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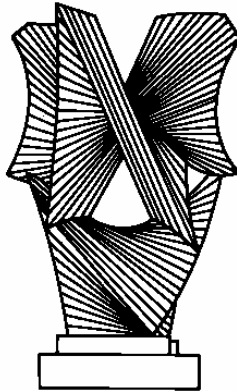
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APPRENDI'S DOMAIN

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APPRENDI'S DOMAIN

JONATHAN F. MITCHELL

Recent Supreme Court decisions have extended the Sixth Amendment right of jury trial to some, but not all, disputed factual questions at sentencing. *Apprendi v New Jersey*,¹ for example, held that the jury right attaches to any sentencing factor (other than recidivism) that increases the maximum allowable punishment for a crime. That means that if the law normally provides a ten-year maximum sentence for a firearms offense, but a “sentencing factor” raises that ceiling to thirty years in cases where the defendant used the firearm to commit murder, a jury must resolve that sentencing enhancement. At the same time, the Court has refused to extend the jury right to “mitigating” sentencing factors.² So if the law provides a thirty-year maximum sentence for the aforementioned firearms offense, which drops to ten years if the defendant shows that he did *not* use the firearm to commit murder, the jury need not resolve that factual issue. And the Court has similarly refused to extend the jury right to facts that mandate minimum sentences without increasing the maximum allowable punishment.³

****298** These court decisions fail to provide a coherent or sensible rule for distributing power between judge and jury. This is because the Supreme Court has inexplicably decided that all facts subject to the Sixth Amendment jury requirement must also be proved beyond a reasonable doubt, and charged in indictments in federal prosecutions, as if they were “elements” of substantive crimes. Because previous cases had limited the Court’s proof-beyond-a-reasonable-doubt requirement to the “elements” of substantive offenses, this has produced a jurisprudence in which the jury right, like the reasonable-doubt rule, attaches only to “elements” of crimes or their “functional equivalents.” So when *Apprendi* extended the jury right to sentencing facts that increase a defendant’s maximum allowable punishment, the Court simultaneously held that such facts were “functional equivalent[s] of [] element[s],”⁴ which prosecutors must prove beyond a reasonable doubt. And when the Court refused to extend the jury right to other

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¹ 530 US 466 (2000).

² *Id.* at 490 n 16.

³ See *Harris v United States*, 536 US 545 (2002).

⁴ *Apprendi*, 530 US at 494 n 19; see also *id.* at 483 n 10 (“Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition ‘elements’ of a separate legal offense.”).

sentencing facts, it based those decisions on its view that such facts are not “elements” of crimes subject to the Court’s proof-beyond-a-reasonable-doubt requirement.⁵

This tie-in arrangement between the jury right and the proof-beyond-a-reasonable-doubt requirement is mistaken. The right of jury trial should extend well beyond the “elements” of crimes (and their “functional equivalents”) and should encompass all disputed questions of fact that purport to aggravate *or mitigate* a defendant’s guilt or punishment. But the courts should not necessarily require that these jury facts be charged by prosecutors or proved beyond a reasonable doubt as if they were “elements” of substantive crimes. Indeed, *Apprendi*’s historical claim that sentencing enhancements were treated as “elements” of offenses whenever they increased a defendant’s maximum punishment is demonstrably mistaken. And the platitudes from Joel Prentiss Bishop’s nineteenth-century treatises,⁶ which the pro-*Apprendi* Justices repeatedly invoke to support ****299** this assertion,⁷ are patently false and did not accurately describe the law in actual court decisions of that era.⁸ Nineteenth-century courts repeatedly held that first-degree murder did not need to be charged in indictments as an “element” of a substantive crime, even though it increased a defendant’s maximum allowable punishment from life imprisonment to death, and even though it was decided by juries. These court decisions instead regarded first and second-degree murder as mere grades of punishment within the unitary offense of murder, and enforced a jury right that extended well beyond the facts that prosecutors were required to charge and prove as components of a substantive crime. The Court should therefore reaffirm and expand *Apprendi*’s Sixth Amendment holding, and overrule its reasonable-doubt holding and its corresponding implication that all “jury facts” must be treated as “elements” of substantive crimes.

I.

The federal Constitution granted judges significant powers, including life tenure and salary protection, but did so with the understanding that a strong jury right would limit judicial power. To that end, the Sixth Amendment provides that “[i]n 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.”⁹ But once the Supreme Court in *Apprendi* resolved to extend this jury right to certain factual disputes at sentencing, it became hard to justify a regime that limits the jury right to a

⁵ See *Harris*, 536 US at 549 (plurality opinion) (holding that sentencing factors that establish mandatory minimums “are not elements, and are *thus not subject to the Constitution’s . . . jury . . . requirements*”) (emphasis added); *McMillan v Pennsylvania*, 477 US 79, 93 (1986) (refusing to extend the right of jury trial to a “sentencing consideration” because it is “not an element of any offense”).

⁶ See, e.g., Joel Prentiss Bishop, 1 *Criminal Procedure* § 81 at 51 (Little, Brown, 2d ed 1872) (cited hereinafter as “Bishop”) (stating that nineteenth-century indictments were required to include “every fact which is legally essential to the punishment”).

⁷ See *Apprendi*, 530 US at 489 n 15 (citing 1 Bishop at § 81 at 51) (cited in note 6); *id* at 510 (Thomas, J., concurring), quoting 1 Bishop at § 81 at 51 (cited in note 6); see also *Blakely v Washington*, 542 US 296, 301–02 (2004), quoting 1 Bishop at § 87 at 55 (cited in note 6).

⁸ See Section V.

⁹ See US Const, Amend VI. See also US Const, Art III, § 2 (“The trial of all crimes, except in cases of impeachment, shall be by jury”).

subset of those factual issues. Numerous sources from before, during, and after the nation's founding indicate that the scope of the jury right hinged on the distinction between questions of fact and questions of law, not on whether a fact might "aggravate" or "mitigate" a defendant's guilt or punishment, or on whether it qualifies as an "element" of a crime.

One must first understand how the Constitution's text and early ****300** American practice regarded the criminal jury as a structural mechanism designed to limit the power of individual judges and preserve popular participation in the judiciary.¹⁰ Article III of the Constitution provided that "[t]he trial of all crimes, except in cases of impeachment, *shall be by jury,*" and this was originally understood as providing a nonwaivable jury in federal criminal trials.¹¹ Many state constitutions were likewise understood to provide a nonwaivable jury in felony criminal cases,¹² which defendants could avoid only by pleading guilty and waiving their entire right to trial.¹³ In refusing to permit criminal defendants to consent to bench trials, courts noted that such trials would confer power on judges beyond that which the law allowed,¹⁴ sometimes even describing the jury's ****301**

¹⁰ See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1182–99 (1991); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L Rev 203, 218 (1995); Herbert J. Storing, *What the Anti-Federalists Were For* 19 (Chicago, 1981) (describing the jury as a means to preserve "the role of the people in the administration of government"). See also John Adams, 2 *The Works of John Adams* 253 (Little, Brown, 1850) (Charles F. Adams, ed) (diary entry, Feb 12, 1771) ("the common people [] should have as complete a control" over the judiciary as over the legislature); Letter from Thomas Jefferson to L'Abbé Arnoux (July 19, 1789), reprinted in Thomas Jefferson, 15 *The Papers of Thomas Jefferson* 282, 283 (Princeton, 1958) (Julian Boyd, ed) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."); Letters From The Federal Farmer (XV), in Herbert J. Storing, ed, 2 *The Complete Anti-Federalist* 320 (Chicago, 1981) (writing that the jury "secure[s] to the people at large, their just and rightful controul in the judicial department"); Letters From The Federal Farmer (IV), in *id* at 249 ("It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department."); Alexis de Tocqueville, 1 *Democracy in America* 293–94 (Vintage, 1945) ("The institution of the jury . . . places the real direction of society in the hands of the governed, . . . and not in that of the government. . . . The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage.").

¹¹ See *Thompson v Utah*, 170 US 343, 353–54 (1898).

¹² See, e.g., *Harris v People*, 21 NE 563, 565 (Ill 1889); *Cancemi v People*, 18 NY 128, 138 (1858); *Hill v People*, 16 Mich 351, 355–59 (1868); *State v Lockwood*, 43 Wis 403, 405 (1877); *State v Ellis*, 60 P 136, 137–38 (Wash 1900); *State v Mansfield*, 41 Mo 470, 479 (1867); *Michaelson v Beemer*, 101 NW 1007, 1008 (Neb 1904).

¹³ Cf. John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 Harv J L & Pub Policy 119, 121 (1992) (noting that criminal defendants could waive the right to jury trial by pleading guilty).

