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# Apprendi v. New Jersey: Who Decides What Constitutes a Crime--An Analysis of Whether a Legislature is Constitutionally Free to Allocate an Element of an Offense to an Affirmative Defense or a Sentencing Factor without Judicial Review

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## COMMENT

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# APPENDI V. NEW JERSEY: “WHO DECIDES WHAT CONSTITUTES A CRIME?” AN ANALYSIS OF WHETHER A LEGISLATURE IS CONSTITUTIONALLY FREE TO “ALLOCATE” AN ELEMENT OF AN OFFENSE TO AN AFFIRMATIVE DEFENSE OR A SENTENCING FACTOR WITHOUT JUDICIAL REVIEW

*B. Patrick Costello, Jr.\**

### INTRODUCTION

The United States Supreme Court’s recent opinion in *Apprendi v. New Jersey*<sup>1</sup> addressed “whether the Due Process Clause of the Fourteenth Amendment<sup>2</sup> requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.”<sup>3</sup> In “what will surely be remembered as a watershed

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1 530 U.S. 466 (2000).

2 The Due Process Clause of the Fourteenth Amendment proscribes a state from depriving “any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

3 *Apprendi*, 530 U.S. at 469 (citation added). Delivering the opinion of the Court in another case, Justice O’Connor wrote that “beyond a reasonable doubt” means “[p]roof to a ‘moral certainty’ . . . .” *Victor v. Nebraska*, 511 U.S. 1, 12 (1994) (citations omitted). “A reasonable doubt is an actual and substantial doubt . . . as distinguished from a doubt arising from mere possibility, from bare imagination, or

change in constitutional law,”<sup>4</sup> the *Apprendi* Court held that the Fourteenth Amendment commands that other than the fact of a prior conviction, *any fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.<sup>5</sup> Justice Thomas’s concurring opinion correctly noted that “[t]his case turns on the *seemingly simple* question of what constitutes a ‘crime.’”<sup>6</sup> Indeed, all of the constitutional protections<sup>7</sup> that citizens accused of a crime in this country enjoy turn on determining which facts constitute the “crime”—in other words, which facts are the “elements” of the crime.<sup>8</sup> This Comment explores the issue of whether it is constitutional for a legislative body to allocate an element of an offense to an affirmative defense or a sentencing factor without that decision being subject to judicial review.<sup>9</sup> Part I provides the analytical tools necessary to examine this issue, including a thorough discussion on the elements and factors traditionally thought to constitute a “crime,” a general overview of sentencing, a brief survey of the Federal Sentencing Guidelines, an outline of how a defendant convicted of a crime may be sentenced under the Federal Guidelines, and several prominent Supreme Court decisions that have helped mold the current constitutional framework

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from fanciful conjecture.” *Id.* at 20 (citation omitted). A dictionary definition for beyond a reasonable doubt is “[t]he degree of proof required of the state in a criminal prosecution; a fair doubt based upon reason and common sense, growing out of the evidence in the case; not an imaginary, captious, or possible doubt.” *BALLENTINE’S LAW DICTIONARY* 133 (3d ed. 1969) (citation omitted). On the other hand, “preponderance of evidence” means “the greater weight of the credible evidence . . . [t]he probability of the truth; evidence more convincing as worthy of belief than that which is offered in opposition thereto.” *Id.* at 980.

4 *Apprendi*, 530 U.S. at 524 (O’Connor, J., dissenting).

5 *See id.* at 476.

6 *Id.* at 499 (Thomas, J., concurring) (emphasis added).

7 Justice Thomas summarizes that an accused person has

the right (1) “to be informed of the nature and cause of the accusation” (that is, the basis on which he is accused of a crime), (2) to be “held to answer for a capital, or otherwise infamous crime” only on an indictment or presentment of a grand jury, and (3) to be tried by “an impartial jury of the State and district wherein the crime shall have been committed.”

*Id.* (Thomas, J., concurring) (quoting U.S. CONST. amends. V, VI; citing U.S. CONST. art. III, § 2, cl. 3).

8 *Id.* at 500 (Thomas, J., concurring).

9 *Apprendi* is a dynamic case of great import, and consequently new cases involving the Court’s decision are decided nationwide practically every day. Therefore, for purposes of efficiency and the demands inherent in the publication process, this Comment generally addresses federal cases that have been decided on or before October 15, 2001.

for the federal criminal law and that influenced the *Apprendi* Court. Part II presents in detail the Supreme Court's *Apprendi* decision and its background, including pertinent cases that the Supreme Court examined in arriving at this decision. Part III surveys various policy considerations that the United States Supreme Court considered in reaching its *Apprendi* decision and provides an overview of certain considerations that the Court overlooked or underestimated. Finally, this Comment concludes that the Supreme Court should reconsider its holding in the *Apprendi* case and recommends that the Court hold that a judge may constitutionally increase a convicted defendant's punishment based on a mere preponderance of the evidence.

I. THE NECESSARY ANALYTICAL TOOLS: AN OVERVIEW OF WHAT CONSTITUTES A "CRIME," A SURVEY OF THE FEDERAL SENTENCING GUIDELINES, HOW PUNISHMENT IS DETERMINED, AND BACKGROUND CASES NECESSARY TO UNDERSTAND *APPRENDI*

A. *What Constitutes a "Crime"?*

Before describing the policy and background of the Federal Sentencing Guidelines, it is appropriate to examine "what constitutes a crime." To answer correctly, it is necessary to understand the basic definitions required for meaningful statutory interpretation. These statutory "building blocks" should then be analyzed under a thorough and logical method of elemental analysis. Indeed, "[s]tatutes should be construed under well-settled rules of interpretation in order to avoid constitutional issues."<sup>10</sup> Only in this manner, with the necessary analytical tools and framework firmly in place, may an accurate and efficient attempt be made to find an answer to the question of what constitutes a crime.<sup>11</sup>

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10 G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under [RICO]*, 33 AM. CRIM. L. REV. 1345, 1571 (1996) (discussing statutory interpretation of § 1963 of the RICO statute).

11 At the risk of grossly oversimplifying the vast and complicated field of criminal jurisprudence, not to mention the risk of offending a reader fluent in the terms of art in this field, this Comment next undertakes to provide a set of fundamental, working definitions and analytical tools that will provide the reader a basic framework with which to approach the *Apprendi* issue. Regrettably, time and space considerations do not allow a more expansive treatment of the definitions and analytical tools that is to follow.

## 1. Definitions

To begin, a "crime" may be defined as "an act committed, or omitted, in violation of a public law, either forbidding or commanding it."<sup>12</sup> Therefore, logic dictates that the next step in this process is to determine precisely what is an "offense." Typically, an "offense" is comprised of selected facts, called "elements," that define the crime. Examples of elements include conduct (i.e., an act or omission), attendant surrounding circumstances, and results.<sup>13</sup> Culpability elements ("state of mind") are applied to each element (except for strict liability crimes); they include purpose ("intent"), knowledge, recklessness, or negligence.<sup>14</sup>

Nevertheless, "[w]here an actor satisfies all of the elements of an offense . . . he nonetheless may be acquitted of the offense if he satisfies the conditions of a *defense*."<sup>15</sup> Some "defenses" are nothing more than the absence of a required offense element.<sup>16</sup> Other defenses are

12 4 WILLIAM BLACKSTONE, COMMENTARIES \*5. The Supreme Court has long recognized that, unlike the states, the federal government has no common-law jurisdiction in the area of criminal justice: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). Furthermore, federal criminal jurisdiction only applies if Congress confers such a jurisdiction on the federal courts. *See United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 105 (1820).

13 The *Model Penal Code* defines the term "element" in a similar fashion: "[E]lement of an offense' means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as (a) is included in the description of the forbidden conduct in the definition of the offense; or (b) establishes the required kind of culpability . . . ." MODEL PENAL CODE § 1.13(9) general definitions (Official Draft & Explanatory Notes 1962).

14 *See* PAUL H. ROBINSON, FUNDAMENTALS OF CRIMINAL LAW 54 (2d ed. 1995). An example of the objective elements of murder might be the requirement

that an actor engage in *conduct* that causes the *death of another human being*. The culpability elements might require that the actor *know* the nature of his conduct, that it will cause a death, and that the death caused is that of a human being (e.g., not that of an inviable fetus). The culpability requirements may be different for different elements of the same offense. A jurisdiction might, for example, require that an actor *know* the nature of his conduct and that it will cause a death, but only require that the actor be *reckless* as to whether the death is that of a human being.

*Id.* at 54-55; *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 49 n.13 (2d ed. 1986).

15 ROBINSON, *supra* note 14, at 56 (emphasis added).

16 *See id.* For example, if one takes a black umbrella, not his own, under the mistaken impression that it is his black umbrella, he may claim a "mistake of fact defense." As the definition of theft requires that the actor know that the property taken is the property of another, the required state of mind of "knowledge" of the

independent of the offense elements. They typically refine or qualify the definition of an alleged offense.<sup>17</sup> A further subset of defenses, known as "general defenses," may be unrelated to a particular offense and instead apply to all offenses.<sup>18</sup> Examples of these are justifications ("affirmative defenses"),<sup>19</sup> excuses,<sup>20</sup> and nonexculpatory defenses.<sup>21</sup> Justifications and excuses may be aptly distinguished by the following

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facts is not satisfied. Such a mistake defense is called a "failure of proof defense," since it derives from the inability of the state to prove a required element, i.e., knowledge that it is not his umbrella. *See id.*

17 *See id.* at 57. For example, some types of assault are frequently defined as "unconsented to touching." Yet if the "victim" actually granted consent, then that consent may be recognized as a defense to the assault for the accused. This would be known as an "offense modification defense." *See id.*

18 *See id.*

19 *See id.* An actor may satisfy all of the elements of an offense, and his conduct may be a legally recognized harm or evil of the sort that generally is prohibited; the circumstances of the offense may suggest, however, that because of the justifying circumstances, this particular offense conduct ought to be tolerated or even encouraged. *See id.* Justifications ("affirmative defenses") include (1) self-defense, (2) defense of property, (3) defense of others, and (4) law enforcement; they may entail placing the burden of proof on the defendant. An affirmative defense does not negate an element of the crime; rather, it means that the accused committed the act, but had an excuse. Examples of such justification defenses include assaulting another in self-defense and purposely burning another's farm (i.e., committing arson) in order to create a firebreak to save a town from a raging forest fire. *See id.* Affirmative defenses may be determined by a preponderance of evidence. Therefore, using "insanity" as an example, the government has to prove that the accused is sane beyond a reasonable doubt in order to overcome the affirmative defense of insanity, which the defendant could prove by a preponderance of the evidence. 18 U.S.C. § 17 (1994) (insanity); *see also* Leland v. Oregon, 343 U.S. 790, 798-99 (1952) (allowing Oregon to require a defendant to prove the affirmative defense of insanity beyond a reasonable doubt).

Affirmative defenses play a definite and important role in advanced criminologies. In a concurring opinion to *People v. Patterson*, 347 N.E.2d 898, 909 (N.Y. 1976), the precursor appellate case to *Patterson v. New York*, 432 U.S. 197 (1977) (discussed *infra* notes 96-101 and accompanying text), Chief Judge Breitel presents an effective argument against a state forestalling or discouraging the use of affirmative defenses. He begins with a premonition of what might occur if affirmative defenses were abolished.

In the absence of affirmative defenses the impulse to legislators, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualifiedly general terms, and leave only to sentence the adjustment between offenses of lesser and greater degree. In times when there is also a retrogressive impulse in legislation to restrain courts by mandatory sentences, the evil would be compounded.

*Patterson*, 347 N.E.2d at 909. Affirmative defenses, when intelligently used, permit the gradation of offenses at earlier stages in the prosecution and trial, thus offering a defendant the opportunity to allege or prove, if possible, any distinction between the

statement: "A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act."<sup>22</sup>

## 2. Analytical "Tools"<sup>23</sup>

Having thus established basic definitions, it is next appropriate to briefly survey the actual "elements" of an offense. In conducting an

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offense charged and mitigating circumstances which could ameliorate the degree or kind of offense. *See id.*

A homicide case provides an appropriate example. Without an affirmative defense, the crime of murder or manslaughter could legislatively be defined as simply "intent to kill," unaffected by the spontaneity with which that intent is formed or any mitigating circumstances that might legally lower the grade of crime. *See id.* Indeed, placing the burden of proof on the defense, even with a lower threshold, is fair because of the defendant's knowledge or access to evidence other than his own on the issue. *See id.* On the other hand, to require the *prosecution* to prove the negation of such mitigating circumstances is unfair, for it requires the prosecution to admit to the jury the possible existence of those factors and then, in the face of definitional and circular reason, prove their non-existence. *See id.* One sign of a more mature and developed criminology is the free use of sophisticated distinctions—guarding, of course, against abuse. *See id.* at 910. The goals should be "more appropriate definition of and sanctions for crime, and a retreat from primitive notions about crime based on a result alone or based largely on result." *Id.* In sum, the appropriate use of affirmative defenses marks "a shift from primitive mechanical classifications based on the bare antisocial act and its consequences, rather than on the nature of the offender and the conditions which produce some degree of excuse for his conduct, [and this is] the mark of an advanced criminology." *Id.*

20 ROBINSON, *supra* note 14, at 57. An actor's conduct, although harmful and evil in itself and not justified by special circumstances, may nonetheless be appropriately subjected to acquittal since the criminal law has a special commitment to punishing only the blameworthy. *Id.* at 58. Excuses ("defenses") include (1) insanity, (2) immaturity, (3) necessity, (4) duress, and (5) mistake of fact/law. Insanity, necessity, and duress also can be affirmative defenses. For example, an actor who is acting involuntarily; who is insane, involuntarily intoxicated, or immature; or who is acting under duress or under a reasonable mistake of law or mistake as to justification may be blameless. *See id.*

21 *See id.* A blameworthy actor may be acquitted if he satisfies the requirements of a nonexculpatory defense. While such defenses are disfavored, they further societal interests that are judged to be more important than punishing the offender at hand. Diplomatic immunity is one example of such a defense. *See id.* at 58–59.

22 Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1558 n.21 (1999) (quoting GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 759 (1978)) (arguing that an action is justified if, and only if, it is permitted by the best moral theory, regardless of the beliefs of the actor).

23 The information in this Part, including the "Paradigm of Individual Responsibility," regarding elemental analyses is ably articulated in Matthew T. Fricker & Kelly Gilchrist, *United States v. Nofziger and the Revision of 18 U.S.C § 207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law*, 65 NOTRE DAME

elemental analysis, it is helpful to have at hand a formula that might well be characterized as a "Paradigm of Individual Responsibility."<sup>24</sup> The first element is "who" is accused of the offense. Is it a person? A group or entity? A corporation? Any combination of these?<sup>25</sup> The second step is to resolve what "conduct" has been alleged against the

L. REV. 803, 822-31 (1990). It stems from work on the proposed federal criminal code. See generally S. REP. NO. 97-307 (1981).

24 A basic element analysis of the crime of "vehicular homicide" illustrates the paradigm. Because statutes vary from state to state as to the elements of this crime, the vehicular homicide statute for the State of Iowa is here used for the sake of example: "Homicide or serious injury by vehicle. 1. A person commits a class 'C' felony when the person unintentionally causes the death of another by . . . the following means: . . . b. Driving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of persons or property . . ." IOWA CODE ANN. § 707.6A (West 1993).

Elements of the Offense of Vehicular Homicide:

Who:	person (actor)		<u>State of Mind of Actor</u>
Conduct:	driving	→	recklessness; with willful or wanton disregard
Attendant Circumstances:	motor vehicle - persons or property	→	recklessness
Result:	death	→	recklessness

Historically, American "law has grouped a variety of acts, circumstances, and results together in a fashion that obscures their distinctions, and referred to the assemblage by a single name." Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 588-89 (1988). Regular and consistent use of precise drafting conventions, denoting plainly what is conduct, what is a circumstance, and what is a result, could produce a much higher degree of exactitude and would not commingle conduct and result. See *id.* at 589. The crime of "murder" (the unlawful killing of any human being with malice aforethought) is the prime example of the application of the Paradigm of Individual Responsibility showing that "kill" is a single word that performs two functions (conduct and result), as illustrated below:

Elements of the Offense of Murder:

Who:	person (actor)		<u>State of Mind of Actor</u>
Conduct:	kill	→	intent to kill with malice aforethought
Attendant Circumstances:	human being	→	knowledge
Result:	kill	→	intent to kill

(N.B. A detailed elemental analysis of the "Hate Crime Statute" discussed in *Apprendi* may be found in the Appendix of this Comment.)

25 For example, if the word "whoever" appears in a statute, that statute applies to any person as well as to any corporation. See, e.g., 1 U.S.C. § 1 (1994) (providing definition of "whoever").



actor (i.e., determine the "what" or the "actus reus"). For example, in a basic murder statute, the conduct referred to would be "to kill." The third part of the analysis should be consideration of the attendant circumstances. That is, facts exist surrounding the alleged offense that may be relevant to application of the statute. Attendant circumstances may be considered in light of "liability" (e.g., "right/wrong" from the perpetrator's perspective), "jurisdiction" (state or federal), "grading" (high/low, e.g., petty or grand larceny based on the value stolen, from the victim's perspective), "venue" (where tried; e.g., S.D.N.Y. or D.D.C.), and "law" (e.g., theory from books rather than empirical observations). The fourth element to be determined is the "result," if any, required by the statute. Using a basic murder statute, the result referred to would be "kill."

Finally, the "state of mind" ("mens rea") of the actor must be determined regarding each of the four sections of the Paradigm of Individual Responsibility that are set forth above (i.e., as to each element). The various states of mind to be applied (with the exception of strict liability crimes) include purpose ("intent"), knowledge, recklessness, and negligence.<sup>26</sup> A well-written statute will include, in either the particular law itself or in the "Definitions" section at the beginning of each related series of laws, specific mention of the state(s) of mind intended by the legislature as it drafted the respective law. Each element of an offense should be considered separately with respect to the state of mind.<sup>27</sup> This will typically give rise to a syntactical ambiguity.<sup>28</sup> Under the common law, a crime could "generally [be] constituted only from concurrence of an evil-meaning mind . . . [and] an evil doing hand . . ." <sup>29</sup> While the requirement of conduct in American criminal law is a matter of constitutional due process, the *state of mind* requirement is a question of legislative intent.<sup>30</sup> Indeed, federal law does not have common-law crimes.<sup>31</sup> Moreover, since

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26 Basic definitions of these states of mind are: "intent/purpose" is to "engage in some conduct with the purpose of . . ."; "knowledge" is a conscious awareness, or the total or range of what has been perceived or learned; "reckless" is conscious risktaking; and "negligence" exists when the defendant "should have known . . . ."

27 See Blakey & Roddy, *supra* note 10, at 1621.

28 See *id.* (citation omitted). For example, what does the state of mind of "knowingly" modify in the phrase "knowingly sells a security without a permit"? As a matter of grammar, it is not at all clear how far down the sentence the word "knowingly" travels in what it modifies—hence, a syntactical ambiguity arises. See *id.* (citation omitted).

29 *Id.* at 1617 (citing, inter alia, *United States v. Bailey*, 444 U.S. 394, 402 (1980), and *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

30 *Id.* at 1620.

