Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Juries and Lawyers/Juries

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

Charles Apprendi fired several bullets into the house of the first African-American family to move into a neighborhood in Vineland, New Jersey. As part of a plea bargain, he pled guilty to second-degree possession of a firearm for unlawful purpose. The maximum statutory penalty for that offense was ten years in prison. The plea bargain also allowed the state to ask for an enhanced sentence on the basis of a New Jersey law which permitted judges to sentence persons guilty of second degree offenses to up to twenty years in prison if, by a preponderance of evidence, the judge determined 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, sexual orientation or ethnicity." Apprendi, as part of the plea bargain, reserved the right to challenge the constitutionality of that sentence enhancement. When the trial judge sentenced him to twelve years in prison, Apprendi appealed. He claimed the hate crimes sentence enhancement violated his Sixth and Fourteenth Amendment right to have a jury decide all elements of a crime beyond a reasonable doubt. Both the New Jersey Superior Court and the Supreme Court of New Jersey ruled that the sentence enhancement was constitutional. Apprendi appealed to the Supreme Court of the United States.

The National Association of Criminal Defense Lawyers and the Rutherford Institute filed amicus briefs urging the Supreme Court to declare the sentence enhancement law unconstitutional. The brief for the National Association of Criminal Defense Lawyers expressed concern "about the denial of procedural protections, guaranteed criminal defendants by the Fifth, Sixth and Fourteenth Amendments, when a fact that raises the maximum penalty is determined to be a sentencing factor." The Clinton Administration and the Anti-Defamation League filed amicus briefs urging the Supreme Court to sustain the New Jersey law. The brief for the Anti-Defamation League bluntly stated, "A hate-motivated purpose is an appropriate sentencing factor. A despicable motive and societal impact are traditional factors used in judicial sentencing."

The Supreme Court by a 5–4 vote ruled that the hate crimes sentence enhancement was unconstitutional. Justice Stevens's majority opinion held that states could not permit judges to find facts that entitled them to sentence criminals to more than the statutory maximum for their crime. What principles supported the rule that juries must find all facts relevant to enhanced punishment? What principles supported the rule that judges may find facts relevant to enhanced punishment? Who had the better of the policy argument and who had the better of the constitutional argument? How are these arguments different? Notice the unusual line-up in this case. The majority was composed of Justices Stevens, Ginsburg, Souter, Thomas, and Scalia. Chief Justice Rehnquist, Justice Breyer, Justice Kennedy, and Justice O'Connor dissented. What might explain this unusual combination?

JUSTICE STEVENS delivered the opinion of the Court.

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In his 1881 lecture on the criminal law, Oliver Wendell Holmes, Jr., observed: "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed." New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for

punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law" and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."

[T]he historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours. . . ."

Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.'. . ."

Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding. As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and that there may be no doubt as to the judgment which should be given, if the defendant be convicted. The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime.

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We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case. [O]ur periodic recognition of judges' broad discretion in sentencing-since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range, has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature.

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The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears "that the jury right could be lost not only by gross denial, but by erosion." But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt. . . . If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.

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In sum, . . . [o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

The New Jersey statutory scheme that Apprendi asks us to invalidate allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree, based upon the judge's finding, by a preponderance of the evidence, that the defendant's "purpose" for unlawfully possessing the weapon was "to intimidate" his victim on the basis of a particular characteristic the victim possessed. In light of the constitutional rule explained above, and all of the cases supporting it, this practice cannot stand.

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New Jersey would point to the fact that the State did not, in placing the required biased purpose finding in a sentencing enhancement provision, create a "separate offense calling for a separate penalty." As for this, we agree wholeheartedly with the New Jersey Supreme Court that merely because the state legislature placed its hate crime sentence "enhancer" "within the sentencing provisions" of the criminal code "does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." Indeed, the fact that New Jersey, along with numerous other States, has also made precisely the same conduct the subject of an independent substantive offense makes it clear that the mere presence of this "enhancement" in a sentencing statute does not define its character.

The New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.

JUSTICE SCALIA, concurring.

I feel the need to say a few words in response to Justice BREYER's dissent. It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State—and an increasingly bureaucratic part of it, at that.) The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

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In Justice BREYER's bureaucratic realm of perfect equity, by contrast, the facts that determine the length of sentence to which the defendant is exposed will be determined to exist (on a more-likely-than-not basis) by a single employee of the State. It is certainly arguable (Justice BREYER argues it) that this sacrifice of prior protections is worth it. But it is not arguable that, just because one thinks it is a better system, it must be, or is even more likely to be, the system envisioned by a Constitution that guarantees trial by jury. What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee—what it has been assumed to guarantee throughout our history—the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins in part, concurring.

