

NOTE

BEYOND STATUTORY ELEMENTS: THE SUBSTANTIVE EFFECTS OF THE RIGHT TO A JURY TRIAL ON CONSTITUTIONALLY SIGNIFICANT FACTS

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INTRODUCTION

LEGISLATIVE supremacy over the substance of criminal law is a virtually unchallenged proposition. In contrast to the explosion of the constitutionalization of criminal procedure, constitutional regulation of substantive criminal law has been limited and sporadic. The courts have, however, periodically undertaken efforts to create an area of substantive constitutional criminal law.

When the courts have imposed constitutional limits on the substance of criminal law they have done so in three contexts. First, courts have enforced specific constitutional provisions, such as the First Amendment's prohibition of the criminalization of most types of speech.¹ Second, and more generally, the United States Supreme Court has imparted limited actus reus and mens rea requirements. Finally, the Court has interpreted the Eighth Amendment to require proportionality between the underlying crime and the punishment imposed. Guidance as to where these boundaries fall, however, has often been hazy and of dubious value.

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¹ See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (prohibiting the criminalization of possession of obscene materials).

In contrast to these rather ambiguous requirements, the Supreme Court's decision in *Apprendi v. New Jersey*² established a relatively clear rule: The Sixth Amendment's right to a jury trial places a substantive restriction on legislatures by preventing *any* fact that has been deemed necessary for a particular level of punishment, either by statute or by constitutional decision, from being subject to judicial factfinding. Specifically, the Court held that the Sixth Amendment right to a jury trial³ requires that any fact (other than a prior conviction) that exposes a defendant to a greater level of punishment be found by the jury beyond a reasonable doubt.⁴ This decision was nominally directed at so-called "sentence enhancements"—facts found by the judge at sentencing that increase punishment beyond the maximum allowed by the underlying statute. Some scholars have expressed concern that legislatures, deprived of the use of the increasingly popular "sentence enhancements," would redefine their criminal codes so as to avoid the new *Apprendi* requirement by simply raising the maximum penalty authorized by the underlying statute.⁵ The judge could then use this greater discretion in sentencing to inflict the higher level of punishment desired.⁶

In light of this fear, there has been a revitalized effort to understand the boundaries that the Constitution places on the substance

² 530 U.S. 466 (2000).

³ U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."). For a general discussion of the various Sixth Amendment rights, see Akhil Reed Amar, *Sixth Amendment First Principles*, 84 *Geo. L.J.* 641 (1996).

⁴ *Apprendi*, 530 U.S. at 490 ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring))). In this Note for ease of use I will usually omit the exemption for prior convictions when discussing the rule.

⁵ See Nancy J. King & Susan R. Klein, *Essential Elements*, 54 *Vand. L. Rev.* 1467, 1488–95, app. A (2001) (surveying historical legislative reactions to procedural restrictions and determining that a normal legislative response is to avoid such changes via a change in the substantive law); see also William Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 *J. Contemp. Legal Issues* 1, 1 (1996) ("[T]he government's natural incentive is to evade or exploit the procedural civil-criminal line by changing the substantive civil-criminal line.").

⁶ *Apprendi*, 530 U.S. at 540 (O'Connor, J., dissenting).

of criminal law. For example, Professors Nancy King and Susan Klein have sought to develop a new test based on the *Apprendi* rule that employs a variety of factors to determine when a fact cannot be delegated away from the jury.⁷ While *Apprendi* is facially a procedural rule that does not impart independent constitutional restrictions on the substantive criminal law, it does not lack substantive effect.

A typical *Apprendi* claim revolves around the language of the statute in question and asks whether the legislature gave the judge discretion to increase the maximum penalty based upon the finding of a particular fact.⁸ Sometimes this question is relatively easy to answer, as in *Apprendi* itself, which involved two distinct statutes, one that set the maximum penalty for the underlying crime and one that explicitly allowed an increased sentence based upon a judicial finding of a particular motive.⁹ On other occasions the determination requires a lengthy interpretive exercise.¹⁰ In either case, *Apprendi* creates a formal barrier that legislatures can easily avoid by simply increasing the underlying penalty, thus leaving any factual determination related to the penalty to the discretion of the judge.¹¹

Nonetheless, there are situations in which *Apprendi*'s procedural rule interacts with other constitutional provisions to impose substantive boundaries on criminal penalties. Such cases arise when the particular fact required for the punishment in question is constitutionally compelled. Because that fact is necessary for the punishment in question it falls under the *Apprendi* umbrella and must be found by the jury beyond a reasonable doubt. The legislature is not able to avoid *Apprendi* because it cannot simply increase the maximum potential punishment to moot the relevancy of the fact in question. Such action is beyond the power of the legislature be-

⁷ King & Klein, *supra* note 5, at 1536–42.

⁸ See, e.g., *United States v. Promise*, 255 F.3d 150, 169 (4th Cir. 2001) (en banc) (Luttig, J., concurring).

⁹ *Apprendi*, 530 U.S. at 470.

¹⁰ See, e.g., *Jones v. United States*, 526 U.S. 227, 232–48 (1999) (engaging in extensive statutory construction to determine whether a particular fact was an element or a sentencing factor).

¹¹ For example, following *Apprendi* itself the New Jersey legislature could have simply increased the maximum penalty for the underlying crime and then instructed the judge to take the defendant's motive into account when determining the sentence.

cause the Constitution requires that the fact be found by the jury. In those cases, *Apprendi*, in conjunction with other constitutional provisions, places a substantive restriction on the criminal offense in question.

This understanding of *Apprendi* as a substantive rather than procedural rule, when the facts in question are “constitutionally significant,” is important in two ways. First, it provides relatively clear guidance for legislatures when defining their criminal laws. All facts that are required by substantive constitutional limitations must be treated as elements and therefore proven to the jury beyond a reasonable doubt. Second, substantive rules are treated differently than procedural rules in certain cases. For example, substantive rules are applied retroactively on habeas corpus review, while procedural rules typically are not. On September 2, 2003, an en banc panel of the United States Court of Appeals for the Ninth Circuit held that *Ring v. Arizona*,¹² an *Apprendi* case dealing with facts that are constitutionally required for the imposition of the death penalty, created a substantive rule.¹³ This finding led to the vacation of over 100 death sentences and created a split among the circuits.¹⁴ On December 1, 2003, the Supreme Court granted certiorari to review this holding.¹⁵

Part I of this Note, a brief overview of the important cases leading up to the Court’s decision in *Apprendi*, will track the Court’s meandering path from the beginnings of the development of a substantive constitutional criminal law to the rise of so-called “sentence enhancement”—the imposition of harsher sentences based on facts found by the judge. Part II will examine the Court’s decision in *Apprendi*, as well as the crucial follow-up case *Ring*, which remedied a glaring inconsistency in *Apprendi*. Part III will present a cohesive picture of the analysis required by *Apprendi* by examining the outer boundaries of the right to a jury trial in conjunction with Eighth Amendment proportionality. Part IV will examine the

¹² 536 U.S. 584 (2002).

¹³ *Summerlin v. Stewart*, 341 F.3d 1082, 1102 (9th Cir. 2003) (en banc), cert. granted sub nom. *Schriro v. Summerlin*, 124 S. Ct. 833 (2003) (mem.).

¹⁴ See, e.g., Adam Liptak, Judges’ Rulings Imposing Death Are Overturned, N.Y. Times, Sept. 3, 2003, at A1 (noting the ruling applies to over 100 death row inmates); Henry Weinstein, Federal Court Tosses Out Scores of Death Sentences, L.A. Times, Sept. 3, 2003, at 1 (same).

¹⁵ *Schriro v. Summerlin*, 124 S. Ct. 833 (2003) (mem.).

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results of *Apprendi* in the context of the death penalty, the area where the Court has exerted some control over the substantive requirements of the criminal law via proportionality review, and thus where *Apprendi* should have the greatest impact in the courtroom. Part V will look at the substantive nature of *Apprendi* when intertwined with other constitutional provisions in the context of habeas corpus by discussing the Ninth Circuit's recent decision in *Summerlin v. Stewart*.¹⁶ This Note will conclude that the Sixth Amendment right to a jury trial, as explained in *Apprendi*, places a substantive restriction on legislatures by requiring that *any* fact deemed necessary for a particular level of punishment, either by statute or constitutional decision, be treated as an element of the crime.

I. THE STRUGGLE WITH A CONSTITUTIONAL BASIS FOR
SUBSTANTIVE CRIMINAL LAW

A. *Initial Efforts at Establishing the Limits of Legislative Power for
Defining Elements of Crimes*

The question of whether a particular fact must be proven to the jury, or may be left for judicial determination at sentencing, has troubled the Supreme Court for some time. Since the Court first started addressing "sentencing factors" in *Williams v. New York*,¹⁷ the Court's opinions have vacillated between imposing constitutional limitations on the substance of criminal law and granting deference to legislatures. The Court has given inadequate guidance, however, on how to determine which facts are constitutionally significant. It is therefore not particularly surprising that after some initially strong moves towards the creation of a body of substantive constitutional criminal law, the Court backed away and allowed, for many years, almost anything to withstand constitutional review.

The basis for the Court's eventual moves toward a substantive constitutional criminal law was its decision in *In re Winship*, which held that an accused is protected "against conviction except upon

¹⁶ 341 F.3d 1082.

¹⁷ 337 U.S. 241, 252 (1949) (approving the use of evidence beyond the scope of trial to guide the judge in determining sentences); see also Kyron Huigens, Solving the *Apprendi* Puzzle, 90 Geo. L.J. 387, 394 (2002) ("The notion of a sentencing factor has its roots in . . . *Williams v. New York*.").

proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”¹⁸ The Court emphasized the societal need for reliability:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.¹⁹

While the stigmatizing effect of a criminal conviction plays a somewhat important role in defining constitutionally significant facts, ultimately the loss of liberty rationale became the most important consideration in defining those facts.²⁰

In *Mullaney v. Wilbur*, the Court considered a state homicide law that defined murder and manslaughter, though contained in two distinct statutes, as two degrees of a *unitary* felonious homicide crime.²¹ Under the state supreme court’s interpretation, a homicide could not be reduced from murder to manslaughter unless the defendant proved that he acted “in the heat of passion on sudden provocation.”²² The Court struck down the law, holding that the “heat of passion” affirmative defense had impermissibly shifted the burden of persuasion on an element of murder.²³ In so doing, the Court emphasized that the distinction between murder and manslaughter presented a significant disparity in stigmatization and culpability. The Court’s reliance on stigmatization and culpability

¹⁸ 397 U.S. 358, 364 (1970).

¹⁹ *Id.* at 363.

²⁰ See *Apprendi*, 530 U.S. at 490.

²¹ 421 U.S. 684, 689 (1975).

²² *Id.* at 684–85. The Maine murder statute at the time, Me. Rev. Stat. Ann. tit. 17, § 2651 (West 1964) (repealed 1975), provided: “Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.” Alternatively, the manslaughter statute, Me. Rev. Stat. Ann. tit. 17, § 2551 (West 1964) (repealed 1975), provided in relevant part: “Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than 20 years”

²³ *Mullaney*, 421 U.S. at 701. For a discussion of the critical distinction between the burdens of production and persuasion, and the implications of constitutionally significant facts thereon, see *infra* text accompanying notes 192–98.

suggested the beginning of a constitutional basis for defining criminal laws: those facts that have great stigmatizing value are constitutionally required to be elements of the offense.²⁴ Only two years later, however, the Court backpedaled from its decision in *Mullaney*. In *Patterson v. New York*, the Court considered a law²⁵ almost identical to the one struck down in *Mullaney*, but upheld it by emphasizing legislative primacy over crime definitions.²⁶ Since the state had decided to treat all felonious homicides as murders unless the defendant proved heat of passion as an affirmative defense, the scheme was permissible. The conviction did not subvert the dictates of *Winship* because each element of the crime, as defined by statute, had been proven to the jury beyond a reasonable doubt.²⁷ Following *Patterson*, a series of cases emphasized almost unbounded legislative supremacy in defining elements of crimes.

B. The Rise of the Sentencing Factor

Having backtracked from its holding in *Mullaney*, the Court focused its attention on a more subtle factual distinction: the sentencing factor. Judges have traditionally used factual circumstances beyond those found at trial to determine the appropriate sentence for criminal defendants. Though judges have long considered factual circumstances in exercising discretion over sentences, the appearance of statutorily defined sentencing factors that trigger particular sentences is relatively recent and presents distinct challenges.

²⁴ *Mullaney*, 421 U.S. at 699–700.

²⁵ N.Y. Penal L. § 125.25 (McKinney 1975) provided in pertinent part:
A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime

.....

²⁶ *Patterson v. New York*, 432 U.S. 197, 201–02 (1977). The Court also undertook a revisionist analysis of *Mullaney*, reading all of the actual arguments out of the case. *Id.* at 214–16.

²⁷ *Id.* at 206.

