cases.[235] Minnesota has also recognized that a presumptive sentence length is necessary but not sufficient to protect defendants.[236] As mentioned above, if a sentencing increase is based on a distinctly different uncharged crime, then a sentence may still be constitutionally suspect even if it is within the guideline. Minnesota has considered this issue and has stated repeatedly that a departure cannot be based on uncharged criminal conduct. If aggravating factors are present, a district court has broad discretion to depart from a presumptive sentence.[237] But this is true only so long as the district court's departure is within proper boundaries:

> Among the boundaries identified for proper departure is that the reasons used for departing must not themselves be elements of the underlying crime. Departures cannot be based on uncharged or dismissed offenses. Departures cannot be based on conduct underlying an offense of which the defendant was acquitted. And conduct underlying one conviction cannot be relied on to support departure on a sentence for a separate conviction.[238]

Under Minnesota's Sentencing Guidelines, the "primary relevant sentencing criteria are the offense of conviction and the offender's criminal history."[239] These parameters do not mean that sentences are never approved when they go beyond the guideline. Rather, when they do, it is because of factors related to the conduct.[240] Despite adopting a deferential abuse of discretion standard,[241]

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234. Semones, *supra* note 113, at 346.

235. State v. Evans, 311 N.W.2d 481, 483 (Minn. 1981).

236. State v. Christianson, No. A13-0433, 2014 WL 1344203, at *6 (Minn. Ct. App. Apr. 7, 2014) (citing State *ex rel.* Flynn v. Rigg*,* 98 N.W.2d 79, 82 (Sup. Ct. Minn. 1959)) ("[E]ven when the district court sentences a defendant within the presumptive imprisonment range under the sentencing guidelines, it abuses its discretion if it expressly relies on a constitutionally impermissible sentencing consideration to fix the imprisonment at the upper end of that range.").

237. State v. Reece, 625 N.W.2d 822, 824 (Minn. 2001).

238. State v. Jones, 745 N.W.2d 845, 849 (Minn. 2008).

239. State v. Jackson, 749 N.W.2d 353, 357 (Minn. 2008).

240. *See, e.g.*, State v. Robideau, 817 N.W.2d 180, 186 (Minn. Ct. App. 2012) (affirming upward departure in murder sentencing because defendant intended the victim's son to be the first to find the victim's body); State v. Weaver, 796 N.W.2d 561, 571 (Minn. Ct. App. 2011) (affirming upward departure for unintentional felony murder where defendant attempted to burn victim's body after incident); State v. Yaritz, 791 N.W.2d 138, 144–50 (Minn. Ct. App. 2010) (affirming a sentence of 288 months for one count of first-degree criminal sexual conduct, where

Minnesota appellate courts have engaged in substantive review and have not been hesitant to vacate and remand sentences that are based upon impermissible factors.[242]

Minnesota has long been a pioneer in developing legally binding sentencing guidelines, and it was the first state to create a permanent and independent sentencing commission to monitor sentencing. Many states have followed the "Minnesota model" to varying degrees.[243] In contrast, the federal system offers little guidance to trial courts about what sorts of departures are appropriate. Thus, in many circuits, appellate review of substantive reasonableness has become an empty exercise. The Supreme Court has provided little useful guidance about what substantive reasonableness means, except that courts are supposed to engage in a substantive reasonableness inquiry. In fact, during the oral argument for *Gall v. United States*, Justice Scalia said, if he were sitting on a court of appeals, he would "have no idea" what would be allowed under a substantive reasonableness review if he applied the standard the Justice Department was advocating.[244] Some appellate judges have expressed frustration with the degree of deference accorded to trial court sentencing.[245] Circuits that do implement substantive reasonableness review are criticized for substituting the appellate court's judgment for the district court's without rhyme

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the presumptive sentence is 144 to 173 months, because defendant engaged in particularly cruel conduct, victim was particularly vulnerable, defendant used multiple methods of penetration, defendant exhibited a high degree of planning, and defendant used a dangerous weapon); State v. Grampre, 766 N.W.2d 347, 352 (Minn. Ct. App. 2009) (affirming upward departure based on particular cruelty in defendant's use of knife during sexual assault).

