

Redefining a “Crime” as a Sentencing Factor to Circumvent the Right to Jury Trial: *Harris v. United States*

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The right to trial by jury is under grave threat today. From time immemorial, whether a person is guilty of a crime has been decided by one’s peers in the community. Under the United States Constitution, an accused person must be indicted by a grand jury and convicted by a petit jury of the charges beyond a reasonable doubt. However, forces are at work attempting to transfer these jury powers to the courts. By the linguistic artifice of redefining the term “crime” as a “sentencing factor,” courts are usurping the jury’s traditional fact-finding role and are dispensing with the standard of proof beyond a reasonable doubt. The following essay tells the story of how this menace to traditional American liberties is being carried out.

William Joseph Harris sold a small amount of marijuana out of his North Carolina pawnshop to undercover federal agents. As was his custom, he wore a pistol in a holster, at one point showing it to his new-found “friends.” He was arrested for, charged with, and convicted of a minor pot offense and of carrying or using a firearm during and in relation to a drug trafficking offense, which is punishable with a minimum of 5 years imprisonment. After the trial was over, he was brought in for sentencing. Under the law, if the firearm was “brandished,” the minimum prison time is seven years, but Harris was not charged with or convicted of this offense. Nonetheless, the sentencing judge found that the firearm was brandished and imposed the 7-year mandatory sentence.

The Constitution provides for several guarantees when a person is charged with a federal crime: an indictment by a grand jury must inform one of the nature of the charges, the person is entitled to a trial by jury, and the proof must be beyond a reasonable doubt.

However, if the existence of an act committed by a person is considered a “sentencing factor” and not the element of a “crime,” courts have held that these constitutional guarantees do not exist. The person must be convicted of some crime, but the sentencing factors that increase prison time need only be decided by a judge on the basis of a mere preponderance of the evidence, that is, the scales need be tipped only slightly in one direction for the fact to be found and the higher sentence imposed. In *Harris v. United States*, decided on June 24, 2002, the United States Supreme Court held that Mr. Harris had no right to be informed in the indictment that he would be accused of brandishing a firearm, no right for a jury to decide whether he committed that act, and no right that the allegation be proven beyond a reasonable doubt.¹ The court held that brandishing was a sentencing factor, not part of the definition of a crime.

Harris is a 5–4 opinion, one significant part of which was joined in only by four justices. Justice Kennedy authored the opinion of the Court with respect to Parts I, II, and IV, in which Chief Justice Rehnquist and Justices O’Connor, Scalia, and Breyer joined. Breyer did not join in Part III, making that part a plurality opinion only. O’Connor filed a concurring opinion while Breyer filed an opinion concurring in part and concurring in the judgment. Justice Thomas filed a dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined. Justice Kennedy began the opinion by noting that “Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts.”² Specifically, the Fifth Amendment provides that “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,” all elements of which must be alleged. The Sixth Amendment guarantees that “in all criminal prosecutions, the accused shall enjoy the right to trial by an impartial jury,” before which the government must prove each element beyond a reasonable doubt. None of these safeguards is required for judicial fact-finding that results in a sentence within the range provided by statute.³

¹*Harris v. United States*, 122 S. Ct. 2406 (2002), U.S. LEXIS 4652 (2002).

²*Id.* at *9.

³*Id.* at *10 (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

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However, without constitutional safeguards, “legislatures could evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor.”⁴ The Court held in *Apprendi v. New Jersey* (2000) that, other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be proven to the jury beyond a reasonable doubt.⁵ However, *McMillan v. Pennsylvania* (1986) upheld a statute providing for an increased minimum sentence where the court at sentencing, found on the basis of a preponderance of the evidence, that the defendant visibly possessed a firearm in the course of another crime.⁶ The Court in *Harris* held that the rule in *McMillan* is consistent with *Apprendi*, that is, that the jury must determine facts that increase the maximum sentence, but not facts that increase a minimum sentence.

Before examining how the Court reached this result, the facts and statute involved in *Harris* warrant explanation. 18 U.S.C. § 924(c)(1)(A)(i) punishes with a minimum of five years imprisonment any person who, during and in relation to a federal crime of violence or drug trafficking, “uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” Section 924(c)(1)(A) continues:

- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

The only fact recited by the Court was that “Harris sold illegal narcotics out of his pawnshop with an unconcealed semiautomatic pistol at his side.”⁷ However, § 924(c)(4) defines “brandish” as “to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person.” These elements are not described in the Court’s one-sentence factual description, but more factual detail is set forth in the dissenting opinion by Justice Thomas. As Thomas pointed out, the

⁴*Id.* at *10–11.

⁵*Id.* at *11 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

⁶*Id.* (citing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)).

⁷*Id.* at *11.

district court conceded that whether Harris brandished a firearm was a “close question” because “the only thing that happened here is [that] he had [a gun] during the drug transaction.”⁸ Harris routinely wore the handgun at the pawnshop, not just when “he was selling small amounts of marijuana to his friends.”⁹ The pot distribution charge here was so minor that the presentence report recommended only zero to six months incarceration.

Still more information is contained in the Fourth Circuit opinion, which the Supreme Court affirmed. During two sales of small quantities of marijuana to undercover agents at his pawnshop, Harris carried a handgun in an unconcealed hip holster and, at one point, removed the handgun and stated that it “was an outlawed firearm because it had a high-capacity magazine,” and that his homemade bullets could pierce an officer’s armored jacket.¹⁰ The Fourth Circuit rejected Harris’s arguments that this was insufficient evidence of brandishing or of carrying the handgun “in relation to” a drug trafficking offense,¹¹ but did not explain why his actions were carried out with the intent to intimidate the undercover marijuana buyers.

The two statements attributed to Harris appear to have been idle boasting, perhaps embellished by the “narcs.” High-capacity magazines do not make a firearm “outlawed”—a prohibition exists on magazines manufactured after 1994 that hold more than 10 cartridges,¹² but Harris undoubtedly possessed a legal magazine made before that date because they are in plentiful supply. It is unclear what “homemade” bullets Harris could have made that would be armor piercing,¹³ and in any event no prohibition exists on mere possession of armor-piercing ammunition.

In any event, Harris was not indicted for brandishing and the jury did not consider the issue. According to the Supreme Court opinion, the government assumed that “brandishing is a sentencing factor to be considered by the judge after the trial.”¹⁴ Quite likely, the

⁸*Id.* at *51.

⁹*Id.*

¹⁰*United States v. Harris*, 243 F.3d 806, 807 (4th Cir. 2001).

¹¹*Id.* at 812 n.7.

¹²18 U.S.C. §§ 921(a)(31), 922(w).

¹³*See* 18 U.S.C. § 921(a)(17)(A) (definition of armor-piercing ammunition).

¹⁴2002 U.S. LEXIS 4652 at *12.

government did not believe that it could prove to a jury beyond a reasonable doubt that Harris committed the act of brandishing as defined in § 924(c)(4), but pinned its hopes on the judge making that finding at sentencing on the basis of the mere preponderance-of-evidence standard. The government also had a strong interest in establishing in the courts its position about this statute, and others, undercutting the right to jury trial in favor of mere sentencing factors. Not unexpectedly, the presentence report recommended that Harris be sentenced to seven years for brandishing, the district court obliged, and the Fourth Circuit affirmed.¹⁵

The Majority Opinion

In the opinion for the Court, with which four other justices agreed, Justice Kennedy began by arguing that the “structure” of the prohibition suggests that brandishing is a sentencing factor. He states: “Federal laws usually list all offense elements ‘in a single sentence’ and separate the sentencing factors ‘into subsections.’”¹⁶ Yet even a cursory look at the federal criminal code disproves that this is “usually” the case. Indeed, the Gun Control Act itself lists most offenses in one section—§ 922—and all penalties (along with more offenses) in a separate section—§ 924. In *Castillo v. United States* (2000), the Court held 9–0 that § 924(c) includes aggravated offenses, including the use of a machine gun in a federal crime of violence, which are not mere sentencing factors.¹⁷ Ironically, the Court now cites *Castillo* as supportive of interpreting everything in § 924(c) other than the “basic” offense as sentencing factors.

Harris contends that the “basic” crime of § 924(c) is carrying or using a firearm during and in relation to a federal crime of violence or drug trafficking, after which the word “shall” prefaces the five-year sentence specified in subparagraph (i). As for brandishing and discharge found in (ii) and (iii), the Court states, “Subsections (ii) and (iii), in turn, increase the minimum penalty if certain facts are present, and those subsections do not repeat the elements from the

¹⁵243 F.3d at 812. Accord, *United States v. Barton*, 257 F.3d 433, 443 (5th Cir. 2001); *United States v. Carlson*, 217 F.3d 986, 989 (8th Cir. 2000); *United States v. Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2000).

¹⁶*Harris*, 2002 U.S. LEXIS 4652 at *15 (citing *Castillo v. United States*, 530 U.S. 120, 125 (2000)).

