# Essential Elements

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As published in Vanderbilt Law Review, Vol. 54, May 2001

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## INTRODUCTION

For well over a century the United States Supreme Court has debated who has final authority to define what is a "crime" for purposes of applying the procedural protections guaranteed by the Constitution in criminal cases. After numerous shifts back and forth from judicial to legislative supremacy,[1] the Court has settled upon a multi-factor analysis for policing the criminal-civil divide, an analysis that permits courts to override legislative intent to define an action as civil in the rare case where the action waddles and quacks like a crime.[2] This tug-of-war over the finality of legislative labels in defining crime and punishment is far from over. For just as labeling an action "civil" may allow the government to circumvent criminal procedure entirely, so labeling a fact an "affirmative

1. The Court first overrode the legislative label in 1886. *See* Boyd v. United States, 116 U.S. 616 (1886); Coffey v. United States, 116 U.S. 436 (1886), *overruled by* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984). There was a switch to legislative deference in the early twentieth century. *See* Helvering v. Mitchell, 303 U.S. 391 (1938) (finding that a statute imposing an additional 50% penalty on amount of delinquent taxes where the deficiency was due to criminal fraud was not punitive action requiring criminal procedures). Not surprisingly, there was a shift toward judicial dominance during the Warren Court years. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167 (1963) (characterizing as criminal a statute that revoked the citizenship of those evading the draft). The Burger Court returned to legislative supremacy in *United States v. Ward*, giving us the Court's present test for distinguishing between civil and criminal penalties. United States v. Ward, 448 U.S. 242, 248 (1980). A blip in the late 1980s to the early 1990s moved away from a legislative deference test, *see* Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994); United States v. Halper, 490 U.S. 435 (1989), before returning to the *Kennedy-Ward* test during the 1996 and 1997 Terms. *See* Hudson v. United States, 522 U.S. 93 (1997).

2. The seven factors of the Court's present test were first identified in *Kennedy v. Mendoza-Martinez*. *Kennedy*, 372 U.S. at 168-69. The Court asks: (1) whether the sanction involved an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only upon a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Id*. The "clearest proof" is required to override legislative intent and conclude that an act denominated civil is punitive in purpose or effect. Seling v. Young, 121 S. Ct. 727, 734 (2001).

defense" or a "sentencing factor" instead of an "element" of an offense may allow the government to bypass, for that particular fact, certain procedures that the Constitution requires in the adjudication of offense elements. These procedural guarantees, namely, proof beyond a reasonable doubt, inclusion in the indictment, and trial by jury,[3] need not be provided for non-elements.

In its recent decision in *Apprendi v. New Jersey*, the Court has put to rest one aspect of this ongoing battle about the significance of labels, by declaring that any fact—other than a prior conviction—that increases the penalty for an offense beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.[4] But even as *Apprendi* settles one dispute, it prompts others. The *Apprendi* Court also recognized the possibility that in order to avoid the adjudication of sentence-enhancing facts in a full-blown trial, legislatures might simply amend some of the many criminal statutes affected by this rule.[5] Suggesting that efforts to avoid the consequences of the rule in *Apprendi* by redrafting criminal statutes will be subject to "constitutional scrutiny," the Court has invited litigation over the constitutionality of substantive criminal law. Not surprisingly, it has offered few clues about the shape of that constitutional scrutiny. This Article takes up that challenge. Drawing guidance from the rich and varied history and commentary of constitutional regulation of the substantive criminal law under many different constitutional provisions,[6] we develop here a modest multi-factor test to help

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3. Patterson v. New York, 432 U.S. 197, 210 (1977) (holding that the government must prove all elements beyond a reasonable doubt); Hamling v. United States, 418 U.S. 87, 117 (1974) (holding that all elements must be included in the indictment); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that the government must prove all elements to the jury).

4. Apprendi v. New Jersey, 120 S. Ct. 2348 (2000).

5. Hundreds, perhaps thousands, of completed criminal prosecutions under dozens of state and federal statutes are now subject to attack. We examine this problem in Nancy J. King & Susan R. Klein, *Après* Apprendi, 12 FED. SENT. REP. 331 (2000).

6. Dozens of articles by other criminal law and criminal procedure scholars have examined the need to enforce some constitutional limits on substantive criminal law in order to protect the procedural guarantees of the Bill of Rights, including work by Professors Ronald J. Allen, John C. Jeffries, Jr., and William J. Stuntz. *See, e.g.*, Ronald J. Allen, *Supreme Court Review—Foreword:* Montana v. Egelhoff*—Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633 (1997) [hereinafter Allen, *Reflections on the Limits of Legislative Imagination*]; Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30 (1977) [hereinafter Allen, *A Comment on Burdens of Persuasion*]; John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996) [hereinafter Stuntz, *Substance, Process, and the Civil-Criminal Line*]; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995)

courts identify those few statutes that contain facts, designated as "non-elements" by a legislature, that nonetheless quack like elements under the Constitution.

## I. THE *APPRENDI* RULE: A JUSTIFICATION

Before turning to the issues raised by the ruling in *Apprendi*, a summary of the decision and a defense of its holding are in order. Only by evaluating the narrow holding of the majority in light of precedent and past practice can one discern how best to address the litigation that will inevitably follow in its wake.

Charles Apprendi, Jr., fired shots into the home of an African-American family and pleaded guilty to a number of state weapons offenses. The most serious of these offenses was punishable by up to ten years in prison. The New Jersey trial judge applied the state's statute that enhanced sentences for "hate-crimes." Pursuant to this statute, the judge found at sentencing that Apprendi faced not a ten- but a twenty-year maximum, because "in committing the crime," he "acted with a purpose to intimidate an individual . . . because of race."[7] The judge sentenced Apprendi to twelve years for the offense. Apprendi, whose attorney had reserved the right to challenge this enhancement when he entered his guilty plea, challenged the judgment, arguing that the "hate-crime" statute created a separate, more aggravated offense than the offense he admitted as part of his plea, that the finding of biased purpose was an element of this separate offense, and that he was denied his right to a jury determination beyond a reasonable doubt of each offense element.

After New Jersey's highest court rejected Apprendi's challenge, the Supreme Court agreed to review the case, and the decision generated five separate opinions. Justice Stevens, writing the opinion for the Court, was joined by Justices Scalia, Souter, Tho-

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[hereinafter Stuntz, *Substantive Origins of Criminal Procedure*]; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) [hereinafter Stuntz, *Uneasy Relationship*]. Prior commentary, however, has for the most part considered a question different from, or more limited than, the one we examine here. For example, commentators have proposed various approaches for regulating, under individual provisions of the Constitution, a legislature's decision to impose strict liability, presumptions, affirmative defenses, "civil" penalties, presumptive sentences, or unusually severe penalties. Building upon the many insights of this prior work, we explore a constitutional meaning for an "element" of crime within a broader context, provide a synthesis of the different situations in which this issue arises, and add both historical analysis and a healthy dose of pragmatism.

7. *Apprendi*, 120 S. Ct. at 2351 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000)).

mas, and Ginsburg. In that majority opinion, Justice Stevens declared, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[8] Justice Stevens defended the ruling as rooted in precedent and the historical practice of American and English courts. Justice Thomas concurred, joined in part by Justice Scalia, who wrote yet another concurring opinion. Justice Thomas argued that history supported an even broader rule that would, in addition, designate as elements prior convictions that boost maximum sentences, as well as all factual findings that modify the permissible sentencing range, including those facts triggering mandatory minimum sentences.

In separate opinions representing the four dissenting justices, Justices O'Connor and Breyer found that the Court's holding was unsupported by either history or the Court's prior decisions. They argued that the decision would disadvantage defendants, that it would undermine thirty years of sentencing reform, and that it amounted to a "meaningless and formalistic" rule because it could so easily be avoided by legislatures.[9] Simply by raising the maximum sentence for a crime, the dissenters observed, a legislature could ensure that the very same sentence enhancements that were deemed elements by the Court's opinion would continue to be adjudicated without a jury finding beyond a reasonable doubt.

We believe that these objections to the majority's rule are unpersuasive. After offering additional support for the decision in response to the critique based on history and precedent, this Part will focus on the argument that the rule in *Apprendi* is too easily avoided to be meaningful.

### *A. The Historical Basis for the* Apprendi *Rule*

The *Apprendi* Court relied upon history for guidance, as it has so often when construing the Bill of Rights in criminal cases, particularly the provisions of the Sixth Amendment. Every justice in *Apprendi* recognized the importance of history in defining the scope of constitutional limitations on the ability of legislatures to define penal law, a question that has persistently eluded alternative analysis. There is, of course, no small controversy surrounding

8. *Id*. at 2362-63.
9. *Id*. at 2390 (O'Connor, J., dissenting).

reliance on history in constitutional interpretation.[10] Later, we conclude that reference to history is an important feature of any effort to gauge the Constitution's impact on substantive criminal law.[11] For now, we note simply that, of the competing historical accounts offered by the opinions in *Apprendi*, the account offered by Justice Stevens in the majority opinion most accurately reflects past practice.

First, the practice of treating as an element any fact other than a prior conviction that increased the statutory maximum sentence was consistent throughout the nineteenth century.[12] What had to be proven at trial depended on what had to be alleged in the indictment.[13] Allegations required for early nineteenth-century crimes invariably included the value of property stolen, injured, burned, or obtained whenever a statute varied the fine according to that value.[14] The fact that a theft was from a church or dwelling-

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10. *See, e.g.*, Jeffries & Stephan, *supra* note 6, at 1325, 1363-64 (critiquing Justice Powell's historical test in his *Patterson* dissent, noting that, "in the context of the penal law, we see little reason to ascribe virtue to antiquity," since crimes have evolved without coherent policy, and common-law doctrines lack relevance today, such that "many prominent aspects of the common law tradition of crime definition seem unfortunate models for modern lawmaking"). A complete list of the work examining this question would be prohibitively long, so a sampling of recent sources must suffice. *See, e.g.*, Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997); Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMM. 411, 413-19 (1998) (discussing Arthur W. Machen, Jr., *The Elasticity of the Constitution*, 14 HARV. L. REV. 200, 273 (1900)).

11. *See infra* notes 258-60 and accompanying text.

12. In addition to the cases supporting this proposition cited in *Apprendi*, see also State v. Kane, 23 N.W. 488, 490-92 (Wis. 1885) (collecting cases); 2 T. BISHOP, CRIMINAL PROCEDURE 200-01 (1866) (collecting cases); Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pennsylvania, 22 SEATTLE U. L. REV. 1057, 1063-68 nn.26-54 (1999) (collecting cases); *infra* notes 14-16, 22, 26 (citing cases).

13. *See infra* note 112 and accompanying text.

14. Punishment for larceny has long depended upon the value of the items involved. *See* 1 Stat. 16 (1790) (providing that those charged with larceny "shall, on conviction, be fined not exceeding the fourfold value of the property"). The value of property stolen distinguished grand from petit larceny; value had to be averred in the indictment. *See, e.g.*, Commonwealth v. Smith, 1 Mass. 245 (1804); 2 BISHOP, *supra* note 12, at 393, 395; 1 T. BISHOP, CRIMINAL PROCEDURE 237 (1866) (stating that, in the case of usury, where the judgment depends upon the quantum taken, the usurious contract must be averred according to the fact and variance from it, because the penalty is apportioned to the value); JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 235-36 (1816); H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE 670-71 (1923) (collecting cases from seventeen states); *see also* United States v. Fisher, 25 F. Cas. 1086, 1086 (D. Ohio 1849) (No. 15,102) (noting that when a statute provides that a mail carrier is subject to a higher penalty for stealing a letter containing an article of value, the indictment must allege that the letter contained an article of value, "which aggravates the offense and incurs a higher penalty"); State v. Garner, 8 Port. 447, 448 (Ala. 1839) (reversing a conviction for

house had to be alleged in the indictment and proven at trial whenever larceny from those places was punished more severely than larceny alone.[15] The intent to kill or the status of victim as an officer had to be alleged and proven whenever an assault statute specified a more severe penalty for assault committed under these aggravating circumstances.[16] Statutes that raise sentence maxima following judicial findings of fact (other than prior conviction) at sentencing are recent departures from this past practice.[17] Indeed, all but two of the dozens of such statutes collected in Appendices B and C of this Article were enacted after 1969.[18]

Second, the *Apprendi* rule makes sense given the historical distinction in the Constitution between the procedures afforded those accused of petty crimes and the procedures provided those accused of serious offenses. The Fifth Amendment right to grand

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malicious mischief, because the indictment failed to allege the value of the horse that was killed, when the fine was capped at four-fifths of the value of the property destroyed); Clark v. People, 1 Scam. 117, 120 (Ill. 1833) (finding an indictment for arson insufficient for not alleging the value of a building destroyed by fire, when punishment included a fine equal to the value of the burned property).

15. *See* 2 BISHOP, *supra* note 12, at 424-28 (collecting cases); *see also* Hobbes v. State, 44 Tyler 353 (Tex. 1875) (finding that when the defendant was charged with burglary of a nondwelling house—an offense carrying a sentence of two to five years—it was error for the judge to have instructed the sentencing jury that the sentencing range was two to ten years, even though the statute provided for up to double punishment (ten years) if entry was effected by force, because the indictment failed to allege that the defendant's entry was effected by force); *see also Fisher*, 25 F. Cas. at 1086 (noting that when the statute provided that a carrier of mail is subject to a higher penalty for stealing a letter out of the mail, if the letter contains an article of value, the indictment must allege that the letter contained an article of value, "which aggravates the offense and means a higher penalty").

16. *See* Beasley v. State, 18 Ala. 535, 540 (1851) (finding an indictment insufficient for failing to allege the facts that constituted assault with intent to commit murder); State v. Seamons, 1 Greene 418, 421 (Iowa 1848) (finding that an indictment failing to allege the manner in which an assault was committed was sufficient because it followed the words of the statute, even though it would have been insufficient at common law); Commonwealth v. Kirby, 2 Cush. 577, 561 (Mass. 1849) (re-sentencing the defendant for the lesser crime of assault, when the indictment did not allege that the defendant knowingly assaulted an officer, a crime carrying a greater penalty); State v. Burt, 25 Vt. 373, 376 (1853) (ruling that the defendant could only be convicted of lesser offense of assault, and not higher offense of impeding an officer, when indictment did not charge that the victim of assault was an officer).

17. One case from 1819 in Indiana suggested that a court, at sentencing, could determine the extent of a fine for larceny when the statute provided that the maximum fine depended upon whether the property was returned. *See* Morris v. State, 1 Blackf. 37, 37-38 (Ind. 1819) (examining a statute providing that the offender pay twofold the value of the thing stolen if it was not returned, otherwise the fine was equal to the value of the stolen property; holding that the total fine ought to have been fully settled by the court as part of the judgment, and could not be determined at a later date). One way to reconcile this unusual case with the otherwise uniform treatment of facts triggering higher sentence ceilings is to characterize the added "fine" for failure to return the property as restitution rather than punishment.

18. Earlier versions of these appendices were included in King & Klein, *supra* note 5, and are reprinted with permission.

jury review and the right to a jury trial in the Sixth Amendment and under Article III do not extend to petty offenses, but are guaranteed only to those facing felony charges. Whether a charge is petty or serious is measured by the penalty that an accused faces upon conviction, which, in turn, is determined by the maximum penalty specified by statute for the offense, not by the aggregate penalty a defendant faces after any given trial.[19] Without the rule in *Apprendi*, a defendant convicted of a minor offense could conceivably face stiff fines or imprisonment of longer than a year, yet be denied the protections due one prosecuted for a felony.[20]

Finally, the historical basis for the broader rule advocated by Justice Thomas is much more ambiguous than the clear support for the limited rule advanced in the majority opinion of Justice Stevens. Admittedly, the language that Justice Thomas quotes from early nineteenth-century cases and treatises is not inconsistent with a broader rule treating as elements all facts that determine the sentence even without raising the sentence maximum. However, closer examination reveals that courts of this earlier era were not presented with the necessity of deciding whether a fact, other than prior conviction, that triggers a mandatory minimum sentence *but not a higher maximum sentence*, was an essential ingredient of an offense that must be pled in the indictment and proven to a jury beyond a reasonable doubt.[21]

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19. *See* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926); *see also* Lewis v. United States, 518 U.S. 322, 328 (1996) (determining that, if a statute specifies a maximum of six months' incarceration, the offense is a petty offense that need not be tried by a jury, even when the defendant faces a number of such charges while in a single trial). For more on the felony/misdemeanor distinction, see Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 569-73 (1924).

20. Even prior to *Jones* and *Apprendi*, several modern cases cited this reason as a basis for recognizing as elements facts that boost what would otherwise be misdemeanor penalties to felony levels. *See, e.g.*, United States v. Stone, 139 F.3d 822, 837-38 (11th Cir. 1998); United States v. Deisch, 20 F.3d 139, 147 (5th Cir. 1994); United States v. Sharp, 12 F.3d 605, 606 (6th Cir. 1993); *see also* OHIO REV. CODE §§ 2921.331(B), 2921.331(C)(2) (providing that the misdemeanor of failing to stop for an officer is enhanced to a felony offense if injury to a person or property results). These statutes have been interpreted by Ohio courts, following *Jones*, as setting forth two separate offenses. *See* State v. Morton, No. C-980391, 1999 WL 252631 (Ohio App. Apr. 30, 1999) (unpublished opinion) (finding that a felony enhancement is a separate element, not a sentencing factor).

21. Of the numerous cases cited by Justice Thomas as support for his rule, in only two did the Court invalidate an indictment or judgment. Of those two, one barred the imposition of a fine *in addition to* the sentence absent proof of property embezzled when the statute required the fine to be based upon the value of what was embezzled. United States v. Woodruff, 68 F. 536 (S.D.N.Y. 1895). The other held that the government had to aver whether a burglary took place during the night or during the day, when the penalty range—both maximum and minimum—changed based on that fact. Jones v. State, 63 Ga. 141, 144 (1879).

Numerous early statutes did designate minimum sentences based on the presence of aggravating facts, but these aggravating facts had the effect of raising the allowable maximum sentence as well. Several statutes mandated a specific sentence depending on the aggravating fact. For example, fines were set at a particular amount depending upon the value of property involved.[22] Mandatory penalties often followed a second offense.[23] More common were statutes that designated a higher *range* of acceptable penalties once an aggravating fact was established, raising the maximum allowable sentence as well as mandating a higher minimum sentence.[24] Other statutes raised the maximum allowable penalty without changing the minimum sentence.[25] When choosing sentences within allowable ranges set by statute, judges of the nineteenth century

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22. *See, e.g.*, *Woodruff*, 68 F. at 58. This was true in states that allowed jury sentencing. *See, e.g.*, State v. Garner, 8 Port. 447 (Ala. 1839) (reversing judgment for killing livestock because of the failure to allege in the indictment the value of property destroyed, noting that "the statute makes the value of property maliciously injured or destroyed, the basis of the verdict, and permits the jury to go to the extent of fourfold its value"); 1789 Va. Acts ch. XXVI § 3 (punishing a juror who takes a bribe, and fining him ten times "as much, as he shall have taken"). This was true as well in states where judges pronounced the sentence in non-capital cases. *See, e.g.*, Clark v. People, 1 Scam. 117 (Ill. 1833) (reversing conviction under an arson statute that imposed a fine equal to the value of the property burned, because the indictment failed to allege the value of the property destroyed and should have been quashed); Richey v. State, 7 Blackf. 168 (Ind. 1844) (same, where the fine ceiling was set at double the value).

23. In 1790, for example, Pennsylvania required death upon a second conviction for an offense carrying a possible death sentence. 1790 Pa. Laws 305. Four years later, this was changed to mandatory life in prison, with a mandatory sentence of twenty-five years for second convictions for other offenses. 1794 Pa. Stat. at Large 179; *see also Ex parte* Seymour, 31 Mass. 40 (1833) (interpreting an 1817 statute providing for imprisonment for life upon third conviction); 1796 N.Y. Laws 669 (life in prison upon second offense).

24. *See, e.g.*, 1811 Ga. Laws 40. Larceny in Georgia in 1811 carried six months to one year if the value of stolen property was ten dollars or less, one to three years if the value was more than ten dollars, and three to seven years if the stolen property was a horse. *Id.* at 46. After 1811, a second conviction for maiming raised the sentence range in Georgia from three to seven years to five to twelve years; those convicted a second time for stabbing faced five to ten years instead of two to five. *See id.* 44-45; *see also* 1786 Mass. Acts 459 (second conviction for counterfeiting punished by hard labor for life or any term of years).

25. In Connecticut, after 1801, a second conviction for arson not endangering lives boosted the sentence from any term up to seven years, to "any limited period, or during his natural life." 1801 Conn. Acts 556. After 1815, stealing from a person carried up to two years, but if one stole from a person gathered to extinguish a fire, the penalty jumped to a five-year maximum. 1815 Conn. Acts 207. Massachusetts statutes in 1806 punished entering without breaking with up to three years; with the additional elements of burglary, the penalty was hard labor for life; if armed, the penalty was death. 1806 Mass. Acts 121; *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 874 & n.41 (2000) (noting that, until 1836 in Massachusetts, other than mandatory death sentences for very serious crimes and mandatory life sentences for robbery, "none of the typical common-law offenses called for a minimum sentence"). In Maine, the higher penalty that attached to the rape of a girl under ten years of age was a prison sentence of hard labor rather than the option of jail, which was available to those convicted of ravishing girls ten and older. *See* State v. Fielding, 32 Me. 585 (1851).

undoubtedly considered various aggravating and mitigating features that were not found by the jury's verdict.[26]

In sum, with the possible exception of provisions governing increased penalties for prior offenders,[27] statutes setting a mandatory minimum sentence but not changing the maximum sentence upon proof of an aggravating fact do not appear in the codes of the early nineteenth century.[28] Statutes that required a certain minimum sentence to follow from proof of an aggravating feature invariably increased simultaneously the maximum penalty the defendant faced. We can only guess how early nineteenth-century judges would have regarded facts other than prior convictions that, by

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26. *See, e.g.*, United States v. Lancaster, 26 F. Cas. 854, 856 (D. Ill. 1841) (No. 15,556) (noting in an embezzled mail case that it was not necessary to include in the indictment a description of bank notes taken: "The taking of these notes does not constitute the principal offence. It adds greatly to the enormity of the act, and *increases the punishment*. But the main offence is the violation of the sanctity of the mail . . . .") (emphasis added); United States v. Herbert, 26 F. Cas. 284 (C.C.D.C. 1836) (No. 15,354); 2 BISHOP, *supra* note 12, at 421 (explaining that, when a statute conditioned a higher sentence upon proof of a certain value of property, and the government proved an amount higher than the threshold value, the jury did not need to specify the actual amount, even if it "might have a practical effect upon the sentence when pronounced by the court") (citing McCorkle v. State, 14 Ind. 39 (1860); State v. Bunten, 11 S.C.L. (1 Nott & McC.) 441 (1820)).

This seemed to be contemplated by the statutory provisions themselves. *See, e.g.*, 1784 S.C. Acts 53; 4 Stat. 775 (1835) (punishing mutiny with a "fine not exceeding two thousand dollars, and by imprisonment . . . not exceeding ten years according to the nature and aggravation of the offense"); *see also* 1806 Mass. Acts 121 (providing for punishment within the stated sentence maxima "as the Justices of the said Court, before whom the conviction may be, shall sentence and order according to the aggravation of the offense"); 1786 Pa. Laws 283 (providing that the penalty for all non-capital crimes formerly punished by maiming, pillory, whipping, or imprisonment for life, would be a fine and hard labor for "any term not exceeding two years, which the court before whom such conviction shall be, may and shall in their discretion think adapted to the nature and heinousness of the offense"). This sentence maximum was extended to seven years in 1807. *See* Rogers v. Commonwealth, 5 Serg. & Rawle 462, 466 (Pa. 1819).

27. Legislation designating mandatory minimum penalties upon proof of prior offense—without raising the maximum penalty allowed—does appear later on. Prior offenders in several states faced higher minimum sentences, usually accompanied by higher maximum exposure as well, see *supra* note 23, but not always. *See* Fisher, *supra* note 25, at 1031, 1034-35 & nn.655-57, 681 (noting that New York and California enacted mandatory minimum sentences for second offenders in 1829 and 1872, respectively).

28. As Professor George Fisher documents in his path-breaking article, the mandatory minimum sentence, which limited judicial discretion to dispense leniency, was a key catalyst in the rise of plea bargaining and became much more popular in the twentieth century. Fisher, *supra* note 25, at 1072-73. By 1960, mandatory minimums varying by offense were enacted in twenty-nine states. *See* Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1140 (1960) [hereinafter Note, *Statutory Structures*]; *see also* MICHAEL TONRY, SENTENCING MATTERS 146-47 (1996) (noting that since 1975 mandatory sentencing laws have been America's most popular sentencing "innovation;" between 1975 and 1983, forty-nine states adopted mandatory sentencing laws for offenses other than murder or drunk driving; by 1991, the United States had enacted twenty new mandatory penalty provisions; by 1994, most states had several mandatory sentences).

statute, triggered mandatory minimum sentences but not higher maximum penalties. Would they have considered such facts equivalent to those facts that triggered higher maximum sentences, as elements of the offense? Or would they have considered them equivalent to facts that judges routinely considered in setting the sentence within the maximum range, as mere sentencing factors that need not be alleged in the indictment and proven to a jury beyond a reasonable doubt? No such guesswork is necessary for the more limited rule, articulated by Justice Stevens in the *Apprendi* Court's majority opinion.

### *B. Preserving Precedent and Sentencing Reform*

In addition to its clear historical support, a significant advantage of Justice Stevens' narrow *Apprendi* rule is that it admirably harmonizes years of diverse decisions regarding legislative control of substantive criminal law, including decisions that uphold legislative efforts to control judicial discretion in sentencing. A brief review of these decisions provides a useful summary of the precedent around which post-*Apprendi* litigators must navigate.

Under Justice Stevens' narrow rule, any fact—other than recidivism—that increases the maximum statutory penalty must be submitted to the jury for a finding beyond a reasonable doubt. This rule helps explain the difference between the results in *Williams v. New York*[29] and *Walton v. Arizona*[30] on the one hand, and *Specht v. Patterson*[31] on the other. The judge in *Williams* raised the defendant's sentence to death from the life imprisonment recommended by the jury, based on his conclusion at sentencing that *Williams* possessed "a morbid sexuality" and was a "menace to society."[32] The Supreme Court found the judge's action acceptable because the statute in New York already designated death as the maximum penalty for the offense of first-degree murder found by the jury. Similarly, in *Walton*, the Court held that allowing the judge to determine the aggravating circumstances necessary to impose the death penalty does not violate the Sixth or Eighth Amendments, so long as the sentence of death is specified by statute as the maximum penalty for the offense proven beyond a reasonable doubt to the jury at trial. By contrast, the Court held that it was unaccept-

29. Williams v. New York, 337 U.S. 241 (1949).
30. Walton v. Arizona, 497 U.S. 639 (1990).
31. Specht v. Patterson, 386 U.S. 605 (1967).
32. *Williams*, 337 U.S. at 244.

able for the judge in *Specht* to increase Specht's sentence from a maximum of ten years to an indeterminate term of imprisonment of one day to life, based on his finding that the defendant "constitute[d] a threat of bodily harm to members of the public" or was "mentally ill."[33]

Likewise, the holding in *Apprendi* leaves intact *In re Winship*[34] and *Mullaney v. Wilbur*,[35] as well as *Leland v. Oregon*,[36] *Patterson v. New York*,[37] and *Martin v. Ohio*.[38] All of these decisions examined the ability of a legislature to transform an element of a criminal offense into an affirmative defense, thus relieving the prosecutor of the burden of proving the fact in question. As Justice Stevens suggests, a formal rule, consistent with the holding of *Apprendi*, emerges from these cases: Due process will not bar legislatures from designating as affirmative defenses to murder proof of self-defense, insanity, and provocation or emotional distress, at least where the legislature makes this designation clear on the face of a statute.[39]

The sharply divided *McMillan v. Pennsylvania*[40] decision is also fully consistent with *Apprendi* because McMillan's five-year mandatory minimum sentence, based upon a judicial finding of visible possession of a firearm, did not exceed the ten-year statutory maximum penalty for the underlying felony of aggravated assault.[41] For the same reason, the *Apprendi* rule preserves the United States

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33. *Specht*, 386 U.S. at 607.

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

35. Mullaney v. Wilbur, 421 U.S. 684 (1975).

36. Leland v. Oregon, 343 U.S. 790 (1952) (holding that due process permitted the State of Oregon to require a defendant to prove his insanity beyond a reasonable doubt to obtain an insanity acquittal).