¹⁴ See, e.g., *Harris v People*, 21 NE 563, 564 (Ill 1889) ("But while a defendant may waive his right to a jury trial [by pleading guilty], he can not by such waiver confer jurisdiction to try him upon a tribunal which has no such jurisdiction by law. . . . For the trial of felonies the judge alone is not the court. The judicial functions brought into exercise in such trials are parceled out between him and the jury, and so long as there is no law authorizing it, the functions to be exercised by the jury might just as well be transferred, by agreement of the parties, to the clerk or sheriff as to the judge."); *Cancemi v People*, 18 NY 128, 138 (1858) (holding the right of jury trial nonwaivable on the ground that "the trial must be by the tribunal and in the mode which the constitution and laws provide."); *State v Mansfield*, 41 Mo 470, 478 (1867) ("His

role in jurisdictional terms.¹⁵ Nonwaivability was a paradigmatic example of how the criminal jury was understood to limit the power of individual judges.¹⁶

The idea of a nonwaivable criminal jury eventually fell out of fashion.¹⁷ But this trend did not repudiate, nor is it inconsistent with, the idea that the criminal jury plays an important structural role in limiting judicial power and preserving popular control in the judiciary. Rather, it is best seen as an allowance that a defendant's right *not* to be tried by a jury (perhaps rooted in due process, or a broader autonomy principle) may trump the structural dimension of the jury guarantee. Indeed, the Supreme Court has made clear that the jury right, even at the state level, continues to serve systemic values beyond protecting individual defendants. In *Taylor v Louisiana*,¹⁸ for example, the Court held that excluding women from juries violated a *male* defendant's Sixth Amendment right of jury trial. It allowed the defendant to challenge his conviction if his jury was not drawn from "a fair cross section of the community,"¹⁹ even if the juror exclusions skewed the jury pool in favor of the defendant's race, sex, or social class, and without regard to whether ****302** such exclusions were harmless.²⁰ In so holding the Court relied on the jury's role as an instrument of popular sovereignty; excluding groups from jury duty was "at war with our basic concepts of a democratic society and representative government."²¹

right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law. . . . [H]e has no power to consent to the creation of a new tribunal unknown to the law to try his offence.").

¹⁵ See, e.g., *Morgan v People*, 26 NE 651 (Ill 1891) ("Consent of the defendant . . . can not confer jurisdiction upon the judge, or dispense with a finding of the fact of guilt before a jury."); *Neales v State*, 10 Mo 498, 500 (1847) ("It is exclusively the province of a jury to try the issue of not guilty, and the consent of the defendant for the court to try the same [] cannot confer such power on the court."); *Craig v State*, 30 NE 1120, 1122 (Ohio 1892) ("[T]he court of common pleas had no authority to try the case without [a jury]. It was a mode of trial unknown to the law. The legislature had not clothed the court with that form of jurisdiction, and no act or consent of the accused could create or confer a jurisdiction not established by law."); see also Charles Hughes, *Hughes' Criminal Law* § 2979, at 776 (Bowen-Merrill, 1901) ("A jury cannot be waived in a felony case—even by agreement or consent of the defendant. It is jurisdictional, and consent can never confer jurisdiction."); Stewart Rapalje, *A Treatise on Criminal Procedure* § 151, at 227 (Bancroft-Whitney, 1889) ("A trial without jury is a trial without jurisdiction.").

¹⁶ See John Proffatt, *A Treatise on Trial by Jury* § 113, at 157 (S. Whitney, 1877) ("[T]he constitutional provisions do not concede the right to waive the jury in criminal cases; for it is deemed, in such cases there are more than personal interests involved, that the rights and interests of the public are also concerned.").

¹⁷ See, e.g., *Patton v United States*, 281 US 276, 298–99 (1930) (allowing criminal bench trials in Article III courts); Susan C. Towne, *The Historical Origins of Bench Trial for Serious Crime*, 26 Am J Legal Hist 123, 145 (1982).

¹⁸ 419 US 522 (1975).

¹⁹ *Id* at 527.

²⁰ *Id* at 538–539 (Rehnquist, J, dissenting) (protesting that the Court had reversed a conviction "without a suggestion, much less a showing, that the appellant has been unfairly treated or prejudiced in any way by the manner in which his jury was selected.").

²¹ *Id* at 527 (quoting *Smith v Texas*, 311 US 128, 130 (1940)). See also *Blakely v Washington*, 542 US 296, 305–06 (2004) (describing the jury right as "no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary"); *Georgia v McCollum*, 505 US 42 (1992) (holding that criminal defendants may not use preemptory challenges in a racially discriminatory manner, even if a defendant would benefit from doing so).

Only until very recently, it was widely understood that criminal juries served these structural functions by preventing trial judges from resolving disputed questions of fact. William Blackstone declared that “[t]he principles and axioms of law . . . should be deposited in the breasts of the judges But in settling and adjusting a question of fact . . . a competent number of sensible and upright jurymen . . . will be found the best investigators of truth and the surest guardians of public justice.”²² And Lord Coke wrote that “ad quaestionem facti non respondent iudices [judges do not answer a question of fact] . . . ad quaestionem juris non respondent juratores [jurors do not answer a question of law].”²³ Section nine of the Judiciary Act of 1789 also embraced this view of the criminal jury’s role. After establishing exclusive jurisdiction in the federal district courts over certain crimes and offenses, the Act provided that “*the trial in issues of fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.*”²⁴ And while opinion at the time of the Founding was divided as to whether the criminal jury should also decide questions of law,²⁵ ****303** no one ever suggested that trial judges should displace the jury’s role in resolving factual disputes. Many state criminal codes expressly provided that juries were to resolve disputed questions of fact,²⁶ and early state-court decisions similarly described the criminal jury’s role as extending beyond the elements of crimes to include all disputed questions of fact, leaving judges to decide questions of law.²⁷

The Supreme Court of the United States continued to endorse this view of the criminal jury throughout the early twentieth century. Even when it rejected the “nonwaivable” jury in *Patton v United States*,²⁸ the Court emphasized that the jury’s

²² See William Blackstone, 3 *Commentaries on the Laws of England* *380 (Chicago, 1979).

²³ See, e.g., Edward Coke, 1 *Commentary on Littleton* § 155b (J. & W.T. Clarke, 19th ed 1832); see also Edward Wynne, 3 *Eunomus: or Dialogues Concerning the Law and Constitution of England* 217 § 53 (B. White, 2d ed 1785); *R. v Poole*, 95 Eng Rep 15, 18 (KB 1734); Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial*, 65 Notre Dame L Rev 1, 4 (1989).

²⁴ Judiciary Act of 1789 § 9, 1 Stat 73, 77 (1789) (emphases added).

²⁵ Compare Federal Farmer (XV), Storing, 7 *The Complete Anti-Federalist* at 319–20 (cited in note 10) (arguing that criminal juries should have the right to “decide both as to law and fact, whenever blended together in the issue put to them”); with Thomas Jefferson, Letter to the L’Abbé Arnoux (July 19, 1789) (cited in note 10) (arguing that juries “are not qualified to judge questions of law”). See also Mark Howe, *Juries as Judges of Criminal Law*, 52 Harv L Rev 582 (1939).

²⁶ See, e.g., Iowa Code § 4439 (1873); Dig Stat Ark, ch 52 § 149 (1848); Mo Rev Stat, ch 138, art 6, § 1 (1845); 7 Tex Crim Proc, art 676 (1879); Stat Okla (Terr), ch 68, art 10, § 4 (1893); Cal Stat 255 § 398 (1851); Gen Laws Kan, ch 32, § 215 (1862); Or Rev Stat 264, at ch 37, § 2 (1855).

²⁷ See *Commonwealth v Porter*, 51 Mass 263, 276 (1845) (opinion of Shaw, CJ); *Commonwealth v Anthes*, 71 Mass 185, 198 (1855) (opinion of Shaw, CJ); *Duffy v People*, 26 NY 588, 595 (1863); *Harris v People*, 21 NE 563, 563 (Ill 1889); *Commonwealth v Garth*, 30 Va 761, 762 (1827); *Townsend v State*, 2 Blackf 151, 157–58 (Ind 1828); *People v Barthleman*, 52 P 112, 114 (Cal 1898); *State v Hudspeth*, 51 SW 483, 487 (Mo 1899); *State v Dickinson*, 55 P 539, 541 (Mont 1898); *State v Magers*, 57 P 197, 201 (Or 1899); *State v Lightfoot*, 78 NW 41, 44 (Iowa 1899); *People v Cignarle*, 17 NE 135, 140 (NY 1888). See also *State v Spayde*, 80 NW 1058, 1059 (Iowa 1899); *McCullough v State*, 34 SW 753, 754 (Tex Ct Crim App 1896).

²⁸ 281 US 276 (1930).

constitutional role presumptively extends to all issues of fact.²⁹ And several modern court decisions recognized that criminal juries should resolve disputed questions of fact, even when such facts do not qualify as “elements” of crimes.³⁰ Most significantly, a 1961 opinion by Judge Henry Friendly extended the Sixth Amendment jury right beyond “elements” to sentencing factors that mitigate a defendant’s sentence. In that case, *United States v Kramer*,³¹ the relevant statute **304 provided that anyone convicted of theft of United States property “[s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both; *but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.*”³² The court recognized that the value of the property was not an “element of the crime,” but rather was a “fact going only to the degree of punishment.”³³ Nevertheless, Judge Friendly’s opinion held that the district court should instruct the jury to determine not only whether Kramer was guilty of “the offense charged,” but also whether the property had a value of in excess of \$100.³⁴ The Court simply took for granted the proposition that “the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge.”³⁵

Given the jury’s structural role in limiting judicial power, and the authorities from the eighteenth through the twentieth centuries holding that juries served this function by keeping judges from deciding questions of fact, the most natural response for the *Apprendi* Court was to extend the Sixth Amendment jury right to *any* disputed factual question that aggravates or mitigates a defendant’s guilt or punishment. But the Supreme Court did not adopt this approach, because it had unwittingly tied the jury right to its proof-beyond-a-reasonable-doubt requirement, which attaches only to “elements” of crimes. Part II discusses the Court’s reasonable-doubt jurisprudence and explains why the Court’s “elements” test, which defines the scope of the reasonable-doubt rule, should not similarly define the scope of the Sixth Amendment jury guarantee.