In *McMillan v. Pennsylvania*, the Court considered a challenge to a Pennsylvania law that mandated a minimum of five years in prison (but did not change the maximum penalty allowed) for the commission of certain enumerated felonies if the judge found, by a preponderance of the evidence at the sentencing hearing, that the defendant had visibly possessed a firearm during the commission of the offense.²⁸ *McMillan* argued that under *Mullaney* the prosecution was required to prove the visible possession of the firearm to the jury because that fact mandated a particular level of punishment.²⁹ The Court soundly rejected that notion, however, and chose to rely on *Patterson*'s deferential rule.³⁰ Again, the Court emphasized that the power to define crimes was well within the province of the legislatures and that Pennsylvania had not chosen to make visible possession of a firearm an element of the crime.³¹ The Court found that the relevant section "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm."³² Although *McMillan* implied the existence of restrictions on a judge's ability to use sentencing factors to increase the maximum penalty for a crime, those restrictions were soon relaxed.³³

Legislative supremacy with respect to sentencing factors reached its high point in *Almendarez-Torres v. United States*.³⁴ *Almendarez-Torres* was indicted for "having been 'found in the United States . . . after being deported' without the 'permission and consent of the Attorney General' in 'violation of . . . Section 1326'" of Title 8 of the United States Code and subsequently pled guilty to the charge.³⁵ At a hearing prior to the acceptance of his plea, *Almendarez-Torres* admitted that his previous deportation was due to three convictions for aggravated felonies.³⁶ The district court was

²⁸ 477 U.S. 79, 81 (1986).

²⁹ *Id.* at 84.

³⁰ *Id.* at 85–86.

³¹ *Id.*

³² *Id.* at 87–88.

³³ See *infra* text accompanying notes 47–53.

³⁴ 523 U.S. 224 (1998).

³⁵ *Id.* at 227 (citation omitted).

³⁶ *Id.*

then faced with a sentencing issue. Subsection (a) of Section 1326 has a maximum sentence of two years, while subsection (b)(2), which requires that the previous deportation be due to an aggravated felony, provides for a maximum penalty of twenty years.³⁷ Almendarez-Torres contended that the statute defined two distinct crimes, and, as such, he could not be sentenced under the harsher provision because his indictment had not alleged his previous aggravated felony convictions.³⁸ The Fifth Circuit, like the district court below, rejected this argument and joined the majority of the circuit courts to examine the issue by holding that subsection (b)(2) of Section 1326 “is a penalty provision that simply permits a sentencing judge to impose a higher sentence when the unlawfully returning alien also has a record of prior convictions.”³⁹ Almendarez-Torres was ultimately sentenced to about seven years in prison.⁴⁰

³⁷ Id. at 229. The statute in relevant part reads:

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens.

(a) Subject to subsection (b) of this section, any alien who—(1) has been . . . deported . . . , and thereafter (2) enters . . . , or is at any time found in, the United States [without the Attorney General’s consent or the legal equivalent], shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of [certain misdemeanors], or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both.

Id. (quoting 8 U.S.C. § 1326 (1988)).

³⁸ Id. at 227; see also *Hamling v. United States*, 418 U.S. 87, 117 (1974) (requiring that all elements of the crime be set forth in the indictment).

³⁹ *Almendarez-Torres*, 523 U.S. at 227; see also *United States v. Valdez*, 103 F.3d 95, 97–98 (10th Cir. 1996) (finding subsection (b)(2) to be a penalty provision); *United States v. Haggerty*, 85 F.3d 403, 404–05 (8th Cir. 1996) (same); *United States v. DeLeon-Rodriguez*, 70 F.3d 764, 765–67 (3d Cir. 1995) (same); *United States v. Palacios-Casquete*, 55 F.3d 557, 559–60 (11th Cir. 1995) (same); *United States v. Munoz-Cerna*, 47 F.3d 207, 210 n.6 (7th Cir. 1995) (same); *United States v. Crawford*, 18 F.3d 1173, 1176–78 (4th Cir. 1994) (same); *United States v. Forbes*, 16 F.3d 1294, 1297–300 (1st Cir. 1994) (same); *United States v. Vasquez-Olvera*, 999 F.2d 943, 945–47 (5th Cir. 1993) (same). But see *United States v. Gonzalez-Medina*, 976 F.2d 570, 572 (9th Cir. 1992) (holding that subsection (b)(2) constitutes separate crime).

⁴⁰ *Almendarez-Torres*, 523 U.S. at 227.

The Supreme Court agreed with the courts below that subsection (b)(2) was simply a sentencing provision and did not define a prior conviction as an element of a greater offense and then turned to the constitutionality of the statute.⁴¹ Examining *McMillan*, the Court found five points on which that decision “arguably turned”: (1) the statute in question plainly did not transcend the limits set in *Patterson*; (2) “the defendant . . . did not face ‘a differential in sentencing ranging from a nominal fine to a mandatory life sentence’”; (3) the statute did not increase the maximum penalty and thus only constrained the sentencing judge’s discretion; (4) the statute did not create a separate offense calling for a separate penalty; and (5) the statute gave “no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense.”⁴² Then the Court noted that the facts surrounding *Almendarez-Torres*’s sentence resembled *McMillan* except with respect to the third factor: In this case the sentencing factor did “alte[r] the maximum penalty for the crime.”⁴³

The Court went on to emphasize that, regardless of this difference, the constitutional outcome was the same.⁴⁴ The Court noted that recidivism has long played a role in sentencing and is perhaps the “most traditional[] basis for a sentencing court’s increasing an offender’s sentence,” thus making it acceptable for legislatures to remove evidence of prior convictions from jury consideration.⁴⁵ Despite the Court’s assertion, however, the traditional role of any given fact does not do the work; the important question is whether legislatures can delegate to judges the power to determine any fact that authorizes a punishment beyond the statutory maximum.⁴⁶

⁴¹ Id. at 235–39.

⁴² Id. at 242–43 (quoting *McMillan*, 477 U.S. at 86–90).

⁴³ Id. at 243 (quoting *McMillan*, 477 U.S. at 87).

⁴⁴ Id. at 243–45.

⁴⁵ Id. at 243.

⁴⁶ It is certainly true that evidence of recidivism has been looked at by courts regularly in determining a criminal’s sentence, but that in and of itself does not resolve the issue in *Almendarez-Torres*. There are a multitude of factors that are likely to be taken into account when sentencing someone; for example, an assault that results in a black eye will surely receive a shorter sentence than one that results in serious injury. Yet, if such differences were to be deemed, automatically, “sentencing factors,” legislatures would have the ability to bend the criminal laws without subjecting themselves to the constraints of the political process. Under this rationale, for instance, a legislature could do away with its murder/manslaughter distinction and authorize the judge

The Court then turned to that question and found the delegation of authority constitutional.⁴⁷ The conclusion rested upon one premise: The “difference—between a permissive maximum and a mandatory minimum—does not systematically, or normally, work to the disadvantage of a criminal defendant.”⁴⁸ Essentially, the Court reasoned that in some cases the judge will not use the extra authority granted by a higher maximum, while a mandatory minimum in all cases restricts the judge, and therefore, “the risk of unfairness to a particular defendant is no less, and may well be greater, when a mandatory minimum sentence, rather than a permissive maximum sentence, is at issue.”⁴⁹ This conclusion, as Justice Scalia pointed out in dissent, is dubious at best.⁵⁰ *McMillan* was premised largely on the idea that the statute required a judge to give a certain weight to the possession of a firearm within his sentencing discretion and did not subject the defendant to any additional punishment.⁵¹ The judge could have imposed the same sentence, regardless of whether the firearm was present.⁵² As Justice Scalia pointed out, the position taken in *Almendarez-Torres* “is a position which *McMillan* not only rejected, but upon the converse of which *McMillan* rested its judgment.”⁵³

Treating recidivism as a special case is defensible because it can reasonably be assumed that evidence of the prior conviction has—as an inherent characteristic—the necessary procedural safeguards to assure validity. Additionally, treating a prior conviction as an element of the crime forces the government to confront the jury with proof of the prior conviction when determining guilt—something that could be prejudicial to the defendant.⁵⁴ The *Almendarez-Torres* Court did not, however, create an exception to the general rule solely for recidivism. Rather, the Court’s rationale ex-

to impose a sentence beyond the statutorily defined maximum for manslaughter if the judge found at sentencing by a preponderance of the evidence that the defendant had the requisite intent for murder.

⁴⁷ *Almendarez-Torres*, 523 U.S. at 244–45.

⁴⁸ *Id.* at 244.

⁴⁹ *Id.* at 245. The Court also noted that although *McMillan* commented on the distinction, the judgment did not rest on it. *Id.*

⁵⁰ *Id.* at 254 (Scalia, J., dissenting).

⁵¹ *McMillan*, 477 U.S. at 87–89.

⁵² *Id.* at 87–88.

⁵³ *Almendarez-Torres*, 523 U.S. at 254 (Scalia, J., dissenting).

⁵⁴ See, e.g., *id.* at 234–35; *Old Chief v. United States*, 519 U.S. 172, 185 (1997).

tended far beyond recidivism and suggested that legislatures could treat almost any fact as a sentencing factor that enhanced the sentence.⁵⁵ The Court's deference to legislatures on crime definition had reached its highpoint with legislatures having carte blanche to redefine crimes so as to have low maximum penalties based on jury findings, while still authorizing judges to impose higher penalties upon the finding of other facts without the safeguards of *Winship*.

C. *The Beginning of the End of the Sentencing Factor*

Although the Court had shown deference to legislatures in *Almendarez-Torres*, it began to recognize the Sixth Amendment problems with such deference shortly thereafter. In *Jones v. United States*,⁵⁶ the Court took its first, albeit hesitant, step towards a reassertion of constitutional limitations on factually triggered sentence enhancements. Nathaniel Jones was indicted under the federal car-jacking statute, which at the time read as follows:

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—(1) be fined under this title or imprisoned not more than 15 years, or both, (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.⁵⁷

Jones's indictment made no reference to any of the numbered subsections, much less charged any of the facts mentioned in the latter two, and the magistrate informed Jones at his arraignment that he faced a maximum of fifteen years in prison.⁵⁸ The district court required the jury to find only the facts outlined in the first paragraph of the statute, and Jones was convicted.⁵⁹ In spite of the magis-

⁵⁵ See *United States v. McVeigh*, 153 F.3d 1166, 1194–95 (10th Cir. 1998) (finding the death of the victim to constitute a sentencing factor).

⁵⁶ 526 U.S. 227, 251–52 (1999).

⁵⁷ *Id.* at 230 (quoting 18 U.S.C. § 2119 (Supp. V 1988)).

⁵⁸ *Id.* at 230–31.

⁵⁹ *Id.* at 231.

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trate's statement and the jury instructions that focused solely on the facts outlined in the first paragraph of the statute, the presentence report suggested a twenty-five year sentence in light of the serious injury suffered by one of the carjacking victims.⁶⁰ Jones objected, arguing that serious bodily injury was an element of a separate crime defined by Section 2119(2) that had not been pled in the indictment or proven to the jury.⁶¹ The district court rejected that argument, finding that serious bodily injury was not an element of the crime but was instead a sentence enhancement.⁶² The Ninth Circuit—prior to the Supreme Court's decision in *Almendarez-Torres*—affirmed, agreeing that Congress intended serious bodily injury to be a sentencing factor and holding that “the key to distinguishing between elements of an offense and sentencing factors is the legislature's definition of the elements of the offense.”⁶³ The lower courts had thus taken the step that *Almendarez-Torres* suggested would be acceptable, even before the Court decided that case.

Apparently recognizing that the rule it endorsed in *Almendarez-Torres* could be used to avoid the constitutional protections of a trial by jury, the Supreme Court reversed course. The Court recognized that Section 2119(2) was susceptible to two constructions: Serious bodily injury was either an element of a different aggravated offense or a sentence enhancing provision.⁶⁴ In concluding that serious bodily harm constituted an element of a distinct crime, the Court invoked the rule that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter.”⁶⁵ Ultimately the Court explicitly recognized the constitutional implications of legis-

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ *United States v. Oliver*, 60 F.3d 547, 552 (9th Cir. 1995), appeal after remand, 116 F.3d 1487 (9th Cir. 1997), rev'd sub nom. *Jones v. United States*, 526 U.S. 227 (1999).

⁶⁴ *Jones*, 526 U.S. at 239. The majority believed that, contrary to the lower court's views, the most reasonable interpretation of the statute suggested that the subsections defined distinct crimes and thus serious bodily harm was in fact an element. Id.

⁶⁵ Id. (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

latures' use of sentence enhancements to shift from jury factfinding to judicial factfinding.