¹⁷*See id.*

principal paragraph.”¹⁸ Yet the elements from the principal paragraph number 112 words, which would be needlessly tedious to repeat in making brandishing an aggravated form of using a firearm. Why not just say, as the statute does in 19 words, “if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years”?

But *Harris* concedes, as it found about the carjacking statute in *Jones v. United States* (1999), that numbered subsections that “look” like sentencing factors may still be elements of an offense.¹⁹ The structure of the statute in *Jones* was identical to that in *Harris*—a basic offense, followed by “shall,” numbered subparagraphs beginning with the penalties for the basic offense, and thereafter descriptions of aggravated offenses with stiffer penalties. The structure of the statute in *Castillo* was identical except that it had no numbered subparagraphs. *Harris* seeks to distinguish amended § 924(c) as follows:

The critical textual clues in this case, however, reinforce the single-offense interpretation implied by the statute’s structure. Tradition and past congressional practice, for example, were perhaps the most important guideposts in *Jones*. The fact at issue there—serious bodily injury—is an element in numerous federal statutes, including two on which the carjacking statute was modeled; and the *Jones* Court doubted that Congress would have made this fact a sentencing factor in one isolated instance. In contrast, there is no similar federal tradition of treating brandishing and discharging as offense elements.²⁰

There was no such “federal tradition” because brandishing and discharge are traditional state and local crimes, and they were made federal crimes in the context of the recent surge to over-federalize criminal conduct. As the Court notes, “The term ‘brandished’ does not appear in any federal offense-defining provision save 18 U.S.C. § 924(c)(1)(A), and did not appear there until 1998, when the statute was amended to take its current form.”²¹ Of course, going back to

¹⁸ *Id.* at *15.

¹⁹ *Id.* at *16 (quoting *Jones v. United States*, 526 U.S. 227, 232 (1999)).

²⁰ *Id.* at *16–17.

²¹ *Id.* at *17.

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the dawn of the federal criminal code and forward, no “federal tradition” existed for each newly enacted federal crime. But that fact does not transform elements of an offense into sentencing factors. Moreover, the Court’s reasoning implies that criminal statutes with identical structures may have wholly different meanings on the basis of facts not evident from the faces of the statutes, that is, what year the prohibition was first enacted and how many similar federal statutes exist.

The Court continues: “The numbered subsections were added then [in 1998], describing, as sentencing factors often do, ‘special features of the manner in which’ the statute’s ‘basic crime’ could be carried out.”²² Serious bodily injury was the manner in which the carjacking was carried out in *Jones*, yet it was an element nonetheless. Aggravated offenses always build on lesser-included offenses and describe special features that make the crime worse.

Harris further distinguished *Jones*, where “the Court accorded great significance to the ‘steeply higher penalties’ authorized by the carjacking statute’s three subsections, which enhanced the defendant’s maximum sentence from 15 years, to 25 years, to life—enhancements the Court doubted Congress would have made contingent upon judicial factfinding.”²³ However, § 924(c)(1)(A) “does not authorize the judge to impose ‘steeply higher penalties’—or higher penalties at all—once the facts in question are found. Since the subsections alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm.”²⁴ Yet this glosses over the fact that, even though § 924(c) authorizes a life sentence in every case, the court is required to impose mandatory minimum sentences of five, seven, and ten years, respectively, depending on how aggravated the act was committed.

Moreover, *Harris* further referred to *Castillo*,²⁵ in which dramatically increased mandatory minimum sentences for firearm use jumped from 5 to 10 to 30 years, depending on the type of firearm. With the 1998 amendments, § 924(c)(1)(B) continues to provide for

²²*Id.*

²³*Id.* at *18 (citing *Jones*, 526 U.S. at 233).

²⁴*Id.* at *18–19.

²⁵*Id.* at *18 (citing *Castillo*, 530 U.S. at 131).

the same 5-, 10-, and 30-year minimum sentences if the firearms are of certain specified types. For a subsequent conviction, subpart (C) requires a 25-year minimum sentence, and life imprisonment if the firearm is of certain types. Does this mean that brandishing and discharge in (A) are sentencing factors, but that the identically structured language concerning firearm types in (B) and (C) are elements because they have dramatically harsher mandatory minimums than the basic offense of carrying or using in (A)?

The Court next turns to the issue of constitutional avoidance, under which “when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”²⁶ *Jones* applied that principle to interpret the carjacking statute as providing offense elements and not sentencing factors, to avoid resolving the issue of whether “any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”²⁷ *Harris* found the avoidance principle inapplicable, in that judicial fact-finding resulting in mandatory minimums had been approved in *McMillan*.²⁸

The Court continued: “And if we stretched the text to avoid the question of *McMillan*’s continuing vitality, the canon would embrace a dynamic view of statutory interpretation, under which the text might mean one thing when enacted yet another if the prevailing view of the Constitution later changed.”²⁹ One of the opinion’s own precepts has the same potential: When a subject is first enacted into the federal criminal code, its presence is not a “federal tradition,” so it is a sentencing factor. Does it become an element over time if the subject gains a repetitive presence in the code and becomes a “federal tradition?”

In any event, *Harris* concludes that “as a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense. The statute regards brandishing and discharging as sentencing factors to be found by

²⁶ *Id.* at *19 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

²⁷ *Id.* at *20 (citing *Jones*, 526 U.S. at 243, n.6).

²⁸ *Id.* (citing *McMillan*, 477 U.S. 79).

²⁹ *Id.* at *21–22.

the judge, not offense elements to be found by the jury.” Besides creating incongruent aspects of the statute, this conclusion leaves one wondering why Congress did not state this in the statute itself had it so intended.

Justice Kennedy’s Plurality Opinion

In Part III of the opinion, *Harris* turns to whether, as construed, the statute is unconstitutional. Only four justices agreed with this part of the opinion (Justice Breyer did not), and thus its value as a precedent is questionable. The gist of Part III is as follows:

McMillan and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* said that any fact extending the defendant’s sentence beyond the maximum authorized by the jury’s verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury’s verdict has authorized the judge to impose the minimum with or without the finding. As *McMillan* recognized, a statute may reserve this type of factual finding for the judge without violating the Constitution.³⁰

The opinion concedes that “Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt,”³¹ and that “certain types of facts, though labeled sentencing factors by the legislature, were nevertheless ‘traditional elements’ to which these constitutional safeguards were intended to apply.”³² However, as long as they are sentencing within the prescribed range, judges may determine facts that give rise to a special stigma and to a special punishment. “There is no reason to believe that those who framed the Fifth and Sixth Amendments

³⁰*Id.* at *23.

³¹*Id.* at *24 (citing *Jones*, 526 U.S. at 240–241); *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975).

³²*Id.* at *24 (citing *Patterson v. New York*, 432 U.S. 197, 211 n.12 (1977)).

would have thought of them as the elements of the crime.”³³ However, the opinion includes not a single reference to the intent of the Framers as they expressed themselves on such issues.

The plurality opinion makes exceptions to the right to jury trial on the basis of distinctions never articulated by the Framers. It first recalls the rule in *Apprendi* that 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.”³⁴ The opinion then continues: “Those facts, *Apprendi* held, were what the Framers had in mind when they spoke of ‘crimes’ and ‘criminal prosecutions’ in the Fifth and Sixth Amendments: A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict included all the facts to which the legislature had attached the maximum punishment.”³⁵ But this merely begs the question of what a “crime” is and simply states the constitutional procedures required to charge and convict a person of a crime. By contrast, *Harris* continues, facts giving rise to mandatory minimum sentences are not elements of a “crime” and thus are not subject to the requirements of indictment, jury trial, and proof beyond a reasonable doubt. The latter is the case even regarding facts that increase a mandatory minimum sentence. Once again, this does not explain why facts giving rise to the minimum sentence are not elements of a crime, but is simply an unsupported assertion that establishing these facts does not require the usual constitutional safeguards.

Harris argued that factual findings that increase a mandatory minimum may have far more impact on a defendant than factual findings that may increase the maximum sentence. This is because the judge must sentence the defendant to a mandatory minimum if the factual predicates exist, but may impose a sentence far below the maximum. This is well illustrated by § 924(c), which imposes mandatory minimums for each level of aggravation—5 years for carrying, 7 for brandishing, 10 for discharge, 30 for a machine gun, life for a machine gun with a prior conviction—but imposes no maximum sentences.

³³ *Id.* at *28.

³⁴ *Id.* at *33 (quoting *Apprendi*, 530 U.S. at 490).

³⁵ *Id.* at *33.

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Because each penalty is worded “not less than,” the maximum sentence for each offense is life imprisonment. But the standard punishment for each offense is the mandatory minimum.