²⁹ Id at 312 (“Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offense.”). See also *Dimick v Shiedt*, 293 US 474, 485–86 (1934); *Quercia v United States*, 289 US 466, 469 (1933).

³⁰ See, e.g., *Ake v Oklahoma*, 470 US 68, 81 (1985) (stating that juries are to be “primary factfinders” on the issue of a criminal defendant’s psychiatric condition); *Sherman v United States*, 356 US 369, 377 (1958) (noting the unanimous view of the federal courts of appeals that entrapment defenses fall within the jury’s purview); *United States v Southwell*, 432 F3d 1050 (9th Cir 2006) (holding that a criminal defendant has a constitutional right to a unanimous jury verdict on the affirmative defense of insanity). See also *United States v Jackalow*, 66 US 484, 487 (1861) (holding that the jury should determine whether a criminal offense was committed out of the jurisdiction of a State, because it was “not a simple question of law”).

³¹ 289 F2d 909 (2d Cir 1961).

³² Id at 920 n 8 (emphasis added) (quoting 18 USC § 641 (1994) (modified 1994)).

³³ Id at 921.

³⁴ Id.

³⁵ Id.

II.

A.

Long before *Apprendi*, the Supreme Court held that the Due Process clause requires prosecutors to prove certain facts beyond a reasonable doubt in criminal prosecutions.³⁶ But the Court did not extend this requirement to every question of fact that affects ****305** a defendant's guilt or punishment. *Martin v Ohio*,³⁷ for example, upheld a state's requirement that criminal defendants prove self-defense, an "affirmative defense" that absolves defendants of guilt. *Patterson v New York*³⁸ approved a statute that required murder defendants to prove that they killed while acting "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."³⁹ This "mitigating circumstance," if proved, would reduce the crime from murder to first-degree manslaughter.⁴⁰ And *McMillan v Pennsylvania*⁴¹ refused to extend the Court's proof-beyond-a-reasonable-doubt requirement to "sentencing considerations" that were not components of a substantive crime.

All these decisions limited the constitutional reasonable-doubt rule to facts characterized as "elements."⁴² "Elements" are facts that the prosecution must establish in every case to secure a conviction for a criminal "offense."⁴³ Facts on which a criminal defendant must offer evidence, by contrast, do not qualify as "elements." An "affirmative defense," for example, is an issue on which a defendant bears the burden of production; the prosecutor need not offer any proof unless the accused produces enough evidence to put the fact in issue.⁴⁴ "Mitigating circumstances" are facts on which a criminal defendant rather than the government carries the burden of persuasion.⁴⁵ And facts that affect only a defendant's sentence, rather than his guilt or innocence of an offense, also did not qualify as "elements" of a substantive crime.

Because legislatures define the substantive criminal law, this ****306** proof-beyond-a-reasonable-doubt requirement amounted to little more than a default rule that legislatures could avoid by characterizing facts as affirmative defenses, mitigating circumstances, or sentencing considerations. If a jurisdiction wanted to amend its

³⁶ See, e.g., *In re Winship*, 397 US 358, 364 (1970).

³⁷ 480 US 229 (1987).

³⁸ 432 US 197 (1977).

³⁹ *Id.* at 206, 218–19 (quoting NY Penal Law § 125.25(1)(a) (McKinney 2006)).

⁴⁰ NY Penal Law § 125.20(2) (McKinney 2006).

⁴¹ 477 US 79 (1986).

⁴² See *Martin*, 480 US at 233–234; *Patterson*, 432 US at 210; *McMillan*, 477 US at 85–86.

⁴³ See, e.g., *Richardson v United States*, 526 US 813, 817 (1999). See also *Black's Law Dictionary* 559 (West, 8th ed 2004) (defining "element" as "[a] constituent part of a claim that must be proved for the claim to succeed").

⁴⁴ See Model Penal Code § 1.12(2) (ALI 1962). Once the accused satisfies his burden of production, then the burden of *persuasion* might rest with either the prosecution or the defense. See *id.* at § 1.12(4).

⁴⁵ See, e.g., 18 USC § 3593(c) (2000 & Supp 2002) (providing that capital defendants must establish mitigating factors by a preponderance of the information); *United States v Washman*, 128 F3d 1305, 1307 (9th Cir 1997) ("The defendant has the burden of proof with respect to any sentence reduction based upon a mitigating factor.").

statutory-rape laws so that guilt or punishment would depend on the perpetrator's knowledge of the victim's age, it could make such knowledge an "element" of the crime, which would trigger the Court's reasonable-doubt rule. But it could instead opt to establish the defendant's *lack* of knowledge as an "affirmative defense" or a "mitigating circumstance" that would not implicate the Court's proof-beyond-a-reasonable-doubt requirement.⁴⁶ Or it might enact a "sentencing factor" that requires higher minimum penalties in cases where the defendant knew the victim was underage. That would likewise avoid the Court's reasonable-doubt rule.

The Supreme Court recognized that legislatures might go to extremes in structuring their criminal codes to evade the proof-beyond-a-reasonable-doubt requirement,⁴⁷ and emphasized that "there are obviously constitutional limits beyond which the States may not go" in this regard.⁴⁸ The Court insisted that every crime contain at least one "element" subject to the reasonable-doubt standard,⁴⁹ though it did not further specify these "obvious constitutional limits" on legislative attempts to avoid the Court's reasonable-doubt rule. The Court did, however, acknowledge the obvious: That the "applicability of the reasonable-doubt standard" has "always been dependent on how a State defines the offense that is charged in any given case."⁵⁰

B.

Several commentators have criticized this formalism in the **307** Court's reasonable-doubt jurisprudence, and have urged the Court to expand the reasonable-doubt rule beyond "elements" to include affirmative defenses or mitigating circumstances.⁵¹ But this was not a realistic option for the Supreme Court. First, there was no source of authority for the Court to impose such an expansive reasonable-doubt rule as a constitutional requirement. The Constitution's text does not mention standards of proof in criminal cases, so the Court instead relied on tradition to justify its reasonable-doubt rule as a constitutional due-process requirement.⁵² Yet the traditional scope of proof-beyond-

⁴⁶ See, e.g., 18 USC § 2243(a), (c) (2000 & Supp 2006) (criminalizing consensual sexual acts with minors under the age of 16 and at least four years younger than the defendant, yet providing that in such prosecutions, "it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years").

⁴⁷ See *Patterson*, 432 US at 210–211 & n 12.

⁴⁸ See *id* at 210.

⁴⁹ See *id* (stating that a legislature cannot "declare an individual guilty or presumptively guilty of a crime," and cannot "create a presumption of all of the facts essential to guilt") (quoting *McFarland v American Sugar Rfg. Co.*, 241 US 79, 86 (1916), and *Tot v United States*, 319 US 463, 469 (1943)).

⁵⁰ See 432 US at 211 n 12.

⁵¹ See generally, e.g., Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L J 1299 (1977); Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 Cal L Rev 1665 (1987); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 Hastings L J 457 (1989).

⁵² See, e.g., *Winship*, 397 US at 361–62 (observing that the proof-beyond-a-reasonable-doubt standard "dates at least from our early years as a Nation" and noting the "virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions"). But see Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 BU L Rev 507, 519–24 (1975) (claiming that states did not regularly employ the reasonable-doubt rule until the 1820s, and that many other states did not instruct juries in reasonable-doubt terms until 1850 or later).

a-reasonable-doubt was limited. Both English and American law long required criminal defendants to bear some burden of proof on “affirmative defenses” such as insanity and self-defense.⁵³ Prohibiting this time-honored burden-shifting in the name of a rule found in tradition would be an opportunistic and unprincipled use of tradition as a source of legal authority. This is not, however, a reason to similarly limit the right of jury trial, which has a different historical pedigree. There is no longstanding tradition suggesting that certain categories of facts should be excluded from the jury’s factfinding role. Indeed, to the extent that history informs the meaning of the criminal jury guarantee, it suggests that juries should simply resolve “questions of fact,” regardless of the standard of proof.⁵⁴

Second, an expansive reasonable-doubt rule could defeat one of the Court’s stated purposes for imposing proof beyond a reasonable doubt as a constitutional requirement. When the Court inferred this standard-of-proof requirement from the Due Process clause, it explained that such a rule was necessary to “command the respect and confidence of the community in applications of ****308** the criminal law.”⁵⁵ But if the Supreme Court required prosecutors to disprove all affirmative defenses or mitigating facts beyond a reasonable doubt, many jurisdictions would repeal or constrict the scope of existing defenses and be reluctant to recognize new ones. The upshot would be more crude and overinclusive definitions of crimes that do not sufficiently account for mitigating circumstances,⁵⁶ forcing less culpable defendants to rely on more capricious and less transparent devices such as prosecutorial discretion or jury nullification. Such an outcome could actually sap public respect for the criminal justice system, contrary to the goals that led the Court to constitutionalize the reasonable-doubt rule in the first place.

