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WHAT MAKES SENTENCING FACTS CONTROVERSIAL? FOUR PROBLEMS OBSCURED BY ONE SOLUTION

JACQUELINE E. ROSS*

I. INTRODUCTION

JUDGES have long found facts at sentencing.¹ In the federal system, this has become more visible and more controversial with the development of the United States Sentencing Guidelines over the last fifteen years. The Guidelines create sentencing factors that confine the available penalties to a statutorily authorized range.² Critics have increasingly asked why these sentencing factors should not be treated as offense elements and tried to a jury.³ They ask why facts that increase a defendant's punishment should

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1. A sentencing court may make findings about aggravating or mitigating factors, which increase or decrease punishment. These "sentencing factors" may be delineated within the statute defining a crime, tying particular sentence increases to additional findings made at sentencing. Sometimes these sentencing factors are set out in separate penalty statutes that may apply to any number of different substantive offenses. And sometimes, like the enhancement provisions of the U.S. Sentencing Guidelines (Guidelines), these factors are not statutes in the typical sense but the legislatively ratified products of delegated authority.

2. The Sentencing Commission designed the guidelines to reduce judicial discretion and disparities in the sentences that different judges awarded to similarly situated defendants.

3. See Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence"*, 35 WM. & MARY L. REV. 147, 160 (1993) (arguing that federal defendants should enjoy same procedural protections at sentencing, including standard of proof beyond reasonable doubt, that they enjoy at trial); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1100 (2001) (discussing effects of elements rule on plea bargaining and concluding that it strengthens prosecutors' bargaining position to detriment of criminal defendant); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-9 (1988) (noting competing rationales behind "real offense" sentencing system and "charge offense" system); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 336-37 (2000) (arguing against "positivistic" approach to defining criminal offenses); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1682-84 (1992) (arguing that Guidelines have produced substantial informal non-compliance with Guidelines' requirements on part of district judges); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 299 (1992) (challenging reduced procedural protections for defendants at sentencing); Nancy J. King & Susan R. Klein, *Commentary: Apprendi and Plea Bargaining*, 54 STAN. L. REV. 295, 309-10 (2001) (contesting Bibas' claim that elements strengthen prosecutor's hand in plea bargaining); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1469 (2001) [hereinafter King & Klein, *Essential Elements*]

be proved by a preponderance of the evidence at sentencing instead of “beyond a reasonable doubt” at trial. The critics point out that sentencing hearings afford defendants many fewer procedural protections than they enjoy at trial. The rules of evidence do not apply at sentencing,⁴ making hearsay more freely admissible. And there is no compulsory process, no

(delineating constitutional limits on legislature’s power to redefine substantive offenses and shift fact-finding responsibility to sentencing); Mark D. Knoll & Richard G. Singer, *Searching for the “Tail of the Dog”: Finding “Elements” of Crimes in the Wake of McMillan v. Pennsylvania*, 22 SEATTLE U. L. REV. 1057, 1062-67 (1999) (arguing that historical practice and constitutional precedent compel elements rule); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1237-39 (1993) (arguing that uncharged conduct should not be considered at sentencing); Alan C. Michaels, *Truth in Convicting: Understanding and Evaluating Apprendi*, 12 FED. SENTENCING REP. 320, 320 (2000) (concluding that *Apprendi*’s holding, which could be described as “truth-in-convicting rule,” imposes modest but salutary restraint on legislative power); Colleen P. Murphy, *Jury Factfinding of Offense-Related Sentencing Factors*, 5 FED. SENTENCING REP. 41, 41 (1992) (arguing for special jury findings on facts relevant to sentencing); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 501-03 (1992) (discussing effect of prosecutorial bargaining and changing discretion on Guidelines’ aim of reducing sentencing disparities); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 925-27 (1990) (describing Sentencing Commission’s efforts to reduce sentencing disparities); Benjamin J. Priester, *Sentenced for a “Crime” the Government Did Not Prove: Jones v. United States and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249, 249 (1998) (arguing for and anticipating *Apprendi* constraint on sentencing proof of fact that raises ceiling on punishment); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 542-46 (1993) (raising constitutional challenges to real-offense practices); Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459, 462-70 (1993) (treating as element any fact that triggers special stigma and special punishment); Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors Into Offense Elements: The Apprendi Debate*, 12 FED. SENTENCING REP. 197, 197 (2000) (arguing that reassigning issues from sentencing hearing to trial may disadvantage defendants by (1) forcing them to choose between denying guilt, on the one hand, and mitigating guilt, on the other hand, and (2) increasing informal resolution of contested issues through plea bargaining); Richard Singer, *The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139, 143-74 (2000) (noting that distinction between offense elements and sentencing factors has been used to eliminate mens rea requirement from offense definitions); Richard G. Singer & Mark D. Knoll, *Elements and Sentencing Factors: A Reassessment of the Alleged Distinction*, 12 FED. SENTENCING REP. 203, 203 (2000) (arguing that distinction between offense elements and sentencing factors should not govern allocation of fact-finding responsibility between judge and jury, but that issues that expose defendant to stigma should be resolved by the jury); Todd Meadow, Note, *Almendarez-Torres v. United States: Constitutional Limitations on Government’s Power to Define Crimes*, 31 CONN. L. REV. 1583, 1604-05 (1999) (arguing that issues whose resolution threatens “substantial increase” in punishment must be treated as offense elements); Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356, 376-80 (1975) (arguing that further procedural safeguards are necessary before repeat offenders may be subjected to extended terms of imprisonment).

4. See *Williams v. New York*, 337 U.S. 241, 244-45 (1949) (indicating that rules of evidence were not applicable to manner in which judge may obtain information

right to confront adverse witnesses and far less notice of what the government plans to prove.⁵ Most importantly, these hearings entrust the resolution of factual disputes to the sentencing judge, which some fear may erode the jury's legitimating role in the criminal process.⁶

In reaction to these fears, judges, litigants and commentators have engaged in extensive debate over how best to distinguish offense elements from sentencing factors.⁷ Much of this discussion centers on one central question: What limits, if any, does the Constitution impose on the legislature's power to designate a factual issue as a sentencing factor rather than an offense element?

The Supreme Court's opinion in *Apprendi v. New Jersey*⁸ gives an answer to this question. The Supreme Court will treat any sentencing factor as an offense element if it increases punishment above the maximum penalty provided for the offense. If a drug offense carries a twenty-year maximum, any sentencing factor that triggers a longer prison term must be treated as an offense element and proved beyond a reasonable doubt at trial before the longer sentence becomes available. Many critics contend that this rule does not go far enough. They argue that many sentencing factors should be treated as offense elements, even if they do not trigger any sentence increase above the statutory cap.⁹

Both the *Apprendi* decision and the commentators take for granted that objections to the fact-finding role of the sentencing judge are essentially unitary. The Supreme Court and the reformers alike trace such objections to a belief that certain sentencing factors are "really" offense elements that belong to the threshold inquiry into guilt. This diagnosis is flawed. The impetus to recast more and more sentencing factors as offense elements masks a cluster of different—and distinct—dissatisfactions

to sentence already convicted defendant); *see also* 18 U.S.C.S. app. § 6A1.3(a) (Law. Co-op. 1987) (same).

5. *See* United States v. Spiller, 261 F.3d 683, 691-92 (7th Cir. 2001) (finding no due process violation); United States v. Petty, 982 F.2d 1365, 1367-70 (9th Cir. 1993) (same); United States v. Wise, 976 F.2d 393, 397-405 (8th Cir. 1992) (same); United States v. Prescott, 920 F.2d 139, 143-45 (2d Cir. 1990) (same); *see also* Williams, 337 U.S. at 251-52 (same); United States v. Silverman, 976 F.2d 1502, 1507-16 (6th Cir. 1992) (en banc) (same).