I join the opinion of the Court in full. I write separately to explain my view that the Constitution requires a broader rule than the Court adopts.

This case turns on the seemingly simple question of what constitutes a "crime." Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." . . .

All of these constitutional protections turn on determining which facts constitute the "crime"—that is, which facts are the "elements" or "ingredients" of a crime. In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under Winship, proved beyond a reasonable doubt). . . .

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[A] "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact—of whatever sort, including the fact of a prior conviction—the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact—such as a fine that is proportional to the value of stolen goods—that fact is also an element. . . .

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Cases from the founding to roughly the end of the Civil War establish the rule that I have described, applying it to all sorts of facts, including recidivism. As legislatures varied common-law crimes and created new crimes, American courts, particularly from the 1840's on, readily applied to these new laws the common-law understanding that a fact that is by law the basis for imposing or increasing punishment is an element.

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Also demonstrating the common-law approach to determining elements was the well-established rule that, if a statute increased the punishment of a common-law crime, whether felony or misdemeanor, based on some fact, then that fact must be charged in the indictment in order for the court to impose the increased punishment. There was no question of treating the statutory aggravating fact as merely a sentencing enhancement—as a nonelement enhancing the sentence of the common-law crime. The aggravating fact was an element of a new, aggravated grade of the common-law crime simply because it increased the punishment of the common-law crime. . . .

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Without belaboring the point any further, I simply note that this traditional understanding—that a "crime" includes every fact that is by law a basis for imposing or increasing punishment—continued well into the 20th-century, at least until the middle of the century. . . . Today's decision, far from being a sharp break with the past, marks nothing more than a return to the status quo ante—the status quo that reflected the original meaning of the Fifth and Sixth Amendments.

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[I]t is irrelevant to the question of which facts are elements that legislatures have allowed sentencing judges discretion in determining punishment (often within extremely broad ranges). Bishop, immediately after setting out the traditional rule on elements, explained why:

> The reader should distinguish between the foregoing doctrine, and the doctrine . . . that, within the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment . . . The aggravating circumstances spoken of cannot swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy [in finding mitigating circumstances]. This is an entirely different thing from punishing one for what is not alleged against him."

Thus, it is one thing to consider what the Constitution requires the prosecution to do in order to entitle itself to a particular kind, degree, or range of punishment of the accused, and quite another to consider

what constitutional constraints apply either to the imposition of punishment within the limits of that entitlement or to a legislature's ability to set broad ranges of punishment. . . .

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JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join, dissenting.

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Our Court has long recognized that not every fact that bears on a defendant's punishment need be charged in an indictment, submitted to a jury, and proved by the government beyond a reasonable doubt. Rather, we have held that the "legislature's definition of the elements of the offense is usually dispositive." Although we have recognized that "there are obviously constitutional limits beyond which the States may not go in this regard," and that "in certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged," we have proceeded with caution before deciding that a certain fact must be treated as an offense element despite the legislature's choice not to characterize it as such. We have therefore declined to establish any bright-line rule for making such judgments and have instead approached each case individually, sifting through the considerations most relevant to determining whether the legislature has acted properly within its broad power to define crimes and their punishments or instead has sought to evade the constitutional requirements associated with the characterization of a fact as an offense element.

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. . . None of the history contained in the Court's opinion requires the rule it ultimately adopts. The history cited by the Court can be divided into two categories: first, evidence that judges at common law had virtually no discretion in sentencing, and, second, statements from a 19th-century criminal procedure treatise that the government must charge in an indictment and prove at trial the elements of a statutory offense for the defendant to be sentenced to the punishment attached to that statutory offense. The relevance of the first category of evidence can be easily dismissed. Indeed, the Court does not even claim that the historical evidence of nondiscretionary sentencing at common law supports its "increase in the maximum penalty" rule. Rather, almost as quickly as it recites that historical practice, the Court rejects its relevance to the constitutional question presented here due to the conflicting American practice of judges exercising sentencing discretion and our decisions recognizing the legitimacy of that American practice. . . .