The Court does not address this distinction between what the sentencing judge may do and what he or she must do, and what great impact it may have on the defendant. Instead of addressing the Framers’ policy reasons for requiring that the trial of all crimes be by jury, the opinion merely restates its rule, newly minted in this very case in the year 2002, that

If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, on the basis of facts not alleged in the indictment or proved to the jury—even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed.³⁶

For the Framers, a “crime” was bad conduct for which a legislature prescribes punishment. The grand jury described the bad conduct in the indictment, the defendant was informed of the nature and cause of the accusation, and the petit jury found beyond a reasonable doubt whether the defendant committed the acts that constituted the crime. The facts having been found, the sentencing court imposes the punishment. By contrast, for the plurality in *Harris*, a court may attribute to the legislature setting up a scheme in which one instance of bad conduct is considered the “crime” for which constitutional protections apply. All other instances of bad conduct defined by the legislature in the same section are considered exempt from the term “crime” so that constitutional protections do not apply.

The above concludes the plurality’s analysis in Part III. Part IV of the opinion simply holds: “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.”³⁷ What if the increase is 25 years, or even life? The Court’s analysis does not provide an answer to that question, but it is sure to arise in the provisions of § 924(c) regarding firearm types and subsequent

³⁶*Id.* at *39.

³⁷*Id.* at *42.

offenses, for which factual findings cause the sentences to zoom up to 30 years and even life. What is the cutoff point in years for when an increase in the minimum sentence does evade the requirements of the Constitution? Even *McMillan* conceded that the increase in sentence must not be so disproportionate that it becomes “a tail which wags the dog of the substantive offense.”³⁸ But the Constitution makes no such distinctions—for every “crime,” the indictment, jury trial, and proof-beyond-a-reasonable-doubt procedures apply.

The Concurring Opinions

Justice O’Connor filed a curt concurring opinion noting that *Jones* was the basis of Harris’s statutory argument that brandishing should be interpreted as an offense element, and *Apprendi* was the basis of her constitutional argument that brandishing must be alleged in the indictment and found by the jury. O’Connor persisted in her dissenting views in those cases that they were wrongly decided.

Justice Breyer, who had also dissented in *Jones* and *Apprendi*, wrote a concurring opinion in *Harris* but did not join in Part III. He conceded—contrary to Justice Kennedy’s opinion—that the issue in this case could not logically be distinguished from *Apprendi*, but that he disagreed with the holding in that case that facts that increase the maximum sentence must be proven to the jury. Breyer’s concurrence makes the curious policy argument that it is against the interest of defendants to treat essential facts as elements requiring proof to the jury. He wrote:

Applying *Apprendi* in this case would not, however, lead Congress to abolish, or to modify, mandatory minimum sentencing statutes. Rather, it would simply require the prosecutor to charge, and the jury to find beyond a reasonable doubt, the existence of the “factor,” say, the amount of unlawful drugs, that triggers the mandatory minimum. In many cases, a defendant, claiming innocence and arguing, say, mistaken identity, will find it impossible simultaneously to argue to the jury that the prosecutor has overstated the drug amount. How, the jury might ask, could this “innocent” defendant know anything about that matter?³⁹

³⁸ *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).

³⁹ *Harris*, U.S. LEXIS 4652, at *47–48.

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Yet defense lawyers have always tried cases by requiring the prosecution to prove every element of the offense beyond a reasonable doubt. Demonstrating a reasonable doubt that the defendant possessed the drugs is hardly incompatible with showing also that the weight of the drugs has not been proven. All elements of the alleged crime portray the defendant in a bad light before the jury, but this is hardly reason to deprive a defendant of the right to have a jury determine every element of the crime. Justice Breyer seems to suggest that it is in the interest of persons charged with crimes to deprive them of requiring proof to the jury beyond a reasonable doubt, and it is in their interest to have a sentencing judge find the required facts by a preponderance of evidence, which is likely to be on the basis of assertions in the prosecution-packed presentence report.

In this very case it is doubtful that a jury would have found, beyond a reasonable doubt, that Harris brandished a firearm in relation to drug trafficking. He did not point it at anyone, and his oral statements constituted bragging, not an intent to intimidate. Breyer does not address how his theory would apply under the facts of this case. For him, the bottom line is that *Apprendi* should not be extended to the mandatory minimum sentencing context: “Doing so would diminish further Congress’ otherwise broad constitutional authority to define crimes through the specification of elements, to shape criminal sentences through the specification of sentencing factors, and to limit judicial discretion in applying those factors in particular cases.”⁴⁰ In short, to “define crimes” means that the legislature may decide which crimes require constitutional protections, and which crimes do not by decreeing that such crimes are not crimes at all but are sentencing factors.

The Dissenting Opinion by Justice Thomas

Justice Thomas, joined by Justices Stevens, Souter, and Ginsburg, dissented in *Harris*. Thomas argued that *McMillan* should be overruled on the basis of *Apprendi*. Regarding the Court’s attempt to sever the jury role on the basis of minimum and maximum sentences,

⁴⁰*Id.* at *48–49.

Thomas wrote, “Such fine distinctions with regard to vital constitutional liberties cannot withstand close scrutiny.”⁴¹ Because the indictment and jury guarantees are effective whenever a person is charged with a crime, “this case thus turns on the seemingly simple question of what constitutes a ‘crime.’”⁴² An expansive definition is required:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact—of whatever sort, including the fact of a prior conviction—the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime on the basis of some fact that fact is also an element. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact for that entitlement is an element.⁴³

Because a finding of brandishing increases the mandatory penalty, “as a constitutional matter brandishing must be deemed an element of an aggravated offense.”⁴⁴ Imposing a special stigma and special punishment means that the conduct in question is a “crime” to which the constitutional guarantees apply. “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.”⁴⁵ Justice Thomas concluded that “there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum.”⁴⁶

On the basis of the oral argument in *Harris*, Justice Thomas wrote, “The United States concedes that it can charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury.”⁴⁷ That would have been a no-brainer in this case in

⁴¹ *Id.* at *53.

⁴² *Id.* at *54.

⁴³ *Id.* at *54–55 (quoting *Apprendi*, 530 U.S. at 501 (concurring opinion)).

⁴⁴ *Id.* at *56.

⁴⁵ *Id.* at *62.

⁴⁶ *Id.*

⁴⁷ *Id.* at *65.

that Harris could have been indicted for brandishing, although the facts suggest that a jury may not have convicted him. Thomas concluded that "it is imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements."⁴⁸ Justice Thomas's arguments did not win the day in this case, but will influence the continuing tug of war between juries and judges.

Given the actual holding in *Harris*, whether a firearm is brandished or discharged during and in relation to a federal crime of violence or drug trafficking will be decided by the court at sentencing. The issue will be whether the requirements of § 924(c)(4) are shown by a preponderance of evidence, that is, that the firearm was displayed or made known to intimidate another person. The effects of *Harris* on the rest of § 924(c), particularly the firearm types, is uncertain. Although *Harris* held that facts giving rise to increased mandatory minimum sentences are not subject to the indictment and jury guarantees, given the recent 5–4 precedents going both ways on these guarantees explained below, one may expect continued uncertainty in this area of the law.

Ring v. Arizona: The Jury and the Death Penalty

The same day that *Harris* was decided, the Court also announced the decision in *Ring v. Arizona*,⁴⁹ which held that, in death penalty cases, the jury must make the factual determinations that authorize imposition of the death sentence. This was a logical application of *Apprendi*, given its holding that fact-findings that increase the maximum sentence must be found by the jury. It seems ironic that the Court would render a decision curtailing the right to jury trial and the same day render another decision expanding that right. A brief analysis of *Ring* is in order.

In Arizona, a jury could find one guilty of first-degree murder, but the judge determined whether aggravating factors defined by law existed so as to warrant the death penalty. The Court previously held that these were sentencing factors that could be found without the Sixth Amendment jury guarantee.⁵⁰ *Ring* overruled that previous

⁴⁸*Id.* at *65–66.

⁴⁹*Ring v. Arizona*, 2002 U.S. LEXIS 4651 (2002).

⁵⁰*Walton v. Arizona*, 497 U.S. 639 (1990).

decision in light of *Apprendi*, commenting, “Capital defendants, no less than noncapital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”⁵¹

The evidence heard by the jury against Timothy Ring did not prove beyond a reasonable doubt that he was a major participant in the armed robbery or that he actually murdered the victim. The evidence connected him to the proceeds but not to the crime scene. At the sentencing hearing, however, the judge heard evidence from an accomplice that Ring personally murdered the victim, an aggravating circumstance that authorized the judge to impose the death penalty.

These kinds of facts, held *Ring*, must be decided by the jury. “By the time the Bill of Rights was adopted, the jury’s right to make these determinations was unquestioned.”⁵² And the Court quoted one of its venerable precedents that stated, “The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.”⁵³ This reasoning is absent from the Court’s opinion in *Harris*.