37. Patterson v. New York, 432 U.S. 197 (1977) (five-three decision).

38. Martin v. Ohio, 480 U.S. 228 (1987) (five-four decision) (finding that states may impose upon a defendant the burden of proving self-defense, despite the fact that this same evidence may disprove premeditation, an element of the charged offense).

39. *See* Apprendi v. New Jersey, 120 S. Ct. 2348, 2360 n.12 (2000). The Maine statute at issue in *Mullaney*, as well as the New York statute at issue in *Patterson*, had precisely the same effect—to shift the burden of proof on heat of passion or extreme emotional distress from the state to the defendant. Maine had retained the common law's heat of passion mitigator, while New York adopted the ALI Model Penal Code's extreme emotional distress analogue. MODEL PENAL CODE § 201.3 cmt. at 46-48 (Tentative Draft No. 9, 1959). The New York version is acceptable under *Apprendi* because the legislature did not include "malice" as an element of the offense of murder; the Maine version is unconstitutional because the legislature did include "malice" as an element. Admittedly, this reconciliation involves some reinterpretation of the *Mullaney* decision.

40. McMillan v. Pennsylvania, 477 U.S. 79 (1986) (five-four decision).

41. That fact distinguishes *McMillan* from *Jones v. United States*, 526 U.S. 227 (1999), and *United States v. Castillo*, 530 U.S. 120 (2000), where the enhancements did increase the statutory sentence ceiling and thus had to be considered elements.

Sentencing Guidelines and is consistent with recent cases such as *Witte v. United States*,[42] *Edwards v. United States*,[43] and *United States v. Watts*.[44] That is, the narrow *Apprendi* rule does not threaten presumptive sentencing schemes such as the Guidelines, so long as the sentences dictated by statute, court rule, or guideline are within the maximum sentence authorized by statute for the offense.

Somewhat more difficult to reconcile with *Apprendi* is *Almendarez-Torres v. United States*,[45] in which the Court rejected a Fifth Amendment challenge to a significant penalty enhancement beyond the sentence maximum specified for the offense due to the offender's prior conviction. In *Almendarez-Torres*, the Court held that the fact of a prior conviction, even when it increases the maximum penalty for a crime, need not be alleged in the indictment with the last offense, at least in a case where the defendant pleads guilty to that last offense and admits his prior conviction.[46] One method of reconciling the *Apprendi* rule with *Almendarez-Torres*—suggested by Justice Stevens' opinion—is simply to recognize an exception to *Apprendi*'s mandate for recidivism generally. This would allow legislatures to continue authorizing stiffer maximum sentences for prior offenders, even when the defendant's prior conviction is not formally charged, and even when the prior conviction is proven only by a preponderance of the evidence to a judge following conviction of the underlying offense.

Alternatively, the Court may conclude that when a prior conviction triggers a higher maximum sentence, an accused has the right to insist that the government prove the prior offense beyond a reasonable doubt to a jury, but no right to insist that the prior of-

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42. Witte v. United States, 515 U.S. 389 (1995) (providing an enhancement for uncharged drug conduct within statutory sentence range for crime of conviction).

43. Edwards v. United States, 523 U.S. 511, 515 (1998) (holding that a judge may determine the type and quantity of drugs at a sentencing hearing where the sentence imposed did not exceed "the maximum that the statutes permit[ted] for a cocaine-only conspiracy").

44. United States v. Watts, 519 U.S. 148 (1997) (per curiam) (providing enhancement for acquitted conduct within statutory maximum sentence for the crime of conviction).

45. Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998) (upholding 8 U.S.C. § 1326(b)(2) (1994), which authorizes a twenty-year term of imprisonment for alien re-entry if initial deportation was for commission of an aggravated felony, and which authorizes a penalty provision despite an otherwise applicable statutory maximum of two years' imprisonment).

46. Almendarez-Torres had admitted the existence of three earlier convictions, and pleaded guilty to the indictment. *Id*. at 227. Therefore, the issue of whether the fact of recidivism must be submitted to a jury for a finding beyond a reasonable doubt never arose.

fense be alleged in the original indictment.[47] In other words, the Court could interpret the Constitution to require the government to treat recidivism as an element for some purposes (jury and burden of proof) but not others (indictment).[48] This construction of *Almendarez-Torres* would require less departure from the rule in *Apprendi*, but would nevertheless invalidate prior offender laws across the nation that allow the government to prove contested prior convictions without a jury.[49] It may also require reconsideration of several Supreme Court decisions that have exempted the adjudication of prior convictions from other procedural protections typically followed when adjudicating offenses, such as freedom from double jeopardy.[50]

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47. Adding Justice Thomas' vote to the four dissenting votes in *Almendarez-Torres* means that at least five current justices have expressed their dissatisfaction with the holding in that case.

48. This would preserve those cases that date back to at least 1912 permitting the existence of a prior conviction to be litigated subsequent to conviction, even when an information is not filed until after the conviction on the underlying offense. *See* Oyler v. Boles, 368 U.S. 448, 455-56 (1962) (holding that the defendant was not denied due process when he was notified, by information, of the habitual offender penalty only after being convicted of the substantive offense, in a case where he had the right to trial by jury on the fact of prior conviction, but admitted his prior conviction); Graham v. West Virginia, 224 U.S. 616, 630 (1912) (upholding an habitual offender sentence although the prior offense was included in a separate information rather than the original charge, in a case where the jury determined the prior offense); *see also In re* Ross, 19 Mass. 165 (1824) (holding that the existence of a prior conviction need not be presented to the grand jury because the inquiry was not whether the offense had been commited, rather, the inquiry was whether the defendant had been convicted of the offense).

49. *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.6(a) (1999) (summarizing variations in habitual offender laws); *see also* Harold Dubroff, Note, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332, 347-48 (1965) (noting that eight states provided at the time for a determination of recidivist status without a jury).

50. In *Monge v. California*, for example, the Court held that the Double Jeopardy Clause did not bar, after appellate reversal for insufficient evidence, a new sentencing hearing on the issue of whether to increase a defendant's sentence from the statutory maximum of seven years to eleven years based on his prior convictions. Monge v. California, 524 U.S. 721, 729-30 (1998). The Court reasoned that the fact of the prior conviction was a sentencing enhancement and not an element of a more aggravated criminal offense. *Id*. at 730-32; *see also* Parke v. Raley, 506 U.S. 20, 37 (1992) (Blackmun, J., concurring) (upholding a statute that shifted the burden of proof on the validity of prior convictions to the defendant); Spencer v. Texas, 385 U.S. 554, 566-68 (1967) (upholding a simultaneous trial of the substantive offense and prior convictions); McDonald v. Massachusetts, 180 U.S. 311 (1901) (rejecting double jeopardy and ex post facto challenges to an habitual offender sentence, in a case where the prior offense was pled in the indictment and found by the jury). In *Spencer v. Texas* , the Court noted that:

> an habitual offender proceeding can be instituted even after conviction on the new substantive offense. The method for determining prior convictions varies also between jurisdictions affording a jury trial on this issue, and those leaving that question to the court . . . . A determination of the "best" recidivist trial procedure necessarily involves a consideration of a wide variety of criteria . . . . To say that the two-stage jury trial . . . is . . . the fairest . . . is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment.

In contrast to the majority opinion, which is able to take cases "at odds with each other" and turn them into a "coherent body of caselaw,"[51] the more expansive approach contained in Justice Thomas' concurring opinion wreaks doctrinal havoc. Justice Thomas, joined by Justice Scalia, suggests that

> if the legislature . . . has provided for setting the punishment of a crime based on some fact . . . that fact is also an element . . . . One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.[52]

Justice Thomas not only openly advocates the reversals of *McMillan*[53] and *Almendarez-Torres*,[54] but his broader test also under-

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*Spencer*, 385 U.S. at 566-68 (citations omitted).

51. Jones v. United States, 526 U.S. 227, 254 (1999) (Kennedy, J., dissenting) (taking the opposite view, however, on the issue of which position is the coherent one).

There is one Supreme Court case that we think the *Apprendi* decision places at risk. In *Libretti v. United States*, the Court held that FED. R. CRIM. P. 11(f), which requires that a trial judge determine whether a factual basis exists for a guilty plea, did not require that the judge find those facts underlying the stipulated asset forfeiture embodied in the agreement because criminal forfeiture was part of the sentence and not a separate crime. Libretti v. United States, 516 U.S. 29, 38-39 (1995). The substantive federal criminal statute to which the defendant pled guilty, 21 U.S.C. § 848(a) (1994), specifically includes criminal forfeiture as part of the penalty. *Id*. at 39 ("[A] person convicted of engaging in a continuing criminal enterprise 'shall be sentenced . . . to the forfeiture prescribed in section 853.' "). The Court noted that the same was true for criminal forfeiture based upon violation of RICO. *Id*. (18 U.S.C. § 1963 provides that forfeiture is imposed "in addition to any other sentence" for a violation of RICO.). The mere inclusion of "forfeiture" as part of the penalty for violating CEE or RICO, however, is not sufficient to avoid an *Apprendi* challenge to the adjudication at sentencing of the forfeitability of assets, unless the statute is interpreted as providing a statutory maximum sentence that includes the forfeiture of all of the defendant's assets. Yet these provisions do not authorize the forfeiture of all assets. Instead, they authorize the forfeiture of only those assets that meet certain criteria, a scheme something like the one set out by larceny statutes that condition the amount of fine on the amount of loss sustained or the value of the property stolen. *See supra* notes 14 & 22. Unlike the RICO and CCE statutes, the controlled substances statute, 21 U.S.C. § 841, and the money laundering and currency reporting statutes, 18 U.S.C. §§ 1956, 1957, and 31 U.S.C. §§ 5313, 5316, do not contain an express reference to forfeiture as part of their penalties. Even if the government succeeds in arguing that criminal forfeiture is part of the stated statutory maximum for these underlying crimes, it would be hard-pressed to claim that each offense may be punished by the forfeiture of up to *all* of the defendant's assets. Rather, the amount forfeited is contingent, by statute, upon a showing that each particular item to be forfeited is one of the following: proceeds of a controlled substance violation, 21 U.S.C. § 853(a)(1); used to facilitate a controlled substance violation, 21 U.S.C. § 853(a)(2); or involved in or traceable to a money-laundering or currency reporting violation, 18 U.S.C. § 982(a)(1). These factual showings arguably must be treated as elements after *Apprendi*. Corresponding civil forfeiture statutes, 21 U.S.C. § 881 and 18 U.S.C. § 981, may, in any event, provide the means for the government to seize and retain the same assets that it seeks under criminal forfeiture provisions. *See* Susan R. Klein, *Civil* In Rem *Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 195-207, 217 (1996).

52. Apprendi v. New Jersey, 120 S. Ct. 2348, 2369 (2000) (Thomas, J., concurring).

53. *Id*. at 2378-80 (Thomas, J., concurring).

54. *Id*. at 2371-73 (Thomas, J., concurring) (listing cases establishing the common-law tradition that the fact of recidivism was an element of an aggravated criminal offense).

mines *Walton*,[55] *Patterson*, affirmative defenses generally, the Guidelines,[56] and similar presumptive sentencing systems in the states.[57]

Under Justice Thomas' approach, the sentencing enhancement in *McMillan* should have been considered an element because "the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum 'entitl[es] the government' . . . to more than it would otherwise be entitled (5 to 10 years, rather than 0 to 10 years . . .)."[58] This rationale also undermines *Patterson*, in which the Court rejected a challenge to the New York statute that keyed the punishment for homicide to a particular fact: whether the defendant acted under the influence of extreme emotional distress. The prosecution was entitled under the statute to the higher penalty for murder, but not if the defendant acted under such distress. It therefore follows, using the approach advanced by Justice Thomas, that the absence of such distress is an element of the offense.

Justice Thomas, who does not mention *Patterson* in his opinion, attempts to sidestep the impact of his approach on the continued viability of affirmative defenses by arguing that "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)."[59] But his opinion offers no means by which to distinguish aggravating facts from mitigating facts. If legislative labels control, then there is no judicially enforceable constraint on a legislature's ability to bypass the consequences of the rule Justice Thomas proposes.[60]

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55. *Id*. at 2380 (Thomas, J., concurring).

> I need not in this case address the implications of the rule that I have stated for the Court's decision in *Walton v. Arizona* . . . . *Walton* did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element.

*Id*. (citation omitted).

56. *Id*. at 2380 n.11 (Thomas, J., concurring) ("It is likewise unnecessary to consider whether (and, if so, how) the rule regarding elements applies to the Sentencing Guidelines.") (citing Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)).

57. *See, e.g.*, Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 427 n.2 (2000) (listing seventeen states using guidelines and eight states considering the adoption of guidelines).

58. *Apprendi*, 120 S. Ct. at 2379 (Thomas, J., concurring).

59. *Id*. at 2368.

60. Justice Stevens, in his *McMillan* dissent, also dismissed the difficulty of distinguishing between aggravators and mitigators. McMillan v. Pennsylvania, 477 U.S. 79, 100 (1986) (Stevens, J., dissenting). He seemed content to accept the legislature's chosen label, arguing that the democratic process would constrain excesses. *Id*.

Assuming that the legislative characterization is *not* determinative, it is fruitless to ask in the abstract whether the defendant's provocation increases the punishment from that for manslaughter to that for murder, or, rather, decreases the punishment for murder to that for manslaughter, without a basis for determining whether murder or manslaughter is the baseline offense.[61] As Justice O'Connor notes in her *Apprendi* dissent, whether a fact is responsible for an increase or a decrease in punishment may rest "in the eye of the beholder."[62] Although it may be possible to formulate a method for determining a constitutionally significant baseline offense for each set of related offenses, the approach of the concurrence poses a much more significant challenge for the Court in reconciling past precedent than does the narrow rule advanced by Justice Stevens.

Under the analysis of the concurring opinion in *Apprendi*, each one of the myriad facts that the United States Sentencing Guidelines and other presumptive sentencing schemes require a judge to take into account becomes an element that must go to the jury. These facts, like those that trigger mandatory minimum sentences, are, using Justice Thomas' phrase, "by law the basis for imposing or increasing punishment;" they empower the prosecution "to require the judge to impose a higher punishment than he might wish."[63] Regardless of whether one views the Sentencing Guidelines

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61. Justice O'Connor used this example to make the same point.

> [T]he Wisconsin statute considered in *Lacy v. State*, 15 Wis. 13 (1862), could plausibly qualify as either increasing or mitigating punishment on the basis of the same specified fact. There, Wisconsin provided that the willful and malicious burning of a dwelling house in which "the life of no person shall have been destroyed" was punishable by 7 to 14 years in prison, but that the same burning at a time in which "there was no person lawfully in the dwelling house" was punishable by only 3 to 10 years in prison. WIS. REV. STAT., ch. 165, § 1 (1858). Although the statute appeared to make the *absence* of persons from the affected dwelling house a fact that mitigated punishment, the Wisconsin Supreme Court found that the *presence* of a person in the affected house constituted an aggravating circumstance.

*Apprendi*, 120 S. Ct. at 2390 (O'Connor, J., dissenting).

62. *Id*.

63. *Id*. at 2379 (Thomas, J., concurring). For example, though Congress has set the statutory penalty range for mail fraud, pursuant to 18 U.S.C. § 1343, at zero to five years, a judge may wish to sentence the defendant to zero to six months in prison. This is nominally permissible. *See* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(a) (1998). However, where the prosecutor can establish that the defendant was the organizer of the mail fraud scheme, the prosecutor can require that the judge impose the higher punishment mandated by section 3B1.1 of six to twelve months in prison. *Id*. § 3B1.1. Likewise, where the prosecutor can establish that the crime involved a fraud at a certain value level, she can insist that the judge impose the higher penalty of fifty-one to sixty-three months in prison. *See id*. § 2F1.1(a). Thus, Justice Thomas' test requires that these be treated as three separate offenses, each with a fact that increases the prescribed range of penalties to which the defendant is exposed, and thus a fact that must be submitted to the jury for a finding beyond a reasonable doubt. Indeed, Justice Thomas' test would turn every

as progressive legal reform that brings needed "proportionality, uniformity, and administratability" to criminal sentencing,[64] or as draconian legislation that replaces rationality and considered judgment with inflexible procedures largely controlled by prosecutors,[65] all will agree with Justice O'Connor's prediction that for the Court to invalidate the Guidelines and other presumptive-sentencing schemes would be a "colossal" upheaval for the criminal justice system.[66] In sum, Justice Stevens' narrow rule is pragmatic,

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federal offense into multiple offenses, each differing by specific characteristics of the offense (value, quantity, injury, use of a weapon), characteristics of the offender (the defendant's role in the offense, whether he selected a vulnerable victim, whether he abused a position of trust or used a special skill, whether he exploited a minor), and the criminal history of the defendant. *See Apprendi*, 120 S. Ct. at 2397-98 (Breyer, J., dissenting).

64. *Id*. at 2399 (Breyer, J., dissenting). Other defenders of the United States Sentencing Guidelines include Frank O. Bowman III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299 (2000) (suggesting that the Guidelines are a notable improvement over the prior federal sentencing scheme).

65. Critics of the Guidelines are too numerous to list here. Representatives include United States v. Harrington, 947 F.2d 956, 963-64 (D.C. Cir. 1991) (Edwards, J., concurring) (calling the Sentencing Guidelines a "farce," and suggesting that they have not eliminated sentencing discretion but have transferred it from district judges to prosecutors and probation officers); KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (dismissing the Guidelines as a failure and suggesting return to judicial hegemony); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Gerald W. Haney, *The Reality of Guideline Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991) (arguing that the Guidelines ignore crucial distinctions among offenders, and that they frequently group offenders on the basis of meaningless criteria); Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587 (1992) (criticizing the Guidelines' complexity).

66. *Apprendi*, 120 S. Ct. at 2395 (O'Connor, J., dissenting). In addition to contesting the analysis of history and precedent offered by the majority, the dissenting justices in *Apprendi* rely upon arguments from policy. Justice Breyer predicts that defendants will be made worse off under the Court's rule. *Id*. at 2401 (Breyer, J., dissenting) (finding that the result in *Apprendi* might "mean significantly less procedural fairness, not more"). He predicts that mandatory minimum sentences will be more attractive to legislators once they are deprived of the ability to specify increased penalties upon judicial findings. *Id*. We disagree. Legislatures inclined to insist upon mandatory minimum sentences were not prevented or discouraged from doing so before the *Apprendi* rule, and *Apprendi* gives them no additional reason to choose mandatory minimum sentences over more discretionary schemes. For additional predictions of prejudice to defendants, see Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors Into Offense Elements: The* Apprendi *Debate*, 12 FED. SENT. REP. 197 (2000).

Also making the price of historical fidelity too high for the dissenters in *Apprendi* is the great disruption of existing sentences that they predict will follow from the decision. In another article, we examine this forecast in more detail and conclude that, while there may indeed be some confusion as courts work through appeals and petitions for collateral relief by defendants sentenced under *Apprendi*-tainted laws, absent an unusual decision to apply *Apprendi* retroactively on collateral review, or to extend it to prohibit judicial determination of facts triggering mandatory sentences within the statutory maximum, the task of adjusting existing convictions and sentences to comply with the *Apprendi* rule should be of limited duration and scope. *See* King & Klein, *supra* note 5. Judging from early returns, courts seem to be handling most of these issues fairly predictably. *Id*. The costs of such a limited realignment of judgments are, in any event,

reflects historical practice, and preserves the Court's precedent as well as the experiments in legislative control of judicial discretion in sentencing that have flourished in the latter half of the twentieth century.

### *C. Beyond Formalism: Real Limits on Legislative Choice*

A rule that maintains fidelity to historical practice and prior decisions is commendable, but is considerably less compelling if its only attributes are consistency and predictability. Justice Stevens does not articulate clearly the theoretical basis for the rule in *Apprendi*. As a result, it is hard to fault the dissenters for questioning the Court's rule, particularly when it seems to be so easily circumvented by rearranging section symbols on a page or deftly editing existing statutory language. As Justice Kennedy observed in *Jones*, "Congress could comply with this principle by making only minor changes of phraseology that would leave the statutory scheme, for practical purposes, unchanged."[67] On the particular facts of *Jones*, he noted that this would merely require increasing the prescribed sentence for carjacking to life imprisonment and providing that the judge shall decrease the sentence to twenty-five years where no death resulted, and fifteen years where no serious bodily injury resulted. A rule forcing legislatures to write criminal statutes in one way as opposed to another, when both achieve the same results, requires some explanation.

The underlying value advanced by the Court's holding is not, contrary to suggestions in *Jones*, related to the jury's ability to engage in nullification, or "pious perjury."[68] As we discuss in more detail in Part III.A.2 of this Article, the Court has not hesitated to erode this ability of the jury to calibrate culpability to penalty in other ways. The complete demise of this jury function makes its resurrection as the unarticulated basis for the *Apprendi* rule particularly implausible.

Nor is the core value protected by the rule in *Apprendi* the individual right of a defendant to receive adequate notice of the

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much less significant than the burdens that would follow from the rule proposed by Justice Thomas.

67. Jones v. United States, 526 U.S. 227, 267 (1999) (Kennedy, J., dissenting).

68. Blackstone used this term to describe the jury's decision to convict of a lesser offense despite clear proof of guilt on a higher offense. 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 238-39 (1769). The Court referenced this practice in *Jones*, 526 U.S. at 245, in the course of explaining why it might be unconstitutional to allow a judge to determine the maximum-enhancing facts at sentencing.

penalty he is facing. The justices at times phrased their discussion as if the key to the decision was providing adequate information to the rational-actor-criminal or the defendant facing trial. Justice Stevens referred to the "defendant's ability to predict with certainty the judgment from the face of the felony indictment."[69] Justice Scalia worried that a "criminal [could] get *more* punishment than he bargained for when he did the crime."[70] Justice Scalia noted that it is only fair "to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years—and if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge . . . ."[71] However, these concerns about fair notice were not central to the decision at all. There was no claim in *Apprendi* that the defendant was blindsided by the punishment he faced. Indeed, he reserved the right to challenge the enhancement in his plea bargain. Neither did the case present the Court with a need to resolve the application of *Apprendi* to indictments.

Instead, the key to *Apprendi* is captured by the following cryptic sentences in a footnote:

> [S]tructural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged "to make its choices concerning the substantive content of its criminal laws with full awareness of the consequence, unable to mask substantive policy choices" of exposing all who are convicted to the maximum sentence it provides . . . . So exposed, "[t]he political check on potentially harsh legislative action is then more likely to operate."
>
> In all events, if such an extensive revision of the State's entire criminal code were enacted for the purpose the dissent suggests, or if New Jersey simply reversed the burden of proof of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not . . . ), we would be required to question whether the revision was constitutional under this Court's prior decisions.[72]

This footnote explains why the formalism of the *Apprendi* rule is not pointless after all. Its meaning is two-fold. First, the rule adds an additional hoop through which legislators must jump before taking action that disadvantages a politically powerless

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69. *Apprendi*, 120 S. Ct. at 2356 (citing 4 BLACKSTONE, *supra* note 68, at 369-70 ("[T]he court must pronounce that judgment, which the law hath annexed to the crime.")).

70. *Id*. at 2367 (Scalia, J., concurring).

71. *Id*.

72. *Apprendi*, 120 S. Ct. at 2363 n.16 (citing Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975)).

group—those accused of crime.[73] In this way, it is not unlike decisions in recent years demanding clear statements from legislatures regarding other aspects of the criminal law,[74] decisions that were also designed to promote "full awareness" of the "substantive content" of legislative choices. Legislators are free to lessen the government's burden in obtaining punishment by crafting the substantive law so that judges rather than juries select higher penalties for an individual offender, but they must be clear with their constituents and their fellow lawmakers about the degree of discretion they are delegating to judges and about the extent of punishment they are authorizing for an offense.

The *Apprendi* Court appeared to assume that the rule will encourage legislative debate, and that the rule may even help to prevent a constitutional showdown between the judicial and legislative branches. When legislators are forced to admit that the only thing standing between a defendant convicted of a given offense and a "harsh" maximum sentence is a single judge's finding by a mere preponderance, they and their constituents, the argument presumes, will be more likely to recognize when such a sentence may be disproportionate to the offense proven to the jury.[75]

The second explanation behind the Court's "formalism" does not depend on this optimistic view of legislative restraint. It is contained in the Court's warning that, even if a legislature clearly states its intent to reduce the barriers to punishment by shrinking offense definitions and expanding sentences, some particularly draconian efforts to impose punishment may be struck down as violations of due process.[76] We believe this second admonishment is a viable threat, and will soon become the focus of intense litigation. For, as we explain below, right behind the wave of challenges to convictions and sentences under existing statutes affected by *Apprendi*, another wave of challenges awaits. Defendants will ask

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73. On the tendency of legislatures to favor prosecutorial interests, see generally Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993); Stuntz, *Uneasy Relationship*, *supra* note 6.

74. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (requiring a clear statement from a legislature that it intends to dispense with the common-law presumption of *mens rea* in criminal offenses); Missouri v. Hunter, 459 U.S. 359 (1983) (finding that clear legislative intent can override the double jeopardy presumption against multiple punishment for the same offense in a single trial); *see also* Regents of the Univ. of California v. Doe, 519 U.S. 425 (1997) (requiring a clear statement of congressional intent to override state sovereign immunity).

75. Indeed, Justice Stevens made this argument more explicitly in his *McMillan* dissent. McMillan v. Pennsylvania, 477 U.S. 79, 95-104 (1986) (Stevens, J., dissenting). *See infra* note 82 for scholars supporting this view.

76. *See supra* note 72 and accompanying text.

courts to strike down, as violations of due process, statutes that mandate minimum penalties upon a finding of fact within sentence ranges that are extraordinarily broad, statutes that shift what were once elements to affirmative defenses, and statutes that increase maximum sentences and shift what were once elements into sentencing enhancements. Before discussing why and how due process may limit such legislative experimentation, we first defend the prediction that this kind of experimentation will occur.

## II. WHY COURTS ARE LIKELY TO BE ENLISTED IN TESTING POST-*APPRENDI* REVISION OF SUBSTANTIVE CRIMINAL LAW

We are certain that litigation testing revisions of substantive criminal law will be with us soon, despite the assurances of Justice Stevens that this sort of legislative action is only a "remote" possibility.[77] There will be many opportunities for legislators to respond to *Apprendi* by modifying their criminal codes. As illustrated by Appendices B and C of this Article, the carjacking and hate crime statutes allowing judges to make findings that trigger higher sentences in *Jones* and *Apprendi* are not unique. Dozens of state and federal statutes suffer from the same flaw. The volume of provisions in which legislatures delegate to the judge the finding of maximum-enhancing facts suggests that this allocation of power away from the jury to the judge will be considered worth salvaging for at least some offenses.

Numerous incentives to take advantage of this opportunity are present as well. Trial-like adjudication is more costly, more time-consuming, and riskier for the government than judicial determinations at less formal hearings. The ever-present need to appear "tough on crime" encourages legislators to present themselves as supporters of laws that impose swifter, more severe punishment, at less cost.[78] Among those who have observed that legislatures are

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77. *Apprendi*, 120 S. Ct. at 2363 n.16.

78. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 211, n.12 (1977) ("[T]he impulse to legislators, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualifiedly general terms, and leave only to sentence the adjustment between offenses of lesser and greater degree. In times when there is also a retrogressive impulse in legislation to restrain courts by mandatory sentences, the evil would be compounded.") (quoting People v. Patterson, 347 N.E.2d 898, 909-10 (N.Y. 1976)); JOHN HART ELY, DEMOCRACY AND DISTRUST 172-73 (1980) (defending the Warren Court's criminal procedure decisions on the grounds that those accused of crimes are a politically powerless group needing added protection); Dripps, *supra* note 73, at 1098-100 (arguing that legislators, like the vast majority of their constituents, adopt the perspective of a potential crime victim when viewing anti-crime legislation, thus limiting the police or prosecutors only when a powerful interest group intervenes);

eager to ease the road to conviction through modifications of substantive law are Professors John C. Jeffries, Jr. and Paul B. Stephan III, who more than twenty years ago warned that legislatures may abolish defenses entirely rather than accept the burden of having to disprove the defense beyond a reasonable doubt.[79] Professor William Stuntz has argued that "the government's natural incentive is to evade or exploit the *procedural* civil-criminal line by changing the *substantive* civil-criminal line," leading Congress to enact overbroad federal fraud statutes and strict liability offenses.[80] The Court itself has sometimes recognized this incentive as well.[81]

On the other hand, the clear-statement rationale that we discussed in Part I.C is based on the assumption that the political process provides some protection against extreme distortions of criminal law. Legislators, it is argued, will not vote in favor of strict liability laws that could ensnare one of their own family members nor will they support lengthy prison terms for traditionally minor offenses, for example.[82]

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Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 709 (1999) (listing some examples of the competition between Democratic and Republican lawmakers to be the toughest on crime, such as California's "Three Strikes and You're Out" law, and Alabama's recent experimentation with chain gangs).