6. For a discussion of these opinions, *see supra* notes 4-5 and accompanying text.

7. For a discussion concerning distinguishing offense elements and sentencing factors, *see supra* notes 4-5 and accompanying text. *See also* *Apprendi v. New Jersey*, 530 U.S. 466, 500-01 (2000) (Thomas, J., concurring); *Almendarez-Torres v. United States*, 523 U.S. 224, 270-71 (1998) (Scalia, J., dissenting); *McMillan v. Pennsylvania*, 477 U.S. 79, 96 (1986) (Stevens, J., dissenting).

8. 530 U.S. 466 (2000).

9. *See Apprendi*, 530 U.S. at 500-01 (Thomas, J., concurring); *Almendarez-Torres*, 523 U.S. at 270-71 (Scalia, J., dissenting); *McMillan*, 477 U.S. at 96 (Stevens, J., dissenting); Herman, *supra* note 3, at 356; King & Klein, *Essential Elements*, *supra* note 3, at 1535; Lear, *supra* note 3, at 1218-23; Justin A. Thornton & Mark H. Allenbaugh, *Apprendicitis: A Troubling Diagnosis for the Sentencing of Hackers, Thieves, Fraudsters, and Tax Cheats*, 9 GEO. MASON L. REV. 419, 433-43 (2000).

with the sentencing process. Therefore, there is not one challenge or problem that reformers need to confront. There are several. No unitary solution can adequately address these different concerns. Disaggregating the component problems is the first step in solving them.

In this Article I will identify four of these component problems, along with my proposed solution for each. I intend these to supplement, not replace, the changes introduced in *Apprendi*. In discussing these problems and proposals, I will use examples from the drug laws, which are the likely frontier on which many of these battles will be fought. In Section II, I will argue that *Apprendi* does not offer a stable way of distinguishing offense elements from sentencing factors. The continuing ability of prosecutors to reserve significant factual disputes for sentencing will fuel further calls for reform. In Section III, I will suggest that much of the impetus for revising the distinction derives from the confluence of four separate dissatisfactions with judicial fact-finding at sentencing. I believe these problems call for separate solutions. Only one of these concerns can be adequately addressed by further refining the demarcation between sentencing factors and offense elements. The other sources of dissatisfaction cannot be traced to any blurring of that distinction and will therefore require separate solutions. In distinguishing these disparate concerns and sketching out possible responses, I hope to suggest why efforts to clarify the relative fact-finding roles of the trial jury and the sentencing judge cannot bear the weight of expectation currently placed upon them.

II. THE INSTABILITY OF *APPRENDI* AND THE RUSH TO FURTHER REFORM

Before describing the four reasons to worry about the fact-finding role of the sentencing judge, I would like to explore some reasons why the *Apprendi* decision fails to provide a stable way of distinguishing offense elements from sentencing factors. In particular, I want to lay out the reasons why commentators, along with two Justices who concurred in *Apprendi*,¹⁰ want to redesignate more sentencing factors as offense elements. In addressing these reform proposals, I will argue that efforts to turn more and more sentencing factors into offense elements offer a one-size-fits-all solution to what is really a cluster of distinct problems. Several of these have nothing to do with the distinction between offense elements and sentencing factors.

The decision in *Apprendi* makes the magnitude of any sentencing increase the main criterion for distinguishing between sentencing factors and offense elements. If a factual finding at sentencing raises punishment above the statutory maximum for the offense, the sentencing factor that mandates this increase must be treated as an offense element. This means that the aggravating fact must be decided at trial, by proof beyond a reasonable doubt. Prosecutors hoping to increase defendants' penalties

10. I refer to the concurrences of Justices Thomas and Scalia.

above the statutory ceiling for the charged offense will not have the option of reserving proof of aggravating factors for the sentencing hearing.

Despite these protections, however, the *Apprendi* rule is unlikely to satisfy commentators and judges who believe that the distinction between sentencing factors and offense elements must rest on the sentencing stakes for defendants.¹¹ Critics of the *Apprendi* rule argue that any “sentencing factor” that significantly increases punishment should be treated as an offense element, even if the resulting sentence is less than the authorized maximum for the charged offense. Many sentencing factors raise penalties by sizeable amounts without increasing punishment above the statutory cap. For example, threshold quantities of certain drugs can increase the maximum penalty for federal drug offenses from forty years to life.¹² After *Apprendi*, a federal defendant whom the jury convicts of selling narcotics cannot be sentenced to more than forty years of imprisonment—unless the jury finds that the defendant sold more than the threshold quantity which triggers a possible term of life imprisonment. Yet defendants who theoretically face a term of life instead of a forty-year maximum often face no realistic prospect of being sentenced to more than forty years of imprisonment. More likely, they face a five- or ten-year mandatory minimum.¹³ The responsibility for deciding disputes about drug quantity will remain with the sentencing judge in all of these cases, whether the stakes are a ten-year mandatory prison term or an increase from four years to nineteen years. Fact-finding responsibility will not shift to the jury unless the final sentence exceeds the twenty-year cap for ordinary drug felonies. Drug quantity will thus remain a sentencing issue in a wide range of cases.

There are other reasons why the *Apprendi* rule leaves many important factual disputes with the sentencing judge, ensuring that facts established at sentencing will continue to dictate sizeable increases in punishment. Even if a drug quantity subjects a defendant to a sentence greater than the twenty-year maximum, a prosecutor can avoid having to prove the relevant quantity at trial. A prosecutor can often carve the underlying conduct into multiple charges. Suppose subject A introduces an undercover officer to subject B, who sells 1000 kilograms of cocaine to the purported drug-dealer. Both A and B can be charged with one count of distributing cocaine¹⁴ and one count of conspiring to distribute cocaine.¹⁵ A transaction that large increases the maximum penalty for distributing cocaine from

11. See *Apprendi*, 530 U.S. at 500-01 (Thomas, J., concurring); *Almendarez-Torres*, 523 U.S. at 270-71 (Scalia, J., dissenting); *McMillan*, 477 U.S. at 96 (Scalia, J., dissenting); Herman, *supra* note 3, at 356; King & Klein, *Essential Elements*, *supra* note 3, at 1535

12. See 21 U.S.C. § 841(b)(1)(A), (b)(1)(B) (1994) (relating maximum penalties to drug amounts).

13. See *id.*

14. See 21 U.S.C. § 841(a)(1) (1994). (making it unlawful “knowingly or intentionally . . . to . . . distribute . . . a controlled substance”).

15. See 21 U.S.C. § 846 (1994) (defining narcotics conspiracy).

twenty to forty years of imprisonment to life.¹⁶ After *Apprendi*, a court cannot impose more than a forty-year prison term for any given count unless the jury expressly finds that the defendant sold more than a certain threshold quantity of cocaine. But in combination, the forty-year maxima of two separate counts will authorize up to an eighty-year prison term, while allowing the prosecutor to reserve proof of the relevant drug amount for sentencing. If charging decisions do not suffice to circumvent *Apprendi*, the legislature itself can relieve the prosecutor of the need to prove the threshold drug amount at trial. The legislature could raise the maximum penalty for all drug transactions to life imprisonment, regardless of the quantities sold. In this way, findings about drug quantity will have no impact on the statutory maximum, allowing the legislature to relegate the issue to sentencing.