The recognition of the constitutional problems associated with sentence enhancements stemmed partly from the Court's explicit recognition that the Sixth Amendment's right to a jury trial—in addition to the due process concerns the Court had relied on in *Mullaney* and *Winship*—creates its own requirements for any determination of facts leading to criminal punishment.⁶⁶ Engaging in a historical analysis of the role of the jury trial, the Court reasoned that the finding of facts that opened up defendants to criminal punishments had likely “been very much to the fore in the Framers' conception of the jury right” and thus represented an important Sixth Amendment question.⁶⁷ Importantly, the Court re-examined *Almendarez-Torres* and suggested that the decision rested on the special status of recidivism in criminal sentencing, a status that exempted recidivism from the general rule that all facts required for a particular level of punishment have to be found by the jury beyond a reasonable doubt.⁶⁸ Since the Court was raising the constitutionality of treating serious bodily injury as a sentence enhancement only to invoke the rule of statutory construction by which such questions are avoided, there was no holding on the issue. In a footnote responding to the dissent, however, the majority presaged *Apprendi v. New Jersey*, stating that

⁶⁶ Id. at 242–43. It is important to draw the distinction between “sentencing factors” and “sentence enhancements.” “Sentencing factors” are facts used during sentencing that constrain judges' discretion in imposing sentences but do not alter the statutory maximum that can be imposed. “Sentence enhancements” are those facts found by a judge at sentencing that increase the maximum penalty to which the defendant is exposed.

⁶⁷ Id. at 244. Specifically the Court focused on the importance of the jury in thwarting the Crown and noted the jury's power to control the outcome of seditious libel cases, making it clear that the Framers were concerned that the “jury right could be lost not only by gross denial, but by erosion.” Id. at 246–48. See also Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 869–75 (1994) (discussing grand jury nullification and its influence on the Framers in the case of John Peter Zenger).

⁶⁸ *Jones*, 526 U.S. at 248–49 (“One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.”).

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under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.⁶⁹

Despite the majority's signal as to the doubtful constitutionality of sentence enhancements, the lower courts continued to uphold them, resulting in the Court's direct confrontation of the issue.⁷⁰

II. *APPRENDI V. NEW JERSEY: THE DEATH OF THE SENTENCE ENHANCEMENT*

After having shifted back and forth regarding what facts the jury must find, the Court addressed the sentence enhancement issue head-on in *Apprendi v. New Jersey*.⁷¹ Addressing the issue *Jones v. United States* had foreshadowed, the Court again reallocated power between legislatures and the judiciary by rejecting the more deferential approach in favor of an approach that examined how a particular fact actually functioned within the penal code.

A. *The Facts of Apprendi*

Charles Apprendi, Jr., fired several shots into the home of an African-American family that had recently moved into his previously all-white neighborhood.⁷² After his prompt apprehension, Apprendi confessed and eventually made a statement to the police, which he later retracted, that suggested the shooting was racially motivated.⁷³ A New Jersey grand jury returned a twenty-two count indictment against Apprendi, alleging shootings on several different dates and the unlawful possession of weapons, but failed to make any reference to the alleged racial motivation of the crimes.⁷⁴

⁶⁹ Id. at 243 n.6.

⁷⁰ See *United States v. Hardin*, 209 F.3d 652, 658 (7th Cir. 2000) (“[W]e are skeptical that the Court would announce such an important legal metamorphosis halfway through a footnote halfway through an opinion that consists mostly of a fact-intensive analysis of a specific statute . . .”).

⁷¹ 530 U.S. 466 (2000).

⁷² *State v. Apprendi*, 698 A.2d 1265, 1266 (N.J. Super. Ct. App. Div. 1997), aff'd, 731 A.2d 485 (N.J. 1999), rev'd, 530 U.S. 466 (2000).

⁷³ Id. at 1267.

⁷⁴ *State v. Apprendi*, 731 A.2d 485, 486 (N.J. 1999), rev'd, 530 U.S. 466 (2000).

Apprendi entered into a plea agreement and pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of the third-degree offense of unlawful possession of an antipersonnel bomb.⁷⁵ The prosecution dismissed the remaining charges.⁷⁶ Under New Jersey law, a second-degree offense carries a penalty range of five to ten years and a third-degree offense carries a penalty range of three to five years.⁷⁷ As part of the plea agreement, however, the prosecution specifically reserved the right to request that the judge impose a longer—“enhanced”—sentence on the second-degree offense pursuant to the state’s hate crimes statute.⁷⁸ The judge found by a preponderance of the evidence that Apprendi’s crime was committed “with a purpose to intimidate,” as required by the hate crime enhancement, and sentenced Apprendi to twelve years on the second-degree offense in question—two years longer than the statutorily defined maximum penalty for a second-degree offense.⁷⁹

On appeal, the New Jersey Supreme Court upheld the enhanced sentence by applying the *McMillan v. Pennsylvania* factors⁸⁰ that the United States Supreme Court had invoked in *Almendarez-Torres v. United States*.⁸¹ The New Jersey Supreme Court, much like the United States Supreme Court in *Almendarez-Torres*, determined that the hate crimes law had all of the characteristics that

⁷⁵ Id. at 487.

⁷⁶ Id.

⁷⁷ N.J. Stat. Ann. § 2C:43-6(a)(2) (West 1995) (five to ten years for a second-degree offense); id. § 2C:43-6(a)(3) (three to five years for a third-degree offense).

⁷⁸ *Apprendi*, 530 U.S. at 470. The New Jersey “hate crimes” law changes the maximum penalty of a second-degree offense from ten to twenty years if the judge finds, by a preponderance of the evidence, that “the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.” N.J. Stat. Ann. § 2C:44-3(e) (West 1995) (repealed 2001). It is also important to note that the issue is not whether the First Amendment permits New Jersey to use the criteria set forth in its hate crime statute to impose a longer sentence, but whether allowing a judge to make the finding violated the Due Process Clause and the right to a jury trial. See *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993) (rejecting a First Amendment challenge to an enhanced sentence based on a jury finding that the defendant had intentionally selected his victim due to the victim’s race).

⁷⁹ *Apprendi*, 530 U.S. at 470–71.

⁸⁰ 477 U.S. 79, 86–90 (1986).

⁸¹ 523 U.S. 224, 242–43 (1998); *Apprendi*, 731 A.2d at 494. See text accompanying note 42 for the *McMillan* factors.

were present in *McMillan*, except that it allowed for an increased maximum penalty.⁸² In particular, the New Jersey Supreme Court emphasized that motive, like recidivism, is a traditional sentencing factor, suggesting that the legislature had not tried to evade the *In re Winship*⁸³ requirement that elements be found by the jury beyond a reasonable doubt by redefining elements of the crimes as sentencing enhancers.⁸⁴ Following in the footsteps of *Almendarez-Torres*, the New Jersey Supreme Court, despite its contention that it would not allow the legislature to shift traditional elements away from juries, took a very formalistic view, affording almost complete deference to legislators in the classification of sentencing factors.⁸⁵

B. *The Apprendi Ruling*

Although courts had noted that legislative labels do not shield a statute from constitutional scrutiny,⁸⁶ the *Apprendi* Court was the first to go beyond rhetoric and examine the actual role of the facts in question. Justice Stevens began his analysis for the Court by reviewing the historical role of the jury. Relying on such authorities as Blackstone, Hale, and Archbold, the Court noted that it was the traditional role of the jury to make the factual determinations that authorized a court to impose punishment.⁸⁷ There was not, how-

⁸² *Apprendi*, 731 A.2d at 494.

⁸³ 397 U.S. 358 (1970).

⁸⁴ *Apprendi*, 731 A.2d at 494–95. The New Jersey court went on to make several other arguments, including that the enhancement was acceptable because the hate crimes statute did not create a separate crime. *Id.* In addition, the court asserted that “[a]lmost invariably there is no real doubt about the factual issue that determines the sentencing decision,” and that requiring the jury to find bias motivation would be prejudicial, as such evidence would inflame the jury. *Id.* at 495–96.

⁸⁵ The New Jersey Supreme Court noted that [t]here should be no mistake that the [New Jersey Supreme] Court would not permit the Legislature (even were it so inclined) to remove traditional *mens rea* or grading factors (such as the absence of passion/provocation in a murder) from the substantive definition of a crime to be determined by a jury and reallocate them for determination by a judge as part of the sentencing process. *Id.* at 495.

⁸⁶ See, e.g., *id.* at 492 (“We begin by stating the obvious. Merely because the Legislature has placed the hate-crimes enhancer within the sentencing provisions of the Code of Criminal Justice does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense.”).

⁸⁷ *Apprendi*, 530 U.S. at 477–83; see also *id.* at 477 (“[T]rial by jury has been understood to require that ‘the truth of every accusation, whether preferred in the shape of

ever, any historical prohibition on the judicial exercise of discretion when imposing a sentence within the range prescribed by statute.⁸⁸ To some extent, Justice Stevens's historical analysis does not resolve the ambiguity, as *Apprendi* was, arguably, sentenced within the range defined by the hate crimes statute.⁸⁹

Ultimately, the key to the decision in *Apprendi* is the uncontroversial *Winship* holding. The Court in *Apprendi* relied on the same two factors that *Winship* required for the application of the reasonable doubt standard: (1) the stigmatizing effect of a criminal prosecution and (2) the loss of liberty that comes from a criminal conviction.⁹⁰ The "loss of liberty" rationale in particular gives great force to the Court's decision in *Apprendi*, since any sentencing factor that increases the maximum penalty by definition exposes the defendant to a greater loss of liberty without the accompanying protection of a jury trial. Looking back at *McMillan*, the case that the lower courts had repeatedly used to justify the constitutionality of sentence enhancements, the Court noted two points: (1) the Constitution limits a state's authority to define away facts from the jury's consideration and (2) using facts not considered by the jury to increase the maximum penalty for a crime is constitutionally suspect.⁹¹ With that in mind, the Court examined *Almendarez-Torres* and determined that it provides an exception to the "general rule." Specifically, a prior conviction is a special type of fact that has procedural safeguards built in. It follows that *Almendarez-Torres* does not suggest a departure from the "otherwise uniform course of decision" that required the facts upon which a sentence depends to

indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours" (quoting 4 William Blackstone, Commentaries, *349-50)). The Court also noted that at the time of the founding there was no distinction between an element and a sentencing factor. *Id.* at 478.

⁸⁸ *Id.* at 481.

⁸⁹ None of the lower court judges had randomly decided to impose sentences in excess of what was statutorily authorized. The legislatures had authorized them, upon a judicial finding of a fact, to impose a greater sentence. The question is whether the Constitution permits legislatures to confer that authority upon a judge.

⁹⁰ *Apprendi*, 530 U.S. at 484; see also *Almendarez-Torres*, 523 U.S. at 251 (Scalia, J., dissenting) (noting that *Winship* had been applied in some situations where the facts did not go to guilt or innocence, but only to the length of the sentence).

⁹¹ *Apprendi*, 530 U.S. at 486.

be found by the jury.⁹² Subsequently, the Court announced the “general rule,” with an exception for previous convictions: “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”⁹³

The dissent argued that the majority’s rule was an exercise in pointless formalism because New Jersey could simply increase the penalty for the underlying crime to twenty years and then instruct the judge to take bias (or lack thereof) into account when sentencing.⁹⁴ The Court’s rejoinder emphasized the power of political checks in setting maximum penalties.⁹⁵ When the legislature sets a maximum penalty for any particular crime, it authorizes the judge to sentence any offender convicted of that crime to the maximum penalty. Political accountability, at least in theory, forces the legislature to make the sentencing range proportional to the gravity of the crime.⁹⁶ The majority’s rule also forces a legislature “to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences.”⁹⁷ With such transparency, “[t]he political check on potentially harsh legislative action is then more likely to operate.”⁹⁸ The Court also noted that “[i]n all events”⁹⁹ it would be obliged to review the constitutionality of the statute under *Mullaney v. Wilbur*¹⁰⁰ and *Patterson v. New York*.¹⁰¹

C. Ring and Harris: Clarifying the Reach of Apprendi

The location of the outer boundary suggested by *Apprendi* presents the most interesting question. Where exactly does the Constitution

⁹² Id. at 488–90. Whether this is true in a world of guilty pleas is up for debate, but it is clear that the Court assumed that a guilty plea contained the same safeguards as does a jury finding.

⁹³ Id. at 490. (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring)).

⁹⁴ See id. at 539–40 (O’Connor, J., dissenting).

⁹⁵ Id. at 490–91 n.16.

⁹⁶ Id.

⁹⁷ *Patterson v. New York*, 432 U.S. 197, 228 n.13 (1977) (Powell, J., dissenting).

⁹⁸ Id.

⁹⁹ *Apprendi*, 530 U.S. at 491 n.16.

¹⁰⁰ 421 U.S. 684 (1975).

¹⁰¹ 432 U.S. 197 (1977).

draw the line regarding a legislature's power to define which facts must be treated as elements and thus found by the jury? Although the majority enunciated a rule that on one level seems clear, the Court included two particularly interesting wrinkles. First, the Court noted that its rule maintained the distinction between aggravating and mitigating facts.¹⁰² Legislatures are, therefore, still free to identify mitigating facts that shorten potential sentences if proven by the defendant and to permit those facts to be found by a judge at sentencing.¹⁰³ Second, and most perplexing, the Court explicitly approved of its decision in *Walton v. Arizona*¹⁰⁴ that allowed judges to find, by a preponderance of the evidence, specific aggravating factors that authorized the imposition of the death penalty.¹⁰⁵ While the former issue necessitates careful analysis to determine how the so-called mitigating factor acts in any given case,¹⁰⁶ the continued vitality of *Walton* required further examination by the Supreme Court.