But again, these concerns should not necessarily lead to corresponding limits on the scope of the Sixth Amendment jury right. It is doubtful that extending the jury right to affirmative defenses of mitigating facts would tilt the substantive criminal law in a manner that provokes legislative correction. Expanding the jury’s factfinding role at the expense of judges would not be likely to increase the odds of acquittal in the way that heightening the government’s burden of proof would; indeed, empirical data show that acquittal rates are actually lower in jury trials than in bench trials.⁵⁷ But even if the political branches were to respond by removing certain facts from the jury’s domain by broadening the scope of criminal liability, such a response would not undermine the purposes of the jury guarantee by, for example, allowing judges to resolve disputed issues of fact. Finally, even if an expansive jury role will hurt some criminal defendants in the

⁵³ See, e.g., Blackstone, 4 *Commentaries* *201 (cited in note 22) (stating that at common law the criminal defendant bore the burden of proving “all [] circumstances of justification, excuse or alleviation”).

⁵⁴ See Section I.

⁵⁵ *Winship*, 397 US at 364.

⁵⁶ See *Patterson*, 432 US at 207–209, 214 n 15.

⁵⁷ See, e.g., James P. Levine, *Jury Toughness: The Impact of Conservatism on Criminal Jury Verdicts*, 29 *Crime & Delinquency* 71, 78, 85–87 (1983) (analyzing nearly 125,000 jury trials and over 50,000 bench trials in federal and state jurisdictions throughout the United States and concluding that juries were more likely to convict than judges); Andrew D. Leipold, *Why Are Federal Judges so Acquittal Prone?*, 83 *Wash U L Q* 151, 152 (2005) (noting that from 1989 to 2002, the average conviction rate in federal court was 84 percent for jury trials, but 55 percent for bench trials).

long run by provoking legislative responses that broaden substantive crimes or toughen sentences, such considerations should be as irrelevant as they were in *Taylor*, where the Court's decision might have worked to the long-term detriment of criminal defendants, yet the Court **309 elided these concerns in its efforts to vindicate popular participation in the judicial branches of government.

Third, when the Constitution allows governments to abolish affirmative defenses or mitigating circumstances, it is hard to justify a constitutional barrier to regimes that merely ease the government's burden of proof on such facts.⁵⁸ But this sort of reasoning, which holds that a legislature's "greater power" to abolish a defense logically entails the "lesser power" to define the standards of proof, cannot justify similar limits on the right of jury trial. Because the jury right is a structural right designed to promote popular sovereignty and limit judicial power over factfinding, there is nothing illogical about insisting that juries determine affirmative defenses or mitigating circumstances while acknowledging a legislature's "greater power" to repeal any such defenses or mitigating facts. In either case, the principle of popular sovereignty will be preserved, either by the jury's factfindings, or by the decision of elected officials that an issue should not be relevant in determining guilt or punishment. On top of that, the Sixth Amendment's text provides a right of jury trial "in all criminal prosecutions," no matter how a legislature chooses to define its substantive criminal law. That a legislature *might* remove facts from the jury by making the substantive criminal law more harsh does not render the Sixth Amendment jury right inapplicable when it provides affirmative defenses and mitigating facts in criminal prosecutions as a matter of grace. The reasonable-doubt rule, by contrast, lacks these structural dimensions, and there is no textual hook in the Constitution that suggests its scope, so it is far more sensible for the Court to regard it as a default rule, applicable only to facts characterized as "elements," which avoids the illogical consequences from a more expansive rule.

Each of these considerations compelled the Court to limit the reasonable-doubt rule to the "elements" of criminal offenses, but none of them justifies similar limits on the constitutional jury guarantee. Yet the Supreme Court's cases have simply assumed that the jury right, like the reasonable-doubt rule, should attach only to "elements" of offenses or their "functional equivalents." **310 Part III explains the origins of this misguided idea and shows how it became the foundation of the Court's *Apprendi* jurisprudence. The culprits are two 1986 Supreme Court decisions: *Cabana v Bullock*⁵⁹ and *McMillan v Pennsylvania*.⁶⁰

⁵⁸ See *Patterson*, 432 US at 207–08. See also Ronald Jay 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, 284–285 (1977); John Calvin Jeffries, Jr. and Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L J 1325, 1345 (1979).

⁵⁹ 474 US 376 (1986).

⁶⁰ 477 US 79 (1986).

III.

A.

In 1986, the Supreme Court issued two decisions that used the concept of “elements” to define the scope of the Sixth Amendment right to “trial [] by an impartial jury.” The first of these cases, *Cabana v Bullock*, held that the Sixth Amendment did *not* require juries to make “*Enmund* findings” in death-penalty trials.⁶¹ These findings had been required by an earlier Court decision that limited capital punishment to persons who killed, attempted to kill, or intended to kill.⁶² The respondents in *Cabana* argued that such *Enmund* findings were “constitutionally equivalent to elements of an offense,”⁶³ and the Court rejected this contention. But its opinion went further, suggesting that the respondents’ Sixth Amendment claim failed *because* the *Enmund* findings were not “elements” of the substantive crime of murder. Wrote the Court:

A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence. . . . [O]ur ruling in *Enmund* does not concern the guilt or innocence of the defendant—it *establishes no new elements of the crime of murder that must be found by the jury.*⁶⁴

This left an unfortunate implication that the Sixth Amendment jury right extends only to “elements.” Yet the Court did not in any way explain why the concept of “elements” should determine the scope of a jury’s constitutional factfinding responsibilities.

****311** *McMillan v Pennsylvania*⁶⁵ established a more explicit link between the jury right and the “elements” of crimes subject to the Court’s reasonable-doubt rule. There the Court upheld a state law that imposed a five-year mandatory minimum sentence in cases where a judge found, by a preponderance of the evidence, that the defendant “visibly possessed a firearm” when committing his crime.⁶⁶ The statute insisted that this was not an element of an offense, but a sentencing factor to be considered only after a defendant’s conviction for a predicate crime.⁶⁷ Yet the petitioners maintained that the “visible possession of a firearm” finding was akin to an element and should therefore be subject to the Court’s reasonable-doubt rule.

The Court rejected this contention, concluding that the “visible possession of a firearm” should not be treated as an element and need not be proved beyond a reasonable

⁶¹ 474 US 376. The Supreme Court’s later in decision *Ring v Arizona*, 536 US 584 (2002), casts doubt on *Cabana*’s continued validity. See notes 109–10 and accompanying text.

⁶² See *Enmund v Florida*, 458 US 752, 801 (1982).

⁶³ Brief for Respondent, *Cabana v Bullock*, No 84-1236, *22 (filed Sep 9, 1985) (available on Lexis at 1984 US Briefs 1236).

⁶⁴ *Cabana*, 474 US at 3384–85 (emphasis added).

⁶⁵ 477 US 79 (1986).

⁶⁶ See *id* at 81 n 1 (quoting 42 Pa Cons Stat § 9712(a) (1982)).

⁶⁷ See *id* at 81 n 1 (quoting 42 Pa Cons Stat § 9712(b) (1995)) (“Provisions of this section shall not be an element of the crime”).

doubt.⁶⁸ It emphasized that a legislature's definitions of crimes are "usually dispositive,"⁶⁹ and accepted Pennsylvania's characterization of this fact as a "sentencing factor" affecting only the level of punishment for a crime.⁷⁰ The Court mentioned two situations in which legislative designations of "sentencing factors" might present more serious constitutional concerns: First, the Court warned against sentencing factors that serve as "a tail which wags the dog of a substantive offense."⁷¹ The Court did not elaborate on the meaning of that phrase, nor did it provide examples. Second, the Court wrote that the petitioners' reasonable-doubt claim "would have at least more superficial appeal" if the "visible possession" finding increased the *maximum* allowable punishment for a crime, rather than increasing only the *minimum* punishment.⁷² The Court's overall analysis, however, recognized considerable legislative control over standards of proof, consistent with prior decisions establishing the reasonable-doubt requirement as a default rule that legislatures ****312** may avoid by characterizing facts as something other than "elements."

The petitioners in *McMillan* also argued that the Sixth Amendment required a jury to decide whether they "visibly possessed a firearm." But they did *not* base this claim on their earlier argument that this fact was akin to an "element." Instead, the petitioners maintained that the Sixth Amendment jury right should attach to *any* factual determinations concerning the alleged criminal conduct, regardless of whether such facts qualified as "elements" or whether they increased or decreased a defendant's sentence.⁷³ They conceded that "historical facts" such as a defendant's criminal history need not be submitted to juries because such facts do not pertain to underlying criminal conduct.⁷⁴ Indeed, the DC Circuit's decision in *Jordan v United States District Court for the District of Columbia*⁷⁵ had previously endorsed this distinction between facts relating to "the manner in which a crime was committed" and "historical" facts such as recidivism, requiring juries to determine the former but allowing judges to decide the latter.⁷⁶ The petitioners' brief cited that case along with numerous legal authorities supporting the view that juries should resolve disputed questions of fact relating to underlying criminal conduct.⁷⁷

But the *McMillan* Court held, without any analysis, that the right of jury trial extends only to "elements" of crimes, and not to "sentencing factors." Given its earlier conclusion that the "visual possession of a firearm" finding was not an element, the Court

⁶⁸ Id at 88.

⁶⁹ Id at 85.

⁷⁰ Id at 85–86.

⁷¹ Id at 88. See also id at 89–90.

⁷² Id at 88.

⁷³ See, e.g., Brief for Petitioners, *McMillan v Pennsylvania*, No 85-215, *33–38 (filed Dec 2, 1985) (available on Westlaw at 1985 WL 670131).

⁷⁴ See id at *33 n 38.

⁷⁵ 233 F2d 362 (DC Cir 1956).

⁷⁶ Id at 367.