Many commentators contend that *Apprendi* fails to protect defendants against sentencing factors that increase punishment significantly. But these critics do not agree on what increases are significant enough to transform the triggering factors into offense elements. Some reformers would treat any fact as an offense element if that fact: (a) triggers an enhancement disproportionate to the gravity of the nominal offense,¹⁷ (b) has traditionally distinguished misdemeanors from felonies¹⁸ or (c) subjects defendants to a sentence increase of more than six months.¹⁹ Indeed, the *Apprendi* plurality opinion itself “reserve[d] for another day”²⁰ whether to overturn its earlier precedent and disallow sentencing findings that mandate a minimum prison term. In his separate concurrence, Justice Thomas went further yet in asserting that:

[A] “crime” includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, 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.²¹

16. See, e.g., 21 U.S.C. 841(b)(1)(A).

17. See Thornton & Allenbaugh, *supra* note 9, at 438.

18. See Bibas, *supra* note 3, at 1150-79 (criticizing *Apprendi* for adversely affecting plea bargains by turning sentencing issues into trial issues and forcing defendants to waive such issues when they plead guilty, while arguing that facts distinguishing misdemeanors from felonies should be treated as elements); King & Klein, *Essential Elements*, *supra* note 3, at 1537-38 (suggesting that courts should consider common law distinction between misdemeanors and felonies, which has traditionally determined process provided to accused).

19. See Herman, *supra* note 3, at 336-37 (noting that six-month penalty deemed sufficiently serious to trigger right to counsel and jury trial).

20. See *Apprendi v. New Jersey*, 530 U.S. 466, 486 n.13 (2000) (refusing to overrule existing precedent).

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

The *Apprendi* rule is also unlikely to satisfy those who believe that it is the nature of disputed facts, not their penal consequences, which distinguish sentencing factors from offense elements.²² Members of this group disagree about which types of facts are intrinsic elements. Some accord this status to any factual determination that carries stigma²³ or to facts whose determination turns on witness credibility.²⁴ They believe juries are particularly well suited to assessing truthfulness. Still others single out as elements “a[ny] fact associated with the commission of the crime, rather than the history of the offender,”²⁵ or any fact that has historically formed part of the definition of a crime.²⁶ Regardless of how they circumscribe the factual domain that they would reserve for the jury, these reformers can take little comfort from *Apprendi*. Sentencing judges may continue to resolve issues that these critics believe to be jury issues—so long as such findings trigger no sentence above the statutory cap.

Finally, the *Apprendi* rule fails to satisfy those critics who worry that legislatures might assign contested factual issues to the sentencing judge by redefining the substantive criminal law. In particular, these critics worry that legislatures may conflate different crimes and grades of crime, while transferring some of the thus eliminated distinctions from the trial to the sentencing phase. With this problem in mind, Professors Nancy King and Susan Klein propose to supplement the *Apprendi* rule with a multi-factor standard that would distinguish between essential elements and sentencing factors on a case-by-case basis.²⁷ They argue that the legislature should not be permitted to turn traditional elements such as mens rea or voluntariness requirements into sentencing factors; or “blend[] . . . historically distinct crimes into one element,”²⁸ or expose defendants to constitutionally excessive penalties by collapsing misdemeanors into felonies or trivial into serious offenses. King and Klein contend that courts should not allow revisions to the criminal code to transform familiar dis-

22. See Priester, *supra* note 3, at 258-70 (listing approaches that treat certain types of facts as “intrinsically offense elements”). These facts include “non-mitigating facts,” facts that have historically been elements and “facts associated with the commission of the crime.” *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) (claiming that historically, “a ‘crime’ includes every fact that is by law a basis for imposing or increasing punishment”).

23. See Singer & Knoll, *supra* note 3, at 205.

24. See Murphy, *supra* note 3, at 43 (“Offense-related sentencing factors . . . involve the same kinds of credibility determinations . . . that traditionally have been committed to the jury.”).

25. See Brief for Petitioner at 15, *Jones v. United States*, 526 U.S. 227 (1999) (No. 6203); Note, *supra* note 3, at 376-81.

26. See *Monge v. California*, 524 U.S. 721, 728 (1998); King & Klein, *Essential Elements*, *supra* note 3, at 1536-37.

27. See King & Klein, *Essential Elements*, *supra* note 3, at 1535-42 (setting forth multi-factor test).

28. See *id.* at 1538-39.

tinctions between offenses into criteria for distinguishing between variants of a single offense or bloated composite.²⁹

Like other proposals to expand upon the gains of *Apprendi*, the King and Klein proposal would treat sentencing factors as offense elements even when those factors trigger no penalty above the statutory maximum for the charged offense. As an example, King and Klein consider a statutory scheme that merged petty theft (a traditional misdemeanor) with grand theft (a traditional felony) and that authorized “penalties ranging from a nominal fine to life imprisonment, depending on the value of the property stolen.”³⁰ A judicial finding about the worth of the stolen goods might authorize a penalty of up to life imprisonment without running afoul of *Apprendi*, because the sentence would not exceed the statutory maximum. Yet King and Klein would invalidate such a scheme for two reasons: (1) it conflates a traditional misdemeanor with a felony and turns a well-entrenched criterion for distinguishing between these grades of crime, namely the value of the stolen property, into a sentencing factor; and (2) it authorizes a disproportionate and excessive penalty (up to life imprisonment) for petty theft.³¹

Some of the objections to proposals for classifying more sentencing factors as offense elements are already familiar. Redesignating more sentencing factors as offense elements will eliminate many of the benefits of determinate sentencing schemes along with their excesses. Legislatures might be wary of creating sentencing factors to guide judicial discretion if courts will interpret such sentencing factors as elements creating different grades of offense.³² As a result, legislators might abandon attempts to rationalize the sentencing process in favor of a return to unfettered judicial discretion at sentencing.³³ Such a reaction would undercut valuable efforts to decrease sentencing disparities that result from unguided judicial discretion. In addition, transforming more sentencing factors into offense elements might well require defendants who wish to plead guilty to give up

29. The factors which King and Klein would consider in deciding whether to allow facts to be reassigned to sentencing include: (1) whether a statute eliminates a traditional element from the offense definition; (2) whether a statute “reclassifies a traditional misdemeanor offense as a felony,” treating the issue that traditionally distinguished the misdemeanor from the felony as a sentencing factor; (3) whether the statute combines historically distinct offenses and makes the facts that historically distinguished them into sentencing factors; (4) whether the penalty provisions are cruel and unusual or excessive; (5) whether an overly wide sentencing range exposes offenders to disproportionate sentences; and (6) whether a statute eliminates mens rea or voluntariness requirements and turns them into affirmative defenses or sentencing factors. *See id.* at 1536-40 (providing multi-factor test).

30. *See id.* at 1542-43 (applying multi-factor test to hypothetical).

31. *See id.* at 1543 (finding hypothetical statute unconstitutional under proposed test).

32. *See id.* at 1527.

33. *See id.* at 1528 (discussing “gross inequalities in sentencing” that result from unguided judicial discretion).

their right to have disputed factual issues resolved at sentencing.³⁴ In effect, defendants would have to give up what limited factual issues their plea now allows them to preserve, ensuring that they receive less, rather than more, process and reinforcing existing pressures to forego an evidentiary hearing on disputed issues.

In short, any wholesale reassignment of fact-finding responsibility from sentencing to trial threatens to undercut the usefulness of sentencing as a tool for distinguishing among offenders in the allocation of punishment. State and federal criminal procedures recognize that separate tiers of fact-finding serve distinct and important functions. Reformers may debate the nature of the threshold findings necessary to legitimate further inquiry at sentencing, but few would argue that a finding of guilt should obviate the need for further fact-finding at sentencing. If there are to be separate tiers of factual inquiry, reformers must design the first to cabin the scope of the second while respecting its separate function.