79. Jeffries & Stephan, *supra* note 6, at 1325, 1353-56 (finding that disallowing legislative control over burdens of proof for affirmative defenses "would work to inhibit reform and induce retrogression in the penal law").

80. Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 6, at 1 (emphasis in original).

81. *See, e.g.*, Monge v. California, 524 U.S. 721, 734 (1998) ("[W]ere we to apply double jeopardy here, we might create disincentives that would diminish these important procedural protections.").

82. *See* Frank R. Herrmann, *30=20: "Understanding" Maximum Sentence Enhancements*, 46 BUFF. L. REV. 175 (1998) (suggesting that legislators would not "expose themselves, or their families, or members of their own electorate, to life imprisonment for possessing any amount of cocaine, just to deny the safeguards of a criminal trial to those who possess great amounts"); *see also Patterson*, 432 U.S. at 211 (noting that the option of creating affirmative defenses has "not lead to such abuses or such widespread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required"); Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1286 (1998) (arguing that "political safeguards" are sufficient to guard against the enactment of most such laws); Note, *Awaiting the Mikado: Limiting Legislative Discretion to Define Criminal Elements in Sentencing Factors*, 112 HARV. L. REV. 1349, 1365 (1999). As an illustration of legislative restraint, consider the present Continuing Criminal Enterprise provision, part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. It was originally introduced as a sentencing alternative invoked upon a motion of the government. Because various members of the House thought that this raised constitutional questions, H.R. 18583 was amended, and the sentencing provision was transformed into "a new and distinct offense with all its elements triable in court." H.R. Rep. No. 91-1444, at 83-84 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4651-53 (joint statement of Reps. Moss, Dingell, Adams, and Eckhardt); *see also* 116 CONG. REC. 1664-65 (1970) (statement of Sen. Hruska); *id*. at 33,630 (statement of Rep. Poff); *id*. at 33,631 (statement of Rep. Eckhardt).

Before taking sides in this debate about legislative behavior, we decided to ask a question that no scholar who has debated these issues has ever asked: How have legislatures responded in the past to cues from the Court about circumventing procedural guarantees through changes in substantive criminal law? We examined the legislative activity by every state legislature and Congress following seven major Supreme Court decisions that allowed a change in substantive criminal law to effectuate a relaxation in procedures. Those seven decisions are: 1) *Leland v. Oregon*, upholding a state law that placed on the defendant the burden of proving insanity beyond a reasonable doubt;[83] 2) *Patterson v. New York*, upholding a state law that placed on the defendant the burden of proving extreme emotional disturbance to mitigate murder to manslaughter;[84] 3) *McMillan v. Pennsylvania*, upholding a state mandatory minimum sentence of five years upon judicial determination by a preponderance of the evidence of the fact that a defendant visibly possessed a firearm;[85] 4) *Martin v. Ohio*, upholding a state law that placed the burden of proving self defense on a defendant accused of murder;[86] 5) *Kansas v. Hendricks*, upholding a state "civil" commitment to a separate section of a prison upon proof of mental abnormality and future dangerousness;[87] 6) *Almendarez-Torres v. United States*, holding that 8 U.S.C. § 1326(b)(2), which authorizes a twenty-year term of imprisonment for any alien who reenters after deportation for an aggravated felony, is a penalty provision rather than a separate criminal offense, despite the eighteen-year increase to the otherwise applicable statutory maximum penalty of two years for reentry after deportation for a felony;[88] and 7) *Montana v. Egelhoff*, upholding a state statute excluding evidence of voluntary intoxication to negate criminal *mens rea*.[89]

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83. Leland v. Oregon, 343 U.S. 790, 797 (1952).

84. *Patterson*, 432 U.S. at 205.

85. McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986).

86. Martin v. Ohio, 480 U.S. 228, 236 (1987).

87. Kansas v. Hendricks, 521 U.S. 346, 357 (1997); *see also* Seling v. Young, 121 S. Ct. 727, 735 (2001) (finding that Washington state's civil commitment of sexually violent predators, once found to be civil, cannot be deemed punitive "as applied" to a single individual).

88. Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998).

89. Montana v. Egelhoff, 518 U.S. 37, 56 (1996). A plurality held that the state can exclude all evidence of voluntary intoxication offered to rebut *mens rea* for murder. *Id*. at 39-56. Justice O'Connor, writing for four dissenters, would have held that, since the legislature, according to Montana's highest court, had not eliminated *mens rea* as an element of the offense of murder, due process forbade the exclusion of relevant evidence. *Id*. at 61-73. In a separate dissent, Justice Ginsburg reasoned that the Montana legislature had changed the substantive definition of the crime, rewriting its murder statute to include either intentional or drunken killings. *Id*. at 56-61.

Unlike these decisions, *Apprendi* does not give a green light to legislators who would like to reduce the burdens on prosecutors by redrafting substantive criminal law. Rather, Justice Stevens' footnoted warning is more of a yellow light: Proceed if you must but we'll be watching. Nevertheless, we have no reason to think that the legislative response will be dramatically different than the response to these earlier decisions. The results of our survey are summarized in Appendix A. With one exception, after each decision additional states eventually jumped on the bandwagon, easing the prosecutor's procedural burden through modification of the substantive law.[90] Fifteen states have relieved the prosecution of the

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90. The legislative response to *Hendricks* has been particularly dramatic. In addition to the twenty bills already pending and six new state laws, of the seventeen states that already had provisions to civilly commit sexual offenders, five amended their statutes to eliminate the procedural protections that the *Hendricks* Court held were not constitutionally required. Four others have similar bills pending. In comparison, state legislatures essentially rejected the Court's invitation in its 1987 decision, *Martin v. Ohio*, to place the burden of proving self-defense on a defendant charged with committing murder.

We do not argue that these Court cases necessarily *caused* the legislative change. However, we do show that, after the Court had placed its imprimatur of constitutionality on a particular change that disadvantaged a criminal defendant, various state legislatures and Congress changed their laws to follow suit. For some statutes, we were able to find references to these Court cases in the legislative history of the responsive enactments. For others, there is similarity between the language of the responsive enactment and the language of the provision blessed by the Court.

For example, though the impetus for the post-*Hendricks* Florida statutes was the brutal rape and murder of a young boy, it was patterned after the Kansas statute and is nearly identical to it. *See* Mari M. Presley, *Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act: Replacing Criminal Justice with Civil Commitment*, 26 FLA. ST. U. L. REV. 487, 489 (1999) (detailing the genesis of the Florida act, which became effective in 1999).

Both the Alaska and Texas legislatures have specifically referred to the *Hendricks* decision as an impetus for their proposed laws. The sponsor statement for Alaska's SB 216 notes that it "is modeled after Kansas' statute, which has been upheld by the highest court of the land." Alaska State Legislature's Majority Organization, *Sponsor Statement for SB 216*, *at* http://www.akrepublicans.org/spstsb216012898.htm (last visited on Dec. 28, 1999). Likewise, Texas's SB 1224—filed by Senator Shapiro on May 13, 1999—notes that, "although the use of the civil commitment of dangerous sex offenders . . . is highly controversial . . . , the United States Supreme Court has upheld its constitutionality." Texas Legislature, *An Act*, *available at* http://www.capitol.state.tx.us/tlo/76R/billtext/SB01224F.HTM (last visited on Feb. 26, 2001).

The New York legislature waited for the *Hendricks* decision to be rendered before passing its own sexually violent predator act, which became law two days later. Michelle Boorstein, *States Busy with Sex Predator Laws After High Court's Ruling*, SAN DIEGO UNION-TRIB., June 28, 1997, at A23. New York Senator Dale Yolker, one of the authors of the act, stated that, "[u]ntil the Supreme Court's decision of the other day . . . , we were reluctant to move because we wanted to feel we were on totally solid ground." *Id*. Likewise, the Illinois law is directly modeled upon the Kansas statute. Terry Burns, *Edgar Signs Sexual Predator Bill Into Law; Act Means Offenders Can Be Locked Up For Further Treatment*, PEORIA J. STAR, July 1, 1997, at D7.

In addition to direct evidence that the five states previously discussed were influenced by the *Hendricks* decision, we note that an additional eleven states use identical, or nearly identical, boilerplate language from the Kansas statute: Alabama, Delaware, Louisiana, Mississippi, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Wisconsin. We

burden of proving the defendant's sanity;[91] nine have relieved the prosecution of the burden of proving the absence of heat of passion in order to obtain a murder conviction; five have permitted the judge to impose mandatory minimum sentences given a judicial finding, by a preponderance of the evidence, that the defendant possessed a firearm; six states have relieved the prosecution of securing a criminal conviction before incarcerating sex offenders; one additional state since *Almendarez-Torres* has already relieved the prosecution of the burden of proving prior convictions to a jury under recidivism statutes; and three states exclude evidence of voluntary intoxication that negates the *mens rea* element of a criminal offense.[92]

This pattern, together with the multiplication of mandatory minimum sentences, the general trend to higher sentences,[93] and the recent proliferation of statutes like the ones examined in *Apprendi* and *Jones*, supports the prediction that some rewriting of the substantive criminal law after *Apprendi* will undoubtedly be attempted.

There are reasons to predict more movement with some statutes than with others. *Apprendi* affects two very different types of laws. Most statutes affected by the rule in *Apprendi* are what Mr. Bishop in his nineteenth-century treatise called "nested" statutes.[94] An example is the carjacking statute in *Jones*, involving core conduct found by the jury with increasing levels of punishment depending on the presence of aggravating factors found by the judge. This allocation of authority between judge and jury prior to *Apprendi* can easily be replicated after *Apprendi* through statutory amendment. To retain the judge's power to determine aggravating features, all a legislature must do is amend the statute so that the

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doubt that this is coincidental. Finally, legislators in New Hampshire and Maine failed to secure passage of sexual predator bills in their jurisdictions prior to the *Hendricks* decision, due to constitutional concerns, but legislators in those states now plan to refile those same bills. *See* Boorstein, *supra*.

91. Most of these changes occurred after the "not guilty by reason of insanity" acquittal of John Hinckley, following his attempted assassination of President Reagan in 1984. While the *Leland* case might not have directly caused the state legislatures' shifting the burden of proof to the defendant in these cases, it certainly left the door open for states to walk through when it became attractive to do so.

92. No state has chosen to join Ohio in relieving the prosecution of the burden of proving that a murder defendant did not act in self-defense. *See infra* notes 102-03 and accompanying text.

93. *See generally* MARK MAUER, THE RACE TO INCARCERATE (1999); STITH & CABRANES, *supra* note 65; TONRY, *supra* note 28.

94. 2 BISHOP, *supra* note 12, at 327.

penalty ceiling formerly specified for the most aggravated version of the offense attaches once the offender is convicted of the core conduct. The actual sentence within this maximum may still be keyed to judicial findings of aggravating or mitigating facts. A classic illustration here would be drug offenses involving punishment tied to the quantity and type of drugs, such as the primary federal controlled substance statute, 21 U.S.C. § 841. Congress would have to amend only the maximum penalty for the core conduct, changing it to life imprisonment, and then specify the sentence within that range depending on the type and quantity of drugs.

The other type of statute affected by *Apprendi* is illustrated by New Jersey's hate crime law. Rather than defining crimes of increasing severity based on a single core offense, these "add on" statutes authorize the imposition of an additional penalty for any crime (or for a large group of crimes), on top of the maximum penalty authorized for that crime.[95] Variations on this theme are plentiful. For example, when *Apprendi* was announced, more than a third of the states and the federal government had "felony/firearm" statutes providing for additional punishment for most felonies whenever a gun was used. At least four states, the District of Columbia, and the federal government authorized maximum-enhancing penalties for any crime committed while on pretrial release.[96] Because these "add-on" statutes affect so many different types of crimes, replicating them after *Apprendi* in order to preserve the aggravating feature for judicial determination would require, as Justice Stevens observed, revision of a jurisdiction's entire criminal code.

This is a more remote possibility than redrafted "nested" statutes for three reasons. First, such revision may involve more work because a legislature may have to amend the statutory maximum penalty for a large number of offenses, not just one.[97] Second, because add-on statutes boost penalties indiscriminately for a wide

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95. *See, e.g.*, Hawaii v. Tafoya, 982 P.2d 890, 895 (Haw. 1999) (providing an extended term if the victim is an elder, a minor, or disabled, or if the defendant inflicts serious injury on such a victim); People v. Chanthalom, No. 2-98-1247, 2001 Ill. App. LEXIS 40, 16-26 (Ill. App. Ct Jan. 12, 2001) (discussing Illinois' extended-term statute, 730 ILL. COMP. STAT. 5/5-8-2, boosting sentences for a variety of aggravating factors).

96. *See infra* Appendix C. Recidivist statutes, such as three-strikes laws and the statute in *Almendarez-Torres*, are of this type as well.

97. In states where sentence ranges do not vary with individual offenses but instead are generally limited to a number of categories (e.g., first-degree felonies carry one sentence range, second-degree felonies another, and so on), the work involved in raising sentence maxima for every offense may be less onerous. A state need only raise the ranges for different degrees of crime.

variety of offenses, some lawmakers may oppose attaching high maximum sentences to crimes formerly carrying minimal penalties.[98]

Third, a legislature has a much less costly alternative available if its goal is to provide stiff sentences for conduct involving a particular aggravating feature. It could simply enact a separate offense that combined the enhancing factor as an element and the commission of any felony as another. Many states chose this route rather than adopting a statute like New Jersey's when crafting their own hate-crime laws and felony firearm offenses.[99] While the separate offense would require that the aggravating factor be proven to a jury beyond a reasonable doubt, the cost of doing so from the legislature's point of view may be lower than the cost of reviewing the entire criminal code to raise sentence maxima. In fact, bills in New Jersey were introduced after *Apprendi* to amend that state's hate crime law to require proof beyond a reasonable doubt to a jury of "purpose to intimidate because of race . . . ."[100] Illinois is likewise considering a catch-all statute that would require pleading and proof to a jury of any fact that raises a statutory maximum sentence.[101]

In addition, a legislature may be unlikely to redraft either nested or add-on statutes to preserve informal adjudication of aggravating features when that revision would mean recasting a traditional offense element that separates the culpable from the blameless in a new role as sentencing factor or affirmative defense. We suspect there has been no replication of the statute in *Martin v. Ohio*[102] because that statute shifted to the defendant the burden of proof of a fact, self-defense, that most would agree separates the

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98. These two reasons did not stop Gov. Gary Locke of Washington state from recently proposing a bill that would circumvent the state's present hate crimes law, which requires prosecutors to prove racial animus to a jury, by amending the state sentencing guidelines to include hate as an exceptional aggravating circumstance allowing a judicial upward departure from the otherwise applicable guideline sentence. *See* Beth Silver, *Locke Bill Targets Bias Crimes Growing Problems: With Such Crimes on Increase, Would Let Judges Consider Motivation*, MORNING NEWS TRIB. (Tacoma, Wash.), Jan. 29, 2001, at B1, *available at* 2001 WL 3985855 (proposing legislative change to WASH. REV. CODE § 9.94A.390). As noted by Gov. Locke's policy advisor, this proposal "avoids" an *Apprendi* issue because it changes only a statutory guideline, not the statutory maximum sentence. *Id*. (quoting Dick Van Wagenen, Locke's policy advisor on corrections). However, legislatures in other jurisdictions may not have the luxury of sufficiently high statutory maxima.

99. Brief for Petitioner at 25, Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) (no. 99-478) (identifying thirty "freestanding hate crime statutes" from twenty-six states).

100. H.R. 1897, 209th Leg., Reg. Sess. (N.J. 2000).

101. H.R. 1511, 91st Gen Assem., Reg. Sess. (Ill. 1999).

102. Martin v. Ohio, 480 U.S. 228 (1987).

guilty from the innocent, rather than a fact that separates the more guilty from the less guilty.[103] Offenses requiring conviction for arguably innocent behavior, which reserve the finding of blameworthy features such as *mens rea* for the judge, will continue to be harder to enact than statutes that prohibit culpable conduct and reserve only the determination of the extent of culpability to the judge.[104]

Finally, it is also possible that, for some crimes, the prosecution and legislature will consider the benefits of forcing the defendant to defend against proof of the element at trial to be greater than the benefits of a lesser burden of proof before a judge. Unless a court is able to provide bifurcated trials or enforce protective stipulations,[105] once a jury hears proof of a prejudicial aggravating fact, it may become more inclined to convict than it would have been if no evidence of the aggravating fact had been introduced until sentencing.[106] The inclusion of additional degrees of crime separated by aggravating elements may also provide more leverage for plea-bargaining.[107] Any prediction about whose ox is gored by the inclusion of more elements depends on the individual aggravating feature and crime, and on the frequency with which the aggravating feature is contested in prosecutions for that offense.

Certainly these drawbacks will make responding to *Apprendi* through statutory amendment unrealistic or undesirable for many statutes affected by the decision. But some statutes, particularly nested offenses, will probably be attractive targets for amendment following *Apprendi*, and, as Justice Stevens warned, will become subject to "constitutional scrutiny."

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103. Every state recognizes self-defense as a justification.

104. If one assumes that the insane are blameless, however, the popularity of placing the burden of proof on the defendant for insanity admittedly cuts against this prediction. An even narrower claim would be that legislatures will be more reluctant to impose criminal liability for "justified" conduct than for "excused" conduct, or more skeptical of excuses like insanity than of justifications like self-defense.

105. *See* Old Chief v. United States, 519 U.S. 172, 184 (1997) (discussing concession of prior offense).

106. *See* Ross, *supra* note 66, at 198-200. For example, the defense, "I did not sell drugs, but if I did, it was five—and not fifty—grams" is not very compelling. Of course, this problem arises whenever a defendant faces a charge with a lesser included offense, such as with grades of larceny.

107. As Professor George Fisher has argued, prosecutors effectuated such bargains in murder cases carrying mandatory death sentences by *nol pross*ing one element of a single count of murder, reducing the charge to manslaughter. Fisher, *supra* note 25, at 890-91.

## III. DEVELOPING DUE PROCESS LIMITS ON SUBSTANTIVE CRIMINAL LAW

We now turn to the shape of that scrutiny. The Court's only hint at constitutional limits on efforts to evade *Apprendi* was its citation of *Patterson v. New York* and *Mullaney v. Wilbur*. If the promise to constrain legislative overreaching in *Patterson* was the only barrier to legislative circumvention of the rule in *Apprendi*, we would be more likely to agree with the dissenting justices that the rule is a futile and costly exercise in formalism. As mentioned earlier, the Court has characterized these cases as turning on legislative labels.[108] But these rather unsatisfying burden-of-proof cases are not the only context in which the constitutional concept of acceptable offense definitions and corresponding punishments has been explored. The "constitutional scrutiny" of the substantive criminal law, including a constitutional concept of element that trumps that of legislatures, should draw its content from the full spectrum of procedural protections in the Constitution that could be eroded by legislative definitions of crime. These include Article III's Jury Clause, the Fourteenth Amendment's Due Process Clause, the Fifth Amendment's Grand Jury, Due Process, and Double Jeopardy Clauses, the Sixth Amendment's Jury and Notice Clauses, and the Eighth Amendment's Cruel and Unusual Punishments Clause. Because each of these provisions could contribute to constitutional limits on what legislatures can define as non-crimes and non-elements, it is worth examining whether or not the individual provisions might pose a barrier to changes in substantive criminal law that supplements or differs from the Court's formulation in *Patterson*.

Our survey of these provisions, described in detail below, reveals that none of them alone, at least according to the understanding of each that has evolved over the years, will restrain legislative efforts to respond to *Apprendi*'s rule through statutory revisions. Nonetheless, as Justice Stevens suggested, the Court should not cede entirely to legislatures the power to obliterate the procedural protections in the Bill of Rights through manipulations of substantive law. This would render constitutional criminal procedural guarantees largely meaningless, and would profoundly change the relationship between a criminal defendant and the

108. *See supra* notes 35-39 and accompanying text.

state.[109] In the absence of an existing identifiable test, how should the Court resolve this dilemma?

There are two quite different ways of approaching the problem. The first is to develop a theory of "element" that would lead to a tidy formula for limiting legislative primacy in defining elements of a crime. Such a formula is likely to be rooted in a particular fundamental constitutional guarantee (such as the jury or the prohibition against excessive punishments), or a particular procedural goal (such as maximizing factual accuracy, ensuring fairness, or equalizing power between a criminal defendant and the state). One could imagine, to offer a few examples, a constitutional rule that identifies as essential elements those facts leading to particular lengths of sentences, those facts most accurately determined by lay juries as opposed to professional judges,[110] those facts inherently part of the core of a particular criminal offense, or those facts upon which criminal (as opposed to civil) culpability turns. The number of potential formulations of this kind is at least as great as the number of theories justifying punishment generally or the number of constitutional provisions for which the concept of element carries significance. Enticing as this theoretical quest for the elemental holy grail is, we reject it as unwise as well as unattainable.

We embrace a second approach to limiting the ability of the legislature to diminish procedural protections through manipulating substantive criminal law: a standard, not a rule, to be applied case by case, over time. Our nation's two-hundred year experience of halting and uneven judicial control of the substantive criminal law under the various provisions in the Bill of Rights suggests that a one-size-fits-all rule for the constitutional regulation of crime and punishment is not only elusive, but may be counterproductive. Using a rough standard, courts now identify through the common-law process—one case at a time—those few statutes that transgress the

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109. *See, e.g.*, Douglas Laycock, *Individual Liberty And Constitutional Architecture: The Founders Prompt Correction of Their Own Mistake*, 16 HARV. J.L. & PUB. POL'Y 75 (1993) (arguing that a functional federal Constitution must allow judicial enforcement of the Bill of Rights); Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 6, at 40 ("Criminal procedure is largely self-defeating without limits on criminal law.").

110. This might include an analysis of whether the adjudication of the fact involves credibility determinations, or might create prejudice against the defendant. *See, e.g.*, the similar analysis described in Knoll & Singer, *supra* note 12, at 1086-87, nn.136-45. *See also* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356, 376-80 (1975) (describing a possible distinction between the treatment of prospective predictions and historical fact, but advancing instead a distinction that would treat as elements "evidence bearing on the seriousness of the crime," and treat as sentencing factors evidence of character).

civil-criminal divide. In doing so, courts clarify by increments the limits of the Constitution.[111] Those unusual facts that transgress the element/non-element divide can also be identified case by case, allowing for gradual and dynamic clarification of constitutional limits. There is no compelling reason to depart from this approach and proclaim the key characteristics of an essential element for all offenses under all circumstances, and, as we explain below, many reasons to forswear such proclamation. Instead, we offer a modest multi-factor test, animated by the many different concerns that have guided the understanding of element under different constitutional provisions, as well as the historical practice in connection with the particular offense in question. The test proposed here, like the Court's test for policing the civil/criminal divide, is designed to preserve legislative primacy in defining crime and punishment, without wholesale abandonment of judicial control over the scope and application of constitutional criminal procedural guarantees.

### *A. Deriving the Test: A Survey of Potential Sources of Limitation on Legislative Freedom to Define Crime and Punishment*

Past commentary and case law provides remarkably little assistance for courts today that are seeking a meaning for the concept of element apart from whatever meaning is assigned by statute. This is particularly surprising considering the degree to which so many features of constitutional criminal procedure are dependent upon the concept of element. We begin with the Grand Jury Clause of the Fifth Amendment.

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111. *See* McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986).

> Our inability to lay down any "bright line" test may leave the constitutionality of statutes . . . to depend on differences of degree, but the law is full of situations in which differences of degree produce different results. We have no doubt that Pennsylvania's Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line.

*Id*.

For a classic analysis of the advantages and disadvantages of the use of standards as opposed to rules in constitutional interpretation, see generally Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). *See also* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS, Ch. 8 (forthcoming 2001); Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998) (suggesting that Fourth Amendment law is not amenable to a top-down general theory, and advocating localized and fact-specific knowledge).

### 1. Fifth Amendment Right to Grand Jury Indictment

In federal cases, the Fifth Amendment guarantees the accused the right to grand jury review of an indictment containing an allegation of each of the elements of an offense.[112] This Clause offers potential authority for constitutional regulation of the substantive criminal law if it requires the government to treat certain facts as essential elements for purposes of including them in an indictment even when the legislature has classified them as non-elements. Thus, the Grand Jury Clause provides a useful starting point for an analysis of the element concept. However, an examination of judicial interpretations of the Clause and of the functions that it serves suggest that it provides no *separate* constitutional basis or theory, independent of that associated with other provisions of the Bill of Rights, for limiting legislative freedom to define crime and punishment.

In order to understand why, it is helpful to examine the three different settings in which there has been a need to determine if there is a constitutional meaning for element that trumps a legislative definition for purposes of inclusion in the charge. Importantly, in all three contexts, both federal and state judges in the early nineteenth century did not identify the essential ingredients of an offense by referring only to statute.[113] Instead, the list of what must be included in the indictment was derived when possible from

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112. *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224, 239 (1998) (stating that all elements of an offense must be charged in the indictment); Russell v. United States, 369 U.S. 749, 763-64 (1962) (finding a grand jury indictment insufficient for not specifying an element of the offense as defined by statute); United States v. Carll, 105 U.S. 611, 612-13 (1881) (invalidating an indictment that omitted an allegation of *mens rea*). In *United States v. Carll*, the Court held that an indictment upon a statute must:

> set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.

*Id.*

113. From the late 1700s through the middle of the 1800s, courts and treatise writers did not regularly use the term "element" to describe that which must be alleged in a criminal charge. Instead, one encounters with some frequency the use of the phrases "essential ingredients" and "necessary ingredients." *See, e.g.*, Beasley v. State, 18 Ala. 535, 539 (1851) (referring to the "necessary ingredients" and the "constituents" of the crime of assault); Tully v. Commonwealth, 45 Mass. 357, 358 (1842); Mears v. Commonwealth, 2 Grant 385, 387 (Pa. 1858); 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 14, 16-17 (6th ed. 1860) (noting that an indictment must "contain all that is material to constitute the crime," referring to "material facts"). The word "element" began to appear more frequently in the mid-1800s, about the same time that state legislatures were increasing the number and complexity of offenses. *See Carll*, 105 U.S. at 612.

the common-law understanding of each offense, even if the offense was codified.[114] First, courts have drawn a distinction over the years between facts that are elements and must be averred, and facts that are relevant only to sentencing that need not be alleged as part of the offense.[115] Second, courts have labored to distinguish those facts that are elements from defenses that are not elements.[116]

Finally, case law has attempted to distinguish between facts that are elements and facts that are merely alternative means of establishing an element and therefore need not be included in the indictment.[117] As waiver rules for pleading error developed over the

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114. *See, e.g.*, United States v. Gooding, 25 U.S. 460, 474-75 (1827).

> [I]n certain classes of statutes, the rule of very strict certainty has sometimes been applied where the common law furnished a close and appropriate analogy. Such are the cases of indictments for false pretences, and sending threatening letters, where the pretences and the letters are required to be set forth from the close analogy to indictments for perjury and forgery . . . . But these instances are by no means considered as leading to the establishment of any general rule. On the contrary, the course has been to leave every class of cases to be decided very much upon its own peculiar circumstances.

*Id*.; *see also* United States v. Smith, 18 U.S. 153, 160 (1820) (stating that, "by such a reference the definitions [of the common law] are necessarily included, as much as if they stood in the text of the act" when discussing the federal statute against privacy); United States v. Wilson, 28 F. Cas. 699 (E.D. Pa. 1830) (No. 16,730); United States v. Watkins, 28 F. Cas. 419 (D.C. 1829) (No. 16,649) (drawing on common law to determine what must be alleged in prosecution for fraud); 1 BISHOP, *supra* note 12, at 244-48 (describing the relationship between statutory and common law); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 290 (2d ed. 1985) (noting that codification meant that "[j]udges lost the power to invent new crimes; but the common law still *defined* the precise meaning and application of old crimes, like rape or theft") (emphasis in original).

115. Much of this history was recounted in the *Apprendi* decision itself, although the Court did not reach the propriety of the indictment in that case. *See also* Benjamin J. Priester, *Developments, Sentenced for a "Crime" the Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249, 251-58 (1998) (reviewing approaches); *see generally* Herrmann, *supra* note 82 (arguing that constitutional criminal procedural protections ought to apply only to aggravating factors that enhance the statutory range).