The Supreme Court's death penalty jurisprudence has required states to narrow the category of defendants who are exposed to the death penalty by requiring the finding of aggravating facts in addition to the conviction for murder.¹⁰⁷ Such a scheme is designed to ensure that only the most culpable defendants are subject to capital punishment. In *Walton*, the Court determined that a judge could find the enumerated aggravating factors that were necessary for

¹⁰² *Apprendi*, 530 U.S. at 491 n.16.

¹⁰³ *Id.* ("If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone.").

¹⁰⁴ 497 U.S. 639, 647-49 (1990).

¹⁰⁵ *Apprendi*, 530 U.S. at 496-97.

¹⁰⁶ See *infra* Section IV.B. If the presence of the "mitigating" factor prohibits a particular sentence then *Apprendi* is implicated. It is therefore important to understand exactly how the "mitigating" factor operates.

¹⁰⁷ See *Walton*, 497 U.S. at 659 (Scalia, J., concurring); see also *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (requiring clear and objective standards for imposing the death penalty); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion) (approving of new capital sentencing scheme because it constrained discretion). Sentencers must also be allowed to consider mitigating factors. See *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

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the imposition of the death penalty.¹⁰⁸ Despite the *Apprendi* Court's explicit approval of *Walton*, the clear tension between the *Apprendi* rule and *Walton* caused confusion in the lower courts.¹⁰⁹

The Court sought to end the confusion by revisiting Arizona's capital sentencing scheme in *Ring v. Arizona*.¹¹⁰ During the sentencing phase of the trial, the judge found two statutorily defined aggravating factors and decided to impose the death penalty.¹¹¹ On appeal, the Arizona Supreme Court made clear that under Arizona law the presence of an aggravating factor was necessary for the death penalty to be imposed.¹¹² Arizona's scheme of judicial fact-finding appeared to conflict with *Apprendi* in that the judge had found the aggravating factors that authorized the imposition of the death penalty. The Arizona Supreme Court nonetheless rejected Ring's challenge based on *Apprendi*'s explicit approval of *Walton*.¹¹³ The United States Supreme Court held, however, that because an aggravating factor must be found before the imposition of the death penalty, the aggravating factors "operate as statutory 'elements' of capital murder under Arizona law."¹¹⁴ The Court emphasized the functional approach to the issue and rejected Ari-

¹⁰⁸ *Walton*, 497 U.S. at 647–49. *Walton* drew significant support from *Cabana v. Bullock*, 474 U.S. 376 (1986), which held that the finding required for the imposition of the death penalty by *Enmund v. Florida*, 458 U.S. 782 (1982), that the defendant killed, attempted to kill, or intended to kill, could be constitutionally made by an appellate court because "*Enmund* 'does not affect the state's definition of any substantive offense, even a capital offense'" and only places "a substantive limitation on sentencing." *Cabana*, 474 U.S. at 385–86 (quoting *Reddix v. Thigpen*, 728 F.2d 705, 709 (5th Cir. 1984)).

¹⁰⁹ See, e.g., *United States v. Promise*, 255 F.3d 150, 159–60 (4th Cir. 2001) (en banc) (calling the continued authority of *Walton* in light of *Apprendi* "perplexing"); *Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir. 2001) (noting four Justices believed *Apprendi* overruled *Walton* and one Justice reserved the question and commenting that "*Apprendi* may raise some doubt about *Walton*"); *People v. Kaczmarek*, 741 N.E.2d 1131, 1142 (Ill. 2000) ("[W]hile it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital, defendants, the Court has endorsed this precise principle, and we are in no position to secondguess [sic] that decision here.").

¹¹⁰ 536 U.S. 584 (2002).

¹¹¹ *Id.* at 594–95. Additionally, because Ring was convicted of felony murder, the judge made the finding required by *Tison v. Arizona*, 481 U.S. 137 (1987), that Ring was a "major participa[nt] in the felony committed" and demonstrated "reckless indifference to human life." *Ring*, 536 U.S. at 594 (quoting *Tison*, 481 U.S. at 158).

¹¹² *Ring*, 536 U.S. at 596.

¹¹³ *Id.*

¹¹⁴ *Id.* at 599 (quoting *Walton*, 497 U.S. at 709 n.1 (Stevens, J., dissenting)).

zona's contention that the special rules applicable in the Eighth Amendment context are subject to a lower level of constitutional scrutiny.¹¹⁵ Since Arizona law required that an aggravating factor be found before the death penalty could be imposed, the Court held that the aggravating factor fell under *Apprendi* and must therefore be found by the jury beyond a reasonable doubt.¹¹⁶

In addition to revisiting *Walton*, the Court recently reconsidered *McMillan v. Pennsylvania*, which allowed judges to find facts that led to a higher mandatory minimum than the minimum for the crime as found by the jury.¹¹⁷ In *Harris v. United States*, the Court relied on *McMillan*'s rationale, but this time explained that the constitutionally significant issue, as noted in *Apprendi*, was the increase in the maximum allowable sentence.¹¹⁸ The Court was clear that once a jury has found the facts that authorize a particular penalty range, the state has the power to define as sentencing factors any legitimate facts¹¹⁹ that constrain the judge's discretion within that range: "Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments."¹²⁰ *Harris*, therefore, made it clear that the Court was not moving back to the original *Mullaney* approach of constitutionalizing substantive criminal law by requiring any fact that bears on culpability to be treated as an element. While this seems to return the Court to a formalistic view of constitutional constraints, in actuality the Court has clarified the critical constitutional factor: a factual finding that increases the range of punishment to which the defendant is exposed. Any fact that exposes the defendant to a greater level of punishment is invalid under *Apprendi* unless it is found by the jury. But it is soundly within the leg-

¹¹⁵ Id. at 604–07.

¹¹⁶ Id. at 609 ("[W]e overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty . . . [b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense'" (citations omitted)).

¹¹⁷ *McMillan*, 477 U.S. at 85–86.

¹¹⁸ 536 U.S. 545, 563–67 (2002).

¹¹⁹ Illegitimate facts would presumably include, for example, the race, sex, or religion of the offender.

¹²⁰ *Harris*, 536 U.S. at 558.

islature's province to allow judicial finding of facts that do not authorize a higher maximum.

Ultimately, the troika of *Apprendi*, *Ring*, and *Harris* form a cohesive, reasonable framework for understanding the right to a jury trial and the institutional allocation of power in the definition of crimes. The Court has effectively tied together its previous cases, forming a coherent approach to the jury trial right via the legislature's ability to define substantive offenses.¹²¹ The *Apprendi* rule is not an invasive rule requiring the Court to create a large body of constitutional substantive criminal law because it demands only that courts determine if there is a fact upon which, either as a statutory or constitutional matter, the sentence hinges. Determining if a fact is statutorily required merely calls for courts to engage in standard statutory construction.¹²² Determining if a fact is constitutionally required, however, presents a more interesting problem, as the Court hinted in *Apprendi*.¹²³ The solution to this problem does not lie solely in the Sixth Amendment, but in its relation to other constitutional provisions.¹²⁴

¹²¹ Despite the seeming simplicity of the rule, there can be difficulties that have led some to conclude that *Apprendi* was wrongly decided. See, e.g., B. Patrick Costello, Jr., Comment, *Apprendi v. New Jersey*: "Who Decides What Constitutes a Crime?" An Analysis of Whether a Legislature is Constitutionally Free to "Allocate" an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review, 77 Notre Dame L. Rev. 1205, 1269 (2002).

¹²² Federal courts are of course subordinate to state courts on the interpretation of state statutes, which make up the vast majority of criminal laws in the United States. See, e.g., *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). A searching inquiry of the statute is typically not needed for federal review; all that must be examined is how the fact was treated in the state courts. If the state courts have determined (even if seemingly contradicted by the language of the statute) that the statute authorizes the highest penalty mentioned for the base crime in the statute, then *Apprendi* is satisfied. Alternatively, if the state court determines that a particular fact need be found for a particular level of punishment to be imposed, such as biased motive in *Apprendi*, then the reviewing court must look to see if that fact was subject to a jury determination. If it was not, then, just as in *Apprendi* itself, it does not survive constitutional scrutiny.

¹²³ *Apprendi*, 530 U.S. at 491 n.16.

¹²⁴ For an argument that the Bill of Rights is best read as a whole, that is, not viewing each amendment in isolation, see generally Akhil Reed Amar, *The Bill of Rights* (1998). Professor Amar "challenge[s] the prevailing practice [of viewing each amendment in isolation] by offering an integrated overview of the Bill of Rights as originally conceived, an overview that illustrates how its provisions related to one another" *Id.* at xii.

III. CONSTITUTIONALLY SIGNIFICANT FACTS

The Constitution has not been interpreted to contain many substantive requirements for criminal laws, but it does place some restrictions on legislatures' ability to define crimes.¹²⁵ It is from those constitutional restrictions that the concept of the "constitutionally significant fact" was born. The term is used in this Note to refer to any fact (or set of facts) that alters the constitutionality of a substantive criminal statute.

A. Specific Constitutional Prohibitions

When the Court has intervened in the substantive criminal law, the majority of the limitations it has imposed have flowed from specific constitutional provisions that provide a substantive area of protection.¹²⁶ The First Amendment's prohibition on the criminalization of speech is the most prominent example of a specific constitutional provision that restricts the legislature's power to define crimes.¹²⁷ For example, under *Stanley v. Georgia* the First Amendment prohibits the criminalization of the possession of obscene materials,¹²⁸ while *Miller v. California* allows for the criminalization of their distribution in certain circumstances.¹²⁹ Thus, whether a defendant was engaged in distribution of obscene materials or was merely in possession of them is a constitutionally significant fact

¹²⁵ See John C. Jeffries, Jr. & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1367 (1979) ("With few, though important, exceptions, the Court's opinions in the field of substantive criminal law have been confined to the construction of federal statutes, and the states have remained largely free to define the penal law as they see fit." (citation omitted)).

¹²⁶ Id. at 1367 n.123 ("Of course, the scope of the criminal law is subject to substantive limits imposed by special constitutional protections for certain kinds of activity.").

¹²⁷ See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that criminalization of flag burning is inconsistent with the First Amendment); *Miller v. California*, 413 U.S. 15 (1973) (prohibiting the criminalization of the distribution of sexually explicit speech unless it appeals to the prurient interest, depicts sexual conduct in a patently offensive way that is specifically defined by law, and lacks serious literary, artistic, political, or scientific value). The Due Process Clause has also created an area of personal autonomy that the state cannot criminally regulate. See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (relying on right of privacy contained in the Due Process Clause of the Fourteenth Amendment and the Bill of Rights); *Roe v. Wade*, 410 U.S. 113 (1973) (same); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (same).

¹²⁸ 394 U.S. 557, 559 (1969).

¹²⁹ 413 U.S. 15, 27 (1973).

because that fact changes the constitutionality of the criminal law proscribing the conduct.¹³⁰ The key is that all constitutionally significant facts must be found by the jury beyond a reasonable doubt because a defendant cannot constitutionally be exposed to the punishment in question in the absence of such a finding. Thus, in the example above, a criminal law that allows for a judge to determine whether distribution has occurred is constitutionally invalid. Although some areas have been excluded from the state's penal authority in this way, "[t]hese incidental limits imposed on the criminal law by virtue of special constitutional protection for certain activities do not . . . contribute much to the notion of minimal constitutional standards applicable to crime definition generally."¹³¹

B. Generally Applicable Standards

The generally applicable restrictions on the legislature's ability to define crimes usually arise out of the Court's decisions regarding actus reus and mens rea elements. The Court has required that there must be some prohibited conduct (whether an act or an omission) for criminal liability to be imposed.¹³² The Court has also flirted with the idea of a constitutional mens rea requirement. Though the Court has approved the absence of a mens rea component in certain "public welfare offenses,"¹³³ it has generally interpreted criminal statutes to contain a mens rea element.¹³⁴ The con-

¹³⁰ This is assuming that the materials in question are in fact obscene, a question that itself presents a different set of constitutionally significant facts necessary to distinguish the material from constitutionally protected sexually explicit speech.

¹³¹ Jeffries & Stephan, *supra* note 125, at 1367 n.123.

¹³² *Robinson v. California*, 370 U.S. 660 (1962) (finding the punishment of the status of being addicted to narcotics to violate the Eighth Amendment). In *Powell v. Texas*, 392 U.S. 514 (1968), the Court made clear that it is not the voluntariness of the conduct, but the fact that some discernable conduct had in fact taken place that was the key to the *Robinson* requirement.

¹³³ See, e.g., *United States v. Park*, 421 U.S. 658, 673–74 (1975); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943); cf. *United States v. Freed*, 401 U.S. 601 (1971) (approving of strict liability for possession of grenades).

