Three Shots Into A Black Santa That May Unwittingly Start an Overhaul of America's Criminal System: *Apprendi v. New Jersey* and the Restructuring of the Federal Sentencing Guidelines.

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INTRODUCTION

Three days before Christmas 1994, a drunken Charles C. Apprendi ("Apprendi") unloaded his .22 caliber rifle into the home of an African American family who had recently moved into a previously monochromatic neighborhood of Vineland, New Jersey.[1] Apprendi was arrested immediately following his rampage and admitted to being the shooter.[2] Apprendi explained that his behavior was not based on anything personal about the occupants of the home he shot into, but was simply "because they are black in color[,] he does not want them in the neighborhood."[3]

Several years later, in July of 2000, the Supreme Court handed down a decision that sent shockwaves of excitement and fear down the spines of pundits, criminal theoreticians, lawyers and judges.[4] It appeared that, perhaps in a momentary lapse of reason while ruling on a state statute, the Supreme Court inadvertently overthrew the Federal Sentencing Guidelines[5] while ruling "[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

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[1] *Apprendi*, 530 U.S. 466, 469 (2000).

[2] *Id.*

[3] *Id.* Apprendi later retracted this statement. *Id.* (citing New Jersey v. Apprendi, 159 N.J. 7, 10 (1999)).

[4] *See e.g.*, Tony Mauro & Jonathan Ringel, *Court's Apprendi Hate Crimes Decision May Have Broad Impact on Sentencing*, THE LEGAL INTELLIGENCER, June 2, 2000, at 4; Lewis L Liman, *Initial Thoughts on* "Apprendi v. New Jersey," N.Y.L.J. July 5, 2000, at 3.

[5] Hereinafter "guidelines."

proved beyond a reasonable doubt."[6] Although Justice Thomas's concurrence stated the possibility of the validation of the guidelines is "a question for another day,"[7] the dissent was more apocalyptic, and proclaimed, the opinion "invalidates with the stroke of a pen three decades worth of nation wide reform."[8] One year later, however, the dissent's dire predictions prove to be unfounded as every circuit court has interpreted *Apprendi* narrowly, thus upholding the guidelines as constitutional.[9]

This note addresses the Supreme Court's decision in *Apprendi v. New Jersey*. It argues that although *Apprendi* does not require the complete dismemberment of the Federal Sentencing Guidelines, when viewed in conjunction with pragmatic concerns about the guidelines, the case suggests that America's criminal justice system is in need of reform. The guidelines are premised on the judge passing sentence on a defendant after finding pertinent facts only by a preponderance of the evidence; by casting into doubt the constitutionality of this standard of proof, *Apprendi* suggests that the guidelines and state determinate sentencing schemes should henceforth require all facts which increase or affect a defendant's sentence be proven beyond a reasonable doubt. Furthermore, to the extent that mandatory minimum sentences limit the range a judge may sentence within, they also must fall by the wayside. I do not advocate a wholesale extinguishing of the guidelines, as that would be throwing out the proverbial baby with bath-water. Rather, I suggest that Congress craft a new guidelines system so as to grant defendants the amount of due process protections mandated by *Apprendi*.

These revisions would act as the first step of a thousand mile journey towards the egalitarian criminal system the original guidelines aimed to create. Support for this call to update the guidelines exists in the text of the *Apprendi* decision itself; Justice Stevens skillfully crafted a seemingly colossal decision that only slightly affects the *status quo*. Congress and state legislatures should act quickly

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[6] *Apprendi v. New Jersey*, 530 U.S. at 490.

[7] *Apprendi*, 530 U.S. at 523 (Thomas, J., concurring).

[8] *Id.* at 550 (O'Connor, J., dissenting).

[9] *See* United States v. Baltas, 236 F.3d 27, 40-41 (1st Cir. 2001); United States v. Garcia, 240 F.3d 180, 184 (2d Cir. 2001); United States v. Williams, 235 F.3d 858, 863-64 (3d Cir. 2000); United States v. Angle, 230 F.3d 113, 121-24 (4th Cir. 2000), (*vacated and ordered to be reheard in banc*), (4th Cir. Jan. 17 2001); United States v. Doggett, 230 F.3d 160, 164-65 (5th Cir. 2000); United States v. Corrado, 227 F.3d 528, 542 (6th Cir. 2000); United States v. Nance, 236 F.3d 820, 826 (7th Cir. 2000); United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); United States v. Hernandez-Guardado, 228 F.3d 1017, 1026-27 (9th Cir. 2000); United States v. Nealy, 232 F.3d 825, 829 n.3 (11th Cir. 2000).

to keep in constitutional step with the recent Supreme Court ruling and prevent the Court from confronting, the several social, or at least political, issues left unresolved in the *Apprendi* decision. If the Legislature fails to act prudently, the Court will eventually have to perform reconstructive surgery on the guidelines with the judicial meat cleaver.

In Part I, I give a brief history of the Federal Sentencing Guidelines and offer a truncated explanation of how they work, in theory. In Part II, I then outline the legal history of the *Apprendi* ruling and I highlight the contentious question of what an appropriate standard of proof is in criminal matters, starting with the seminal case of *In re Winship*. In Part III, I offer a detailed account of the Court's reasoning in Apprendi. Thorough analysis of *Apprendi* is necessary as this case is of paramount importance and has the potential to implicate numerous areas of state and federal sentencing schemes. In Part IV, I note the several questions left open by *Apprendi* and restate several criticisms of the guidelines as they now exist. I also discuss other arguments that the guidelines violate the holding of *Apprendi* and suggest why these arguments are insufficient to support a radical change in America's sentencing system. In Part V, I suggest a firm philosophical foundation based on pragmatic concerns of criminal defendants and America's criminal system on which to support a restructuring of the guidelines. Finally, in Part VI, I conclude that *Apprendi* ought to lead to a revision of the guidelines such that all facts that affect or increase a defendant's sentence must be proven, to a judge, beyond a reasonable doubt.

I. A BRIEF HISTORY OF FEDERAL SENTENCING GUIDELINES

A. PRE-GUIDELINES SENTENCING SCHEMES

What time is it? Said the judge,
To Joey when they met
Five to ten, said Joey
The judge said, well that's exactly what you get.[10]

When Bob Dylan wrote the above quoted words he was not just being facetious. Prior to the promulgation of the Sentencing Reform Act in 1984[11] and the resulting Federal Sentencing Guidelines in 1987, judges had virtually unlimited discretion to sentence a defendant within the generally broad legislatively cre-

[10] BOB DYLAN, *Joey, on* DESIRE (Columbia Records 1975).

[11] Sentencing Reform Act of 1984 18 U.S.C.A. §§3551-3625 (1984).

ated range of sentences.[12] The pre-guidelines sentencing system also left the sentence a convict served in the hands of neither the judge nor the jury, as a result, defendants rarely served the sentence the judge handed down.[13] Rather, the indeterminate pre-guideline sentencing left the time of actual incarceration to the United States Parole Commission, after a judge laid down a sentence.[14] Most disturbing, however, was how pre-guidelines sentencing resulted in gross disparities in sentencing.[15]

Pre-guidelines indeterminate sentencing schemes generally left a particular defendant's sentence to a combination of the crime of which she was convicted, the sentencing judge's bias, caprice, or any factor the judge wished to consider.[16] Considerable concern over the injustice of disparities had been expressed for several decades leading up to the 1984 revolution in sentencing procedures; in 1940, Attorney General Robert H. Jackson expressed with veritable agitation, "[i]t is obviously repugnant to one's sense of justice that the judgment meted out to an offender should depend in large part on a purely fortuitous circumstance; namely the personality of the particular judge before whom the case happens to come for disposition."[17] In 1974, a prominent study uncovered a glimpse of the extreme disparities in sentences for identical crimes when fifty district court judges were given identical pre-sentence reports and asked to impose a sen-

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[12] The case of George Jackson is particularly telling of the possible ranges judges were permitted to work within. After being convicted of stealing seventy dollars from a gas station at the age of 18, a California judge sentenced Jackson to a term of 1 to 70 years. MARC MAUER, THE RACE TO INCARCERATE 46 (The New Press 1999).

[13] All federal prisoners were sentenced pursuant to either 18 U.S.C. § 4205(a) (repealed 1984), 18 U.S.C. § 4204(b)(1) (repealed 1984), or 18 U.S.C. § 4204(b)(2) (repealed 1984). Under each of these statutes imprisoned persons were eligible for parole after serving one-third of their sentence, less than one-third of their sentence, or at anytime the Parole Commission determined, respectively. 18 U.S.C. §§ 4205(a) 4204(b)(1)&(2) (repealed 1984).

[14] *Id.*

[15] In the 1970's, studies indicated that if a convicted person faced a judge in a southern state, the defendant was likely to serve six months more than average, and a defendant convicted in California was more likely going to serve twelve months less. Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14 CRIM. JUST. 28 (1999). Black bank robbers convicted in the South generally served an additional 13 months, and female bank robbers were usually sentenced six months less than an identical male bank robber. *Id.*

[16] "No limitation shall be placed on the information concerning the background character and conduct of a person convicted of an offense which a court of United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. §3651 (repealed 1984).

[17] REPORT OF THE ATTORNEY GENERAL 5-6 (1939-1940).

tence.[18] Sentences ranged from three years in prison to twenty years plus a 65,000 dollar fine.[19]

During this same time frame, retribution and incapacitation replaced rehabilitation as the dominant purposes of criminal punishment.[20] Although as late as 1968 seventy-two percent of Americans thought that the primary purpose of the prison should be rehabilitation,[21] shortly thereafter a change in national philosophical beliefs took place.[22] A combination of distaste of disparate sentencing,[23] an increased belief that rehabilitation of convicts is not possible,[24] and rising crime (or at least a perception thereof),[25] in addition to great prison unrest,[26] all interlaced to lead a charge for an absolute overhaul of the American criminal justice system as it existed. Together these factors produced an unusual coalescence of the left, which cited concern over disparate sentences, and the right, which charged that the criminals were "getting off easy." These sides joined forces to overhaul the entire criminal system in America.[27]

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[18] ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 1-3, 9 (1974).

[19] *Id.*

[20] Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 686-89.

[21] FRANCIS T. CULLEN AND KAREN E. GILBERT, REAFFIRMING REHABILITATION 8 (Cincinnati: Anderson, 1982).

[22] For an interesting summation of the shift away from supporting rehabilitation and the rationale behind the convergence of the left and the right to revise the current sentencing scheme see, Mauer, *supra* note 12, at 42-79.

[23] MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973).

[24] Mauer, *supra* note 12, at 47; Andrew Von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD L. REV. 6, 11 (1983) (noting several studies emerging in the early 1970's concluded that "virtually no rehabilitation program has been shown to succeed.").

[25] Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1079 (1992).

[26] S. REP. NO. 98-225, at 46 (1983) (noting that disciplinary problems in prisons have resulted from sentences handed down which are "unjustifiably high compared to similarly situated offenders. . ." *Id.* For a good concise summary of the numerous prison uprisings during the 1970's see CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 163-70 (Verso 1999).

[27] Mauer, *supra* note 12, at 44.