116. *See, e.g.*, Jefferson v. People, 3 N.E. 797 (N.Y. 1885); 1 BISHOP, *supra* note 12, at 268-79; 4 LAFAVE ET AL., *supra* note 49, at 763.

> Courts look to various factors to distinguish between defenses and elements of the offense [including] (1) whether the exception was treated as a defense at common law; (2) whether the exception was "so incorporated in the language of the statute defining the crime that the elements of the offense cannot be accurately described if the exception is omitted"; and (3) whether the exception appears in the enacting law of the statute (suggesting it is an element of the offense) or is located in a subsequent clause (suggesting it is a defense).

*Id*. (quoting Austin W. Scott, *Fairness in the Accusation of Crime*, 41 MINN. L. REV. 509, 527-28 (1957)); *see also* 4 LAFAVE ET AL., *supra* note 49, at 750-51 & nn.25, 29-30; Note, *Streamlining the Indictment*, 53 HARV. L. REV. 122, 124-45 (1939) (noting that the element pleading requirement means "statutory exceptions must be negatived").

117. *See, e.g.*, United States v. Gooding, 25 U.S. 460, 473-75 (1827) (distinguishing between "matters of evidence" and "averment"); 2 BISHOP, *supra* note 12, at 205-06, 212-13 ("[I]f the thing alleged to have been done is a crime only in certain circumstances defined by the law, the in-

years, this distinction between element and means became a crucial one: Failure to plead an essential element could be raised at any time and was always reversible error, while a claim for relief due to failure to provide sufficient factual specificity was lost if not raised prior to trial. Even today, leaving out an element from a federal indictment is not considered harmless error.[118]

Although all three questions arose in early cases as challenges to indictments, each had ramifications for what must be proven to a petit jury at trial. Decisions and treatises from the first half of the nineteenth century tied what must be pled to what must be proven, and what must be proven to what must be pled.[119] What was considered an "element" also influenced the scope of double jeopardy protections under both federal and state law. Until written records of trials and guilty plea proceedings became routine, the only way to determine the validity of the accused's plea in bar (claim of double jeopardy) was to compare the two charging documents to see if they involved the "same offense."[120] As appellate review of trial jury instructions became more commonplace, the Supreme Court's discussions of the meaning of "element" were not confined to cases in which a defendant claimed that one was missing from the indictment.[121]

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dictment must aver and set out the existence of those circumstances."); *see also* United States v. Cruikshank, 92 U.S. 542, 558 (1875) (noting that the allegation must include "every ingredient of which the offence is composed") (quoting United States v. Cook, 17 U.S. (Wall.) 168, 174 (1872)).

118. *See generally* King & Klein, *supra* note 5, at 337 & n.20 (noting the majority view that an omission of an element from the indictment is never harmless error). *See also* H.L. McClintock, *Indictment By a Grand Jury*, 26 MINN. L. REV. 153 (1941) (citing an ALI study and crime surveys from two states). Following the Court's decision not to require grand jury review for state prosecutions in *Hurtado v. California*, 110 U.S. 516 (1884), many states moved to "short form" indictments, used in conjunction with bills of particulars that furnished the specificity once provided by the indictment. *See* 4 LAFAVE ET AL., *supra* note 49, § 19.1(c); *see also* People v. Bogdanoff, 171 N.E. 890 (N.Y. 1930).

119. *See, e.g.*, Clark v. State, 1 Scam. 117, 120 (Ill. 1833) (noting that because the fine was set by arson statute at the value of property destroyed, the indictment "should have changed the value . . . , otherwise it could not properly have been inquired into by the jury [and] would form no part of the issue which they were sworn to try"); Divine v. State, 4 Ind. 240 (1853); State v. Wilson & Strange, 9 S.C.L. (1 Mill) 135, 137 (S.C. 1818) (noting that "whatever is indispensably necessary to be proven to warrant a conviction, must be alleged in the indictment," and finding that, since it was necessary to prove that the defendants, charged with deceit, "knew that the girl [whom they represented to be a slave] was free at the time of the sale, it ought to have been alleged in the indictment"); 2 BISHOP, *supra* note 12, at 204-05; JOSEPH CHITTY, CRIMINAL LAW 168 (3d ed. 1836).

120. *See* 4 LAFAVE ET AL., *supra* note 49, § 19.2(b).

121. *See, e.g.*, Spurr v. United States, 174 U.S. 728 (1899); Coffin v. United States, 162 U.S. 664 (1896); Pointer v. United States, 151 U.S. 396 (1884) (reviewing a trial jury instruction that included the charge that motive was not an element of murder).

During the 1950s and 1960s, the Court first expanded the reach of federal habeas corpus review of state criminal cases to include constitutional as well as jurisdictional error, and then incorporated into the Fourteenth Amendment's Due Process Clause—limiting state courts—both the Jury Clause and the Double Jeopardy Clause, but not the Grand Jury Clause.[122] This meant that the need for all criminal courts to address the reach of the trial and double jeopardy provisions of the Bill of Rights grew much more pressing than the need to flesh out the meaning of the Grand Jury Clause. As a result, the battle over the constitutional concept of element spread, then shifted, from the Grand Jury Clause to the Due Process, Double Jeopardy, and Jury Clauses.

The concept of element as a constitutional matter lost some coherence as the Court addressed the original three problems separately. In *Mullaney*, and then *Patterson*, the Court tackled the first problem—distinguishing elements from defenses. The Court treated this problem as a question about the scope of substantive due process in the context of *trial* jury instructions. The third issue, the means/element distinction, led to the decisions in *Schad v. Arizona* and *Richardson v. United States*, discussed below.[123] The Court again relied on the Due Process Clause in the trial context for guidance as to which facts are elements to be found unanimously by the jury. The Court addressed the second distinction, between elements and sentencing factors, in a series of cases including *McMillan* and, of course, *Apprendi*. Again, each of these disputes raised the issue in the context of the trial, not the grand jury.[124]

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122. *See* Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (finding that habeas corpus "is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused."); *Hurtado*, 110 U.S. at 538 (ruling that the protections of the Fifth Amendment's Grand Jury Clause are not part of the "due process" that a state must not deny a defendant under the Fourteenth Amendment).

123. *See infra* notes 163-82 and accompanying text.

124. The means/element question also became key to the ongoing debate on the Court about the scope of the phrase "same offence" in the Double Jeopardy Clause, a debate that, for now, is dominated by those justices who believe the term "same offence" carries no constitutional content that might trump a legislature's characterization of the elements of an offense. *Compare* Illinois v. Vitale, 447 U.S. 410 (1980), *with* Carter v. United States, 530 U.S. 255 (2000). An examination of how courts have defined the "element" concept for the purposes of determining when two offenses are the "same" under the Double Jeopardy Clause is beyond the scope of this Article. Commentators continue to debate whether legislative definitions of sameness (through their offense definitions) can be trumped by more abstract constitutional principles. *Compare* Susan Klein, *Double Jeopardy's Demise*, 88 CAL. L. REV. 1001 (2000) (suggesting that judges must independently define "offense" and "jeopardy" to protect the value underlying the clause, thus protecting defendants from harassing multiple prosecutions and convictions), *with* GEORGE C. THOMAS III, DOUBLE

Thus, the Court in its past decisions has not recognized in the Grand Jury Clause any constraint *independent* of that provided by the Jury and Due Process Clauses that would prevent a legislature from omitting elements from its offense definitions. Instead, the decisions have fragmented into several pieces what began as a unitary question: What are the essential elements of an offense? Any constitutional evaluation of legislative revisions of the substantive criminal law after *Apprendi* must reunite these pieces. At the very least, a court should take them into account when attempting to evaluate whether the Constitution prohibits a legislature from labeling as non-element a fact formerly considered an element.

Not only has precedent linked the concept of "element" under the Fifth Amendment to the same concept under the Jury and Due Process Clauses, the *function* of the Grand Jury Clause requires no greater or lesser constraint on legislative choice than those Clauses. The requirement of pleading each and every element provides: (1) notice adequate to prepare for trial or plea; (2) information to facilitate a claim of double jeopardy; (3) information for the judge who will rule on sufficiency of the charge; and, finally, (4) assurance that the grand jury took all the elements into consideration in voting to indict (the "grand jury review" function).[125] Actual notice of the nature of the charge may not require the recitation of every element in the indictment or charge and, in any event, it does not require more than a simple list of those facts that the prosecution must prove beyond a reasonable doubt.[126] As for the judge's ability

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JEOPARDY: THE HISTORY, THE LAW (1998) (arguing that the history of the clause supports absolute deference to legislative definitions of offenses, and that it checks only judges and prosecutors).

125. *See, e.g.*, United States v. Miller, 471 U.S. 130, 139-40 (1985); Jenckins v. McKeithen, 395 U.S. 411, 430 (1969) (plurality opinion); Russell v. United States, 369 U.S. 749, 763-64 (1962); Smith v. United States, 360 U.S. 1, 9 (1959); *Ex parte* Bain, 121 U.S. 1, 13 (1887); *see also* 1 BISHOP, *supra* note 12, at 199-200, 207 ("Precision in the description of the offence is of the last importance to the innocent; for it is that which marks the limits of the accusation and fixes the proof of it. It is the only hold he has on the jurors, judges as they are of the fact and the law, or on an insubordinate judge . . . .") (internal quotations omitted); CHITTY, *supra* note 119, at 169; 4 LAFAVE ET AL., *supra* note 49, at 747; McClintock, *supra* note 118, at 159, 161.

126. Even where a reference to an element is missing from the charging instrument, a defendant may have actual notice of the crime charged, either through sources other than the charging instrument itself, or from the "short-form" allegation in the charge. *See, e.g.*, 4 LAFAVE ET AL., *supra* note 49, § 19.2(c) at 751 n.29 (collecting cases); *see also* Edmund Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 293-95 (1944); James Roberton, Comment, *Constitutional Law—Federal Criminal Procedure—Short Form Indictment*, 35 MICH. L. REV. 456, 461 (1937); *supra* note 118 (discussing "short form" indictments). Arguably, if the function of the Grand Jury Clause is to provide the defendant with the information he needs in order to prepare for trial and make an informed plea, one might expect more information would be provided to an accused

to rule on pretrial motions that challenge the legality or sufficiency of the charge or that raise a double jeopardy bar, information about the case and the crime charged is available from documents apart from the formal charge itself.[127]

That leaves grand jury screening as a potential reason for insisting that certain facts be treated as elements and alleged in the indictment, despite a legislature's decision to eliminate those facts from the definition of the offense. One might argue that the grand jury, as a bulwark against governmental oppression, is entitled to understand enough about the offense and its elements to allow it to protect a particular defendant from an unfounded prosecution or to block the enforcement of a law with which it disagrees. One response is that such protection is a fallacy. Any prosecutor worth her salt will admit that a grand jury can indict a ham sandwich, and the Court has done absolutely nothing to prevent the pig from becoming bacon. Indeed, the screening function of the grand jury has been nearly obliterated by decisions of the Court. A no-bill by a grand jury blocks nothing; the prosecutor can try again. Insufficient, even non-existent, proof before the grand jury is considered "cured" by a subsequent conviction by proof beyond a reasonable doubt.[128] Exculpatory evidence need not be presented to the grand jury.[129] Even accepting the "bulwark" argument, the Court is in no

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prior to plea or trial than a list of the facts that must be proven by the prosecution beyond a reasonable doubt. Defendants assessing whether or not to plead guilty or preparing for trial also need notice of possible defenses that they might raise to escape punishment altogether. Yet defenses have never been considered "elements" for purposes of the Grand Jury Clause.

127. *See* 4 LAFAVE ET AL., *supra* note 49, § 19.2(d), at 755 ("[P]retrial review of the adequacy of the prosecution's theory is readily available through procedures other than a challenge to the pleadings."); *see also id*. § 19.2(b), at 749.

> [T]he determination of double jeopardy—especially with the introduction of [the] doctrine of collateral estoppel—is no longer a matter that courts expect to resolve on the basis of matching charging instruments in the first and second prosecutions. Transcriptions of trial proceedings are available to determine exactly what was put before the jury in the first case and the prosecution can be expected, in response to a defense objection, to explain how the anticipated proof in the second case will differ.

*Id*.

128. *See generally* United States v. Mechanik, 475 U.S. 66 (1986); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

Some have suggested that these developments have knocked away the support for the rule requiring relief despite conviction when an indictment fails to allege every element. *See, e.g.*, 4 LAFAVE ET AL., *supra* note 49, § 19.2(f), at 759-60 (noting that "a challenge claiming that the grand jury was not aware of the essential elements of the offense is quite similar to a challenge that it did not have before it sufficient evidence to support a charge" that is not cognizable); King & Klein, *supra* note 5 (listing cases examining the expansion of *Neder*'s harmless error analysis to the omission of elements from the indictment); Scott, *supra* note 116, at 517-18.

129. United States v. Williams, 504 U.S. 36, 54 (1992).

better position to determine what "elements" must be alleged in an indictment than it is to determine what "elements" must be established for the trial jury. What minimum information about the alleged offense and its punishment does "the people's panel"[130] need to perform this function? When is a sentencing fact or an affirmative defense so crucial to the ability of the grand jury to screen the charge that it must be treated as an element? There is no reason to believe that the screening function of the grand jury, not essential enough to be a part of the due process that states must guarantee to their citizens,[131] requires more protection from the legislature than the various functions of trial by jury. The grand jury's review function thus provides no special guidance for ascertaining the constitutional line a legislature must not cross when it declines to classify a given fact as an element.

### 2. The Right to Trial by Jury

Like the Grand Jury Clause, the Sixth Amendment is a plausible source of limitation on the freedom of a legislature to decide what is and what is not an element. Just as the Grand Jury Clause has been construed to require the allegation of each element in an indictment, the Jury Clause guarantees a trial jury finding of each element. Indeed, the Court in *Jones* and *Apprendi* appeared to derive the distinction between sentencing facts and elements from the Jury Clause of the Sixth Amendment. It referred in both cases to the power of the English jury to "thwart Parliament and Crown" by returning convictions on offenses of a lower degree than the offense charged.[132] In *Jones*, the Court expressed concern that if judges were authorized to find facts that raised maximum sentences from fifteen years to life in prison, "the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: In some cases, a jury finding of fact necessary for a maximum fifteen year sentence would merely open the door to a judicial finding sufficient for life imprisonment."[133] It is easy to read these references as suggesting that the Sixth Amendment guarantees to the

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130. RICHARD YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES 1634-1941 (1963).

131. *See* Hurtado v. California, 110 U.S. 516, 538 (1884).

132. Jones v. United States, 526 U.S. 227, 245 (1999); *see also* Apprendi v. New Jersey, 120 S. Ct. 2348, 2357 n.5 (2000).

133. *Jones*, 526 U.S. at 243-44.

accused a jury with the power to determine the *extent* of punishment through its verdict. If the jury guaranteed by the Constitution is a jury that can continue to exercise its power to effectively set the punishment for an individual defendant by convicting of a lesser offense, then government action that deprives the jury of that ability may also violate the Sixth Amendment. Forbidden action would include the enactment of statutes substituting one offense with a large sentence range for what once was a set of separate, graded offenses. However, as we explain below, the Sixth Amendment's Jury Clause provides no authority on its own for limiting legislative discretion to set extremely broad sentence ranges within which judges, not juries, select punishment.

As an initial matter, it is doubtful that the setting of penalties was ever as firmly a part of the jury's function in the United States as it was in England. Compared to jurors on the other side of the Atlantic, American juries at the time of the adoption of the Bill of Rights played a minor role in sentencing. Instead, many—or perhaps most—sentences were set by judges, at their discretion, within broad statutory ranges.[134] In England, jurors dealt with dozens of crimes carrying mandatory execution as the sentence. Unless they convicted of a lesser offense carrying a lesser penalty, conviction on the highest charge meant death. This led, as the Court has observed, to "pious perjury"—acquittal of the higher offense in cases

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134. For example, in the Connecticut criminal code of 1784, only a handful of offenses were punished by death (rape, murder, burglary with violence, highway robbery with violence, and treason). The majority of offenses carried fines, imprisonment, or a corporal punishment such as whipping. *See* Lawrence Henry Gibson, *The Criminal Codes of Connecticut*, 6 J. AM. INST. CRIM. L. & CRIMINOLOGY 177, 185-88 (1916).

In Pennsylvania, maximum terms of imprisonment were set by acts of 1786 and 1790. 1786 Pa. Laws 280-290; 1790 Pa. Laws 293-306 (e.g., up to ten years for robbery, burglary, or sodomy). In 1794, most sentences for major felonies carried set minimum as well as maximum ranges. *See* 1794 Pa. Laws 174-181 (limiting penalties for, e.g., treason (six to twelve years); arson (five to twelve years); rape (two to twenty-one years); second-degree murder (five to eighteen years); forgery (four to fifteen years)); *see also Brief History of Penal Legislation of Pennsylvania*, 1 PA. J. PRISON DISCIPLINE & PHILANTHROPY 1, 3-4 (1845); Fisher, *supra* note 25, at 874 (noting that, at least by the early nineteenth century in Massachusetts, "[e]xcepting only those very serious crimes that carried mandatory life or death sentences, none of the typical common-law offenses called for a minimum sentence," and noting, for example, the penalty of "zero to life" for unarmed robbery or forging a bank bill); *id*. at 910 & n.183.

In Rhode Island as of 1787, larceny was punished by up to two years hard labor, and counterfeiting coins was punished by any fine or corporal punishment chosen by the judge. *See* 1787 R.I. Acts & Resolves 6; 1785 R.I. Acts & Resolves 5.

*See generally* ADAM J. HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA 8-14, 57 (1992). *See also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY, 77-82 (1993).

where guilt of the higher offense was clear.[135] In many American jurisdictions as of 1791, jurors encountered far fewer offenses for which executions were mandatory. To be sure, some colonies, suffering from their generation's crime wave during the mid- to late-1700s, expanded somewhat the number of capital offenses just before the Revolution.[136] But in the 1780s, this trend began to reverse, declarations of sentencing reform appeared in the constitutions of some new states, and there was a widespread view that whipping and capital punishment had lost their deterrent power.[137] In 1785, Massachusetts, followed by many other states, reduced the number of crimes punishable by death and began to rely on the penitentiary for crime control, responding in part to the prevailing philosophy that solitude and hard labor would cure the wayward.[138] Imprisonment offered a range of sanctions previously unavailable when the only option was death.[139] And imprisonment eventually replaced other punishments that had already been imposed at the discretion of the court, such as whipping and the pillory.[140] For example, of the

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135. *See* John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in THE JURY TRIAL IN ENGLAND, FRANCE, GERMANY 1700-1900, at 13, 37 (Antonio Padoa Schioppa ed., 1987); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 22, 41 n.160, 51 (1983) (noting that "trials were sentencing proceedings" in which the defendant's "main object" was to persuade the jury "to reduce the sanction from death to transportation, or to lower the offense from grand to petty larceny, which ordinarily reduced the sanction from transportation to whipping"); *see also* J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 426-30 (1986).

136. *See, e.g.*, HIRSCH, *supra* note 134, at 40 (noting that Massachusetts added four capital crimes between 1737 and 1770).

137. *Id*. at 41.

138. *See id*. at 11-12; DAVID ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 49 (1990); STITH & CABRANES, *supra* note 65, at 16; *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 12 (1977) (noting criticism of judicial discretion in 1786); O.F. LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS 1776-1845, at 64-67 (1922) (describing the abandoned copper mine used from 1790 to 1827 as Connecticut's state prison).

139. The shift from capital punishment to imprisonment took place later in some jurisdictions. For example, a 1792 Georgia statute punishing horse stealing with death was replaced in 1809 by a statute reserving death for the second offense, and setting the punishment for the first offense at thirty-nine lashes plus between twenty and thirty days' imprisonment. *See* 1792 Ga. Laws 34; 1810 Ga. Laws 32. Two years later, whipping was eliminated and the term of imprisonment was raised to three to seven years. *See* 1811 Ga. Laws 40. Forgery, too—punished by death in 1792—carried four to twelve years after 1811. *See* 1792 Ga. Laws 35, 1811 Ga. Laws 37.

Virginia made the shift to imprisonment in 1796. *See* 1796 Va. Acts ch. 2, 5-14; RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW 52-53 (2000). *See generally* Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 LAW & HIST. REV. 53 (1983).

140. *See, e.g.*, Rogers v. Commonwealth, 5 Serg. & Rawle 462, 466 (Pa. 1820) (tracing this development in Pennsylvania); PESTRITTO, *supra* note 139, at 29-44 (same); *id*. at 45-57 (tracing the shift in Virginia and New York); Bradley Chapin, *Felony Law Reform in the Early Republic*, 113 PA. MAG. HIST. & BIOGRAPHY 163 (1989). For example, larceny of a horse, punished in New

twenty-two crimes enacted by the First Congress in 1790, six were to be punished by hanging. Thirteen provided maximum sentences only, leaving the discretion of what sentence to assign to the judge. For two others, the punishment was set at four times the value of the property involved. For the remaining crime, bribery of a judge, no penalty was specified; instead, a fine and imprisonment could be imposed at the discretion of the judge.[141] At the turn of the century, jurors did include sentences as part of their verdicts in non-capital cases in several jurisdictions,[142] but jury sentencing was not universal, nor was sentencing part of the role of the jury in federal cases.[143]

As a result, expectations about jury function vis-à-vis sentencing when the Bill of Rights was ratified may have been very different from those prevailing in England. Indeed, decades later in England, after Parliament eventually followed the American trend of replacing execution with incarceration as the penalty for property crimes, "pious perjury" declined and the "English came to conceive of the role of the jury . . . as merely to find fact and then to

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Hampshire in 1792 by marking the face with India ink for the first offense and up to one hundred stripes (whipping) and standing at the gallows with a rope about one's neck for up to two hours for the second offense, was punished after 1812 by one to five years' imprisonment, or two to ten for the second offense. *See* 1812 N.H. Laws 15; 1792 N.H. Laws 431.

141. *See* 1 Stat. 112 (1790).

142. In Virginia, for example, jurors fixed some sentences, but not all. *See* HENING, STATUTES OF VIRGINIA XII, at 333 (providing for jury decision on sentences for rioting and unlawful assembly); SHEPHERD, STATUTES OF VIRGINIA I, at 111 (bribery); *id*. at 193 (default on payment of surety). In 1796, a new code replaced several corporal and death sentences with imprisonment. Fines were set by "the court." *See also* SHEPHERD, STATUTES OF VIRGINIA II, 5-13; VA. REV. CODE, 1819, I, at 558-616 (providing for time at the pillory to be set by the court). The 1796 Act, unlike the proposed sentencing reform legislation defeated by one vote twenty years earlier, provided that for many serious crimes juries would set the sentence of imprisonment within the statutory range. *See* Preyer, *supra* note 139, at 76-78 (listing sentence ranges for treason, arson, rape, second-degree murder, robbery, burglary, larceny, maiming, and homicide under the 1796 Act, and noting that sentences were set by juries). Penalties for counterfeiting, however, remained in the hands of the judge. *See* 1789 Va. Acts ch. 15 (counterfeiting to be punished by imprisonment as limited by the court); 1801 Va. Acts ch. 71 (court sets imprisonment from one to ten years for delivering a person to be transported out of the United States); *see generally* Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968 (1967).

143. *See generally* Charles O. Betas, *Jury Sentencing*, 2 NAT'L PAROLE AND PROBATION ASS'N J. 369 (1956). *See also* Hawkins v. State, 3 Stew. & P. 63 (Ala. 1832) (noting that an 1807 state statute providing for jury determination of the amount of fine, but retaining judicial determination of the term of imprisonment, was "an innovation upon the rules of the common law, so far as it transfers power from the court to the jury"); Blevings v. People, 2 Ill. (1 Scam) 172 (1835) (noting that at common law, juries never were invested with the power of determining the character or extent of the punishment, and construing an 1833 statute to grant the jury power to sentence, but not in guilty plea cases).

apply the law as stated by the bench."[144] With the "emerging view of Parliament as the quintessential democratic institution," "jury discretion had come, finally, to be viewed as potentially undemocratic, and as a threat to the subject's right to be tried by a law that was certain and predictable."[145] This same transformation in expectations about jury function may very well have taken place earlier in America.

Even assuming that penalty-setting was once considered a vital function of the jury that is guaranteed by the Sixth Amendment, this understanding has been obliterated beyond resurrection by the past two centuries of sentencing reform and litigation. First, in the late eighteenth and early nineteenth centuries came the continued decline of mandatory penalties in favor of judicial discretion to set sentences within a range set by the legislature.[146] For such crimes, jurors could only guess what sentence would follow their conviction.

Second, with the rise of the "medical model" of sentencing in the late 1800s, and the ensuing indeterminate sentencing statutes in the early twentieth century, came even broader sentence ranges. This leeway was required so that experts in correction would have the room they needed to prescribe the appropriate amount of treat-

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144. Thomas A. Green, *The English Criminal Trial Jury and the Law Finding Traditions on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, *supra* note 135, at 72.

145. *Id*.

146. *See supra* notes 139-41. Discretionary sentences had been the rule in misdemeanors for some time before the Revolution. *See* Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 350 (1982); *see also supra* note 140. Following the Revolution, common-law crimes were attacked as unconstitutional and bad policy. Justice Samuel Chase declared, in an opinion rejecting common-law federal crimes, that legislative standards must control punishment:

> [I]t appears to my mind, to be as essential, that Congress should define the offenses to be tried, and apportion the punishment to be inflicted, as that they should erect Courts to try the criminal, or to pronounce a sentence on conviction . . . . [I]f Congress had ever declared and defined the offence, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject.

United States v. Worrall, 2 U.S. 384, 394-95 (1798). The Supreme Court later rejected federal common-law crimes in *United States v. Hudson and Goodwin*, 7 U.S. (Cranch) 32, 34 (1812) ("[T]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."); HORWITZ, *supra* note 138, at 11-30. With the codification of crime came the increasing use of incarceration. Statutes often specified broad ranges within which judges could choose an appropriate sentence. *See, e.g.*, 1 BISHOP, *supra* note 14, at 606 ("[I]n some of our States the statutes fix only the maximum of punishment, leaving the court to go as low as it sees fit."); Fisher, *supra* note 25, at 913-14 (discussing broad discretion given to judges in sentencing during this period).

ment.[147] During this period, many states previously clinging to jury sentencing in non-capital cases gave up or severely limited the practice as inconsistent with the prevailing view that "disposition of offenders is a problem for specialists in criminology and psychiatry."[148] The number of jurisdictions that allowed any jury sentencing in non-capital cases dwindled by the mid-twentieth century to thirteen states. Two of these states limited such sentencing to homicide or a handful of serious crimes and one state limited it to those few cases in which the code failed to set a maximum and minimum sentence for the offense. All but three states disallowed jury sentencing following a guilty plea. In addition, judges in four states had significant power to modify the jury's sentence.[149]

The most telling rejection of the penalty-setting role of the jury hinted at in the *Apprendi* decision is the line of decisions, beginning in 1895, in which the Court considered jury instructions on

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147. In many states, statutory sentence ranges expanded drastically as the rehabilitative philosophy took hold. Massachusetts provided in 1886 that, "when a convict is sentenced to the Massachusetts reformatory, the court or trial justice imposing the sentence shall not fix or limit the duration thereof." Fisher, *supra* note 25, at 1046 (internal quotation omitted); *see also id*. at 874, 886 (noting that a sentence from zero to life could be imposed for "forging a bank bill or unarmed robbery," or "assault with intent to rape"); Apprendi v. New Jersey, 120 S. Ct. 2348, 2375 (2000) (Thomas, J., concurring) (noting that the robbery penalty in 1894 in Maine was any term of years to life). A half-dozen states around the turn of the century enacted laws depriving the judge of any power to set the sentence within the statutory maximum and minimum; release dates were controlled entirely by the parole board. *See* Fisher, *supra* note 25, at 1055. The bifurcation of guilt and sentencing was

> deepened and entrenched during the Progressive Era in response to our deep uncertainty regarding free will. At trial the jury would determine guilt or innocence according to traditional, generally accepted notions of personal responsibility. At the sentencing phase, however, judges were to consider more individualized, explanatory, or mitigating factors such as the "defendant's background, upbringing, associates, and so on—matters rarely formally admissible during the trial . . . ."

Sherman Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2444 (1999) (quoting Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1923 (1995)).