¹³⁴ See *Staples v. United States*, 511 U.S. 600, 604–19 (1994) (noting the historical significance of a mens rea requirement and using the maximum penalty of ten years imprisonment to infer a mens rea requirement into a statute that was silent on the issue); see also *United States v. Balint*, 258 U.S. 250, 251 (1922) (noting that at common law scienter was a required element of every crime). See generally John S. Wiley, Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 Va. L. Rev. 1021 (1999) (contending that the Court assumes Congress be-

stitutional requirements of a mens rea and actus reus for traditional crimes are likely to have limited effects in an *Apprendi* situation. Even if a legislature undertook a significant revision of its criminal code, it is unlikely that it would choose to do so in such an extreme way as to remove either the necessity of a prohibited act or a culpable state of mind. With respect to the proper distribution of factfinding, *Apprendi* is more likely to enter into the substantive constitutional law through what Professors John Jeffries and Paul Stephan have identified as the third substantive constitutional requirement: proportionality.¹³⁵

The Eighth Amendment's prohibition of cruel and unusual punishment has been recognized, for almost a century, as embodying not only a prohibition on certain types of punishment, but also a requirement that there be some level of proportionality between the punishment and the crime.¹³⁶ Proportionality review looks to determine whether the sentence in question is so severe in light of the underlying offense that the imposition of the sentence constitutes cruel and unusual punishment. Essentially, when a court invalidates a law under proportionality review, it determines that the facts of the case do not rise to the level necessary to support the punishment in question.¹³⁷ When the rule of proportionality is over-

lieves in tying criminal liability to moral culpability). The Court has never explicitly imposed a mens rea requirement. Even typically textualist Justices, however, have labored to find mens rea requirements in statutes that are facially devoid of any such requirements. This appears to be the Court using statutory "interpretation" to avoid the constitutional issue and is thus suggestive of a nascent constitutional requirement of some level of mens rea for traditional crimes.

¹³⁵ See Jeffries & Stephan, *supra* note 125, 1376–79.

¹³⁶ U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Proportionality review began in *Weems v. United States*, 217 U.S. 349, 380–82 (1910), where the Court found a sentence of fifteen years hard-labor for minor clerical falsifications to constitute cruel and unusual punishment. Some current Justices have disagreed with proportionality review and have written that the Eighth Amendment only prohibits certain types of punishment (for example, torture). See *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (opinion of Scalia, J., & Rehnquist, C.J.). The Court has continued, however, to apply proportionality review. See, e.g., *Ewing v. California*, 123 S. Ct. 1179, 1185 (2003) (O'Connor, J., announcing the judgment of the Court); *id.* at 1193 (Breyer, J., dissenting); *Lockyer v. Andrade*, 123 S. Ct. 1166, 1173 (2003).

¹³⁷ The standard of proportionality review has not been abundantly clear, particularly with respect to terms of imprisonment. In the latest decision on the matter, *Ewing*, the Court adopted Justice Kennedy's concurrence from *Harmelin* and listed four "principles of proportionality review—the primacy of the legislature, the variety of

laid with the holding of *Apprendi*, then, the following proposition emerges: Because all of the facts necessary to satisfy proportionality review are constitutionally significant, they must all be treated as elements and found by the jury beyond a reasonable doubt.

The relationship between *Apprendi* and proportionality is best understood through an example. In *Enmund v. Florida*, the Court dealt with a challenge to a death sentence imposed for aiding and abetting a murder by driving the getaway car for a robbery/homicide.¹³⁸ Enmund, the driver, was convicted of felony murder. Because Florida law had no mens rea requirement regarding the killing itself, he was sentenced to death without any proof of intent.¹³⁹ The Court found that because there was no evidence that Enmund killed or intended to kill, he was not sufficiently morally culpable for the imposition of the death penalty and thus the punishment was disproportionate enough to violate the Eighth Amendment.¹⁴⁰ If imposing the death penalty for felony murder where the defendant did not actually kill, or have the intent to do so, is so disproportionate that it constitutes cruel and unusual punishment, but is an acceptable punishment for those that killed or had the intent to do so, those facts—killing or having the intent to do so—are constitutionally significant facts for *that* level of punishment. Accordingly, the act of killing and the mens rea of intent have become constitutionally necessary facts for the imposition of the death penalty. Because *Apprendi* requires that any fact necessary for a higher level of punishment be found by the jury beyond a reasonable doubt, the state would have to prove that the defendant had killed or had intended to kill in order to sentence him to death. Here, the *Constitution*, as opposed to a statute, makes the fact necessary for that higher level of punishment. A contrary result would give legislatures the power to define

legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors.” *Ewing*, 123 S. Ct. at 1186 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)). These four principles inform the final principle of proportionality: “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Id.* at 1186–87 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)).

¹³⁸ *Enmund v. Florida*, 458 U.S. 782, 784–88 (1982). *Enmund* was subsequently “clarified” by *Tison v. Arizona*, 481 U.S. 137, 156–58 (1987), but for the purposes of this explanation the rationale is the same and is a simpler example than *Tison*.

¹³⁹ *Enmund*, 458 U.S. at 785.

¹⁴⁰ *Id.* at 801.

crimes in such a way that constitutionally required factual inquiries could be delegated to a judge (for a finding by a preponderance of the evidence), while those inquiries simply required by statute (and thus within the legislature's power to alter) could not be delegated to the judge. This proposition was squarely rejected in *Ring v. Arizona*.¹⁴¹

Although the Court in *Ring* found that Arizona's statute, which requires that aggravating factors be found before imposing the death penalty, was facially covered by *Apprendi*, the Court spoke in far broader terms. The Court noted that Arizona's contention that "the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."¹⁴² Further elucidating the point, the Court noted that if a legislature reworked the definition of a given offense in response to the Court's determination that a previously absent element was constitutionally required, "surely the Sixth Amendment guarantee would apply to that element."¹⁴³ Even Justice Scalia, not normally characterized as a proponent of the Court's Eighth Amendment death penalty jurisprudence,¹⁴⁴ opined that "whether or not the States have been erroneously coerced into the adoption of 'aggravating factors,' wherever those factors exist . . . they must be found by the jury beyond a reasonable doubt."¹⁴⁵ Upon close examination, *Ring* suggests that constitutionally imposed factual requirements must be found by the jury beyond a reasonable doubt.¹⁴⁶

The proposition that the legislature cannot delegate to a judge the authority to determine the facts necessary to survive proportionality review fits seamlessly into the Court's precedent.¹⁴⁷ In ad-

¹⁴¹ 536 U.S. 584, 588–89 (2002).

¹⁴² *Id.* at 606 (quoting *Apprendi*, 530 U.S. at 539 (O'Connor, J., dissenting)).

¹⁴³ *Id.* at 607.

¹⁴⁴ See, e.g., *Morgan v. Illinois*, 504 U.S. 719, 751 (1992) (Scalia, J., dissenting).

¹⁴⁵ *Ring*, 536 U.S. at 612 (Scalia, J., concurring).

¹⁴⁶ Although this Note focuses on the nexus between proportionality and *Apprendi*, the same nexus is formed between any constitutionally mandated fact and the decision.

¹⁴⁷ The key theme to the *Apprendi/Ring/Harris* line of cases is that if a fact exposes a defendant to greater punishment, it must be found by the jury. If Eighth Amendment

dition, it draws a clean dividing line between the power of the state to define crimes (and thus control the allocation of factfinding) and the power of the courts to police those definitions. Once the prosecution has established that the maximum statutorily authorized penalty would survive proportionality review given the facts as found by the jury under *Apprendi*, the prosecution is free to seek any sentence within that range based on any relevant, legitimate fact. The prosecution enjoys this freedom because the baseline facts, as found by the jury, have proven constitutionally proportionate to the maximum sentence; within the constitutional and statutory boundaries the legislature's authority is plenary. Thus, if under Eighth Amendment proportionality review a state is allowed to impose life without parole on one who purposely or knowingly kills, the state can define whatever additional facts it deems relevant as sentencing factors. In turn, the state can manipulate the sentence—within the confines of the authorized maximum—because the defendant's rights have been protected by requiring the jury to find enough facts to support the greater penalty.¹⁴⁸

Understanding legislatures to have wide-ranging authority within the proportional statutory maximum accords with the Court's decision in *Harris v. United States*, where it upheld the continued use of judicially found facts that trigger mandatory minimums.¹⁴⁹ Because the fact that triggers the mandatory minimum is neither statutorily nor constitutionally required for the imposition of the maximum penalty, the sentencing factor does not expose the defendant to a greater punishment. Because the sentencing factor does not authorize a greater penalty, its presence or absence is not constitutionally significant, and the state is therefore free to delegate the factfinding to the judge.¹⁵⁰ This understanding fits with the

proportionality review hinges on a particular fact, then that fact exposes the defendant to the level of punishment that is being sought; if that fact is absent then the punishment is unconstitutional. Therefore, the fact upon which proportionality review turns exposes the defendant to the higher level of punishment.

¹⁴⁸ See Ronald J. Allen, *Mullaney v. Wilbur*, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention, 55 Tex. L. Rev. 269, 296 (1977).

¹⁴⁹ 536 U.S. 545, 563–67 (2002).

¹⁵⁰ If, for example, a state's assault statute prescribing a maximum sentence of ten years was deemed constitutionally proportionate, then the state could specify a fact, such as visible possession of a firearm, that—if found by the judge at sentencing—requires the imposition of at least a five-year sentence. *Apprendi* is clear that what

legislative primacy in the definition of crimes by creating a relatively simple rule that allows for significant leeway in defining criminal conduct, while still affording the defendant the protection of *Apprendi* for all facts that are necessary—both in the constitutional and statutory sense—for a particular level of punishment.¹⁵¹

In most situations, the Court has been quite deferential when undertaking proportionality review. For sentences to be invalidated by the Eighth Amendment, they must be “grossly disproportionate” to the underlying crime, a distinction that is difficult for the courts to make given that “the fixing of prison terms for specific crimes involves a substantive penalogical judgment that, as a general matter, is ‘properly within the province of legislatures, not courts.’”¹⁵² Even though courts are hesitant to find prison terms constitutionally disproportionate, they have occasionally done so when faced with a large discrepancy in the level of punishment afforded the same crime in differing jurisdictions.¹⁵³ In such cases,

triggers the right to the jury determination is a fact that leads to exposure to a higher range of penalties. Since in the hypothetical example above, the visible possession of a firearm does not expose the defendant to any greater penalty than he faced based solely on the underlying assault conviction (in both cases the maximum is ten years), the judge can make the finding. The important distinction for the outer boundary of *Apprendi* arises when the underlying facts cannot support Eighth Amendment proportionality review. Under *Enmund* and *Tison v. Arizona*, 481 U.S. 137 (1987), a state may not execute someone for felony murder without a finding that the defendant was at least recklessly indifferent to the loss of life. To be exposed to the death penalty for felony murder, there must be a factual inquiry into the defendant’s mens rea, and since that fact is a necessary condition for the death penalty, *regardless of what the state statute says*, the fact must be proven to the jury beyond a reasonable doubt to comply with *Apprendi*.

¹⁵¹ This is a rewording of the *Apprendi* rule. With respect to statutes, the question is whether the facts as found by the jury authorized the punishment that was imposed; if they did not, then the judge-found fact exposed the defendant to a greater level of punishment. With respect to the Constitution, it is a question of whether the facts the Constitution require have been found by the jury; if they were not then the particular level of punishment imposed violates the Constitution.

¹⁵² *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980)); see also *Ewing v. California*, 123 S. Ct. 1179, 1190 (2003) (upholding a sentence of twenty-five years to life for the theft of \$1,200 worth of golf equipment under California’s three-strikes law); *Lockyer v. Andrade*, 123 S. Ct. 1166, 1175 (2003) (finding two consecutive twenty-five year sentences for stealing approximately \$150 worth of videotapes did not contravene clearly established Eighth Amendment jurisprudence).

¹⁵³ See, e.g., *Solem v. Helm*, 463 U.S. 277 (1983) (invalidating a sentence of life without parole for passing a bad check when the previous convictions were for nonviolent

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courts are faced with highly fact-specific inquiries that pose difficult questions, particularly in light of legislative primacy. For example, even though visceral reaction to a fifty-year sentence for assault might suggest that the sentence is grossly disproportionate, it is difficult to define where that imbalance disappears. Is twenty years acceptable? Thirty? Forty? Line-drawing is extremely difficult in this area, and the Court has been very deferential to legislatures, relying, like the *Apprendi* Court, on the constraints the political process imposes on legislatures to keep these sentences in check.¹⁵⁴ It is therefore unlikely that constitutional issues would arise if a legislature chose to redefine its penal code to avoid *Apprendi*—so long as the death penalty or life without parole were not in consideration.

Although the Court has been very deferential towards legislative judgments when the punishment involved is a term of imprisonment, it has been actively involved where the death penalty is in play. Indeed, the Court has placed a multitude of restrictions on the application of the death penalty, such as requiring the separation of guilt determination from sentencing¹⁵⁵ and restraining the sentencer's discretion to impose the death penalty.¹⁵⁶ Some of those rules are purely procedural and have no relevance for determining which facts the jury must find; others, however, are substantive and

felonies); *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001) (overturning a life sentence for the delivery of .238 grams of cocaine base).