31 See *id.* at 1620 n.19.

Congress typically drafts legislation against a common-law background, strict liability becomes an exception—and silence is not enough to infer that Congress intended strict liability.<sup>32</sup> If a statute is silent as to state of mind, typically a state of mind is read into the statute<sup>33</sup> based on general principles of statutory construction,<sup>34</sup> the *Model Penal Code* (MPC) principle,<sup>35</sup> or a non-MPC principle.<sup>36</sup>

### B. Sentencing in General<sup>37</sup>

*Apprendi* indeed "shifted the tectonic plates insofar as criminal sentencing is concerned."<sup>38</sup> To understand the magnitude of *Apprendi's* affect, an understanding of sentencing is required.

The basic outline of the sentencing process is as follows:

32 *Id.* at 1621–22.

33 A state's criminal code introductory section on guidance should be checked to see if it sets out rules for "reading in" states of mind. For example, regarding silence as to state of mind in a New Jersey statute, the New Jersey Code of Criminal Justice specifically states that "[a] statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime with the culpability defined in paragraph b.(2) of this section" [i.e., "knowledge"]. N.J. STAT. ANN. § 2C:2-2(c)(3) (West 1995).

34 The modern federal principle of statutory construction provides the following regarding state of mind: Conduct is "knowing" (i.e., "with knowledge"); Surrounding Circumstances: Liability is "knowing"; Jurisdiction is "strict"; Grading is "strict"; Law is "strict/knowledge"; Result is "knowing/knowledge"; and Affirmative Defenses are to be implied. See Fricker & Gilchrist, *supra* note 23, at 822–31.

35 The MPC principle of statutory construction provides the following regarding state of mind: "Conduct," "Result," and "Surrounding Circumstances," including those used for grading, but not venue or jurisdiction, are "reckless" unless expressly stated otherwise. MODEL PENAL CODE § 2.02(3) explanatory note on section (Official Draft & Explanatory Notes 1962).

36 States that use a non-MPC principle of statutory construction should delineate in a clear and unambiguous manner within their statutes the states of mind that the legislatures desire the courts to employ. See Blakey & Roddy, *supra* note 10, at 1571. Typical states of mind required in such states for elements of common-law felonies are conduct is "intent"; surrounding circumstances is "knowledge"; and result is "intent."

37 Sentencing can, depending on the applicable law and the facts of each individual case, involve the imposition of anything from probation to confinement to capital punishment. "Confinement" is common to both the civil and criminal systems. While an in-depth discussion of the rationale for confinement is outside the scope of this work, a thorough discussion of the traditional rationales for confinement may be found at Katherine P. Blakey, Note, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is an Appropriate Legal Compromise Between "Mad" and "Bad"*—A Study of Minnesota's Sexual Psychopathic Personality Statute, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 244–51 (1996).

38 *United States v. Robinson*, 241 F.3d 115, 123 (1st Cir. 2001), *cert. denied*, 70 U.S.L.W. 3237 (2001).

[If a criminal] defendant pleads guilty or is found guilty at trial, the judge will enter a judgment of conviction and set the case for sentencing. The structure of the sentence and the discretion of the judge in choosing among sentencing alternatives will be controlled by statute. For misdemeanors a judge ordinarily has discretion to impose a fine, probation, suspended sentence, or fixed jail term not to exceed a statutorily prescribed maximum. For felony offenses, the choice ordinarily is between imprisonment and probation although the legislature is likely to have prohibited probation for some offenses. . . . [Some states] require that the sentence be indeterminate, i.e., the court sets a minimum and maximum term, with the parole board determining the actual release date between the minimum and maximum. . . . In recent years, many states have moved from indeterminate to determinate prison sentences for most felonies. Under determinate sentencing, the judge sets a single fixed term of imprisonment, which must fall within a fairly narrow range set by the legislature for the particular crime. This sentencing structure eliminates earlier parole release except for limited good-behavior credits.<sup>39</sup>

And “[i]n cases tried without a jury, the judge, of course, determines the sentence to be imposed.”<sup>40</sup> In jury cases, however, the practice varies among the states. Most of them limit the jury function to a determination of guilt or innocence and permit the judge to assign the penalty.<sup>41</sup>

Criminal law statutes are drafted with great care to make the assignment of liability a matter of rules rather than one of judicial discretion.<sup>42</sup> This enduring “commitment to the articulation of liability rules, called the principle of legality, has always been a foundation of Anglo-American criminal law.”<sup>43</sup> Some commentators, however, feel that the sentencing process is highly discretionary in determining

39 ROBINSON, *supra* note 14, at 14–15 (quoting WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 1.4(o) (1985)).

40 ANDRE A. MOENSSENS ET AL., *CASES AND COMMENTS ON CRIMINAL LAW* 10 (5th ed. 1992).

41 *See id.* For murder and rape, however, most states place both responsibilities upon the jury. *See id.*

42 *See* ROBINSON, *supra* note 14, at 59. Indeed, “[i]n a democracy, the legislature, which is the most representative branch of government, is generally thought to be the proper body to exercise the criminalization decision. This rationale directly supports the prohibition of judicial creation of offenses and the abolition of judicially created offenses.” PAUL H. ROBINSON, *CRIMINAL LAW* 79 (1997).

43 ROBINSON, *supra* note 14, at 59. The traditional statement of the legality principle provides, “[N]ullum crimen sine lege, nulla poena sine lege.” (Roughly: “No crime without law; no punishment without law,” or “No conduct may be held criminal unless it is precisely described in a penal law.”) *See id.* at 117.

punishment.<sup>44</sup> Professor Paul H. Robinson<sup>45</sup> succinctly lays out his position on the issue by asking: "If unguided discretion is carefully avoided in the liability assignment process, why is it tolerated in sentencing, where the punishment is in large part determined?"<sup>46</sup> This question is further explored in detail throughout this Comment.

### C. Sentencing Reform Act of 1984<sup>47</sup> (*Federal Sentencing Guidelines*)

Prior to the most recent wave of sentencing reform, the federal and state governments "employed indeterminate-sentencing schemes in which judges and executive branch officials (e.g., parole board officials) had substantial discretion to determine the actual length of a defendant's sentence."<sup>48</sup> Nevertheless, studies of indeterminate sentencing schemes found that similarly situated defendants often received widely disparate sentences.<sup>49</sup> It was discovered that, while "indeterminate sentencing" was intended to soften the uniform and often harsh sentences formerly imposed under mandatory sentencing schemes, the indeterminate sentencing actually had the opposite effect.<sup>50</sup> Congress and state legislatures responded to this by shifting to

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44 See, e.g., *id.* at 60.

45 Professor Robinson is a Professor of Law at Northwestern University School of Law. He is the author of numerous textbooks and articles related to criminal law. Further, he served in the mid-1980s as one of the seven original commissioners on the United States Sentencing Commission. See generally *id.*; DISSENTING VIEW OF COMMISSIONER PAUL H. ROBINSON ON THE PROMULGATION OF SENTENCING GUIDELINES BY THE UNITED STATES SENTENCING COMMISSION (1987) [hereinafter DISSENTING VIEW].

46 ROBINSON, *supra* note 14, at 60. Professor Robinson adds,

In assessing whether to *impose* liability, and what *grade* of liability to impose, the criminal law follows fixed and specific rules that allow little discretion; the legality principle is well preserved. In the determination of an offender's *sentence*, however, it is common to have few or no rules and to allow broad judicial discretion. It is unclear whether this dramatic difference is justifiable. . . . If the distribution of punishment is to be discretionary at the sentencing stage, society has benefited little from the strict adherence to legality at the liability assignment stage. It is in part for this reason that the current wave of sentencing reform introduces articulated rules and significantly reduces sentencing discretion.

ROBINSON, *supra* note 42, at 83–84.

47 18 U.S.C. §§ 3551–3586 (1994 & Supp. V 1999). For the sake of simplicity and clarity, these materials do not attempt to provide an overview of the sentencing guidelines of individual states that have chosen to adopt such a system. The Federal Sentencing Guidelines provide a reasonably adequate and necessary framework within which the issue of "who decides what a 'crime' is" may be effectively analyzed.

48 *Apprendi v. New Jersey*, 530 U.S. 466, 549 (2000) (O'Connor, J., dissenting).

49 See *id.* (O'Connor, J., dissenting).

50 See *id.* (O'Connor, J., dissenting).

"determinate sentencing" schemes that aimed to limit the sentencing discretion of judges and therefore provide equal treatment to similarly situated defendants.<sup>51</sup>

The United States Congress created the most well known of these reforms when it passed the Sentencing Reform Act of 1984.<sup>52</sup> In doing so, Congress committed the federal system to rationality and consistency in criminal sentencing,<sup>53</sup> commencing November 1, 1987—the effective date of the Federal Sentencing Guidelines.<sup>54</sup>

Then-Circuit Judge Stephen Breyer authored an article in 1988 that provides the background necessary to understand the Guidelines and the task the United States Sentencing Commission faced when they drafted the Guidelines, as well as the kinds of compromise that are embodied in the final version of the Guidelines.<sup>55</sup> Congress had two primary purposes when it enacted the new Sentencing Reform Act. The first was "honesty in sentencing," which "meant to end the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him after four. . . . [T]his system sometimes fooled the judges, sometimes disappointed the offender, and often mislead the public."<sup>56</sup> The new law ensured that the sentence the judge gave was the sentence the offender would serve.<sup>57</sup> Congress's second purpose was to reduce "unjustifiably wide" sentencing disparities in which, for example, punishments for identical actual cases could range from three years to twenty years imprisonment.<sup>58</sup>

To effectuate its intent in the Sentencing Reform Act, Congress created the United States Sentencing Commission,<sup>59</sup> of which now Justice Breyer was an original member.<sup>60</sup> The Commission followed

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51 See *id.* at 550 (O'Connor, J., dissenting).

52 See *id.* (O'Connor, J., dissenting).

53 See DISSENTING VIEW, *supra* note 45, at 2. The Senate voted 91 to 1 on this Act, and the House voted 316 to 91. *Id.* The statutory authority of the Commission is codified in Chapter 58 of Title 28, United States Code; the related statutory authority for sentencing is codified in Chapters 227 and 229 of Title 18, United States Code. See U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS app. B (1987).

54 See U.S. SENTENCING GUIDELINES MANUAL (1988).

55 See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 2 (1988).

56 *Id.* at 4.

57 See *id.*

58 See *id.* at 4–5.

59 *Id.* at 5.

60 Justice Breyer is one of the four dissenters in the *Apprendi* decision. See *infra* note 260 and accompanying text.

two principles throughout the period in which it drafted the Guidelines. First, regarding the creation of categories and determination of sentence lengths, the Commission followed typical past practice, determined by an analysis of 10,000 actual cases.<sup>61</sup> Second, the Commission remained cognizant throughout the drafting process that Congress intended it to be a permanent body that continuously would revise the Guidelines over the years.<sup>62</sup> Overall, the ultimate goal of the Commission was to create a rational and consistent sentencing system. The guideline range of imprisonment for each combination of offense and offender characteristic was to be narrow, "the top of which range cannot exceed the bottom by more than twenty-five percent."<sup>63</sup>

The Sentencing Commission was urged by some to adopt a controlling principle or rationale for punishment from among those invoked in classical penal law: deterrence, incapacitation, retribution, and rehabilitation.<sup>64</sup> The Commission declined to do so to avoid impeding the general acceptability of the Guidelines; the Commission did, however, resolve certain other policy issues.<sup>65</sup> For example, the Commission believed that a "charge offense" sentencing (the conduct corresponding to the material elements of the crimes of which defendants have been convicted or to which they plead guilty) was more attainable than a real offense sentencing (the actual conduct in which defendants engaged, regardless of the charges on which they were indicted or convicted).<sup>66</sup> Nevertheless, the Guidelines have certain elements of reality. For example, "it has utilized generic conduct rather than the elements of a multiplicity of narrow federal criminal law statutes."<sup>67</sup> Further, the Guidelines also reflect important real offense elements commonly encountered, such as the actor's role in the commission of an offense, the presence of firearms, and the amount of money taken.<sup>68</sup>

The second basic policy adopted by the Sentencing Commission dealt with judicial freedom to depart from guideline sentences.<sup>69</sup> The

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61 See Breyer, *supra* note 55, at 7.

62 See *id.* at 7-8.

63 *Id.* at 5.

64 See JOHN S. BAKER, JR. ET AL., HALL'S CRIMINAL LAW 887 (5th ed. 1993). For an in depth discussion of the rationale for punishment, see generally Blakey, *supra* note 37, at 244-51.

65 See BAKER ET AL., *supra* note 64, at 887.

66 See *id.*

67 *Id.* (citing U.S. SENTENCING COMM'N, *supra* note 53, at 1.5-6 (West 1993)).

68 See *id.* at 887-88 (citation omitted).

69 See *id.* at 888.

Commission recognized that "in many instances, it will be appropriate that the court consider the actual conduct of the offender, even when such conduct does not constitute an element of the offense."<sup>70</sup> In acknowledging the occasional need for departures, the Commission wrote,

[This] sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance. . . that was not adequately taken into consideration . . .". [see] 18 U.S.C. § 3553(b). . . . The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.<sup>71</sup>

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70 U.S. SENTENCING COMM'N, *supra* note 53, at 1.14–15 (1987). Final Draft [hereinafter F.D.] section 1B1.3, entitled "Relevant Conduct," provides:

- (a) Unless otherwise specified under the guidelines, conduct and circumstances relevant to the offense of conviction means: acts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable, that (1) are part of the same course of conduct, or a common scheme or plan, as the offense of conviction, or (2) are relevant to the defendant's state of mind or motive in committing the offense of conviction, or (3) indicate the defendant's degree of dependence upon criminal activity for a livelihood.
- (b) Injury relevant to the offense of conviction means harm which is caused intentionally, recklessly or by criminal negligence in the course of conduct relevant to the offense of conviction.

*Id.* at 1.15.

71 *Id.* at 1.6 (1987); see also *Koon v. United States*, 518 U.S. 81 (1996). Commissioner Robinson, however, points out that despite the "Relevant Conduct" provision that may suggest that the Guidelines take into account most aspects of the offender's conduct, the only factors or conduct that a judge is permitted to take into account under the Guidelines are those *specifically listed* in the applicable guideline section. See DISSENTING VIEW, *supra* note 45, at 8 (referencing U.S. SENTENCING COMM'N, *supra* note 53, F.D. § 1B1.1 ("Application Instructions") steps (a)–(c)). As an example, because the burglary guideline does not specifically aggravate the guideline sentence where the offender causes physical injury, the burglar who beats a homeowner will be treated the same as the burglar who does not. That is, the beating of the homeowner is "free" in burglary, as it is in a host of other offenses.

*Id.*; see also U.S. SENTENCING COMM'N, *supra* note 53, F.D. § 2B2.1 ("Burglary of a Residence"). Indeed, a bank robber might or might not use a gun; he might take a little, or a lot, of money; he might, or might not, injure the teller. Yet the typical armed robbery statute does not distinguish among these different ways of committing the crime. See Breyer, *supra* note 55, at 9. The judge must depart from the Guidelines to

Overall, judges were to be bound by the Guidelines unless there existed an unusual factor in a case that "was not adequately taken into consideration" by the Commission in drafting the Guidelines.<sup>72</sup> Such an occurrence was to be rare, because the Guidelines were drafted to take into account "every important factor relevant to sentencing."<sup>73</sup>

*D. Determination of Punishment: Applying a "Crime" to a Sentencing Guideline*

After applying these working definitions and analytical tools (assuming that both an effective elemental analysis is performed on a particular criminal statute and that the government believes it can prove each and every element of an offense<sup>74</sup>), legislatively-created sentencing Guidelines may then be considered. Within these Guidelines, particular offense characteristics are often specified to establish the seriousness of the offense.<sup>75</sup> When present in a case, particular offense characteristics require an adjustment in the offense level. For example, the robbery guideline in the Federal Sentencing Guidelines provides "a 3-level increase if a firearm was possessed, a 5-level increase if a firearm was discharged, a 6-level increase if life-threatening bodily injury occurred, and an increase of zero to seven levels depend-

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take account of physical injury caused during such offenses as burglary, escape, prison riot, and aircraft piracy. See DISSENTING VIEW, *supra* note 45, at 14 n.48. Commissioner Robinson also pointed out that by inviting departures rather than incorporating all relevant sentencing factors into the Guidelines, the Sentencing Commission violated its statutory mandate and invited disparity. See David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 424 n.87 (1993) (discussing the Federal Sentencing Guidelines' approach to real-offense sentencing).

<sup>72</sup> DISSENTING VIEW, *supra* note 45, at 2 (quoting 18 U.S.C. § 3553(b) (1994)).

<sup>73</sup> *Id.* (citing S. REP. NO. 98-225, at 169 (1983)). Nevertheless, Commissioner Robinson believes that

[the guidelines] are neither comprehensive nor binding. [They] ignore many factors important to sentencing, fail to provide a guideline for many offenses (including all offenses committed by organizations), frequently fail to provide definitions of terms and criteria for sentencing factors, and provide extensive invitations—indeed, directions—to judges to depart from the guidelines. As a result, there may be as much disparity under these guidelines as there was without guidelines.

*Id.* at 12.

<sup>74</sup> For the sake of clarity in the following explanation of how the Federal Sentencing Guidelines work, this caveat puts aside for the moment the central issues in contention within *Apprendi*, which are who should determine the precise elements necessary to constitute a particular "crime" and what exactly those elements are.

<sup>75</sup> See NORMAN ABRAMS & SARA S. BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 702 (3d ed. 2000).



ing on the value of the property taken.”<sup>76</sup> Jurisdictions differ, however, in what they regard as elements of specific crimes. To put these crucial differences in context, it is necessary to examine several prominent Supreme Court decisions that demonstrate the recent evolution in the Court’s jurisprudence of what constitutes a “crime.” These cases influenced the *Apprendi* Court in varying manners and helped to mold the current constitutional framework for the federal criminal law.

### E. Background Cases Necessary To Understand *Apprendi*

#### 1. *Williams v. New York*

Over fifty years ago, the Court held in *Williams v. New York*<sup>77</sup> that “determination of evidentiary relevance at sentencing hearings was solely within the discretion of the sentencing judge” and that “[t]his evidentiary latitude . . . even extend[ed] to the consideration of alleged but unproven prior criminal acts.”<sup>78</sup> Justice Black wrote the Court’s opinion that upheld a death sentence based on factors that were outside the record presented in the trial.<sup>79</sup> The *Williams* Court “reasoned that individualized sentencing requires judges to have access to all relevant information.”<sup>80</sup> While “[t]his stance was not remarkable in the rehabilitative penological climate of the 1940’s [sic],” “[t]he effect of *Williams* . . . was to diminish the importance of a defendant’s conviction offense.”<sup>81</sup> For example, “[a] defendant charged with armed robbery, but convicted by a jury of theft, may later be sentenced as if he had been convicted of armed robbery. The conviction offense, therefore, [had] little, if any, relevance to sentencing.”<sup>82</sup>

#### 2. *In re Winship*

While the narrow issue the Court faced in the seminal case of *In re Winship*<sup>83</sup> was “whether proof beyond a reasonable doubt is among the ‘essentials of due process and fair treatment’ required during the adjudicatory stage when a juvenile is charged with an act which would

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76 *Id.*

77 337 U.S. 241 (1949).