In the 1900s, many states set maximum terms of twenty to life for a large number of felonies. *See* FRIEDMAN, *supra* note 114, at 159-63 (describing the history of indeterminate sentencing); STITH & CABRANES, *supra* note 65, at 21 ("By the early 1970s, California . . . sentenced nearly all serious offenders to an indeterminate term of between one year and life [and] the duration of almost all prison sentences in California was determined by parole authorities."); Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 473-74 & nn.15-17 (1961) (listing statutes from New York, Pennsylvania and California); Note, *Statutory Structures*, *supra* note 28, at 1137-41 (noting that six states required minimum felony sentences of only one year and that two states repealed all minima in 1959). The Model Penal Code graded felonies into three degrees, the most serious carrying a sentencing range of one year to life.

148. Comment, *Consideration of Punishment by Juries*, 17 U. CHI. L. REV. 400, 401 n.6 (1949); *see also* STITH & CABRANES, *supra* note 65, at 18; Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1374 (1999).

149. Note, *Statutory Structures*, *supra* note 28, at 1154-55.

lesser-included offenses in murder cases. Murder at that time was the only crime in which mandatory death sentences played a major role. In order to avoid the mandatory sentence of death, juries had "persistently" refused to convict "a significant portion" of those charged with first-degree murder.[150] But rather than protect this practice, the Court went out of its way to condemn it, first in the 1895 murder case of *Sparf and Hansen*,[151] and then, nearly a century later, in a series of cases beginning with *Beck v. Alabama*.[152] Indeed, the jury practice of convicting a defendant of a lesser offense in order to protect that defendant from certain death was targeted by the Court as a source of arbitrariness and unfairness that plagued the administration of the death penalty. It contributed to the Court's decision to prohibit mandatory death sentences altogether. Efforts by juries to spare the lives of capital defendants by acquitting them of capital murder were condemned by the Court as an exercise of "unguided and unchecked discretion regarding who will be sentenced to death."[153] In the Court's view, this led to the same " 'wanton' and 'arbitrary' imposition of the death penalty" that had troubled it in *Furman*.[154] As perhaps the final blow to the common-law vision of the jury as mediator of penalty, the Court upheld

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150. Baldwin v. Alabama, 472 U.S. 372, 388 (1985) (quoting Woodson v. North Carolina, 428 U.S. 280, 302-03 (1976)).

151. *See generally* Sparf v. United States, 156 U.S. 51 (1895); Hawaii v. Kapea, 11 Haw. 293 (1898) (collecting cases); *see also* 5 WHARTON'S CRIMINAL LAW & PROCEDURE § 2099, at 268-70 (1957) (collecting cases).

152. In *Beck v. Alabama*, 447 U.S. 625 (1980), and its progeny, the Court sought to separate the sentencing decision from the jury's decision on guilt, not bind them together. Under *Beck*'s principles, a trial judge was required to instruct the jury on a lesser alternative to murder in certain circumstances to give the jury a third choice other than outright acquittal or capital murder. *Beck*, 447 U.S. at 637.

153. Woodson v. North Carolina, 428 U.S. 280, 302 (1976).

154. *Baldwin*, 472 U.S. at 388; *see also* Roberts v. Lousiana, 428 U.S. 325, 333 (1976) (striking down a statutory scheme under which five specific types of murder carried a mandatory death sentence, and under which the jury in each case had to be instructed on lesser included offenses of second-degree murder and manslaughter, whether or not the evidence justified those instructions). The plurality in *Roberts* commented:

> This responsive verdict procedure not only lacks standards to guide the jury in selecting among first degree murderers but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions. The Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's de facto sentencing discretion.

*Id.* at 334-35.

statutes that allowed a judge's decision to trump the jury's selection of life or death in a capital case.[155]

Thus, the separation of juries from sentencing in America began well before 1789 and has continued for over two centuries. Even the remarkable explosion of mandatory sentences in the past three decades, accompanied by the rejection of indeterminate sentencing in a third of the states and by Congress, has not been enough to reverse this trend.[156] Arguments that the Sixth Amendment affords defendants the right to present sentencing information to their juries have been uniformly rejected.[157] By 1994, when the Court in *Shannon v. United States* was asked to require judges to instruct jurors on the sentencing consequences of a verdict of not guilty by reason of insanity, the Court dismissed the argument as contrary to long-standing practice.[158] Today, in nearly all jurisdictions,[159] jurors in non-capital cases are forbidden to learn of the sentencing consequences of their decisions,[160] and many statutory sentence ranges remain quite broad.[161]

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155. *See, e.g.*, Harris v. Alabama, 513 U.S. 505, 514 (1995).

156. For a summary of the rise of not only mandatory minimum sentencing statutes, but also sentencing guidelines and presumptive sentencing schemes by which legislatures set presumptive terms from which judges cannot depart absent a finding of aggravating or mitigating facts, see 4 LAFAVE ET AL., *supra* note 49, § 26.3, at 733-41.

157. *See generally* Milton Heumann & Lance Cassack, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 AM. CRIM. L. REV. 343 (1983); *see also* Adrian Lanni, Note, *Jury Sentencing in Non-Capital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1782-85 (1999).

158. Shannon v. United States, 512 U.S. 573, 586-87 (1994).

> Shannon offers us no principled way to limit the availability of instructions detailing the consequences of a verdict to cases in which an NGI defense is raised. . . . [A]s a general matter, jurors are not informed of mandatory minimum or maximum sentences, nor are they instructed regarding probation, parole, or the sentencing range accompanying a lesser included offense . . . . [A] district court, under Shannon's reasoning, might be obligated to give juries information regarding these possibilities as well. In short, if we pursue the logic of Shannon's position, the rule against informing jurors of the consequences of their verdicts would soon be swallowed by the exceptions.

*Id*.

159. In Georgia, in those limited cases where the jury does sentence, it must be informed accurately. GA. CODE ANN. § 16-6-1 (2000) (one year to life for rape); GA. CODE ANN. § 16-12-123 (2000) (one year to life for hijacking). *See generally* Carbray v. Champion, 905 F.2d 314 (10th Cir. 1990). Louisiana requires the judge to provide sentencing information to the jury if requested by the defendant. *See* State v. Hooks, 421 So. 2d 880, 886 (La. 1982) ("When the penalty to be imposed is a mandatory one, our law requires the trial judge to inform the jury, on request of the defendant, of the penalty and to permit defense counsel to argue the penalty to the jury.").

160. *See, e.g.*, United States v. Johnson, 62 F.3d 849, 850-51 (6th Cir. 1995); United States v. Thomas, 895 F.2d 1198, 1200 (8th Cir. 1990); Limose v. Florida, 656 So. 2d 947, 949 (Fla. 1995). Of course, the penalty that a defendant faces is sometimes revealed during cross-examination of prosecution witnesses, and is occasionally discovered by jurors from sources external to the trial. *See, e.g.*, Ross v. State, 231 Ga. App. 506, 509 (1998) (reporting that, on cross-examination in an

Throughout 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. These fluctuations in *who* decides the sentence follow shifts in prevailing philosophy about *why* and *how* we sentence. There is no basis for believing that those changes will cease. If the Jury Clauses of the Constitution do limit the facts that a legislature can remove from the jury and shift into the sentencing phase, and if those limits are not exceeded by the sentencing practices followed in non-capital cases for most of the past two hundred years, the permissible boundaries are very broad. They are broad enough, for example, to accommodate statutes that delegate to a judge the unencumbered discretion to set a sentence for a serious crime at anywhere from a year to life in prison. In this sense, the Court's concern that the jury not be reduced to "low-level gatekeeping"[162] seems curiously optimistic—the jury has played this role for years.

### 3. Due Process Right to Juror Unanimity

The Court has been more direct about using the Due Process Clause itself to rein in legislative choice concerning what is and what is not an element, at least in dicta. Twice in the past ten years, in *Schad v. Arizona*[163] and again in *Richardson v. United States*,[164] the justices have agreed that the Due Process Clause would prevent legislatures from defining an element of an offense so that it could be satisfied by alternative means that had been treated historically as separate elements of offenses. This anti-combination rule would protect against a guilty verdict accompanied by jury disagreement on a point that the Constitution would require to be treated as an element. It is a *specificity* requirement that forces courts to treat as independent elements what a legisla-

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armed robbery trial, a defense witness stated that he faced "ten years mandatory" on an armed robbery charge).

161. *See, e.g.*, 18 U.S.C. § 2241(c) (1994) (any term up to life imprisonment for child sexual assault); IDAHO CODE § 18-1508 (Michie 1997) (zero to life for lewd conduct with a minor); IDAHO CODE § 18-5609 (Michie 1997) (two years to life for inducing a minor into prostitution); IND. CODE ANN. § 35-50-2-4 (Michie 2000) (twenty to fifty years for a Class A felony); OHIO REV. CODE ANN. § 2929.11 (West 2000) (four to twenty-five years for a first-degree felony); 18 PA.CONS. STAT. ANN. § 106 (West 2000) (one to twenty years for a first degree felony); N.Y. PENAL LAW § 70.00 (McKinney 2000) (three years to life imprisonment for a Class A felony); MASS GEN. LAWS ch. 269, § 10E (2000) (ten years to life for unlawful sale of twenty or more guns).

162. *See supra* note 133.

163. Schad v. Arizona, 501 U.S. 624 (1991).

164. Richardson v. United States, 526 U.S. 813 (1999).

ture has chosen to characterize as simply different means of establishing a single element. The problem, the Court observed in *Schad*, arises when "the *inherent nature of the offense charged* requires the state to prove as an element of the offense some fact that is not an element under the legislative definition."[165] Although the Court has stopped short of invalidating any statute on this basis, every justice has recognized this constitutional restriction on the substantive criminal law.[166]

Drawing from the burden-shifting cases, the Court in *Schad* explained that setting due process limits on offense definitions selected by states meant "deciding, as an abstract matter, what elements an offense must comprise."[167] This required the Court to examine whether a "State's particular way of defining a crime has a long history, or is in widespread use," or rather, whether it is a "freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions."[168] The Arizona statute at issue in *Schad* permitted a jury to return a guilty verdict on a charge of first-degree murder without first agreeing unanimously on whether the defendant committed felony murder or premeditated murder. Justice Souter, with whom three other justices joined, and with whom Justice Scalia concurred on this point,[169] found persuasive evidence that Arizona's scheme did indeed have a long history.[170] Justice Scalia did not join the further analysis of the plurality, namely, that a court considering a due process claim like Schad's must, in addition, look past history "to narrower analytical methods of testing the moral and practical equivalence of the different" facts that could count as a single ele-

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165. *Schad*, 501 U.S. at 639 (emphasis added).

166. Since *Schad*, reported decisions of lower courts have only rarely found in a defendant's favor, upholding convictions absent jury agreement on whether the defendant was an accomplice or a principal, stole employee time or paint supplies, committed voluntary or involuntary manslaughter, laundered money by promoting illegal activity or concealing it, etc. *See, e.g.*, United States v. Navarro, 145 F.3d 580 (3d Cir. 1998) (means of laundering money); United States v. Sanderson, 966 F.2d 184 (6th Cir. 1992) (theft of employee time or paint supplies); Simms v. United States, 634 A.2d 442 (D.C. 1993) (same); Walker v. State, 944 P.2d 762 (Nev. 1997) (aiding and abetting or principal); Evans v. State, 944 P.2d 253 (Nev. 1997) (same); State v. Anderson, 511 N.W.2d 174 (Neb. 1993) (voluntary or involuntary manslaughter).

167. *Schad*, 501 U.S. at 639.

168. *Id*. at 640.

169. Justice Scalia wrote that, under the Due Process Clause, it "is precisely the historical practices that *define* what is 'due.' " *Id*. at 650 (Scalia, J., concurring) (emphasis in original). He concluded that "[u]nless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.' " *Id*. at 651 (Scalia, J., concurring).

170. *Id*. at 642 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977) (citation omitted)).

ment.[171] In *Schad*, this meant asking if the two different "mental states" of felony murder and premeditated murder "may satisfy the *mens rea* element" of first-degree murder.[172] Subsequently in *Richardson v. United States*, the Court interpreted the Continuing Criminal Enterprise statute, 21 U.S.C. § 848, to require the jury to agree which predicate "violation" occurred.[173] The *Richardson* Court noted that a different interpretation would have raised a question of constitutionality under *Schad* because there was no history of treating individual criminal violations as simply different means toward the commission of a greater crime even under habitual offender laws.[174]

In examining what constitutional barriers exist for legislators who would otherwise shift elements to sentencing factors in hopes of avoiding the consequences of the rule in *Apprendi*, it is useful to review the three hypothetical examples of offense definitions that a majority of justices in *Schad* and *Richardson* agreed in dicta would violate due process: 1) a crime of "recidivism" consisting merely of a combination of offenses, without a requirement of jury agreement on which offenses the defendant had committed;[175] 2) a crime so "generic" or irrational that a finding of any combination of "embezzlement, reckless driving, murder, burglary, tax evasion or littering . . . would suffice for conviction";[176] and 3) "novel 'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return)."[177] These hypothetical statutes would violate due process because they vary drastically from historical practice. In addition, under the "history-plus-moral-equivalence" approach adopted by a minority of justices, these statutes could not be applied as written because they would allow jurors to mix and match criminal acts that carry grossly disparate levels of moral blameworthiness (e.g., littering and murder), raise "serious questions as to fairness and rationality because the jury's discretion would be so uncon-

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171. *Id*. at 637.

172. *Id*. The plurality found such moral equivalence between the two alternatives in the Arizona statute. *Id*.

173. Richardson v. United States, 526 U.S. 813, 824 (1999).

174. *Id*. at 819-20.

175. *Id*. at 835-36. Even the justices who dissented in *Richardson* agreed that a habitual offender statute specifying a single element that could be met by any series of crimes, without requiring juror unanimity on one particular underlying crime, would raise "serious questions as to fairness and rationality because the jury's discretion would be so unconstrained." *Id*. at 836 (Kennedy, J., dissenting). The CCE statute was not such a statute, the dissenters maintained, "for the various elements work together to channel the jury's attention toward a certain kind of ongoing enterprise." *Id*. (Kennedy, J., dissenting).

176. *Schad*, 501 U.S. at 633.

177. *Id*. at 650 (Scalia, J., concurring).

strained,"[178] and amount to "an end run around the Constitution's jury unanimity requirement."[179]

Prohibiting only such extreme departures from traditional offense defintions, the *Schad* rule itself provides little ammunition against statutes designed to preserve judicial adjudication of certain facts after *Apprendi*. Given the hypotheticals offered by the Court, an offense definition reformulated to avoid the consequences of *Apprendi* will be no more likely to violate the *Schad* rule than any other criminal statute. An offense carrying a large sentence maximum that binds a judge's discretion within that maximum depending on the presence or absence of aggravating features will not require the use of an element that may be proven by any combination of disparate acts.[180]

But the rationale of *Schad* and *Richardson* is highly instructive. By linking what due process requires of states in defining crime to consistent and widespread offense definitions of the late eighteenth and early nineteenth centuries,[181] *Schad* supports an historically based rule for testing the constitutionality of a state's designation of a fact as something other than an element. If the crime (or its equivalent) has been punished for over two centuries

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178. *Richardson*, 526 U.S. at 836 (Kennedy, J., dissenting).

179. *Id*. (Kennedy, J., dissenting).

180. *Schad* might create difficulty should a legislature wish to combine into one element two or more crimes that, throughout the history of this nation, have been treated fairly consistently as separate offenses. For example, a crime of either rape or murder, or of either larceny or assault, would be the kind of unacceptably contra-historical crime prohibited under *Schad*. If the New Jersey legislature wanted to retain as a sentencing factor, not an element, the presence or absence of racial motivation for a broad range of crimes, it could create an offense of "felony harassment," with a penalty of one year to life in prison, and define felony harassment to include "any offense against a person or property, including but not limited to fraud, theft, assault, robbery, murder, or home invasion." Sentence ranges would be graded by the presence or absence of aggravating factors, *including discriminatory motivation*. This kind of statute would undoubtedly trigger the *Schad* limitation because lumping such disparate crimes into one crime has no basis in history, nor is assault or negligent damage to property anywhere near the moral equivalent of murder.

In any event, a statute like this is highly improbable. The same quality that makes this combination offense unlikely to survive scrutiny under *Schad* also makes it unlikely to be enacted into law. The offense definition is "irrational," particularly when the crimes lumped together are defined and punished less severely elsewhere in the state's code. No legitimate reason exists for punishing the very same conduct so differently in two provisions of the code. Assault charged as a misdemeanor assault would carry quite low penalties, while the same conduct charged as "harassment" would carry the maximum penalty of life, even though each involved identical conduct.

181. *See, e.g.*, *Schad*, 501 U.S. at 641 n.8 (citing a state statute from 1794 and a state case from 1903); *id*. at 651 (Scalia, J., concurring) (tracing the definition of murder to the sixteenth century: "It was the norm when this country was founded, was the norm when the Fourteenth Amendment was adopted in 1868, and remains the norm today.").

in this country with a drastically different allocation of authority between judge and jury than exists in the challenged statute, the novel statutory scheme should trigger further scrutiny. Also, the *Schad* plurality presents another concern: that even where an offense definition has no common-law analogue, due process may require courts to override legislative decisions that allow jurors to agree on a single element by mixing and matching acts of widely differing blameworthiness.[182] Our approach for assessing statutes enacted after *Apprendi* that shift what are arguably elements to the sentencing phase, described in Part III.B below, incorporates both of these considerations.

### 4. Eighth Amendment Prohibition Against Cruel and Unusual Punishments

The Eighth Amendment's Cruel and Unusual Punishments Clause will offer weak barriers to post-*Apprendi* efforts by legislatures to omit facts that affect sentences from the definitions of offenses punishable by penalties less than death.[183] Death, of course, is different,[184] and we expect that the Court will police post-*Apprendi* statutes that authorize execution as a penalty with con-

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182. *Richardson*, 526 U.S. at 836-37.

183. In addition to the proportionality analysis discussed in this Section, there are two other areas where the Eighth Amendment's Cruel and Unusual Punishments Clause offers protection: (1) *Robinson v. California*'s bar against "status" crimes; and (2) *Weems v. United States*' bar against inhumane modes of punishment. *See generally* Robinson v. California, 370 U.S. 660 (1962); Weems v. United States, 217 U.S. 349 (1910). The former is covered in the section discussing substantive due process. *See infra* Part III.A.5. The latter will be barred regardless of whether the jury or the judge finds the facts necessary for imposition of punishment.

Justices and scholars continue to disagree as to whether the Framers, when modeling the Cruel and Unusual Punishments Clause upon the English Declaration of Rights of 1689, had proportionality in mind. *Compare, e.g.*, RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 236 (1959); Charles Walter Schwarz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummell*, 71 J. CRIM. L. & CRIMINOLOGY 378 (1980); Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966); Note, *What is Cruel and Unusual Punishment?*, 24 HARV. L. REV. 54 (1910); *with* Anthony Granucci, *'Nor Cruel and Unusual Punishments Inflicted,' The Original Meaning*, 57 CAL. L. REV. 839, 844-60 (1969); Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783 (1975).

184. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion).

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

*Id*.; *see also* Furman v. Georgia, 408 U.S. 238, 270-71 (1972) (Brennan, J., concurring).

siderably more vigor than statutes that authorize penalties less than death.

*Death cases.* Capital punishment is not immune from *Apprendi* fallout. In capital cases as well as non-capital cases, a legislature may decide to bypass grand jury indictment, jury trial, and proof beyond a reasonable doubt for certain factual matters. For example, a number of federal statutes now label facts that must be established for a sentence of death to be imposed as sentence-enhancing factors, such as the fact that a defendant proximately caused the death of a victim in the course of another felony.[185] Although these existing "enhancements" have now become "elements" in the wake of *Apprendi*, one could easily imagine Congress increasing the maximum penalty for the underlying offense to death, and directing a judge to impose only imprisonment upon finding that the defendant did not cause a death during the crime.[186] Arguably, nothing in the Eighth Amendment prohibits this course of action. The Court in *Cabana v. Bullock* held that a federal court reviewing a state prisoner's petition for habeas relief may reject a claim that the state failed to satisfy the Eighth Amendment's requirement that some culpable mental state be shown before a defendant may be executed for felony murder simply by examining the entire course of the state court proceedings, including the sentencing hearing and appellate findings.[187] The majority reasoned that this culpability requirement "establishes no new elements of the crime of murder that must be found by a jury."[188] Likewise, the Court in *Walton v. Arizona* reiterated that capital sentencing, including the constitutionally required determination that the aggravating factors outweigh the mitigating ones, can be handled solely by the judge.[189] This determination is not an element of the offense

185. *See* 21 U.S.C. § 848 (1994) (prohibiting engaging in a continuing criminal enterprise, with a potential sentence of life imprisonment, but containing a subsection, labeled "death penalty," providing that, "in addition to the other penalties set forth in this section, . . . any person engaged in . . . a continuing criminal enterprise, . . . who intentionally kills, . . . may be sentenced to death"). *See infra* Appendix B for additional examples.

186. Congress could rewrite the continuing criminal enterprise statute, for example, by increasing to death the maximum penalty for violation of the CCE provision, so long as the judge at sentencing imposes a lesser sentence if the defendant had not killed another in the course of the crime.

187. Cabana v. Bullock, 474 U.S. 376, 382 n.1, 386 (1986) (five-four).

188. *Id.* at 385.

189. Walton v. Arizona, 497 U.S. 639, 647-48 (1990) (holding that an aggravating factor is a sentencing enhancement, not an element of the offense); *see also* Hildwin v. Florida, 490 U.S. 638, 640-41 (1989) (per curiam) (holding that the sentencing judge may determine death-qualifying aggravating facts); Spaziano v. Florida, 468 U.S. 447, 448 (1984) (finding that neither the Sixth nor the Eighth Amendment provides a capital defendant the right to jury sentencing).

of conviction that must be determined by a jury.[190] Thus, one might argue if both the *mens rea* necessary for execution of a felony-murderer and the individuation necessary for any execution can be found by the judge rather than the jury, why not the fact of the killing itself?

There are at least two possible answers to this question. First, crimes that do not include the death of a human *as an element of the offense* may not be sufficiently serious to warrant the penalty of death under the Eighth Amendment. Indeed, the Court has upheld the death penalty for only those offenses that require proof of a homicide as an element of the offense.[191] To be sure, the Court may subsequently approve of execution as a penalty for serious non-homicide felonies, such as child rape, treason, or espionage.[192] However, we expect that the Court will judge the constitutionality of death sentences for crimes other than homicide by examining exclusively the elements of the offense of conviction, not what might be proven at sentencing.[193] An alternative answer is to accept that, so long as a jury determines the elements designated by the legislature as sufficient to authorize the execution of the ac-

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190. *Hildwin*, 490 U.S. at 640.

191. *See, e.g.*, *Cabana*, 474 U.S. at 385.

> *Enmund* holds only that the principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law: that is the class of murderers who did not themselves kill, attempt to kill, or intend to kill.

*Id.*; Enmund v. Florida, 458 U.S. 782, 797 (1982) (five-four) (holding that the Eighth Amendment does not permit "imposition of the death penalty on one such as Enmund . . . who does not himself kill, or intend that a killing take place or that lethal force will be employed"); *see also* Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (finding that the imposition of capital punishment for the rape of an adult female violated the Eighth Amendment). *Enmund* was limited in *Tison v. Arizona*, in which the Court found that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." Tison v. Arizona, 481 U.S. 137, 158 (1987) (five-four).

192. The Court has not yet passed on the many federal and state statutes authorizing the death penalty for those convicted of certain crimes not resulting in the death of the victim, such as espionage, child rape, aircraft hijacking, and kidnapping. *See* 83 ABA J. 30 (Aug. 1997) (listing states and crimes); *see also* Bethany v. Louisiana, No. 96-8334, 138 L. Ed. 2d 188 (1997) (statement of Stevens, Ginsburg, and Breyer, JJ., that denial of certiorari as to a 1995 Louisiana law authorizing the death penalty for rape of a child younger than twelve does not constitute a ruling on the merits).

193. This is precisely the position the lower federal courts have taken in determining the proportionality of non-capital sentences; they compare the enhanced sentence solely to the elements of the offense of conviction. *See, e.g.*, United States v. Gonzales, 121 F.3d 928, 942-43 (5th Cir. 1997) (stating that a sentencing enhancement of thirty years for using or carrying a machine gun during and in relation to a drug offense, consecutive to the seventy-eight months for the drug offense, is not grossly disproportionate to the gravity of the drug offense, and thus does not violate the Eighth Amendment).

cused, proof that the defendant caused a death may be assessed by a judge in a capital case consistent with the Cruel and Unusual Punishments Clause. If so, restraints on this sort of legislative experimentation must instead be found in the Due Process Clauses. The due process inquiry would presumably differ from that under the Eighth Amendment alone. We offer one alternative, a multifactor test described in Part III.B, below.[194]

*Non-capital cases.* Outside of capital cases, we believe that the Eighth Amendment's Cruel and Unusual Punishments Clause offers little protection against disproportionate prison sentences in a post-*Apprendi* nation. In an influential article, Professor Ronald J. Allen suggested that the answer to legislative redefinitions of crimes that shift "elements" into "defenses" is to impose a constitutional requirement of "maintaining proportionate punishment,"[195] though he did not articulate the contours of such a test.[196] Without

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194. Alternatively, one of us believes that the Court might reconsider the five to four holdings of *Walton* and *Cabana* in light of *Apprendi*. There is some inconsistency in holding both that the federal Constitution demands that the state prove a certain fact not included by the legislature as an element of a crime before the state can impose the authorized punishment, and that this fact is not subject to those procedural protections afforded elements of crimes because it is merely a "substantive limitation on sentencing." *Walton*, 497 U.S. at 680-81 (Blackmun, J., dissenting); *id.* at 709 (Stevens, J., dissenting) (arguing that aggravating circumstances do "operate as statutory 'elements' of capital murder"). Labeling as a "limitation on sentencing" the affirmative defense in *Patterson* and the sentencing factor in *McMillan* is plausible in part because New York could have rejected the defense of extreme emotional distress, and Pennsylvania could have imposed the same sentence regardless of whether the defendant visibly possessed a firearm. The greater power to eliminate the significance of facts entirely may include the lesser power to shift the burden of proving a fact to the defendant and to recognize the fact only at sentencing as found by a judge. This "greater includes the lesser" rule of constitutional interpretation is the subject of rich and intense scholarly and judicial debate in both the criminal and civil context. *See infra* note 212 and accompanying text. This argument, however, fails on its own terms when applied to facts that a state cannot eliminate because of federal constitutional commands.

195. Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 325 (1980) [hereinafter Allen, *Structuring Jury Decisionmaking*]; *see also* Ronald J. Allen, Mullaney v. Wilbur, *the Supreme Court, and the Substantive Criminal Law: An Examination of the Limits of Legislative Intervention*, 55 TEX. L. REV. 269, 295-301 (1977) [hereinafter Allen, *Limits of Legislative Intervention*]; Allen, *Reflections on the Limits of Legislative Imagination*, *supra* note 6, at 648-54. Examples of more recent scholarship advocating stronger proportionality review include Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107 (1995) (advocating "limited retributivism" as a justification for a ban on disproportionate sentencing); Nancy Jean King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 105 (1995) (suggesting that because due process, double jeopardy, and common-law preclusion rules permit successive penalties for the same conduct, the Court should engage in "cumulative excessiveness" review under the Eighth Amendment).

196. For example, after correctly noting that the rebuttable presumption of intent to kill in *Sandstrom v. Montana*, 442 U.S. 510, 517 (1977) ("[T]he law presumes that a person intends the

significant revision of current standards, however, the Eighth Amendment alone cannot shoulder this load.

First, even though seven justices currently ascribe to some form of proportionality review of sentences of imprisonment in non-capital cases,[197] the Court's present test is so narrow that it is difficult to imagine a constitutionally disproportionate felony sentence,[198] especially where the sentence is anything less than life imprisonment without the possibility of parole.[199]

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ordinary consequences of his voluntary act."), is the functional equivalent of a negligent murder statute with an affirmative defense of lack of intent to kill, Professor Allen concludes without explanation that the 100-year sentence imposed was disproportionate to the murder committed. Allen, *Structuring Jury Decisionmaking*, *supra* note 195, at 358.