The array of votes by the justices in *Ring* sharply contrasts with that in *Harris*. Justice Ginsburg delivered the opinion of the *Ring* Court, in which Justices Stevens, Scalia, Kennedy, Souter, and Thomas joined. Scalia filed a concurring opinion in which Thomas joined, and Kennedy also filed a concurrence just to say that *Apprendi* was wrongly decided, but that he would grudgingly go along with it now that it was precedent. But Justice Breyer filed an opinion concurring only in the judgment, rejecting the Court’s analysis because it was on the basis of the right to jury trial and *Apprendi*, preferring instead to hold that imposition of the death penalty without jury decision-making was cruel and unusual punishment under the Eighth Amendment. Not surprisingly, Justice O’Connor filed a

⁵¹ *Ring*, 2002 U.S. LEXIS 4651 at *12.

⁵² *Id.* at *29 (quoting *Walton v. Arizona*, 497 U.S. 639, 710–11 (1990) (Stevens, J., dissenting)).

⁵³ *Id.* at *44–45 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)).

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dissenting opinion in which Chief Justice Rehnquist joined, arguing that *Apprendi* should be overruled and that the death penalty imposed in this case should be upheld.

Justice Scalia’s concurring opinion is particularly noteworthy, given his deafening silence and vote with the majority in *Harris* after running with the jury torch in other critical cases. Scalia wrote in *Ring*: “I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”⁵⁴ Scalia wrote that he observed “the accelerating propensity of both state and federal legislatures to adopt ‘sentencing factors’ determined by judges that increase punishment beyond what is authorized by the jury’s verdict,” not to mention a near-majority of the Justices who were willing to uphold such schemes, that

cause me to believe that our people’s traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man’s going to his death because a judge found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.⁵⁵

Justice Scalia could not resist taking a jab against Justice Breyer for continuing to reject the jury role as explicated in *Apprendi*, noting also that jury fact-finding has nothing to do with the Eighth Amendment. Scalia concluded, “There is really no way in which Justice Breyer can travel with the happy band that reaches today’s result unless he says yes to *Apprendi*. Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.”⁵⁶ That criticism was well deserved, but so too is criticism warranted for Scalia’s vote in *Harris* which,

⁵⁴*Id.* at *47.

⁵⁵*Id.* at *49–50.

⁵⁶*Id.* at *51.

to use his above language, “cannot preserve our veneration for the protection of the jury in criminal cases.”⁵⁷

**Why *Harris* Was Wrongly Decided:
The Constitutional Text**

Harris was wrongly decided. The opinion contains no meaningful analysis of the Constitution’s requirements for criminal prosecutions and fails to acknowledge the objective meaning of the concepts provided in the constitutional text.

The right to trial by jury was guaranteed in the original text of the Constitution before the amendments known as the Bill of Rights were ratified. Article III, § 2, of the Constitution provides that “The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.” If the trial of “all crimes” must be by jury, the term “crime” may not be manipulated to remove the jury from this function. A crime is something that has been “committed,” that is, an act that a person has carried out. No constitutional authorization exists for a law that punishes a person for an act he has “committed” to declare that such act is not a “crime” but is a mere “sentencing factor” that may be removed from trial by jury.

The Fifth Amendment imposes the following further procedural guarantees for persons accused of bad acts:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

If a person may not be held “to answer” for such “crime” other than by indictment by the grand jury, it is difficult to understand how a person may be required “to answer” for bad acts that are

⁵⁷ *Id.* at *50.

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not alleged in an indictment brought by a grand jury. The double jeopardy prohibition uses the synonym "offense" for "crime," again suggesting that a crime is a bad act (something offensive) for which a person may be punished. The prohibition on compelled self-incrimination refers to "any criminal case," again linking the trial of a "crime" to the entire judicial proceeding. Finally, no person may be punished—"deprived of life, liberty, or property"—"without due process of law." Due process includes the procedures of indictment by grand jury and trial of the charges by the petit jury.

The Sixth Amendment provides that

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The guarantee applies to "all criminal prosecutions," which does not end until the final judgment. The subject is "the accused," and a person is being "accused" of bad acts when allegations of those bad acts are made at any time during the criminal proceeding, including at sentencing. These bad acts are "committed" in a certain location and are again called a "crime." The trial must be by an "impartial jury," not what the Framers frequently saw as partial judges. The accused must "be informed of the nature and cause of the accusation," which means an allegation that a person did an act for which he may be punished. Significant facts alleged at sentencing are "accusations" requiring prior notice and jury determination. The accused may confront "the witnesses against him," which can only mean in a public trial; by contrast, judicial fact-finding at sentencing routinely relies on anonymous witnesses and no confrontation.

The above provisions would mean little if the procedural guarantees could be circumvented simply by linguistic evasion. A person who is "accused" of having "committed" acts warranting punishment, who is being "held to answer" for those acts, and against whom "witnesses" are making "accusations" is by this vocabulary a person who is alleged to have committed a "crime." And that

person is entitled to the guarantees of indictment by a grand jury and trial by an impartial jury.

Harris eschews any analysis of the meaning of the preceding fundamental terms. It simplistically declares that a “crime” is any fact-finding about wrongdoing for which the legislature allows a jury trial, and a “sentencing factor” is any fact-finding about wrongdoing that the legislature declares shall be reserved to the judge. This cannot be true to the constitutional text and the intent of the Framers.

The Text and Structure of § 924(c) Establish that Brandishing Is an Offense Element

Criminal statutes should be presumed to have been intended not to violate the paramount constitutional values of indictment, notice, jury trial, and proof beyond a reasonable doubt. This is easily accomplished here simply by considering the text and structure of § 924(c).

“The language of the statute [is] the starting place in our inquiry.”⁵⁸ As amended in 1998,⁵⁹ § 924(c)(1)(A) provides in pertinent part that

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Subpart (B) provides for 10- and 30-year minimum sentences if the firearms are of certain specified types. For a subsequent conviction, subpart (C) requires a 25-year minimum sentence, and life imprisonment if the firearm is of certain types. Subpart (D) prohibits probation for a person so convicted.

The fact that Congress defined brandishing, carefully wording both the mens rea and acts required, demonstrates that brandishing is an aggravated crime. Section 924(c)(4) provides that

⁵⁸ *Staples v. United States*, 511 U.S. 600, 605 (1994).

⁵⁹ Pub. L. No. 105-386, 112 Stat. 3469 (1998).

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For purposes of this subsection, the term “brandish” means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

This is the type of definition typically given as a jury instruction, along with the admonition that each and every element must be proven beyond a reasonable doubt. A definition is unnecessary if brandishing is a mere sentencing factor—the judge simply considers the particular facts without being bound by whether each and every one of the preceding elements are present.

The text and structure of § 924(c)(1) make clear that brandishing is an offense. As in *Castillo v. United States* (2000), “the first part of the opening sentence clearly and indisputably establishes the elements of the basic federal offense of using or carrying a gun during and in relation to a crime of violence.”⁶⁰ Further, “Congress placed the element ‘uses or carries a firearm’ and the word ‘machine gun’ in a single sentence,”⁶¹ just as here terms such as “use” and “brandish” are in the same sentence and are separated by mere semicolons. The carjacking statute in *Jones* had numbered subsections making them “look” like sentencing factors, but that “look” was superficial.⁶²

Defining the basic and aggravated crimes and stating the corresponding penalties is clear and concise draftsmanship. First the basic offense is defined and penalized (totaling 125 words). The two “if” clauses introducing the brandishing and discharge offenses define aggravated crimes and punish them (totaling 19 and 18 words, respectively). By using “if” instead of repeating all of the elements of the basic offense, economy of words is achieved over tedious repetition. Similarly, the term “if” is used to introduce subpart (B), which defines aggravated offenses involving specified firearm types, once again being concise rather than repeating all of the basic offense elements. No rule of statutory drafting requires senseless reiteration of the same elements over and over.

⁶⁰ *Castillo v. United States*, 530 U.S. 120, 124 (2000).

⁶¹ *Id.* at 124–25.

⁶² *Id.* (quoting *Jones v. United States*, 526 U.S. 227, 232–33 (1999)).

Both the basic and the aggravated offenses alike are in the present tense: “uses or carries,” “possesses,” “if the firearm is brandished,” “if the firearm is discharged,” “if the firearm is a short-barreled rifle” or other specified type. The present tense ties together each element in a moment in time to complete the offense. A sentencing factor may very likely be in the past tense because the judge is looking at a past event.

The following further aspects of prior § 924(c) described in *Castillo* continue to apply to the amended version here:

The next three sentences of § 924(c)(1) refer directly to sentencing: the first to recidivism, the second to concurrent sentences, the third to parole. These structural features strongly suggest that the basic job of the entire first sentence is the definition of crimes and the role of the remaining three is the description of factors (such as recidivism) that ordinarily pertain only to sentencing.⁶³

Similarly, with amended § 924(c)(1), subpart (C) concerns recidivism⁶⁴ and subpart (D) concerns the same probation and concurrent-sentence prohibitions as before.