What motivates these thorny and far-reaching efforts to distinguish sentencing factors from offense elements? I believe the impetus derives from a cluster of dissatisfactions with judicial fact-finding at sentencing. The King and Klein proposal effectively addresses some of these. In particular, it points out that increased fact-finding at sentencing may distort the substantive definition of crimes by exposing small offenders to disproportionate penalties and by stripping criminal statutes of elements until there is nothing of substance left behind that may constitutionally be called an offense.

An improved distinction between offense elements and sentencing factors can remedy problems with judicial fact-finding at sentencing beyond those discussed by King and Klein.

They worry about unconstitutional definitions of crime and unconstitutional sentencing ranges. This is important, but the distinction between elements and factors can also redress sentencing abuses that occur when the statute defining an offense is constitutional and the penalties are proportional to the crime. One such failing consists of allowing sentencing factors to punish offenders for acting with a more culpable mental state than the threshold *mens rea* required for guilt. For example, a defendant convicted of knowingly possessing certain contraband should not be subjected to a sentencing enhancement for intending to distribute the contraband. The underlying offense along with its designated penalty range may be entirely ordinary and constitutional. Yet I will argue that sentencing courts should not be permitted to increase punishment, even within the authorized range, based on a finding that the defendant committed the offense with a more culpable state of mind than that required for conviction. And I will argue that the distinction between sentencing factors and

34. See Ross, *supra* note 3, at 200 (noting that *Apprendi* rule will place defendants under pressure to waive issues that they may no longer preserve for sentencing); see also Bibas, *supra* note 3, at 1152 (same).

offense elements should be geared to combating even proportional punishments for which the threshold determination of guilt provides an insufficient factual predicate.

But there are also other worries about the sorts of factual disputes that judges routinely decide at sentencing—dissatisfactions that reformers do not recognize as calling for some other response than that of reassigning factual issues to the trial jury. While these concerns may fuel the familiar debate over how to distinguish sentencing factors from offense elements, courts should handle these abuses through different reforms. Some of the impetus to assign more factual issues to the trial jury derives from the perceived unfairness of allowing sentencing judges to increase punishment for crimes with which defendants were not charged or of which they were acquitted.³⁵ And much of the opposition to sentence enhancements based on drug quantity is really a reaction to the perceived unfairness of holding defendants strictly liable for possessing large quantities of drugs, without proof that the defendants were aware how much they possessed.³⁶ Turning more sentencing factors into elements will not address these concerns effectively. I hope to disaggregate these issues from the undifferentiated cluster of dissatisfactions that generate so much controversy around the distinction between issues for trial and issues for sentencing.

III. FOUR QUALMS ABOUT FACTS FOUND AT SENTENCING

A. *Dissatisfaction with Strict Liability Enhancements*

The first concern that animates efforts to distinguish offense elements from sentencing factors is unease with the many factors that impose strict liability. Enhancements that gear punishment to drug amounts are one example.³⁷ Commentators hotly debate who should find this fact—judge or jury. Are they concerned about the accuracy or reliability of the finding? This seems unlikely. How many kilograms of cocaine a courier will be found to have carried in his backpack is not going to depend on whether the judge or the jury decides this issue. Such enhancements attract controversy because they tie significant punishment increases to drug amounts without proof that the defendant knew how much cocaine he was transporting. Critics who would assign this issue to the jury may be trying, indirectly, to undermine the strict liability regime by making it harder to trigger such enhancements. Assigning the issue to the jury, after all, brings a higher burden of proof. In addition, treating enhancements as

35. See Beale, *supra* note 3, at 151; Herman, *supra* note 3, at 295; Lear, *supra* note 3, at 1180; Priester, *supra* note 3, at 298; Reitz, *supra* note 3, at 531-32; Rosenberg, *supra* note 3, at 467.

36. See Singer, *supra* note 3, at 151 (noting that decision to treat drug quantity as sentencing factor leads courts to dispense with any requirement that defendant be aware of quantity he possesses).

37. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (1998) (setting forth drug quantity table and enhanced sentences relating to quantity).

offense elements makes them less likely to be interpreted as imposing strict liability. That a legislature makes an issue into a sentencing factor is sometimes taken as an endorsement of strict liability for that circumstance.³⁸ Treating enhancements as offense elements avoids this interpretive convention and therefore undermines strict liability.

Because disputes over treating aggravating circumstances as sentencing factors or offense elements are partly driven by discomfort with strict liability, I propose to reorient the debate about who should find strict liability enhancements into a discussion of whether strict liability is permissible. In particular, we should evaluate strict liability enhancements by asking whether the legislature would have the power to impose them for some aggravating circumstance if it were an element of the offense. If the legislature could not constitutionally impose strict liability for some feature of the crime by making it an offense element, it should not be able to do so indirectly by making that feature a sentencing factor instead. Conversely, if the legislature is entitled to hold defendants strictly liable for some aggravating circumstance, it should have the freedom to choose between making it an offense element or a sentencing factor. As I will argue shortly, we should care about who finds certain facts only when the facts being found involve culpability, that is, *mens rea*. If an enhancement dispenses with any showing of culpability, we should worry about strict liability instead. It is strict liability, not the allocation of fact-finding responsibility that explains opposition to this kind of enhancement.

Once it is established that the legislatures may impose strict liability for some offense element (such as the age of the victim), the legislature's power to turn that element into a sentencing factor should be unproblematic. But if strict liability offense elements are to be freely transformable into strict liability sentencing enhancements, there must be some constitutional limit on the power to impose strict liability for offense elements. Otherwise the legislature could simply strip culpability requirements from any elements that it wished to make into sentencing factors. But what is that constitutional limit? How do we decide whether legislatures have the power to impose strict liability for some element? Alan Michaels argues that the legislature may only establish strict liability for certain elements when the remaining elements provide an independent basis for criminal liability.³⁹ Thus, a legislature could not define the crime of bigamy so as to eliminate the requirement that the defendant know at the time of remarriage that he or she is still legally married. If one eliminates the strict liability element—still being legally married at the time of the second marriage—the remaining intentional conduct—namely, getting married—is not conduct that the legislature has the power to prohibit. If some additional element is needed to justify the imposition of a

38. See Singer, *supra* note 3, at 151.

39. See Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 836 (1999) (“[I]ndependent culpability must be established for [each] element.”).

criminal sanction—namely, that the offender be legally married at the time of the second marriage—this crucial element must comport a culpable state of mind, such as *knowledge* that one is still legally married. Accordingly, would-be bigamists may not be held strictly liable for this essential feature of the crime.⁴⁰

Michaels' test protects defendants against strict liability elements when the legislature's power to criminalize certain conduct is in doubt. But Michaels' test may not protect defendants against strict liability elements if the remaining elements of the crime provide sufficient grounding for criminal liability. For example, Michaels' criterion would uphold an offense that made drug quantity an element of drug possession crimes, even if the legislature dispensed with proof that the defendant knew how much he possessed. The legislature could dispense with the strict liability element altogether. It clearly has the power to criminalize drug possession without regard to amount. Yet, I believe that courts should scrutinize not only what remains of the crime when the strict liability element is subtracted, but also what the strict liability element adds to the mix. The added element may distinguish different grades of an offense and may raise the penalty significantly. To justify such increases, the triggering elements must identify some aggravating feature of the crime. If the triggering element increases punishment even when the defendant did not know how much cocaine he possessed, courts should question whether quantity meaningfully aggravates the crime. Accordingly, I would supplement Michaels' proposal with further strictures on strict liability.