B. BIRTH OF THE FEDERAL SENTENCING GUIDELINES

In 1984 President Reagan signed into law the Sentencing Reform Act.[28] The bill introduced numerous provisions, such as the creation of a "sentencing commission"[29] which was charged with promulgating strict sentencing guidelines,[30] creation of mandatory minimum sentences, and increase prison sentences for drug crimes. The new bill was haled as a "new era"[31] by Strom Thurmond and described as "the most far reaching law-enforcement in our history" by Ted Kennedy, the bill's other champion.[32] The dual objectives of the Act were "fairness and honesty in sentencing."[33] The drafters of the Act intended to create a sentencing system which would both, greatly reduce, if not eliminate, the possibility of similarly situated defendants receiving different sentences, and also ensure that defendants served the sentence which the judge imposed–as opposed to the customary system of defendants being let out before the end of their sentence on parole.[34]

The Sentencing Commission revolutionized the American criminal justice system in several ways. First, the Sentencing Commission eliminated parole of federal prisoners.[35] Another transformation following the '84 Act was the bifurcation of the factfinding aspect of a criminal trial.[36] Under the new regime, the jury weighs facts offered by the prosecution to determine only the guilt or inno-

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[28] 18 U.S.C. § 3551 (1984)

[29] 28 U.S.C. § 991(a) (1984).

[30] 28 U.S.C. § 994(b)(2) (1984).

[31] Quoted in *Impact of Uncle Sam's New Crime Law*, U.S. NEWS AND WORLD REPORT, October 22, 1984.

[32] *Id.*

[33] Breyer, *supra* note 15, at 28. Supreme Court Justice Steven Breyer worked for the Senate Judiciary Committee when Congress considered sentencing reform, and was also a member of the original Sentencing Commission from 1985 to 1989. *Id.*

[34] Frank O. Bowman, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U.L.J. 299, 302 n. 11 (2000) (discussing the Act of June 25, 1910, ch. 387, 36 Stat. 819, where Congress mandated that each federal prison have its own parole board).

[35] U.S. GUIDELINES MANUAL, ch. 1, pt. A (2001).

[36] U.S.S.G. § 1 (Nov. 2000).

cence of a defendant.[37] Then in the second sentencing phase of trial, the prosecution offers to a judge all facts of the defendant's own uncharged, dismissed or acquitted conduct that is taken as part of the same transaction, common scheme, or plan as the offense of the conviction.[38] The judge only needs to find the existence of such facts by a preponderance of the evidence to determine an appropriate sentence.[39]

Eliminating sentencing disparities proved more difficult than achieving "truth in sentencing."[40] As Stith and Cabranes illustrated in their seminal work *Fear of Judging*, history clearly shows a consistent pattern of broad judicial discretion in sentencing.[41] The guidelines, in contrast to this model, attempted to centralize sentencing decisions and proscribe specific detailed rules which command that the judge hand down the sentence that correlates with the Sentencing Table, as devised by the commission.[42] The original commission decided against a "pure charge" system because such a system would not take into account that different offenders can commit the same crime in "significantly different ways."[43] As a result, the commission decided on a "real offense" sentencing system, which looks at the offender's real behavior rather than simply the charged crime.[44]

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[37] *Id.*

[38] U.S.S.G. §1B1.3 (1998); Roger W. Haines Jr., Frank O. Bowman, III, & Jennifer C. Woll, FEDERAL SENTENCING GUIDELINES HANDBOOK (West Group 1999) at 113 ("All circuits agree that relevant conduct includes unchanged conduct outside the offense of conviction").

[39] U.S.S.G. § 3B1.3 (commentary).

[40] The term "truth in sentencing" refers to the assurance that when a criminal defendant is given a sentence of a particular length of time, that is the amount of time the defendant will be incarcerated, as opposed to being let out early on parole. U.S.S.G., pt. A, The Basic Appraoch (Policy Statement).

[41] K. STITH & J. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998) (noting that since the beginning of the Republic, federal judges were entrusted with wide sentencing discretion).

[42] U.S. GUIDELINES MANUAL, ch. 1, pt. A (2001).

[43] Breyer, *supra* note 15, at 30. Justice Breyer used the example of two men charged with robbing a bank where bank robber A holds up a crowded bank at gunpoint, terrifies the crowd, injures the teller, and makes off with a large sum of money. *Id.* Robber B, on the other hand, is a man with a low I.Q. uses a toy gun to obtain from the teller 20$ that he believes he needs to pay the veterinarian for curing his sick dog and turns himself into the FBI when he learns his dog has died. *Id.* Justice Breyer opined that punishing these men identically would not be justice. *Id.*

[44] *Id.*

This system assures that the law punishes the conduct of the criminal and not only the charged crime.

The real offense sentencing system works by first instructing the judge to find an appropriate sentence on the Sentencing Table, a basic chart with a vertical axis describing a defendant's nineteen possible Offense Levels and a horizontal axis enumerating the defendant's Criminal History Category.[45] The judge's responsibility is to determine first the defendant's disposition to criminality and then the seriousness of the present crime.[46] Where these two findings intersect on the chart will yield a sentencing range where the maximum sentence is 25% higher than the minimum.[47] Additionally, the guidelines lists adjustments on the sentencing range based on "relevant conduct." The relevant conduct principle allows a judge to take into account uncharged or acquitted conduct of the defendant during the commission of the offense.[48] Statutorily, however, relevant conduct under the guidelines does not include a defendant's history of charitable good works,[49] lack of guidance as a youth,[50] history of substance abuse,[51] age, and other similar factors. Lastly, the judge may also decide to grant an upward or downward departure on account of "offense adjustments" based on various factors such as a defendant's minor or major role in the offense,[52] acceptance of responsibility,[53] and other factors.[54]

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[45] U.S.S.G. §1B1.1.

[46] *Id.*

[47] U.S.S.G. ch. 1, pt. A.

[48] U.S.S.G. §§3A.1. – 3B.1.

[49] U.S.S.G. §5H1.11.

[50] U.S.S.G. §5H1.12.

[51] U.S.S.G. §5H1.4.

[52] U.S.S.G. §3B1.1.

[53] U.S.S.G. § 3E1.1.

[54] U.S.S.G. ch. 5, pt. A.

II. THE BRICKS THAT BUILT A HOUSE OF DUE PROCESS

A. HISTORY OF DEFENDANTS' RIGHT TO PROOF BEYOND A REASONABLE DOUBT

Although the common law provided almost universal acceptance of the beyond a reasonable doubt standard, it was not until 1970 that the Supreme Court established "beyond a reasonable doubt" as the standard of proof which a prosecutor must satisfy when a state wishes to convict a defendant. *In re Winship*[55] was the first modern case to explicitly rule that all defendants are protected against conviction except when proven guilty beyond a reasonable doubt of all facts necessary to constitute the charged crime. In so doing, Justice Brennan garnered a majority of votes over the Chief Justice[56] to declare that proof beyond a reasonable doubt is "among the essentials of due process and fair treatment" and that legislatures are not free to legislate the standard down to a preponderance of evidence.[57] Most notably, however, was the court's affirmation that whenever a conviction may result in loss of liberty and societal stigmatization, certain fundamental due process rights necessarily attach.[58]

Several years later the Supreme Court reaffirmed *Winship* and refined sentencing jurisprudence when a convicted defendant challenged a Maine statute on due process grounds.[59] Maine's statute classified all homicides as murder and shifted the burden to defendants to prove by a preponderance of evidence that they acted out of the heat of passion in order to reduce the crime to manslaughter.[60] After a jury found Wilbur guilty of murder, he appealed his conviction and

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[55] 397 U.S. 358, 364 (1970).

[56] Chief Justice Burger filed a dissenting opinion arguing that the juvenile proceeding in which twelve year-old Samuel Winship was sentenced to six years in "training school" was not a criminal proceeding because the State was not acting as a traditional court but rather as a "generously conceived program of compassionate treatment. . .." *Winship*, 397 U.S. at 376. The New York Family Court judge sentenced Winship after finding by a preponderance of evidence, but explicitly not beyond a reasonable doubt, that Winship had stolen a little over a hundred dollars from a purse in a locker room. *Id.* at 359.

[57] *Id.* at 359.

[58] *Id.*

[59] Mullaney v. Wilbur, 421 U.S. 684 (1975).

[60] *Id.* at 684-85.; *compare* ME. REV. STAT. ANN. tit. 17, § 2651 (West 1964) *and* ME. REV. STAT. ANN. tit. 17, § 2551 (West 1964).

argued that malice aforethought is an element of murder and that the state denied his due process rights under *Winship* by forcing him to prove that he acted in the heat of passion.[61] The Court offered a brief history of the common law regarding the burden of proving heat of passion on sudden provocation and concluded that Maine must prove beyond a reasonable doubt the absence of heat of passion.[62] Moreover, Justice Powell announced the Court's unwillingness to permit a legislature to legislate around the *Winship* requirements by categorizing all homicides as felonious murder and then shifting the burden to the defendant to prove a lessor offense.[63] The Court took pains to restate that the primary concern of *Winship's* mandate was that of substance and not of formalism.[64]

The unique notion of substance over formalism proved short-lived, however, as the Court in *Patterson v. New York*[65] retreated from the strong constitutional mandate announced in *Mullaney*.[66] Indeed, the Court in *Patterson* concluded, in a factual situation analogous to *Mullaney*, that a New York law that burdened the prosecution with only proving, intent to cause death and, causing the death of such person was constitutional.[67] Noting that the New York statute required that the defendant prove that she acted "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse" by a preponderance of the evidence to downgrade the charge from murder to manslaughter the Court deferred to the State's legislature.[68] Commenting on the paramount importance of not trammeling on the administration of justice by the

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[61] *Id.* at 687.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 699. It is interesting to note that regardless of which way the pendulum swings in this area of law, both sides inevitably accuse the other of electing to follow formalism over substance. *See e.g., Apprendi v. New Jersey*, 530 U.S. at 539 (O'Connor, J., dissenting) ("the Court's. . . rule rests on meaningless formalism."); *compare id.* at 494 ("the relevant inquiry is not one of form but of effect. . .") *and* Patterson v. New York, 432 U.S. 197, 225 (1977) (Powell, J., dissenting) ("It is unnecessary for the Court to retreat to a formalistic test. . .").

[65] 432 U.S. 197 (1977).

[66] *Id.* In *Patterson*, Justice Powell, the author of the unanimous *Mullaney* decision, stated in dissent, "[the majority] manages to run a constitutional boundary line through a barely visible space that separates Maine's law from New York's." *Id.* at 221.

[67] *Id.* at 206.