78 See Michael H. Tonry, *Criminal Law: The Missing Element in Sentencing Reform*, 35 VAND. L. REV. 607, 625 (1982).

79 See *Williams*, 337 U.S. at 251–52.

80 Tonry, *supra* note 78, at 625 (citing *Williams*, 337 U.S. at 247).

81 *Id.*

82 *Id.*

83 397 U.S. 358 (1970).

constitute a crime if committed by an adult,"<sup>84</sup> the Court used *Winship* to establish the important principle that the government must prove beyond a reasonable doubt "every fact necessary to constitute the crime" for which any defendant may be charged.<sup>85</sup> Noting that "[t]he requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation,"<sup>86</sup> the Court emphasized that "[t]hese rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."<sup>87</sup> This reasonable doubt standard has certainly "play[ed] a vital role in American criminal procedure" and has been "a prime instrument for reducing the risk of convictions resting on factual error."<sup>88</sup>

### 3. *Mullaney v. Wilbur*

The landmark case of *Mullaney v. Wilbur*<sup>89</sup> expanded the protections afforded in *Winship* and held that the government may not shift the burden of proof on elements of an offense.<sup>90</sup> The issue the Court faced in *Mullaney* was whether the Maine rule requiring a defendant "to prove that he acted 'in the heat of passion on sudden provocation' . . . comports with the due process requirement, as defined in *In re Winship*, that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged."<sup>91</sup> While "[m]any states impose different statutory sentences on different degrees of assault," in Maine, for example, the "prosecution must prove elements of aggravation in criminal assault cases by proof beyond a reasonable doubt."<sup>92</sup> The *Mullaney* Court pointed out that *Winship* emphasized the societal interests in the reliability of jury verdicts:

The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the uncertainty that he would be stigmatized by the conviction. . . .

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84 *Id.* at 359.

85 *Id.* at 364.

86 *Id.* at 361.

87 *Id.* at 362.

88 *Id.* at 363.

89 421 U.S. 684 (1975).

90 *See id.* at 703-04.

91 *Id.* at 684-85 (citation omitted).

92 *Id.* at 699 n.24 (citing *State v. Ferris*, 249 A.2d 523 (Me. 1969)).

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. *It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent people are being condemned.*<sup>93</sup>

The Court recognized that "this is often a heavy burden for the prosecution to satisfy. . . . [b]ut this is the traditional burden which our system of criminal justice deems essential."<sup>94</sup> The Court in *Mullaney* stated that it was "an intolerable result" to require

a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence.<sup>95</sup>

Therefore, the Due Process Clause requires that the government may not shift the burden of proof on *elements of an offense*.

#### 4. *Patterson v. New York*

Nevertheless, *Patterson v. New York*<sup>96</sup> reached a result complementary to, yet distinguishable from, *Mullaney* based on one important factor. The Supreme Court held that the government *is allowed* to shift the burden of proof to the defendant on an *affirmative defense*.<sup>97</sup> Defendant Patterson was convicted of killing his estranged wife's paramour.<sup>98</sup> His jury was instructed under the applicable New York state law that "the defendant had the burden of proving his affirmative defense by a preponderance of the evidence."<sup>99</sup> The majority wrote that "a State must [not] prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of punishment."<sup>100</sup> Overall, a state's decision with

93 *Id.* at 700-01 (citing *Winship*, 397 U.S. at 363-64) (emphasis added).

94 *Id.* at 701.

95 *Id.* at 703.

96 432 U.S. 197 (1977).

97 *See id.* at 206-09. *See supra* note 19 for a thorough discussion of affirmative defenses and their role in an advanced criminology.

98 *Patterson*, 432 U.S. at 198-200.

99 *Id.* at 200. The jury was further told that if it found beyond a reasonable doubt that Patterson had intentionally killed his wife's lover but that Patterson had demonstrated by a preponderance of the evidence that he had acted under the influence of extreme emotional disturbance, it had to find Patterson guilty of manslaughter rather than murder. *Id.*

100 *Id.* at 207 (emphasis added). The Court went on to add:

respect to its criminal procedures is "not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"<sup>101</sup>

### 5. *McMillan v. Pennsylvania*

Only sixteen years ago, *McMillan v. Pennsylvania*<sup>102</sup> held that a court may use the preponderance of evidence standard when considering a sentencing factor.<sup>103</sup> This holding directly contrasts with *Apprendi*, which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>104</sup> The Pennsylvania Mandatory Minimum Sentencing Act<sup>105</sup> provided that anyone convicted of certain enumerated felonies was subject to a mandatory minimum prison sentence of five years if the sentencing judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense.<sup>106</sup> The Act specifically incorporated the statement that "[p]rovisions of this section shall *not* be an element of the crime."<sup>107</sup> Defendant *McMillan* shot a person after an argument

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The requirement of proof beyond a reasonable doubt in a criminal case is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is thus an increased risk that the guilty will go free. While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits; and Mr. Justice Harlan's aphorism provides little guidance for determining what those limits are. Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person. Punishment of those found guilty by a jury, for example, is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail.

*Id.* at 208.

101 *Id.* at 201-02.

102 477 U.S. 79 (1986). The *McMillan* majority consisted of Justices Rehnquist, White, Powell, O'Connor, and Chief Justice Burger. Justices Marshall, Brennan, Blackmun, and Stevens were in dissent.

103 *See id.* at 84-91.

104 *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

105 42 PA. CONS. STAT. § 9712 (1982).

106 *See McMillan*, 477 U.S. at 80-81.

107 *Id.* at 81 n.1 (emphasis added).

over a debt and was convicted by a jury of aggravated assault.<sup>108</sup> He and his fellow petitioners appealed on the basis that “visible possession of a firearm [was] an element of the crimes for which they were being sentenced and thus must be proved beyond a reasonable doubt under *In Re Winship* and *Mullaney v. Wilbur*.”<sup>109</sup> Yet the *McMillan* Court looked to *Patterson*, which “rejected the claim that whenever a state links the ‘severity of punishment’ to ‘the presence or absence of an identified fact’ the state must prove that fact beyond a reasonable doubt.”<sup>110</sup> In fact, “*Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature’s definition of the elements of the offense is usually dispositive.”<sup>111</sup> The Court believed that *Patterson*, rather than *Mullaney*, controlled the *McMillan* case.<sup>112</sup> The majority looked with approval upon the Pennsylvania legislature’s express determination that “visible possession of a firearm is not an *element* of the crimes enumerated in the mandatory sentencing statute,” but rather “a *sentencing factor* that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt.”<sup>113</sup> The Pennsylvania statute “neither alter[ed] the maximum penalty for the crime committed nor create[d] a separate offense”—it merely “limit[ed] the sentencing court’s discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm.”<sup>114</sup> Indeed, “[t]he 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.”<sup>115</sup>

The battle in *Apprendi* was foreshadowed in *McMillan* as that Court stated,

Petitioners’ claim that visible possession under the Pennsylvania statute is “really” an element of the offenses for which they are being punished—that Pennsylvania has in effect defined a new set of upgraded felonies—would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment but it does not.<sup>116</sup>

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108 *Id.* Defendant *McMillan* was one of four petitioners appealing the Pennsylvania Act in question. The cases were consolidated upon appeal. *See id.* at 82–83.

109 *Id.* at 83 (citations omitted).

110 *Id.* at 84.

111 *Id.* at 85.

112 *Id.*

113 *Id.* at 85–86 (emphasis added).

114 *Id.* at 87–88.

115 *Id.*

116 *Id.* at 88 (citation omitted).

Toward the end of the majority's opinion, the Court proclaimed, "We have *no doubt* that Pennsylvania's Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line."<sup>117</sup> That statement that would prove to be ominously portentous of the *Apprendi* decision only a few years later.

#### 6. *Almendarez-Torres v. United States*

In *Almendarez-Torres v. United States*,<sup>118</sup> the defendant was convicted of illegally reentering the United States after having been previously deported following his conviction of aggravated felonies.<sup>119</sup> He appealed, arguing that "an indictment must set forth all the elements of a crime," "that his indictment had not mentioned his earlier aggravated felony convictions," and that, consequently, the district court should not have sentenced him to more than "the maximum authorized for an offender without an earlier conviction."<sup>120</sup> The Court held that while "[a]n indictment must set forth each element of the crime that it charges. . . . it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime."<sup>121</sup> In fact, "[w]ithin limits, the question of which factors are which is normally a matter for Congress."<sup>122</sup> The Court then turned to the statute under which *Almendarez-Torres* was sentenced to determine if Congress intended the presence of an earlier conviction as a separate crime or as a sentencing factor that might be used to increase punishment.<sup>123</sup> To answer this question, the Court "look[ed] to the statute's language, structure, subject matter, context, and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text."<sup>124</sup> Analyzing the statute in light of these factors, the

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117 *Id.* at 91 (emphasis added).

118 523 U.S. 224 (1998). *Almendarez-Torres* was a 5–4 decision, with Justices Breyer, O'Connor, Kennedy, Thomas, and the Chief Justice joining. Justices Scalia, Stevens, Souter, and Ginsburg dissented.

119 *Id.* at 227.

120 *Id.*

121 *Id.* at 228 (citations omitted).

122 *Id.* (referencing *Staples v. United States*, 511 U.S. 600, 604 (1994) (citation omitted) (holding that "the definition of a criminal offense [is] entrusted to the legislature 'particularly in the case of federal crimes, which are solely creatures of statute'" (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985))). The limits to which the Court here referred are found in *McMillan v. Pennsylvania*, 477 U.S. 79, 84–91 (1986) (discussed *supra* notes 102–17). In *McMillan*, the Court specifically refused to define the limits to which due process forbids the reallocation or reduction of burdens of proof in criminal cases. See *McMillan*, 477 U.S. at 86.

123 See *Almendarez-Torres*, 523 U.S. at 228.

124 *Id.*

Court first noted that the relevant subject matter of the statute was recidivism<sup>125</sup> and then found that Congress intended to set forth a sentencing factor in the relevant statute rather than to set forth a separate criminal offense.<sup>126</sup> After reviewing and balancing the rationales and holdings of several of its precedent cases, including *Winship*, *Mullaney*, *Patterson*, and *McMillan*, the Court found no significant support for the proposition that the Constitution forbids legislative authorization of a longer sentence for recidivism.<sup>127</sup>

### 7. *Jones v. United States*

The holding in *Jones v. United States*<sup>128</sup> was a precursor to the *Apprendi* holding only a year later. In *Jones*, the Court put boundaries on the *Almendarez-Torres* holding by stating that, based on the Due Process Clause and the Sixth Amendment, any fact other than recidivism that increases the maximum penalty for a crime must be included in an indictment and proved beyond a reasonable doubt to a jury.<sup>129</sup> The *Jones* Court examined the pertinent car-jacking statute<sup>130</sup> and decided that the "if death results" and "if serious bodily injury results" clauses were elements of the statute.<sup>131</sup> The Court also held that states may not get around due process limitations of *Winship* by not presenting to juries facts that increase the severity of the possible penalty.<sup>132</sup> Finally, the *Jones* Court held that the classification of recidivism as a sentencing factor was an exception from the general rule that every fact that might expand the statutory maximum penalty range must be determined by a jury beyond a reasonable doubt.<sup>133</sup>

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125 *See id.* at 230.

126 *See id.* at 235.

127 *See id.* at 240-46.

128 526 U.S. 227 (1999).

129 *See id.* at 243 n.6.

130 18 U.S.C. § 2119 (Supp. V 1993). The statute then read as follows:

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—(1) be fined under this title or imprisoned not more than 15 years, or both, (2) if serious bodily injury (as defined in section 1365 of this title . . . ) results, be fined under this title or imprisoned not more than 25 years or both, and (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both . . . .

*Id.* (current version at 18 U.S.C. § 2119 (Supp. V 1999)).

131 *Jones*, 526 U.S. at 235-36.

132 *See id.* at 240-41.

133 *See id.* at 248-49.

## II. APPRENDI V. NEW JERSEY

### A. Background

#### 1. The Statute<sup>134</sup>

The New Jersey statute classifying as a second-degree offense the possession of a firearm for an unlawful purpose<sup>135</sup> provides for imprisonment of "between five years and 10 years."<sup>136</sup> A separate statute, known as a "hate crime" law, provides for an "extended term" of imprisonment if the trial judge finds, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity."<sup>137</sup> The extended term for such second-degree offenses is "between 10 and 20 years."<sup>138</sup>

#### 2. The Facts

In the early morning hours of December 22, 1994, Charles C. Apprendi, Jr. fired several .22-caliber bullets into the home of an African-American family that had recently moved into a previously all white area of Vineland, New Jersey.<sup>139</sup> He was arrested shortly thereafter and only an hour after the incident admitted that he had been the shooter.<sup>140</sup> After further questioning, "he made a statement—which he later retracted—that even though he did not know the occupants of the house personally, 'because they are black in color he [did] not want them in the neighborhood.'"<sup>141</sup>

#### 3. Procedural History

##### a. New Jersey Trial Court

Subsequently, a New Jersey grand jury returned a twenty-three count indictment against Apprendi that alleged shootings on four dif-

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134 A complete reproduction of the applicable statutes and the hate crime enhancement is found in the Appendix. Additionally, a full elemental analysis of this statute is provided in the Appendix.

135 See *Apprendi v. New Jersey*, 530 U.S. 466, 468 (2000) (referencing N.J. STAT. ANN. § 2C:39-4(a) (West 1995)).

136 *Id.* (referencing N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995)).

137 *Id.* at 468–69 (referencing N.J. STAT. ANN. § 2C:44-3(e) (West 1995)).

138 *Id.* at 469 (referencing N.J. STAT. ANN. § 2C:43-7(a)(3) (West 1995)).

139 *Id.*

140 *Id.* A subsequent search of Apprendi's home uncovered a .22-caliber rifle and an anti-personnel bomb. See *State v. Apprendi*, 731 A.2d 485, 486 (N.J. 1999).

141 *Apprendi*, 530 U.S. at 469 (citing *Apprendi*, 731 A.2d at 486).



ferent dates and “the unlawful possession of various weapons. None of the counts referred to the hate crime statute, and none alleged that Apprendi acted with a racially biased purpose.”<sup>142</sup> The parties entered into a plea agreement in which Apprendi pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of the third-degree offense of unlawful possession of an anti-personnel bomb.<sup>143</sup> The remaining counts were dismissed.<sup>144</sup> As part of the plea agreement, however, the state reserved the right to request the court to impose a higher “enhanced” sentence on the count related to the December 22 shooting on the ground that the offense was committed with a biased purpose under the hate crime statute.<sup>145</sup> Apprendi, in turn, “reserved the right to challenge the hate crime sentence enhancement on the ground that it violates the United States Constitution.”<sup>146</sup> The maximum sentence that Apprendi faced on the three counts in the absence of the hate crime statute was twenty years in total.<sup>147</sup> If the judge enhanced the sentence based on the hate crime statute, the count related to the December 22 shooting alone would be twenty years, and the maximum of the three counts in aggregate would be thirty years, with a fifteen year period of parole ineligibility.<sup>148</sup> After the trial judge accepted the three guilty pleas, the prosecutor filed a motion for an extended term.<sup>149</sup> The trial judge held an evidentiary hearing on the issue of Apprendi’s “purpose” in the shooting.<sup>150</sup> After hearing from a psychologist and numerous character witnesses, as well as from Apprendi himself, the trial judge concluded that the evidence supported a finding “that the crime was motivated by racial bias.”<sup>151</sup> Determining “‘by a preponderance of the evidence’ that Apprendi’s actions were taken ‘with a purpose to intimidate’ as provided by the statute, the trial judge held that the hate crime enhancement applied.”<sup>152</sup> The judge rejected Apprendi’s constitutional challenge to the hate crime statute and sentenced him to a twelve year term for the December 22 shooting, and to shorter concurrent sentences on the other two counts.<sup>153</sup>

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142 *Id.*

143 *Id.* at 469–70.

144 *Id.* at 470.

145 *Id.*

146 *Id.*

147 *Id.*

148 *See id.*

149 *Id.*

150 *Id.*

151 *Id.* at 471; *see also id.* at 470.

152 *Id.* at 471 (citation omitted).

153 *Id.*

### b. New Jersey Appellate Court

Apprendi appealed to the Appellate Division of the Superior Court of New Jersey, arguing "that the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime statute was based must be proved to a jury beyond a reasonable doubt."<sup>154</sup> Over dissent, that court relied on the United States Supreme Court's decision in *McMillan v. Pennsylvania*<sup>155</sup> and found that the state legislature decided to make the hate crime enhancement a "sentencing factor," as opposed to "an element of an underlying offense—and that decision was within the State's established power to define the elements of its crimes."<sup>156</sup> The appellate court also found that the hate crime statute did not create a presumption of guilt and did not appear "tailored to permit the . . . finding to be a tail which wags the dog of the substantive offense."<sup>157</sup> That court characterized the required finding as one of "motive" and described it as a traditional "sentencing factor" that was not considered an essential element of any crime unless the legislature so provides.<sup>158</sup> Although it recognized that the hate crime law did indeed expose defendants to "greater and additional punishment,"<sup>159</sup> the appellate court held that this "one factor standing alone" was not sufficient to render the statute unconstitutional.<sup>160</sup>

### c. New Jersey Supreme Court

A divided New Jersey Supreme Court began its affirmation of the appellate court by explaining that while due process only requires the government

to prove the "elements" of an offense beyond a reasonable doubt, the mere fact that a state legislature has placed a criminal component "within the sentencing provisions" of the criminal code "does

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154 *Id.* Defendant Apprendi was relying on the Supreme Court's holding in *In re Winship*, 397 U.S. 358 (1970), fully discussed *supra* notes 83–88 and accompanying text.

155 477 U.S. 79 (1986). *McMillan* is discussed fully *supra* notes 102–17 and accompanying text.

156 *Apprendi*, 530 U.S. at 471.

157 *Id.* (quoting New Jersey v. Apprendi, 698 A.2d 1265, 1269 (N.J. Super. Ct. App. Div. 1997) (quoting *McMillan*, 477 U.S. at 88)).

158 *Id.* at 471–72 (quoting *Apprendi*, 698 A.2d at 1270).

159 *Id.* at 472 (quoting *Apprendi*, 698 A.2d at 1269 (citing *McMillan*, 477 U.S. at 88)).

160 *See id.* (quoting *Apprendi*, 698 A.2d at 1269).

not mean that the finding of a biased purpose to intimidate is *not* an essential element of the offense."<sup>161</sup>

Nor "could the constitutional question be settled simply by defining the hate crime statute's 'purpose to intimidate' as 'motive' and thereby excluding the provision from any traditional conception of an 'element' of a crime."<sup>162</sup> Even if one characterized the language that way, and the court doubted that such a characterization was accurate, "proof of motive did not ordinarily 'increase the penal consequences to an actor.' Such '[l]abels,' . . . would not yield an answer to Apprendi's constitutional question."<sup>163</sup>

While taking judicial notice of the United States Supreme Court's 1999 decision in *Jones v. United States*<sup>164</sup> that cast serious doubt on the constitutionality of allowing penalty-enhancing findings to be determined by a judge by a preponderance of the evidence, the court concluded that those doubts were not essential to the holding in *Jones*.<sup>165</sup> The state supreme court then relied on *McMillan*, as the appellate court had, as well as *Almendarez-Torres v. United States*<sup>166</sup> to hold the hate crime statute valid.<sup>167</sup> The majority found that rather than allowing impermissible burden shifting and creating "a separate offense calling for a separate penalty . . . 'the Legislature simply took one factor that has *always* been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor.'"<sup>168</sup> The majority recognized that the hate crime statute was unlike that in *McMillan* only so far as it increased the maximum penalty to which a defendant could be subject.<sup>169</sup> But the court continued that "it was not clear that this difference alone would 'change the constitutional calculus,' especially where, as here, 'there is rarely any doubt whether the defendants committed the crimes with the purpose of intimidating the victim on the basis of race or ethnicity.'"<sup>170</sup> Additionally, in light of concerns to avoid "punishing thought itself," the enhancement served as an appropriate balance between those concerns and a

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161 *Id.* (quoting *Apprendi*, 731 A.2d at 492) (emphases added).