I would require strict liability elements and enhancements to meet at least some minimal standard of rationality. Under my own proposal for giving content to this requirement, a legislature should be able to impose strict liability for some aggravating feature of the crime if the alternative—requiring the defendant to have actual knowledge of that circumstance—would lead defendants to remain strategically ignorant about that aspect of the offense while continuing their criminal activity.⁴¹ For example, a

40. *See id.* at 853-56 (discussing relationship between constitutional innocence and strict liability).

41. While the legislature may have the power to impose strict liability for these sorts of elements or sentencing factors, the legislature should be required to be explicit about imposing strict liability when it does so. Professor Richard Singer has pointed out that courts are quite willing to assume that the legislature has imposed strict liability for some circumstance once courts decide that the circumstance is a sentencing factor rather than offense element. *See Singer, supra* note 3, at 150-57 (discussing court decisions that quantity of drug is not element of crime). For example, although the drug statutes pre-exist the Guidelines, courts use the Guidelines' inclusion of drug quantity as a sentencing factor as a basis for concluding that Congress intended to make defendants strictly liable for the quantity of drugs they possessed. *See id.* Courts should not be permitted to reason from the premise that drug quantity and drug type are sentencing issues to the conclusion that the legislature intended to create strict liability for these factors. Drug quantity should justify sentencing increases only if: (a) the criminal code does not make drug quantity into a grading device for carving drug offenses into greater and lesser-included variants (*i.e.*, if drug quantity is not an element); (b) the stat-

legislature should be able to impose strict liability for drug amounts on defendants convicted of drug possession with intent to distribute.⁴² Requiring culpable knowledge of the drug quantity will simply encourage strategic ignorance without reducing the scale of drug transactions. This method of determining whether strict liability is constitutional fits with decisions that uphold strict liability for improperly conducting certain heavily regulated activities, such as the sale of liquor and pharmaceuticals. Holding defendants strictly liable for selling alcohol to minors also makes sense, because any requirement that the seller know the age of the buyer will simply encourage strategic ignorance by the vendors, without discouraging sales to minors. At the same time, imposing strict liability for selling alcohol to minors will encourage vendors to require identification.

On the other hand, strict liability should trouble us when it is not designed to counteract strategic evasions like those of the drug transporter who avoids inquiry into the size of his cargo. For example, holding defendants strictly liable for drug amounts makes less sense when the underlying crime is simple possession, which requires no proof of intent to distribute. For simple possession, a quantity enhancement would serve as a proxy for intent to distribute, not just for the scale of the operation. Such an enhancement would allow courts to punish a defendant as a dealer without requiring the government to prove intent to distribute as an element of the crime—that is, without requiring the government to prove beyond a reasonable doubt that the defendant *was* a dealer (as opposed to a user or other peripheral actor). Yet the justification for this strict liability enhancement—concern that drug dealers will strategically avoid knowing specifics as to quantity—presupposes proof that the offender *is* a drug dealer. Strict liability for drug quantity is supposed to ease the distinction between large and small drug dealers after it has been established that the defendant is a dealer. Yet one can possess drugs without being involved in their distribution.⁴³ Strict liability for drug quantity may not substitute for proof that someone is a drug dealer and not just a user. Accordingly, strict liability for drug amounts may be justifiable only when the underlying offense already requires proof of intent to distribute.

Despite added strictures on strict liability, this proposal gives legislatures the opportunity to redefine at least some crimes, such as felony murder, by turning the strict liability element (someone dying during the commission of a felony) into an issue for sentencing. Should we worry about insulating such findings from the discipline of trial? Should we fear such changes to the criminal code? I believe that some such changes would be salutary. Many commentators criticize the felony murder rule

ute clearly authorizes strict liability for drug quantity; and (c) the legislature has the power to hold defendants strictly liable for that circumstance (*i.e.*, to dispense with a requirement of culpability as to amount).

42. *See, e.g.*, 21 U.S.C. § 841(a)(1) (1994) (proscribing possession of controlled substances with intent to distribute).

43. *See, e.g.*, 21 U.S.C. § 844(a) (setting out penalties for simple possession).

for using the doctrine of transferred intent to equate accidental deaths with intended ones.⁴⁴ If the legislature decided to treat accidental deaths during felonies as sentencing factors, the crime for which a defendant would be sentenced would not be murder, but the underlying felony itself. The felon would still face extra punishment to reflect the (unintended) consequences of his felony; yet there would be no need to conflate his crime with ordinary intentional killings. Turning the unintended death into a sentencing factor would make it possible to hold defendants accountable for unintended consequences without indulging the fiction that equates such deaths with intended ones. Avoiding that fiction makes it more likely that the legislature will set a reasonable penalty.

B. *Dissatisfaction with Sentencing Findings About Aggravating Motive or Mental State*

By contrast to the dispute about strict liability, any discomfort we feel with enhancements that do require a particular mental state is actually a concern about assigning such issues to the sentencing judge. This should be a central concern for reformers who wish to improve the distinction between trial issues and penalty issues. Does the legislature have the power to split up determinations about a defendant's mental state, assigning some to the jury at trial and others to the judge at sentencing? An inquiry at sentencing into defendants' mental state threatens to invade the jury's core function as the arbiter of mens rea. Such sentencing factors look like offense elements because of the central importance of mens rea requirements in criminal law. The mental state of the accused matters because criminal liability, unlike tort liability, envisages punishment of the perpetrator rather than compensation of the victim. Making mens rea issues into sentencing factors rather than offense elements is problematic because mens rea elements perform a vital function in justifying the criminal sanction and in distinguishing variants or grades of offense. Paradoxically, mental state requirements also play a crucial role in justifying strict liability for certain offense elements. Holding someone strictly liable for some aspect of a crime or some harm that he did not intend can often be justified only because the remaining offense elements require a culpable mental state. Thus, mental state requirements play an important role in justifying the criminal sanction even when the legislature chooses to dispense with a mens rea requirement for one of the elements of a crime. Accordingly, a sentencing court's mental state findings should not subvert the crucial function of mens rea requirements as a device for sorting offenses into different grades of severity. This means that mens rea findings at sentencing cannot justify punishing a recklessness offense as though it

44. See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 546 (1972); Jeanne Seibold, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 *CATH. LAW.* 133, 133-34 (1978) ("As a result of widespread recognition of the harshness inherent in its application, the [felony murder] doctrine has been subjected to a variety of limitations.").

were a specific intent offense; such findings define a higher grade of offense and should therefore be made by a jury.

By singling out factors that heighten culpability, I propose to graft the way courts differentiate offense elements from sentencing factors onto a distinction with a longer pedigree: that between “accidental” features of a crime for which the criminal law imposes strict liability, and the “core” features that ground the offender’s culpability. If the legislature may dispense with strict liability elements altogether, it may turn them into sentencing factors. On the other hand, if a defendant has to intend some harm before the judge may increase his penalty, the issue to be decided seems to become a jury issue because it involves an inquiry into mens rea.

An example may clarify what distinguishes opposition to strict liability (Problem One) from our discomfort with allowing the sentencing judge to inquire into the defendant’s mental state (Problem Two). Suppose the legislature or sentencing commission creates an enhancement for selling drugs in a school zone. The application of this sentencing factor raises questions about legislative power to impose strict liability for proximity to a school zone. If the defendant did not know he was near a school, is it fair to increase his penalty? Converting this sentencing factor into an offense element does nothing to abate the concern about strict liability. On the other hand, if the legislature does have the power to dispense with a culpability requirement, it should have the power to assign the issue to the sentencing phase instead of the trial. What worries us about the school zone enhancement has nothing to do with who finds the aggravating fact—judge or jury—and everything to do with strict liability.