[68] *Id.*

individual states, the Court looked towards the explicit language of both the Maine and New York statutes in order to distinguish the two. The Court concluded that no constitutional imperative exists which commands that a "[s]tate must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused."[69] Reiterating that criminal justice is a matter of state concern, Justice White, writing for the majority, noted "[t]he applicability of the reasonable doubt standard. . .has always been dependent on how a state defines the offense in any given case."[70] The Court explained, due process is satisfied so long as the state proves beyond a reasonable doubt every fact necessary to constitute the crime charged.[71] Rebutting the allegation that under this holding legislatures may successfully reallocate burdens of proof by formally labeling them as affirmative defense, the Court noted "there are obviously limits beyond which a state may not go."[72]

Later in *McMillan v. Pennsylvania*,[73] the Court addressed the constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act. The Act divested trial judges of discretion to impose a sentence of less than five years if the judge found by a preponderance of the evidence that a person "visibly possessed a firearm" during the commission of an enumerated felony.[74] Following several trial judges imposition of sentences lower than the mandatory five years proscribed by the statute[75] upon several persons convicted of one of the listed felonies, the Commonwealth appealed.[76] Taking a strong federalism approach to the question of due process, the Court reiterated that a State must only prove those elements included in the definition of the crime.[77] The Court explained that the Pennsyl-

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[69] *Id.* at 210.

[70] *Id.* at 211 n.12.

[71] *Patterson*, 432 U.S. at 211.

[72] *Id.* at 210.

[73] 477 U.S. 79 (1986).

[74] *McMillan*, 477 U.S. at 81 (citing 42 PA. CONS. STAT. § 9712 (1982)).

[75] *Id.* at 82. Several trial judges determined that the mandatory minimum sentences violated a defendant's due process rights. *Id.*

[76] *Id.* In one case, the defendant, a 73 year old man committed an aggravated assault against a neighborhood youth he suspected of stealing money from his house. *Id.* at 95. (Stevens, J., dissenting). The judge imposed a sentence of 11 ½ to 23 months, refusing to sentence the defendant to five years in prison. *Id.*

[77] *Id.*

vania legislature expressly noted that possession of a firearm is not a defined element, but rather a sentencing factor.[78]

Although not explicitly enumerated within the text of the decision, throughout the analysis the Court listed five factors that bear on the permissibility of legislatures to define a crime. The majority suggested that a state has satisfied due process where the sentencing enhancement does not [1] discard the presumption of innocence; [2] relieve the prosecution of its burden of proving guilt;[79] [3] create a separate offense calling for a separate penalty;[80] [4] alter the maximum penalty for the crime committed;[81] or [5] give the appearance of being created to permit the enhancement to be a "tail which wags the dog" of the substantive offense.[82] In deciding that *Patterson*, and not *Mullaney,* controlled the case at hand, Justice Rehnquist concluded that Pennsylvania's Act neither granted the State a presumption of the existence of an element of the crime, nor relieved the prosecution of its burden; therefore, the Mandatory Minimum Act did not offend the Due Process Clause.[83] The majority did acknowledge that constitutional limits as to how far legislatures can reallocate burdens of proof and persuasion do exist.[84] The Court, however, declined to proffer what that limit may be.[85] Instead, five Justices found the Pennsylvania Act constitutional, whatever the limits are.[86]

The reasoning in *McMillan,* however, was not unanimous and Justice Stevens' dissenting opinion is noteworthy for it foreshadowed the Court's ultimate

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[78] *Id.* at 85.

[79] *Id.* at 86.

[80] *McMillan*, 477 U.S. at 88.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 84. Several years later Chief Justice Rehnquist stated "mandatory minimums. . .are frequently the result of floor amendments to demonstrate emphatically that legislatures want to 'get tough of crime.' Just as frequently they do not involve any careful consideration of the effect they might have on sentencing guidelines as a whole." Remarks of Chief Justice, Nat'l Symposium on Drugs and Violence in America, June 18, 1993, at 10.

[84] *McMillan*, 477 U.S. at 86.

[85] *Id.*

[86] *Id.*

holding in *Apprendi*.[87] Justice Stevens reasoned that *Winship* commanded that any fact that leads to a greater stigma or loss of liberty be proven beyond a reasonable doubt.[88] Because Pennsylvania's legislature intended to prohibit certain behavior and threatened a lengthy incarceration if one committed the enunciated behavior, the dissenting Justices opined that Pennsylvania's Act offended basic due process rights by not proving that the certain behavior occurred beyond a reasonable doubt.[89] Although the dissent acknowledged that States do possess the authority to define a criminal offense, the Justice reiterated that no prior case law permitted a state to determine for itself which of the ingredients of the crime are elements.[90] After driving home that the teachings of *Winship* and *Patterson* prohibit a State from furthering its criminal law objectives by lessening a defendant's due process protections, Justice Stevens asserted ". . .it would demean the constitution itself–if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an "element" of a crime."[91]

The wide gap between the rationale of the Justices continued to divide the Court. In 1998, in *Almedarez Torres v. United States*,[92] the Court explained what, if any, constitutional boundaries constrained Congress in determining what facts constitute an element of a crime compared with what facts are mere sentencing enhancements.[93] After having been deported on a previous occasion due

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[87] *Id.* at 95 (Stevens, J., dissenting).

[88] *Id.* at 96 (Stevens, J., dissenting).

[89] *Id.* at 95 (Stevens, J., dissenting).

[90] *McMillan*, 477 U.S. at 98.

[91] *Id.* at 102.

[92] 523 U.S. 224 (1998).

[93] *Id.* Frank Bowman explained how prior to *Almendarez*, prosecutors and defendants (with the judges acquiescence) would engage "charge bargaining" around the guidelines to facilitate criminal alien defendants to plead guilty in order to process a larger amount of cases. Frank O. Bowman, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L. J. 299, 302 n. 11 (2000). Charge bargaining is a frequently used method of circumventing the strict and high prison sentences imposed upon defendants by which the defendant pleads guilty to a lessor charge and receives the maximum sentence permitted by the guidelines in return for a dismissal of (or agreement not to file) other charges which would expose a defendant to a much higher sentence. *Id.* Originally, "fast track" defendants, in the Southern District of California were able to plead guilty to a violation of 8 U.S.C. § 1326(a), which capped a defendant's sentence at the two-year statutory maximum. In *Almendarez-Torres*, the Supreme Court vanquished all possibility of a defendant pleading guilty to a § 1326(a) charge and receiving a two-year statutory maximum. *Almen-*

to an earlier conviction for aggravated felonies, Hugo Almendarez-Torres reentered the United States without the requisite special permission of the Attorney General.[94] Upon being caught and pleading guilty to the charge, the United States District Court for the Northern District of Texas sentenced him to six to eight years in prison, pursuant to subsection (b)(2) of 8 U.S.C. §1326.[95] The issue before the Court was whether subsection (b)(2), which authorized a sentence of twenty years in prison if the deported alien defendant had previously been convicted of an aggravated felony, was intended to be a separate crime, thereby demanding that the elements be listed in the indictment and proven beyond a reasonable doubt, or whether Congress desired the additional penalty to serve as a sentencing enhancement of the crime listed under subsection (a) which authorized a prison term of only two years for any alien caught in the United States without permission.[96]

Relying once again on strict formalism, the Court found that the particular language used in §1326 sufficiently illustrated that Congress intended subsection (b)(2) to be a sentencing factor, which meant that Almendarez-Torres's prior conviction did not need to be proven beyond a reasonable doubt, only by a preponderance of the evidence.[97] In reaching that conclusion, the Court paid particular attention to the fact that the primary issue in the case was recidivism, and that "–prior commission of a crime–is as typical a sentencing factor as one might imagine."[98] Reading prior case law as protecting defendants against conviction unless every fact necessary to constitute the charged crime is established beyond a reasonable doubt, and relying on the language in *Patterson* that "the state legislature's definition of the elements of the offense is usually dispositive," the Court concluded that Congress was within that still undefined constitutional limit of the legislature's power to define the element of an offense.[99]

The dissent, authored by Justice Scalia, concluded that the issue could be determined on statutory construction alone, without reaching the constitutional is-

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darez-Torres, 523 U.S. at 247.

[94] *Almendarez-Torres*, 523 U.S. at 227.

[95] *Id.*

[96] *Id.* at 228.

[97] *Id.* at 230.

[98] *Id.*

[99] *Id.* at 238-42 (Scalia, J., dissenting) (citing *Patterson*, 432 U.S. at 214).

sue.[100] Because prior case law had prohibited increasing a defendant's sentence above the statutory maximum without having proven the existence of the pertinent fact beyond a reasonable doubt, and because § 1326 is susceptible to two different interpretations, Justice Scalia reasoned the Court is obligated to construe the statute as creating two separate offenses, so as to not throw into doubt the statute's constitutionality.[101] Justice Scalia ended the dissent by noting the unlikelihood that the Constitution permits a judge to increase a maximum sentence by a mere preponderance of the evidence.[102]

Although Justice Thomas voted with the majority in *Almendarez-Torres*, providing the necessary fifth vote to hold § 1326(b)(2) a sentencing enhancement, not a separate crime, the very next term saw a shift in Justice Thomas's vote, and consequently a majority in *Jones v. United States*[103] concluded that the federal carjacking statute 18 U.S.C. § 2119 provided for three distinct offenses as opposed to one offense with three possible maximum penalties, depending upon sentencing factors.[104] In the same manner as the Court decided *Almandarez-Torres* during the previous term, Justice Souter undertook an extensive examination of the history of the fact at issue, the degree of injury to victims of crime, and after taking the historical treatment of bodily injury into account, determined that regardless of the statutory drafting, Congress must have intended that fact to be an element defining an aggravated form of the crime, not a sentencing enhancement.[105]

Echoing Justice Scalia's dissent the year before, the majority reiterated that the Court's duty, when faced with two possible conflicting interpretations, is to interpret the statute so as to avoid casting a constitutional doubt over Congress' legislation.[106] Perhaps as preparation for the *Apprendi* opinion the following year, the Court spent considerable time extolling the virtues of trial by jury and taking notice that further infringement upon the legislatures would inevitably lead to a complete erosion of the right to a trial by one's peers.[107] By viewing

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[100] *Almendarez-Torres,* 523 U.S. at 249 (Scalia, J., dissenting).

[101] *Id.*

[102] *Id.* at 268 (Scalia, J., dissenting).

[103] 526 U.S.227 (1999).

[104] *Id.* at 251.

[105] *Id.* at 235-37.

[106] *Id.* at 251.

[107] *Id.* at 248.

the federal carjacking statute in the foreground of the prior case law on sentencing factors, the Court concluded that construing the federal statute to list sentencing factors would step over one of *Patterson*'s limits on the States' freedom to define their crimes: a recognized limit on the authority to reallocate traditional burden of proof.[108]

III. *APPRENDI V. NEW JERSEY*

A. A CONSTITUTIONAL RULE

Merely a year after the Court in *Jones* suggested the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment might require facts which increase a defendant's sentence be proven beyond a reasonable doubt, the Court created a new constitutional rule.[109] In June of 2000, Justice Stevens etched another mandate into the pillar of constitutional law as the Court ruled "[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."[110] Recalling prior language from the unanimous *Winship* decision, Justice Stevens reiterated that the historical foundation of the right to trial by jury is aimed at protecting against the "spirit of oppression and tyranny" and that it constitutes the "great bulwark of [our] civil and political liberties."[111] Building on the right to trial by jury, the Court continued to illustrate the equally important right, "expressed since ancient times," to have the jury verdict based on proof beyond a reasonable doubt.[112] The majority noted that during the time of the Nation's founding, no distinction between an "element" and a "sentencing factor" existed.[113] Rather, the Court explained, the requirement that an indictment list the precise facts and circumstances which constituted the offense emerged from the close link between crime and punishment and the need to provide defendants

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[108] *Id.* at 227.