162 *Id.* (quoting *Apprendi*, 731 A.2d at 492).

163 *Id.* (quoting *Apprendi*, 731 A.2d at 492).

164 526 U.S. 227 (1999). *Jones* is discussed fully *supra* notes 128–33 and accompanying text.

165 *See Apprendi*, 530 U.S. at 472–73.

166 523 U.S. 224 (1998). *Almendarez-Torres* is discussed fully *supra* notes 118–27 and accompanying text.

167 *See Apprendi*, 530 U.S. at 473.

168 *Id.* (quoting *Apprendi*, 731 A.2d at 494–95) (emphasis added).

169 *See id.*

170 *Id.* (quoting *Apprendi*, 731 A.2d at 495).

state's compelling interest in vindicating the right "to be free of invidious discrimination."<sup>171</sup>

The dissent believed

instead that the case turned on two critical characteristics: (1) "[A] defendant's mental state in committing the subject offense . . . necessarily involves a finding so integral to the charged offense that it must be characterized as an element thereof"; and (2) "the significantly increased sentencing range triggered by . . . the finding of a purpose to intimidate" means that the purpose "must be treated as a material element [that] must be found by a jury beyond a reasonable doubt."<sup>172</sup>

The dissent was convinced that "there can be little doubt that the sentencing factor applied to this defendant—the purpose to intimidate a victim because of race—must fairly be regarded as an element of the crime requiring inclusion in the indictment and proof beyond a reasonable doubt."<sup>173</sup>

### B. *The United States Supreme Court Decision*

#### 1. The Majority Opinion<sup>174</sup>

The United States Supreme Court granted certiorari<sup>175</sup> and reversed. In writing the opinion of the Court, Justice Stevens stated that the issue presented was whether defendant Apprendi had a constitutional right to have a jury determine beyond a reasonable doubt whether he was motivated by racial bias in committing his crime.<sup>176</sup> The answer to that question, according to Justice Stevens, was foreshadowed in *Jones v. United States*<sup>177</sup> in which the Court noted that

under 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.<sup>178</sup>

171 *Id.* (quoting *Apprendi*, 731 A.2d at 495).

172 *Id.* (quoting *Apprendi*, 731 A.2d at 498 (Stein, J., dissenting)).

173 *Id.* at 474 (quoting *Apprendi*, 731 A.2d at 512 (Stein, J., dissenting)).

174 Justice Stevens was joined in the majority opinion by Justices Scalia, Souter, Thomas, and Ginsburg.

175 *Apprendi v. New Jersey*, 528 U.S. 1018 (1999).

176 *Apprendi v. New Jersey*, 530 U.S. 466, 475–76 (2000).

177 526 U.S. 227 (1999).

178 *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6).

Applying this reasoning to *Apprendi*'s case, the majority held "[t]he Fourteenth Amendment commands the same answer in this case involving a state statute."<sup>179</sup>

The Supreme Court believed that at stake in *Apprendi* were "constitutional protections of surpassing importance," including proscription of any deprivation of liberty without due process of law and the right to a speedy and public trial by an impartial jury.<sup>180</sup> The Court continued, "[T]he 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."<sup>181</sup> The Court stated that these principles had a historical foundation extending for centuries.<sup>182</sup> Furthermore, "the demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times . . . [and] is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt."<sup>183</sup> Justice Stevens further noted that "[a]ny 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."<sup>184</sup>

Like Justice Thomas, who devoted a large part of his concurrence<sup>185</sup> to a review of the relevant historical authorities that support his view, Justice Stevens also touched on historical support in his opinion for the majority. For example, "the judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law."<sup>186</sup> Further,

[w]here a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offense, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have

179 *Id.* at 476.

180 *Id.* at 476-77.

181 *Id.* at 477 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)) (emphasis added).

182 *See id.* ("[T]o guard against a spirit of oppression and tyranny on the part of rulers," trial by jury requires that "the truth of every accusation . . . be confirmed by the unanimous suffrage of twelve . . . equals and neighbors." (citations and emphasis omitted)).

183 *Id.* at 478 (citations omitted).

184 *Id.*

185 Justice Thomas's concurrence is discussed in detail *infra* notes 240-59 and accompanying text.

186 *Apprendi*, 530 U.S. at 479-80 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 396 (1769)) (emphasis omitted).

been committed under those circumstances, and must state the circumstances with certainty and precision.<sup>187</sup>

The *Apprendi* majority saw a "historic[al] link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties."<sup>188</sup> Further, this link highlights "the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."<sup>189</sup> Overall, the majority believed that "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense."<sup>190</sup>

The *Apprendi* majority next explained its holding in light of several landmark cases previously decided by the Court. Noting its holding in *In re Winship*,<sup>191</sup> the Court stated that the "'reasonable doubt' requirement 'has [a] vital role in our criminal procedure for cogent reasons.'"<sup>192</sup> Prosecution subjects a criminal defendant to "the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction."<sup>193</sup> Therefore, the Court requires certain "procedural protections in order to 'provid[e] concrete substance for the presumption of innocence,' and to reduce the risk of imposing such deprivations erroneously."<sup>194</sup>

Justice Stevens added that since *Winship*, the Court made clear that "*Winship*'s due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'"<sup>195</sup> This was a primary lesson of *Mullaney v. Wilbur*,<sup>196</sup> in which the Court held that the government may not shift the burden of proof on elements of an

187 *Id.* at 480 (quoting 2 MATTHEW HALE, PLEAS OF THE CROWN \*170).

188 *Id.* at 482.

189 *Id.* at 482–83 (emphasis omitted).

190 *Id.* at 483 n.10.

191 397 U.S. 358 (1970). *Winship* is discussed fully *supra* notes 83–88 and accompanying text.

192 *Apprendi*, 530 U.S. at 484 (quoting *Winship*, 397 U.S. at 363).

193 *Id.* (quoting *Winship*, 397 U.S. at 363).

194 *Id.* (quoting *Winship*, 397 U.S. at 363).

195 *Id.* (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)). *Almendarez-Torres* is discussed fully *supra* notes 118–27 and accompanying text.

196 421 U.S. 684 (1975). *Mullaney* is discussed fully *supra* notes 89–95 and accompanying text.

offense.<sup>197</sup> In *Mullaney*, the government had posited that *Winship* protections did not apply in requiring a defendant to prove heat-of-pasion intent to overcome a presumption of murderous intent because, upon conviction of either offense, the defendant would face the same loss of liberty and social stigma.<sup>198</sup> Since the “consequences” of a guilty verdict for murder and for manslaughter differed substantially, the Court “dismissed the possibility that a State could circumvent the protections of *Winship* merely by ‘redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.’”<sup>199</sup>

At this point in the opinion, the *Apprendi* majority discounted Justice O’Connor’s suggestion in dissent<sup>200</sup> that *Patterson v. New York*<sup>201</sup> posed no direct challenge to this aspect of *Mullaney*.<sup>202</sup> *Patterson* held that the government is allowed to shift the burden of proof to the defendant on an affirmative defense.<sup>203</sup> According to the *Apprendi* majority, “*Patterson* made clear that the state law still required the State to prove every element of that State’s offense of murder and its accompanying punishment. ‘No further facts are either presumed or inferred in order to constitute the crime.’”<sup>204</sup> In discounting the argument that the Court’s *Patterson* view could allow “state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes,” the Court added in *Patterson* that there were “obviously constitutional limits beyond which the States may not go in this regard.”<sup>205</sup>

Justice Stevens next pointed out that it was in *McMillan v. Pennsylvania*<sup>206</sup> in which the Court for the first time coined the term “sentencing factor” to refer to a fact that was not found by a jury but that could affect the sentence imposed by a judge.<sup>207</sup> *McMillan* held that a court may use the preponderance of evidence standard when consid-

197 See *Apprendi*, 530 U.S. at 484.

198 See *id.* at 484–85 (citing *Mullaney*, 421 U.S. at 697–98).

199 *Id.* at 485 (quoting *Mullaney*, 421 U.S. at 698).

200 *Id.* at 530–32 (O’Connor, J., dissenting). Justice O’Connor’s dissent begins on 530 U.S. at 523.

201 432 U.S. 197 (1977). *Patterson* is discussed fully *supra* notes 96–101 and accompanying text.

202 See *Apprendi*, 530 U.S. at 485 n.12.

203 See *Patterson*, 432 U.S. at 206–09.

204 *Apprendi*, 530 U.S. at 485 n.12 (quoting *Patterson*, 432 U.S. at 205–06).

205 *Id.* (quoting *Patterson*, 432 U.S. at 210).

206 477 U.S. 79 (1986). *McMillan* is discussed fully *supra* notes 102–17 and accompanying text.

207 *Apprendi*, 530 U.S. at 485.

ering a sentencing factor.<sup>208</sup> According to the *Apprendi* majority, the *McMillan* Court did *not* budge from the *Winship* position that there are constitutional limits to states' authority to define away facts necessary to constitute a criminal offense.<sup>209</sup> Further, a state scheme to keep from juries facts that "expos[e] [defendants] to greater or additional punishment" may raise serious constitutional concerns.<sup>210</sup> Rather, the section of the Pennsylvania code<sup>211</sup> at issue in *McMillan* "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the [sentencing factor]." <sup>212</sup> The Pennsylvania statute gave "no impression of having been tailored to permit the [sentencing factor] to be a tail which wags the dog of the substantive offense."<sup>213</sup>

The *Apprendi* majority next addressed the contention of Justice O'Connor in her dissent that the *Apprendi* decision overrules *McMillan*. Justice Stevens wrote, "We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself."<sup>214</sup>

Justice Stevens concluded his review of pertinent prior case law by stating that, as the Court

made plain in *Jones* last Term, *Almendarez-Torres v. United States*<sup>[215]</sup> represents at best an exceptional departure from the historic practice that we have described. . . .

. . . *Almendarez-Torres* turned heavily upon the fact that the additional sentence to which the defendant was subject was "the prior commission of a serious crime." Both the certainty that procedural safeguards attach to any "fact" of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a

208 See *McMillan*, 477 U.S. at 91–93.

209 See *Apprendi*, 530 U.S. at 486.

210 *Id.* (quoting *McMillan*, 477 U.S. at 88).

211 42 PA. CONS. STAT. § 9712 (1982).

212 *Apprendi*, 530 U.S. at 486 (quoting *McMillan*, 477 U.S. at 87–88).

213 *Id.* (quoting *McMillan*, 477 U.S. at 87–88).

214 *Id.* at 487 n.13.

215 523 U.S. 224 (1998).



“fact” increasing punishment beyond the maximum of the statutory range.<sup>216</sup>

In conclusion, the Court found that its reexamination of cases in this area and of the history upon which it relied confirmed the opinion expressed in *Jones* that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>217</sup> Further, “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. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”<sup>218</sup>

Having laid the foundation for its course of action, the Court next turned its attention to the specific facts of the *Apprendi* case. *Apprendi* asked the Court to invalidate a New Jersey statutory scheme<sup>219</sup> that

allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree<sup>[220]</sup> based upon the judge’s finding, by a preponderance of the evidence, that the defendant’s “purpose” for unlawfully possessing the weapon was “to intimidate” his victim on the basis of a particular characteristic the victim possessed.<sup>221</sup>

The Court held that, “[i]n light of the constitutional rule explained above, and all of the cases supporting it, this practice cannot stand.”<sup>222</sup> The State of New Jersey defended its hate crime enhancement statute with, inter alia, the claim that the “required finding of biased purpose was not an ‘element’ of a distinct hate crime offense, but rather the traditional ‘sentencing factor’ of motive.”<sup>223</sup> This claim

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216 *Apprendi*, 530 U.S. at 487–88 (quoting in part *Almendarez-Torres*, 523 U.S. at 230) (citations omitted).

217 *Id.* at 490.

218 *Id.* (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring)).

219 The applicable New Jersey statutes, including the “hate crime enhancement statute,” are reproduced in the Appendix to this work. Additionally, these provisions are discussed *supra* notes 134–38 and accompanying text.

220 See N.J. STAT. ANN. § 2C:43-6(a)(1) (West 1999).

221 *Apprendi*, 530 U.S. at 491.

222 *Id.* at 491–92.

223 *Id.* at 492.

was summarily dismissed by the Court as "nothing more than a disagreement with the rule we apply today."<sup>224</sup>

Further, the Court believed that any distinction between "sentencing factors" and "elements" was constitutionally novel and elusive, and was based on mere "labels."<sup>225</sup> Justice Stevens wrote, "[d]espite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"<sup>226</sup> The footnote to this sentence in the case accurately sums up the majority's position:

This is not to suggest that the term "sentencing factor" is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.<sup>227</sup>

In fact, "merely because the state legislature placed its hate crime sentence 'enhancer' 'within the sentencing provisions' of the criminal code 'does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense.'"<sup>228</sup> The Court felt that the effect of New Jersey's sentence "enhancement" unquestionably turned a second degree offense into a first degree offense and that this conflicted directly with the warning in *Mullaney* that *Winship* is concerned as much with the category of substantive offense as with the "degree of criminal culpability" assessed.<sup>229</sup> A basic policy reason for this is that "[t]he degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment."<sup>230</sup>

224 *Id.*

225 *Id.* at 494.

226 *Id.*

227 *Id.* at 494 n.19.

228 *Id.* at 495 (quoting *New Jersey v. Apprendi*, 731 A.2d 485, 492 (N.J. 1999)).

229 *Id.* at 494–95.

230 *Id.* at 495.

The Court also said that New Jersey's reliance on *McMillan* in order to justify its sentence enhancement statute was misplaced.<sup>231</sup> New Jersey had argued that any increase in Apprendi's sentence as a result of the sentence enhancement was minimal.<sup>232</sup> In response, the Court noted that "it can hardly be said that the potential doubling of one's sentence—from 10 years to 20—has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance."<sup>233</sup> At this point, Justice Stevens proclaimed, "When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'"<sup>234</sup>

Near the end of the majority's opinion, the Court noted that New Jersey's reliance on *Almendarez-Torres* was also unavailing.<sup>235</sup> *Almendarez-Torres* dealt with recidivism, which "does not relate to the commission of the offense" itself.<sup>236</sup> Nevertheless, "New Jersey's biased purpose inquiry goes precisely to what happened in the commission of the offense."<sup>237</sup> The Court also noted the

vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.<sup>238</sup>

In conclusion, the *Apprendi* majority held that the Fourteenth Amendment commands that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.<sup>239</sup>

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231 *See id.*

232 *See id.*

233 *Id.*

234 *Id.* (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

235 *See id.* at 496.

236 *Id.* (quoting *Almendarez-Torres*, 523 U.S. at 230, 244).

237 *Id.* (quoting *Almendarez-Torres*, 523 U.S. at 230, 244).

238 *Id.*

239 *See id.* at 476.

## 2. Justice Thomas's Concurring Opinion<sup>240</sup>

As noted above,<sup>241</sup> Justice Thomas accurately wrote that "[t]his case turns on the seemingly simple question of what constitutes a 'crime.'"<sup>242</sup> Indeed, all of the constitutional protections<sup>243</sup> that citizens of this country enjoy turn on determining which facts constitute the "crime"—in other words, which facts are the "elements" of the crime.<sup>244</sup> It is thus critical to know which facts are elements.<sup>245</sup> While judges have long had to consider which facts are elements, this issue "became more complicated following the Court's decision in *McMillan v. Pennsylvania* which spawned a special sort of fact known as a sentencing enhancement. Such a fact increases a defendant's punishment but is not subject to the constitutional protections to which elements are subject."<sup>246</sup>

Justice O'Connor's dissent<sup>247</sup> agreed with *McMillan* and *Almendarez-Torres* in stating that "a legislature is free (within unspecified outer limits) to decree which facts are elements and which are sentencing enhancements."<sup>248</sup> Justice Thomas took exception to this, believing that *courts* have long had to consider which facts are elements.<sup>249</sup> In arriving at this conclusion, Justice Thomas reviewed "[a] long line of essentially uniform authority addressing accusations . . . stretching from the earliest reported cases after the founding until well into the 20th century . . ." <sup>250</sup> Such authority established "the original understanding of which facts are elements . . . [and demonstrates] that a 'crime' includes every fact that is by law a basis for

240 Justice Thomas was joined in his concurring opinion as to Parts I and II by Justice Scalia. *Id.* at 499 (Thomas, J., concurring).

241 See *supra* note 6 and accompanying text.

242 *Apprendi*, 530 U.S. at 499 (Thomas, J., concurring).

243 Justice Thomas summarizes that an accused person

has the right (1) "to be informed of the nature and cause of the accusation" . . . (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed."

*Id.* (Thomas, J., concurring) (quoting U.S. CONST. amends. V, VI; citing U.S. CONST. art. III, § 2, cl. 3).

244 See *Apprendi*, 530 U.S. at 500 (Thomas, J., concurring).

245 See *id.* (Thomas, J., concurring).

246 *Id.* at 500 (Thomas, J., concurring) (citation omitted).

247 Justice O'Connor's dissent is discussed fully *infra* notes 260–93 and accompanying text.

248 *Apprendi*, 530 U.S. at 500 (Thomas, J., concurring).

249 See *id.* at 500–01 (Thomas, J., concurring).

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

imposing or increasing punishment.”<sup>251</sup> Therefore, if a legislature defines a certain core crime and then provides for increasing the punishment for that crime based on a finding of some aggravating fact of any kind, including a prior conviction, the core crime and the aggravating fact together constitute an aggravating crime.<sup>252</sup> For example, grand larceny is an aggravated form of petty larceny.<sup>253</sup> According to Justice Thomas, “the aggravating fact is an element of the aggravated crime,” and “[n]o multifactor parsing of statutes, of the sort that we have attempted since *McMillan*, is necessary.”<sup>254</sup> In sum, “[o]ne need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.”<sup>255</sup>

Justice Thomas next embarked on an extremely detailed and thorough historical review of cases and secondary sources dating back to the 1840s, all of which he used to support his contention that American courts readily applied to “new laws the common-law understanding that a fact that is by law the basis for imposing or increasing punishment is an element.”<sup>256</sup> Conversely, if “a fact was *not* the basis for punishment, that fact was, for that reason, not an element.”<sup>257</sup>

As he neared his conclusion, Justice Thomas wrote that “one of the chief errors of *Almendarez-Torres*—an error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender’s sentence.”<sup>258</sup> Nevertheless,

251 *Id.* (Thomas, J., concurring).