To move from Problem One (concern about strict liability) to Problem Two (concern about the identity of the fact-finder and the standard of proof), simply suppose the school zone enhancement requires culpability. Assume the government must show that the drug dealer targeted school-children or knew he was located near a school. Such an enhancement raises special concerns because it punishes proximity to the school zone only if the defendant has a culpable mental state with respect to that proximity. This enhancement is problematic not because it is a substantively questionable ground for increasing punishment, but because it assigns a mens rea issue to the sentencing realm.

A central purpose of distinguishing between offense elements and sentencing enhancements should be to decide when the judge may make findings about defendants’ mental states. I do not mean to suggest that findings about mens rea must always be made by a jury. However, sentencing enhancements that turn on findings about motive, knowledge and mental state should be the focus of close scrutiny.

When are such enhancements permissible? My proposal is as follows: The mens rea requirements for an offense should set the parameters for further inquiry into mens rea at sentencing. To decide whether a sentencing scheme permissibly assigns some issue about a defendant’s mental

state to the sentencing judge, a court should ask the following question: If this issue were not a sentencing factor but an offense element, would it affect the “culpability grade” of the offense? Would the resolution of that issue turn a general intent crime into a specific intent crime, or a recklessness crime into an intent crime, or a negligence crime into a recklessness crime? If so, the issue is one for the jury. If a defendant is convicted of a general intent crime such as possession of narcotics, the legislature could not make intent to distribute a sentencing issue; if intent to distribute were an element, it would turn a general intent crime into a specific intent crime, raising the “culpability grade” of the offense. Likewise, being convicted of a recklessness crime should foreclose any sentencing inquiry into motive. Not so if the defendant is convicted of a specific intent crime such as possession with intent to distribute cocaine. In that case, a sentencing judge should be allowed to distinguish offenders who distribute drugs for profit from those who distribute user quantities to their friends. This gives the sentencing judge some leeway to deepen his or her understanding of motive and mental state within the culpability parameters of the verdict. It is not intrinsically improper for a sentencing judge to inquire into motive or mental state, but the verdict (and culpability grade of the crime) must provide a threshold to legitimate the inquiry. This means that the permissible scope of inquiry at sentencing depends on the culpability threshold established by verdict. Whether a judge can inquire into motive will depend on whether the crime is a specific intent crime. If it is not, the sentencing factor must be treated as an offense element requiring proof to a jury with all attendant procedural guarantees.⁴⁵

45. See King & Klein, *Essential Elements*, *supra* note 3, at 1470 (discussing *Apprendi* decision). One of the criteria by which King and Klein would evaluate a statute that transfers factual issues to sentencing is whether the statute eliminates mens rea or voluntariness requirements from the statute defining the offense and reassigns that issue to sentencing. See *id.* My proposal echoes this. However, what matters to me about enhancements for aggravated motive or mental state is not whether they were historically elements of the substantive offense, but rather whether they would heighten what I term the “culpability grade” of the offense if they were elements. Heightening the “culpability grade” of criminal conduct is what juries do. Before the sentencing judge may inquire into motive at sentencing, the jury must have established, by its verdict, that the defendant committed a specific intent crime. Nor may the judge make any other findings about the defendant’s mental state if that finding establishes a grade of culpability (such as intent) that goes beyond that required for conviction of the substantive offense (which may require only recklessness). My test is functional rather than historical. Whether the substantive offense ever contained a heightened variant of that recklessness crime does not matter under my proposal; the “culpability grade” of the crime for which a defendant was convicted limits inquiry into mental state regardless of how offenses were traditionally classified or defined. One might say that the King and Klein proposal addresses itself to the danger that the creation of sentencing factors will take elements away from the substantive criminal law, thereby distorting it and rendering some newly redefined statutes unconstitutional. My concern is primarily with the constitutionality of allowing sentencing factors to increase punishment for existing crimes whose constitutionality is not in issue.

My proposal provides an independent basis for the result, which the Supreme Court reached in *Apprendi*. A New Jersey court convicted Charles Apprendi of weapons violations, which included the discharge of a firearm at the house of his African-American neighbors.⁴⁶ Finding that Apprendi was motivated by racial bias, the sentencing court used an extended term provision to sentence Apprendi to twelve years of imprisonment.⁴⁷ Without this provision, the statute defining the weapons offense would have capped his punishment at ten years.⁴⁸ The plurality found the extended term provision to be unconstitutional in its application to Apprendi because it allowed a sentencing finding to increase punishment beyond the statutory maximum.⁴⁹ Any finding that increased punishment beyond the statutory maximum was an element defining a higher grade offense and had to be made as part of the threshold determination of guilt.

Under my proposal, the extended term provision is also unconstitutional, but on independent grounds. The New Jersey criminal code included several offenses that made racial bias an element.⁵⁰ If a criminal code treats racial bias as an offense element of certain crimes, it makes racial bias into the distinguishing feature of a higher culpability grade. This means that the classification of even a specific intent crime may be heightened by proof of that aggravating circumstance. Accordingly, even conviction of a specific intent crime would not pave the way to sentencing inquiry into racial bias if the jurisdiction uses racial bias to define a heightened grade of culpability.

My proposal must confront a crucial objection. I attach great importance to mental state requirements, using them to redesignate certain factors as offense elements. Yet mens rea requirements are only one way of sorting more serious from less severe offenses. Some offenses may vary along parameters other than mental state. Indeed, some specific intent crimes may be less serious than offenses that require only recklessness or even negligence. Reckless homicide is almost certainly a more serious crime than mail fraud, a specific intent crime. Likewise, killing someone during a robbery is more serious than the underlying robbery, even though robbery is a specific intent crime and murder is not. Should a conviction for mail fraud or robbery permit sentencing inquiry into related homicides simply because the underlying offense is a specific intent crime? Proof of the homicides does not establish a heightened grade of mail fraud or robbery; instead, they establish a separate crime. As I will

46. See *Apprendi v. New Jersey*, 530 U.S. 466, 469-70 (2000) (holding that any factor considered at sentencing which increases incarceration beyond statutory maximum must be proven beyond reasonable doubt).

47. See *id.* at 471 (setting forth facts of *Apprendi*).

48. See *id.* at 468 (discussing facts of *Apprendi*).

49. See *id.* at 494 (explaining plurality's holding).

50. See Brief for Petitioner at 4, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (No. 99-478) (describing N.J. STAT. ANN. § 2C:44-3(e) (deleted by amendment 2001)).

argue below, the objection to allowing sentencing inquiry into related criminal conduct is not that such related crimes are *elements* of the charged offenses or of aggravated variants. Rather, the objection is that such crimes are wholly separate offenses that should be charged and proved at trial before they may be allowed to increase punishment.

But if relevant conduct is not an offense element that should be decided at trial, is it therefore fair game at sentencing? We have considered when a court may apply strict liability enhancements, or sentencing factors that hinge on aggravated motive or mental state. These do not, however, exhaust the realm of aggravating circumstances. Besides enhancements for motive or unintended harm, there are sentencing factors that increase punishment for a variety of aggravating and intentional conduct, such as the taking of hostages during a bank robbery. These may not define separately chargeable offenses and, accordingly, may look like elements defining aggravated forms of the nominal offense. Should judges be allowed to inquire into these forms of relevant conduct? My proposal suggests that a conviction for a specific intent crime, such as bank robbery, would permit sentencing inquiry into other intentional conduct, such as hostage taking that accompanied the commission of the robbery. Because robbery is a specific intent offense, proof that the robber took hostages during the commission of the robbery does not heighten the “culpability grade” of the crime.