Section 924(c)(1)(D)(i) provides that “a court shall not place on probation any person *convicted* of a violation of this subsection.” Thus, one must be “convicted” of (not just sentenced for) the acts described in “this subsection.” As the Court held elsewhere, “In the context of § 924(c)(1), we think it unambiguous that ‘conviction’ refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction.”⁶⁵

⁶³ *Castillo*, 530 U.S. at 125.

⁶⁴ *Harris* did not concern whether subpart (C)’s reference to “a second or subsequent conviction” is an element or a sentencing factor. Elsewhere, the Gun Control Act treats a prior felony conviction as an element. 18 U.S.C. § 922(g) (felon in possession of firearm); see *Old Chief v. United States*, 519 U.S. 172, 174 (1997). One or more prior convictions were also elements in 18 U.S.C. App. § 1202(a) (repealed 1986). See *United States v. Batchelder*, 442 U.S. 114, 119 (1979).

⁶⁵ *Deal v. United States*, 508 U.S. 129, 132 (1993). Similarly, *Garrett v. United States*, 471 U.S. 773 (1985), construed 21 U.S.C. § 848(a), which provides enhanced penalties for recidivists engaged in a continuing criminal enterprise. The Court held that

At this point there is no reference to other statutory offenses, and a separate penalty is set out, rather than a multiplier of the penalty

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The fact that § 924 is entitled “Penalties” provides no guidance, for as *Castillo* notes, “at least some portion of § 924, including § 924(c) itself, creates, not penalty enhancements, but entirely new crimes.”⁶⁶ Complete offenses abound throughout § 924, some with structures identical to § 924(c).⁶⁷

Section 924(j) is the most dramatic example of Congress’s practice of setting forth offense elements in § 924 with a structure identical to that of § 924(c):

- A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall
- (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and
 - (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

To construe murder and manslaughter as mere sentencing factors would be a radical departure from due process and the right to a jury trial. The courts have held that the reference to murder in § 924(j) is an offense element.⁶⁸ Yet under the *Harris* Court’s interpretation

established for some other offense. This same paragraph then incorporates its own recidivist provision, providing for twice the penalty for repeat violators of this section. Significantly the language expressly refers to “one or more prior convictions . . . under this section.” Next, subparagraph (2) . . . also refers to any person “who is convicted under paragraph (1) of engaging in a continuing criminal enterprise,” again suggesting that § 848 is a distinct offense for which one is separately convicted.

Garrett, 471 U.S. at 780. Further, § 849 (now repealed) has “starkly contrasting language that plainly is not intended to create a separate offense”: the court sits without a jury to consider prior offenses and determines status as a dangerous special drug offender by a preponderance of evidence. *Id.* at 782.

⁶⁶ *Castillo*, 530 U.S. at 125.

⁶⁷ *E.g.*, § 924(a)(6)(B) (a nonjuvenile “who knowingly violates section 922(x),” which prohibits transfer of a handgun to a juvenile, “(i) shall be . . . imprisoned not more than 1 year,” “and (ii) if the person sold” the handgun “knowing . . . that the juvenile intended to” use the handgun to commit a violent crime, “shall be . . . imprisoned not more than 10 years. . . .” See *Bryan v. United States*, 524 U.S. 184, 188 (1998) (construing elements of “willfully” and “knowingly” in § 924(a)).

⁶⁸ *United States v. Pearson*, 203 F.3d 1243, 1269–70 (10th Cir. 2000) (jury must find murder in course of § 924(c) violation); *United States v. Harris*, 66 F. Supp. 2d 1017, 1033 (N.D. Iowa 1999) (distinguishing *Jones*, 526 U.S. 227, in that indictment “specifically alleges murder”).

only convict a defendant of causing a death through the use of a firearm in the course of a § 924(c) violation, and the court may find at sentencing that the death was murder and impose the death penalty.

Amended § 924(c) is structurally identical both to the prior version construed in *Castillo* and to the federal carjacking statute, 18 U.S.C. § 2119, construed in *Jones*. The following compares the texts of these two statutes:

18 U.S.C. § 2119	18 U.S.C. § 924(c)(1)(A)
<p>Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle from the person or presence of another by force and violence or by intimidation, or attempts to do so, <i>shall</i></p> <p>(1) be fined under this title or imprisoned not more than 15 years, or both,</p> <p>(2) <i>if</i> serious bodily injury results, be fined under this title or imprisoned not more than 25 years, or both, and</p> <p>(3) <i>if</i> death results, be fined under this title or imprisoned for any number of years up to life, or both.</p>	<p>any person who, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, <i>shall</i>—</p> <p>(i) be sentenced to a term of imprisonment of not less than 5 years;</p> <p>(ii) <i>if</i> the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and</p> <p>(iii) <i>if</i> the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.</p> <p>(Italics added.)</p>

In short, whoever commits act A “shall” be sentenced to X, and “if” he commits aggravating act B, “shall” be sentenced to Y. Both *Jones* and *Castillo* held that act B in statutes with this structure is an element of the offense. Other statutes with the same structure must be interpreted the same as a matter of consistent construction and due process. The result cannot vary depending on, as *Harris* held, whether the federal enactment covers new rather than old ground. The criminal law would be a cruel joke if statutes with identical structures may or may not create offense elements depending on

obscure circumstances not contained on the face of the statutes. The fundamental rights to notice and due process preclude the linguistic anarchy inherent in construing statutes with identical structures to mean one thing here and the opposite elsewhere. Accordingly, the Court should have decided that the text and structure of § 924(c) make clear that brandishing is an offense element.

Brandishing Is a Traditional Crime Subject to Trial by Jury

Brandishing is as typical a crime in Anglo-American history as one could imagine. All of the reasons underlying the right to jury trial support treatment of brandishing as an element of the offense and not as a sentencing factor.

Section 924(c)(4) defines brandishing as a specific-intent crime, requiring that a person display or make a firearm known to another "in order to intimidate that person." Statutes ordinarily entrust the determination of a defendant's intent to the jury.⁶⁹

As noted in *Castillo*, courts have not "typically or traditionally used firearm types (such as 'shotgun' or 'machine gun') as sentencing factors, at least not in respect to an underlying 'use or carry' crime."⁷⁰ "Statutory drafting occurs against a backdrop of traditional treatment of certain categories of important facts."⁷¹ "Congress is unlikely to intend any radical departures from past practice without making a point of saying so."⁷²

It was an indictable offense at common law to go armed with the intent of committing crimes of violence.⁷³ Brandishing and discharge

⁶⁹ See *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975) ("although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not . . . justify shifting the burden to him").

⁷⁰ *Castillo*, 530 U.S. at 126.

⁷¹ *Id.* (quoting *Jones*, 526 U.S. at 234).

⁷² *Jones Id.* at 234.

⁷³ "If any man "Ride[s] Armed covertly or secret with Men of Arms against any other to Slay him, or Rob him, or Take him, or Retain him till he hath made Fine and Ransom . . . it . . . shall be judged Felony or trespass, according to the Laws of the Land of old time used. . . ." EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 160 (6th ed. 1680). Carrying arms "malo animo" (with an evil mind) was a crime. *Rex v. Knight*, Comb. 38, 90 Eng. Rep. 330 (K. B. 1686).

of firearms were included within this offense.⁷⁴ Such common-law offenses were recognized in the early American Republic.⁷⁵

Brandishing and inappropriate discharge of firearms, while labeled differently, are crimes in the laws of every state.⁷⁶ Many state statutes prohibit brandishing or pointing *per se*,⁷⁷ some define assault-type offenses to encompass those terms,⁷⁸ and others simply punish acts of brandishing under general assault statutes.⁷⁹ Brandishing may be an aggravation of another violent crime.⁸⁰ Brandishing is an element to be found by the jury.⁸¹

⁷⁴An affray was committed “where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law. . . .” 2 WILLIAM HAWKINS, *PLEAS OF THE CROWN* 488 (8th ed., London 1824). See *Rex v. Meade*, 29 L.T.R. 540, 541 (1903) (offense charged was “under the common law,” if the defendant was “firing a revolver in a public place, with the result that the public were frightened or terrorized”).

⁷⁵*State v. Huntley*, 25 N.C. (3 Ired.) 284 (1843) (defendant exhibited “dangerous and unusual weapons” and declared intent to kill); Cf. *Simpson v. State*, 13 Tenn. (5 Yer.) 356, 358–60 (1833) (indictment for affray insufficient unless it alleges fighting in a public place).

⁷⁶See *STATE FIREARMS LAWS*, in STEPHEN P. HALBROOK, *FIREARMS LAW DESKBOOK: FEDERAL AND STATE CRIMINAL PRACTICE* App. A, 2002.