252 *See id.* (Thomas, J., concurring).

253 *See id.* (Thomas, J., concurring).

254 *Id.* (Thomas, J., concurring).

255 *Id.* (Thomas, J., concurring).

256 *Id.* at 502 (Thomas, J., concurring). Highlights of this overview include the following: a case involving burglary, in which the court stated that if “certain acts are . . . made punishable with greater severity, when accompanied with aggravating circumstances [then the statute has created] two grades of crime,” *id.* at 503–04 (Thomas, J., concurring) (quoting *Larned v. Commonwealth*, 53 Mass. 240, 242 (1847)), and early cases addressing recidivism statutes, *see id.* at 506–07 (Thomas, J., concurring) (citing *Commonwealth v. Welsh*, 3 Va. 135, 135 (2 Va. Cas. 57, 57–59) (1817)). Justice Thomas also heavily relies on an 1872 treatise by Joel Bishop, a leading authority in that era in the fields of criminal law and procedure. *See id.* at 510–21 (Thomas, J., concurring). For example, Bishop believed, “[t]he indictment must allege whatever is in law essential to the punishment sought to be inflicted.” *Id.* at 510 (Thomas, J., concurring) (quoting 1 JOEL BISHOP, LAW OF CRIMINAL PROCEDURE 50 (2d ed. 1872)).

257 *Id.* at 504 (Thomas, J., concurring).

258 *Id.* at 520 (Thomas, J., concurring).

[w]hat matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment . . . it is an element. . . . I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.<sup>259</sup>

### 3. The Principle Dissenting Opinion<sup>260</sup>

Justice O'Connor's dissent may be outlined as follows: "Our Court has long recognized that *not* every fact that bears on a defendant's punishment need be charged in an indictment, submitted to a jury, and proved by a reasonable doubt. Rather, we have held that the 'legislature's definition of the elements of the offense is usually dispositive.'<sup>261</sup> In arriving at this conclusion, she first dismissed the historical arguments advanced by the majority and Justice Thomas, and then explained why that position is unworkable and unrealistic.

To begin, Justice O'Connor noted that "[n]o Member of [the] Court questions the proposition that a state must charge in the indictment and prove at trial beyond a reasonable doubt the actual elements of the offense."<sup>262</sup> "*This case*, however, concerns the distinct question of when a fact that bears on a defendant's punishment, but which the legislature has not classified as an element of the charged offense, must nevertheless be treated as an offense element."<sup>263</sup> The majority of the *Apprendi* Court held that its constitutional rule "emerges from our history and case law."<sup>264</sup> Justice O'Connor, however, believed that "the history on which the Court's opinion relies provides no support for its 'increase in the maximum penalty' rule."<sup>265</sup> Indeed, "[t]he history cited by Justice Thomas does not require, as a matter of federal constitutional law, the application of the

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

260 Justice O'Connor authored the principle dissent. She was joined in her dissenting opinion by Chief Justice Rehnquist and Justices Kennedy and Breyer. *Id.* at 523 (O'Connor, J., dissenting).

261 *Id.* at 524 (5-4 decision) (O'Connor, J., dissenting) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986)); see also *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998); *Patterson v. New York*, 432 U.S. 197, 210, 211, n.12 (emphasis added).

262 *Apprendi*, 530 U.S. at 527 (O'Connor, J., dissenting).

263 *Id.* (O'Connor, J., dissenting) (emphasis added).

264 *Id.* at 492.

265 *Id.* at 526 (O'Connor, J., dissenting).

An examination of the decisions cited by Justice Thomas makes clear that they did not involve a simple application of a long-settled common-law rule that any fact that increases punishment must constitute an offense element. That would have been unlikely, for there does not appear to have been any such common-law rule. . . .

rule he advocates."<sup>266</sup> Justice O'Connor dismissed as irrelevant the historical arguments relied upon by the majority and Justice Thomas, noting that "[w]hile the decisions Justice Thomas cites provide some authority for the rule he advocates, they certainly do not control our resolution of the federal constitutional question presented in [*Apprendi*] and cannot, standing alone, justify overruling three decades worth of decisions by this Court."<sup>267</sup>

Justice O'Connor next discounted the logic and analysis of the majority's assertion that its rule is supported by "our cases in this area."<sup>268</sup> The Court cited *Mullaney v. Wilbur*<sup>269</sup> "to demonstrate the 'lesson' that due process and jury protections extend beyond those factual determinations that affect a defendant's guilt or innocence."<sup>270</sup> The *Apprendi* majority "explains *Mullaney* as having held that the due process proof-beyond-a-reasonable-doubt requirement applies to those factual determinations that . . . make a difference in the degree of punishment the defendant receives."<sup>271</sup> Nevertheless, this reasoning ignored the decision of the Court only two years later in *Patterson v. New York*.<sup>272</sup> There the Court declined

to adopt as a constitutional imperative . . . that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most *basic* procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the *legislative branch*.<sup>273</sup>

The *Mullaney* decision was explained further in *Patterson* as holding only "that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."<sup>274</sup> Indeed, "*Patterson* is important be-

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. . . Few of the decisions cited by Justice Thomas indicate a reliance on pre-existing common-law principles.

*Id.* at 528-29 (O'Connor, J., dissenting).

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

267 *Id.* at 529 (O'Connor, J., dissenting) (emphasis omitted).

268 *Id.* at 490.

269 421 U.S. 684 (1975).

270 *Apprendi*, 530 U.S. at 529-30 (O'Connor, J., dissenting) (citing *id.* at 484).

271 *Id.* at 530 (O'Connor, J., dissenting) (referencing *id.* at 484) (emphasis added).

272 *See id.* (O'Connor, J., dissenting).

273 *Id.* (O'Connor, J., dissenting) (quoting *Patterson*, 432 U.S. at 210) (emphases added).

274 *Id.* at 532 (O'Connor, J., dissenting) (quoting *Patterson*, 432 U.S. at 215).

cause it plainly refutes the [majority's] expansive reading of *Mullaney*."<sup>275</sup>

The *Apprendi* majority also looked for support to the Court's decision in *McMillan* apparently to argue that any fact that changes *in any way* the range of penalties to which a defendant is exposed must be proved to a jury beyond a reasonable doubt.<sup>276</sup> Justice O'Connor believed that the Court's reliance in this regard was inaccurate. She pointed out that the Court in *Patterson* and *McMillan* rejected the claim that when a state links the severity of punishment to the presence or absence of an identified fact, the state must prove that fact beyond a reasonable doubt.<sup>277</sup> The *McMillan* Court also reaffirmed the *Patterson* rule that "in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive"<sup>278</sup> within certain undefined constitutional limits. Additionally, the New Jersey statute at issue in *Apprendi* resembles the Pennsylvania statute the Court upheld in *McMillan* in every respect but one. That difference was merely that the New Jersey statute increases the *maximum* punishment to which a defendant may be exposed. In sum regarding *McMillan*, Justice O'Connor believed that it holds the following:

When a State takes a fact that has always been considered by sentencing courts to bear on punishment, and dictates the precise weight that a court should give that fact in setting a defendant's sentence, the relevant fact need not be proved to a jury beyond a reasonable doubt as would an element of the offense.<sup>279</sup>

The New Jersey statute also resembles the statute<sup>280</sup> upheld in *Almendarez-Torres v. United States*<sup>281</sup> in virtually every respect.<sup>282</sup> The only significant difference was that the New Jersey statute provides an enhancement based on the defendant's motive, while the statute in *Almendarez-Torres* provided an enhancement based on the defendant's commission of a prior felony.<sup>283</sup> Since both factors are traditional bases for increasing an offender's sentence and may therefore serve as

275 *Id.* at 531 (O'Connor, J., dissenting).

276 *See id.* at 533 (O'Connor, J., dissenting).

277 *See id.* at 533-34 (O'Connor, J., dissenting) (citing *McMillan*, 477 U.S. at 84; *Patterson*, 432 U.S. at 214).

278 *Id.* at 534 (O'Connor, J., dissenting) (citing *McMillan*, 477 U.S. at 85).

279 *Id.* at 535 (O'Connor, J., dissenting) (citing *McMillan*, 477 U.S. at 89-90).

280 8 U.S.C. § 1326 (1994).

281 523 U.S. 224 (1998). *Almendarez-Torres* is discussed fully *supra* notes 118-27 and accompanying text.

282 *Apprendi*, 530 U.S. at 554 (O'Connor, J., dissenting)

283 *See id.* (O'Connor, J., dissenting).



the grounds for a sentence enhancement, the distinctions between the two are of no constitutional importance.<sup>284</sup>

Justice O'Connor found that while *Mullaney* and *McMillan* do not lend support for the *Apprendi* majority's ruling, a case ignored by the majority actually *refuted* the Court's holding.<sup>285</sup> In *Walton v. Arizona*,<sup>286</sup> a jury found the defendant guilty of first-degree murder.<sup>287</sup> On appeal, Walton challenged the Arizona capital sentencing scheme that allowed a judge, rather than a jury, to determine the existence of any aggravating and mitigating factors when deciding between imposition of life imprisonment or capital punishment.<sup>288</sup> Such a contention was renounced soundly by the *Walton* Court,<sup>289</sup> leaving the *Apprendi* dissenters to wonder:

If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed.<sup>290</sup>

The dissenters concluded by summarizing that the majority's "statement that its 'increase in the maximum penalty' rule emerges from the history and case law that it cites is simply incorrect."<sup>291</sup> The Court cited irrelevant historical evidence, ignored controlling precedent (e.g., *Patterson*), and failed to distinguish between its *Apprendi* decision and previous cases addressing the same subject in the context

284 *See id.* (O'Connor, J., dissenting).

285 *See id.* at 537 (O'Connor, J., dissenting).

286 497 U.S. 639 (1990).

287 *Apprendi*, 530 U.S. at 536 (O'Connor, J., dissenting) (referring to *Walton*, 497 U.S. at 642).

288 *See id.* (O'Connor, J., dissenting).

289 *See id.* at 537 (O'Connor, J., dissenting) (citing *Walton*, 497 U.S. at 647). Indeed, as of January 14, 2002 there was a growing list of *Apprendi*-related grants of certiorari to the Supreme Court for that term, including *Ring v. Arizona*, 122 S. Ct. 865 (2002), wherein the Justices will reconsider a statement in *Apprendi* that preserves Arizona's capital sentencing scheme. In *Ring*, the Arizona Supreme Court noted that the *Apprendi* majority had expressly preserved *Walton*, which approved Arizona's judge-sentencing scheme. *State v. Ring*, 25 P.3d 1139, 1151-52 (Ariz. 2001). The Arizona Supreme Court explained that Justice O'Connor's *Apprendi* dissent correctly described Arizona's system as one of factfinding by judge rather than by jury, but the court found itself bound by the *Apprendi* majority's apparent desire to carve out *Walton*. *Id.* at 1152. Additional *Apprendi*-related grants include *Harris v. United States*, 122 S. Ct. 663 (2001), and *United States v. Cotton*, 122 S. Ct. 803 (2002), in which the Court will decide whether it can accept the ramifications of *Apprendi*'s reasoning.

290 *Apprendi*, 530 U.S. at 537 (O'Connor, J., dissenting).

291 *Id.* at 539 (O'Connor, J., dissenting).

of capital sentencing (e.g., *Walton*).<sup>292</sup> Overall, according to the dissenters, the majority's newly minted legal doctrine in *Apprendi* is not required by the Constitution.<sup>293</sup>

### III. POLICY CONSIDERATIONS

#### A. Possible Interpretations of the Court's Decision

In the wake of *Apprendi*'s "newly-elaborated constitutional mandate,"<sup>294</sup> state and federal district trial judges are without guidance as to exactly what the controlling rule of the Court is. At least two possible interpretations may be offered of the constitutional principle upon which the *Apprendi* majority's decision rests.<sup>295</sup> Under one reading, the Court appears to hold that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt only if that fact *extends* the range of punishment *beyond the prescribed statutory maximum*.<sup>296</sup> Yet, reacting to such an interpretation, a state's legislature could easily remove from the jury (and thereby subject to a standard of proof below "beyond a reasonable doubt") the assessment of those facts that fall within the statutory range, to which the defendant may be sentenced.<sup>297</sup> Indeed, New Jersey could "cure" its sentencing scheme and achieve the same results by redrafting its weapons possession statute in the following manner: the legislature first could provide in the statute itself for a range of five to twenty years of imprisonment for any person who commits the offense.<sup>298</sup> Next, New Jersey could arrange the statute so that *only* those defendants convicted under this law who are found by a judge, by a preponderance of the evidence, to have acted with a purpose to intimidate a person on the basis of race may receive a sentence of greater than ten years imprisonment.<sup>299</sup> The *Apprendi* majority opinion does not foreclose such manipulation; within certain limitations, in fact, it practically invites

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292 See *id.* (O'Connor, J., dissenting).

293 See *id.* (O'Connor, J., dissenting).

294 *United States v. Robinson*, 241 F.3d 115, 118 (1st Cir. 2001).

295 See *Apprendi*, 530 U.S. at 540 (O'Connor, J., dissenting).

296 See *id.* (O'Connor, J., dissenting). Justice O'Connor here points to an example of this possible interpretation, directing the reader to Justice Stevens's statement that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490 (emphasis added).

297 See *id.* (O'Connor, J., dissenting).

298 See *id.* (O'Connor, J., dissenting).

299 See *id.* (O'Connor, J., dissenting).

it.<sup>300</sup> Indeed, “[i]t is difficult to understand, and the Court does not explain, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.”<sup>301</sup>

Under a separate reading, the Court’s decision could be read to mean that it is only constitutionally required “that a fact be submitted to a jury and proved beyond a reasonable doubt if it, as a formal matter, *increases* the range of punishment *beyond that which could legally be imposed absent that fact.*”<sup>302</sup> Reacting to such an interpretation, a state’s legislature could act in a manner that is almost the mirror image of the first interpretation and easily remove from the jury (and thereby subject to a standard of proof below “beyond a reasonable doubt”) the assessment of those facts that decrease the range of punishment below that which legally could be imposed absent that fact.<sup>303</sup> Again, New Jersey could comply with *Patterson* and “cure” its sentencing scheme, thereby achieving the same intended results by redrafting its weapons possession statute in the following manner: the legislature could first provide in the statute itself for a range of five to twenty years of imprisonment for any person who commits the offense.<sup>304</sup> Next, New Jersey could arrange the statute so that *only* those defendants convicted under this law who a judge finds, by a preponderance of the evidence, to *not* have acted with a purpose to intimidate a person on the basis of race may receive a sentence of *no greater* than ten years imprisonment.<sup>305</sup> Overall, the specific means by which a legislature chooses to

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300 In discussing the difference between the terms “sentencing factor” and “sentence enhancement,” Justice Stevens writes that the term “sentencing factor”

appropriately describes a circumstance . . . that supports a specific sentence *within the range* authorized by the jury’s finding that the defendant is guilty of a particular offense. On the other hand, when the term “sentence enhancement” is used to describe an increase *beyond the maximum authorized statutory sentence*, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict. Indeed, it fits squarely within the usual definition of an “element” of the offense.

*Id.* at 494 n.19 (second emphasis added).

It is not difficult to imagine a legislature altering its sentencing scheme in order to get around the *Apprendi* Court’s distinctions between monikers such as “sentencing factors” and “sentence enhancements” in order to legitimize the state’s goals regarding the handling and punishment of certain crimes.

301 *Id.* at 541 (O’Connor, J., dissenting).

302 *Id.* (O’Connor, J., dissenting).

303 *See id.* (O’Connor, J., dissenting).

304 *See id.* at 541–42 (O’Connor, J., dissenting).

305 *See id.* (O’Connor, J., dissenting).

control judges' discretion within that permissible range is of no importance.<sup>306</sup>

As recently as May 2001, the published results of a comprehensive examination showed that legislatures will, in fact, engage in post-*Apprendi* evasion.<sup>307</sup> Indeed, by "[s]uggesting that efforts to avoid the consequences of the rule in *Apprendi* by redrafting criminal statutes will be subject to 'constitutional scrutiny,' the Court has invited litigation over the constitutionality of substantive criminal law. Not surprisingly, it has offered few clues about the shape of that constitutional scrutiny."<sup>308</sup>

Justice O'Connor correctly points out that "whether a fact is responsible for an increase or a decrease in punishment rests in the eye of the beholder."<sup>309</sup> Nevertheless, given the fact that the two possible interpretations presented above rest on the mere formalistic interpretation of the Court's words, it is more likely that the constitutional principle underlying the *Apprendi* holding is further reaching.<sup>310</sup> The dissent believes that the actual principle "may be that any fact (other than prior conviction) that has the effect, *in real terms*, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt."<sup>311</sup> To put it differently, in Justice Stevens's words, "does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"<sup>312</sup> This principle is extremely far reaching, for it not only encompasses a system like New Jersey's where a factual determination could expose a defendant to a sentence beyond the statutory maximum, but also to any and all determinate-sentencing schemes like the Federal Sentencing Guidelines<sup>313</sup> in which the length of a defendant's sentence *within* the statutory range turns on specific factual determinations.<sup>314</sup> Such a principle

306 See *id.* at 554 (O'Connor, J., dissenting).

307 See Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1467 (2001).

308 *Id.* at 1469.

309 *Apprendi*, 530 U.S. at 542-43 (O'Connor, J., dissenting).

310 See *id.* at 543 (O'Connor, J., dissenting).

311 *Id.* at 543-44 (O'Connor, J., dissenting).

312 *Id.* at 544 (O'Connor, J., dissenting) (quoting *id.* at 494).

313 A detailed discussion of the origination and benefits of the Federal Sentencing Guidelines is provided *supra* notes 47-73 and accompanying text.

314 See *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting). Indeed, "Justice Thomas essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the Sentencing Guidelines." *Id.* (citing *id.* at 523 n.11 (Thomas, J., concurring)).

basically invalidates decisions such as *Patterson* and *Walton*, yet the *Apprendi* majority formally declined to do so.<sup>315</sup>

### B. Constitutional Ramifications<sup>316</sup>

In light of the Court's significant history of approving discretionary sentencing by judges, "it is difficult to understand how the Fifth, Sixth, and Fourteenth Amendments could possibly require the Court's or Justice Thomas's rule."<sup>317</sup> The dissenters noted that it is indeed "remarkable that the Court cannot identify a *single instance*, in the over 200 years since the ratification of the Bill of Rights, that our Court has applied, as a constitutional requirement, the rule it announces today."<sup>318</sup> As the majority acknowledged, the Supreme Court has never doubted the constitutionality of permitting Congress and the state legislatures to define criminal offenses, to delineate broad ranges of punishment for those offenses, and to give judges discretion to decide where specifically within those ranges each particular defendant's punishment should be set.<sup>319</sup> The Court stated,

We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.<sup>320</sup>

Consequently, any due process concerns are simply not implicated under legitimate use of discretionary sentencing.

Under a discretionary-sentencing scheme,<sup>321</sup> judges base the sentences of defendants on numerous facts neither presented at trial

315 See *id.* at 544 (O'Connor, J., dissenting).

316 In succinctly describing the issue of *Apprendi*, Justice Stevens wrote that "[t]he question presented is whether the Due Process Clause of the *Fourteenth Amendment* requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Apprendi*, 530 U.S. at 469 (emphasis added). However, as Fifth and Sixth Amendment concerns are incorporated by the Fourteenth Amendment, see, e.g., *id.* at 532–33 (O'Connor, J., dissenting), they are therefore correspondingly addressed throughout the *Apprendi* case and this Comment.