. . . No Member of this Court questions the proposition that a State must charge in the indictment and prove at trial beyond a reasonable doubt the actual elements of the offense. This case, however, concerns the distinct question of when a fact that bears on a defendant's punishment, but which the legislature has not classified as an element of the charged offense, must nevertheless be treated as an offense element. The excerpts drawn from the Archbold treatise do not speak to this question at all. The history on which the Court's opinion relies provides no support for its "increase in the maximum penalty" rule.

In his concurring opinion, Justice THOMAS cites additional historical evidence that, in his view, dictates an even broader rule than that set forth in the Court's opinion. . . . Justice THOMAS divines the common-law understanding of the Fifth and Sixth Amendment rights by consulting decisions rendered by American courts well after the ratification of the Bill of Rights, ranging primarily from the 1840's to the 1890's. Whatever those decisions might reveal about the way American state courts resolved questions regarding the distinction between a crime and its punishment under general rules of criminal pleading or their own state constitutions, the decisions fail to demonstrate any settled understanding with respect to the definition of a crime under the relevant, pre-existing common law. Thus, there is a crucial disconnect between the historical evidence Justice THOMAS cites and the proposition he seeks to establish with that evidence.

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[T]he Court's statement that its "increase in the maximum penalty" rule emerges from the history and case law that it cites is simply incorrect. To make such a claim, the Court finds it necessary to rely on

irrelevant historical evidence, to ignore our controlling precedent, and to offer unprincipled and inexplicable distinctions between its decision and previous cases addressing the same subject in the capital sentencing context. The Court has failed to offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the "increase in the maximum penalty" rule is not required by the Constitution.

That the Court's rule is unsupported by the history and case law it cites is reason enough to reject such a substantial departure from our settled jurisprudence. Significantly, the Court also fails to explain adequately why the Due Process Clauses of the Fifth and Fourteenth Amendments and the jury trial guarantee of the Sixth Amendment require application of its rule. Upon closer examination, it is possible that the Court's "increase in the maximum penalty" rule rests on a meaningless formalism that accords, at best, marginal protection for the constitutional rights that it seeks to effectuate.

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For example, under one reading, the Court appears to hold that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt only if that fact, as a formal matter, extends the range of punishment beyond the prescribed statutory maximum. A State could, however, remove from the jury (and subject to a standard of proof below "beyond a reasonable doubt") the assessment of those facts that define narrower ranges of punishment, within the overall statutory range, to which the defendant may be sentenced. Thus, apparently New Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting its weapons possession statute in the following manner: First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years' imprisonment for one who commits that criminal offense. Second, New Jersey could provide that only those defendants convicted under the statute who are found by a judge, by a preponderance of the evidence, to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence greater than 10 years' imprisonment.

. . . It is difficult to understand, and the Court does not explain, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

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. . . If New Jersey can, consistent with the Constitution, make precisely the same differences in punishment turn on precisely the same facts, and can remove the assessment of those facts from the jury and subject them to a standard of proof below "beyond a reasonable doubt," it is impossible to say that the Fifth, Sixth, and Fourteenth Amendments require the Court's rule. . . .

Given the pure formalism of the above readings of the Court's opinion, one suspects that the constitutional principle underlying its decision is more far reaching. The actual principle underlying the Court's decision may be that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt. . . .

I would reject any such principle. As explained above, it is inconsistent with our precedent. . . . More importantly, given our approval of—and the significant history in this country of—discretionary sentencing by judges, it is difficult to understand how the Fifth, Sixth, and Fourteenth Amendments could possibly require the Court's or Justice THOMAS' rule. Finally, in light of the adoption of determinate-sentencing schemes by many States and the Federal Government, the consequences of the Court's and Justice THOMAS' rules in terms of sentencing schemes invalidated by today's decision will likely be severe.

As the Court acknowledges, we have never doubted that the Constitution permits Congress and the state legislatures to define criminal offenses, to prescribe broad ranges of punishment for those offenses, and to give judges discretion to decide where within those ranges a particular defendant's punishment should be set. That view accords with historical practice under the Constitution. "From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion. . . . Under discretionary-sentencing schemes, a judge bases the defendant's sentence on any number of facts neither presented at trial nor found by a jury beyond a reasonable doubt. As one commentator has explained:

> During the age of broad judicial sentencing discretion, judges frequently made sentencing decisions on the basis of facts that they determined for themselves, on less than proof beyond a reasonable doubt, without eliciting very much concern from civil libertarians. . . . The sentence in any number of traditional discretionary situations depended quite directly on judicial findings of specific contested facts. . . . Whether because such facts were directly relevant to the judge's retributionist assessment of how serious the particular offense was (within the spectrum of conduct covered by the statute of conviction), or because they bore on a determination of how much rehabilitation the offender's character was likely to need, the sentence would be higher or lower, in some specific degree determined by the judge, based on the judge's factual conclusions.