⁷⁷*E.g.*, VA. CODE ANN. § 18.2-282.A (2001) (“It shall be unlawful for any person to point, hold or brandish any firearm . . . in such manner as to reasonably induce fear in the mind of another”). See also CONN. GEN. STAT. § 53-206(c) (2001); IND. CODE ANN. § 35-47-4-3 (2001); MICH. COMP. LAWS § 750.234e(1) (2001); NY PENAL LAW § 265.35.3 (2001); VT. STAT. ANN. tit. 13 § 4011 (2001); IDAHO CODE § 18-3304 (2000); MINN. STAT. § 609.66 Subd. 1(a) (2000); S.C. CODE ANN. § 16-23-420(B) (2000); 13; WIS. STAT. § 941.20(1) (2000).

⁷⁸*E.g.*, IOWA CODE § 708.1 (2001) (“A person commits an assault when, without justification, the person does any of the following: . . . 3. Intentionally points any firearm toward another”). See MICH. COMP. LAWS § 750.329 (2001); MONT. CODE ANN., § 45-5-213(1) (2001); N.J. STAT. ANN. § 2C:12-1.b(4) (2001); W. VA. CODE § 61-7-11 (2001); WYO. STAT. ANN. § 6-2-504(b) (2001); MINN. STAT. § 609.713 Subd. 3(a) (2000).

⁷⁹*E.g.*, *Brown v. State*, 305 S.E.2d 386, 387 (1983) (“he deliberately got the gun and brandished it at his wife in order to scare her, thus committing an aggravated assault”).

⁸⁰*E.g.*, OHIO REV. CODE ANN. § 2911.01 (Anderson 2001) (“Aggravated robbery. (A) No person, in attempting or committing a theft offense, . . . shall do any of the following: (1) Have a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.”).

⁸¹*E.g.*, *Kelsoe v. Commonwealth*, 226 Va. 197, 308 S.E.2d 104 (1983) (“There are two elements of the offense: (1) pointing or brandishing a firearm, and (2) doing so in such a manner as to reasonably induce fear in the mind of a victim.”). See *Nantz v. State*, 740 N.E.2d 1276, 1283 (Ind. App. 2001); *State v. Tate*, 377 N.E.2d 778 (1978).

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Just as the difference between use of a pistol and of a machine gun "is great, both in degree and kind," and "numerous gun crimes make substantive distinctions between" such weapons,⁸² brandishing and discharge are aggravated crimes compared with less serious but unlawful use and carrying of firearms. The difference between these activities "is both substantive and substantial—a conclusion that supports a 'separate crime' interpretation."⁸³

Harris argued that brandishing was not a crime, but only a sentencing factor, because there was no tradition in federal statutes of treating brandishing as a crime. Yet this could be said about every new federal crime when first enacted in the long march since 1789 of the creation of a federal criminal code. The only federal crimes explicitly authorized by the Constitution, which appear in Article I, § 8, concern such matters as counterfeiting and piracy on the high seas. Powers such as the establishing of post offices may be the subject of criminal legislation under the Necessary and Proper Clause.⁸⁴ "It is clear, that Congress cannot punish felonies generally."⁸⁵

But it is a double stretch of the Constitution to argue that each new offense created by Congress to appear tough on what have long been state crimes is not triable by jury but is only a sentencing factor. This just happens to be the first time Congress made brandishing an element of a crime. Parallel with brandishing, § 924(c) also makes discharge a crime, and discharge may be found as an element of numerous federal crimes.

In addition to traditional treatment as a crime, *Castillo* postulates the parallel traditional preference for fact-finding by the jury. To reword *Castillo* so that it applies here, "to ask a jury, rather than a judge, to decide whether a defendant [brandished a firearm] would rarely complicate a trial or risk unfairness."⁸⁶ "As a practical matter, in determining whether a defendant used or carried a 'firearm,' the jury ordinarily will be asked to assess the particular weapon at issue as well as the circumstances under which it was allegedly used."⁸⁷ These circumstances include brandishing.

⁸² *Castillo*, 530 U.S. at 126–27.

⁸³ *Id.* at 127.

⁸⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416–17 (1819).

⁸⁵ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821).

⁸⁶ *Castillo*, 530 U.S. at 126–27.

⁸⁷ *Id.* at 127–28.

Inherent in the jury function of determining “uses or carries” is the finding of *how* a firearm was used.⁸⁸ It would be illogical to conclude that Congress intended that the jury must determine whether a firearm was used, but not whether this use included brandishing or discharge.

Whether the firearm was brandished or discharged may also bear on the jury’s determination of whether it was used or carried “during and in relation to” a predicate offense. Transforming brandishing or discharge into a sentencing factor “might unnecessarily produce a conflict between the judge and the jury,” particularly when “the sentencing judge applies a lower standard of proof” and “additional years in prison are at stake.”⁸⁹ In sum, brandishing is a traditional crime that is subject to determination by the jury, not the sentencing judge.

The Rules of Lenity and Constitutional Doubt

To the extent that any uncertainty exists, § 924(c) should have been interpreted according to the rules of lenity and of constitutional doubt. Both require that brandishing be treated as an element to be found by the jury.

To reword *Castillo*, “the length and severity of an added mandatory sentence that turns on the presence or absence of [brandishing or discharge] weighs in favor of treating such offense-related words as referring to an element.”⁹⁰ Here, the 5-year sentence increases to 7 years for brandishing and 10 years for discharge. If uncertainty exists, “we would assume a preference for traditional jury determination of so important a factual matter.”⁹¹ The “rule of lenity requires that ‘ambiguous criminal statutes be construed in favor of the accused.’”⁹² Like the more dangerous firearms in *Castillo*, brandishing “refer[s] to an element of a separate, aggravated crime.”⁹³

As the Court held in construing earlier versions of § 924(c), “This policy of lenity means that the Court will not interpret a federal

⁸⁸ See *Bailey v. United States*, 516 U.S. 137, 148 (1995) (resolving “what evidence is required to permit a jury to find that a firearm had been used at all”).

⁸⁹ *Castillo*, 530 U.S. at 128.

⁹⁰ *Id.* at 131.

⁹¹ *Id.*

⁹² *Id.* (quoting *Staples v. United States*, 511 U.S. 600, 619 n.17)(1994).

⁹³ *Id.*

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criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be on the basis of no more than a guess as to what Congress intended."⁹⁴ The test is whether Congress has "plainly and unmistakably" enacted the harsher alternative,⁹⁵ which it obviously did not do here.⁹⁶

Moreover, the rule of constitutional doubt requires that brandishing and discharge be considered as elements of the offense. A "crime" cannot be construed as a sentencing factor so as to undercut the requirements that "the trial of all crimes shall be by jury,"⁹⁷ or that "[i]n all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial, by an impartial jury, and to be informed of the nature and cause of the accusation."⁹⁸ Blackstone explained the policy behind the right to jury trial as follows:

But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice.⁹⁹

Blackstone further wrote that trial by jury is secure only "so long as this palladium remains sacred and inviolate, not only from all open attacks, but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of

⁹⁴*Simpson v. United States*, 435 U.S. 6, 15 (1978); *accord*, *Busic v. United States*, 446 U.S. 398, 405–06 (1980).

⁹⁵*United States v. Bass*, 404 U.S. 336, 348–49 (1971).

⁹⁶*Bass* explained why "doubts are resolved in favor of the defendant" as follows:

First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Id. at 347–48 (citations and quotation marks omitted).

⁹⁷U.S. CONST., art. III, § 2, ¶ 3.

⁹⁸*Id.* amend. VI.

⁹⁹3 BLACKSTONE, COMMENTARIES, *380.

trial.”¹⁰⁰ Indeed, Blackstone even held that “the jury may, if they think proper, take upon themselves to determine at their own hazard, the complicated question of fact and law.”¹⁰¹

John Adams quoted this passage in 1771, when the colonists were asserting the power of juries to decide not just the facts, but also the law.¹⁰² In an essay on the rights of juries, Adams wrote: “Juries are taken by lot or by suffrage from the mass of the people, and no man can be condemned of life, or limb, or property or reputation, without the concurrence of the voice of the people.” He added that “the common people should have as complete a control, as decisive a negative, in every judgment of a court of judicature.”¹⁰³ Expressing the colonists’ struggle against the Crown, Adams condemned the attempts of judges to usurp the power of juries and vindicated jury nullification.¹⁰⁴ This history is difficult to square with the assertion in *Harris* that the Founders approved of judicial fact-finding to decide accusations in criminal cases with devastating consequences to defendants.

If anything was certain, it was that factual determinations are within the province of the jury. John Marshall stated this principle in simple but forceful language at the Virginia ratification convention in 1788:

What is the object of a jury trial? To inform the court of the facts. I hope that in this country, where impartiality is so much admired, the laws will direct facts to be ascertained by a jury.¹⁰⁵

Moreover, the Fifth Amendment provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless

¹⁰⁰ *Jones*, 526 U.S. at 246, quoting 4 BLACKSTONE, COMMENTARIES *342–344. “Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge.” *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The jury guarantee reflects “a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.” *Id.* See *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995).