317 *Id.* at 544 (O'Connor, J., dissenting) (citations inserted).

318 *Id.* at 525 (O'Connor, J., dissenting).

319 See *id.* (O'Connor, J., dissenting) (referencing *id.* at 480–81).

320 *Id.* at 481.

321 In a "discretionary-sentencing scheme," as the title suggests, "the judge's decision of where to set the defendant's sentence within the prescribed statutory range is left almost entirely to discretion." *Id.* at 548 (O'Connor, J., dissenting). In a "deter-

nor found by a jury beyond a reasonable doubt.<sup>322</sup> Indeed, a factual determination made by a judge using a standard of proof below "beyond a reasonable doubt" often made the difference between a lesser and a greater punishment.<sup>323</sup> The Court's precedent in *Williams* holds that a judge may leave the determination of a defendant's sentence to a judge's discretionary decision within a prescribed range of penalties.<sup>324</sup> When a judge accordingly decides to increase a defendant's sentence on the basis of certain contested facts, it is not necessary that those facts be proven to a jury beyond a reasonable doubt.<sup>325</sup> Rather, the judge's findings, whether determined by proof beyond a reasonable doubt or less, are constitutionally sufficient.<sup>326</sup> Yet, the *Apprendi* decision seems to indicate that if a legislature prescribes certain sentences to be imposed in connection with the determination of those same facts, the Constitution requires that those facts instead be proved to a jury beyond a reasonable doubt.<sup>327</sup> This directly conflicts with the Court's holding in *McMillan* that "[w]e have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with addi-

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minate-sentencing system," however, "the discretion the judge wields within the statutory range is tightly constrained." *Id.* (O'Connor, J., dissenting); see also *supra* notes 37-46 and accompanying text (discussion of "Sentencing in General").

322 See *Apprendi*, 530 U.S. at 545 (O'Connor, J., dissenting).

323 See *id.* (O'Connor, J., dissenting). Justice O'Connor cited the following example to illustrate her point:

[I]n *Williams v. New York* [337 U.S. 241 (1949)], a jury found the defendant guilty of first-degree murder and recommended life imprisonment. The judge, however, rejected the jury's recommendation and sentenced Williams to death on the basis of additional facts that he learned through a pre-sentence investigation report and that had neither been charged in an indictment nor presented to the jury. In rejecting Williams's due process challenge to his death sentence, we explained that there was a long history of sentencing judges exercising "wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by the law." Specifically, we held that the Constitution does not restrict a judge's sentencing decision to information that is charged in an indictment and subject to cross-examination in open court. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."

*Id.* at 545-46 (O'Connor, J., dissenting) (citations omitted).

324 See *id.* at 546 (O'Connor, J., dissenting).

325 See *id.* (O'Connor, J., dissenting).

326 See *id.* (O'Connor, J., dissenting).

327 See *id.* (O'Connor, J., dissenting).

tional guidance."<sup>328</sup> While the Court acknowledges the legitimacy of discretionary sentencing by judges, it never provides a valid reason for treating differently under the Constitution the judicial fact finding involved in determinate-sentencing schemes now prevalent today.<sup>329</sup>

Consideration in particular of the Sixth Amendment's jury trial guarantee further demonstrates why the Court's acceptance of judge-made findings under discretionary sentencing suggests approval of the same judge-made findings in the context of determinate sentencing as well.<sup>330</sup> A compelling purpose of the Sixth Amendment's jury trial guarantee is to protect criminal defendants against potentially arbitrary judges.<sup>331</sup> It is certainly a logical conclusion that such Sixth Amendment jury trial guarantees, if they apply to sentencing at all, would apply with greater strength to discretionary-sentencing schemes rather than to determinate-sentencing schemes.<sup>332</sup> Discretionary-sentencing schemes allow an arbitrary judge much greater potential to disproportionately sentence one defendant relative to a similarly situated defendant; under a system of determinate-sentencing, however, the discretion available to a judge is tightly constrained within the statutory range.<sup>333</sup> It is therefore rational to conclude that since the Court approves of discretionary-sentencing schemes, in which the defendant is *not* entitled to have a jury make factual findings relevant to sentencing despite the effect those findings have on the severity of the defendant's sentence, the defendant should have *no right* to have a jury make the equivalent factual determinations under a determinate-sentencing scheme.<sup>334</sup> Consequently, none of the due process or fair trial safeguards protected by the Fifth, Sixth, or Fourteenth Amendments are impacted by allowing a judge to increase a convicted defendant's punishment based on a factual determination considered by a standard of proof that is lower than "beyond a reasonable doubt."

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328 *Id.* at 546 (O'Connor, J., dissenting) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986)).

329 *See id.* at 547 (O'Connor, J., dissenting). Justices Thomas's attempt to explain this distinction is equally unavailing. *See id.* (O'Connor, J., dissenting). Indeed, [a] defendant's actual punishment can be affected in a very real way by facts never alleged in an indictment, never presented to a jury, and never proved beyond a reasonable doubt. In *Williams'* case, facts presented for the first time to the judge, for purposes of sentencing alone, made the difference between life imprisonment and a death sentence.

*Id.* (O'Connor, J., dissenting).

330 *See id.* (O'Connor, J., dissenting).

331 *See id.* (O'Connor, J., dissenting).

332 *See id.* at 548 (O'Connor, J., dissenting).

333 *See id.* (O'Connor, J., dissenting).

334 *See id.* at 548-49 (O'Connor, J., dissenting).

C. *Practical Ramifications: Is Apprendi the Death Knell for Determinate-Sentencing Schemes?*

1. Overview and Analysis of the Realistic Problems and Unanswered Questions Created by *Apprendi*

The *Apprendi* majority held that the Fifth, Sixth, and Fourteenth Amendments command that, other than the fact of a prior conviction, increases in the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.<sup>335</sup> In other words, every fact that is relevant to the determination of sentence under a determinate-sentencing scheme must be submitted to a jury and proved beyond a reasonable doubt. If this is an accurate description of the constitutional principle underlying *Apprendi*, then this decision will have the effect of invalidating significant sentencing reforms enacted at the federal and state levels over the past three decades.<sup>336</sup>

Prior to the most recent wave of sentencing reform, the federal and state governments "employed indeterminate-sentencing schemes in which judges and executive branch officials (*e.g.*, parole board officials) had substantial discretion to determine the actual length of a defendant's sentence."<sup>337</sup> Yet, studies of such indeterminate-sentencing schemes found that similarly situated defendants often received widely disparate sentences.<sup>338</sup> Responding to this problem, Congress passed the Sentencing Reform Act of 1984.<sup>339</sup> In spite of limited criticism that the Guidelines are incomplete and occasionally require judges to depart from them,<sup>340</sup> these Guidelines have committed the federal system to rationality and consistency in criminal sentencing.<sup>341</sup>

Yet *Apprendi* appears excessively broad in its holding and, possibly, to be a violation of the separation of powers between the three branches of our federal government. The holding is excessively broad, for the apparent effect of the Court's holding is to halt any debate on sentencing reform "and to invalidate with the stroke of a

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335 *See id.* at 476.

336 *See id.* at 549 (O'Connor, J., dissenting). In fact, Justice Thomas seems to have indicated that the Sentencing Guidelines may be invalidated under *Apprendi*. *See id.* at 523 n.11 (Thomas, J., concurring).

337 *Id.* at 549 (O'Connor, J., dissenting).

338 *See id.* (O'Connor, J., dissenting).

339 *See id.* at 550 (O'Connor, J., dissenting) (discussing Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3586 (1994 & Supp. V 1999)).

340 *See supra* notes 71-73 and accompanying text.

341 *See* DISSENTING VIEW, *supra* note 45, at 2; *see also supra* notes 52-73 and accompanying text.



pen three decades' worth of nationwide reform, all in the name of a principle with a questionable constitutional pedigree."<sup>342</sup> The *Apprendi* dissenters accurately sum up this additional resultant effect of the majority's holding:

[I]t is ironic that the Court, in the name of constitutional rights meant to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges, appears to rest its decision on a principle that would render unconstitutional efforts by Congress and the state legislatures to place constraints on that very power in the sentencing context.<sup>343</sup>

The *Apprendi* Court believes that no historical basis exists to suggest that it is impermissible for *judges* to exercise discretion in imposing judgment within the range prescribed by statute.<sup>344</sup> The *Apprendi* majority raised no objection to traditional, pre-Guidelines sentencing procedures whereby judges, not juries, made the factual determinations that would lead to an increase in an individual offender's sentence.<sup>345</sup> Yet Justice Breyer believes that the majority leaves unanswered the question of how a legislative determination of those facts would be different in any significant way.<sup>346</sup> The Court's theory apparently supports the following proposition: if a legislature attempts to limit the discretion of a judge, that makes any subsequent sentencing unconstitutional. By contrast, if a judge has total discretion, the Court would approve and hold that there is no requirement that a fact, whether a "sentencing factor" or a true "element" of the crime, be proven beyond a reasonable doubt. While the *Apprendi* Court found no existing history to support "sentencing factors," no history is present saying there *should not* be any.<sup>347</sup> If no history or constitutional text gives the Court an answer as to what specifically should be an "element" and what should be a "sentencing factor," then the Court should defer this issue to the legislature.<sup>348</sup> If we allow our system to revert to judges having complete discretion, we may well return to a sentencing structure that is neither fair nor honest regarding all defendants.<sup>349</sup>

The strongest and most critical impact of *Apprendi* "will be a practical one—its unsettling effect on sentencing conducted under cur-

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342 *Apprendi*, 530 U.S. at 550 (O'Connor, J., dissenting).

343 *Id.* (O'Connor, J., dissenting).

344 *See id.* at 481 (emphasis added).

345 *See id.* at 561 (Breyer, J., dissenting).

346 *See id.* at 562–63 (Breyer, J., dissenting).

347 *See* discussion *supra* note 320 and accompanying text.

348 *See* discussion *supra* notes 248, 261 and accompanying text.

349 *See* discussion *supra* notes 48–50 and accompanying text.

rent federal and state determinate-sentencing schemes."<sup>350</sup> While at least the Fourth Circuit<sup>351</sup> and Eleventh Circuit<sup>352</sup> have specifically stated that *Apprendi* does not apply to the Sentencing Guidelines, Justice O'Connor points out that "the Court does not say whether these schemes are constitutional, but its reasoning strongly suggests that they are not."<sup>353</sup> Further, Justice Breyer's dissent<sup>354</sup> points out that the *Apprendi* holding

would *seem* to promote a procedural ideal—that of juries, not judges, determining the existence of those facts upon which increased punishment turns. But the real world of criminal justice cannot hope to meet any such ideal. It can function only with the help of procedural compromises, particularly in respect to sentencing. And those compromises, which are themselves necessary for the fair functioning of the criminal justice system, preclude implementation of the procedural model that today's decision reflects. At the very least, the impractical nature of the [majority's holding] supports the proposition that the Constitution was not intended to embody it.<sup>355</sup>

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350 *Apprendi*, 530 U.S. at 550 (O'Connor, J., dissenting).

351 See *United States v. Kinter*, 235 F.3d 192, 201 (4th Cir. 2000). See *id.* at 199–202 for a thoughtful discussion by Judge Niemeyer about the definition of "prescribed statutory maximum" under *Apprendi*.

352 See *United States v. Harris*, 244 F.3d 828, 830 (11th Cir. 2001). The *Harris* court noted that "[b]ecause a finding under the Sentencing Guidelines determines the sentence within the statutory range rather than outside it, the decision in *Apprendi*, which addresses any increase in penalty for a crime outside the statutory maximum, has no application to the Guidelines." *Id.* (quoting *United States v. Maldenaldo Sanchez*, 242 F.3d 1294, 1300 (11th Cir. 2001)). Indeed, "[i]t will always be the case that the sentencing range identified by the Guidelines will not exceed the statutory maximum, as the Sentencing Guidelines require that the Guidelines cannot be used to increase the penalty beyond the statutory maximum." *Id.* at 830 n.3 (citing U.S. SENTENCING GUIDELINES MANUAL § 5G1.1 (1988)).

353 See *Apprendi*, 530 U.S. at 550–52 (O'Connor, J., dissenting). The question begs: If the Federal Sentencing Guidelines were not unconstitutional to create, as was held in *Mistretta v. United States*, 488 U.S. 361, 412 (1989), then why does the *Apprendi* Court find them unconstitutional to administer? However, the point may be moot, as Justice Thomas seems to have indicated that the Sentencing Guidelines may be invalidated under *Apprendi*. See *Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., concurring).

354 Justice Breyer was joined in his dissenting opinion by Chief Justice Rehnquist. *Apprendi*, 530 U.S. at 555 (Breyer, J., dissenting).

355 *Id.* at 555 (Breyer, J., dissenting) (emphasis added). Expanding on this idea of "compromises," one may take the question of what *Apprendi* means for the future of criminal justice to its next logical step and determine that *Apprendi* may be more appropriately referred to as "*Mullaney v. Wilbur II*." Recall that the Court sustained *Patterson* as a compromise: "While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits . . ." *Patterson v. New York*, 432 U.S. 197, 208

In light of this, it will certainly be interesting to watch the Supreme Court's reaction to the cases that hold the Guidelines in general are unaffected by *Apprendi*.

Indeed, the practical reason why judges, rather than juries, traditionally determined the presence or absence of sentencing factors in any given case is crucial.<sup>356</sup> It does not reflect an idea of procedural fairness, but rather an administrative need for procedural compromise.<sup>357</sup> To put it frankly and simply, far too many potentially relevant sentencing factors are present in real life to permit submission of many or all of them to a jury.<sup>358</sup> To ask a jury, consisting of numerous men and women of varying backgrounds, experience, and education, to consider many or all of such factors is unworkable.<sup>359</sup>

Further, requiring a jury to consider all such factors during a trial, where the issue is guilt or innocence, could place the defendant

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(1977). Indeed, the Constitution contains no definition of an offense. In fact, the Supreme Court has determined that the meaning of an "offense" is statutory. The Constitution is not a theory, but rather a series of compromises. It is therefore a non sequitur that the Court allows affirmative defenses to be determined by the legislature (since the Constitution never spells out what is an "element" of an offense) but does *not* allow the legislature to determine what constitutes the elements of an offense. In effect, *Apprendi* shifts to defendants the burden of disproving the surrounding circumstances and conduct that had previously been determined by a judge to be sentencing factors. *Apprendi* is a decision without real life compromises.

356 See *Apprendi*, 530 U.S. at 556 (Breyer, J., dissenting).

357 See *id.* at 556-57 (Breyer, J., dissenting).

358 See *id.* at 557 (Breyer, J., dissenting). An example of a typical case might be [a] bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller, or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

*Id.* (Breyer, J., dissenting) (quoting U.S. SENTENCING GUIDELINES pt. A, 1.2).

359 See *id.* (Breyer, J., dissenting). In discussing the distinctions between presenting to juries facts that establish the criminality of a defendant's conduct and those that merely satisfy procedural requirements (such as venue and jurisdiction), the authors of the MPC lend support to this belief, writing that "there is grave danger of confusion in presenting to a jury different standards for appraising different features of the prosecution's case." MODEL PENAL CODE § 1.12 cmt.—proof beyond a reasonable doubt 189 (Official Draft & Revised Comments 1962). For a thorough discussion of cases and studies on whether requiring proof beyond a reasonable doubt rather than proof by preponderance of the evidence affects the outcome of a trial, see Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1308-11 (1977); see also MODEL PENAL CODE § 1.12 cmt.—proof beyond a reasonable doubt 190 n.6.

in the awkward and unfair position of having to deny he committed the crime yet offer proof about *how* he committed it.<sup>360</sup> An example might be, "I did not sell drugs, but I sold no more than 500 grams."<sup>361</sup> Another example involves juvenile convictions, which the Ninth Circuit found do not fall under the *Apprendi* exception in *Almendarez-Torres*.<sup>362</sup> Indeed,

a defendant with a prior juvenile adjudication will be put to the Hobson's choice of stipulating to the priors or parading them before a jury. But, as *Almendarez-Torres* recognized, "[e]ven if a defendant's stipulation were to keep the name and details of the previous offense from the jury, jurors would still learn, from the indictment, the judge, or the prosecutor, that the defendant had committed [three violent felonies]." . . . This approach seems to wreak havoc on the very due process rights *Apprendi* sought to vindicate.<sup>363</sup>

While special post-verdict sentencing juries could remedy this problem, "they have seemed (but for capital cases) not worth their administrative costs."<sup>364</sup> "In principle, the number of potentially relevant behavioral characteristics is endless,"<sup>365</sup> and a judge is far better suited to determine which factors should be taken into account for sentencing purposes.<sup>366</sup>

The *Apprendi* majority held that the Fourteenth Amendment commands that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable

360 See *Apprendi*, 530 U.S. at 557 (Breyer, J., dissenting).

361 *Id.* (Breyer, J., dissenting).

362 See *United States v. Tighe*, 266 F.3d 1187, 1194 (9th Cir. 2001).

363 *Tighe*, 266 F.3d at 1200-01 (Brunetti, J., dissenting) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998)).

364 *Apprendi*, 530 U.S. at 557 (Breyer, J., dissenting).

365 *Id.* at 558 (Breyer, J., dissenting).

366 See *id.* at 557. The drafters of the MPC appear to have given judges more credit than most regarding the issue of ensuring fairness toward defendants under different burdens of proof: The MPC indicates that when a fact to be considered is not an element of the offense charged, "the fact must be proved to the satisfaction of the Court or jury, as the case may be." See MODEL PENAL CODE § 1.12(4)(b). While proof "to the satisfaction of the court or jury" leaves an ambiguity as to the required measure of persuasion, it means at least proof by a preponderance of the evidence. See MODEL PENAL CODE § 1.12 cmt.—burden of proof with respect to facts not an "element" of an offense: subsection (4) 201 (Official Draft & Revised Comments 1962). Yet, the drafters of the MPC believe that proof by a preponderance of evidence "is not likely to leave room for a substantial doubt. This should suffice to afford adequate protection in an area where it was sought to broaden the discretion of the court[s]." See *id.* at 201.

doubt. The question therefore arises: Does *Apprendi* overrule *McMillan*?<sup>367</sup> Justice Stevens wrote, "We do *not* overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict . . ." <sup>368</sup> Yet, if a judge does not sentence beyond the statutory maximum, then a fact may be considered a sentencing element. The question then becomes what will the Supreme Court allow as an acceptable "statutory maximum"? Will the Court defend this under the Eighth Amendment right to proportionality or the right against cruel and unusual punishment? If so, then *every* sentencing scheme designed by a legislature raises an Eighth Amendment question. Will the Court constitutionalize the length of punishment? If so, then the five Justices in the *Apprendi* majority may find themselves policing the criminal codes in every state to ensure that the new *Apprendi* mandate is not violated.<sup>369</sup> It will be impossible for the Justices of the Supreme Court to review all of the criminal codes in this country for legislative conformity with the vague *Apprendi* determination of what constitutes the "*elements*" of a crime (i.e., facts that increase the prescribed range of penalties to which a criminal defendant is exposed). Such a determination of what the elements of a crime are—and the rationale behind each one—is far better suited for Congress and the fifty state legislatures. Nevertheless, the Court has dictated in *Apprendi* that a legislative body may not do so.