Accordingly, under the discretionary-sentencing schemes, a factual determination made by a judge on a standard of proof below "beyond a reasonable doubt" often made the difference between a lesser and a greater punishment.

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Under our precedent, then, a State may leave the determination of a defendant's sentence to a judge's discretionary decision within a prescribed range of penalties. When a judge, pursuant to that sentencing scheme, decides to increase a defendant's sentence on the basis of certain contested facts, those facts need not be proved to a jury beyond a reasonable doubt. The judge's findings, whether by proof beyond a reasonable doubt or less, suffice for purposes of the Constitution. Under the Court's decision today, however, it appears that once a legislature constrains judges' sentencing discretion by prescribing certain sentences that may only be imposed (or must be imposed) in connection with the same determinations of the same contested facts, the Constitution requires that the facts instead be proved to a jury beyond a reasonable doubt. I see no reason to treat the two schemes differently. . . .

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Consideration of the purposes underlying the Sixth Amendment's jury trial guarantee further demonstrates why our acceptance of judge-made findings in the context of discretionary sentencing suggests the approval of the same judge-made findings in the context of determinate sentencing as well. One important purpose of the Sixth Amendment's jury trial guarantee is to protect the criminal defendant against potentially arbitrary judges. It effectuates this promise by preserving, as a constitutional matter, certain fundamental decisions for a jury of one's peers, as opposed to a judge. . . . Clearly, the concerns animating the Sixth Amendment's jury trial guarantee, if they were to extend to the sentencing context at all, would apply with greater strength to a discretionary-sentencing scheme than to determinate sentencing. In the former scheme, the potential for mischief by an arbitrary judge is much greater, given that the judge's decision of where to set the defendant's sentence within the prescribed statutory range is left almost entirely to discretion. In contrast, under a determinate-sentencing system, the discretion the judge wields within the statutory range is tightly constrained. Accordingly, our approval of discretionary-sentencing schemes, in which a defendant is not entitled to have a jury make factual findings relevant to sentencing despite the effect those findings have on the severity of the defendant's sentence, demonstrates that the defendant should have no right to demand that a jury make the equivalent factual determinations under a determinate-sentencing scheme.

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Prior to the most recent wave of sentencing reform, the Federal Government and the States employed indeterminate-sentencing schemes in which judges and executive branch officials (e.g., parole board officials) had substantial discretion to determine the actual length of a defendant's sentence. Studies of indeterminate-sentencing schemes found that similarly situated defendants often received widely disparate sentences. . . .

In response, Congress and the state legislatures shifted to determinate-sentencing schemes that aimed to limit judges' sentencing discretion and, thereby, afford similarly situated offenders equivalent treatment. . . . Whether one believes the determinate-sentencing reforms have proved successful or not—and the subject is one of extensive debate among commentators—the apparent effect of the Court's opinion today is to halt the current debate on sentencing reform in its tracks and to invalidate with the

stroke of a pen three decades' worth of nationwide reform, all in the name of a principle with a questionable constitutional pedigree. Indeed, it is ironic that the Court, in the name of constitutional rights meant to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges, appears to rest its decision on a principle that would render unconstitutional efforts by Congress and the state legislatures to place constraints on that very power in the sentencing context.

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Because I do not believe that the Court's "increase in the maximum penalty" rule is required by the Constitution, I would evaluate New Jersey's sentence-enhancement statute by analyzing the factors we have examined in past cases. First, the New Jersey statute does not shift the burden of proof on an essential ingredient of the offense by presuming that ingredient upon proof of other elements of the offense. Second, the magnitude of the New Jersey sentence enhancement, as applied in petitioner's case, is constitutionally permissible. Under New Jersey law, the weapons possession offense to which petitioner pleaded guilty carries a sentence range of 5 to 10 years' imprisonment. The fact that petitioner, in committing that offense, acted with a purpose to intimidate because of race exposed him to a higher sentence range of 10 to 20 years' imprisonment. The 10-year increase in the maximum penalty to which petitioner was exposed falls well within the range we have found permissible. Third, the New Jersey statute gives no impression of having been enacted to evade the constitutional requirements that attach when a State makes a fact an element of the charged offense. . . .

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JUSTICE BREYER, with whom THE CHIEF JUSTICE joins, dissenting.