⁷⁷ See, e.g., Brief for Petitioners at *35 (cited in note 73) (citing Edward Wynne, 3 *Eunomus, or Dialogues Concerning the Law and Constitution of England* § 53, at 205–07 (1768)); id at *35 n 40 (quoting John Hawles, *The Englishman's Right. A dialogue between a Barrister at Law, and a Juryman* 8 (R. Janeway, 1680)).

wrote that the petitioners' Sixth Amendment claim "merit[ed] little discussion," and tossed it aside in a perfunctory sentence: "Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of ****313** fact."⁷⁸ This was a woefully inadequate response to the petitioners' argument.

First, the petitioners never asserted anything resembling a "right to jury sentencing." They advanced a more limited and nuanced claim: That the Sixth Amendment required juries to determine all "critical facts" relating to the alleged criminal conduct, as opposed to "historical facts" such as a defendant's character and background. To be sure, some of these "critical facts" may affect the ultimate sentencing decision. In *McMillan*, for example, the "visible possession of a firearm" finding would lead to a minimum five-year prison sentence. But requiring a jury to decide such "critical facts" is a far cry from requiring the jury to choose the ultimate sentence. Indeed, the petitioners' brief expressly disclaimed any constitutional right to jury sentencing, and carefully explained why their argument did not imply such a right.⁷⁹ Their argument no more implicated a "right to jury sentencing" than the Supreme Court's holding in *Ring v Arizona*⁸⁰ that juries must find statutory aggravating factors in death penalty cases.⁸¹

Second, the *McMillan* Court gave no reasons for limiting the jury right to the "elements" subject to the Court's reasonable-doubt rule. Its opinion parroted the slapdash analysis in the respondents' brief, which asserted (without reasons or citations) that the Sixth Amendment jury right extends only to "elements" of crimes,⁸² and raised the straw man of a right to jury sentencing in response to the petitioners' Sixth Amendment argument.⁸³ But neither the Court nor the respondents attempted to explain why the "elements" test should define the jury's constitutional factfinding role. This silence was especially puzzling given that the Second Circuit's *Kramer* opinion, authored by Judge Friendly, had already extended the Sixth Amendment jury right beyond the "el- ****314** ements" of criminal offenses to "sentencing facts" that affected only a defendant's punishment.⁸⁴

In every case subsequent to *McMillan*, the Justices and the Court's practitioners have labored under its unsupported premise that the jury right is co-extensive with the

⁷⁸ *McMillan*, 477 US at 93 (citing *Spaziano v Florida*, 468 US 447, 459 (1984)).

⁷⁹ See, e.g., Brief for Petitioners at *38 (cited in note 73).

⁸⁰ 536 US 584 (2002).

⁸¹ See *id.* at 597 n 4 ("Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . . [H]e [does not] argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty.") (emphasis added).

⁸² See Brief for Respondent, *McMillan v Pennsylvania*, No 85-215, *12-13 (filed Oct 1985) (available on Westlaw at 1985 WL 670135).

⁸³ See *id.* at *13 ("[T]he relevant inquiry is whether the sixth amendment requires a sentencing jury. It is clear that the sixth amendment carries no such requirement. There is no sixth amendment right to jury sentencing") (citing *Spaziano*, 468 US at 460).

⁸⁴ See *United States v Kramer*, 289 F2d 909, 920-21 (2d Cir 1961). See also notes 31-35 and accompanying text.

reasonable-doubt rule, attaching only to “elements” of crimes. Several post-*McMillan* decisions, for example, refused to extend the right of jury trial to aggravating factors that render a defendant eligible for capital punishment on the ground that such facts are not “elements” of crimes.⁸⁵ And in *Sullivan v Louisiana*,⁸⁶ the Court made the connection even more explicit, writing, “It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.”⁸⁷ *Sullivan* went on to hold that a constitutionally deficient reasonable-doubt instruction violated the defendant’s *Sixth Amendment right of jury trial*, because “the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.”⁸⁸ It did not account for the possibility that the Sixth Amendment might require jury findings on factual issues outside the scope of the reasonable-doubt rule.⁸⁹

Perhaps the most dramatic post-*McMillan* opinion linking the scope of the jury right with the reasonable-doubt rule and the concept of “elements” was Justice Scalia’s dissent in *Monge v California*.⁹⁰ *Monge* held that a court’s refusal to find a sentencing enhancement is not an “acquittal” of an “offense” for purposes of the Double Jeopardy clause. Justice Scalia’s dissent, however, argued that sentencing enhancements that increase a defendant’s maximum allowable sentence are akin to “elements” of a separate, aggravated “crime,” and that refusals to find such enhancements represent “functiona[l] acquit[als]” of such crimes.⁹¹ Then he went even further, claiming that the concept of “elements” defined the scope of the Sixth Amendment right of jury trial as well as the Double Jeopardy clause and the reasonable-doubt rule:

“The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence provides the foundation for our entire double jeopardy jurisprudence *The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt.*”⁹²

Justice Scalia’s *Monge* dissent presaged the Court’s *Apprendi* jurisprudence in two ways. First, it expressly linked the right of jury trial with the reasonable-doubt rule,

⁸⁵ See, e.g., *Clemons v Mississippi*, 494 US 738, 745–746 (1990); *Hildwin v Florida*, 490 US 638, 639–41 (1989); *Walton v Arizona*, 497 US 639, 647–49 (1990). The Court overruled these cases in *Ring v Arizona*, 536 US 584, 609 (2002) (holding that statutory aggravating factors in death-penalty cases are the “functional equivalent” of “elements,” and must therefore be found by a jury) (quoting *Apprendi*, 530 US at 494 n 19).

⁸⁶ 508 US 275 (1993).

⁸⁷ *Id.* at 278.

⁸⁸ *Id.* (emphasis added).

⁸⁹ See also *United States v Gaudin*, 515 US 506, 510 (1995) (“[The Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”); *id.* at 511 (“The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.”).

⁹⁰ 524 US 721 (1998).

⁹¹ See *id.* at 741 (Scalia, J, dissenting).

⁹² *Id.* at 738 (Scalia, J, dissenting) (emphasis added).

and limited both to “elements” of “crimes.” Second, it sought to give meaningful content to the jury right and other constitutional provisions by setting forth an expansive view of “elements” that does not depend on labels used in criminal codes, and turns instead on whether a fact increases the range of punishment to which a defendant is exposed. Subpart B describes how the Court’s *Apprendi* jurisprudence endorsed and expanded on the approach that Justice Scalia urged in *Monge*.

B.

Apprendi v New Jersey perpetuated the Supreme Court’s link between the jury right and the reasonable-doubt rule. The petitioner had pleaded guilty to a firearms offense that normally carried a maximum penalty of ten years’ imprisonment.⁹³ But the trial court imposed a twelve-year sentence because of New Jersey’s hate-crimes law, which increased the maximum allowable sentence to twenty years’ imprisonment if a trial judge finds, by a preponderance of the evidence, that the defendant acted with a “purpose ****316** to intimidate” an individual because of race.⁹⁴ The petitioner protested that this regime violated his right of jury trial and the Court’s proof-beyond-a-reasonable-doubt rule.

Once again, the Court proceeded as if the jury right and the reasonable-doubt rule were identical in scope. The Court described its proof-beyond-a-reasonable-doubt requirement as “the companion right” to the right of jury trial,⁹⁵ with each extending to the “elements” of crimes: “*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.’”⁹⁶

Unlike prior decisions, however, the *Apprendi* Court refused to limit these protections to facts designated as “elements” in criminal codes, an approach that would allow legislatures to circumvent the jury right by redesignating “elements” as “sentencing factors.”⁹⁷ Instead, the Court decided that the concept of “elements” should depend on *effects* at sentencing rather than labels used in statutes. It claimed that historical practice showed that “facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition ‘elements’ of a separate legal offense.”⁹⁸ From this

⁹³ See NJ Stat Ann § 2C:43-6(a)(2) (West 2006).

⁹⁴ See NJ Stat Ann § 2C:44-3(e) (West 2001) (repealed by 2001 NJ Sess Law Serv 443 (West)).

⁹⁵ *Apprendi*, 530 US at 478.

⁹⁶ *Id* at 477 (emphases added) (citations omitted). See also *id* at 484 (describing the extent of “*Winship’s* due process and associated jury protections”) (emphasis added); *id* at 483–84 (“[P]ractice 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.”).

⁹⁷ See *id* at 494 (noting that “[l]abels do not afford an acceptable answer”) (citation omitted); see also *Ring*, 536 US at 605 (“[T]he characterization of a fact or circumstance as an ‘element’ or a ‘sentencing factor’ is not determinative of the question ‘who decides,’ judge or jury.”).