A related question that the *Apprendi* Court does not answer deals with the effect of juror exposure to the supposed "elements" of a defendant's crime that were previously considered "sentencing elements." For example, in *Jones v. United States*,<sup>370</sup> the Court considered the pertinent car-jacking statute<sup>371</sup> and determined that the "if death results" and "if serious bodily injury results" clauses were elements of the statute.<sup>372</sup> Yet, under an *Almendarez-Torres*<sup>373</sup> scenario, why should recidivism not be made an element of the offense as opposed to a sentencing factor? The drawback to this is, of course, that prosecutors

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367 *McMillan* is discussed *supra* notes 102–17 and accompanying text. A related question that remains unanswered by the *Apprendi* Court is whether "mandatory minimum" sentencing schemes like the one in *McMillan* are also overruled.

368 *Apprendi*, 530 U.S. at 487 n.13 (emphasis added).

369 The Court found themselves in a similar predicament when they constitutionalized, for example, aspects of the administration of prisons and mental health facilities. See, e.g., Interview with G. Robert Blakey, Professor of Law, Notre Dame Law School, in Notre Dame, Ind. (Nov. 10, 2000) (on file with author).

370 526 U.S. 227 (1999).

371 18 U.S.C. § 2119 (1994).

372 *Jones*, 526 U.S. at 232–52. In fact, this is probably a fair reading of that statute.

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

could introduce at trial that the defendant was convicted of prior crimes, thereby possibly "poisoning" the jury against the defendant for the current crime with which the defendant is charged. To remove what were traditionally guideline departure factors (i.e., sentencing factors) from the purview of judges and give them instead to juries as elements of offenses is, in fact, more detrimental in the end for defendants, because it exposes to the jury *all* of the negative aspects of a defendant's conduct. The *Apprendi* decision will undoubtedly lead to increased conviction rates by juries.<sup>374</sup> When Congress and state legislatures chose in their respective criminal codes to have a judge determine, as a sentencing factor, whether or not a defendant had any prior convictions, this decision did not have a basis anywhere in history or the text of the Constitution—it was instituted as a pragmatic matter for the protection of defendants.

Moreover, with respect to past sentences handed down by judges under determinate-sentencing schemes, the *Apprendi* decision has unleashed "a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision."<sup>375</sup> *Apprendi* threatens to bog down state and federal courts in procedural review of countless sentences.

## 2. Fallout: Several Examples of the Many Petitions for Sentence Reversals

Almost 500,000 federal defendants have been sentenced under the Sentencing Guidelines since 1989.<sup>376</sup> Further, while exact figures are unavailable, a multitude of federal prisoners were convicted of drug crimes in which the quantity of drugs involved, as determined by the judge, pushed their sentences over the statutory maximum. These

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374 For example, in an aggravated assault statute, a defendant's guilt or innocence could easily rest on whether possession of a gun is considered an "element" of the offense or a "sentencing factor." If such possession remains a sentencing factor, this would have the effect of making it "grading," which should be construed under strict liability. See *supra* notes 10–36 and accompanying text. Making possession of a gun an "element" rather than a "sentencing factor," however, means that it becomes a liability factor (i.e., right or wrong) rather than a grading element (i.e., strict). Jury members hearing of yet another "wrong" thing that the defendant has done may lead to an increased likelihood of conviction. See *Almendarez-Torres*, 523 U.S. at 235.

375 *Apprendi v. New Jersey*, 530 U.S. 466, 551 (2000) (O'Connor, J., dissenting). Recent cases documenting this very problem are discussed fully *infra* notes 376–420 and accompanying text.

376 See *Apprendi*, 530 U.S. at 551 (O'Connor, J., dissenting) (citation omitted).

prisoners will undoubtedly appeal their sentences based on *Apprendi*.<sup>377</sup>

Nevertheless, federal defendants make up only the tip of the sentencing iceberg. "In 1998, for example, federal criminal prosecutions represented only about 0.4% of the total number of criminal prosecu-

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377 Other criteria previously considered as sentencing factors may also become "elements" in light of *Apprendi*. One example is "quantity of money laundered." See 18 U.S.C. § 1956 (1994). *Apprendi* could change the valuable sentencing tool of "criminal forfeiture" (under 21 U.S.C. §§ 848, 853 (1994 & Supp. V 1999)) to an "element" of the offense. In *Libretti v. United States*, 516 U.S. 29 (1995), the Court specifically held that "[f]orfeiture is an element of the sentence imposed following conviction . . . . Congress conceived forfeiture as a punishment for the commission of various drug and racketeering crimes." *Libretti*, 516 U.S. at 38–39. Additionally, "[f]orfeiture is imposed 'in addition to any other sentence,'" and "Congress plainly intended forfeiture of assets to operate as *punishment* for criminal conduct in violation of the federal drug and racketeering laws, *not as a separate substantive offense*." *Id.* at 39 (citation omitted) (original emphasis deleted) (emphases added). Justices O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, and the Chief Justice all concurred in this portion of the holding, see *id.* at 31, for the Justices indicated in italics were all in the *Apprendi* majority. Further, Justices Scalia and Thomas, both *Apprendi* majority members, concurred with the following from *Libretti*:

Our cases have made abundantly clear that a defendant does *not* enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed. See, e.g., *McMillan v. Pennsylvania*, 47 U.S. 79, 93 (1986) ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.").

*Id.* at 49. While *Libretti* has not been overturned as of this writing, it appears that it most certainly will be overruled in the near future under the Court-created *Apprendi* law, for under that logic the Court will most likely see "forfeiture" as an increase in punishment that could exceed the statutory maximum a defendant might otherwise face. A recent Seventh Circuit case could serve as the vehicle for the Court's determination of the *Apprendi*-forfeiture issue. See *United States v. Vera*, 278 F.3d 672 (7th Cir. 2002). Judge Easterbrook wrote in *Vera*:

Like the other circuits that have considered this question, we hold that *Apprendi* does not disturb the rule that forfeiture is constitutional when supported by the preponderance of the evidence. . . .

. . . .

Determining the forfeitable proceeds of an offense does not come within *Apprendi*'s rule, because there is no "prescribed statutory maximum" and no risk that the defendant has been convicted *de facto* of a more serious offense. [21 U.S.C. §] 853(a) is open-ended; *all* property representing the proceeds of drug offenses is forfeitable. Forfeiture has long been a civil remedy as well as a criminal sanction, handled by a preponderance standard in either event—and usually by the judge rather than the jury. See FED. R. CRIM. P. 32.2. Restitution, another open-ended component of both criminal and civil judgments, is not affected by *Apprendi* because there is no "statutory maximum." Forfeiture is governed by the same principle and thus may be decided by the judge on a preponderance standard.

tions in federal and state courts. Because many States, like New Jersey, have determinate-sentencing schemes, the number of individual sentences drawn into question by the Court's decision [is] colossal."<sup>378</sup>

While thousands of *Apprendi*-related appeals are in the system,<sup>379</sup> four recent examples from the Fourth and Seventh Circuits are illus-

<sup>378</sup> *Vera*, 278 F.3d 672–73 (citations omitted); see also *Apprendi*, 530 U.S. at 551 (O'Connor, J., dissenting) (citations omitted).

<sup>379</sup> The following cases are arranged numerically by circuit and illustrate how the federal courts of appeals are each handling the many hundreds of *Apprendi*-related appeals that come before them:

United States v. Caba, 241 F.3d 98 (1st Cir. 2001).

By its own terms, the holding in *Apprendi* applies only when the disputed "fact" enlarges the applicable statutory maximum and the defendant's sentence exceeds the original maximum. For this reason, *Apprendi* simply does not apply to guideline findings (including, *inter alia*, drug weight calculations) that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum.

*Id.* at 101 (citation omitted).

Santana-Madera v. United States, 260 F.3d 133, 138 (2d Cir. 2001) (citing the basic *Apprendi* holding that "any fact other than a prior conviction that increases a defendant's sentence beyond the otherwise applicable maximum penalty must be decided by a jury beyond a reasonable doubt").

United States v. Williams, 235 F.3d 858, 863 (3d Cir. 2000) (finding that a defendant has no valid *Apprendi* claim where his ultimate sentence is less than that which would have been authorized by the jury's verdict); see also *id.* at 862 ("*Apprendi* does not apply to . . . increases[s] . . . under the Sentencing Guidelines.").

United States v. Angle, 254 F.3d 514, 518 (4th Cir. 2001) (en banc) (finding no error in the sentence the defendant received because it was less than the maximum penalty authorized by the facts found by the jury). See further discussion of *Angle* *infra* notes 380–88 and accompanying text.

United States v. Baptiste, 264 F.3d 578 (5th Cir. 2001).

In this court, drug trafficking crimes defined in 21 U.S.C. § 841 are governed by *Apprendi* analysis on the theory that the dramatically tiered sentences for increasing quantities of illegal drugs enhance the "core" statutory maximum of § 841(b)(1)(C). United States v. Doggett, 230 F.3d 160, 163 (5th Cir. 2000). Consequently, the quantity of drugs must be alleged in the indictment and proved to the jury beyond a reasonable doubt if, as here, the government seeks enhanced penalties under § 841(b)(1)(A) or (b)(1)(B). [*Doggett*, 230 F.3d] at 164–65.

*Baptiste*, 264 F.3d at 592.

United States v. Alvarez, 266 F.3d 587 (6th Cir. 2001).

*Apprendi* explicitly applies only to those situations in which "a factual determination made under a lesser standard of proof than the reasonable doubt standard increases the penalty for a crime beyond the statutory maximum."

....

... To put it another way, the Sixth Circuit has determined that "the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed, such as moving up the scale of mandatory



minimum sentences, invokes the full range of constitutional protections required for 'elements of the crime.'" Therefore, "[a]ggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved."

*Id.* at 597–98 (citations omitted).

United States v. Westmoreland, 240 F.3d 618 (7th Cir. 2001).

It is now clear that, if drug quantity is determined by the sentencing judge rather than by the jury, a defendant's rights are violated when the sentence dictated by the drug quantity is greater than the lowest, unenhanced statutory maximum prescribed by § 841(b). Thus, when drug quantity is not charged in the indictment or submitted to the jury, the statutory maximum under § 841(b) must be determined without reference to drug quantity.

*Id.* at 632 (citation omitted).

United States v. Bradford, 246 F.3d 1107, 1113–14 (8th Cir. 2001) (finding it less than clear as to whether the court of appeals "must avert *Apprendi* violations by merely finding that the district court could have imposed consecutive, rather than concurrent, sentences to justify those actually imposed, or whether [the court] may or should remand on that point"); cf. United States v. Angle, 254 F.3d 514, 518–19 (4th Cir. 2001).

[T]he sentencing guidelines instruct that if the total punishment mandated by the guidelines exceeds the statutory maximum of the most serious offense of conviction, the district court must impose consecutive terms of imprisonment to the extent necessary to achieve the total punishment. . . .

. . . .

. . . *Apprendi* does not foreclose this result.

*Id.*

United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir. 2001) ("Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof . . . do not fall within *Apprendi's* 'prior conviction' exception.").

United States v. Sullivan, 255 F.3d 1256, 1265 (10th Cir. 2001) ("Other circuits have held that *Apprendi* does not apply to sentencing factors that increase a defendant's guideline range but do not increase the statutory maximum. We agree with those circuits.") (citations omitted).

United States v. Nealy, 232 F.3d 825, 829 (11th Cir. 2000) (failure to submit the issue of drug quantity to the jury was held to be harmless error that did not require reversal, since it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error") (citation omitted); accord United States v. Webb, 255 F.3d 890, 902 (D.C. Cir. 2001).

United States v. Fields, 251 F.3d 1041 (D.C. Cir. 2001).

[I]n drug cases charged under 21 U.S.C. §§ 841 and 846, where the prescribed statutory maximum depends upon the amount of drugs involved, before a defendant can be sentenced to a higher statutory maximum, "the Government must state the drug type and quantity in the indictment, submit the required evidence to the jury, and prove the relevant drug quantity beyond a reasonable doubt."

. . . [But,] *Apprendi* does not apply to enhancements under the Sentencing Guidelines when the resulting sentence remains within the statutory

trative of the waves of convicted defendants seeking to invalidate their sentences based on *Apprendi* and the problems these appeals are causing the courts and prosecutors.

First, *United States v. Angle*<sup>380</sup> is a typical post-*Apprendi* case facing district courts, due to the excessively large federal mandatory minimum sentences required by Congress for certain drug offenses. The defendants in *Angle* challenged their convictions based on the proposition that the district court failed to treat as an element the specific quantity of narcotics involved in the offense.<sup>381</sup> A panel of the Fourth Circuit initially handled this appeal and summarized the new case law arising out of *Apprendi*:

Under *Apprendi*, sentencing factors that support a specific sentence *within* the statutorily prescribed penalty range are still properly submitted to a judge to be found by a preponderance of the evidence.

. . . *Apprendi* neither overrules *McMillan* nor makes the term "sentencing factor" devoid of meaning. Ultimately, a court may still consider aggravating and mitigating factors that support a specific sentence within the statutorily prescribed range when sentencing a defendant, *so long as the sentence imposed is not greater than the maximum statutory penalty* . . . established by the jury's verdict.<sup>382</sup>

Based on the case law established in *Apprendi*, the panel next resolved the issue of whether the drug quantity attributed to Angle at sentencing was an element that should have been proven to the jury beyond a reasonable doubt, or a sentencing factor that was properly found by the district court judge by a preponderance of the evidence.<sup>383</sup> In spite of the fact that the Fourth Circuit and "all of her sister circuits have held that drug quantity is a sentencing factor, not an element of the crime. . . . *Apprendi* does change the traditional interpretation that drug quantity is always a sentencing factor."<sup>384</sup> Therefore, if the findings of particular drug quantities expose the defendants to sentences greater than authorized by the jury's verdict under the relevant drug statute, then the requirement of *Apprendi* has not been satis-

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maximum. This understanding of *Apprendi* is shared by our [thereinafter listed] sister circuits.

*Id.* at 1043–44 (citations omitted).

380 254 F.3d 514 (en banc).

381 *Id.* at 516.

382 *United States v. Angle*, 230 F.3d 113, 121 (4th Cir. 2000) (2–0 decision) (citation omitted) (emphasis added), *aff'd in part; vacated and remanded in part*, 254 F.3d 514 (en banc).

383 *See id.* at 121–24.

384 *Id.* at 122–23 (citations omitted) (emphasis added).

fied.<sup>385</sup> Such a mandate, while appropriate in light of *Apprendi*, may prove cumbersome and unmanageable to judges, for while

the judge may still determine the amount of drugs by a preponderance of the evidence for the purposes of calculating the offense level and relevant conduct under the . . . Guidelines. However, if the determination of the judge with respect to quantity leads to a suggested sentence range under the Sentencing Guidelines that is *greater* than the . . . statutory maximum, the judge only [sic] may sentence at or below the statutory maximum penalty . . . .<sup>386</sup>

Subsequently, the entire Fourth Circuit Court of Appeals voted to vacate the panel decision in order to rehear the appeal en banc.<sup>387</sup> While the case was vacated and remanded for determination of the quantity of drugs attributable to one of the defendants, the overall reasoning of the panel court was upheld.<sup>388</sup>

The second example of the flood of petitions facing courts and prosecutors as a result of *Apprendi* is *Talbott v. Indiana*.<sup>389</sup> The first sentence of Judge Easterbrook's opinion in *Talbott* set the tone for how the Seventh Circuit was going to handle this case: "Richard Talbott is among the throngs of state and federal prisoners who believe that *Apprendi v. New Jersey* undermines their sentences."<sup>390</sup> He continued,

Not one of the *Apprendi*-based applications for permission to file has been granted . . . and none is going to be granted in the near future, for a fundamental reason: a new decision of the Supreme Court justifies a second or successive collateral attack *only* if it establishes "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." . . . [T]hat retroactive application must be declared by the Supreme Court itself.

*Apprendi* does *not* state that it applies retroactively to other cases on collateral review. . . . If the Supreme Court ultimately declares that *Apprendi* applies retroactively on collateral attack, we will authorize successive collateral review of cases to which *Apprendi* applies. *Until*

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385 *See id.* at 123.

386 *Id.* (emphasis added).

387 *United States v. Angle*, 254 F.3d 514, 517 (4th Cir. 2001) (en banc).

388 *See id.* at 519.

389 226 F.3d 866 (7th Cir. 2000).

390 *Id.* at 868 (citation omitted).

*then prisoners should hold their horses and stop wasting everyone's time with futile applications.*<sup>391</sup>

The court explains that *Apprendi* only holds that circumstances *increasing a statutory maximum* sentence must be treated as elements of the offense, not sentences that fall *within* a statutory cap.<sup>392</sup> Indeed, many federal prisoners are convicted on drug charges. These prisoners are mistaken in thinking that *Apprendi* affects the holding of *Edwards v. United States*,<sup>393</sup> which held that the judge alone determines drug types and quantities when imposing sentences short of the statutory maximum.<sup>394</sup> In sum, the *Apprendi* decision is resulting in "prisoners peppering district judges with initial collateral attacks. . . ."<sup>395</sup>

The third example is *United States v. Brown*,<sup>396</sup> a case where the defendant was sentenced to life in prison under the federal "three-strikes-and-you're-out" law, 18 U.S.C. § 3559(c) (1994 & Supp. V 1999).<sup>397</sup> The law requires a life sentence upon conviction of a "serious violent felony" if the defendant has previously been convicted of two "serious violent" felonies.<sup>398</sup> Brown, the defendant, plead guilty to a bank robbery wherein he used a baseball bat and during his escape had rammed a police officer's car.<sup>399</sup> Brown argued, *inter alia*, that the "three strikes" law violates due process by imposing on him the burden of proving that a robbery is non-qualifying under that statute.<sup>400</sup> Judge Posner dismissed this argument, however, noting that

*Apprendi* leaves undisturbed the principle that while the prosecution must indeed prove all the elements of the offense charged beyond a reasonable doubt the legislation creating the offense *can* place the burden of proving affirmative defenses *on the defendant*. What is more, it can be a heightened burden of proof, like proof beyond a

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391 *Id.* at 868–69 (citations omitted) (emphases added); *accord* Tyler v. Cain, 121 S. Ct. 2478, 2482 (2001) (holding that lower courts cannot apply Supreme Court decisions to make a rule retroactive for habeas purposes).

392 *Talbott*, 226 F.3d at 869.

393 523 U.S. 511 (1998).

394 *See Talbott*, 226 F.3d at 869–70 (referencing *Edwards*, 523 U.S. at 514).

395 *Talbott*, 226 F.3d at 869 (emphasis removed). Indeed, on December 4, 2000, the Supreme Court vacated and remanded "for further consideration in light of *Apprendi*" the sentences of six defendants out of fifteen in a drug/firearm case before Chief Judge Posner and Judges Easterbrook and Wood of the Seventh Circuit. *See Patterson v. United States*, 531 U.S. 1033 (2000) (order granting cert.—vacating and remanding).

396 276 F.3d 930 (7th Cir. 2002).

397 *Id.* at 931.