¹⁵⁴ See, e.g., *Ewing*, 123 S. Ct. at 1187–89 (describing rationales for legislative supremacy); *Harmelin*, 501 U.S. at 998 (same); *Rummel*, 445 U.S. at 282 n.27 (“[W]hatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy.” (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958))).

¹⁵⁵ See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 301–05 (1976) (plurality opinion) (requiring, implicitly, separate capital sentencing proceeding); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality opinion) (same).

¹⁵⁶ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam) (requiring, implicitly, discretion to be constrained); see also *McCoy v. North Carolina*, 494 U.S. 433, 443–44 (1990) (concluding that unanimity requirement impossibly limits the jury's consideration of evidence); *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (regulating jury instructions); *Booth v. Maryland*, 482 U.S. 496 (1987) (requiring that all evidence in mitigation of punishment be placed before the sentencing jury); *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (same); *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (same); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (dictating the type and extent of discretion the jury must and must not have); *Lockett v. Ohio*, 438 U.S. 586, 604–08 (1978) (plurality opinion) (same).

limit the ability of the state to apply the death penalty in the presence or absence of particular facts.¹⁵⁷ Since the Court has imposed substantive constitutional rules in the death penalty context, it is in that area that the *Apprendi* rule will have its greatest bite.

IV. APPRENDI AND THE DEATH PENALTY

A. *The Basic Problem of Aggravating Factors*

As Justice Thomas commented in *Apprendi*, “in the area of capital punishment, unlike any other area, [the Court] ha[s] imposed special constraints on a legislature’s ability to determine what facts shall lead to what punishment—[it] ha[s] restricted the legislatures’ ability to define crimes.”¹⁵⁸ In the pre-*Apprendi* world, the Court had allowed judicial finding of facts that ultimately led to the death penalty.¹⁵⁹ In the post-*Apprendi* world, however, judicial factfinding for death eligibility is no longer a legitimate option because under the Court’s somewhat ad hoc approach a wide range of facts has been turned into de facto elements of capital crimes.

Although the Court in *Ring v. Arizona*¹⁶⁰ had state law grounds to support its position (in that the statute required the aggravating factors to be found for the imposition of the death penalty), the end result would have been no different had Arizona explicitly authorized the death penalty for any person convicted of first-degree murder. The Court’s death penalty precedents require that a state channel the discretion of the jury by limiting the number of situations that are eligible for the death penalty.¹⁶¹ Had Arizona disposed of any finding of aggravating factors, a death sentence would

¹⁵⁷ The procedure-substance distinction is often difficult but important. For example, substantive rules are typically given retroactive effect on post-conviction review whereas procedural rules are not. See *Teague v. Lane*, 489 U.S. 288, 310–11 (1989).

¹⁵⁸ *Apprendi*, 530 U.S. at 522–23 (Thomas, J., concurring).

¹⁵⁹ See, e.g., *Walton v. Arizona*, 497 U.S. 639, 647–49 (1990) (allowing courts to find the aggravating factors necessary for the death penalty); *Cabana v. Bullock*, 474 U.S. 376, 392 (1986) (allowing an appellate court, rather than a jury, to find the intent required by *Enmund v. Florida*, 458 U.S. 782 (1982)).

¹⁶⁰ 536 U.S. 584 (2002).

¹⁶¹ See *Furman*, 408 U.S. at 239–40; see also *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (“Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer’s discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.”).

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not have survived constitutional scrutiny because the use of aggravating factors in capital cases is mandated by the Eighth Amendment.¹⁶² The effect of aggravating factors is that they function as elements of capital crimes. Thus, for the imposition of the death penalty to be constitutional, an aggravating factor must be found.¹⁶³

Prior to *Apprendi*, states were free to have judges find the extra facts required for the imposition of the death penalty. Indeed the *Walton v. Arizona* Court found that since the underlying crime had been proven to the jury, judicial factfinding was acceptable for sentencing beyond the prescribed maximum.¹⁶⁴ *Apprendi*, however, rejected the dichotomy between facts constituting the underlying crime and facts exposing the defendant to greater penalties. Under *Apprendi*, both types of facts are de facto elements whether the state calls them “elements of the offense, sentencing factors, or Mary Jane.”¹⁶⁵ Regardless of how the state attempts to label it, any fact that is required, either by statute or the Constitution, for the imposition of a particular level of punishment, must be found by the jury beyond a reasonable doubt because that fact is an element of the crime. In other words, because an aggravating factor is constitutionally necessary for the imposition of the death penalty and the finding of that fact falls under the *Apprendi* umbrella, a defendant is entitled to have a jury find the aggravating factor, even though aggravating factors are not conceived of as “traditional elements” of the crime.¹⁶⁶

¹⁶² *Ring*, 536 U.S. at 610–11 (Scalia, J., concurring) (“[T]he Constitution requires state law to impose such ‘aggravating factors.’”). Justice Scalia recognizes that the Constitution has been interpreted to require states to impose such factors, but believes that these requirements stem from a misreading of the Constitution and continues to express his belief that the requirements have been “mistakenly” imposed. *Id.* (Scalia, J., concurring).

¹⁶³ *Tuilaepa v. California*, 512 U.S. 967, 971–72 (1994).

¹⁶⁴ See *Walton*, 497 U.S. at 648–49.

¹⁶⁵ *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

¹⁶⁶ This is not to say that aggravating factors have to be proven at the guilt/innocence phase of a trial; it is well within the rights secured by *Apprendi* to prove a fact required for the death penalty during sentencing, so long as it is proven to the jury beyond a reasonable doubt. This understanding of *Apprendi* also does not require that the jury be allowed to make the final determination of whether to impose the death penalty. *Apprendi* is concerned with having the jury make the factual findings needed to support the sentence that a judge is allowed to consider, not with a jury determination of the actual sentence that is imposed. *Ring*, 536 U.S. at 612–13 (Scalia, J., concurring). Nor does *Apprendi* convert the judicial function of weighing aggravating and

B. The Use of Mitigating Factors as an Affirmative Defense

Although defendants must be able to put forth evidence of mitigating factors and the sentencer must be allowed to consider those factors when determining the appropriateness of the death penalty, the appellate courts' review is deferential to the weighing of factors by the trial courts.¹⁶⁷ While sentencing courts must have discretion to consider mitigating factors, their presence or absence does not (at least in the vast majority of cases) compel a different constitutional result.¹⁶⁸ For the most part, the presence of an aggravating factor authorizes the death penalty, and the presence of mitigating factors does not compel a different result regarding the proportionality of the sentence.¹⁶⁹ It is in regards to this permissive change in sentence that *Apprendi's* distinction regarding mitigating factors comes into play: The finding of mitigating factors is irrelevant to the constitutionality of the final sentence, and the legislature can therefore place the burden of proving them upon the defendant.¹⁷⁰ This conclusion follows because if all of the factual findings needed to impose capital punishment have been found by the jury, "the ac-

mitigating factors into a necessary factual determination that the aggravating factor(s) outweigh any mitigating factors. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The jury needs to find only the facts that are required to support the penalty in question; once those facts are found a judge may decide the appropriate punishment. See *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983). Essentially, judges can only use the aggravating factors found by the jury to support the imposition of the death penalty. Therefore, a finding that mitigating factors outweigh aggravating factors enough to deem the death penalty cruel and unusual is merely a finding that in a particular case the facts as found by the jury were insufficient to support the death penalty. *Apprendi* only prevents courts from using judicially found aggravating factors in its weighing process.

¹⁶⁷ In "non-weighing" states, the Court has authorized the death penalty even when some of the aggravating factors found by the sentencer were invalid so long as there was one valid aggravating factor remaining. See *Stringer v. Black*, 503 U.S. 222, 232 (1992). It does not matter, from a constitutional standpoint, whether it is the jury or judge that evaluates the mitigating factors. The only requirement is that whichever body will ultimately determine the sentence, it must be allowed to consider mitigating factors when making its decision.

¹⁶⁸ *Tuilaepa*, 512 U.S. at 971-73. The general rule is that once an aggravating factor has been found, the death penalty is authorized. In theory it is possible that a particular person could present so much mitigating evidence that the imposition of the death penalty would constitute cruel and unusual punishment, but no court has so held.

¹⁶⁹ See *supra* note 167.

¹⁷⁰ See *Allen*, *supra* note 148, at 296.

cused's interests are fully protected even if he is permitted to prove the existence of" the mitigating factor.¹⁷¹

An automatic exemption from a particular sentence, based on a finding of a particular mitigating factor, presents a more subtle problem. In the first, purely statutory, part of an *Apprendi* analysis, this presents no problem as it simply constrains the judge's discretion within the statutorily defined range. The *Apprendi* Court specifically endorsed such a procedure, noting

[i]f the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone.¹⁷²

This analysis, however, presupposes that the state could impose the maximum punishment even if the mitigating factor had been found. In the death penalty context, the Court has found that the presence of a set of certain mitigating factors renders executions cruel and unusual per se.¹⁷³ In such situations, the state may not constitutionally impose the maximum sentence if the "mitigating" fact is present. The fact is, therefore, no longer a "mitigating factor" in the sense suggested in *Apprendi*; the absence of that fact is more of a "qualifying" factor as it is necessary—but not sufficient—for the imposition of the death penalty.

*Atkins v. Virginia*¹⁷⁴ illustrates this point. In *Atkins*, the Court ruled that the execution of the mentally retarded constitutes cruel and unusual punishment and is therefore prohibited by the Eighth Amendment.¹⁷⁵ Even though mental retardation had long been

¹⁷¹ *Id.*

¹⁷² *Apprendi*, 530 U.S. at 491 n.16.

¹⁷³ See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the execution of the mentally retarded); see also *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (finding the imposition of the death penalty on a defendant who was fifteen-years old when he committed murder violates the Eighth Amendment).

¹⁷⁴ 536 U.S. 304.

¹⁷⁵ *Id.* at 321.

considered a mitigating factor,¹⁷⁶ *Atkins* changed the constitutional calculus. *Apprendi* exempts mitigating factors from its protections because the state is free to punish the defendant with the maximum penalty regardless of the presence or absence of the mitigating factor. *Atkins*, however, removed the power of the state to expose the mentally retarded to the maximum penalty by holding that “the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.”¹⁷⁷ Once the Constitution has been interpreted to remove the state’s power to impose the maximum penalty in a particular situation, that situation (or its negative) becomes a de facto element of the crime because it is a necessary condition for the constitutional imposition of the death penalty.¹⁷⁸ In short, *Atkins* made the ab-

¹⁷⁶ See *Penry v. Lynaugh*, 492 U.S. 302, 319–20 (1989) (holding that the execution of the mentally retarded does not violate the Eighth Amendment, but that mental retardation is a mitigating factor that the jury must be allowed to consider).

¹⁷⁷ *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

¹⁷⁸ Going through the analysis step-by-step is perhaps helpful at this point. *Atkins* holds that a state may not execute someone who was mentally retarded when the crime was committed. This is logically the same as saying that, for the imposition of the death penalty to be constitutional, the defendant must not be mentally retarded. The defendant’s lack of mental retardation has thus become a necessary condition for his execution. Since the lack of mental retardation is a fact necessary for the imposition of the higher punishment of death, it qualifies for the protections afforded by *Apprendi*. Therefore, if the state chooses to seek the death penalty, it must prove to the jury beyond a reasonable doubt that the defendant is not mentally retarded.

The Georgia Supreme Court recently rejected this reasoning in *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003). The court made two arguments for why mental retardation does not fall under the purview of *Apprendi*. First, the court noted that mental retardation is simply a mitigating factor, and thus its absence does not expose a defendant to a greater penalty. *Id.* at 619–20. Second, the court relied on language in *Atkins* that stated that the United States Supreme Court was leaving the procedural implementation of *Atkins* to the states as it had done in *Ford v. Wainwright*. *Id.* at 620. The Georgia Supreme Court reasoned the reference to *Ford* meant that *Apprendi* did not apply.

The Louisiana Supreme Court in *State v. Williams*, 831 So. 2d 835, 859–60 (La. 2002), also held that the burden of persuasion may be placed on the defendant. The Louisiana court relied on the absence of guidance in *Atkins*, *id.*, and reasoned that mental retardation is different from the situation in *Ring* because *Atkins* created an exemption to the death penalty whereas the aggravating factors in *Ring* were required for the death penalty to be authorized initially, *id.* at 860 n.35.