¹⁰¹ 3 BLACKSTONE, COMMENTARIES, *378.

¹⁰² LEGAL PAPERS OF JOHN ADAMS 219 (1965).

¹⁰³ *Id.* at 229.

¹⁰⁴ See *id.* at 210–27.

¹⁰⁵ 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 557–58 (1836).

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on a presentment or indictment of a Grand Jury." Justice Story wrote, "The grand jury performs most important public functions; and, is a great security to the citizens against vindictive prosecutions."¹⁰⁶

The term "crime," a fundamental concept in the Constitution's vocabulary, has an objective meaning and is assuredly not just anything the legislature or a court says it is (or is not).¹⁰⁷ When what is really a "crime" is declared by the legislature or construed by the judiciary to be a sentencing factor, the power of the grand jury to accuse (or not accuse) a person of crime and of the petit jury to try the person is shifted to the judiciary. Yet the jury is just as much a constitutional decision-maker as are the other branches of government, and its power cannot be usurped by wordsmithery.

The Court in *Jones* reiterated the long-established rule that "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."¹⁰⁸ In *Harris*, constitutional doubt existed as to whether facts requiring an increased mandatory minimum sentence must be found by the jury, while in *Jones* doubt existed as to whether facts requiring an increased maximum sentence must be found by the jury.¹⁰⁹ The latter issue was resolved in favor of the jury in *Apprendi v. New Jersey* (2000).¹¹⁰ Some background to that decision is in order.

¹⁰⁶ JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 390 (1840).

¹⁰⁷ *TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978):

This recalls Lewis Carroll's classic advice on the construction of language: "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'"

¹⁰⁸ *Jones*, 526 U.S. at 239 (citations omitted).

¹⁰⁹ *Jones*, 526 U.S. 243 n.6, explained the principle as follows:

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the statute rises only to the level of doubt, not certainty.

¹¹⁰ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

To begin with, the Court noted in *In re Winship* (1970) 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.”¹¹¹ This burden cannot be avoided by judicially redefining a crime as a sentencing factor.

Further, *Mullaney v. Wilbur* (1975) invalidated a murder statute providing that malice is presumed on proof of intent to kill resulting in death, except that the crime is manslaughter if the defendant proves provocation in the heat of passion.¹¹² The rebuttable presumption relieved the state of its due process burden to prove every element of the crime beyond a reasonable doubt. *Mullaney* stated,

Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.¹¹³

But *Patterson v. New York* (1977) upheld a definition of murder as causing death with intent, subject to an affirmative defense of extreme emotional disturbance.¹¹⁴ There was no presumption of malice, and at common law the prosecution need not disprove beyond a reasonable doubt every fact constituting an affirmative defense.¹¹⁵ The Court noted,

This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard.¹¹⁶

This is open to the broad reading that “the State lacked the discretion to omit ‘traditional’ elements from the definition of crimes and instead to require the accused to disprove such elements.”¹¹⁷

¹¹¹*In re Winship*, 397 U.S. 358, 364 (1970).

¹¹²*Mullaney v. Wilbur*, 421 U.S. 684, 686 & n.3 (1975).

¹¹³*Id.* at 697.

¹¹⁴*Patterson v. New York*, 432 U.S. 197, 205–06 (1977).

¹¹⁵*Id.* at 202, 210–11.

¹¹⁶*Id.* at 210.

¹¹⁷*Jones*, 526 U.S. at 241–42.

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Underlying *Winship*, *Mullaney*, and *Patterson*, regardless of how each case resolved the burden shifting, is the premise that the jury determines all of the pertinent facts. By contrast, transforming an element into a sentencing factor completely removes the fact-finding from the jury.

McMillan v. Pennsylvania (1986) upheld a state statute imposing a minimum 5-year sentence for which the court finds the fact of visible possession of a firearm at sentencing by a preponderance of evidence.¹¹⁸ The enhancement was lower than the 20- and 10-year maximum sentences authorized for the actual offenses, and thus “the statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense.”¹¹⁹ The claim that visible possession is really an offense element “would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment but it does not.”¹²⁰

While upholding *McMillan*, the court in *Harris* disregards the “tail which wags the dog” implicit in its interpretation of amended § 924(c). Because it imposes only minimums and authorizes life imprisonment for every offense, § 924(c) breaks out of the *McMillan* paradigm altogether. *McMillan* was decided before the Brave New World in which all crimes of a class, from the lowest level to the most aggravated, have the same maximum of life imprisonment. Under this regime, the *McMillan* framework cannot protect the basic constitutional values at stake.

Almendarez-Torres v. United States (1998) held that recidivism, which is “as typical a sentencing factor as one might imagine,” is not an element of the crime of unlawful reentry after deportation under 8 U.S.C. § 1326.¹²¹ By contrast, brandishing is prosecuted as a crime in every state in the United States. Moreover, recidivism is rarely contested and may create unfair prejudice with the jury.¹²² But in determining whether a firearm was “used,” the jury will invariably determine if it was brandished or discharged, which is

¹¹⁸ *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).

¹¹⁹ *Id.* at 88.

¹²⁰ *Id.*

¹²¹ *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998).

¹²² *Id.* at 235.

frequently contested. Finally, unlike other allegations, “a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.”¹²³

Almendarez-Torres was a 5–4 decision authored by Justice Breyer and joined by the Chief Justice and Justices O’Connor, Kennedy, and Thomas. Justice Scalia wrote a strong dissent joined by Justices Stevens, Souter, and Ginsburg. However, in *Apprendi*, Justice Thomas wrote a concurring opinion in which he confessed error in joining with the majority in *Almendarez-Torres* and argued that the right to jury trial requires that the existence of a prior conviction be considered an element of the offense.¹²⁴ It is apparent that only four Justices now agree with the opinion in *Almendarez-Torres*.

Interpretation of aggravated crimes as sentencing factors reduces the jury function, in the words of *Jones*, to “low-level gatekeeping,” that is, the jury’s fact-finding necessary for the basic offense with the lowest level punishment opens the door to a judicial finding sufficient to impose far higher sentences.¹²⁵ The jury’s fact-finding for a minimum 5-year sentence in *Harris* opened the door to a judicial finding triggering minimum 7- and 10-year sentences, respectively.

Apprendi v. New Jersey (2000) held that facts that result in an increase in the maximum punishment must be found by the jury.¹²⁶ Its underlying premises would also apply to facts that increase mandatory minimum penalties. With the exception of the fact of a prior conviction, *Apprendi* endorsed the following: “It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.”¹²⁷

Apprendi found the essence of a “crime” to be as follows: “The law threatens certain pains if you do certain things, intending thereby to

¹²³ *Jones*, 526 U.S. at 249.

¹²⁴ *Apprendi*, 530 U.S. 466, 520 (Thomas, J., concurring).

¹²⁵ *Id.* at 243–44.

¹²⁶ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).

¹²⁷ 120 S. Ct. at 2363 (quoting *Jones*, 526 U.S. at 252–253 (Stevens, J., concurring)). Justice Stevens added in that concurrence: “A proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence. . . .” *Id.* at 253.

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give you a new motive for not doing them."¹²⁸ "[T]he procedural safeguards designed to protect *Apprendi* from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment."¹²⁹

Where a "crime" is concerned, the Constitution repeatedly addresses the role of the grand jury and the petit jury.¹³⁰ *Apprendi* relates about the original intent: "Any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding."¹³¹

Brandishing includes the specific intent of making the presence of a firearm known to intimidate another, and criminal intent has always been a jury matter. "The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'"¹³² The legislature cannot define and punish a crime, but then remove it from the jury's purview by referring to it as a sentencing factor:

[A] State cannot through mere characterization change the nature of the conduct actually targeted. It is as clear as day that this hate crime law defines a particular kind of prohibited intent, and a particular intent is more often than not the sine qua non of a violation of a criminal law.¹³³

The harsher minimum imprisonment and additional blameworthiness also make clear that brandishing is a crime. *Apprendi* states, "Both in terms of absolute years behind bars, and because of the

¹²⁸ *Id.* at 2356 (quoting O. HOLMES, *THE COMMON LAW* 40 (1963)). Justice Thomas wrote in *Apprendi* that "This case turns on the seemingly simple question of what constitutes a 'crime.'" *Id.* at 2367–68 (Thomas, J., concurring) (quoting Fifth and Sixth Amendment guarantees). "[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment.)" *Id.* at 2369.

¹²⁹ *Id.*

¹³⁰ U.S. CONST., art. III, § 2; amds. 5 & 6.

¹³¹ 120 S. Ct. at 2356.

¹³² *Id.* at 2364.