The majority holds that the Constitution contains the following requirement: "[A]ny fact [other than recidivism] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule would seem to promote a procedural ideal—that of juries, not judges, determining the existence of those facts upon which increased punishment turns. But the real world of criminal justice cannot hope to meet any such ideal. It can function only with the help of procedural compromises, particularly in respect to sentencing. And those compromises, which are themselves necessary for the fair functioning of the criminal justice system, preclude implementation of the procedural model that today's decision reflects. At the very least, the impractical nature of the requirement that the majority now recognizes supports the proposition that the Constitution was not intended to embody it.

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[I]t is important for present purposes to understand why judges, rather than juries, traditionally have determined the presence or absence of such sentence-affecting facts in any given case. And it is important to realize that the reason is not a theoretical one, but a practical one. . . . There are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury. . . .

At the same time, to require jury consideration of all such factors—say, during trial where the issue is guilt or innocence—could easily place the defendant in the awkward (and conceivably unfair) position of having to deny he committed the crime yet offer proof about how he committed it, e.g., "I did not sell drugs, but I sold no more than 500 grams." . . .

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[I]n respect to sentencing systems, proportionality, uniformity, and administrability are all aspects of that basic "fairness" that the Constitution demands. And it suggests my basic problem with the Court's rule: A sentencing system in which judges have discretion to find sentencing-related factors is a workable system and one that has long been thought consistent with the Constitution; why, then, would the Constitution treat sentencing statutes any differently?

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Legislatures have tended to address the problem of too much judicial sentencing discretion in two ways. First, legislatures sometimes have created sentencing commissions armed with delegated

authority to make more uniform judicial exercise of that discretion. Congress, for example, has created a federal Sentencing Commission, giving it the power to create Guidelines that (within the sentencing range set by individual statutes) reflect the host of factors that might be used to determine the actual sentence imposed for each individual crime.

Second, legislatures sometimes have directly limited the use (by judges or by a commission) of particular factors in sentencing, either by specifying statutorily how a particular factor will affect the sentence imposed or by specifying how a commission should use a particular factor when writing a guideline. Such a statute might state explicitly, for example, that a particular factor, say, use of a weapon, recidivism, injury to a victim, or bad motive, "shall" increase, or "may" increase, a particular sentence in a particular way.

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I do not see how the majority can find in the Constitution a requirement that "any fact" (other than recidivism) that increases the maximum penalty for a crime "must be submitted to a jury." As Justice O'CONNOR demonstrates, this Court has previously failed to view the Constitution as embodying any such principle, while sometimes finding to the contrary. . . . The majority raises no objection to traditional pre-Guidelines sentencing procedures under which judges, not juries, made the factual findings that would lead to an increase in an individual offender's sentence. How does a legislative determination differ in any significant way? For example, if a judge may on his or her own decide that victim injury or bad motive should increase a bank robber's sentence from 5 years to 10, why does it matter that a legislature instead enacts a statute that increases a bank robber's sentence from 5 years to 10 based on this same judicial finding?

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. . . The source of the problem lies not in a legislature's power to enact sentencing factors, but in the traditional legislative power to select elements defining a crime, the traditional legislative power to set broad sentencing ranges, and the traditional judicial power to choose a sentence within that range on the basis of relevant offender conduct. Conversely, the solution to the problem lies, not in prohibiting legislatures from enacting sentencing factors, but in sentencing rules that determine punishments on the basis of properly defined relevant conduct, with sensitivity to the need for procedural protections where sentencing factors are determined by a judge (for example, use of a "reasonable doubt" standard), and invocation of the Due Process Clause where the history of the crime at issue, together with the nature of the facts to be proved, reveals unusual and serious procedural unfairness. . . .

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Finally, the Court's new rule will likely impede legislative attempts to provide authoritative guidance as to how courts should respond to the presence of traditional sentencing factors. The factor at issue here—motive—is such a factor. Whether a robber takes money to finance other crimes or to feed a starving family can matter, and long has mattered, when the length of a sentence is at issue. The State of New Jersey has determined that one motive—racial hatred—is particularly bad and ought to make a difference in respect to punishment for a crime. That determination is reasonable. The procedures mandated are consistent with traditional sentencing practice. Though additional procedural protections might well be desirable, for the reasons Justice O'CONNOR discusses and those I have discussed, I do not believe the Constitution requires them where ordinary sentencing factors are at issue. Consequently, in my view, New Jersey's statute is constitutional.