241. State v. Givens, 544 N.W.2d 774, 776 (Minn. 1996).

242. *See, e.g.*, Tucker v. State, 799 N.W.2d 583, 587–88 (Minn. 2011) (upward departure for second-degree unintentional felony murder because of defendant's failure to help victim was not justified, because failure to render aid is typical of that offense and thus did not constitute *particular* cruelty); *Jackson*, 749 N.W.2d at 357 (double durational departure for robbery not justified by nature of victim's injuries, because the harm should have been charged as third-degree assault); State v. Peterson, 329 N.W.2d 58, 60 (Minn. 1983) (uncharged evidence of defendant's uncharged sexual assaults on other victims could not justify departure).

243. Nineteen states plus the District of Columbia and the federal courts now have some form of sentencing guidelines, and Minnesota's approach has also been endorsed by the American Bar Association and in early drafts of proposed revisions of the American Law Institute's Model Penal Code. Richard Frase, *Sentencing Policy and Criminal Justice in Minnesota: Past, Present, and Future*, COUNCIL ON CRIME AND JUSTICE, http://www.crimeandjustice.org/councilinfo.cfm?pID=52 (last visited Oct. 13, 2014).

244. *See* Transcript of Oral Argument at 43, Gall v. United States, 552 U.S. 38 (2007) (No. 06-7949), *available at* http://www.supremecourt.gov/oral arguments/argument transcripts/06-7949.pdf. The view Justice Scalia reacted to was advanced by the Justice Department, an approach "giving appeals courts clear-cut authority to demand more justification from sentencing judges for sentences that fall 'significantly outside' a Guideline range, with the need for stronger reasons rising with the amount of deviation from the range."

245. *See* Cravens, *supra* note 186, at 967; *see also* United States v. Olfano, 503 F.3d 240, 245 (3d Cir. 2007); United States v. Salas-Argueta, 249 F. App'x 770, 773 (11th Cir. 2007); United States v. Grant, 247 F. App'x 749, 753 (6th Cir. 2007).

or reason.[246] At least one scholar suggests that we should get rid of substantive reasonableness review altogether and let a robust procedural reasonableness review suffice.[247]

Substantive reasonableness, however, provides an important check upon sentencing, a form of review that cannot be provided with just a procedural checklist. The Supreme Court has already suggested a number of substantive channels of review: that district courts may evaluate the extent of the sentence's deviation from the guidelines,[248] whether the § 3553(a) factors emphasized by the district court can bear the weight assigned to them,[249] and whether a policy disagreement is contributing to the sentence.[250] First, circuit courts must take initiative and utilize the tools provided to them to conduct a meaningful appellate review, similar to the *Astronomo* case.[251] Second, the courts, in conversation with the Sentencing Commission,[252] must provide more guidance—for example, by clarifying that the extent of a sentencing deviation should be a relative and absolute inquiry.

The recent Supreme Court jurisprudence, in combination with an executive branch willing to take on harsh sentencing laws, signals an opportunity to revitalize our federal sentencing regime. There is a rising recognition that the effects of sentencing on defendants' lives are just as significant as the adjudication of innocence or guilt. During the same term that the Court resolved *Alleyne*, the Court held in *Peugh v. United States* that the Ex Post Facto Clause is violated when a defendant is sentenced under new Sentencing Guideline provisions that result in an increased risk of greater punishment.[253] The Court

246. Critics include Justice Scalia. *See Gall*, 552 U.S. at 60 ("I continue to believe that substantive-reasonableness review is inherently flawed."); *see also* Cravens, *supra* note 186, at 967 ("[C]ircuit courts pay lip service to the concept [of substantive reasonableness]."); Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1 (2008) (noting that several circuits "expressly employed an 'abuse of discretion' analysis" as a proxy for reasonableness review due to confusion over what the reasonableness standard meant, even before the Supreme Court adopted the reasonableness standard in *Booker*).

247. *See* Cravens, *supra* note 186, at 966–74.

248. *Gall*, 552 U.S. at 45.

249. *See id.* at 51. The Court in *Rita v. United States* summarized the § 3553(a) factors as follows: "That provision tells the sentencing judge to consider (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing . . . ; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution." 551 U.S. 338, 347–48 (2007).