If the aggravating circumstance—such as hostage taking or physical restraint of the victim—is not chargeable as a separate offense in the same jurisdiction, then it serves purely as a device for distinguishing more serious from less serious variants of the underlying crime. When the egregiousness of the aggravating circumstance swamps the seriousness of the offense for which a defendant is convicted, there may be an argument for treating the aggravating circumstance as an offense element defining a higher grade of the underlying crime. For example, it would be hard to countenance a scheme that treated homicides as follows: the defendant is convicted only of assault (a specific intent crime) and the government may prove the intentional killing (a general intent crime) as an aggravating factor at sentencing. The seriousness of the killing far outweighs that of the assault, even though the killing requires only general intent and therefore does not heighten the culpability grade of the assault. On the other hand, it is much harder to claim that physical restraint of a robbery victim must be treated as an offense element (like use of a firearm) defining a higher grade of bank robbery. If every significant aggravating circumstance had to be treated as an offense element, it is hard to see what sentencing factors would be left.

I do not claim that a conviction for a specific intent crime should automatically permit sentencing inquiry into more serious offenses requiring a lesser *mens rea*. Rather, I propose that we use the well-developed grading mechanisms already in existence to bar the sentencing court from

using post-conviction findings to punish a defendant for what our sorting principles ordinarily treat as an aggravated variant of the crime. The best developed and least arbitrary⁵¹ of these grading mechanisms is that by which we distinguish different levels of mens rea. Accordingly, proof of motive may not be relegated to sentencing unless the underlying crime requires specific intent. While conviction of a specific intent crime should open the door to sentencing inquiry into the defendant's mental processes, however, it need not invite findings about other, more serious crimes, even if these are related to the nominal offense. Like the sentencing factor which enhances the assault penalty when the victim dies of his injuries, such "sentencing factors" might define an aggravated variant of the offense along some parameter other than mens rea. If so, they should be treated as elements. Without suggesting that mens rea distinctions are the sole criteria for sorting offenses by severity, I argue: (1) for treating "sentencing factors" as offense elements when these threaten to raise the "culpability grade" of the offense for which the defendant was convicted; and (2) for distinguishing our unease with strict liability enhancements from the reflexive concern with whether to treat them as sentencing factors or offense elements.

C. *Dissatisfaction with Inquiring into Uncharged Crimes*

A third concern that drives the effort to distinguish offense elements from sentencing factors is dissatisfaction with allowing the government to prove uncharged offenses. Under the U.S. Sentencing Guidelines, sentencing courts may consider evidence of uncharged crimes that form part of the same course of conduct as the offense for which the defendant was convicted.⁵² That a drug defendant participated in uncharged narcotics sales or that a defendant convicted only of kidnapping murdered his victim surely does not establish new *elements* of a drug crime or a kidnapping. Rather, these findings go to the commission or non-commission of separate uncharged crimes. Many reform proposals respond to the perceived unfairness of considering uncharged offenses by limiting the sentence increases that such offenses will trigger.⁵³ Alternatively, reform schemes disable sentencing judges from making findings that are traditionally

51. Contrast the necessarily arbitrary nature of distinctions based on property value or drug amount.

52. See 18 U.S.C.S. app. § 1B1.3 (Law. Co-op. 1987) (describing "relevant conduct" that bears on punishment).

53. For a discussion of the role of drug quantity in sentencing, see *supra* note 12 and accompanying text. *Apprendi* itself caps such enhancements at the statutory maximum for the charged offense. See *Apprendi*, 530 U.S. at 494. Assume that an offender is charged with a drug offense that carries a forty-year maximum. Suppose further that he participated in uncharged transactions, including selling a sufficient quantity of drugs to trigger a prison term of more than forty years. Sentencing proof of those uncharged transactions may increase his penalty, but not above the forty-year cap.

associated with the jury, such as credibility findings or findings that increase stigma.⁵⁴

Prohibiting sentencing courts from considering uncharged conduct contravenes the Supreme Court's own repeated approval of using uncharged crimes to increase punishment.⁵⁵ The Supreme Court allows sentencing courts to consider uncharged crimes because the conduct not only merits punishment in its own right, but reflects on the seriousness of other, charged offenses.⁵⁶ That a kidnaper murdered his victim or that a defendant committed perjury at his trial does not lose relevance at sentencing for the charged offenses simply because they also constitute separate offenses.

This does not mean that there should be no limitations on the use of uncharged conduct at sentencing, or upon the government's ability to seek further punishment for that uncharged crime in a subsequent prosecution. Some restrictions are needed to deal with strategic behavior by prosecutors who choose to undercharge offenses, reserving for sentencing crucial issues involving the scope of criminal activity. But not all reasons for failing to charge criminal conduct are suspect. Some offenses may not be chargeable in the same jurisdiction. Others, like perjury at trial, have not yet occurred at the time the initial charges are preferred. Still others are not charged by consent of the defendant, who may wish to garner the benefits of pleading guilty in return for reserving disputes about the uncharged offenses for sentencing. Scrutiny of the reasons why issues are left for sentencing makes it possible to permit proof of uncharged offenses on a selective basis. Further, inquiry at sentencing into uncharged conduct should afford defendants certain protections. For example, as I have argued elsewhere, the Double Jeopardy Clause requires a punishment increase attributable to the uncharged offense to offset any punishment later accorded to that crime in its own right.⁵⁷ I have also advocated imposing stricter procedural requirements for the proof of uncharged crimes. Enhanced notice, proof by clear and convincing evidence, and compulsory process would all ensure greater accuracy.⁵⁸ In addition, the

54. For a discussion of reform schemes that would assign to the jury all issues that enhance stigma, see *supra* notes 22, 23 and accompanying text.

55. See *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959) (pre-Guidelines decision approving sentencing consideration of uncharged crimes); *Witte v. United States*, 515 U.S. 389, 399-400 (1995) (same but under U.S. Sentencing Guidelines).

56. See *Williams*, 358 U.S. at 585-86 (explaining that "the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime," which can include uncharged but related offense); *Witte*, 515 U.S. at 399-400 (holding that consideration of uncharged but related cocaine importation at sentencing did not violate double jeopardy).

57. See Jacqueline E. Ross, *Damned Under Many Headings: The Problem of Multiple Punishment*, 29 AM. J. CRIM. L. (forthcoming Summer 2002) (arguing that sentences imposed in separate proceedings should not exceed sentences that could have been imposed had the proceedings been consolidated).

58. See Ross, *supra* note 3, at 202 (discussing other potential safeguards in considering sentencing factors).

Apprendi decision imposes some limit on the impact of uncharged conduct at sentencing by making the statutory maximum of the charged offense a cap on punishment.

But what basis is there for going further and disallowing the use of most uncharged crimes at sentencing, as many reform proposals do? The fiction that uncharged offenses are elements of the charged offenses does not support this sweeping reform. The sentencing use of uncharged offenses merits attention in its own right. Yet current proposals to disable the sentencing judge from making credibility findings or findings that carry stigma treat uncharged crimes as though they were elements of the charged offenses. The same is true of reform proposals that would prevent findings about uncharged conduct from increasing punishment by more than some determinate percentage or amount. Treating proof of uncharged conduct as though it were offered to prove some part of the charged offense obscures both the possibility of and the need for a separate solution.