Likewise, Professors Jeffries and Stephan also argue that the legislature is limited in redefining crimes to evade criminal procedural guarantees by the Eighth Amendment's requirement of proportionality. Jeffries & Stephan, *supra* note 6, at 1383-85. They assert that if felony murder is viewed as a strict liability crime, it is always an unconstitutionally cruel and unusual punishment; on the other hand, if felony murder is viewed as an adjunct of the underlying crime, it does not violate the Eighth Amendment if the underlying offense is rape, but it is disproportionate if the underlying offense is selling alcohol to an inebriated customer. *Id*. at 1385. Professors Jeffries and Stephan offer as little guidance on proportionality review as does Professor Allen. In any event, cultural attitudes toward the seriousness and moral culpability surrounding drunk driving have changed since Professors Jeffries and Stephan wrote their article.

197. Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (upholding a mandatory life sentence without the possibility of parole imposed upon a first-time drug possessor). The plurality agreed to engage in the intra- and inter-jurisdictional analysis it developed in *Solem v. Helm*, 463 U.S. 277 (1983), but only upon "an initial judgment that the sentence is grossly disproportionate to a crime." *Harmelin*, 501 U.S. at 1006; *see also Solem*, 463 U.S. at 278, 290-92 (measuring proportionality by comparing: "i) the gravity of the offense and the harshness of the penalty; ii) the sentences imposed on other criminals in the same jurisdiction; and iii) the sentences imposed for commission of the same crime in other jurisdictions").

198. The Court repeatedly gives the single example of life imprisonment for overtime parking as a statute under which the proportionality principle would "come into play," suggesting but not holding that such an offense might be insufficiently serious to warrant a severe penalty. *Harmelin*, 501 U.S. at 963; *Solem*, 463 U.S. at 288; Hutto v. Davis, 454 U.S. 370, 374 n.3 (1982); Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980). Life or near-life sentences have been upheld by federal courts for felonies such as possession of small quantities of controlled substances. *See generally Davis*, 454 U.S. 370 (per curiam) (upholding a forty-year sentence for the crime of distributing nine ounces ($200 worth) of marijuana). In only a handful of pre-*Harmelin* cases have Eighth Amendment challenges to felony sentences succeeded. *See* Hart v. Coiner, 483 F.2d 136, 143 (4th Cir. 1973) (finding that life imprisonment under a West Virginia recidivism statute for offenses of perjury, bouncing a $50 check, and transporting forged checks worth $140, was constitutionally disproportionate), *cert. denied*, 415 U.S. 983 (1974); Thacker v. Garrison, 445 F. Supp. 376, 380 (W.D.N.C. 1978) (finding that a fifty-year sentence for breaking into a nursery and stealing $10 was constitutionally disproportionate); Roberts v. Collins, 404 F.Supp. 119, 124 (D. Md. 1975) (finding that consecutive twenty-year sentences for two counts of simple assault were constitutionally disproportionate, where the maximum sentence for a charged, greater offense of assault with intent to murder was fifteen years), *aff'd*, 544 F.2d 168 (4th Cir. 1976). In only two post-*Harmelin* cases have Eighth Amendment challenges to felony sentences succeeded, while hundreds of similar claims have been rejected. *See* State v. Bartlett, 830 P.2d 823, 823-24 (Ariz. 1992) (after Supreme Court's reversal of a sentence reduction and remand in light of *Harmelin*, the Arizona Supreme Court again determined that a forty-year sentence with no possibility of parole was disproportionate to the offense of consensual sexual intercourse between a

Second, there is no consensus regarding a method for determining whether any particular penalty is unconstitutionally harsh. It is difficult to dispute Justice Kennedy's conclusions in *Harmelin* that fixing prison terms "is properly within the province of the legislature not the courts," that "there are a variety of legitimate punishment schemes based upon theories of retribution, deterrence, incapacitation, and rehabilitation," that "the Eighth Amendment does not mandate the adoption of any one penological theory," and that divergences "in the length of the prescribed prison term are the inevitable, often beneficial" result of Federalism.[200]

This means that the Eighth Amendment will rarely, if ever, check legislative efforts to bypass procedure through redefinition of substantive criminal offenses already serious enough to be punished as felonies.[201] Consider statutes redrafted to achieve the results vacated in *Jones*, *Apprendi*, and *Castillo*. Congress could increase the maximum sentence for simple carjacking from fifteen years to life, the New Jersey legislature could increase the sentence for possessing a firearm for an unlawful purpose from ten to twenty

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twenty-three-year-old defendant with no criminal record and two fifteen-year-old girls); State v. Bonner, 577 N.W.2d 575, 582 (S.D. 1998) (fifteen-year sentence for second-degree burglary disproportionate when compared to sentences received by co-defendants); Adam M. Gershowitz, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishment and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1276-79 (2000) (collecting post-*Harmelin* authority, and arguing that the analyses in *Bartlett* and *Bonner* were flawed). *But see* United States v. Bajakajian, 524 U.S. 321 (1998) (five-justice majority adopting the same "grossly disproportionate" test for the Excessive Fines Clause as for the Cruel and Unusual Punishments Clause, striking fine, and suggesting that failure to report legally-earned currency is not a serious offense).

199. Some circuits limit proportionality review after *Harmelin* exclusively to cases involving sentences of life imprisonment without the possibility of parole. *See, e.g.*, United States v. Lockhart, 58 F.3d 86, 89 (4th Cir. 1999) (finding that a 120-month sentence does not violate the Eighth Amendment prohibition against cruel and unusual punishment, since "proportionality review is not appropriate for any sentence less than life imprisonment without parole"). Though such a conclusion is not mandated by *Harmelin*, it is certainly consistent with it. Justice Powell, a dissenter in *Rummell* but writing for the majority in *Solem*, maintained in *Solem* that he was not overruling *Rummell*, noting the factual distinction that Rummell's life sentence carried with it the possibility of parole while Helm's did not. *Solem*, 463 U.S. at 300-03.

200. *Harmelin*, 501 U.S. at 998-99 (Kennedy, J., concurring).

201. Defendants may have better luck in the state courts where many of the state constitutional counterparts to the Cruel and Unusual Punishments Clause are more charitable. A number of states have clauses in their constitutions providing both that "cruel or unusual punishment is prohibited," and that penalties and punishments be proportioned to the nature of the offense. *See, e.g.*, People v. Dillon, 668 P.2d 697 (Cal. 1983) (finding a life sentence constitutionally disproportionate for felony murder based on attempted robbery); State v. Lewis, 447 S.E. 570, 570-72 (W.Va. 1994) (finding a one- to ten-year sentence constitutionally disproportionate, under both state and federal constitutions, for felony murder of third-offense shoplifting of $8.83 worth of groceries); State *ex rel.* Boso v. Hedrick, 391 S.E.2d 614, 614-17 (W.V. 1990) (finding a life sentence imposed under a recidivist statute constitutionally disproportionate for burglary).

years, and Congress could increase the sentence for possession of any firearm from five to thirty years. Such statutes suffer no Eighth Amendment infirmity under present doctrine. Though these crimes become less serious when we eliminate from their definitions proof that the carjacker also caused death, or that the shooter acted out of racial hatred, or that the gun possessed was a machine gun, the longer sentences are still in no measure "grossly disproportionate" to these crimes.

While disproportionality alone will generally be insufficient to invalidate statutes redrafted to avoid the consequences of *Apprendi*, when combined with other factors it can assist in drawing a constitutional line that cannot be crossed. Proportionality of punishment is therefore included in the multi-factor test proposed in Part III.B, below.

### 5. Fifth and Fourteenth Amendment Substantive and Procedural Due Process

Present doctrine surrounding the rights to a jury trial, juror unanimity, grand jury indictment, and freedom from punishments that are disproportionate is not, at present, capable of curbing legislative efforts to sidestep *Apprendi*'s rule, and we are not inclined to suggest radical or even significant overhaul of this doctrine. A final source of limits on the substantive criminal law is the Due Process Clause itself. Since the Court decided the seemingly conflicting cases of *Mullaney v. Wilbur* and *Patterson v. New York* in the late 1970s, much ink has been spilled by scholars regarding the question of whether the Due Process Clause in some manner prohibits legislative circumvention of *Winship*'s requirement that crimes be proven beyond a reasonable doubt. Professor Scott Sundby previously divided these scholars into three camps: expansive proceduralists, restrictive proceduralists, and substantivists.[202] We will use his handy taxonomy, with some elaboration, to review alternative existing proposals for due process limits on substantive criminal law. None provides a satisfactory test for identifying when legislative efforts to bypass the procedural ramifications of *Apprendi* are unconstitutional.

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202. Scott Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 463 (1989) (classifying expansive proceduralists, restrictive proceduralists, and substantivists).

*Restrictive Proceduralists: Elements are what the legislature says they are.* The restrictive proceduralist position limits constitutional procedural guarantees to those facts included within the legislature's definition of a criminal offense. This describes *Patterson*'s reinterpretation of *Mullaney*,[203] as well as the Court's decision in *Martin v. Ohio*, to uphold a statute that placed on the defendant the burden of persuasion on the issue of self-defense.[204] This approach, however, allows a legislature to circumvent criminal procedural guarantees through legislative draftsmanship. While the Court should afford substantial deference to legislative definitions of crime, it should not give up the store. A meaningful Bill of Rights must be enforceable by the courts.[205]

*Expansive Proceduralists: Any fact identified by the legislature as controlling the sentence is treated as an element.* Expansive proceduralists, represented by Scott Sundby,[206] Donald Dripps,[207] and Stephen Saltzburg,[208] argue that the Constitution demands the application of criminal procedural guarantees to all facts designated by statute as affecting criminal liability, regardless of whether or not those facts are designated presumptions, defenses, or sentencing enhancers. For example, Professor Dripps argues that the legality principle inherent in the Fourteenth Amendment's Due Process Clause prevents a state from punishing a person unless he clearly violated positive law, and that the beyond-a-reasonable-doubt rule is needed for all facts recognized by the legislature as affecting criminal liability or punishment to insure that there are no unjust convictions of persons who have not violated such positive law. Similarly, Professor Sundby argues that the presumption of

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203. *See* Patterson v. New York, 432 U.S. 197, 212-16 (1977).

204. Martin v. Ohio, 480 U.S. 228, 232 (1987).

205. *See supra* note 109 and accompanying text.

206. *See generally* Sundby, *supra* note 202, at 465-69.

207. *See generally* Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665 (1987).

208. *See* Stephen Saltzburg, *Burden of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 AM. CRIM. L. REV. 393 (1983) (suggesting that the requirement of proof beyond a reasonable doubt must attach to all facts recognized by a legislature as leading to a greater penalty, because a defendant has a liberty interest in protection against the stigmatization attached to the offense); *see also* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, *supra* note 110, at 374-75 (describing and critiquing this approach). *See generally* Knoll & Singer, *supra* note 12; Barbara Underwood, *Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977) (arguing that the application of the requirement of proof beyond a reasonable doubt to every fact specified by the legislature as justifying the invocation of the particular criminal sanction at issue is necessary to fulfill the rule's function—reducing erroneous convictions and symbolizing the great significance of a criminal conviction).

innocence extends beyond the constitutional prerequisites for assessing criminal liability, because the state creates a protected liberty interest in being free from erroneous condemnation and punishment when it provides defenses and gradations of punishment in a criminal statute.[209] Justice Thomas essentially adopts this expansive proceduralist position in his *Apprendi* concurrence, though he attempts to exclude penalty mitigators from constitutional procedural protections.[210]

To be sure, this simple rule is an attractive option, resolving the tension between substance and procedure with logic and predictability. Once the legislature tagged a fact as having such importance that its presence or absence must lead to an increase or decrease in punishment, it would invariably create an entitlement in the accused to have that issue resolved with the full array of criminal procedural guarantees that are constitutionally mandated. The Pattersons of the world would have a legislatively created entitlement to be free from punishment for murder (as opposed to voluntary manslaughter) unless the government established that they acted in the absence of heat of passion. Such an entitlement to a certain punishment could not, this argument holds, be revoked absent the full array of criminal procedure any more than a legislatively-created civil entitlement could be revoked without procedural due process.[211]

While recognizing the significant appeal of the expansive proceduralist position, we reject it.[212] First, as applied to sentencing

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209. Sundby, *supra* note 202, at 491.

210. *See supra* notes 59-62 (discussing the difference between aggravating features and mitigating features). In his *McMillan* dissent, Justice Stevens voiced a similar view: "Once a State defines a criminal offense," he argued, "the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt." McMillan v. Pennsylvania, 477 U.S. 79, 96 (1986). He explained that "*Patterson* . . . clarified that the Due Process Clause requires proof beyond a reasonable doubt of conduct which exposes a criminal defendant to greater stigma or punishment, but does not likewise constrain state reductions of criminal penalties." *Id*. at 99.

211. For a collection of civil cases, see *infra* note 212.

212. In rejecting the expansive proceduralist position, we do not rely upon the argument that the greater ability of the legislature to eliminate the defense or mitigating fact entirely includes the lesser option to offer the defense or mitigator with a procedural price tag. *See, e.g.*, Allen, *Structuring Jury Decisionmaking*, *supra* note 195, at 347 ("[I]f a state limits its manipulation of burdens of persuasion to issues that need not be proved under the Eighth Amendment's proportionality standard or principles of substantive fairness imposed by due process, then whatever the state does should be acceptable."); Jeffries & Stephan, *supra* note 6, at 1345 ("[T]he first fault of this approach is its illogic . . . . [It] would allow the government to abolish a given ground of exculpation, but not to retain it as an affirmative offense . . . . [T]he logic of the greater-power-includes-the-lesser argument seems compelling."). *See generally* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (arguing, in the context of procedural due process

factors that do not raise the allowable maximum sentence, it lacks clear support in historical practice, as discussed earlier.[213] Additionally, cases and treatises from the late eighteenth and early nineteenth centuries reveal that, at least for purposes of inclusion of a fact in an indictment, judges regularly distinguished between elements (facts that increased sentence maxima) on the one hand, and defenses (facts that mitigated punishment or relieved a defendant of liability) on the other.[214] To be consistent with this history, the approach would have to include a method of distinguishing as a constitutional matter between those facts that increase punishment, and those facts that decrease punishment, and it does not.

In any event, this position, on balance, is undesirable for purely consequentialist reasons. Modern criminal trials have evolved in such a way that conducting them in the manner sug-

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in civil claims, that where the legislature retains power to control substantive entitlements, it ought to retain control of the process used to evaluate claims of entitlement arising under that substantive rule).

Although this argument has thus far carried the day as a constitutional canon in the criminal context, it has not had nearly the same success in the civil arena. *Compare* Pennsylvania v. Finley, 481 U.S. 551 (1987) (finding that, since a state has no constitutional obligation to provide post-conviction review, the Due Process Clause does not mandate that the state supply a lawyer to indigent defendants when it chooses to offer such relief); Bordenkirtcher v. Hayes, 434 U.S. 357 (1978) (finding that, since the government has the constitutional authority to seek the maximum criminal penalty against the defendant, it can condition a lower sentence through plea bargaining upon the defendant's non-assertion of his constitutional right to a jury trial); Patterson v. New York, 432 U.S. 197 (1977) (finding that, since a homicide defendant has no constitutional right to the extreme emotional distress defense, a state can place upon him the burden of proof); *and* Ross v. Moffitt, 417 U.S. 600 (1974) (finding that, since the defendant had no constitutional right to discretionary review by the state supreme court or the United States Supreme Court, he had no constitutional right to appointed counsel for this review); *with* Dolan v. City of Tigard, 512 U.S. 374 (1994) (finding that the government could not coercively condition the benefit of a development permit on the plaintiff's dedicating a portion of her property to a storm drainage system without asserting her constitutional right to just compensation); *and* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (finding that, despite the power of states to treat employees at-will, once the state civil service statute at issue provided that employees would be discharged only for cause, due process required a pre-discharge hearing even though the statute entitled them only to post-discharge review). Constitutional scholars have offered persuasive justification for rejecting the "greater-includes-the-lesser" argument in the civil law context. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-16, at 744 (2d ed. 1988) (suggesting that procedural safeguards "are ultimately more understandable as inherent in decent treatment than as optimally designed to minimize mistakes"). *See generally* Douglas Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clause Nonjusticable*, 60 TEX. L. REV. 875 (1982) (arguing that legislative control over both substance and process makes the Due Process Clause nonjusticiable).

213. *See supra* notes 21-28. Statutes that control eligibility for parole and good time may even fall within this expansive proceduralist rule, so that the factors determining such eligibility become elements of an offense, though historically parole eligibility has not been a question for the jury. *See* Note, *Statutory Structures*, *supra* note 28, at 1151-54.

214. *See supra* note 116 and accompanying text.

gested by the expansive proceduralists would constrict even further the tiny percentage of those accused of crime who could realistically take advantage of the right to insist that the government prove guilt beyond a reasonable doubt to a jury. If prosecutors would have to include in the indictment and present to the jury for a beyond-a-reasonable-doubt finding every affirmative defense, any statutory exception, every statutory mitigator, and every fact presently determined by the judge at sentencing in the growing number of jurisdictions with presumptive sentencing systems (such as the Guidelines), indictments would expand and trials would lengthen.[215] The system limps along at present only because fewer than one of every ten criminal defendants goes to trial,[216] and many claim that we have not devoted sufficient resources to try even this tiny fraction.[217] With a significant increase in the cost and time of trial for any crime accompanied by legislated sentencing factors, something would have to give. One possibility is that prosecutors would be prompted to offer much greater incentives to defendants to plead guilty, so that an even smaller fraction of these longer cases need be tried. This may have the perverse effect that the worst offenders—those with the greatest number of aggravators that must be proven to the jury beyond a reasonable doubt—would be the most attractive plea candidates, because their trials would take the longest.

Alternatively, the "something" that might shift in response to the inability to adjudicate defenses and sentencing factors with less exacting procedures is the substantive law itself. In order to avoid the procedural costs of their efforts to calibrate penalty with culpability through defenses and sentencing controls, legislators would have a strong incentive to repeal defenses and statutory constraints on the sentencing discretion of judges and to provide very wide, unguided sentence ranges for every crime.[218] This returns us

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215. Justice Breyer makes this point quite effectively in his *Apprendi* dissent. Apprendi v. New Jersey, 120 S. Ct. 2348, 2398 (2000) (Breyer, J., dissenting) (noting that, if the jury had to make every one of the twenty or more factual findings that the Guidelines presently require the judge to make, with the considerable assistance of the Presentence Report prepared by the Probation Department, at sentencing, in a bifurcated proceeding, trials would become absurdly long and complicated).

216. *See* 1 LAFAVE ET AL., *supra* note 49, § 1.3(q) at 21 & n.226 (noting that only three to seven percent of all felony complaints are resolved by trial).

217. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1843-45 (1994) (lamenting inadequate funding for indigent defense in most states).

218. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 207-08 (1977) ("[T]he due process clause, as we see it, does not put New York to the choice of abandoning [affirmative] defenses or undertaking to disprove their existence in order to convict of a crime that otherwise is within its con-

to a regime of pure judicial discretion, where we would simply hope that judges would use their discretionary power wisely. A primary impetus of the sentencing reform movement over the last thirty years was recognition that relying entirely on judicial discretion led to gross inequalities in sentencing. Offenders who committed the same crime received vastly different penalties depending upon the judge, or upon factors such as gender or race.[219] A return to unguided judicial discretion does not, in our opinion, represent progress.

*Compromise Proceduralists: Enhanced procedure at sentencing.* Professor Sarah Beale and other commentators advocate what might be termed the compromise proceduralist approach, suggesting that due process compels the prosecutor to prove certain sentence enhancements by "clear and convincing" evidence, and mandates that the defendant be afforded a hearing at which he has the opportunity to confront and cross-examine the witnesses against him.[220] There is some reason to believe the Court may be receptive to this rationale, although its willingness to use the procedural due process test of *Mathews v. Eldridge* in the criminal setting has been uneven.[221] In any event, a resolution of the debate over whether to

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stitutional powers to sanction by substantial punishment."); Jeffries & Stephan, *supra* note 6, at 1354.

> In point of fact, however, the burden shifting defense quite generally is employed to moderate traditional rigors in the law of crimes. There is, therefore, reason to believe that rejection of this device would result in abandonment of the underlying substantive innovations and reversion to older and harsher rules of penal liability.

*Id*.

219. *See, e.g.*, SENATE REPORT ON THE 1984 FEDERAL SENTENCING GUIDELINE LEGISLATION, S. REP. NO. 98-225 (1983) (finding that the federal criminal sentencing system had the "unjustified" and "shameful" consequence of great variation among sentences imposed by different judges upon similarly situated defenders); U.S. DEP'T OF JUSTICE, SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT AND EFFECTS (August 1985) (finding that similarly situated defendants in indeterminate-sentencing schemes receive widely disparate sentences); JUDGE MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

220. *See* Sarah Sun Beale, *Procedural Issues Raised by Guideline Sentencing: The Constitutional Significance of Single "Elements of the Offense,"* 35 WM. & MARY L. REV. 147 (1993); *see also* Professor Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Factfinding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992). One of the authors made a similar suggestion regarding the policing of the criminal-civil divide. *See generally* Klein, *supra* note 78 (suggesting that the Court develop heightened procedural protections for nominally civil actions imposing arguably punitive sanctions).

221. *Compare* Medina v. California, 505 U.S. 437 (1992) (refusing to employ *Mathews* to determine whether the defendant's right to due process was violated by a state statute that placed upon him the burden of proving his mental incompetency to stand trial); *and* McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (rejecting the clear and convincing standard for proving sentence factors, without discussing *Mathews*); *with* Almendarez-Torres v. United States, 523 U.S. 148, 149 (1998) ("We express no view on whether some heightened standard of proof might apply to

use *Mathews* to impose heightened protections at sentencing for some facts will not help to answer whether a fact designated as a sentencing factor or affirmative defense in a statute enacted following *Apprendi* must be treated as an element.[222]

*Expansive Substantivists: Constitutionally essential elements for all criminal culpability.* Rather than tying procedural protections to the legislature's decision to recognize a fact as relevant to penalty, some commentators have argued that the government must prove a given fact beyond a reasonable doubt to a jury whenever its presence or absence is constitutionally required as a condition for imposing criminal punishment. The champions of what we call expansive substantivism include Professors Jeffries and Stephan, who argue that substantive due process requires that all criminal offenses include certain fundamental elements, such as *actus reus* and *mens rea*.[223] This faith in the Court's ability to fulfill the criminal theorist's dream of determining, in the abstract, the minimum components of crime appears somewhat unrealistic.[224] Criminal law theorists themselves are unable to agree on the "best" theoretical structure for criminal law,[225] and are unable even to

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sentencing determinations which bear significantly on the severity of sentences.") (citing *United States v. Watts*, 519 U.S. 148, 149 (1997), which acknowledged a circuit split regarding the proper standard of proof for relevant conduct under the federal sentencing guidelines and listed the cases); Cooper v. Oklahoma, 517 U.S. 348 (1996) (finding that due process was offended by Oklahoma's procedural rule presuming that a criminal defendant is competent to stand trial unless he proves his incompetence by clear and convincing evidence); *and Medina*, 505 U.S. at 454-55 (O'Connor, J., concurring) (suggesting that *Mathews* is particularly helpful in "the context of modern administrative procedures" such as "the new administrative regime established by the federal criminal sentencing guidelines"). *See generally* Jerold H. Israel, *Free Standing Due Process and Criminal Procedure, The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. (forthcoming 2001) (manuscript on file with author).

222. Indeed, one of us believes that identifying a middle ground between elements and non-elements requiring some processes but not others is subject to the same criticism leveled at the Court's short-lived experiment with a middle ground between civil and criminal penalties. *See, e.g.*, Carol Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).

223. Jeffries & Stephan, *supra* note 6, at 1347.

> A constitutional policy to minimize the risk of convicting the "innocent" must be grounded in a constitutional conception of what may constitute "guilt." Otherwise "guilt" would have to be proved with certainty, but the legislature could define "guilt" as it pleased, and the grand ideal of individual liberty would be reduced to an empty promise.

*Id*.

224. Powell v. Texas, 392 U.S. 514, 547 (1968) (Black, J., concurring) (rejecting a system in which the Court would "set itself up as a board of Platonic Guardians to establish rigid, binding rules upon every small community in this large nation . . . .").

225. *See, e.g.*, GEORGE FLETCHER, RETHINKING CRIMINAL LAW (1978) (identifying the German structure of criminal law theory as superior to Anglo-American theory). *See generally* HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE (1979) (suggesting ideals of a criminal justice

agree on the purposes of criminal liability and punishment.[226] Aside from the counter-majoritarian consequences of such an approach, the Court as an institution is not well suited to resolve the philosophical, medical, and social issues necessary to develop a grand theory regarding the constitutionally mandated components of "crime."

The problems inherent in such an approach are best demonstrated by considering just one small incursion into substantive criminal law—the requirement that the *actus reus* of a crime be committed voluntarily. If the Court were to constitutionalize a requirement of voluntariness, it would, in subsequent cases, be forced to define it. Are acts committed while sleepwalking, while under hypnosis,[227] while suffering from "confusional arousal syndrome,"[228] or while unconscious[229] committed voluntarily? Issues such as the extent of the human capacity for free will, whether there is an aggression gene at the root of crimes of violence,[230] and whether suf-

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system); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982) (suggesting a five-tiered conceptual framework for a system of criminal defenses).

226. *See, e.g.*, CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 11 (Henry Peolucci trans., 1936) (arguing that punishment is necessary only to protect public security); JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 170-203 (1789) (arguing that deterrence provides justification for the imposition of punishment); GEORG WILHELM FRIEDRICH HEGEL, HEGEL'S PHILOSOPHY OF RIGHT § 97 (T.M. Knox trans., Oxford 1967) ("A crime . . . is something negative, so that its punishment is only a negation of the negation."); SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 22-34 (1987) (decrying adverse consequences of using the criminal law to enforce morality, provide social services, and avoid restraints on law enforcement); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (John Ladd trans., Bobbs-Merrill 1965) ("Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society . . . . The law concerning punishment is a categorical imperative."); KARL MENNINGER, THE CRIME OF PUNISHMENT (1968) (suggesting that rehabilitation should be the aim of criminal punishment); HERBERT MORRIS, ON GUILT AND INNOCENCE 48-49 (1976) (advocating a modern version of the retributive argument, in the tradition of Kant and Hegel, by suggesting that punishment expresses respect for the criminal's autonomous choices); BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW (1963) (arguing that the ultimate aim of punishment is rehabilitation); Kent Greenawalt, *Punishment*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1336, 1340 (Sanford Kadish, ed., 1983) (arguing that the justification for punishment is to "reinforce community norms by affecting the dictates of individual consciences"); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958) (suggesting that the purpose of criminal law is to express the community's moral condemnation of particular conduct); *see also* Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROBS. 528, 532-34 (1958) (noting that "even the basic objectives of correction raise dispute among reputable authorities," and describing the "contrariety of expert opinion about sentencing procedures and their effects").

227. MODEL PENAL CODE § 2.01(2)(c) (Official Draft 1985) (providing that conduct under hypnosis is not a voluntary act).

228. People v. Cegars, 7 Cal. App. 4th 988, 1000 (1992).

229. State v. Mercer, 165 S.E.2d 328, 336 (N.C. 1969).

230. *See, e.g.*, STEVEN J. GOULD, MISMEASURE OF MAN 151-75 (1996) (debunking "projects" purporting to find biological causes of violence); STEVEN ROSE, LIFELINES (1998) (critiquing

fering abuse as a child leads to adult criminal behavior[231] are matters suited for robust democratic debate in a legislative body. It is surely for this reason that the plurality opinion in *Powell v. Texas*—which upheld a Texas statute punishing a defendant for being found in a state of intoxication in a public place[232]—limited the holding in *Robinson v. California*[233] to an Eighth Amendment ban on punishing status. "Unless *Robinson* is so viewed," the plurality in *Powell* observed, "it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the cruel and unusual punishments clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."[234]

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studies purporting to find biological or medical causes of violent behavior); Carolyn Abraham, *Doctor Pinpoints Key to the Criminal Mind, Research Cites Damage to Brain's Frontal Lobes*, GLOBE & MAIL (Toronto, Canada), March 22, 2000, at A1 (citing twenty years of research by Dr. Daniel Tranel, neuropsychologist at the University of Iowa, suggesting that injury to the ventromedial prefrontal cortex results in anti-social and violent behavior); Adrian Rain, NEW SCIENTIST, May 13, 2000, *available at* http:// www.newscientist.com/opinion223819.html (arguing that biology turns certain individuals into rapists and serial killers).

231. Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1158 (1999) (citing medical literature to support the contention that "strong evidence exists that a person who was abused as a child is at risk of suffering long-term effects that may contribute to his violent behavior as an adult").