[109] *Apprendi,* 530 U.S. 466 (2000).

[110] *Id.* at 475.

[111] *Id.* at 475 (citing 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873).

[112] *Id.* at 478.

[113] *Id.*

with enough information to properly prepare their defense so that if convicted, no question remained as to the proper sentence.[114]

Citing to several cases, the Court explicated how before and after the American Revolution judges in both America and England retained broad discretion in imposing sentences within the confines of fixed by statutes.[115] In a footnote, Justice Stevens also brought to light the 1923 writings of Bishop's Criminal Law treatise which explained the common law's tradition of granting courts wide discretion to determine a punishment "within the limits of the law."[116] Paying particular attention to historical connection between the verdict and judgment, combined with the continual limit on judicial discretion of penalties, the Court pointed out the "novelty of a legislative scheme" that actually removed from the jury a determination of fact that would expose the defendant to a penalty which surpasses the allowable punishment of the facts determined by the jury.[117]

In formulating the holding's *apologia* from prior case-law, the Court relied on Justice Brennan's words in *Winship* that "cogent reasons" exist for the vital role of "reasonable doubt" in our criminal procedure.[118] Justice Stevens also noted that heightened loss of liberty and the greater stigma attached to an increased sentence necessitates that the standard of proof must also increase.[119] Justice Stevens reasoned that since *Winship*, due process protections are aimed not only to protect from erroneous findings of guilt or innocence but also to ensure an adequate "length of his sentence."[120] As in *Mullaney v. Wilbur*, the majority rejected the argument that societal stigma only attached from guilt or innocence and acknowledged once again that criminal law is concerned with the degree of criminal culpability assessed.[121] As a result, the Court concluded that *Winship's* mandates could not be circumvented by redefining elements that con-

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[114] *Id.* at 478-79 (citing J. Archbold, PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (5th ed. 1862)).

[115] *Id.*

[116] *Apprendi,* 530 U.S. at 482 (citing J. Bishop, CRIMINAL LAW SS 933-34 (1)(9th ed. 1923)).

[117] *Id.* at 482-83.

[118] *Id.* at 483.

[119] *Id.*

[120] *Id.* at 484 (citing *Almendarez-Torres*, 523 U.S. at 251).

[121] *Id.* at 485.

stitute different crimes.[122]

To buttress the foundation of the constitutional rule , the Justice clarified the scope of *McMillan v. Pennsylvania.*[123] Noting the origin of the term "sentencing factor" emerged from *McMillan*, the Court explained the contours of the holding as accepting Pennsylvania's Mandatory Minimum Act.[124] Justice Stevens explained that mandatory minimums comply with the multifactor set of criteria for determining the *Winship* protection as illustrated in *McMillan.*[125] The majority maintained, however, that "constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense" and that a legislative scheme which exposes a defendant to a greater or additional punishment without the protection of a jury's determination may trigger a constitutional analysis.[126] The Court then expressly stated that *McMillan* had not been overruled, but rather that *Apprendi* limited *McMillan's* holding to cases not involving a judgment in excess of the statutory maximum for the crime established by the jury's verdict.[127]

Restating the conclusion and language from *Jones,* decided in the previous term, Justice Stevens classified *Almendarez-Torres* as an "exceptional departure" from historic practice.[128] The majority took pains to distinguish the *Almendarez-Torres* holding as turning heavily on the subject in issue: recidivism.[129] Although the *Almedarez-Torres* decision resulted from successful application of the *McMillan* factors, the Court stressed the differences between the prior commission of a crime and all other facts relating to an offense and then concluded that the holding was intended to be narrowly restricted to the question of recidivism.[130] Justice Stevens, while questioning the validity of *Almendarez-Torres,* chose not to overrule the case, and instead relegated its holding to a narrow ex-

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[122] *Apprendi,* 530 U.S. at 485.

[123] *Id.*

[124] *Id.* at 485-86.

[125] *Id.* at 486.

[126] *Id.*

[127] *Id.* at 487 n.13.

[128] *Apprendi,* 530 U.S. at 487.

[129] *Id.* at 488.

[130] *Id.*

ception to the general rule.[131] The Justice further stated that legislative removal from the jury of a determination of facts that enhance the range of penalties to which an accused is exposed is unconstitutional and it is clear such facts must be proven beyond a reasonable doubt.[132]

Agreeing with the skepticism exhibited by the New Jersey Supreme Court, the majority rejected New Jersey's argument that biased purpose is a traditional sentencing factor, by reasoning that the factor at issue was one of intent, or in criminal law, *mens rea*, a factor described as "close as one might hope to come to a core criminal offense 'element.'"[133] The Court then posited that regardless of how one classified the factor at hand, the appropriate inquiry does not hinge on form but on effect.[134] The majority rephrased the question to ask whether the "required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict."[135] Taking time to qualify the holding and ensure the continued viability of "sentencing factors," the Court noted that the term remains a useful phrase to describe aggravating or mitigating facts to assist a judge in proscribing a sentence *within* the range of the substantive statute and permitted by the jury's finding of guilt.[136] Justice Stevens then explained how the hate crime statute directly conflicted with the findings in *Mullaney*, that *Winship*'s premise that criminal defendants deserve to have guilt proven beyond a reasonable doubt applies to not only the substantive offense, but additionally with the degree of criminal culpability.[137] Returning to the original concerns of loss of liberty and societal stigmatization listed in *Winship*, the majority found the State's argument relying on *McMillan* misguided because the difference in potential punishment affected both the length of prison time and the societal stigma.[138]

The Court further found the fact that New Jersey's legislature deemed the conduct in issue a sentence "enhancer" and not an element of the crime irrele-

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[131] *Id.* at 489.

[132] *Id.*

[133] *Id.* at 493.

[134] *Apprendi*, 530 U.S. at 494.

[135] *Id.*

[136] *Id.* at 494 n.19.

[137] *Id.* at 494-95.

[138] *Id.* at 495.

vant.[139] Indeed, the Court surmised that numerous states have provided for similar sentence "enhancement" regarding hate crime prohibitions, yet the presence of such enhancements are not dispositive of their definition.[140] In rejecting the State's reliance on *Almendarez-Torres*, the majority distinguished recidivism from the biased purpose inquiry by noting that New Jersey's factor asks what occurred during the "commission of the offense."[141] Consequently, Justice Stevens found any reliance on *Almendarez-Torres* without benefit to the State's position.[142]

The Court ended the discussion by briefly addressing two final issues proffered in the dissenting opinions.[143] First, the Court noted Justice O'Connor's concern that the present ruling will invalidate state sentencing schemes that permit a judge to sentence a defendant to death after finding enumerated aggravating factors even though the jury verdict standing alone would only permit life imprisonment.[144] To this question, the majority simply stated that decisions in capital cases do not control the question at hand and that in *Walton v. Arizona*,[145] the jury had found the defendant guilty of a crime which carried a maximum sentence of death and therefore the judges determination to impose the highest penalty was not in excess of that found by the jury.[146] In a final footnote, the Court also expressed the absence of any view regarding the continued viability of the Federal Sentencing Guidelines.[147]

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[139] *Id.* at 496.

[140] *Apprendi*, 530 U.S. at 496.

[141] *Id.* at 496.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] 497 U.S. 639 (1990) (holding that Arizona's sentencing scheme did not violate the Eight or Fourteenth Amendments by placing on the defendant, convicted of murder, the burden of proving to the sentencing judge the existence of mitigating circumstances by a preponderance of the evidence in order to escape the punishment of death).

[146] *Apprendi*, 530 U.S. at 496-97.

[147] *Id.* at 497 n. 21.

B. JUSTICE THOMAS REASONS CASE-LAW REQUIRES A BROADER RULE

Justice Thomas adopted the Court's decision but authored a separate opinion, joined by Justice Scalia as to parts I and II, to express the opinion that the Constitution requires a more expansive rule than the one adopted by the majority.[148] After mentioning that the "special sort of fact known as a sentence enhancement" did not come into existence until *McMillan*, a relatively recent case, Justice Thomas explained how both the traditional role of judges in having to determine which facts are elements and "uniform authority" established a rule even broader than the Court's holding, *i.e.* that every fact which is a basis for imposing or increasing punishment is an element.[149] The Justice's concurrence enumerated numerous antebellum cases all of which erected a jurisprudence requiring that all facts, including recidivism, which impose or increase a sentence be classified as an "element."[150] In order to further buttress the argument, the Justice incorporated several more pre-civil war cases to illustrate that the converse of the rule, that a fact that was not the basis for punishment was not an element, was also true.[151]

After establishing the historical evidence rationalizing a broader rule than the majority's holding, Justice Thomas next moved on to address the problem of distinguishing recidivism from all other facts.[152] Justice Thomas, in admitting a mistake in the Court's rationale in *Almendarez-Torres*, relied again on several antebellum cases, which all decided that recidivism was indeed an element of a crime, in order to suggest that recidivism together with other facts of the most recent crime, interlace to become a new aggravated crime.[153] The Justice reiterated that whether a particular fact is traditionally or typically a sentencing factor or element is not the appropriate question.[154] Rather, according to Justice Tho-

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[148] *Id.* at 499 (Thomas, J., concurring).

[149] *Id.* at 500-01 (Thomas, J., concurring).

[150] *Id.* at 501-04 (Thomas, J., concurring) (discussing Larned v. Commonwealth, 53 Mass 240, 242 (1847); Hope v. Commonwealth, 50 Mass 134 (1845); Commonwealth v. Smith, 1 Mass. (1 Will), 1804 WL 709 at *245, (1804)).

[151] *Id.* at 503 (Thomas, J., concurring) (discussing Commonwealth v. McDonald, 59 Mass. 365 (1850), where the Court concluded that "where two statutes barred purchasing corn from a slave, and one referred to purchasing from a slave who lacked a permit, absence of permit was not an element, because both statutes had the same punishment").

[152] *Apprendi*, 530 U.S. at 506 (Thomas, J., concurring).

[153] *Id.* at 507-08 (Thomas, J., concurring).

[154] *Id.*

mas, the only relevant inquiry was how the fact relates to the sentence.[155] To illustrate the overwhelming support and agreement among jurists of the common law theory on what constitutes an element, the Justice referred back to Justice Bishop's Criminal Procedure treatise which solidified the common law rule that defined elements of a crime as "that wrongful aggregation out of which the punishment proceeds."[156] Bishop's treatise, Justice Thomas explained, was grounded in "well established common-law practice, and in the provisions of Federal and State Constitutions guaranteeing notice of an accusation in all criminal cases, indictment by a grand jury for serious crimes, and trial by jury."[157] The Justice then concentrated on the constitutional provisions that further supported the view that a proper jury trial require a proper accusation which outlines all the facts which are essential to the punishment.[158] Arguing for a rule which would define a "crime" as every fact which would impose or increase punishment, the Justice characterized *McMillan* as a sharp break from centuries of American jurisprudence and welcomed the majority's decision as simply a return to the original meaning of the Fifth and Sixth Amendments.[159]

Justice Thomas then announced in Part III of his opinion, not joined by any other justice, which stated that the consequences of the above decision ought to render the holdings of *Almendarez-Torres* and *McMillan* overruled.[160] Opining that facts that the legislatures have allowed sentencing judges' discretion in determining punishment is irrelevant, Justice Thomas did not address the remaining question of "what constitutional constraints apply either to the imposition of punishment within the limits of that entitlement or to a legislature's ability to set broad ranges of punishment."[161] In conclusion, Justice Thomas remarked that the majority opinion addressed neither the question of the capital crimes distinction nor the constitutionality of the Federal Sentencing Guidelines.[162]

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[155] *Id.*

[156] *Id.* at 510 (Thomas, J., concurring) (citations omitted).