These cases were incorrectly decided. As the Georgia Supreme Court recognized, the “facts that determine the upper limit of punishment” must be proven to the jury beyond a reasonable doubt. *Head*, 587 S.E.2d at 619. If someone is mentally retarded the upper limit of punishment does not include the death penalty. The Georgia and

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sence of mental retardation a de facto element of capital crimes.¹⁷⁹

Examining the distinction between the *Apprendi* rule put forward in this Note and the precedents allowing states to require a defendant to prove his incompetence for trial and his insanity to avoid execution is helpful in understanding the nature and application of the *Apprendi* rule. The explicit holding of *Ford v. Wainwright*, that it is unconstitutional to execute someone while he is insane but it is constitutional to require the defendant to prove his insanity, warrants brief discussion.¹⁸⁰ Justice Powell, as the fifth vote in concurrence, recognized that insanity, as addressed in *Ford*, was not a question of whether the death penalty could be imposed, but when it could be imposed.¹⁸¹ The Court has not addressed whether the Constitution requires a state to afford defendants a defense based on insanity or other modes of diminished capacity at the time the crime was committed, although the reasoning of *Atkins* suggests such a defense might be constitutionally compelled at least in the death penalty context.¹⁸² If the Court determined that insanity, like mental retardation, is a per se bar to the imposition of the death penalty because of the defendant's lowered culpability, the burden would be on the prosecution to disprove insanity to the jury.

It is important to recognize that *Atkins* only addressed capital punishment. The mentally retarded may be subjected to any other punishment because it is only in the context of the death penalty

Louisiana courts failed to recognize that, while most mitigating factors may be judge-found under *Apprendi*, mental retardation is different because the presence of the mitigating factor makes the otherwise maximum punishment unconstitutional.

¹⁷⁹ See *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (plurality opinion) (recognizing that some elements of capital crimes may be found during the sentencing proceeding). There is a caveat to the requirement of disproving mental retardation. The state must only disprove mental retardation once there has been a prima facie showing by the defendant, such as by bringing forward an I.Q. test suggesting the defendant's mental retardation. See *infra* notes 196–99 and accompanying text.

¹⁸⁰ 477 U.S. 399, 409–10 (1986) (plurality opinion).

¹⁸¹ *Id.* at 425 (Powell, J., concurring in the judgment). In fact, Justice Powell buttressed his argument with the fact that Ford had already been convicted and sentenced, suggesting that a lower burden was required prior to conviction. *Id.* at 426 (Powell, J., concurring in the judgment).

¹⁸² Cf. *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (allowing Montana to prevent the jury from considering voluntary intoxication where state of mind of the defendant is at issue).

that mental retardation is a constitutionally significant fact. The state could, if it so chose, make mental retardation or insanity an affirmative defense to other crimes.¹⁸³ Because the state is constitutionally allowed to impose the penalties regardless of the defendant's mental retardation or insanity, the state could also restrict the defenses of mental retardation or insanity in any context other than the death penalty. Even in the death penalty context the state would not need to disprove mental retardation or insanity at the guilt or innocence phase of the trial because that phase does not expose the defendant to the death penalty. If, alternatively, it were held that the imprisonment of the mentally retarded violated the Eighth Amendment *in every situation*, then under the analysis suggested here the prosecution would be forced to disprove mental retardation in every situation.

Perhaps the easiest way to understand these prohibitions as creating de facto elements of criminal laws is to understand them as creating a heightened mens rea requirement for the imposition of the death penalty. Culpability, a factor that is essential for proportionality, is a combination of two factors: mental state and physical actions.¹⁸⁴ By deciding that the mentally retarded do not possess the requisite level of culpability to support the death penalty, the Court has essentially ruled that they are per se unable to form a mens rea sufficiently culpable to justify the imposition of the death penalty, regardless of the physical acts undertaken.¹⁸⁵ The potential anomaly this creates was a prominent feature of Justice Scalia's dissent in *Atkins*, as he declined to find that a slightly mentally retarded individual who commits a series of torture killings is less culpable than the recklessly indifferent felony murder accomplice.¹⁸⁶ Understanding *Atkins* as essentially a holding on the mens rea required for the imposition of the death penalty perhaps makes it easier to understand insofar as mens rea is a traditional element that the prosecution must prove.

In contrast to the prohibition on the execution of the mentally retarded, the requirement of a defendant's competence is not based on the need for moral culpability for punishment; it is based

¹⁸³ See *Atkins*, 536 U.S. at 318.

¹⁸⁴ See id. at 350–51 (Scalia, J., dissenting).

¹⁸⁵ See id. at 318–20.

¹⁸⁶ See id. at 350–51 (Scalia, J., dissenting).

on the generalized need for a fair trial. The Court has explicitly held that “the criminal trial of an incompetent defendant violates due process.”¹⁸⁷ In *Medina v. California* the Court held that a state may presume a defendant to be competent and require him to prove his incompetence by a preponderance of the evidence.¹⁸⁸ Competence to stand trial is required to give full effect to other rights, such as the effective assistance of counsel, because it is assumed that an incompetent person cannot adequately defend his interests in court.¹⁸⁹ The emphasis on the defendant’s ability to effectively assert his rights has led one commentator to recognize the requirement of competence “as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.”¹⁹⁰

Whereas the competency requirement stems from procedural due process, the constitutional underpinning of *Atkins* is the Eighth Amendment. Although the various clauses become intertwined, competency, as applied in *Cooper v. Oklahoma*¹⁹¹ and *Medina*, arises from significantly different concerns than the prohibition against executing the mentally retarded.¹⁹² As Justice Powell noted in his *Ford* concurrence, competency is not a matter of if one can go to trial, but when one can go to trial.¹⁹³ If one is initially deemed incompetent to stand trial, a court can reevaluate that decision later and then proceed with the trial once the newly competent person can vindicate his procedural rights. In contrast, if someone was considered mentally retarded when he committed his

¹⁸⁷ *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Medina v. California*, 505 U.S. 437, 453 (1992)).

¹⁸⁸ *Medina v. California*, 505 U.S. 437, 442, 452–53 (1992); see also *Cooper*, 517 U.S. at 369 (prohibiting a state from requiring proof of incompetence by clear and convincing evidence).

¹⁸⁹ See *Riggins v. Nevada*, 504 U.S. 127, 139–40 (1992) (Kennedy, J., concurring in the judgment) (“Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one’s own behalf . . .”).

¹⁹⁰ Caleb Foote, A Comment on Pre-Trial Commitment of Criminal Defendants, 108 U. Pa. L. Rev. 832, 834 (1960).

¹⁹¹ 517 U.S. 348 (1996).

¹⁹² See *Cooper*, 517 U.S. at 354–55; *Medina*, 505 U.S. at 450–53.

¹⁹³ *Ford*, 477 U.S. at 425 (Powell, J., concurring in the judgment).

crime, the death penalty is permanently barred because the constitutional protections are applied with respect to the facts at the time of the crime. Competency as addressed in *Cooper* and *Medina* is purely a due process rule that does not implicate the same issues as *Apprendi*.¹⁹⁴

One note needs to be made to avoid confusion about the obligations of the state: There is a distinction between the burden of production and the burden of persuasion. The burden of production “refers to a requirement imposed upon a litigant to adduce some evidence of a particular factual assertion in order to introduce that issue into the case,” whereas the burden of persuasion “refers to the burden a litigant bears to convince the factfinder of the truth of a particular factual assertion.”¹⁹⁵ “Theoretical inconsistency notwithstanding, placing the burden of production on the defendant has not been thought to raise any practical challenge to the reasonable-doubt standard.”¹⁹⁶ Since in theory the prosecution “could prove beyond a reasonable doubt the absence of any exculpatory fact for which the defendant” cannot produce any evidence, shifting the burden of production acts as “an economical way to screen out issues extraneous to the case at hand and thus to promote efficient litigation.”¹⁹⁷ *Apprendi* deals with the burden of persuasion, requiring that the prosecution prove facts beyond a reasonable doubt to the jury. *Apprendi* is silent on whether the initial burden of production could be shifted to the defendant on essential facts. In its silence, one may assume that the traditional rule applies in at least some cases. Therefore, in situations such as *Atkins*, when the courts are dealing with the existence of a fact that is legitimately contested in only a small number of cases,¹⁹⁸ it is not a violation of

¹⁹⁴ Of course, incompetence at trial might be suggestive of a diminished mental capacity at the time of the offense. If incompetence were found to rise to the same constitutional level as mental retardation when determining criminal culpability, it would then place the burden on the prosecution to show that the defendant was in fact competent enough for his sentence to survive proportionality review.

¹⁹⁵ Ronald J. Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Approach to Evidentiary Devices, 94 Harv. L. Rev. 321, 327–28 (1980).

¹⁹⁶ Jeffries & Stephan, *supra* note 125, at 1334.

¹⁹⁷ *Id.*

¹⁹⁸ American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 46 (4th ed. 2000) (estimating one percent of the population to be mentally retarded); James W. Ellis & Ruth A. Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 426 (1985) (noting that the best modern evidence

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Apprendi to require the defendant to establish a prima facie showing because only the burden of production is shifted.¹⁹⁹ Once that initial showing has been made, the burden of persuasion shifts to the prosecution, which must prove the lack of mental retardation to the jury beyond a reasonable doubt in order to seek the death penalty.

There is, as usual, a qualifying remark about the possibility of burden-shifting under *Apprendi*. If the initial burden of production is set too high, the theoretical basis of the rule breaks down. The state has effectively changed the initial burden of production into an affirmative defense, impermissibly avoiding *Apprendi* by shifting the burden of persuasion back to the defendant under the guise of shifting only the burden of production.²⁰⁰ Since *Apprendi* eschews a formalistic approach, courts should look into how the burden shifting affects the case: “[T]he relevant inquiry is one not of form, but of effect.”²⁰¹ Exactly where the line between permissible and impermissible burden-shifting is drawn is beyond the scope of this Note, but it must be policed to maintain the constitutionally mandated distinction between elements, affirmative defenses, and sentencing factors.

In sum, *Apprendi* will have the most bite in the death penalty context, where the Court has placed restrictions on the legislature’s authority over the substantive criminal law and thus on the power of the legislature to classify certain facts as sentencing factors. Once the Court has found that a factual finding is a requirement for the death penalty, it has become a de facto element of capital crimes. As an element of capital crimes, the state, if it desires to impose the death penalty, is obligated under *Apprendi* to prove that fact to the jury beyond a reasonable doubt.

suggests that the crime rate among the mentally retarded does not greatly exceed the rate among the average population).

¹⁹⁹ Jeffries & Stephan, *supra* note 125, at 1334.

²⁰⁰ In the *Atkins* context, for example, it would be quite easy to set the initial burden such that to get over the “prima facie” hurdle of production the defendant would have to effectively prove his mental retardation instead of simply placing his status in question.

²⁰¹ *Apprendi*, 530 U.S. at 494.

V. THE IMPORTANCE OF THE SUBSTANTIVE NATURE OF THE *RING* REQUIREMENTS FOR HABEAS CORPUS

The substantive impact of the *Apprendi* rule when it intersects with another constitutional provision has important consequences in more than one area. As noted above, the intersection of *Apprendi* with particular constitutional rights makes any fact that changes the constitutional calculus a de facto element of the underlying crime. Thus, as the Supreme Court continues to place restrictions on the imposition of the death penalty, the facts relevant to those restrictions will become elements that must be proven to the jury beyond a reasonable doubt. The same conclusion applies to any other substantive right that the Court determines to be constitutionally protected. There is another area of law in which the substantive effects of the right to a jury trial on constitutionally significant facts is of immediate concern: post-conviction review. The courts are currently dealing with the issue of retroactive application of *Ring v. Arizona*,²⁰² an *Apprendi* case dealing with constitutionally significant facts (the aggravating factors necessary for the imposition of the death penalty), on post-conviction review. The “distinction between substance and procedure is an important one in the habeas [corpus] context” because procedural rules are generally not given retroactive effect, while substantive rules generally are.²⁰³

Teague v. Lane, which created the paradigm for determining the retroactive effect of new constitutional rules, gives different treatment to substantive and procedural rules.²⁰⁴ In *Teague*, the Court held that “new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced” unless the new rule “places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe’” or could be considered a “watershed rule[] of criminal procedure.”²⁰⁵ As Chief Jus-

²⁰² 536 U.S. 584 (2002).

²⁰³ *Bousley v. United States*, 523 U.S. 614, 620 (1998).

²⁰⁴ 489 U.S. 288 (1989).

²⁰⁵ *Id.* at 310–11 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)). To qualify, a rule would need to be a “bedrock procedural element” such as the right to counsel. *Id.* (quoting *Mackey*, 401

tice Rehnquist has noted, *Teague* “by its terms applies only to procedural rules.”²⁰⁶ The question is clearly presented: Is *Apprendi* a procedural or substantive rule?

The distinction between the two is often difficult, and some cases do “not fall neatly under either the substantive or procedural doctrinal category.”²⁰⁷ For *Teague* purposes, substantive judgments are not simply those that decriminalize certain conduct but include those that deal with the meaning and scope of a statute.²⁰⁸ Importantly, a “criminal judgment necessarily includes the sentence imposed upon the defendant.”²⁰⁹ Conversely, procedural rules are those that implicate how the trial process functions.²¹⁰

Every circuit court that has dealt with the problem has determined *Apprendi* to be a procedural rule that does not rise to the level of a watershed rule under *Teague*.²¹¹ The courts have therefore uniformly declined to apply the rule to habeas petitions. Despite the courts’ unanimous rejection of retroactive effect for *Apprendi*, prisoners have brought habeas claims styled as *Ring* challenges. In *Turner v. Crosby*, the United States Court of Appeals for the Eleventh Circuit determined that *Ring* was simply an extension of *Apprendi* and reasoned that since *Apprendi* is neither

U.S. at 693). The Court opined that it is “unlikely that many such components of basic due process have yet to emerge.” *Id.* at 313.