232. Powell v. Texas, 392 U.S. 514, 535 (1968).

233. Robinson v. California, 370 U.S. 660, 667 (1962) (holding that punishing for addiction, which is "apparently an illness which may be contracted innocently or involuntarily," violates the Eighth Amendment's Cruel and Unusual Punishments Clause, because "even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold").

234. *Powell*, 392 U.S. at 514 (plurality opinion). A head count shows that five justices in *Powell* believed that the concept of voluntariness had been constitutionalized. Four justices in dissent believed that Mr. Powell's conviction should have been reversed because *Robinson* stood for the principle that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id*. at 533 (Fortas, J., dissenting). While Justice White concurred with the plurality in the outcome of upholding the conviction, he agreed with the dissenters that, if it cannot be a crime to be addicted to narcotics, "I do not see how it can constitutionally be a crime to yield to such a compulsion." *Id*. at 548 (White, J., concurring). However, Justice White found that, even if Powell was a chronic alcoholic with a compulsion to drink, nothing in the record supported the defense's conclusion that he had a compulsion to frequent public places when intoxicated.

The Court had earlier rejected the similar argument that due process prohibited states from punishing those acting under an "irresistible impulse." In *Leland v. Oregon*, the Court refused to require Oregon to define legal insanity to include not only the inability to distinguish right from wrong, but also the inability to control one's behavior. Leland v. Oregon, 343 U.S. 790 (1952). The Court noted that "the choice of a test of legal insanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility." *Id*. at 800-01. Despite five votes to constitutionalize a requirement of voluntariness, conventional wisdom today is that a defendant may be punished for an involuntary act. *See, e.g.*, Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court* Mens Rea *Since Herbert Packer*, 1997 BUFF. CRIM. L. REV. 68, 70 n.19.

Even *mens rea*, a notion "as universal and persistent in mature systems of law as belief in freedom of the human will and of consequent ability and duty of normal individuals to choose between good and evil,"[235] has not been entrenched as an essential element of every crime under the Constitution.[236] Instead, the Court has blessed strict liability crimes,[237] though it has curbed the worst excesses via statutory interpretation.[238] While scholars vehemently denounce the propriety of criminal liability without *mens rea*,[239]

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235. Morissette v. United States, 342 U.S. 246, 250 (1952).

236. *Lambert v. California*, the only case in which the Court overturned a conviction on strict liability grounds, did indeed "turn out to be an isolated deviation . . . a derelict on the waters of the law." Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting) (striking down a statue imposing criminal liability for being in Los Angeles and failing to register as a felon); *see also* GEORGE DIX & M. MICHAEL SHARLOT, TEACHER'S MANUAL TO CRIMINAL LAW 149-50 (4th ed. 1996) (suggesting that *Lambert* is best explained as a case involving the unreasonable search and seizure of an attorney's African-American secretary, that simply required reversal, except that *Mapp*'s application of the exclusionary rule to the states did not yet exist); Allen C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (1999) (suggesting that strict liability crimes will be upheld as constitutional unless the non-strict liability elements of the offense could not themselves be criminalized without violating another clause of the Constitution, and interpreting *Lambert* as a right to travel case).

237. *See, e.g.*, United States v. Park, 421 U.S. 658, 673-74 (1974) (involving a potential one-year imprisonment for first offense and three-year imprisonment for second offense for violation of § 301(k) of the Federal Food, Drug, and Cosmetic Act); United States v. Int'l Minerals and Chem. Corp., 402 U.S. 558, 564-65 (1971) (involving the strict liability felony of undocumented shipping of acids); United States v. Freed, 401 U.S. 601, 607 (1971) (involving a maximum penalty of ten-year imprisonment and/or $10,000 fine for possession of a hand grenade); United States v. Balint, 258 U.S. 250, 254 (1922) (involving a potential five-year imprisonment for sale of opium and cocoa leaves not pursuant to an I.R.S. order form); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 70 (1910) (upholding a strict liability felony with a fine of up to $1,000 and/or imprisonment of up to two years).

238. *See, e.g.*, United States v. X-Citement Video, 513 U.S. 64, 74-75 (1994) (interpreting the Protection of Children Against Exploitation Act of 1977 to require that the defendant be aware that the person depicted was a minor); Staples v. United States, 511 U.S. 600, 616 (1994) (reading the National Firearms Act prohibiting possession of an unregistered machine gun to require that the defendant know that his AR-15 assault rifle was an automatic weapon); Ratzlaf v. United States, 510 U.S. 135, 149 (1994) (interpreting 31 U.S.C. § 5322 as requiring that the defendant knew that the structuring was unlawful); Liparota v. United States, 471 U.S. 419, 426 (1985) (interpreting a statute criminalizing the unauthorized acquisition and possession of food stamps as requiring proof that the defendant knew his possession was unauthorized); Morissette v. United States, 342 U.S. at 252-56 (interpreting a theft of government property statute as requiring that the defendant knew that the spent casings were the property of the federal government rather than abandoned property); *see also* John Shepard Wiley, Jr., *The New Federal Defense, Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999) (concluding that this method of statutory interpretation in federal criminal cases all but eliminates strict liability crimes).

239. *See generally* FLETCHER, *supra* note 225, §§ 9.3.3-.4, at 729-36; Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 422-25 (1958); Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 267-69 (1987); Herbert Packer, Mens Rea *and the Supreme Court*, 1962 SUP. CT. REV. 107; Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law and Due Process*, 24 WAYNE L. REV. 1571, 1592-615

certain strict liability crimes with a long pedigree retain popular support[240] and should probably remain constitutional.

The few attempts by the Court to develop a grand theory of substantive criminal law have fallen flat and have been quickly abandoned. We have already discussed the Court's retreat from *Robinson* two years later in *Powell*.[241] Additional examples abound. The Court in *United States v. Halper* offered a comprehensive theory aimed at distinguishing civil from criminal penalties.[242] "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."[243] Finding it difficult to identify criminal punishment by using deterrent purpose, the Court began backpedaling and completed its retreat with *Hudson v. United States*.[244] The Court had done precisely this same thing in the burden of proof cases, which tested statutes that attempted partial rather than total circumvention of the process guarantees reserved for criminal cases. The actual holding in *Mullaney v. Wilbur* was that due process was offended by shifting the burden of proving the absence of heat of passion to the defendant because "criminal law is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability."[245] The retreat from this position in the form of a reinterpretation of

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(1974); *see also* MODEL PENAL CODE § 2.05, cmt., at 282 (1985); Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1152 (1975). *But see* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

240. For example, one study suggests that the public overwhelmingly supports the felony-murder doctrine. *See* David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 9 HARV. J.L. & PUB. POL'Y 259 (1985) (analyzing a national survey of crimes conducted by the Bureau of Justice Standards of the United States Department of Justice). The same is true for statutory rape, a traditional strict liability crime. *See, e.g.*, Jenkins v. State, 877 P.2d 1063 (Nev. 1994). *But see* State v. Guest, 583 P.2d 836 (Alaska 1978) (requiring criminal intent in a statutory rape case). *See* PAUL ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME (1975) (surveying public attitudes regarding criminal offenses, and suggesting that definitions of crime cannot stray too far from public sentiment).

241. *See supra* notes 227-35 and accompanying text.

242. United States v. Halper, 490 U.S. 435, 449 (1989).

243. *Id*.; *see also* Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 777 n.4, 784 (1994) (finding that a state tax on marijuana after criminal conviction for the same offense was barred by the Double Jeopardy Clause); Austin v. United States, 509 U.S. 602, 621-22 (1993) (finding that civil *in rem* forfeitures under the federal controlled substances statutes are punitive for purposes of the Excessive Fines Clause).

244. Hudson v. United States, 522 U.S. 93, 105 (1997) (finding that civil sanctions may also serve a deterrent purpose); *see also* United States v. Bajakajian, 524 U.S. 321, 354 (1998); United States v. Ursery, 518 U.S. 267, 284-85 (1996).

245. Mullaney v. Wilbur, 421 U.S. 684, 697 (1975).

*Mullaney* came two years later in *Patterson v. New York*.[246] Imposition of a uniform theory regarding what must be contained in the definition of a crime strangles experimentation and evolution. Mandating top-down global change even on a small part of a system as complex and interrelated as criminal law and procedure affects the system as a whole, often in unexpected ways.[247]

*Restrictive Substantivists: Crime-specific trumping of legislative labels.* We call the final category of scholars restrictive substantivists. These scholars believe that the legislature is supreme in defining substantive criminal law except in the rare case, though they disagree as to what that rare case is. Professor Louis Bilionis believes that the Court should trump legislative choice in matters of substantive criminal law only when the democratic process breaks down,[248] though he does not pinpoint exactly how the Court can recognize such a phenomenon. Professor William Stuntz has advocated invigorating judicial constraint of legislative excesses by constitutionalizing both a limited *mens rea* requirement and the doctrine of desuetude.[249]

Although the proposal advanced in this Article would not go nearly as far in restraining legislative experiments as that proposed by Professor Stuntz, nor, probably, the proposal of Professor Bilionis, we nonetheless place ourselves in this category. Some of the criticisms leveled against the expansive substantivists are applicable to any test, including ours, which requires judges to substitute a legal standard for legislative choice. We note, however, that there are significant differences that soften the impact of these criticisms. The expansive substantivist position constitutionalizes certain elements of all criminal offenses, and thus straightjackets the states with a set of inflexible rules. Our proposed test does not

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246. Patterson v. New York, 432 U.S. 197 (1977).

247. *See* Allen & Rosenberg, *supra* note 111, at 1187-202. *See generally* Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 6.

248. Bilionis, *supra* note 82 (suggesting that the criminal process breaks down in the absence of deliberative legislative choices or where there is dysfunction in political or institutional safeguards).

249. Stuntz, *Substance, Process, and Civil-Criminal Divide*, *supra* note 6, at 33 (advocating that courts require proof of "negligence as to illegality where the relevant criminal statute prohibits conduct that is not obviously wrongful," and disallow prosecutions under statutes that criminalize behavior "ordinary people do not see as crim[inal]," unless the state can show "regular nonstrategic enforcement, enforcement aimed at the conduct specified in the crime rather than at something else"). We include Professor Stuntz's work in this category because his proposal is jurisdiction-specific, requiring an inquiry into the particular practices of an individual legislature and state law enforcement system, and because his *mens rea* requirement is more limited than those advanced by others.

require the Court to identify the constitutive components of all crimes. Rather, it is steeped, to the extent possible, in objective factors such as history; it is sensitive to individual offenses; and it is drawn from the law that has evolved as courts have interpreted specific constitutional provisions.

### *B. A Proposed Multi-Factor Test*

This survey of possible limits on a legislature's ability to designate a fact as something other than an element reveals several recurring themes. First, some outer limit on the substantive criminal law is necessary in order to prevent legislatures from bypassing criminal procedure guarantees wholesale. Procedure and substance are inexorably linked, and *Apprendi* suggests the importance of keeping that link secure.

Second, avoiding the complete abdication to legislatures of control over the substantive criminal law protects a variety of constitutional values. While the right to a jury determination of criminal guilt does not include the right to a jury determination of penalty, the narrower the offense and the broader the sentence range, the farther the jury is moved from its potential position as a safeguard between an individual and abuse of the criminal process, and the closer it gets to being a "low-level gatekeep[er]."[250] Every expansion of an element such that it can be accomplished by different means makes it more likely that jurors disagree as to "whether a defendant has engaged in conduct that violates the law."[251] Every shift in the burden of proof from the government to the defendant increases "the risk of convictions resting on factual error."[252] Each time a legislature chooses to accommodate degrees of culpability by expanding the sentence range for a crime rather than by creating multiple graded offenses, there is less "proportionality" between the maximum penalty and the base offense.[253] The test proposed here incorporates each of these different yet important values as factors,

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250. Jones v. United States, 526 U.S. 227 (1999).

251. Richardson v. United States, 526 U.S. 813, 818 (1999).

252. *In re* Winship, 397 U.S. 358, 363 (1970).

253. It has been suggested to us that, since different criminal procedural guarantees protect different values, we ought to construct a different test for the constitutionality of an evasion statute based upon which criminal procedural guarantee is evaded. We decline to do this, both because it is too complicated, and, more importantly, because the Court will never accept it. The Court uses the word "element" interchangeably, regardless of whether it is referring to a fact that must be pled in a grand jury indictment, submitted to a jury, or proved beyond a reasonable doubt, included. The Court is unlikely to "redo" this case law and redefine "element" for each context.

rather than formulating a one-size-fits-all litmus test for unconstitutionality. Each of the factors identified deserves consideration, and no single factor should be determinative. Nor will every factor apply to every challenged statute. The concept of element is too bound up with individual procedural protections to be defined in the abstract, or to be divorced from the considerations that have shaped those individual guarantees. It is, at the same time, too pervasive a concept in the criminal process to be defined differently depending upon which textual provision a particular litigant happens to champion.

Past efforts to find constitutional limits on substantive criminal law have taught a third lesson—the importance of incremental limits. Legislative freedom to accommodate the criminal law to the times should remain unconstrained except in the most extreme circumstances. Identifying those circumstances through the common-law process, one case at a time, has proved the more durable approach in clarifying the civil/criminal line. This suggests that a similar analysis would be appropriate when defining the distinction between elements and non-elements. Consequently, the test here leaves undisturbed all but the most unusual and startling offense-penalty combinations. This is disappointing to those who would rein in the punitive trends in criminal law. But, to quote Justice Stevens in *Apprendi*, "This is as it should be."[254] Too much regulation of the evolution of criminal law by courts would stunt the ability of legislatures to fulfill their representative function, to respond to the evolving nature of the procedural guarantees themselves,[255] as well as to the changing social, political, and economic influences that shape both criminal law and criminal procedure. Due process must bar only those statutory formulations of crimes that profoundly disturb our deepest notions of fairness. The best that one can do to articulate what that means is to cobble together those factors that have mattered most to courts forced to answer this question over the years and to identify factors that will best protect the values safeguarded by the Bill of Rights in criminal cases.

The most useful and well-worn guide to constitutional meaning here is tradition. Not surprisingly, the Court in each of the opinions discussed above relied heavily on common-law definitions

254. *See supra* note 72 and accompanying text.
255. *See* Stuntz, *Uneasy Relationship*, *supra* note 6.

of crime and punishment.[256] It makes sense to turn to historical practice for answers to this difficult question. If for centuries in American law a given fact was treated as an element of a certain offense, a statute that eliminates that fact from the offense definition and shifts it to a defense, or shifts it to sentencing, deserves further scrutiny.[257] To be sure, the historical inquiry is not limited to divining the intent of the Framers on a particular point of substantive criminal law. Instead, the question should resemble that asked in *Schad*, which was whether a "State's particular way of defining a crime has a long history, or is in widespread use," or rather, whether it is a "freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions."[258] For crimes with no common-law or well-established analogue, courts must rely on considerations other than historical comparison.

A second factor is based upon the distinction at common law between a misdemeanor and a felony. This distinction has traditionally determined the process provided to the accused. For example, only a felony was serious enough to warrant capital punishment and to require grand jury indictment. Courts should consider whether the statutory offense in question reclassifies a traditional misdemeanor offense as a felony. Specifically, courts should be cautious when a statute collapses both petty and serious crime into one

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256. *See* Apprendi v. New Jersey, 120 S. Ct. 2348, 2355-60 (2000); Jones v. United States, 526 U.S. 227, 244 (1999); Almendarez-Torres v. United States, 523 U.S. 148, 243 (1998); Schad v. Arizona, 501 U.S. 624, 640 (1991); Martin v. Ohio, 480 U.S. 228, 235 (1987); McMillan v. Pennsylvania, 477 U.S. 79, 90 (1986); Patterson v. New York, 432 U.S. 197, 202 (1977); Mullaney v. Wilbur, 421 U.S. 684, 692 (1975); *In re* Winship, 397 U.S. 358, 362 (1970); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 170 n.23 (1963); Leland v. Oregon, 343 U.S. 790, 800 (1952). For an extensive discussion and analysis of the use of history in defining "free-standing" due process in criminal proceedings, see Israel, *supra* note 221, at 119-34.

257. Lower courts, too, rely on history as a guide to when a fact must be treated as an element. *See, e.g.*, State v. Eagle, 994 P.2d 395, 398 (Ariz. 2000) (rejecting a challenge to a kidnapping statute that set penalty at second-degree felony, then provided that, if the victim was released without physical injury, the penalty would be lower, except if the victim was less than fifteen years old). The scheme at issue in *Eagle* essentially created the crime of kidnapping up to second degree, but allowed mitigation to a lesser penalty if the victim was over fifteen and released. The court looked at whether release was typically an element of kidnapping. Citing cases from other states, it noted that, "[a]t common law, kidnapping involved the forcible taking of a person . . . . [and] movement or confinement of the victim," and it also observed that some states have added release or injury as elements, but that this is not consistent with the common-law view. *Id.* at 399.

258. *Schad*, 501 U.S. at 640; *see also Patterson*, 432 U.S. at 226-27 (noting that due process requires prosecutors to bear the burden of proving a factor if "the factor at issue makes a substantial difference in punishment and stigma" *and* if, "in the Anglo-American legal tradition[,] the factor in question historically has held that level of importance"); Hurtado v. California, 110 U.S. 516, 528-32 (1884).

offense carrying a very large sentencing range. The elements of the former misdemeanor would become the only facts submitted to the jury for proof beyond a reasonable doubt, and the government would escape criminal procedural requirements for those facts that traditionally had been treated as elements of a separate felony. Such a scenario is more than hypothetical. A number of jurisdictions presently have statutes that combine in a single statutory provision a misdemeanor offense with more serious felony conduct.[259] After *Apprendi*, such provisions must be considered a series of separate offenses. Nevertheless, a legislature could preserve judicial adjudication of aggravating facts by providing in a new statute that, upon conviction of the least aggravated version of the offense (the former misdemeanor), the defendant faces a maximum penalty high enough to accommodate the most aggravated version of the offense.[260] A legislature, of course, does not violate the Constitution whenever it reclassifies a petty offense as a felony. There are a number of good reasons a legislature might choose to do so. We merely suggest that courts, in passing upon the constitutionality of a criminal statute, should consider this, along with historical treatment of the offense and the other factors that follow.

Third, *Schad* warns against the blending of historically distinct crimes into one element, and criminal offense definitions may occasionally tread over this line (as the Court suggested in *Richardson*). While legislatures reacting to *Apprendi* are no more likely to enact such statutes than they were before the case was decided, one option a legislature might pursue in order to reduce the

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259. For example, the misdemeanor failure to stop when signaled by an officer is transformed into a felony failure to stop when it results in great bodily injury. *See generally* United States v. Davis, 184 F.3d 366 (4th Cir. 1999) (finding that S.C. CODE ANN. § 56-5-750 failure to stop, which is a misdemeanor carrying a ninety-day to three-year sentence, also provides a felony ten-year sentence where the driver also causes great bodily injury); State v. Morton, No. C-980391, 1999 WL 252631 (Ohio Ct. App. Apr. 30, 1999) (unpublished opinion) (interpreting OHIO REV. CODE § 2921.331(b)-(c)(2) as providing that it is a misdemeanor to fail to stop for an officer, but that it is a felony if injury to a person or property results), and misdemeanor theft is transformed into a felony theft when the property stolen is sufficiently valuable, *see* TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 2000) (providing that it is a criminal offense for a person to "unlawfully appropriate property with intent to deprive the owner of property," with maximum penalties ranging from a $4,000 fine to life imprisonment based primarily upon the amount of the theft). *See infra* Appendix C.

260. For example, the Texas legislature could consolidate theft into a single "nested" provision with a high maximum penalty, thus effectively avoiding jury review of the facts separating the former Class C misdemeanor leading to a nominal fine (where theft involved less than $50) from the former first-degree felony leading to life imprisonment (when the theft involved at least $200,000). TEX. PENAL CODE ANN. § 31.03(e) (Vernon Supp. 2000); TEX. PENAL CODE ANN. §§ 12.21-12.35 (Vernon 1994) (penalty provisions).

burden on the government would be to bypass the unanimity requirement and allow a single element to be established by one of several alternative facts.

Fourth, no gauge of the constitutionality of a criminal statute is complete without some evaluation of whether the punishment it imposes is either cruel and unusual or excessive under the Eighth Amendment. The citations in *Apprendi* to *Mullaney* and *Patterson* rather than to *Harmelin* and *Solem* suggest that it was not proportionality the Court was worried about but rather the outer limits of due process past which legislatures dare not tread. Still, it is not easy to explain the references to "generally proportional" and "harsh legislative action"[261] as anything but invocations of Eighth Amendment concepts, concepts which must at least inform the due process calculus applied when assessing whether an offense definition lacks an essential element.

Fifth, and closely related to the last factor, is the penalty range specified for the offense by the legislature. When a defendant, upon the finding of a fact at sentencing, can receive a penalty two or three times as severe as the sentence authorized without the fact, a court may conclude that such a fact is much more important than its legislative designation indicates. The fact is the "tail which wags the dog," to use the phrase employed by the Court in *McMillan*.[262] Particularly suspect would be a legislative scheme that creates a new statute with a high maximum sentence and a wide penalty range but which retains the prior lesser offense with the much lower penalty maximum.[263]

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261. *Apprendi*, 120 S. Ct. at 2363 n.16.

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

263. By preserving the lower penalty option, the legislature itself has indicated that the large maximum penalty is not the appropriate one. Prosecutors may prefer the flexibility provided by two grossly disparate penalties for the very same conduct, as this scheme provides more charging and bargaining options. Moreover, if a legislature raises statutory maxima instead of creating separate offenses, there will be far fewer "different" offenses, and hence fewer possibilities for successive prosecutions under the Court's present "same elements" double jeopardy test. For example, if every increased penalty under 18 U.S.C. § 1959(1)-(6) (violent crime in aid of racketeering activities) is treated as a separate offense, the government could prosecute the defendant at least six times (once for attempting to maim, a second time for attempting to murder, a third time for threatening to commit a violent crime, a fourth time for assaulting with a dangerous weapon, a fifth time for maiming, and a sixth time for murder). *See* United States v. Dixon, 592 F.2d 329 (6th Cir. 1979). If Congress makes this a single offense with a maximum penalty of death, in order to avoid the consequences of the *Apprendi* rule, a defendant could be tried only once for any of the above acts. *Cf.* Carter v. United States, 530 U.S. 255 (2000) (defendant unsuccessfully argued that property value was a sentencing factor and not an element of bank larceny, that bank larceny was thus a lesser included offense of bank robbery, and that the jury should have been instructed on it).

Sixth, courts should closely examine true strict liability statutes carrying felony penalties and statutes dispensing with proof of a voluntary act. The elimination of *mens rea* or voluntariness, or the shift of these features to affirmative defenses or sentencing, especially when inconsistent with the common-law analogue of the offense, while not in itself sufficient to violate due process, should prompt close examination of the statute.[264]

Finally, a word about legislative purpose. The Court has considered legislative motive relevant when policing legislative decisions to classify a given penalty as civil or criminal, in the burden-shifting cases, and in *Apprendi* itself.[265] Moreover, legislative purpose has intuitive appeal as a factor to consider when evaluating the constitutionality of a criminal statute that eliminates from an offense definition what under a former statute would have been treated as an element after *Apprendi*. For example, consider two hypothetical statutes based upon 18 U.S.C. § 2119, as described in

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264. *See supra* notes 227-41 and accompanying text (discussing strict liability and voluntariness).

265. In *Apprendi*, the Court made it a point to specify the relevance of purpose analysis in evaluating the constitutionality of legislative reaction to its holding, noting that it would be required to question the constitutionality of the dissent's predicted "extensive revision of the State's entire criminal code," if it were "enacted *for the purpose the dissent suggests*." *Apprendi*, 120 S. Ct. at 2363 (emphasis added); *see also* Richardson v. United States, 526 U.S. 836 (1999) (Kennedy, J., dissenting) (arguing that, unlike an habitual criminal statute, "the sole element of which was the existence of a series of crimes without a requirement of jury unanimity on any underlying offense," the CCE statute in *Richardson* "does not represent an end run around the Constitution's jury unanimity requirement, for Congress had a sound basis for defining the elements as it did: to punish those who act as drug kingpins"); Almendarez-Torres v. United States, 523 U.S. 224, 245 (1998) ("The relevant statutory provisions do not change a pre-existing definition of a well-established crime, nor is there any more reason here than in *McMillan* to think Congress intended to 'evade' the Constitution, either by 'presuming' guilt or 'restructuring' the elements of an offense."); United States v. Ursery, 518 U.S. 267 (1996) (considering whether the statutory scheme at issue was so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism, and finding that forfeiture statutes "serve important non-punitive goals"); United States v. James Daniel Good Real Prop., 510 U.S. 43, 55-56 (1993) (striking down a section of a statute authorizing *ex parte* seizure of real property, because protection of an adversarial hearing "is of particular importance here, where the government has a direct pecuniary interest" in the outcome of the proceeding); Austin v. United States, 509 U.S. 602, 620 (1993) (holding that the Excessive Fines Clause of the Eighth Amendment applied to civil *in rem* forfeiture of real property and conveyances that facilitated a drug related crime because, despite the legislature's label, the "legislative history of § 881 confirms the punitive nature of the provisions"); *McMillan*, 477 U.S. at 87-88 ("[T]he specter raised by petitioners of States restructuring existing crimes in order to 'evade' the commands of *Winship* just does not appear in this case."); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963) (listing a number of factors that "must be considered," it reasoned, "absent conclusive evidence of congressional intent as to the penal nature of a statute," and rejecting the dissent's warning that inquiry into Congressional motives is "a dubious affair indeed," and that it was wrong to hope that "the underlying purpose" could be "refined to the point of isolating one single, precise objective").

*Jones v. United States*.[266] In hypothetical number one, Congress immediately reacts to the *Jones* and *Apprendi* cases by increasing the maximum penalty for carjacking to life imprisonment, but caps the sentence at twenty-five years if the victim is not killed, and at fifteen years if no victim suffers serious bodily injury. In hypothetical number two, there was no carjacking statute prior to *Apprendi*, and Congress for the first time creates the identical carjacking statute described in hypothetical number one. Some may find statute number one more troubling than statute number two because they suspect that Congress redrafted the statute in hypothetical number one for the express purpose of avoiding the necessity of including the facts of serious bodily injury and death in the indictment and proving those facts to a jury beyond a reasonable doubt.

We reject, however, the use of legislative motive to assess the constitutionality of criminal statutes. The constitutionality of the statute in the first hypothetical above should not depend upon why one or more Representatives or Senators voted for its passage. Purpose analysis has been reviled as indeterminate, illogical, and futile by many academics and judges for good reason.[267] Reliance on legislative purpose would mean that the very same criminal law might be unconstitutional due to bad motive in one state, but upheld as constitutional in the absence of bad motive in another state. Defining which legislative motives for crafting crimes and punishments undercut the constitutionality of criminal law is more difficult than articulating illicit purposes in the context of Equal Protection, First Amendment, or Commerce Clause challenges.[268]

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266. Jones v. United States, 526 U.S. 227 (1999).

267. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting); United States v. O'Brien, 391 U.S. 367, 382 (1968) ("The Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); TRIBE, *supra* note 212, § 3-2, at 24.

> [I]f a government-enacted rule is constitutionally inoffensive both on its face and as applied to the particular individual challenging it, the fact that the rule would not have been promulgated . . . but for the enacting body's desire to achieve a constitutionally forbidden result tells us nothing more than that the government body engaged in an unsuccessful attempt to violate the Constitution.

*Id*. *See generally* Larry Alexander, *Affirmative Action and Legislative Purpose*, 107 YALE L.J. 2679 (1998).

268. In those contexts, there is at least a shaky consensus on what kinds of reasons or purposes the Constitution forbids; the government may not censor ideas because it disapproves of those messages, nor discriminate among people on the basis of race, nor seek to promote or restrict a religion, nor seek protectionist ends. In the context of crime, the Court has permitted the legislature to burden intentionally a constitutional protection that a defendant would otherwise receive. After all, the Court has upheld a sentencing scheme that was designed to encourage defendants to plead guilty and not to insist on trial; along with its decision to uphold jury waiver,

Moreover, purpose evidence is so easy to manipulate that due process would become little more than instructions on manners.[269] Finally, a defendant's interest in having a grand jury and trial jury stand between her and the government's curtailment of her liberty, her interest in being free from disproportionate punishment, and her interest in having the risk of factual error rest with the government do not change depending upon whether the legislature is infringing upon these interests intentionally or unintentionally. The other factors of our proposed test which are designed to determine when legislative substantive law reform unfairly impinges upon procedural values actually do a pretty fair job of ferreting out bad legislative motive. When legislatures jettison history, ratchet misdemeanors up to felonies, blend historically distinct crimes, and create wide sentencing ranges, these acts indicate a motive to bypass procedural guarantees. Thus, the test reaches this behavior without the many drawbacks of inquiring into legislative intent.