[157] *Id.* (citations omitted).

[158] *Apprendi*, 530 U.S. at 511 (Thomas, J., concurring).

[159] *Id.* at 518 (Thomas, J., concurring).

[160] *Id.*

[161] *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring)

[162] *Id.* at 523 (Thomas, J., concurring).

C. FOUR JUSTICES DISSENT

The dissenting opinion sharply criticized the majority's reasoning, suggesting that the newly adopted constitutional rule is inconsistent with prior case law and that it casts serious doubt on both state and federal sentencing schemes, particularly the Federal Sentencing Guidelines.[163] Justice O'Connor, joined by Justices Rehnquist, Kennedy, and Breyer, authored a dissenting opinion that anchored in the essential finding in *Patterson* and concluded that usually a legislature's definition of a crime's elements is dispositive.[164] While taking note of the fact the Court had previously acknowledged a constitutional limit beyond which legislatures could not wander, Justice O'Connor was unwilling to conclude that the fact pattern at issue overstepped any proscribed previously delineated boundaries.[165] Describing the majority's holding as casting aside the Court's traditional cautious approach before infringing upon the rights of legislatures to define crimes in favor of an untenable bright-line rule, the Justice opined that no authority exists for such a position.[166] The dissent then suggested that neither authority that the majority rested the decision upon, the historical role of discretionary sentencing nor the Archbold treatise, lends support to the "increase in the maximum penalty rule."[167] Continuing with a strongly worded challenge, the dissent cast the question in the case as an inquiry about when a court must treat a fact, which bears on a defendant's punishment as an element, despite the legislative definition of the fact as not an element.[168] Because the majority only answered whether a State must charge and prove beyond a reasonable doubt all elements of the offense, the dissent accused the majority of deciding the case on an issue not in dispute.[169]

The dissent also refuted the proposition that the Court's cases "in this area" support the new constitutional rule.[170] The dissent noted that the majority was

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[163] *Apprendi*, 530 U.S. at 523-24 (O'Connor, J., dissenting).

[164] *Id.* at 524 (O'Connor, J., dissenting).

[165] *Id.* at 525 (O'Connor, J., dissenting).

[166] *Id.*

[167] *Id.* at 525-26 (O'Connor, J. dissenting).

[168] *Id.*

[169] *Apprendi*, 530 U.S. at 526 (O'Connor, J., dissenting).

[170] *Id.*

only able to reach the announced decision by turning a blind eye towards the Court's holding in *Patterson*, which, according to Justice O'Connor, unambiguously rejected a broad reading of the *Mullaney v. Wilbur* decision.[171] Rather, the Justice illustrated how *Patterson* clearly restricted the *Mullaney* holding to only stand for the proposition 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."[172] After *Mullaney,* Justice O'Connor explained, the only other case supporting the majority's new rule was *McMillan*,[173] a case which, according to the dissent stands for the rejection of the court's rule.[174] Restating the two basic conclusions in the Court's present announcement, the dissent formulated an argument which suggested that the new rule effectively overruled *McMillan* by prohibiting the removal from the jury any fact that increases or alters the range of penalties to which a defendant is exposed.[175] Continuing to chastise the majority, the dissent wrote that the only other case cited by the majority was *Almendarez-Torres*, a case which "squarely rejected" the newly announced constitutional rule.[176] The Justice then ruled out the possibility of *Almendarez-Torres* existing as an outlier by noting the Court had previously used the holding of *Almendarez-Torres* to decide *Monge v. California.*[177]

Saving perhaps the strongest argument for last, Justice O'Connor concluded

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[171] *Id.* at 530 (O'Connor J. dissenting).

[172] *Id.* at 532 (O'Connor J. dissenting) (citations omitted).

[173] 477 U.S. 79 (1986) (holding the right to a trial by jury is not violated by Pennsylvania's Mandatory Minimum Sentencing Act which mandates a sentencing judge to sentence all defendants to a minimum of five years imprisonment if the defendant possessed a firearm during the commission of an enumerated offense). *Id.* at 93.

[174] *Apprendi*, 530 U.S. at 533 (O'Connor, J., dissenting).

[175] *Id.* The dissent found that *McMillan* specifically held that Pennsylvania's Mandatory Minimum Sentencing Act survived constitutional scrutiny even though it obviously increased or altered the range of penalties a defendant was exposed to. *Id.* at 533 (O'Connor, J., dissenting) (discussing McMillan v. Pennsylvania, 477 U.S. 79, 85-87(1986)).

[176] *Id.* at 535 (O'Connor, J., dissenting). Justice O'Connor phrased the holding of *Almendarez-Torres*'s as permitting legislatures to freely determine that recidivism is purely a sentencing factor and not an element of an aggravated crime. *Id.*

[177] *Id.* (discussing Monge v. California, 524 U.S. 721 (1998)). The Court in *Monge* reasoned, "the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." *Monge*, 524 U.S. at 729 .

the first part of the dissenting opinion by addressing *Walton v. Arizona*,[178] the case Justice Thomas explicitly denied was implicated by the issue at bar.[179] The dissent reasoned that *Walton*,[180] as dramatically as possible, stands for the proposition that the Court supports the contention that a judge can increase a defendant's sentence by finding certain factors by a preponderance of evidence after the jury has been excused.[181] If a judge can increase a sentence from life to death, the dissent posited, surely a judge can increase a sentence by two years.[182] As a result, the dissent concluded, the Court's new "increase in the maximum penalty" rule can not, with intellectual honesty, be said to emerge from prior case law.[183]

Characterizing the Court's rule as "meaningless formalism" and failing to "clarify the contours of the constitutional principle" which may only superficially protect constitutional rights, the dissent then set forth the several possible interpretations of the majority decision.[184] Justice O'Connor explained the first possible reading as limited to those situations where a fact can increase a punishment range beyond the prescribed statutory maximum.[185] In fact, the dissent suggested this was the conclusion the majority intended to explicate.[186] Justice O'Connor then suggested a hypothetical scenario whereby a legislature could avoid the constitutional problem announced by the Court's decision by simply redrafting criminal statutes to proscribe the desired punishment in the same stat-

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[178] 497 U.S 639 (1990).

[179] *Apprendi*, 530 U.S. at 536-38 (O'Connor, J., dissenting) (discussing *Walton v. Arizona*, 497 U.S. 639 (1990) (upholding Arizona's capital punishment sentencing scheme where a judge, not a jury, determines whether a defendant is eligible for state sanctioned execution after finding certain aggravating factors)).

[180] *Id.* The Court in *Walton* permitted a state to place the decision of life and death in the hands of a judge after a jury found the defendant guilty of a crime punishable by death, but only if the judge thereafter determined statutorily prescribed aggravating factors. *Walton*, 497 U.S. at 639.

[181] *Id.* at 538 (O'Connor, J., dissenting).

[182] *Id.* at 537 (O'Connor, J., dissenting).

[183] *Id.*

[184] *Id.* at 539 (O'Connor, J., dissenting).

[185] *Apprendi*, 530 U.S. at 540 (O'Connor, J., dissenting).

[186] *Id.* at 540-41 (O'Connor, J., dissenting).

ute that defines the crime to be punished. [187] Under another possible reading of the holding, the dissent proffered the suggestion that due process protections attach to any fact that can increase the range of punishment "beyond that which could legally be imposed absent the fact."[188] Again, Justice O'Connor illustrated a possible legislative statutory scheme which would survive the "increase in maximum penalty" rule which would lead to the same result.[189] Citing to Justice Kennedy's dissenting opinion in *Jones*, the Justice questioned whether the majority was simply admonishing the New Jersey legislature for "failing to use the approved phrasing" of its laws.[190]

Moving away from the Court's newly stated constitutional rule, Justice O'Connor also engaged in a classic Clauswitzian style assault on Justice Thomas's concurring opinion.[191] Starting with the premise that the Court's history does not mandate the majority's holding, the dissent had little problem viewing with extreme skepticism, if not outright contempt, the notion that history could require a broader ruling which would force a state to prove beyond a reasonable doubt every fact affecting a defendant's sentence.[192] The dissent quickly confronted Justice Thomas's concurrence, which concluded that the Fifth and Sixth Amendments mandate a broader rule than the majority's announcement, and buttressed the argument using cases primarily from the mid-nineteenth century.[193] While acknowledging that the precedent Justice Thomas cited to presents some authority for the broader rule, Justice O'Connor articulated that the cases "certainly do not control [the Court's] resolution of the federal constitutional question presented. . . ."[194] Justice O'Connor referred to Justice Thomas's admission that the holding may overrule the Federal Sentencing Guidelines and clearly exhibited strong disagreement with such a proposition.[195] Rejecting Justice Tho-

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[187] *Id.*

[188] *Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting).

[189] *Id.* at 542 (O'Connor, J., dissenting).

[190] *Id.* (O'Connor, J., dissenting) (citing *Jones*, 526 U.S. at 267 (Kennedy, J., dissenting)).

[191] *Id.* at 527 (O'Connor, J., dissenting).

[192] *Id.*

[193] *Id.*

[194] *Apprendi, 530 U.S.* at 529 (O'Connor, J., dissenting) (alteration in original).

[195] *Id.*

mas's position regarding the overthrowing of the guidelines, the dissenting opinion defined the underlying purpose of the Sixth Amendment as the protection against "potentially arbitrary judges."[196] Tying in the original intent of the Sixth Amendment with contemporary tightly-reigned determinate sentencing schemes, where a defendant has no entitlement to have a jury make factual determinations regarding her sentence by a jury, the dissent supported the notion that, as a result of the aforesaid, a defendant may not complain if a judge, and not a jury, makes factual determinations under a determinate sentencing scheme.[197]

The dissenting opinion then addressed the fact that the "increase in maximum penalty" rule will apply to all determinate sentencing schemes and is likely to have severe effects, specifically on the Federal Sentencing Guidelines.[198] In support of determinate sentencing schemes, the dissenting opinion stressed the historical practice of permitting judges to make factual determination on proof less than beyond a reasonable doubt which exposed a defendant to an increased sentence.[199] Continuing to advance support for *status quo* sentencing schemes, Justice O'Connor rejected the argument that the Constitution in any way interferes with judicial fact-finding in determining a convicted defendant's sentence.[200]

Justice O'Connor next embarked on a historical tour of the advent of the Sentencing Reform Act of 1984, which ultimately lead to the creation of the Federal Sentencing Guidelines.[201] Explaining that the primary purpose of the guidelines was to eliminate disparate sentences of similarly situated defendants, the dissent expressed grave concerns towards the possibility of eradicating "three decades worth of nationwide reform," an unpalatable position regardless of the reasonable debates revolving around the effectiveness of determinate sentencing schemes.[202] In concluding, Justice O'Connor briefly pondered the potential practical problem of the majority's rule on court dockets taking into consideration the half-million persons who have recently been sentenced under the guide-

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[196] *Id.* at 547 (O'Connor, J., dissenting).