⁹⁸ *Apprendi*, 530 US at 483 n 10. The Court also cited with approval the portions of Justice Thomas’s concurrence that argued that courts historically treated such sentencing enhancements as elements of separate, aggravated crimes. *Id* (citing *Apprendi*, 530 US at 501–04 (Thomas, J, concurring)).

observation the Court held that any fact, other than the fact of a prior conviction,⁹⁹ that increases the penalty for a crime beyond the “maximum authorized statutory ****317** sentence” is the “*functional equivalent* of an element of a greater offense,”¹⁰⁰ and must be submitted to a jury and proved beyond a reasonable doubt.¹⁰¹ The Court distinguished *McMillan*, where the sentencing enhancement increased only the minimum punishment, and did not raise the statutory maximum.¹⁰²

Justice Thomas's concurrence argued for an even broader view of “elements.”¹⁰³ He agreed that courts should look beyond a legislature's designations, but he thought that “elements” should include any fact established by law as a basis for *imposing or increasing* punishment, even if such facts do not raise the “statutory maximum” punishment.¹⁰⁴ He urged the Court to overrule *McMillan*, because facts establishing mandatory minimums increase a defendant's punishment and should therefore be deemed “elements.” But he acknowledged that “fact[s] that mitigat[e] punishment” are not “elements” subject to the constitutional jury or standard-of-proof requirements.¹⁰⁵

Post-*Apprendi* decisions continued to link the scope of the jury right with the reasonable-doubt rule and the concept of “elements.” In *Harris v United States*,¹⁰⁶ the Court reaffirmed *McMillan*'s holding that sentencing facts that impose mandatory minimums, without increasing a defendant's maximum allowable punishment, are not “elements” for constitutional purposes, and need not be charged by prosecutors, submitted to juries, or proved beyond a reasonable doubt. The plurality opinion, like *McMillan*, assumed that the jury's constitutional factfinding responsibilities extended only to “elements” of crimes, and did not consider the possibility that they might extend beyond that; the plurality wrote that facts that “are not elements *are thus not subject to the Constitution's . . . jury . . . requirements.*”¹⁰⁷ Justice Breyer concurred in the judgment based on his continued disagreement with *Apprendi*'s holding; he claimed that he could not “easily distinguish *Apprendi v New Jersey* from this case.”¹⁰⁸ But whatever tension may exist between *Apprendi* and the *Harris* plurality opinion, they have this much in common: Each opinion links the jury right with the reasonable-doubt rule and limits both to the “elements” of crimes or their “functional equivalents.”

⁹⁹ The Court excluded recidivist sentencing enhancements because of its decision in *Almendarez-Torres v United States*, 523 US 224, 226-27 (1998) (holding that 8 USC § 1326(b)(2) (2000), which enhances penalties for recidivist criminals, was not an “element” of a crime and need not be charged in an indictment, even if it increases the maximum punishment that could otherwise be imposed).

¹⁰⁰ *Apprendi*, 530 US at 494 n 19 (emphasis added).

¹⁰¹ *Id* at 490. See also *id* at 494 n 19 (“[W]hen the term ‘sentence enhancement’ is used to describe an increase beyond the maximum authorized statutory sentence, . . . it fits squarely within the usual definition of an ‘element’ of the offense.”).

¹⁰² See *id* at 487 n 13.

¹⁰³ See *id* at 499–523 (Thomas, J, concurring).

¹⁰⁴ *Id* at 501 (Thomas, J, concurring).

¹⁰⁵ See *id* at 500, 501 (Thomas, J, concurring).

¹⁰⁶ 536 US 545 (2002).

¹⁰⁷ *Id* at 549 (plurality opinion) (emphasis added).

¹⁰⁸ *Id* at 569 (Breyer, J, concurring in the judgment).

Three more decisions reaffirmed and clarified the scope of *Apprendi*. *Ring v Arizona*¹⁰⁹ held that aggravating factors that render a defendant eligible for capital punishment are “functional equivalent[s]” of “element[s],” which must be found by a jury beyond a reasonable doubt.¹¹⁰ *Blakely v Washington*¹¹¹ clarified that *Apprendi* applies to any fact that increases the maximum sentence that could be imposed based *solely* on facts found by a jury or admitted by the defendant.¹¹² Finally, *United States v Booker*¹¹³ found the Federal Sentencing Guidelines unconstitutional to the extent that they allowed judicial factfinding to increase a defendant’s maximum allowable penalty. To remedy this constitutional defect, the Court decided to invalidate the statutory provisions that made the Guidelines mandatory.¹¹⁴ As advisory Guidelines, judicial factfinding would no longer alter “statutory maximum” sentences and would not implicate the *Apprendi* rule. Throughout its opinion, however, the Court reaffirmed and recited *Apprendi*’s formulation that linked the scope of the jury right with the reasonable-doubt ****319** rule.¹¹⁵

Factfinder:		
Standard of Proof:	Right to Jury Determination	No Right to Jury
Proof Beyond Reasonable Doubt Required	Elements “ <i>Apprendi</i> facts” (or “Functional Equivalents” of Elements)	
Less than Proof Beyond Reasonable Doubt Allowed		All Other Sentencing Factors

Fig. 1

Figure 1 illustrates the Court’s current approach to the constitutional jury and standard-of-proof requirements in felony prosecutions. This approach leaves the bottom-left and top-right boxes as null sets.¹¹⁶ But tying the jury right with the reasonable-doubt rule has created two serious problems in the Court’s *Apprendi* jurisprudence. Part IV

¹⁰⁹ 536 US 584 (2002).

¹¹⁰ Id at 609 (quoting *Apprendi*, 530 US at 494 n 19). This overruled earlier decisions holding that the Sixth Amendment did not require jury findings on such aggravating factors. See note 85.

¹¹¹ 542 US 296 (2004).

¹¹² See id at 303–04 (“In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”).

¹¹³ 543 US 220 (2005).

¹¹⁴ Id at 244–268.

¹¹⁵ See, e.g., id at 230–31, 244.

¹¹⁶ Because the Supreme Court has held that juries are not required for “petty” offenses, see, e.g., *Blanton v City of North Las Vegas*, 489 US 538 (1989), there may be situations in certain non-felony prosecutions where the Court’s jurisprudence would require proof beyond a reasonable doubt without requiring a jury determination. But as for felony prosecutions, the Court treats the jury right and the reasonable-doubt rule as coterminous.

shows that the Court has failed to provide “intelligible content” to the right of jury trial because it has trapped the jury right within the reasonable-doubt rule’s formalism. Because the Court cannot extend the reasonable-doubt rule to affirmative defenses and “mitigating” circumstances, its *Apprendi* jurisprudence excludes “mitigating” sentencing facts from the jury’s domain, producing an overly formalistic jury right that is easily evaded by legislatures. Worse, there is no sound basis on which to distinguish “aggravating” from “mitigating” sentencing facts for purposes of the Sixth Amendment jury right. Deciding that a so-called “mitigating” fact has *not* been proved will increase a defendant’s sentence from that which would otherwise be imposed, no less than finding that an “aggravating” fact *has* been proved. Part V shows that *Apprendi*’s all-too-limited limited efforts to expand the jury right has led courts to adopt overbroad and historically indefensible understandings of “elements” and “crimes.”

IV.

A.

Although the Supreme Court claims that *Apprendi* gives “intelligible content to the right of jury trial,”¹¹⁷ its failure to extend ****320** the jury right to facts that *mitigate* punishment allows legislatures and sentencing commissions to continue to shift factfinding power from juries to judges, either by converting “elements” of crimes into affirmative defenses, or by transforming aggravating sentencing facts into mitigators that describe the absence of aggravating conduct.¹¹⁸ This loophole is a result of the Court’s unwillingness to extend the reasonable-doubt rule to such facts, and its unwarranted assumption that the jury right can extend no further.

To see this, suppose a legislature or sentencing commission provided a penalty range of 10 to 20 years for a firearms offense, which drops to 5 to 10 years if the defendant proves, by a preponderance of the evidence, that he did *not* act “with a purpose to intimidate an individual or group of individuals because of race.” Neither *Apprendi*’s holding nor the more expansive rule urged in Justice Thomas’s concurrence would have anything to say about this, even though the judge decides whether the defendant will be exposed to a sentence beyond ten years’ imprisonment.¹¹⁹ The courts would intervene only if they regarded the “purpose to intimidate” issue as a “tail which wags the dog of a substantive offense.”¹²⁰

¹¹⁷ *Blakely*, 542 US at 305.

¹¹⁸ See *Apprendi*, 530 US at 540–543 (O’Connor, J, dissenting); *Blakely*, 542 US at 339 (Breyer, J, dissenting); *Jones v United States*, 526 US 227, 267 (1999) (Kennedy, J, dissenting); Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U Chi Legal F 149, 197 (noting that the conversion of aggravating factors into mitigators “was for some time following *Blakely* the favored option of important decisionmakers in the Justice Department and among some key congressional staff”); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 Geo L J 183, 198 (2005) (concluding that *Apprendi* “will not suffice to prevent erosion of” the jury right because it is “remarkably easy to evade”).

¹¹⁹ See *Apprendi*, 530 US at 490 n 16; *id* at 501 (Thomas, J, concurring).

¹²⁰ *McMillan*, 477 US at 88.

The *Apprendi* Court was unfazed by this scenario. It predicted that the political branches would acquiesce, and would not try to recast sentencing enhancements as “mitigating facts” that describe the absence of aggravating conduct. Such action “seems remote,” the Court explained, because “structural democratic constraints” would discourage legislatures or sentencing commissions from evading the jury right in this fashion.¹²¹ For this reason, the Court felt that it was not necessary to extend the jury right to mitigating sentencing facts.

****321** The Court’s reliance on “structural democratic constraints” as a means to protect the jury’s factfinding responsibilities from legislative evasion is not convincing. Any such decision to rely on political safeguards over judicial enforcement of a constitutional norm should be justified by institutional considerations. There must be concrete reasons to believe either that courts are ill-equipped to fully enforce a constitutional principle, or that the political branches will respect a constitutional norm without the courts’ help. The Court’s reluctance to enforce a strong “nondelegation doctrine,” for example, can be defended by institutional difficulties in fashioning a principled judicial doctrine that distinguishes between permissible and impermissible delegations.¹²² And court decisions that rely on “political safeguards” to protect norms of constitutional federalism provide specific institutional reasons to be sanguine about Congress’s willingness to respect state prerogatives.¹²³ This sort of institutional analysis is necessary to prevent the concept of “political safeguards” from becoming a convenient cubbyhole into which judges can relegate disfavored constitutional provisions for underenforcement.