### *C. Applying the Proposed Test: Outer Limits*

We readily admit that our multi-factor test for determining the constitutionality of criminal statutes will not yield wholly predictable results. Even judges and legislators who agree about the historical background of an offense may often weigh each factor differently. However, the test will in all likelihood prohibit the worst legislative excesses, and this is as far as the Court should intrude upon the supremacy of the legislature in defining substantive criminal law.

This point is best demonstrated by applying the test to a number of hypothetical statutes. Several statutes have already been discussed which would withstand scrutiny under this test.[270] Consider now a state's effort to preserve judicial adjudication of grading facts in a nested petty/grand theft statute, with penalties ranging from a nominal fine to life imprisonment, depending upon

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the Court's tacit approval on this front has contributed to plea-bargaining's serious and seemingly irreversible erosion of the right to a jury trial. *See* Corbitt v. New Jersey, 439 U.S. 212 (1978); *see also* 5 LAFAVE ET AL., *supra* note 49, at 33-36.

269. Elena Kagen, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 439 (1996) (finding that the problem of futility arises only because legislators, at any time, can feign a purpose they do not have); *see also* Palmer v. Thompson, 403 U.S. 217 (1971) (noting that a motive test to assess constitutionality is one that will lead to its own obsolescence because the legislature will never provide evidence of motivation).

270. *See supra* note 94 and text following note 201.

the value of the property stolen.[271] Assume further that the state wishes after *Apprendi* to continue to avoid charging and proving to a jury beyond a reasonable doubt the value of stolen property, while preserving a tight rein on the sentence that a judge may impose for thefts of differing degrees. Thus the state enacts felony theft, a new statute, with a maximum penalty of life imprisonment with the possibility of parole, but it requires the judge to mitigate the sentence to no more than twenty years if the defendant can establish that the value of the property stolen was less than $200,000; to no more than ten years for property valued at less than $100,000; to no more than two years for amounts less than $20,000; to no more than one year for amounts less than $1500; and to no more than a fine if the defendant can show that the value of the property was less than $50.

This statute should be found unconstitutional under our multi-factor test. The first and second factors weigh against it. Value in theft statutes has historically been considered an element, and the value of the property is what distinguished misdemeanor from felony thefts at common law.[272] Those factors alone, however, are insufficient unless the Constitution simply freezes crimes into their nineteenth-century forms. Our fourth factor, proportionality, is particularly troubling here. While some might rationally conclude that petty thieves deserve life imprisonment, or that such a steep penalty is necessary for general deterrence, this would certainly be at the margin of what the Eighth Amendment allows. The sixth factor likewise should cause concern, because the penalty range of a fine without jail time to life imprisonment is striking.

As another example of a statute that would probably test constitutional limits, consider a legislative definition of an offense called "felonious injury" that 1) is broad enough to encompass every infliction of harm by one person upon another; 2) carries a maximum sentence of life in prison with the possibility of parole; but 3) provides for a decreased sentence if the defendant can show that he did not act intentionally or knowingly and for further decreases if he can show that "he did not rob, rape, or kill his victim during the

271. *See* TEX. PENAL CODE ANN. § 31.03(e) (Vernon Supp. 2000) (providing that theft is a Class C misdemeanor if it involves less than $50; that the offense is a state jail felony if the property is stolen from the person of another or from a corpse; that the offense is a second degree felony if the property stolen is worth $20,000 or more, the defendant was a public servant, and the property came into his custody by virtue of that status; and that the offense is a first degree felony where the theft involved at least $200,000).

272. *See supra* note 14.

commission of the offense."[273] This hypothetical statute should also be stricken under our proposed test for slightly different reasons. Admittedly, a state might rationally conclude that physical assaults have become a sufficiently grave problem to merit this severe sanction. If this hypothetical felony assault statute is unconstitutional, it is not because of disproportionality. Other factors instead weigh in against it: Simple assault was classified at common law as a misdemeanor rather than a felony;[274] the extent of the victim's injury was traditionally considered an element of this kind of criminal offense; the statute includes strict liability, at least as to the extent of injury; and the offense combines what historically had been treated as separate offenses into one offense.

## CONCLUSION

It is not surprising that the United States Supreme Court has once again announced a decision that restricts Congressional experimentation in crime and punishment, and that will prompt considerable backing and filling in the offices of United States Attorneys and our elected federal representatives. But *Apprendi* does much more than constrain Congressional excess. It reasserts constitutional limits on state power in the definition of crime, an area that lies at the very core of state autonomy. Even in this age of states' rights, the Court in *Apprendi* recognized that the ability of the law to ensure that the procedural rights of the accused are re-

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273. This is a variant of a hypothetical offered in *McMillan*. McMillan v. Pennsylvania, 477 U.S. 79, 102 (1986) (Stevens, J., dissenting). Similar hypotheticals have been posited by the justices and scholars. *See* Monge v. California, 524 U.S. 721, 737 (1998).

> Suppose that a State repealed all of the violent crimes in its criminal code and replaced them with only one offense, "[purposefully] causing injury to another," bearing a penalty of 30 days in prison, but subject to a series of "sentencing enhancements" authorizing additional punishment up to life imprisonment or death on the basis of various levels of *mens rea*, severity of injury, and other surrounding circumstances. Could the state then grant the defendant a jury trial, with requirement of proof beyond a reasonable doubt, solely on the question whether he "knowingly cause[d] injury to another," but leave it for the judge to determine by a preponderance of the evidence whether the defendant acted intentionally or accidentally, whether he used a deadly weapon, and whether the victim ultimately died from the injury the defendant inflicted?

*Id*. (Scalia, J., dissenting); *see also* Mullaney v. Wilbur, 421 U.S. 684, 698-99 (1975) ("[As] an extreme example . . . Maine could impose a life sentence for any felonious homicide—even one that traditionally might be considered involuntary manslaughter—unless the *defendant* was able to prove that his act was neither intentional nor criminally reckless.") (emphasis in original); Jeffries & Stephan, *supra* note 6, at 1358.

274. See the authority collected in *Rogers v. Commonwealth*. Rogers v. Commonwealth, 5 Serg. & Rawle 462 (Pa. 1820) (noting that infamous penalties were restricted to assaults attended with an intent to murder or some gross attempt on the person).

spected in state court depends in the end upon the power of the judiciary to enforce, against state legislative circumvention, constitutional conceptions of crime and of punishment.

Looking beyond the context of sentencing to other aspects of the criminal process, it is apparent that *Apprendi* is only the latest in a series of decisions that acknowledge this simple concept. The decision presents an ideal opportunity to develop that insight further, to synthesize prior efforts to define constitutional limits on substantive criminal law, to begin to define the ephemeral line that states may not cross when choosing which facts are elements and which facts are something less. Just as the continuing stream of newly minted civil penalties necessitated a more specific standard for distinguishing which penalties labeled "civil" must nevertheless be treated as criminal, innovative offense definitions following *Apprendi* will require the development of some method of distinguishing elements from non-elements under the Constitution. Taking on that task here, we offer an approach that, unlike other efforts to give content to "due process" limits on the substance of crime, would require neither the radical realignment of federal and state power in criminal justice matters, nor the abandonment of venerable precedent, nor the disruption of a half-century of sentencing reform.

APPENDICES

## Appendix A

| Case Name | Provision authorized by decision | # states with similar provision at time of Supreme Court decision | increase in # states with similar provision since decision | Total states with similar provision |
|---|---|---|---|---|
| *Leland v. Oregon*, 343 U.S. 790 (1952) | Insanity must be proven by defendant beyond a reasonable doubt. | 25 | 15 | 40 |
| *Patterson v. New York*, 432 U.S. 197 (1977) | Defendant must prove extreme emotional disturbance in order to mitigate murder to manslaughter. | 3 | 9 | 12 |
| *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) | Five-year mandatory minimum sentence upon finding by a judge by a preponderance that defendant possessed a firearm during the commission of offense. | 6 | 5 | 11 |
| *Martin v. Ohio*, 480 U.S. 228 (1987) | Defendant has burden of proving self defense in murder case. | 2 | 0 | 2 |
| *Montana v. Egelhoff*, 518 U.S. 37 (1996) | Evidence of intoxication not admissible to prove lack of mens rea in murder case. | 10 | 3 | 13 |
| *Kansas v. Hendricks*, 521 U.S. 346 (1997) | Civil commitment of sex offender to penal institution upon proof of mental abnormality and future dangerousness. | 17 | 6 | 23 |
| *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) | Prior conviction not pled in indictment for offense of conviction raised statutory maximum sentence beyond that of offense of conviction. | 20 | 1 | 21 |

## Appendix B

Selected Federal Statutes Subject to *Apprendi* Challenge

| **Statute** | **Maximum enhancing feature(s)** | **Discussed In:** |
|---|---|---|
| 7 U.S.C. § 2024(b) (food stamp fraud) | Increasing maximum sentence from one to five years if value exceeds $100, and from five to twenty years if value exceeds $1,000. | *United States v. Garcia*, 240 F.3d 180 (2d Cir. 2001) |
| 8 U.S.C. § 1324(a)(1)(B) (alien smuggling) | Increasing maximum sentence from five years to the death penalty if smuggling was for commercial advantage or gain, if serious bodily injury is caused, or if the violation results in the death of any person. | *United States v. Hernandez-Guardado*, 228 F.3d 101 (9th Cir. 2001) |
| 18 U.S.C. § 13 (drunk driving on military base or federal lands) | Increasing maximum sentence by one year where minor in vehicle. | |
| 18 U.S.C. § 34 (penalty when death results) | Increasing maximum sentence to death penalty based upon crime resulting in death. | *Ferranti v. United States*, 2001 WL 273827 (2d Cir. 2001) (unpublished) |
| 18 U.S.C. § 43(b) (aggravated offense, animal enterprise terrorism) | Increasing maximum sentence from one year to life imprisonment based upon finding of bodily injury or death. | |
| 18 U.S.C. § 111(a)(2) (assaulting federal officer) | Increasing maximum sentence from one to three years based upon seriousness of assault. | *United States v. McCulligan*, 2000 U.S. Dist. LEXIS 16013 (E.D.Pa., Nov. 30, 2000); *United States v. Nuñez*, 180 F.3d 227 (5th Cir. 1999) |
| 18 U.S.C. § 111(b) (use of a weapon in assault of federal officer) | Increasing maximum sentence from three to ten years based upon use of a deadly weapon or infliction of bodily injury. | *United States v. Chestaro*, 197 F.3d 600 (2d Cir. 1999) |
| 18 U.S.C. § 201(b)(2) (bribery) | Increasing fine to three times the monetary equivalent of the thing of value. | |
| 18 U.S.C. § 215 (bribery of a bank officer) | Increasing maximum sentence from one to thirty years if value exceeds $1,000. | |

| **Statute** | **Maximum enhancing feature(s)** | **Discussed In:** |
|---|---|---|
| 18 U.S.C. § 216 (penalty and injunctions) | Increasing maximum sentence from one to five years if violation of 18 U.S.C. §§ 203-205 or §§ 207-209 (bribery and gratuity) occurs willfully. | |
| 18 U.S.C. § 247 (damage to religious property) | Increasing maximum sentence from one year to death penalty based upon finding of bodily injury or death. | *Jones v. United States*, 1998 WL 713483 (1999) (oral argument) |
| 18 U.S.C. § 248(b) (penalties for violation of freedom of access to clinic entrances act) | Increasing maximum sentence from three to ten years or life imprisonment based upon serious bodily injury or death. | |
| 18 U.S.C. § 510 (forgery) | Increasing maximum penalty from one to ten years if value exceeds $1,000. | |
| 18 U.S.C. § 521 (criminal street gang statute) | Increasing maximum sentence by additional ten years if federal felony offense was committed while participating in or to promote a criminal street gang. | *United States v. Matthews*, 178 F.3d 295 (5th Cir.), *cert. denied*, 528 U.S. 944 (1999) |
| 18 U.S.C. § 653 (misuse of public funds) | Increasing fine to amount embezzled. | |
| 18 U.S.C. § 659 (interstate or foreign shipments by carrier) | Decreasing maximum sentence from ten years to one year based upon value of goods stolen not exceeding $10,000. | *United States v. Galvez*, 2000 WL 1140343 (S.D. Fla. 2000) |
| 18 U.S.C. § 661 (theft within special maritime jurisdiction) | Increasing maximum sentence from one to five years based upon value of property. | |
| 18 U.S.C. § 893 (extortionate extensions of credit) | Increasing fine to twice the value of the money or property so advanced. | |
| 18 U.S.C. § 924(c) (use of firearm in relation to crime of violence or drug trafficking) | Increasing maximum sentence by additional five to thirty years based upon type and use of firearm. | *Castillo v. United States*, 530 U.S. 120 (2000) (Congress intended the statutory references to particular firearm types to define separate crimes) |

| **Statute** | **Maximum enhancing feature(s)** | **Discussed In:** |
|---|---|---|
| 18 U.S.C. § 924(c)(1)(A) (enhanced penalties for use of weapon in relation to crime of violence or drug trafficking) | Increasing maximum sentence by an additional five to ten years based upon brandishing or discharging weapon; increasing maximum sentence to life based on type of firearm. | *United States v. Harris*, 2001 WL 273146 (4th Cir. 2001); *United States v. Sandoval*, 241 F.3d 549 (7th Cir. 2000); *United States v. Carlson*, 2000 WL 924593 (8th Cir. 2000); *United States v. Pounds*, 230 F.3d 131 (11th Cir. 2000) |
| 18 U.S.C. § 924(e)(1) (Armed Career Criminal Act of 1984) | Providing a mandatory minimum of fifteen years and no specified maximum sentence for violating 922(g) after three previous convictions. | *United States v. Thomas*, 2001 WL 178506 (11th Cir. 2001); *United States v. Mack*, 2000 WL 1456245 (3d Cir. 2000) |
| 18 U.S.C. § 924(j) (causing death of a person in the course of a violation of subsection (c)) | Increasing maximum sentence by additional five years to death sentence based upon a murder. | *United States v. Peña-Gonzalez*, 62 F. Supp. 2d 366 (D. P.R. 1999) |
| 18 U.S.C. § 982 (criminal forfeitures) | Authorizing property forfeiture in addition to maximum penalty for violation of money laundering or bank secrecy act based on offense involving property or generating proceeds. | |
| 18 U.S.C. § 1030(c) (penalty for fraud in connection with computers) | Increasing maximum sentence from one to five years based upon value of information. | |
| 18 U.S.C. § 1033 (crimes by or affecting persons engaged in the business of insurance) | Increasing maximum sentence from ten to fifteen years based upon jeopardizing the soundness of an insurer. | |
| 18 U.S.C. § 1091(b) (punishment for genocide) | Increasing maximum sentence from twenty years to death penalty based upon resulting death. | |
| 18 U.S.C. § 1201 (death during kidnapping) | Increasing maximum sentence from life imprisonment to death penalty based upon death of victim. | *United States v. Montgomery*, 2001 WL 132210 (10th Cir. 2001) (unpublished); *Hernandez v. United States*, 226 F.3d 839 (7th Cir. 2000); *United States v. Brown*, 1999 WL 1068273 (D. Me. 1999) |
| 18 U.S.C. §§ 1341 and 1343 (mail and wire fraud) | Increasing maximum sentence from five to thirty years based upon violation affecting a financial institution. | |

| **Statute** | **Maximum enhancing feature(s)** | **Discussed In:** |
|---|---|---|
| 18 U.S.C. § 1347 (health care fraud) | Increasing maximum penalty from five years to death penalty based upon whether bodily injury or death. | *United States v. Ellis*, 2001 U.S. App. LEXIS 2234 (9th Cir., Feb. 15, 2001); *United States v. Nachamie*, 2001 WL 266349 (2d Cir. 2001) (unpublished) |
| 18 U.S.C. § 1363 (buildings or property within special maritime jurisdiction) | Increasing maximum sentence from five to twenty years based upon the building being a dwelling or a life being placed in jeopardy. | *United States v. Davis*, 202 F.3d 212 (4th Cir. 2000) |
| 18 U.S.C. § 1503(b) (punishment for influencing juror) | Increasing maximum penalty from ten years to death penalty based upon killing. | *United States v. Russell*, 234 F.3d 404 (8th Cir. 2000) |
| 18 U.S.C. § 1512(a) (witness tampering) | Increasing maximum penalty from twenty years to death based upon death of witness. | |
| 18 U.S.C. § 1791(b) (federal inmates possessing prohibited object) | Increasing maximum sentence from six months to twenty years based upon nature of prohibited object. | *United States v. Allen*, 190 F.3d 1208 (11th Cir. 1999) |
| 18 U.S.C. § 1958(a) (use of interstate commerce in commission of murder-for-hire) | Increasing maximum penalty from ten years to life imprisonment if death results. | *United States v. Tinsley*, 238 F.3d 418 (4th Cir. 2000) (unpublished); *United States v. Smith*, 232 F.3d 651 (8th Cir. 2000) |
| 18 U.S.C. § 1959 (violent crime in aid of racketeering activities) | Increasing maximum penalty from three years to death penalty based upon use of weapon, injury to victim, death of victim. | *United States v. Kee*, 2000 WL 863119 (S.D.N.Y. 2000) |
| 18 U.S.C. § 1963(a)(3) (criminal RICO forfeiture) | Mandating forfeiture of proceeds derived from or proceeds of racketeering activity. | *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000); *United States v. Corrado*, 227 F.3d 528 (6th Cir. 2000) |
| 18 U.S.C. § 2113(b) (bank theft) | Increasing maximum sentence from one to ten years if value exceeds $1,000. | |
| 18 U.S.C. §§ 2113(d) and (e) (bank robbery) | Increasing maximum penalty from twenty years to death if person is assaulted or killed. | |
| 18 U.S.C. §§ 2261(A) (interstate stalking) and 2261 (interstate domestic violence) | Increasing maximum sentence from five years to life based on injury to victim. | *United States v. Brown*, 1999 WL 1068273 (D. Me. 1999) |

| **Statute** | **Maximum enhancing feature(s)** | **Discussed In:** |
|---|---|---|
| 18 U.S.C. § 2262(b) (penalties for interstate violation of protective order) | Increase sentence from five to ten years if serious bodily injury to the victims result, twenty years if permanent disfigurement results, or life imprisonment if the victim dies. | |
| 18 U.S.C. § 2326 (enhanced penalties for fraud) | Increasing maximum fraud sentence by additional five years based upon telemarketing, and additional ten years based upon victimizing at least ten persons over age fifty-five. | *United States v. Pavelcik*, 232 F.3d 898 (9th Cir. 2000) (unpublished) |
| 18 U.S.C. § 2332(b)(c) (penalties for acts of terrorism transcending national boundaries) | Increasing maximum sentence from ten to twenty-five years based on damage to property, thirty years based on serious bodily injury, thirty-five years for maiming, life imprisonment for kidnapping, and the death sentence for killing. | *United States v. Nichols*, 2001 WL 208713 (D. Colo. 2001); *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001) |
| 18 U.S.C. § 2701(b) (punishment for violation of video piracy protection act) | Increasing sentence from six months to one year based upon purpose of commercial advantage. | |
| 18 U.S.C. § 3147 (penalty for offense committed while on release) | Increasing maximum sentence by additional one to ten years for commission of an offense while on release. | *United States v. Ellis*, 2000 WL 33173123 (9th Cir. 2001); *United States v. Parolin*, 239 F.3d 922 (7th Cir. 2001); *United States v. Davis*, 114 F.3d 400 (2d Cir. 1997) |
| 18 U.S.C. § 3559(c)(3)(A) (federal three-strikes law) | Increasing maximum sentence for a serious violent felony to mandatory life imprisonment based upon recidivism, with exceptions for certain kinds of robberies. | *United States v. Gatewood*, 230 F.3d 186 (6th Cir. 2001) (en banc); *United States v. Williams*, 230 F.3d 1368 (Table) (9th Cir. 2000); *United States v. Kaluna*, 192 F.3d 1188 (9th Cir. 1999) |
| 21 U.S.C. § 841(b) (penalties for marijuana possession) | Decreasing maximum sentence from five years to one year based upon small amount and no remuneration. | *United States v. Lowe*, 2000 WL 1768673 (S.D. W.Va. 2000) |

| **Statute** | **Maximum enhancing feature(s)** | **Discussed In:** |
|---|---|---|
| 21 U.S.C. §§ 841(b)(1)(A), (B) and (C) (manufacture or possession of a controlled substance with intent to distribute) | Increasing maximum sentence from twenty years to life based upon quantity of Schedule I or II substance or injury/death. | *United States v. Fields*, 2001 WL 241804 (D.C. Cir. 2001); *United States v. Brough*, 2001 WL 278479 (7th Cir. 2001); *United States v. Cambrelen*, 2001 WL 219285 (2d Cir. 2001); *United States v. Smith*, 240 F.3d 927 (11th Cir. 2001); *United States v. Rebmann*, 226 F.3d 521 (6th Cir. 2000); *Jones v. United States*, 194 F.3d 1178 (10th Cir. 1999), *cert. Granted, vacated and remanded*, 120 S. Ct. 2739 (2000) |
| 21 U.S.C. § 841(b)(1)(D) (manufacture or possession of a controlled substance with intent to distribute) | Increasing maximum sentence from one to five years based upon quantity of marijuana. | *United States v. Keeling*, 235 F.3d 533 (10th Cir. 2000); *United States v. Kelly*, 2000 WL 103972 (S.D. Cal. 2000) |
| 21 U.S.C. § 841(b)(7) (penalties for distribution) | Increasing maximum sentence from one to twenty years based upon commission of crime of violence during drug offense. | |
| 21 U.S.C. § 843(d) (penalties for prohibited acts) | Increasing maximum sentence from four to ten years based upon intent to manufacture methamphetamine. | *United States v. Caldwell*, 238 F.3d 424 (6th Cir. 2000) (unpublished) |
| 21 U.S.C. § 844(a) (penalties for simple possession) | Increasing maximum sentence from one to twenty years based upon the substance containing cocaine base, from one year to three years based upon possession of flunitrazepan. | |
| 21 U.S.C. § 846 (attempt and conspiracy to distribute controlled substances) | Authorizing same enhancements as under 21 U.S.C. § 841(b). | *United States v. Porter*, 1999 WL 1116812 (10th Cir. 1999); *United States v. Aguayo-Delgado*, 2000 WL 988128 (8th Cir. 2000) |
| 21 U.S.C. § 848(e) (death penalty for violation of continuing criminal enterprise) | Increasing maximum sentence from life imprisonment to death penalty based upon an intentional killing. | |
| 21 U.S.C. § 853 (criminal forfeitures) | Authorizing property forfeiture in addition to maximum sentence based on property being used in or derived from a drug offense. | |

| **Statute** | **Maximum enhancing feature(s)** | **Discussed In:** |
|---|---|---|
| 21 U.S.C. § 859 (distribution to persons under age 21) | Authorizing twice the maximum sentence for violation of § 841(b), based upon distribution to a person under twenty-one years of age. | |
| 21 U.S.C. § 860 (distribution near schools) | Authorizing twice the maximum sentence available for violation of § 841(b) based upon distributing within 1,000 feet of a school. | *United States v. Edmonds*, 240 F.3d 33 (D.C. Cir. 2001) |
| 21 U.S.C. §§ 952(a) and 960(a)(1) (importing controlled substance) | Increasing maximum sentence from five years to life based on type and quantity of controlled substance. | *United States v. Ayala-Moreno*, 2001 WL 231694 (9th Cir. 2001) (unpublished); *United States v. Martinez*, 232 F.3d 728 (9th Cir. 2000) |
| 31 U.S.C. §§ 5322(b), 5324(c) (criminal penalties for violation of bank secrecy act) | Increasing maximum sentence from five to ten years based upon violating the bank secrecy act while violating another law or as part of a pattern of illegal activity. | |

# Appendix C

## Selected State Criminal Statutes Subject to *Apprendi* Challenge

*Examples of "Nested" Statutes That Allow Judge to Raise the Penalty Within a Certain Type of Crime*

1. Theft Statutes

| State and Statute | Maximum Enhancing Feature | Discussed In: |
|---|---|---|
| GA. CODE ANN. § 16-8-12 (Georgia) (1933) | Increasing offense from misdemeanor to ten-year felony if theft exceeded $500; to fifteen-year sentence if defendant is fiduciary or public employee. | *State v. Forthe*, 514 S.E.2d 890 (Ga. Ct. App. 1999); *Hight v. State*, 472 S.E.2d 113 (Ga. Ct. App. 1996) |
| MD. ANN. CODE art. 27 §342 (Maryland) (1977) | Increasing offense from misdemeanor to fifteen-year felony if theft exceeded $300. | *State v. Stackowitz*, 511 A.2d 1105 (Md. 1986); *Proctor v. State*, 435 A.2d 484 (Md. 1981) |

2. Controlled Substance Statutes

| State and Statute | Maximum Enhancing Feature | Discussed In: |
|---|---|---|
| ALA. CODE ANN. § 13-A-12-250; § 13A-12-270 | Adding five years if sale within three miles of school. | *Sanders v. State*, 2001 Ala. Crim. App. LEXIS 33 (Ala. Crim. App. March 2, 2001); *Pearson v. State*, 2001 Ala. Crim. App. LEXIS 19 (Ala. Crim. App. March 2, 2001) |
| GA. CODE ANN. § 16-13-31 (Georgia) (1989) | Increasing sentence from ten to twenty-five years based upon quantity. | *Cleveland v. State*, 463 S.E.2d 36 (Ga. Ct. App. 1995) |
| N.D. CENT. CODE § 19-03.1-23.1 (North Dakota) (1989) | Raises offense to next higher class of felony based upon quantity. | *State v. Allesi*, 216 N.W.2d 805 (N.D. 1974) |

*Examples of "Add-on" Statutes That Allow Judge to Raise the Penalty for all Crimes*

1. "While on Release" Statutes

| **State and Statute** | **Maximum Enhancing Feature** | **Discussed In:** |
|---|---|---|
| D.C. CODE ANN. § 23-1328 (D.C.) (1970) | Additional one to five years if felony, ninety to 180 days if misdemeanor. | *Speight v. United States*, 569 A.2d 124 (D.C. 1989) (en banc) |
| ARIZ. REV. STAT. § 13-604.02(A) (Arizona) (1993) | Court may increase statutory maximum by up to 25% if it finds two "substantial aggravating factors." | *State v. Hurley*, 741 P.2d 257 (Ariz. 1987); *State v. Powers*, 742 P.2d 792 (Ariz. 1987) |
| CONN. GEN. STAT. § 53a-40b (Connecticut) (1990) | Adds ten years to offense if felony, adds one year if misdemeanor. | *State v. Sanko*, 62 Conn. App. 34 (Conn. App. Ct. 2000) |
| N.H. REV. STAT. ANN. § 597:14-b (New Hampshire) (1988) | Adds up to seven years to sentence if felony offense, one year if misdemeanor. | *State v. Ringuette*, 697 A.2d 507 (N.H. 1997) |
| R.I. GEN. LAWS § 12-13-1.2 (Rhode Island) (1985) | Additional two to ten years if felony, ninety to 365 days if misdemeanor. | |

2. Firearms Statutes

| **State and Statute** | **Maximum Enhancing Feature** | **Interpreted In:** |
|---|---|---|
| CAL. PENAL CODE §§ 12022 et. al. (California) (1977) | Additional one to ten years for felony if weapon used. | |
| IND. CODE § 35-42-1-3 (Indiana) (1987) | Raises voluntary manslaughter to higher class of felony. | |
| KY. REV. STAT. ANN. § 218A.992 (Kentucky) (1994) | Controlled substance offenses raised to higher class of felony. | *Adams v. Commonwealth*, 931 S.W.2d 465 (Ky. Ct. App. 1996) |
| ME. REV. STAT. ANN. tit. 17-A § 401 (Maine) (1977) | Burglary offenses raised to higher class of felony. | *State v. DeWalt*, 684 A.2d 1291 (Me. 1996) |
| N.J. STAT. ANN. § 2C39-4.1 (New Jersey) (1998) | Controlled substance offenses raised. | |
| N.C. GEN. STAT. § 15A-1340.16A | Adding sixty-month enhancement. | *State v. Guice*, 541 S.E.2d 467 (N.C. App. 2000), *stay granted*, 2001 N.C. LEXIS 136 (N.C. Jan. 18, 2001) |