¹³³ *Id.* at 2364 n.18.

more severe stigma attached, the differential here is unquestionably of constitutional significance."¹³⁴

Thus, the principles set forth in *Apprendi* apply just as much to increases in mandatory minimum sentences as to increases in the maximum sentence. As Justice Thomas, joined by Justice Scalia, wrote in his concurrence,

The mandatory minimum "entitles the government" to more than it would otherwise be entitled. Those courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law.¹³⁵

Happily, the *Harris* Court did not allude to legislative history, but a word on that subject is in order. The Court did affirm the decision of the Fourth Circuit, which held that the legislative history established that brandishing is a sentencing factor.¹³⁶ However, "principles of lenity preclude our resolution of the ambiguity against petitioner on the basis of legislative history."¹³⁷ Even where there are "contrary indications in the statute's legislative history," a court must "resolve any doubt in favor of the defendant."¹³⁸ Nor can legislative history override the doctrine of constitutional doubt.

Statutes with identical structures—the two versions of § 924(c) and the statute in *Jones*—cannot be construed differently regarding elements versus sentencing factors on the basis of a court's rendition of legislative history.¹³⁹ Under this discordant linguistic methodology, citizens may not rely on uniformity in the language or structure

¹³⁴*Id.* at 2365.

¹³⁵*Id.* at 2379–80 (Thomas, J., concurring) (citation omitted).

¹³⁶*Harris*, 243 F.3d at 810–11.

¹³⁷*Hughey v. United States*, 495 U.S. 411, 422 (1990).

¹³⁸*Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994). See *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 (1992) (applying rule of lenity); *Id.* at 521 (Scalia, J., concurring, joined by Thomas, J.) ("that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history" is "particularly inappropriate in determining the meaning of a statute with criminal application").

¹³⁹See *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring, joined by Kennedy and Thomas, JJ.) (the fiction that one is presumed to know the criminal law "descends to needless farce when the public is charged even with knowledge of Committee Reports").

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of criminal laws, but are subject to prosecution on the basis of a court's *post hoc* portrayal of "legislative history." Rather than rely on legislative history, the Supreme Court in *Harris* relied on the more illusive but related concept that brandishing just was not the kind of thing that Congress had a history of making into a crime, and thus it must be a sentencing factor.

That said, factually the legislative history regarding amended § 924(c) verifies that brandishing was considered to be a crime.¹⁴⁰ Not one proponent cited any need to transform the acts condemned in § 924(c) from elements of the offense to sentencing factors, and not one opponent criticized the bills for usurping the right to jury trial.¹⁴¹

Had Congress intended the disputed portions of § 924(c) to be mere sentencing factors, it could have declared just that in the statute itself. At the very least, a proponent or opponent of the bill would have mentioned it. Neither was the case. *Harris* is the product of the campaign by the Department of Justice to transform crimes into sentencing factors to ease the path to conviction and imprisonment, particularly in questionable cases in which the jury probably would not convict. It was able to muster five votes on the Supreme Court and thus succeeded in its objective in *Harris*, as it had in *Almendarez-Torres*. However, it failed to do so in *Jones*, *Castillo*, and *Apprendi*.

Whither Harris?

The most immediate effect of *Harris* will be felt elsewhere in § 924(c), and its outcome is by no means clear. As noted earlier, *Harris* relied in part on *Castillo*, which applied some of the same factors to reach the opposite conclusion concerning the types of firearms that are used or carried, graduating from 5 years for a

¹⁴⁰ See H.R. REP. NO. 105-344, at 12 (1997) ("To sustain a conviction for brandishing or discharging a firearm"); 144 CONG. REC. H533 (Feb. 24, 1998) (remarks of Rep. McCollum) (bill provided that "a crime be the possession or the brandishing or the discharging of the gun"); *Id.* at H10, 329 (Oct. 9, 1998) (remarks of Rep. McCollum) (House-Senate compromise bill "clarifies Congress' intent as to the type of criminal conduct which should trigger the statute's application," including "using a gun, possessing in the course of a crime a gun, or certainly brandishing or discharging that gun."); *Id.* (remarks of Rep. Scott) (comparing brandishing and discharge penalties "to the penalties for other crimes").

¹⁴¹ See *Castillo v. United States*, 530 U.S. 120, 130 (2000) ("the 'mandatory sentencing' statements to which the Government points show only that Congress believed that the 'machine gun' and 'firearm' provisions would work similarly").

normal firearm to 30 years for a machine gun. *Castillo* held the firearm types to be offense elements, not sentencing factors.

Castillo arose out of the 1993 tragedy at Waco, Texas. The few Branch Davidians who were not killed in the fire were indicted for conspiracy to murder federal agents, but the jury acquitted them of this charge. Because the prosecution essentially lost its case, it seized upon the conviction of the defendants for carrying firearms under § 924(c), a 5-year offense. Contrary to all previous precedents, the prosecution argued that the type of firearm is a mere sentencing factor, that someone at Waco had machine guns, that whoever was not killed was responsible for whoever used machine guns, and thus the defendants must be sentenced to 30 years for constructively carrying machine guns. The district court obliged, sentencing the defendants to 30 years for accusations that were not in the indictment and/or decided by the jury, and the Fifth Circuit affirmed twice.¹⁴² Then other circuits began to hold the same, creating a circuit conflict.¹⁴³

That saga reveals how what is considered a crime was judicially transformed into a sentencing factor, and how the precedent creating the transformation spread to other circuits. But in this instance, the Supreme Court put its foot down, rendering a 9–0 opinion in *Castillo* that held that firearm types in § 924(c) are elements of the offense. Surprisingly, the opinion was authored by Justice Breyer, who in other cases has been associated with favoring the taking of fact-finding from juries to sentencing judges. This author argued *Castillo* both times in the Fifth Circuit and then in the Supreme Court.

The opinion of the Court in *Harris* relied on *Castillo* for propositions that support the continued interpretation of firearm types as offense elements. Firearm types are traditionally offense elements. *Harris* states, “Tradition and past congressional practice were perhaps the most important guideposts in *Jones*. The fact at issue there—serious bodily injury—is an element in numerous federal statutes; and the *Jones* Court doubted that Congress would have made this fact a sentencing factor in one isolated instance.” *Harris* then cites the pages of *Castillo* that made this same point about firearm types.¹⁴⁴

¹⁴²United States v. Branch, 91 F.3d 699 (5th Cir. 1996), cert. denied sub nom., Castillo v. United States, 520 U.S. 1185 (1997), aff’d. after remand, 179 F.3d 321 (5th Cir. 1999), rev’d., 530 U.S. 120 (2000), final remand, 220 F.3d 648 (5th Cir. 2000).

¹⁴³For a detailed account, see HALBROOK, FIREARMS LAW DESKBOOK: FEDERAL AND STATE CRIMINAL PRACTICE § 2.15.

¹⁴⁴Harris v. United States, 2002 U.S. LEXIS 4652, at *16 (2002) (citing *Castillo*, 530 U.S. at 126–127).

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Harris also quotes *Castillo* for the proposition that "traditional sentencing factors often involve special features of the manner in which a basic crime was carried out,"¹⁴⁵ and *Castillo* rejected the government's argument that firearm types were in that category.

The dramatic increase in penalties in the statutes in *Jones* and *Castillo* also contrasted with the mere two-year difference in the brandishing provision in *Harris* in the calculus for whether something is an element or a sentencing factor. In *Castillo*,¹⁴⁶ mandatory minimum sentences for firearm use jumped from 5 to 30 years if the firearm is a machine gun. The 1998 amendments recodified the provision at § 924(c)(1)(B) to provide for the same leaps in minimum sentences if the firearms are of certain specified types. For a subsequent conviction, subpart (C) requires a 25-year minimum sentence, and life imprisonment if the firearm is of certain types.

Other factors listed as decisive in *Castillo* continue to apply after the 1998 amendments. It bears repeating that *Castillo* was a 9–0 opinion and that *Harris* was 5–4, with part of the opinion being only a plurality opinion. But the issue of whether firearm types continue to be offense elements and not sentencing factors will be hotly contested in the future.

The above is only a preview of what is already taking place regarding numerous federal criminal statutes. *Harris* for the time being resolves the constitutional issue that facts that form the basis for mandatory minimum sentences need not be alleged in the indictment, found by the jury, or proven beyond a reasonable doubt. But the basis of the opinion was agreed to only by a plurality of the Court.

Like other guarantees in the Bill of Rights, the protections under the Fifth and Sixth Amendments for persons accused of crimes are in a state of flux. The current transformation of "crimes" into sentencing factors, while on rare occasions have been explicitly enacted by the Congress or state legislatures, is primarily the work of prosecutorial agendas and judicial activism. It remains to be seen how extensively this linguistic manipulation will serve to erode the right to be informed in an indictment of the accusations, the right of trial by jury, and the right to proof beyond a reasonable doubt.

¹⁴⁵ *Id.* at *17 (citing *Castillo*, 530 U.S. at 126).

¹⁴⁶ *Id.* at *18 (citing *Castillo*, 530 U.S. at 131).