Yet the *Apprendi* opinion did not note any institutional problems that might arise if courts were to extend the jury right to mitigating sentencing facts. Although Justice Breyer’s dissent asserted that such a regime would be impracticable, on the ground that there are “far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury,”¹²⁴ this seems an overstatement. Such regimes are already the norm for capital sentencing; the Federal Death Penalty Act (and many state laws) require jurors to make findings on every relevant mitigating and aggravating factor during the sentencing phase.¹²⁵ And the number ****322** of mitigating facts in such capital cases is potentially infinite; federal law requires jurors to consider “*any* mitigating factor”

¹²¹ *Apprendi*, 530 US at 490 n 16.

¹²² See, e.g., *Mistretta v United States*, 488 US 361, 415 (1989) (Scalia, J, dissenting) (“[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. . . . [W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”); see also Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich L Rev 303, 311 (1999) (describing the nondelegation doctrine as a “genuine, but judicially underenforced, constitutional norm”).

¹²³ See, e.g., *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 551 (1985); see generally Herbert Wechsler, *The Political Safeguards of Federalism*, 54 Colum L Rev 543 (1954); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum L Rev 215 (2000).

¹²⁴ *Apprendi*, 530 US at 557 (Breyer, J, dissenting).

¹²⁵ See, e.g., 18 USC § 3593(d) (2000).

beyond the eight enumerated factors in the death-penalty statute.¹²⁶ California's Penal Code similarly requires jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime,"¹²⁷ which, in one capital case, allowed jury consideration of a dance choreography prize that the defendant received while in prison.¹²⁸ The widespread use of such regimes makes it difficult to see any institutional problems with requiring juries to find mitigating sentencing facts along with sentencing enhancements that raise the maximum punishment.

More importantly, the *Apprendi* opinion offered no reasons to believe that political processes will preserve a meaningful factfinding role for the jury, absent a requirement that juries find all disputed sentencing factors, including mitigators. Jury factfinding in criminal sentencing has little political currency. During recent House Judiciary Committee hearings on responses to *Booker*, none of the four witnesses proposed a system in which the jury would play any factfinding role at sentencing.¹²⁹ Nor is this surprising. Even William Blackstone, who praised the criminal jury as "the grand bulwark" of English liberties,¹³⁰ recognized that jury factfinding produces "inconveniences,"¹³¹ and strong political constituencies naturally coalesce behind more convenient principles such as equality and even-handedness in the criminal justice system. Tough-on-crime politicians want sentencing uniformity and predictability as a means to promote deterrence. And politicians that sympathize with the criminal defense bar, or with criminal suspects, are equally unlikely to advocate a system that produces disparities in criminal punishment. On top of this, the future criminal defendants who might benefit from jury factfinding are unknown, and cannot lobby for an expansive jury right. For all these ****323** reasons, the right of jury trial seems an especially poor candidate for reliance on political safeguards or for treatment as an "underenforced constitutional norm."¹³²

Apprendi therefore amounts to little more than an option for legislatures or sentencing commissions to choose between jury fact-finding (by creating sentencing facts that purport to "aggravate" a defendant's maximum allowable sentence) or judge factfinding (by creating "mitigating" sentencing facts that describe the absence of aggravating conduct). Although the reasonable-doubt rule is similarly structured as a default rule that legislatures may evade, in that situation the court could not justify an expansive rule that attaches to "affirmative defenses," or "mitigating circumstances," so an easily evaded standard-of-proof requirement was the lesser of two evils. But the Court's valid reasons for limiting the reasonable-doubt requirement as a default rule do

¹²⁶ See 18 USC § 3593(c) (2000 & Supp 2002) (emphasis added). See also 18 USC § 3593(d) (2000).

¹²⁷ Cal Penal Code § 190.3(k) (West 2006).

¹²⁸ See *Boyd v California*, 494 US 370, 382 n 5 (1990).

¹²⁹ See *United States v. Booker: One Year Later—Chaos or Status Quo?* Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security, 109th Cong, 2d Sess (2006); see also Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 *Houston L Rev* 341, 371–72 (2006).

¹³⁰ Blackstone, 4 *Commentaries* at *342 (cited in note 22).

¹³¹ *Id* at *343–344.

¹³² See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv L Rev* 1212 (1978).

not carry over to the jury right,¹³³ and it is hard to see how treating the jury right as a default rule is consistent with the Supreme Court's stated goal of giving "intelligible content" the right of jury trial.

B.

Apprendi's conception of the jury right suffers from a more serious problem: There is no coherent basis to distinguish "facts in aggravation of punishment" from "facts in mitigation"¹³⁴ for purposes of the right of jury trial. Consider again the hypothetical discussed in subsection A, where conviction for a firearms offense triggers a penalty range of 10 to 20 years, which drops to 5 to 10 years if the defendant proves, by a preponderance of the evidence, that he did *not* act "with a purpose to intimidate an individual or group of individuals because of race." This regime is functionally identical to what the Supreme Court nixed in *Apprendi*; in both cases the defendant's maximum sentence will be increased ten years if a judge concludes that it is more likely than not that he acted with a biased purpose to intimidate. The only difference is that the defense (rather than the prosecution) bears the burden of proof on the "purpose to intimidate" issue. But **324 legislative choices that allocate burdens of proof should not affect constitutional requirements regarding the identity of the factfinder; the Court's contrary view is another unfortunate result of its decision to link the jury right with its standard-of-proof requirements.

Neither *Apprendi* nor subsequent cases made a serious effort to explain how "aggravating" and "mitigating" facts can be distinguished for Sixth Amendment purposes, given that a failure to find a "mitigating" fact enhances a defendant's maximum sentence just as surely as an "aggravator." All that *Apprendi* had to say was that judicial determinations of "mitigating" facts "neither expos[e] the defendant to a deprivation of liberty greater than that authorized by the [jury's] verdict," nor "impos[e] upon the defendant a greater stigma than that accompanying the jury verdict alone."¹³⁵ But this analysis is circular; the extent of punishment and stigma "authorized" by the jury's verdict itself depends on whether the defendant can establish the relevant "mitigating facts."

Justice Thomas's concurrence defended this distinction between "aggravating" and "mitigating" sentencing facts by arguing that the jury right should extend only to facts that are "a basis for imposing or increasing punishment."¹³⁶ This, however, is a non sequitur. When a "mitigating" circumstance decreases a defendant's maximum allowable sentence, the absence of that circumstance is a "basis for imposing" any punishment exceeding the mitigated penalty range. Recall *Patterson v New York*, where New York provided an affirmative defense for those who killed "under the influence of extreme emotional disturbance."¹³⁷ That the defendant had *not* acted under the influence of

¹³³ See Section II.B.

¹³⁴ See *Apprendi*, 530 US at 490 n 16.

¹³⁵ *Id.*

¹³⁶ See *id.* at 501 (Thomas, J, concurring).

¹³⁷ NY Penal Law § 125.25(1)(a).

“extreme emotional disturbance” was the “basis” for sentencing him to life imprisonment, rather than a reduced penalty. Even though the defendant bore the burden of proof on this issue, the factual determination was as much a “basis” for his punishment as the fact that he caused the death of another human being. Each fact was necessary to expose him to life imprisonment.

The Court's *Apprendi* jurisprudence fails to recognize that sentencing facts are “aggravating” or “mitigating” only in relation to ****325** some baseline from which departures are measured.¹³⁸ Just as the failure to confer a property-tax exemption can “penalize” a constitutional right,¹³⁹ so too the refusal to find a “mitigating” fact can “increase” a defendant's otherwise applicable maximum sentence. To see this, consider once again our earlier hypothetical, where conviction for a firearms offense triggers 10 to 20 years' imprisonment, unless the defendant proves, by a preponderance of the evidence, that he did *not* act with a “purpose to intimidate an individual or group of individuals because of race,” which drops the penalty to 5 to 10 years. One might view this sentencing fact as “lowering” the maximum sentence from 20 to 10 years in cases where the defendant satisfies his burden of proof. This perspective uses the 20-year maximum sentence as its benchmark, the highest possible penalty the judge could impose. Yet one might instead view a defendant's failure to satisfy his burden of proof as triggering a “penalty” that raises his maximum punishment from 10 to 20 years. This view uses the lower of the two sentencing ranges as the baseline for measurement.

*Blakely v Washington*¹⁴⁰ purported to adopt a baseline when it defined the “statutory maximum” as the highest sentence a judge may impose “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”¹⁴¹ The Court explained: “[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”¹⁴² It is not immediately clear what this means; modern sentencing regimes almost always require *some* assessment of factual evidence before a “maximum sentence” can be ascertained. Consider again our aforementioned hypothetical sentencing regime; the judge must make some decision regarding whether the defendant satisfied his burden of proof on the “purpose to intimidate” mitigator before *any* “maximum sentence” can be ascertained. If he decides that the ****326** defendant proved that he did not act with a biased “purpose to intimidate,” the maximum punishment is 10 years. Otherwise the judge would decide that the defendant failed to carry his burden of proof on this issue, which triggers a 20-year maximum. *There is no* “statutory maximum” that can be ascertained without *some* decision regarding a party's ability to carry his burden on the existence of sentencing facts.