[197] *Id.* at 548-49 (O'Connor, J., dissenting).

[198] *Id.* at 544 (O'Connor, J., dissenting).

[199] *Id.* at 545 (O'Connor, J., dissenting).

[200] *Apprendi*, 530 U.S. at 547 (O'Connor, J., dissenting).

[201] *Id.*

[202] *Id.* at 550 (O'Connor, J., dissenting).

lines and may now challenge their sentences.[203]

D. JUSTICE BREYER CHALLENGES MAJORITY HOLDING ON PRAGMATIC CONCERNS

Justice Breyer introduced an additional dissenting opinion, joined by the Chief Justice, by stating that the "real world" is incapable of conforming to the idealistic ruling of the majority which, according to the Justice, mandated juries and not judges find those facts responsible for increasing punishment.[204] In acknowledging the possibility of incorporating a "charge offense" system of criminal justice, defined by sentencing depending solely upon the charged crime, Justice Breyer explained how such a system would lead to treating different offenders similarly.[205] As a result, the Justice reasoned that practicality has traditionally lead to judges, and not juries, determining the presence or absence of factors which bear on punishment.[206] Explaining the voluminous factors which a judge must consider before determining a sentence, Justice Breyer illustrated the practical impossibility of a system where a jury must make many nuanced determinations.[207]

Justice Breyer continued to lay out the problems of fairness in a system where juries determine both the guilt and the sentence of an accused, which would require the defendant to, in an easily imaginable circumstance, argue to a jury "I did not sell drugs, but I sold no more than 500 grams."[208] Justice Breyer also touched upon the rationale which usually supports a legislature's finding of which factors ought to be enhancers and those which ought to be elements.[209] The Justice remarked that no theory can wholly explain the process and reminded the majority that the legislatures look to "common-law tradition, to his-

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[203] *Id.* at 551 (O'Connor, J., dissenting).

[204] *Id.* at 555 (Breyer, J., dissenting).

[205] *Id.* at 556 (Breyer, J., dissenting). Justice Breyer explained how a "charge offense" system ignores any fact "that did not constitute [a] statutory elemen[t] of the offens[e] of which the defendant was convicted." *Id.* As a result, under such a system, "different offenders" would be treated similarly "despite major differences in the manner in which each committed the same crime." *Id.*

[206] *Apprendi*, 530 U.S. at 556 (Breyer, J., dissenting).

[207] *Id.* at 557 (Breyer, J., dissenting).

[208] *Id.*

[209] *Id.*

tory, and to current social need" for guidance.[210]

Justice Breyer next responded to Justice Thomas's argument by casually stating that "the Constitution does not freeze 19th-century sentencing practices into permanent law."[211] Supporting Justice O'Connor's argument that no prior case law mandates the Court's rule, Justice Breyer responded to the majority and concurring opinions reasoning that the constitutional cure–mandating the maximum penalty rule–is ill-suited to resolve the infirmity in question, i.e. preventing a legislature from "defin[ing] away facts necessary to constitute a criminal offense."[212] In order to solve the riddle, the Justice hinted that the Court should increase the required standard of proof by which a judge must find the sentencing factors enumerated by the legislature.[213] The Justice then addressed the paradox left by the decision which permits the continued validity of mandatory minimums, which alters the range to which a defendant is exposed yet prohibits an increase in maximum penalty, essentially the same thing, and in effect "would mean significantly less procedural fairness, not more."[214]

E. JUSTICE SCALIA REMINDS THE DISSENT THAT THE CONSTITUTION MEANS ONLY WHAT IT SAYS

Justice Scalia penned a brief concurrence primarily to respond to several issues addressed in Justice Breyer's dissent.[215] The Justice began by postulating that, although the dissenting opinion depicted a "fair and efficient" criminal justice system which is entrusted to the hands of the State, the Founders of the American Republic declined to leave criminal right determinations to the State.[216] While acknowledging the existence of disparities in a sentencing scheme left to the jury, the Justice defended such a system by reasoning that the inherent fairness in ensuring that a criminal defendant never receives a higher sentence than that State threatened to give.[217] Justice Scalia also acknowledged

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[210] *Id.* at 559 (Breyer, J., dissenting).

[211] *Id.*

[212] *Apprendi*, 530 U.S. at 562 (Breyer, J., dissenting).

[213] *Id.* at 562-63 (Breyer, J., dissenting).

[214] *Id.* at 563-64 (Breyer, J., dissenting).

[215] *Id.* at 498 (Scalia, J., concurring).

[216] *Id.*

[217] *Id.*

the possibility that Justice Breyer's envisioned system may be better than the current one, but relied on the proposition that regardless of which system may work best, the only permissible system is the one envisioned by the Constitution.[218] Categorizing Justice Breyer's argument as one which assumes that the Constitution means what judges think it ought to mean, Justice Scalia ended by reiterating that the Constitution means only what it says.[219]

IV. WHAT EXACTLY DOES *APPRENDI* MEAN: TWO UNRESOLVED QUESTIONS

If the new, narrow, constitutional ruling vanquished all debate revolving around whether factors of a crime[220] may enhance a sentence beyond the statutory maximum after a finding by a judge of a preponderance of the evidence, the case unsealed a pandora's box of numerous questions about America's criminal justice structure.[221] The Court in *Apprendi* left two questions open. The first unanswered dilemma asks how far a legislature may go in changing its substantive laws in order to avoid *Apprendi* scrutiny. Justice O'Connor, chiding the majority in dissent, indicated that this very inquiry may pose a problem and referred to the decision as "meaningless formalism," due to the ability of legislatures to legislate around *Apprendi's* requirements.[222] Justice Stevens, in response, noted that subsequent statutory revisions will come under close judicial scrutiny based on the Court's prior decisions.[223] At the time of printing the question of "how far may a legislature go" remains anyone's guess.

The second mendicant question left for resolution, is whether the preponderance of the evidence standard which permits a judge to increase a defendant's punishment *within* the statutory range is constitutional. Although the majority in a footnote commented that"[t]he guidelines are, of course, not before the

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[218] *Apprendi,* 530 U.S. at 498 (Scalia, J., concurring).

[219] *Id.* at 499 (Scalia, J., concurring).

[220] With the exception of recidivism.

[221] *See, e.g.*, Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV.1469-70 (2001) (discussing how the rule in *Apprendi* will determine the constitutionality of redrafted criminal statutes which designate "non-elements" "that nonetheless quack like elements under the constitution") [hereinafter "Essential Elements"].

[222] *Apprendi*, 530 U.S. at 539.

[223] *Id.* at 490 n. 16.

Court,"[224] a reasonable interpretation of the majority decision ought to require States to prove all facts which bear on punishment beyond a reasonable doubt, even *within* the statutory range. Such a requirement would not necessarily invalidate the guidelines. Although the guidelines bifurcated system requires the judge to make sentencing determination after a jury trial, the preponderance of the evidence standard at sentencing may be replaced by the beyond a reasonable doubt standard as hinted at in *Apprendi*. The Supreme Court has upheld the constitutionality of the Federal Sentencing Guidelines in general,[225] and the Sentencing Commission "believes that use of the preponderance of evidence standard is appropriate to meet due process requirements. . ."[226] The Court, however, has not spoken on the issue of the requisite burden of proof under the guidelines to satisfy due process rights.[227] Answering this question requires mindfulness of the dominant theme interlaced throughout the cases dealing with the necessary burdens of proof which must be satisfied before imprisoning a criminal defendant. Justice Brennan in *Winship* concluded that whenever a penal sentence will lead to societal stigmatization and loss of liberty those facts must be proven beyond a reasonable doubt.[228] Understanding that the standard of proof requirement serves to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication" and that because society has such a strong interest in preventing erroneous judgment in criminal cases, defendants have historically been provided with the right to have facts effecting their loss of liberty and stigma proved beyond a reasonable doubt.[229] Presently, no one can say with a straight face that a defendant does not have as strong an interest in the varying degrees of her sentence within the twenty-five percent sentencing grid range as with punishment at all.[230]

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[224] *Id.* at 496 n.21.

[225] Mistretta v. United States, 488 U.S. 361 (1989).

[226] United States Sentencing Commission, *Guidelines Manual*, §6A1.3 commentary.

[227] Justice White dissented from a denial of certiorari to resolve this issue in Kinder v. United States, 504 U.S. 946 (1992) (White, J., dissenting).

[228] *In re Winship*, 397 U.S. 358, 363 (1970).

[229] Stephanie C. Slatkin, *The Standard of Proof at Sentencing Hearings Under the Federal Sentencing Guidelines: Why the Preponderance of the Evidence Standard is Constitutionally Inadequate*, 1997 U. ILL. LAW REV. 583, 589 (1997) (quoting Addington v. Texas, 441 U.S. 418, 423 (1978)).

[230] If a defendant has a Criminal Offense category of I and a Criminal History category of I, the judge may sentence the defendant anywhere in between the range of zero to six

A logical interpretation of *Apprendi* mandates that all facts which increase or affect a defendant's sentence, even within the twenty-five percent discretionary range must be proven beyond a reasonable doubt. Even before the *Apprendi* decision, some Circuit Courts began to impose a higher standard of proof when a "sentencing enhancer" greatly increased a defendant's sentence and undeniably increased the stigma and loss of liberty under which the traditional sentence would have imposed.[231] The Third,[232] Eighth,[233] and Ninth[234] Circuits have held under certain circumstances, particularly when an upward departure is the "tail which wags the dog of the substantive offense," the standard of proof by which a judge must find a fact is clear and convincing.[235] Even this heightened standard, however, is insufficient. *Apprendi*'s conclusion strongly suggests that any fact which subjects a defendant to stigma and loss of liberty, must be proven, beyond a reasonable doubt. Although Justice Thomas and Scalia argue that the Constitution requires that all facts must be submitted to a jury, I would suggest, as did Justice Breyer in dissent, that pragmatic concerns permit Congress to remedy the guidelines by increasing the standard of proof a judge must utilize before sentencing a defendant from preponderance of evidence to beyond a reasonable doubt.

Both questions left open from the admittedly contourless *Apprendi* decision can be resolved by answering one critical question: what constitutes an element of a crime. An "element" of a crime is properly defined as any fact that affects a defendant's sentence length. As a result then, legislatures will not be able to change their substantive law to avoid granting defendant's constitutional protections when attempting to prove the occurrence of such a fact. To date, the circuit courts have declined to interpret *Apprendi* broadly and have refused to address the constitutionality of the Federal Sentencing Guidelines.[236] It is unclear,

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months. U.S.S.G. Sentencing Table 2001. To argue that the defendant has no interest in what sentence she receives between that range is to exist in a state of willful blindness.