398 *Id.*

399 *Id.*

400 *Id.*

reasonable doubt, and even more clearly therefore it can be as in this case the lesser burden of proof by clear and convincing evidence.<sup>401</sup>

Overall, “the federal ‘three strikes’ law does not alter the existing statutory definition of bank robbery. It just allows the defendant to show that the particular robbery he committed was not very violent.”<sup>402</sup>

Finally, *United States v. Promise*,<sup>403</sup> and in particular the concurring opinion of Judge Luttig, is worthy of mention for several reasons. To begin, Judge Luttig points out that in interpreting 21 U.S.C. § 841 (1994 & Supp. V 1999), the Fourth Circuit and every other court of appeals “have unwittingly and unnecessarily reached and decided the very question that the Supreme Court has as yet declined to answer, and indeed expressly reserved in *Apprendi*, namely, whether *all* facts that could serve to increase a defendant’s sentence must be found by the jury beyond a reasonable doubt.”<sup>404</sup> This is “due largely to the Supreme Court’s own failure to distinguish clearly its statutory from its constitutional analyses.”<sup>405</sup> Nonetheless,

[t]he as-yet quite narrow constitutional principle of *Apprendi* is that the jury must find beyond a reasonable doubt *only* any fact that increases *the maximum sentence authorized for the statutory offense*. And the holdings of *Almendarez-Torres*, *Jones*, and *Castillo*—that whether any given fact is an element of the offense (requiring proof beyond a reasonable doubt) or a sentencing factor (requiring only proof by a preponderance) is a question of legislative intent, and therefore statutory interpretation—remain unaffected by *Apprendi* . . . . [Judge Luttig remains f]aithful to the limited constitutional principle in *Apprendi*, but equally faithful to the bedrock principle of *Almendarez-Torres*, *Jones*, and *Castillo* that the power to define criminal offenses rests in the legislature, subject only to constitutional limitations . . . .

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401 *Id.* at 932.

402 *Id.* at 933.

403 255 F.3d 150 (4th Cir. 2001). *Promise* is a drug case in which the district court erred in sentencing the defendant to a term beyond the maximum allowable for possession of an unspecified amount of drugs without the amount attributable to the defendant being charged in the indictment or found by the jury beyond a reasonable doubt. However, the Fourth Circuit Court of Appeals declined to notice the plain error of the district court given the overwhelming and uncontroverted evidence that the defendant did in fact possess the amount of drugs attributed to him by the district court. *See id.* at 161–65.

404 *Id.* at 169 (Luttig, J., concurring) (emphasis added).

405 *Id.* (Luttig, J., concurring).

. . . [T]he statutory maximum sentence for commission of [§ 841] offenses, and therefore the punishment authorized by the jury's verdict of guilt of a section 841 offense, is life imprisonment, plus fine, with the actual sentence imposed dependant upon judicial findings of the presence or absence of the various sentencing factors, including drug amount and drug type, identified in section 841(b). Because the statutory maximum sentence for commission of the offenses defined by Congress in section 841 is life plus fine, I would hold that the principle of *Apprendi* . . . is not offended by any of the sentences imposed in the cases before us because none of the sentences at issue exceeds life imprisonment.<sup>406</sup>

*Promise* also reveals that the Department of Justice (DOJ) is as understandably confused by *Apprendi* as are the federal courts.<sup>407</sup> In his concurrence, Judge Luttig points out that the DOJ is vacillating on its position throughout the various § 841 trials are coming before the Fourth Circuit on *Apprendi*-related appeals.<sup>408</sup> The DOJ first apprised its attorneys that they *may*, but were not required, to argue that drug amounts are mere sentencing factors.<sup>409</sup> Yet before the en banc court of the Fourth Circuit, the DOJ

directly contradicted its earlier position in *Promise*, and equivocated even on what, a month later, would be its position . . . arguing inconsistently (if not incoherently) that . . . Congress plainly intended drug quantity and type to be sentencing factors only, but, at the same time, that the quantity and type of drug increase the statutory maximum sentence and "it is error to impose a sentence that is authorized only by virtue of that increase in the maximum sentence without proving that fact (type or quantity) to the jury beyond a reasonable doubt." Letter from Nina Goodman, DOJ, Criminal Division, Appellate Section, to Clerk of Court, Fourth Circuit (Feb. 22, 2001). Thus[,] . . . unable to reconcile what it knows to be Congress' intent with what it either believes (mistakenly) or fears (prematurely) to be a holding by the Court in *Apprendi* that any fact that increases a sentence significantly must be proven to the jury beyond a reasonable doubt, the United States now takes the novel position that a fact that it concedes is not an element of the offense must nevertheless be proven to the jury beyond a reasonable doubt as if it were an element—apparently confusing a fact that increases a sentence beyond the statutory maximum, which the Supreme Court characterized in *Apprendi* as "the functional equivalent" of an element of a greater offense, see 530 U.S. at 494 n.19, with a fact that

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406 *Id.* at 169–70 (Luttig, J., concurring).

407 *See id.* at 182 (Luttig, J., concurring).

408 *See id.* (Luttig, J., concurring).

409 *See id.* (Luttig, J., concurring).

increases a sentence, but only within the range of punishments authorized by the legislature.<sup>410</sup>

Judge Luttig explains the conundrum facing the DOJ:

And as if this position were not untenable enough, [the DOJ] assures us that, even though this “non-element” must be proven to the jury beyond a reasonable doubt as if it were an element, it need not be charged in the indictment for the reason that it is not a “real” element—a *position one cannot help but believe was formulated solely because virtually every drug conviction in recent history would be reversed otherwise*.<sup>411</sup>

Indeed, federal prosecutors are basically taking the “safe route” to avoid being overturned on appeal, which is for them to say that a § 841 offense has a twenty-year maximum unless the drug quantity is specified in the indictment.<sup>412</sup> Yet, the pursuit of the “safe route” forces those same federal prosecutors to abandon the zealous representation of their client, the United States.<sup>413</sup> But until the Court refines its decision in *Apprendi*, the DOJ is no less bound than the federal appellate court judges by *McMillan*.<sup>414</sup>

Judge Luttig elucidates the logical and practical difficulty of the position that is thrust upon the DOJ by *Apprendi*:

I cannot even imagine the Supreme Court accepting such tortured arguments as to those matters that must and must not be proven to the jury beyond a reasonable doubt and those that must and must not be charged in the indictment. Indeed, I have a hard time conceiving even that the Solicitor General would be prepared to advance such an argument before the Supreme Court.<sup>415</sup>

Yet the Solicitor General has argued that point in briefs before the Supreme Court.<sup>416</sup> The DOJ is attempting to avoid the logical inconsistencies of its position by arguing that any *Apprendi* error in many such drug cases does not require reversal under the plain-error standard because the petitioners cannot show that the error both “affect[ed] substantial rights” and “seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.”<sup>417</sup> The DOJ argued that this is because evidence of drug quantity is essentially un-

410 *Id.* at 184–85 (Luttig, J., concurring) (emphasis deleted) (citation omitted).

411 *Id.* at 185 (Luttig, J., concurring) (emphasis added).

412 *See id.* at 184 (Luttig, J., concurring).

413 *See id.* (Luttig, J., concurring).

414 *See id.* at 186 (Luttig, J., concurring).

415 *Id.* at 185 (Luttig, J., concurring).

416 *See, e.g.*, Brief for the United States at 6, *Barrios v. United States*, 245 F.3d 793 (11th Cir. 2001), *cert. denied* 122 S. Ct. 50 (Oct. 1, 2001) (No. 00-1787).

417 *Id.* at 8–9 (citations omitted).

disputed in these cases<sup>418</sup> and because the petitioners could have been sentenced to the same overall prison term through the imposition of partially consecutive sentences on each count as allowed by the Sentencing Guidelines.<sup>419</sup>

Unfortunately, until the Supreme Court adequately resolves the many *Apprendi*-related problems, federal prosecutors will be forced to wade through the confusion and uncertainty caused by the *Apprendi* decision, take the unnecessary step of submitting drug quantity and type in every § 841 indictment, and prove those beyond a reasonable doubt. Further, those prosecutors must now either (1) secure instructions that quantity and type are elements of the offense (i.e., so that a general verdict will be binding on the elements), or (2) ask for a special verdict that specifically states the weight and type.<sup>420</sup>

### 3. What the Future Holds: Uncertainty for Sentencing Judges<sup>421</sup>

*Apprendi* will likely have an extremely damaging effect on sentencing conducted in the immediate future under current determinate-sentencing schemes.<sup>422</sup> Since the Court failed to "clarify the precise contours of the constitutional principle [if any] underlying its decision, federal and state judges are left in a state of limbo."<sup>423</sup> These judges are unsure if they should "continue to assume the constitutionality of the determinate-sentencing schemes under which they have operated for so long, and proceed to sentence convicted defendants in accord with those governing statutes and guidelines."<sup>424</sup> The majority "provides no answer, yet [the Court's] reasoning suggests that each [future] sentence will rest on shaky ground."<sup>425</sup>

Federal courts are noting *Apprendi*'s tumultuous effect. For example, one district court judge pointed out that *Apprendi* "completely abrogated existing law in every federal circuit."<sup>426</sup> The Sixth Circuit Court of Appeals proclaimed that "[t]he rule in *Apprendi* has 'radically

418 *See id.* at 9.

419 *See id.* at 10.

420 *See generally* FED. R. CRIM. P. 31 (Verdict); *id.* 32(d)(1) (Sentence and Judgment, In General).

421 Career prosecutors and law professors are also questioning the Court's decision, echoing the concerns of the *Apprendi* dissenters. *See, e.g.*, Blakey Interview, *supra* note 369.

422 *See Apprendi v. New Jersey*, 530 U.S. 466, 551 (2000) (O'Connor, J., dissenting).

423 *See id.* (O'Connor, J., dissenting).

424 *Id.* (O'Connor, J., dissenting).

425 *Id.* at 551-52 (O'Connor, J., dissenting).

426 *West v. United States*, 123 F. Supp. 2d 845, 846 (D. Md. 2000).



departed from this court's prior treatment of the quantity of drugs as a sentencing factor rather than as an element of the offense."<sup>427</sup> The Fifth Circuit Court of Appeals was even more blunt in its disapproval. In a case involving a drug conspiracy and particularly brutal multiple murder, that court indicated that manifest injustice actually resulted from the Supreme Court's widely unexpected *Apprendi* decision:

One cannot help but note the unfortunate consequences here: conspirators who killed or maimed seven people without compunction, three of them in one family and two in another, in order to wipe out their rivals or intimidate witnesses, may [only] be sentenced to a maximum of 20 or 30 years in prison. Yet, had it been forewarned of *Apprendi*, the government could have restructured its charges to emphasize the murders and attempted murders or add a statement on drug quantities. As it stands, a disproportionately lenient result is compelled by our current precedent.<sup>428</sup>

To avoid *Apprendi*-created manifest injustice in a Fourth Circuit case, that court of appeals actually declined to notice plain *Apprendi* error even though specific threshold drug quantity was not alleged in the indictment because the defendant did not assert that lack of notice precluded him from disputing drug quantity.<sup>429</sup> The court unequivocally stated, "It would be a miscarriage of justice to allow [the defendant] to avoid a sentence for the aggravated drug trafficking crime that the evidence overwhelmingly demonstrates he committed. We therefore declined to notice the error."<sup>430</sup>

The question also arises as to whether judges are now restricted in sentencing. Traditionally, no limitation was placed on the ability of a judge to sentence consecutively based on factors that may not have been presented to the jury. Nevertheless, if a judge now exceeds the maximum sentence, the *Apprendi* holding applies and the judge will be overruled on appeal. But if the judge sentences consecutively—thereby staying *under* the maximum statutory penalty—*Apprendi* does not apply and the judge will not be overruled.<sup>431</sup> *This situation has the potential to return our system to the very disparities and incongruous sentences that the sentencing reform initiatives of the past three decades were designed to erase.*

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427 *United States v. Alvarez*, 266 F.3d 587, 597 (6th Cir. 2001) (citations omitted).

428 *United States v. Baptiste*, 264 F.3d 578, 594–95 (5th Cir. 2001).

429 *See United States v. Promise*, 255 F.3d 150 (4th Cir. 2001).

430 *Id.* at 164.

431 The Fourth and Eighth Circuit Courts of Appeal addressed this issue and came to different conclusions. *See supra* note 379 (providing a discussion of *United States v. Angle*, 254 F.3d 514, 518–19 (4th Cir. 2001), and *United States v. Bradford*, 246 F.3d 1107, 1113–14 (8th Cir. 2001)).

## CONCLUSION

The United States Supreme Court came to an incorrect conclusion in *Apprendi* in holding that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The procedures mandated by the New Jersey legislature in its "hate crime statute" are consistent with traditional sentencing practice. Further, echoing Justice Breyer's comment that although "additional procedural protections might well be desirable,"<sup>432</sup> this Comment reflected why the Constitution does *not* require such extra safeguards where ordinary sentencing factors are at issue.

Prior to the Court's June 2000 ruling in this case, uncertainty was not present across the country among legislative bodies, attorneys, and judges as they walked "an unidentified path . . . between state autonomy to define crimes and the safeguards for criminal defendants embodied in the Due Process Clause."<sup>433</sup> The Court's newly created "elements" of crimes lead to important unanswered theoretical questions regarding which party is responsible for the requisite burden of proof, to whom this burden must be proven, by what constitutional limitations, and to what degree of confidence. The question also arises whether the Supreme Court Justices—or some other undetermined reviewing body—are going to put limitations on and review what the legislative bodies can establish as elements of a crime. Additionally, a true constitutional crisis may develop if post-*Apprendi* legislatures, unable to appropriately raise sentences based on standards of proof, begin to manipulate criminal codes and sentencing provisions through careful and clever draftsmanship.

Moreover, it is unclear whether the Court in *Apprendi* is constitutionalizing the "elements" of an offense. What is clear, however, is the magnitude of problems that will face judges, attorneys, and defendants in the aftermath of the Court's unfortunate decision in *Apprendi*. While no history can be found that says there *should be* sentencing factors, no history can be found that says that there *should not be* sentencing factors. Accordingly, the legislative branch of government should have the authority and power to exercise this prerogative.

The Supreme Court has provided no compelling reason why Congress or a state legislature may not decree what constitutes the

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432 *Apprendi v. United States*, 530 U.S. 466, 565–66 (2000) (Breyer, J., dissenting).

433 Joshua S. Bratspies, *Beyond a Reasonable Doubt: Limiting the Ability of States To Define Elements of an Offense in the Context of Hate Crime Legislation*, 30 SETON HALL L. REV. 893, 921 (2000).

elements or sentencing factors in particular crimes. The Court should recognize the errors of the *Apprendi* decision and overrule it or severely limit it at the earliest opportunity. The precedent established in *McMillan v. Pennsylvania*,<sup>434</sup> which held that a court may use the preponderance of evidence standard when considering a sentencing factor,<sup>435</sup> should continue to be followed. Otherwise, the future holds "what will likely prove to be a lengthy period of considerable confusion"<sup>436</sup> for defendants, judges, and attorneys. Furthermore, *Apprendi* will continue to create an unnecessary backlog in the court system throughout the United States.

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434 477 U.S. 79 (1979).

435 See *id.* at 84–91.

436 *Apprendi*, 530 U.S. at 552 (O'Connor, J., dissenting).

APPENDIX: THE RELEVANT NEW JERSEY STATUTES WITH AN  
ELEMENT ANALYSIS

A. *Statutes Related to Weapons Possession*

1. N.J. STAT. ANN. § 2C:39-4(a) (West 1995)<sup>437</sup>

2C:39-4. Possession of weapons for unlawful purposes

(a) Firearms. Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree.

2. N.J. STAT. ANN. § 2C:43-6(a) (2) (West 1995)

2C:43-6. Sentence of imprisonment for crime; ordinary terms; mandatory terms

(a) Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows:

(2) In the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years;

B. *Statutes Related to "Hate Crimes"*

1. N.J. STAT. ANN. § 2C:44-3(e) (West 1995 & Supp. 2001)

The court . . . shall,<sup>[438]</sup> upon application of the prosecuting attorney, sentence a person who has been convicted of a crime . . . to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e. . . .

e. The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.

2. N.J. STAT. ANN. § 2C:43-7(a) (3) (West 1995)

2C:43-7. Sentence of imprisonment for crime; extended terms

<sup>437</sup> Element Analysis follows *infra* at app. C.

<sup>438</sup> Author's Explanatory Note: Section 2C:43-7(a) uses the word "may" in delineating what actions a sentencing judge could possibly take regarding *all* of the subsections of section 2C:44-3. However, section 2C:44-3 specifically indicates that the court "shall" sentence a person to an extended term if any of the criteria of subsection (e) to section 2C:44-3 is satisfied.

a. In the cases designated in section 2C:44-3, a person who has been convicted of a crime may<sup>439]</sup> be sentenced . . . to an extended term of imprisonment, as follows:

(3) In the case of a crime of the second degree, for a term which shall be fixed by the court between 10 and 20 years.

### C. *Element Analysis*

#### 1. N.J. STAT. ANN. § 2C:39-4(a) (West 1995)

2C:39-4. Possession of weapons for unlawful purposes

(a) Firearms. Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime in the second degree.

Jurisdiction here is, by definition of the title of the New Jersey statute, a *state* prosecution. Before conducting the elemental analysis, it is appropriate to look for guidance in the "introductory" or "definitions" section(s) of the New Jersey Code of Criminal Justice:

a. Under "General principles of liability; possession as an act," the following instruction is given:

(c) Possession is an act, within the meaning of this section, if the possessor *knowingly* procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate the possession.<sup>440</sup>

b. Under "Kinds of culpability defined," the following definitions are found:

(1) Purposely. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "*With purpose*," "designed," "with design" or equivalent terms have the same meaning.

(2) Knowingly. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is

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439 See *supra* note 438.

440 N.J. STAT. ANN. § 2C:2-1(c) (West 1995).

practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.<sup>441</sup>

c. Under "Construction of statutes with respect to culpability requirements," the following instruction is given:

(1) Prescribed culpability requirement applies to all material elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, *such provision shall apply to all the material elements of the offense*, unless a contrary purpose plainly appears.<sup>442</sup>

Therefore, applying the preceding guidance to the applicable statute in *Apprendi*, one derives the following elemental analysis.

## 2. N.J. STAT. ANN. § 2C:39-4(a) (West 1995)

### 2C:39-4. Possession of weapons for unlawful purposes

a. Firearms. Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime in the second degree.

#### ELEMENTS OF THE OFFENSE OF POSSESSION OF WEAPONS FOR UNLAWFUL PURPOSE:

Who:	(any) person (actor)		
			<u>State of Mind of Actor</u>
Conduct:	possess	→	knowingly and with purpose to use unlawfully against another person
Attendant Circumstances:	firearm (grading) <sup>443</sup>	→	knowingly and with purpose to use unlawfully against another person
Result:	possess	→	knowingly

441 N.J. STAT. ANN. § 2C:2-2(b)(1-2) (West 1995) (emphasis added).

442 N.J. STAT. ANN. § 2C:2-2(c)(1) (West 1995) (emphasis added).

443 Certain non-firearms weapons violations, including "other weapons" and "imitation firearms," are considered crimes of the third and fourth degrees, respectively. Hence, "firearm" in this elemental analysis is a surrounding circumstance labeled as "grading."