D. *Dissatisfaction with Inquiry into Crimes or Elements Rejected at Trial (Acquitted Conduct)*

A fourth and final concern drives many proposals to reclassify sentencing factors as offense elements: sentencing judges have power to revisit issues that the jury has decided in the defendant's favor.⁵⁹ Even after *Apprendi*, a conviction on one charge allows the sentencing judge to increase punishment based on crimes of which the jury acquitted the defendant if the judge finds by a preponderance of the evidence that the defendant committed that crime. Likewise, if a jury rejects the government's proof of some element that distinguishes a greater from a lesser-included offense, the sentencing judge is free to find that element by a preponderance of the evidence and to increase punishment for the lesser-included offense.⁶⁰

The Supreme Court approved this use of acquitted conduct because a jury finding that the government failed to prove a relevant crime beyond a reasonable doubt does not preclude a conclusion that the state met the lower preponderance of the evidence standard that governs fact-finding at sentencing. Yet allowing the sentencing court to revisit jury issues permits a defendant to be punished for a crime of which he was actually acquitted. Consider a defendant charged with armed bank robbery who is instead convicted of simple bank robbery. The sentencing judge finds by a preponderance of the evidence that the defendant used a firearm to intimi-

59. See *United States v. Watts*, 519 U.S. 148, 151-52 (1997) (per curiam) (finding that sentencing judge may consider drug charge of which offender has been acquitted by jury), remanded to *United States v. Putra*, 110 F.3d 705 (9th Cir. 1997).

60. Of course, the statutory maximum for the offense, for which the defendant was convicted, sets a cap on that increase. See *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000). Within the often-wide penalty range, however, the acquitted conduct may have a significant impact.

date the bank teller and increases punishment accordingly, imposing a sentence that is less than the maximum for simple (unarmed) bank robbery. Surely it makes no sense to insist that the judge is not punishing the defendant for armed bank robbery but is only considering the use of the firearm as it bears on the seriousness of the unarmed bank robbery. What, then, allows the sentencing judge to punish the defendant based on findings made by a preponderance of the evidence, if the findings involve an offense element requiring proof beyond a reasonable doubt?

Redesignating more and more sentencing factors as elements ironically does nothing to prevent a sentencing judge from revisiting newly minted elements at sentencing, regardless of a favorable verdict on those elements. The sentencing judge may increase punishment for acquitted conduct, including elements of aggravated crimes of which the defendant was acquitted, so long as the jury returned a guilty verdict on some lesser-included offense or on a related charge. If the judge finds that the government proved that element by a preponderance of the evidence, the statutory maximum for the lesser offense will cap any sentence increase flowing from that finding. That upper limit, however, only mutes the penal impact of the reconsidered element. Reform proposals that would find some other way to reduce the potential impact of acquitted conduct at sentencing do not address the root of the problem—namely, permitting sentencing judges to make preponderance findings about what are undisputedly elements.⁶¹

In effect, the use of acquitted conduct splits the difference between guilt and innocence. Allowing judges to increase a defendant's sentence based on acquitted conduct allows them to punish the defendant for the acquitted crime. At the same time, the statutory cap for the lesser offense of which the defendant was actually convicted imposes a limit on that increase. This effectively discounts the amount of the penalty increase for the use of a lesser and therefore less reliable standard of proof. It is not clear why the existence of some threshold guilty finding for a lesser or related offense opens the door to doing what a wholesale acquittal would prevent. If this permitted use of acquitted conduct rests on the view that

61. Suppose, for example, that a sentencing factor is redesignated as an offense element because it triggers a penalty increase that is out of proportion to the gravity of the offense for which the defendant is convicted. Suppose further that a jury rejects the government's proof of that element and instead convicts the defendant of a lesser-included variant of the charged offense. The sentencing court is nonetheless free to conclude that the government proved the element by a preponderance of the evidence and to increase punishment accordingly, up to the statutory maximum for the lesser-included offense. Alternatively, assume a sentencing factor becomes an element because it triggers some mandatory minimum penalty. If the jury acquits a defendant of the triggering element (such as drug quantity), but convicts the defendant of a lesser crime made up of the remaining offense elements, the sentencing judge does not have to impose the otherwise mandated term. The judge, however, retains the *discretion* to impose the same penalty or even a higher one (up to the statutory maximum) if she finds the relevant "element" by a preponderance of the evidence.

the trial process is insufficiently accurate, it is better to improve the trial process. Alternatively, we might follow Professor Amar's proposal for limited review of all acquittals to determine whether the acquittal was the result of an erroneous evidentiary ruling.⁶² If it was, the case should be sent back for retrial. This proposal has the virtue of improving the accuracy of the ultimate verdict while leaving the ultimate determination of trial issues to the trial jury. The proposal also has the virtue of applying equally to complete and partial acquittals. Allowing sentencing judges to "fix" erroneous partial acquittals by increasing punishment for the counts on which the jury convicts reduces political pressure to improve the trial process that results in erroneous acquittals.

Thus, treating more sentencing factors as offense elements does nothing to address the problem of acquitted conduct. Instead of redrawing the distinction between offense elements and sentencing factors to expand the domain of the former, I propose to reform the practical import of the distinction. Offense elements belong to the jury. They must be found beyond a reasonable doubt, or not at all. Accordingly, sentencing judges may not revisit partial acquittals at sentencing. If a defendant is acquitted of armed robbery but convicted of simple (unarmed) robbery, the judge may not increase his penalty for use of a firearm. The same should be true if the defendant has only been charged with simple robbery and, following the conviction, the prosecutor offers proof of a firearm at sentencing. (Conviction of a lesser-included offense always effects an acquittal of the greater offense, whether charged or not.)⁶³ This solution accords the same finality to partial acquittals as it does to full acquittals. Furthermore, it protects a defendant from punishment for a higher-grade offense if he was only charged with a lesser-included variant. This limitation on the sentencing process vindicates the principle that a crime may not be punished except upon proof beyond a reasonable doubt of *every* element.

Respecting the finality of a partial acquittal accomplishes two important things: (1) it enhances the real and symbolic power of the jury verdict as the final word on all issues essential to guilt or innocence; and (2) it legitimates the still substantial fact-finding role of the sentencing judge, while making the verdict into a meaningful limit on factual inquiry at sentencing.

IV. CONCLUSION

The debate about offense elements versus sentencing factors arises from four separate shortcomings of the sentencing process. The mainstays of controversy about judicial fact-finding at sentencing are whether to

62. See Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1841 (1997) (recommending retrial after acquittal if trial infected by legal error).

63. See *Green v. United States*, 355 U.S. 184, 190-91 (1957) (holding conviction for second-degree murder precluded conviction for first degree murder on retrial).

allow strict liability for aggravating circumstances such as drug amounts; who should make the relevant findings; whether to allow proof of uncharged drug offenses; and whether to respect partial acquittals. Each of these problems requires its own solution. My aim has been to suggest how these four problems may be disaggregated. The solution offered for any one of them need not dictate the approach to the others. My approaches to these separate problems should preserve a sphere of judicial competence within which the sentencing judge may make guided distinctions among variants of a crime. At the same time, my proposals offer a way of circumscribing the permitted bounds of inquiry at sentencing. The judge may not ask questions whose answers would raise the culpability grade of the crime if the issue were treated as an element. The judge must respect the finality of partial acquittals no less than the finality of full ones. Together, these requirements can make the verdict a more meaningful constraint on the second tier of fact-finding.

But the improved distinction between what the jury does at trial and what the judge does at sentencing depends as much on respecting the finality of the verdict as on my proposed refinements to the distinction between sentencing factors and offense elements. Nor will efforts to improve that distinction relieve our unease with strict liability enhancements or with reliance on uncharged conduct. Distinguishing objections to strict liability and the use of uncharged conduct from objections to the allocation of power between the trial jury and the sentencing judge makes it possible directly to address these separate concerns without undercutting the importance of sentencing inquiry as a meaningful supplement to trial.