[231] *See, e.g.*, United States v. Paster, 173 F.3d 206, 216 (3d Cir. 1999) (applying the clear and convincing standard when reviewing a nine-level upward departure). *But cf.* United States v. Mack, 229 F.3d 226 (3d Cir. 2000) (holding a thirty-nine percent increase insufficient upward departure to trigger clear and convincing standard).

[232] United States v. Kikumura, 918 F.2d 1084, 1409 (3d Cir. 1994).

[233] United States v. Townley, 929 F.2d 365, 369 (8th Cir. 1991).

[234] United States v. Restrepo, 946 F.2d 654, 664 (9th Cir. 1992) (Tang, J., concurring, Pregerson & Hug, J.J., dissenting) (advocating stricter burden).

[235] *Id. See supra* notes 228, 229.

[236] *See supra* note 9.

however, whether these decisions are a result of adhering to the Supreme Court's statement in a footnote that "[t]he guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held,"[237] or out of fear that the likely answer indeed will wipe out thirty years of reform without another system in place.[238] The fact that four Justices assume *Apprendi* will overrule the guidelines, combined with the fact that at least two Justices openly advocate this position necessarily leads one to ask whether the invalidation or major adjustments of the guidelines is desirable.[239]

SHOULD THE GUIDELINES BE REVISED?

The Federal Sentencing Guidelines is, on several levels, a sick bird. Of course having been spawned from a consummation of Senators Edward Kennedy and Strom Thurmond, one would expect it to live out a strange and uncertain existence.[240] There is no shortage of scathing criticisms of the guidelines, and criminal theoreticians are not the only ones who debate whether the guidelines provide any benefit to either society or criminal defendants.[241] A 1996 study suggested that over 73% of judges "strongly prefer a system in which judges are accorded more discretion than they are under the current guidelines."[242] Further reason for such a strong antipathy towards the federal determinate sentencing scheme comes in the form of its greatest failure; evidence suggests that the

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[237] *Apprendi*, 530 U.S. at 495 n. 21.

[238] *Id.* at 495.

[239] Justice Thomas, regarded as one of the two most conservative justices on the Court, explicitly announced his opposition to the holdings in *McMillan*, and *Almendarez-Torres*. Taking Justice Thomas's arguments to their logical conclusion, however, would also invalidate *Patterson*, *Walton*, and abolish the Federal Sentencing Guidelines. *Id.* at 523 n.11.

[240] On March 3, 1983 Senator Kennedy introduced S. 668 – The Sentencing Reform Act of 1983. On March 16, 1983 Senator Thurmond introduced S. 829. S. Rep. No. 98-225 at 37 (1983).

[241] For an extensive analysis on the guidelines and perhaps the most comprehensive critique see, KATE STITH & JOSE A CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURT, (1998). [hereinafter "Fear of Judging"]; Frank O. Bowman, while strongly disagreeing with Stith and Cabranes, offers a well thought out critique of the guidelines. *See* Bowman *supra* note 34; Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); United States v. Harrington, 947 F.2d 956, 963-64 (D.C. Cir. 1991) (Edwards, J., concurring).

[242] MOLLY TREADWAY JOHNSON & SCOTT GILBERT, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY (1997).

guidelines have failed to accomplish one of its primary purposes.[243] Although the guidelines have been proven to have reduced inter-judge sentencing disparities, (defendants within a particular district with similar records who have been convicted of similar crimes are likely to obtain similar penal sentences) intra-judge sentencing disparity has actually increased substantially since 1987.[244] Even more disturbing is the consistent data which illustrates the *increase* in sentencing disparity between races since the promulgation of the guidelines.[245] Since 1987, the crevasse between the average of sentences imposed on African-Americans and Latinos and on males and the average of sentences imposed on whites and females has actually increased.[246] In fact, Paul Hofer and Kevin Blackwell, two researchers at the U.S. Sentencing Commission, explained how the differences in the average sentence imposed between Latinos and African-Americans and whites has multiplied since the introduction of the guidelines.[247] Studies indicate that the widening gap in sentencing disparities has resulted from a rapid increase by Congress in disproportionately punishing crimes disproportionately committed by African-Americans, Latinos and men, i.e. drug trafficking and firearm offenses.[248] For similar reasons, Professor Ronald Wright has likened the guidelines to a "Reign of Terror" because of their treatment of drug offenders.[249]

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[243] Paul J. Hofer, Kevin R. Blackwell, & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239 (Fall 1999).

[244] Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J. L. & ECON. 271, 273-274 (1999).

[245] *Id.*

[246] *Id.* (citing Douglas C. McDonald & Kenneth E Carlson, Bureau of Just. Stats., Sentencing in the Federal Courts: Does Race Matter? 181 (1993)).

[247] *Id.*

[248] McDonald and Carlson explained the differences in sentences for whites and minorities as resulting from the large number of African-Americans sentenced for drug crimes. McDonald & Carlson, *supra* note 246, at 181. Perhaps the most frequently attacked is the undeniably capricious, if not questionably motivated, laws which continue to sentence a defendant who possesses one gram of crack cocaine equal to a defendant convicted of possessing one hundred grams of cocaine. *Id.* African-American's are more likely to possess the former. *Id.* Even the Sentencing Commission acknowledged there is no rationale explanation for this disparity. U. S. Sentencing Commission and Federal Sentencing Policy 196-97 (1993).

[249] Ronald F. Wright, *Book Review: Rules for Sentencing Revolutions*, 108 YALE L.J. 1355 (1999).

V. CRITICISMS OF THE GUIDELINES AND THEIR PHILOSOPHICAL FOUNDATIONS

The *Apprendi* decision was handed down well over a year ago, and so far the critics of the holding, and their attacks on the broader rule proposed by Justice Thomas, have not been supported on constitutional grounds. Rather, most proponents of interpreting *Apprendi* narrowly, so as to not disturb the Federal Sentencing Guidelines, build their entire foundation on political and practical reasoning.[250] Most of the commentary arising since *Apprendi* extol the decision, not so much for its sound constitutional foundation or the beneficial results likely to emerge from the new constitutional rule, but rather for its "pragmatism."[251] This is not surprising; Justice O'Connor likely jump-started the bandwagon by expressing concern, not from the ruling's constitutional infirmity, rather because of the potential practical effects.[252] Although the Justice acknowledged that historical evidence may support the Court's ruling, nevertheless Justice O'Connor admitted to fearing the decision's "unsettling effect on sentencing conducted under current federal and state determinate sentencing guidelines."[253] In a phrase smacking of similarity to Justice Powell's in *McKlesky v. Kemp,*[254] Justice O'Connor, after revealing statistics provided by the National Center for Courts and discovering that almost a half-million cases have been disposed of under the Sentencing Guidelines since 1989,[255] reasoned that the new rule would "unleash a flood of petitions by convicted defendants. . . ."[256] In other words, at least part of the dissent's concern with the newly announced constitutional protection

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[250] *See Apprendi*, 530 U.S. at 542-46 (O'Connor, J., dissenting); *Id.* at 555 (Breyer, J., dissenting); Essential Elements, *supra* note 221, at 1481-82. *See also*, Andrew Fuchs, *The Effects of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399 (2001).

[251] *Apprendi*, 530 U.S. at 551-53.

[252] *Id.*

[253] *Id.* at 550-51.

[254] 481 U.S. 279, 315 (1987). "Petitioners claim, taken to its logical conclusion, throws into serious question the principles that underlies our entire criminal justice system." *Id.* at 282. To which Justice Brennan replied in dissent that "[t]aken on its face, such a statement seems to suggest a fear of too much justice." *Id.* at 339.

[255] *Id.* Federal cases only represent .4% of the total number of criminal prosecutions in federal and state courts. *Id.*

[256] *Id.*

granted to criminal defendants is the logistical problems of adjusting the sentences to perhaps 500,000 convicted persons to a sentence in line with the crime under which they were properly charged and convicted.[257] In dissent, Justice Breyer all but abandoned the hope of a Constitutional argument, and relied solely on pragmatism.[258] Other commentators have challenged Thomas's rule on the ground that it "wreaks doctrinal havoc" having the real effect of invalidating not only *McMillan* and *Almendarez-Torres*, but also *Walton*, *Patterson*, and the guidelines.[259] Surprisingly, no one has taken seriously the argument that *Apprendi*, should in fact begin an overhaul of America's criminal system. I attribute this lack of support for change on the distorted view from which most critics have viewed this problem.

A constitutional ruling which defines the appropriate contours of the power of legislatures to define elements of a crime and instructs judges as to what is the appropriate standard of proof must ultimately arise from a firm philosophical foundation. Perhaps one of the biggest criticisms of *Apprendi,* and the one flaw which potentially leads to social unrest, is Justice Steven's lack of philosophical reasoning behind the judicial decision.[260] With criminal justice being one of the most important issues in society today, a well thought out reasoned philosophy behind every aspect of the U.S. criminal system is essential to garner popular support and consequently lead to both safer streets and safer prisons. Indisputably, Due Process rights under the Fifth and Fourteenth Amendment and the right to jury under the Sixth Amendment are inextricably linked to the philosophical belief impelling the current criminal system in America. As noted by Nancy King and Susan Klein in their comprehensive article on the question of essential elements, "[t]hroughout American history, then, there has been significant variation in the allocation of authority between judge, jury, and administrative officials in selecting sentences within statutory ceilings. This fluctuation in who decides the sentence follow shifts in prevailing philosophies about why and how we sentence."[261] For example, as is frequently noted, the degree to which a judge has discretion to sentencing a defendant has always been in proportion to

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[257] *Id.*

[258] *Apprendi*, 530 U.S. at 555 (Breyer, J., dissenting).

[259] Essential Elements, *supra* note 221, at 1481-82. *See also*, Fuchs, *supra* note 250, at 1432-37.

[260] Nancy King and Susan Klein have also noted this to be true. Essential Elements, *supra* note 221, at 1485.

[261] Essential Elements, *supra* note 221, at 1513.

the belief in rehabilitation.[262] Hence, as the argument against rehabilitation gained momentum, the guidelines were promulgated and judicial discretion was severely curbed.[263]

Justices Thomas and Scalia[264] founded their argument, that the Constitution requires due process guarantees to all facts which affect penal liability, regardless of how the legislature designates them, on their well known beliefs in "strict constructionism."[265] Justice Scalia, famed for reiterating that the Constitution means what it says, not what we think it ought to mean, concluded that the new constitutional rule "means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury."[266] Although this position lends assistance to a proper argument leading to a broader rule, the argument for reconstructing the guidelines can not stand on strict constructionism alone.

Several fatal flaws infect Justices Scalia and Thomas's reasoning. First, the strong disagreement between the five members of the court who consider the Constitution to be a living organic document, not as a dead document, preclude this philosophical foundation from ever cementing in the hearts of Americans.[267] Even assuming *arguendo* there is a certain virtue in antebellum criminal jurisprudence as Scalia and Thomas suggest, it is debatable whether Justice Thomas's historical lesson necessarily leads to the broader rule proposed in the concurring opinion. Justice O'Connor adroitly challenged the notion of founding our modern criminal jurisprudence on what we speculate was the original intent of the framers. [268] Pragmatically speaking, the rule proposed by Thomas and Scalia is simply unattainable given the breadth and complexity of the numerous "sentencing factors." Despite Justice Scalia's pronouncement that the Constitution

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[262] Mauer, *supra* note 12, at 45. "The rationale for the indeterminate sentence was tied to the prospect of rehabilitation in the prison setting. It was believed that if an inmate was to be encouraged to take advantage of programming in prison. . ., a reward system should be in place." *Id.*

[263] *Id.*

[264] *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (noting "all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury").