250. "[C]loser review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations even in a mine-run case.'" Kimbrough v. United States, 552 U.S. 85, 109 (2007) (quoting *Rita*, 551 U.S. at 351).

251. *More than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951, 970–71 (2014).

252. *See id.* at 965–66 ("[S]ubstantive reasonableness review is an integral component of what Congress hoped would be a feedback loop between the courts, the Sentencing Commission, and Congress.").

253. Peugh v. United States, 133 S. Ct. 2072, 2078 (2013).

noted that, while the Guidelines are advisory, judges are still required, under *Gall* and by statute, to begin their sentencing determination by correctly calculating the applicable Sentencing Guidelines range.[254] While a defendant does not have an "expectation subject to due process protection" that he will be sentenced within the Guidelines range,[255] four Justices recognized that a defendant charged with an increased punishment for his crime is likely to feel enhanced pressure to plead guilty.[256] Though the Supreme Court did not go so far as to extend this reasoning to uncharged conduct, the Court did recognize that sentencing guidelines must abide by fundamental concerns of fairness that animate the Ex Post Facto Clause.[257]

In the latter portion of the opinion, the Court in *Peugh* considered whether their ruling that Guidelines could trigger an Ex Post Facto Clause violation would trigger a Sixth Amendment violation as well.[258] The Court found Sixth Amendment concerns to be analytically distinct, but in doing so recharacterized the *Apprendi* line of cases. Instead of being solely focused on the statutory maximum, *Peugh*, like *Alleyne*, articulated that the Court's Sixth Amendment cases stood for a more general concern regarding whether "*a given finding of fact is required to make a defendant legally eligible for a more severe penalty.*"[259]

Additionally, the executive branch has remained committed to federal sentencing reform. In a speech delivered to the U.S. Senate Committee on the Judiciary, the Attorney General stated that "[a]s part of the 'Smart on Crime' approach," he was mandating "a significant change to the Justice Department's charging policies so that people accused of certain low-level federal drug crimes will face sentences appropriate to their individual conduct—and that stringent mandatory minimum sentences will be reserved for the most serious offenders."[260] While the reforms called for in this article are broader, and go beyond drug offenses, the executive branch's commitment to reform is galvanizing change in the right direction.

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254. *Id.* at 2080.

255. Irizarry v. United States, 553 U.S. 708, 713–14 (2008).

256. *Peugh,* 133 S. Ct. at 2085; *see also* Carmell v. Texas, 529 U.S. 513, 534 n.24 (2000); Weaver v. Graham, 450 U.S. 24, 32 (1981).

257. *Peugh,* 133 S. Ct. at 2084.

258. "The government's argument assumed that the Sixth Amendment and the *Ex Post Facto* Clause share a common boundary; that only where judge-found facts are the basis of a higher sentence in a manner that raises Sixth Amendment concerns can a set of sentencing rules be sufficiently determinate to run afoul of the *Ex Post Facto* Clause." *Id.* at 2087–88.

259. *Id.* at 2088 (emphasis added).

260. *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 3 (2014) (statement of Eric Holder, Att'y Gen. of the United States).

CONCLUSION

In the years following the *Apprendi v. New Jersey* decision, courts initially read the ruling narrowly—that facts determining the statutory maximum must be determined by a jury. Courts may be initially tempted to interpret *Alleyne* just as narrowly—that juries must determine the range of punishment but, within that range, judges have free reign. But the Court's reasoning in *Alleyne* indicates the decision has broader implications.

In *Alleyne*, the court explicitly noted that a defendant cannot be sentenced for one crime if the jury found facts for another. In giving importance to what offenses a jury has authorized with its verdict, rather than what *range* of punishment a jury has authorized, the Court heralded a new perspective on uncharged and acquitted conduct. The next step, of course, will be to define how and to what extent relevant conduct can be considered. This article suggests sufficient nexus and both an absolute and relative analysis of any possible increase in sentence as necessary measures. With these shifts in sentencing, *Alleyne* has the potential to revitalize federal sentencing and lead the way for much-needed reform in sentencing jurisprudence.