²⁰⁶ *Bousley*, 523 U.S. at 620.

²⁰⁷ *United States v. Woods*, 986 F.2d 669, 677 (3d Cir. 1993).

²⁰⁸ See *Bousley*, 523 U.S. at 620; see also *Summerlin v. Stewart*, 341 F.3d 1082, 1100 (9th Cir. 2003) (en banc) (“Decisions of ‘substantive criminal law’ . . . are those that reach beyond issues of procedural function and address the meaning, scope, and application of substantive criminal statutes.”), cert. granted sub nom. *Schriro v. Summerlin*, 142 S. Ct. 833 (2003) (mem.).

²⁰⁹ *Teague*, 489 U.S. at 314 n.2.

²¹⁰ See *Bousley*, 523 U.S. at 620.

²¹¹ See, e.g., *Sepulveda v. United States*, 330 F.3d 55, 60 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77, 84 (2d Cir. 2003); *Goode v. United States*, 305 F.3d 378, 383 n.8 (6th Cir. 2002); *United States v. Brown*, 305 F.3d 304, 308–10 (5th Cir. 2002); *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002); *In re Turner*, 267 F.3d 225, 230 (3d Cir. 2001); *McCoy v. United States*, 266 F.3d 1245, 1257–58 (11th Cir. 2001); *United States v. Moss*, 252 F.3d 993, 998–1000 (8th Cir. 2001); *United States v. Sanders*, 247 F.3d 139, 151 (4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1237–38 (9th Cir. 2000). For the alternative argument, see generally Heather Jones, *Apprendi v. New Jersey: A True “Watershed” Ruling*, 81 Tex. L. Rev. 1361 (2003) (arguing that *Apprendi* should be applied retroactively as a watershed rule).

substantive nor a watershed case, neither, by extension, is *Ring*.²¹² The United States Court of Appeals for the Tenth Circuit has determined likewise.²¹³ When an en banc panel of the Ninth Circuit recently faced the issue in *Summerlin v. Stewart*, the court broke ranks and applied *Ring*, but not *Apprendi*, retroactively.²¹⁴

The Ninth Circuit found that *Ring*, which can be understood to signify an *Apprendi* rule that deals with constitutionally significant facts (in contrast to statutorily required facts), operates substantively, or in the alternative, is a watershed rule of procedure.²¹⁵ The claim that *Ring* is somehow more of a watershed procedural rule than *Apprendi* is nonsensical because, when viewed procedurally, the two situations are identical: *Ring* and *Apprendi* both dictate a particular (though constitutionally mandated) factfinding procedure. They must stand together: Either they are both watershed rules or neither is. The courts have overwhelmingly rejected the proposition that the shift from judicial to jury factfinding, in certain situations, is a shift of the magnitude of *Gideon v. Wainwright*.²¹⁶ The Ninth Circuit's opinion in this regard, particularly in light of prior Ninth Circuit precedent holding *Apprendi* insufficiently important to constitute a watershed rule,²¹⁷ is likely an example of "death-is-different" jurisprudence²¹⁸ and the court's desire to void death sentences handed down under a now unconstitutional procedure.

The real distinction, as the Ninth Circuit held in *Summerlin*, is that *Ring* effected a substantive change in the underlying law. The

²¹² *Turner v. Crosby*, 339 F.3d 1247, 1283–86 (11th Cir. 2003) ("For the reasons outlined below, we conclude that . . . [the] retroactivity analysis of *Apprendi* applies equally to *Ring*, and that, under the *Teague* doctrine, *Ring* does not apply retroactively to *Turner's* death sentence."). The Eighth Circuit has declined to address the issue by determining that since the Supreme Court has not explicitly determined *Ring* to be retroactive, it is not. *Moore v. Kinney*, 320 F.3d 767, 771 n.3 (8th Cir. 2003) (en banc).

²¹³ *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002).

²¹⁴ 341 F.3d 1082, 1121 (9th Cir. 2003) (en banc), cert. granted sub nom. *Schriro v. Summerlin*, 142 S. Ct. 833 (2003) (mem.); cf. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002) (declining to apply *Apprendi* retroactively).

²¹⁵ *Summerlin*, 341 F.3d at 1101, 1120–21.

²¹⁶ 372 U.S. 335, 344–45 (1963). *Gideon*, which guaranteed the right to appointed counsel, was the one procedural decision *Teague* identified as being of a watershed nature. *Teague*, 489 U.S. at 311–12; see supra note 211.

²¹⁷ *Sanchez-Cervantes*, 282 F.3d at 671.

²¹⁸ *Simmons v. South Carolina*, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting).

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court recognized that, because of Eighth Amendment implications, *Ring* had invalidated Arizona's substantive murder laws.²¹⁹ *Ring* effectively required that there be two distinct crimes: first-degree murder and capital murder.²²⁰ Arizona essentially had only one crime of first-degree murder, which as a substantive matter was constitutionally insufficient to support the death penalty because it lacked the necessary factual basis to survive proportionality review.²²¹

It is the mix of the Eighth Amendment's proportionality requirement and the Sixth Amendment's right to a jury trial that creates the distinction between a *Ring* situation and the typical *Apprendi* situation. In a normal *Apprendi* claim, the issue is exclusively procedural because only the Sixth Amendment right to a jury trial is implicated. For example, in *Apprendi* itself, no other constitutional provision could have been invoked to challenge a twelve-year sentence based on the facts as found by the jury.²²² In contrast, in *Ring* the Eighth Amendment provided a separate, but intertwined, basis for objection. Once the facts found by the judge were rendered invalid by the *Apprendi* rule, the Eighth Amendment presented a substantive bar to execution because the facts as found by the jury supported only first-degree murder, not capital murder.

Some of the reasoning of the circuit courts holding that *Apprendi* is not retroactive support the theory that once the Sixth Amendment procedural right becomes intertwined with another substantive constitutional provision it is substantive for *Teague* purposes. The Second Circuit, for example, found that *Apprendi*

²¹⁹ *Summerlin*, 341 F.3d at 1104–06.

²²⁰ See *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (plurality opinion) (“[F]or [the] purposes of the Sixth Amendment[] . . . the underlying offense of ‘murder’ is a distinct, lesser included offense of ‘murder plus one or more aggravating circumstances’: Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death.”) (quoting *Ring*, 536 U.S. at 608–09).

²²¹ *Tuilaepa v. California*, 512 U.S. 967, 971–72 (1994) (“To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one ‘aggravating circumstance’ (or its equivalent) at either the guilt or penalty phase.”).

²²² The jury found that *Apprendi* had committed several crimes, and it is inconceivable that a court would find a twelve-year sentence for the underlying offenses, which included several firearms violations, cruel and unusual.

was not a substantive rule in part because it did not affect “the relationship between the defendant’s conduct and the severity of punishment.”²²³ In a *Ring* scenario, however, that is exactly what is at stake: the relationship between the facts as proven and the punishment involved. In *Ring*, the relationship between the jury-found facts and the punishment imposed was, as a substantive matter, constitutionally inadequate: It would have been unconstitutional to execute someone on the basis of the jury-found facts.

The distinction here is, admittedly, not a clear one. The right to a jury trial has been held a purely procedural rule in most situations.²²⁴ It is the interaction of that right with other, substantive, constitutional provisions that infuses it with a substantive effect. While the slightly muddled nature of the *Ring* right is not ideal, the Supreme Court has said that the distinction between substance and process is not “an ironclad one that will invariably result in the easy classification of cases in one category or the other.”²²⁵ While the distinctions are not necessarily clear, when the right to a jury trial intersects with constitutionally significant facts it affects the scope and application of a substantive statute and therefore creates a substantive constitutional rule that should be applied retroactively.²²⁶

²²³ *Coleman v. United States*, 329 F.3d 77, 84 (2d Cir. 2003).

²²⁴ See, e.g., *Sepulveda v. United States*, 330 F.3d 55, 60 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77, 84 (2d Cir. 2003); *Goode v. United States*, 305 F.3d 378, 383 n.8 (6th Cir. 2002); *United States v. Brown*, 305 F.3d 304, 308–10 (5th Cir. 2002); *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002); *In re Turner*, 267 F.3d 225, 230 (3d Cir. 2001); *McCoy v. United States*, 266 F.3d 1245, 1257–58 (11th Cir. 2001); *United States v. Moss*, 252 F.3d 993, 998–1000 (8th Cir. 2001); *United States v. Sanders*, 247 F.3d 139, 151 (4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1237–38 (9th Cir. 2000).

²²⁵ *Robinson v. Neil*, 409 U.S. 505, 509 (1973).

²²⁶ See *Bousley v. United States*, 523 U.S. 614, 620 (1998). An example of a superficially procedural rule that has uniformly been found substantive is the rule expressed in *Richardson v. United States*, 526 U.S. 813, 815 (1999). *Richardson* requires jury unanimity on the exact offenses that make up the “continuing series” of offenses that constituted the predicate offenses for conviction of continuing criminal enterprise. *Id.* Although this rule appears, on its surface, procedural, the circuits have found that since the procedural rule shapes the scope of a substantive statute it is substantive for *Teague* purposes. See, e.g., *United States v. Montalvo*, 331 F.3d 1052, 1056 (9th Cir. 2003) (*per curiam*); *Santana-Madera v. United States*, 260 F.3d 133, 138–39 (2d Cir. 2001).

CONCLUSION

Over time, the Court has struggled with the substantive restrictions the Constitution places upon states' determination of criminal laws. After an initial step towards the creation of a constitutional substantive criminal law in *Mullaney v. Wilbur*,²²⁷ the Court has consistently moved away from such a view and has time and again recognized legislative primacy in crime definition.²²⁸ Even with such primacy, however, legislatures cannot avoid the procedures required by the Constitution, including the rule articulated by *Apprendi v. New Jersey* that any fact necessary for a particular level of punishment must be found by the jury beyond a reasonable doubt.²²⁹

This rule requires a two-part analysis, one part statutory and the other constitutional. The first, usually dispositive, inquiry looks to the statute to determine if the fact in question is required for the sentence in question to be imposed. This analysis leaves the power of the legislature almost untouched and forces it to confront directly only its policy choices. While this is a deferential review, there was nothing in *Apprendi*, or the cases that *Apprendi* tied together, to suggest that the Court was interested in wading into the quagmire that would invariably result from the Court's large-scale efforts at creating a body of substantive criminal law. Legislative primacy has been, and will continue to be, the operative force in the creation of substantive criminal law.

Second, *Apprendi* suggests an inquiry about whether a particular fact is required by the Constitution, most likely the Eighth Amendment, for the punishment that is sought.²³⁰ The Court's proportionality review in most cases is deferential to legislatures, as is the first stage of the *Apprendi* analysis, and relies primarily on the political process to ensure proportionality between crimes and the associated terms of imprisonment.²³¹ In the context of the death

²²⁷ 421 U.S. 684 (1975).

²²⁸ See, e.g., *Patterson v. New York*, 432 U.S. 197, 201–02 (1977).

²²⁹ *Apprendi*, 530 U.S. at 490.

²³⁰ See *supra* Part IV.

²³¹ See, e.g., *Ewing v. California*, 123 S. Ct. 1179, 1187–89 (2003) (articulating rationales for legislative supremacy); *Harmelin v. Michigan*, 501 U.S. 957, 998–99 (1991) (Kennedy, J., concurring in part and in the judgment) (same); *Rummel v. Estelle*, 445 U.S. 263, 282 n.27 (1980) (“Whatever views may be entertained regarding severity of

penalty, however, the Court has imposed myriad substantive restrictions on the states' ability to define capital crimes.²³² Since the Constitution requires facts beyond the typical first-degree murder conviction for the imposition of the death penalty, the defendant is entitled to the protections of *Apprendi* for the finding of those additional aggravating facts. It is here that *Apprendi* will have its primary bite in the courtroom, though the other parts of the analysis may have some effect in the legislative chamber.

Apprendi presents a well-reasoned rule that protects the right to a jury trial while maintaining legislative primacy in criminal law definitions. Although the rule may seem a paper tiger because legislatures can, in theory, avoid it with ease, there is little to suggest that legislatures will undertake a massive rewriting of their statutes now that they may no longer use sentence enhancements. The political process should constrain legislatures, just as it did in the majority of cases prior to *Apprendi*, and when a law is so far over the line as to violate another constitutional provision, namely the Eighth Amendment, *Apprendi* illuminates the relationship between the substantive criminal law and the facts used to support the penalty: What is important for determining constitutionality are the facts that were proven to the jury beyond a reasonable doubt.

punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy.” (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958))).

²³² See *Walton v. Arizona*, 497 U.S. 639, 657 (1990) (Scalia, J., concurring in part) (listing constitutional restrictions on the death penalty).