[265] *Id.*

[266] *Id.* at 499 (Scalia, J., concurring).

[267] Rebecca L. Spiro, *Federal Sentencing Guidelines and the Rehnquist Court: Theories of Statutory Interpretation*, 37 AM. CRIM. L. REV. 103 (2000).

[268] *Apprendi*, 530 U.S. at 525 (O'Connor, J., dissenting).

means what it says, the founding fathers could never had intended it to say and create a logistical impossibility.

Aside from a belief in nothing other than the exact wording of America's Constitution, several other categories of philosophical belief have emerged which attempt to define what constitutes an element of a crime.[269] Some criminal theoreticians argue that elements are quite simply what the legislatures say they are, as the Supreme Court appeared to hold in *Patterson*.[270] The problem with this approach however, as illustrated by subsequent Court decisions and general approval of them, is that it accepts a narrow definition of democracy and potentially leads to the exclusion of constitutional guarantees by considering the will of the majority but not the protection of the weak and insolent group of persons susceptible to prosecution. This philosophy undermines the primary intent of the Founding Fathers, as noted by James Madison's quoted words in *Reitman v. Mulkey*, "[i]n our Goverments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. . . ."[271]

Another group of criminal theoreticians support the idea that due process mandates that the prosecution prove sentencing enhancements by "clear and convincing" evidence.[272] This position has found support as discussed, *supra*, in the Third, Eighth, and Ninth Circuits, under certain restricted circumstances.[273] Supporters of this position, although admirably attempting to design an acceptable compromise, fails the logical reading of *Apprendi*, which requires a beyond a reasonable doubt standard when ever a defendant is faced with the original concerns in *Winship*, loss of liberty and greater stigma and society is faced with the appropriate degree of confidence a factfinder should have in the correctness

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[269] Nancy J. King and Susan R. Klein do a remarkable job of defining and categorizing the several emerging groups before explaining which camp they belong to and before offering their multi-factor test to determine what they consider appropriate legislative limits. This section whereby I outline the several emerging philosophies is simply a paraphrasing of a section of their helpful article and is a result of their insight and erudition. *See* Essential Elements, *supra* note 221, at 1523-1535.

[270] Patterson v. New York, 432 U.S. 197 (1977).

[271] Reitman v. Mulkey, 387 U.S. 369, 389 (1967) (citations omitted).

[272] Essential Elements, *supra* note 221, at 1534

[273] *See supra* notes 231-34.

of factual conclusions.[274] Another group of scholars believe that "the legislature is supreme in defining substantive criminal law except in the rare case. . ."[275] The weakest link in this argument is that "except in the rare case" has not yet been defined or even close to agreed upon, and consequently this philosophy walks the same path as the Supreme Court's earlier cases which hinted at a constitutional limit over which legislatures could not trespass, yet never defining those external limits. At this stage in the game and with the ever politicization of crime, it has become obvious that legislatures need a line drawn in the sand or representatives will continuously attempt to legislate around due process rights to seem even tougher on crime than their opponents.

THE GUIDELINES VIEWED FROM ANOTHER ANGLE

The debate around the efficacy of the guidelines and determinate sentencing schemes in general thus far has been impelled by a philosophical debate which concerns itself with how much power a legislature has to define elements of crime and that in turn leads to the amount of due process afforded criminal defendants. The proposed answers of this important question have, so far, been structured to divert attention towards dynamics between the Congress and the courthouse as situated under the grand umbrella of theoretical constitutional constraint. Even the pragmatic argument, most persuasively argued by Justice Breyer, original sentencing commission commissioner, has only taken into consideration the hardships which courts would face if the broader rule were indeed applied.[276]

In contrast, I submit that the problem of applying an appropriate standard of proof ought to be inversely viewed from the penitentiary to the courthouse. In other words, any legitimate solution must be founded on a philosophy grounded in practical consideration of the effects of a legislatures' ability to define a crime, i.e. the effects of the guidelines on, at the micro level, individual sentences, and at that macro level, the explosive growth in prison population in the last decade and a half.[277] Accordingly, the answer to what constitutes a "crime" must emerge from both constitutional doctrine and a realistic look at the contemporary criminal system in America. Another way to phrase the debate which *Apprendi*

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[274] In re Winship, 397 U.S. at 370 (Harlan, J., concurring).

[275] *Id.* at 1535.

[276] *Apprendi*, 530 U.S. at 555-60 (Breyer, J., dissenting).

[277] *See e.g.*, DARRELL K. GILLARD & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONS IN 1993, at 5 (1994) (commenting prison population has grown over 400% between 1968 and 1993).

pushes to the forefront is to ask the question of whether America can continue to send persons to prison for longer periods of time for particular acts whose commission was only more likely than not committed. When Justice Stevens announced that a legislature is not permitted to send a woman to prison for two years more than the legislature has for a second degree offense after finding, by a preponderance of the evidence, that the defendant violated a separate state statute, what is really at issue is the advisability of permitting a State to add an extra two years to a defendant's sentence without guaranteeing to its constituents that the defendant committed the alleged act beyond a reasonable doubt.

It is an indisputable premise that the government has a strong interest in handing out a just punishment. The overarching theme of the guidelines is the idea of "just sentencing," that is, an absence of disparate sentencing for similar crimes committed by similar defendants and assuring that a defendant serves out her sentence "honestly." In this sense then, the right of a State to determine the level of constitutional protections afforded a criminal defendant is inextricably linked to the State's right to incarcerate the individual. The distinguishable standards of proof, preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt, are premised on the idea that organized society requires different thresholds of surety depending upon the infringement of another person's natural rights.[278]

Although no one could argue against the proposition that a sovereign should possess an absolute right to punish those who break enunciated laws, it is important to remember that the right of a sovereign to punish an individual corporally in revenge for an affront to the sovereign's power eventually metamorphosed into the right to discipline an individual and render her docile so as to not interfere with public order.[279] The emergence of the prison at the beginning of the nineteenth century marked a supposedly enlightening moment in the history of mankind. Two hundred years ago, Quakers and other reformers in Pennsylvania developed the institution of the penitentiary, "an experiment in molding human behavior that was befitting of other innovations in the new democracy."[280] The shifting of punishment away from public torture and execution to a private prison marked the shift from inhumanity to humanity. The birth of the prison system in America marked the first time that justice became equal because the [1] stigma and [2] the loss of liberty affected all the same regardless of wealth,

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[278] Slatkin, *supra* note 229, at 589.

[279] *See generally*, MICHEL FOUCAULT, DISCIPLINE & PUNISH, THE BIRTH OF PRISON (1977) (suggesting this metamorphosis resulted from the development of capitalism and industrialized society's need for more constant and totalitarian exploitation of bodies).

[280] Mauer, *supra* note 12, at 1.

tolerance of pain, and other factors which served to differentiate previous forms of punishment. Before the introduction of the prison, punishments varied depending upon one's community status.[281] Persons of means would receive fines and the lower classes were subjected to stockades or public whippings."[282] Prison, however, introduced the idea of egalitarian punishment.

Once this new form of punishment emerged, however, a responsibility attached as American society became accustomed to a "just," "humane" and egalitarian form of punishment. Once that transition began, it became incumbent upon the government to maintain that level of equality and evenhandedness. Any system of punishment in America must remain a just tool to maintain public order, or else society will ultimately reject it. It must be remembered that the impetus for the Federal Sentencing Guidelines were inhumane prison conditions and disparate sentencing which lead to prison unrest, a proliferation of prisoner's rights movements and active agitation from outside as well inside prisons.[283]

It is here the practical problems arising from the Federal Sentencing Guidelines and the constitutional rule announced in *Apprendi* intersect to provide for a firm foundation in which to overhaul the Federal Sentencing Guidelines. As it stands now, the guidelines are failing miserably at maintaining an egalitarian form of punishment worthy of a country intent on leading the world in human rights and equality. This is noted not only in the greater disparities between the African-Americans, Latinos and Whites, but also in the inappropriately high sentences placed on drug crimes, mandatory minimum sentencing schemes, and most importantly permitting judges to sentence a defendant to an increased prison term after determining only that the prosecution produced more evidence, which suggests she committed the act in question than the quantitative amount of evidence produced by the defendant suggesting she did not commit the act, instead of proving the fact which is about to lead to a greater stigma and loss of liberty beyond a reasonable doubt. A linear progression of the argument then, is that a government has a strong interest in a just prison system which results from just sentences. Just sentences emerge from the absence of disparities, a proportionate punishment compared to the act, and just due process; in particular an appropriate standard of proof that the defendant committed the act which the state sought to prohibit and threatened with carcerial sanctions if committed. These premises are certainly incontestable. However, this still does not answer

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[281] *Id.* at 2.

[282] *Id.*

[283] For a brief history of the prison reform movement, see CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 164-67 (1999). Bowman, *supra* note 34, at 304.

what the appropriate standard of proof is.

Apprendi answers this question, although it does so with a bullhorn and not a sledge-hammer. Read in an intellectually honest light, *Apprendi* mandates that any fact which, in real terms has the effect of increasing a defendant's sentence must be proven beyond a reasonable doubt, even if this sentence is *within* the sentencing range. Despite the language that "the guidelines are of course not before the Court," the Supreme Court in *Apprendi* made clear that permitting judges to increase defendant's sentences after only finding a fact by a preponderance of the evidence is not going to last much longer. The Court has offered a wide avenue in which to walk down the road of reform towards a truly egalitarian form of sentencing. The *Apprendi* ruling was indeed craftily written to obtain its objective, to give the legislature time to begin working on a new system without the tumultuous jolt of a Supreme Court ruling which instantaneously overrules them and throws the American criminal system back thirty years.

VI. CONCLUSION

The *Apprendi* decision may live up to the bombast and excitement the decision first created. The Circuit Courts have respectfully and prudently adhered to the narrow ruling, leaving the guidelines intact. Undoubtedly the courts are poorly suited to revise America's criminal system. Such a project is best left to the legislatures, checked, of course, by the Court's interpretation of what due process requires. In this case, it requires that all facts, which in real terms have the effect of imposing or increasing a sentence, must be proven beyond a reasonable doubt. The Federal Sentencing Guidelines as well as numerous state schemes provide for a judge to increase a defendant's sentence only after finding facts to have occurred by a preponderance of the evidence and therefore increase both the societal stigma and the time of loss of liberty. The line of cases from *Winship* to *Apprendi*, however, demand that the guidelines are restructured to provide that judges find such facts beyond a reasonable doubt. Such a revision will be a step towards achieving the original intent of guidelines, to further the basic purposes of criminal punishment in a truly egalitarian criminal justice system.[284]

[284] 18 U.S.C. ch. 1, pt. A, The Statutory Mission.