¹³⁸ Cf. Cass R. Sunstein, *Lochner's Legacy*, 87 Colum L Rev 873 (1987).

¹³⁹ See *Speiser v Randall*, 357 US 513 (1958).

¹⁴⁰ 542 US 296 (2004).

¹⁴¹ See *id* at 303 (emphasis omitted).

¹⁴² See *id* at 303–04. See also *Cunningham v California*, 127 S Ct 856, 869 (2007) (holding that “the jury's verdict alone” must authorize a sentence to comport with the Sixth Amendment).

The *Blakely* Court seems to be suggesting that its “statutory maximum” baseline is the highest sentence a court may impose, if all sentencing facts are resolved adversely to the party bearing the burden of proof. On this view, when a party fails to satisfy its burden of proof with regard to a sentencing fact, there is no “finding” that alters the baseline punishment. That means that when criminal defendants bear the burden of proof with regard to a sentencing fact, it is a “mitigating fact” that need not be submitted to the jury. By contrast, when prosecutors bear the burden of proof with regard to a sentencing fact, it is an “aggravating fact” and belongs to the jury if it increases the baseline maximum punishment.

But the Court has provided no reasons why the scope of the jury right should depend on who bears the burden of proof, and none is apparent. A determination that a “mitigating” sentencing fact has not been established exposes the defendant to punishment beyond that which he would otherwise receive; the effect is no different from finding an aggravating fact that increases the maximum punishment beyond what could otherwise be imposed. The only difference is that the defendant has been assigned the burden of proof in the former case. The Constitution may allow legislatures or sentencing commissions to choose how to allocate burdens of proof given the limited scope of the reasonable-doubt rule,¹⁴³ but why should this affect what the Constitution requires regarding the identity of the factfinder, especially when there is no difference in the effect of the factfinder’s decision? Allowing the right to a jury determination to depend on legislative decisions to allocate the burdens and standards of proof seems arbitrary.

Not only is this baseline arbitrary, it is almost entirely within the control of the political branches. When constitutional rights ****327** are at stake, the Supreme Court rarely allows its analysis to proceed from baselines over which the political branches have near-plenary control. That much is clear from the many decisions in the Court’s “unconstitutional conditions” genre.¹⁴⁴ It is hard to see why the Sixth Amendment jury right should be different in this regard, nor has the court suggested a reason why. While the Court allows the scope of its constitutional reasonable-doubt requirement to depend on decisions of the political branches, those limits are necessary to prevent the Court from overstepping its authority by expanding the reasonable-doubt requirement beyond its traditional scope, and to avoid creating incentives for crude and overinclusive criminal laws that would defeat the Court’s stated purposes for the reasonable-doubt rule.¹⁴⁵ None of these reasons carries over to the jury right.

Finally, some sentencing statutes do not specify which party bears the burden of proof, making it difficult to determine whether a sentencing fact increases or decreases the “statutory maximum” under *Blakely*. Consider the a few provisions of the federal drug statutes, which establish a range of penalties that depend on drug type and quantity.¹⁴⁶ For persons convicted of distributing marijuana, 21 USC § 841(b)(1)(C)

¹⁴³ See Section II.

¹⁴⁴ See, e.g., *FCC v League of Women Voters*, 468 US 364, 399–401 (1984); *Sherbert v Verner*, 374 US 398, 405–06 (1963); *Arkansas Writers’ Project v Ragland*, 481 US 221, 229 (1987).

¹⁴⁵ See Section II.B.

¹⁴⁶ See 21 USC § 841(b)(1)–(4) (2000 & Supp 2002).

provides a maximum sentence of 20 years, plus fine. But then 21 USC § 841(b)(1)(D) provides that persons distributing less than 50 kilograms of marijuana may be punished with a sentence of no more than five years' imprisonment (plus fine). And 21 USC § 841(b)(4) goes even further, saying that those who distributed only "a small amount of marijuana for no remuneration" may not be imprisoned for more than one year. Yet nowhere does the statute specify whether the prosecution or the defense must prove whether the amount of marijuana falls within the ranges provided in sections 841(b)(1)(D) or 841(b)(4).¹⁴⁷ Hence, the statute does not indicate whether the "statutory maximum" under *Blakely* should be the 20 years' imprisonment plus fine provided in section 841(b)(1)(C), the five years' imprisonment plus fine provided in section 841(b)(1)(D), or the one year in prison plus fine allowed by section 841(b)(4). Judges are left with little guidance in choosing from among these options.¹⁴⁸

In some respects, *Apprendi's* attempt to distinguish "aggravating" and "mitigating" facts contains echoes of the "right/privilege" distinction that used to hold sway in constitutional law.¹⁴⁹ The Justices might think that facts that purport to increase a defendant's maximum allowable punishment implicate his "right" to be free from confinement, whereas facts that decrease the maximum punishment confer a "privilege" and therefore do not implicate the Sixth Amendment jury right. Justice Scalia's *Apprendi* concurrence contained shades of this reasoning, claiming that it was "not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years—and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge."¹⁵⁰

The problem with this view is that mitigating facts that lower a defendant's maximum allowable sentence do not confer "privileges" or "mercy" when they represent *legal entitlements* to be free from certain levels of punishment. A judge who wrongfully withholds this entitlement does not fail to dispense mercy, but deprives the defendant of a legal claim to freedom. That such deprivation is accomplished by the failure to find a mitigating fact, as opposed to the finding of a sentencing enhancement, should make no difference for purposes of the jury right. The Supreme Court has recognized as much in its procedural due process cases, which have abandoned "right/privilege" analysis and protect all "entitlements" created by law.¹⁵¹ Similar reasoning should extend the jury right to "mitigating" sentencing facts, no less than aggravating ones. But the Court cannot adopt this approach under its current jurisprudence because it is unwilling to

¹⁴⁷ See *United States v Brough*, 243 F3d 1078, 1079 (7th Cir 2001) ("[T]he statute [§ 841] does not say who makes the findings or which party bears what burden of persuasion.").

¹⁴⁸ Cf. *United States v Outen*, 286 F3d 622, 637–39 (2d Cir 2002) (holding that the "default" penalty for marijuana possession is the five-year term in 21 USC § 841(b)(1)(D) rather than the one-year term in 21 USC § 841(b)(4)); *United States v Campbell*, 317 F3d 597, 603 (6th Cir 2003) (same).

¹⁴⁹ See, e.g., *Barsky v Board of Regents*, 347 US 442, 451 (1954) (upholding the suspension of a physician's license on the ground that the license was "a privilege granted by the State under its substantially plenary power to fix the terms of admission"); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv L Rev 1439 (1967).

¹⁵⁰ *Apprendi*, 530 US at 498 (Scalia, J, concurring). See also *Harris*, 536 US at 565 (plurality opinion) (stating that conviction "authorize[s]" the government "to impose any sentence below the maximum").

¹⁵¹ See, e.g., *Board of Regents v Roth*, 408 US 564 (1972).

countenance a corresponding expansion in the proof-beyond-a-reasonable-doubt requirement and the concept of “elements.”

V.

A.

Part IV showed that the Supreme Court has failed to give “intelligible content” to the jury’s constitutional factfinding role because of its unjustifiable decision to link the jury right with the reasonable-doubt rule. Yet the problems caused by this linkage are even more far reaching. Under the Supreme Court’s precedents, whenever courts expand the jury right, they must bring along the reasonable-doubt rule and, with it, the “elements” label. As a result, *Apprendi*’s well-meaning efforts to strengthen the jury’s factfinding role have produced a regime in which prosecutors must prove certain sentencing enhancements beyond a reasonable doubt, and allege such facts in indictments in federal prosecutions, as if they were “elements” of a substantive crime.¹⁵² In the Supreme Court’s words, a non-recidivist fact that increases a defendant’s maximum allowable sentence must be treated as “the functional equivalent of an element of a greater offense.”¹⁵³

The *Apprendi* Court and Justice Thomas’s concurring opinion defended this outcome by claiming that sentencing enhancements had always been regarded as “elements” of substantive crimes whenever they increased a defendant’s maximum allowable punishment.¹⁵⁴ They each relied on Joel Prentiss Bishop’s assertion ****330** that nineteenth-century indictments were required to include “every fact which is legally essential to the punishment.”¹⁵⁵ But this statement from Bishop’s Criminal Procedure treatise is flatly wrong; numerous nineteenth-century cases held that first-degree murder findings were not required to be charged in indictments as “elements” of a greater crime, even though they increased the maximum allowable sentence from life imprisonment to death, and even though they were to be determined by juries. They also demonstrate that the Court’s expansive concept of “elements” is historically indefensible, and that juries’

¹⁵² See, e.g., *United States v Cotton*, 535 US 625, 632 (2002). See also, e.g., *United States v Fields*, 242 F3d 393, 395–96 (DC Cir 2001) (holding that drug quantity under 21 USC § 841(b) “is an element of the offense” if it results in a sentence that exceeds the statutory maximum, and that “the Government must state the drug type and quantity in the indictment”); *United States v Promise*, 255 F3d 150, 152 (4th Cir 2001) (holding that drug quantities under § 841(b) “must be treated as elements of aggravated drug trafficking offenses [and] charged in the indictment.”); *United States v Doggett*, 230 F3d 160, 164–65 (5th Cir 2000) (holding that drug quantity under § 841(b) is an “element” of a crime, which “must be stated in the indictment”); *United States v Rebmann*, 226 F3d 521, 524–25 (6th Cir 2000) (describing drug quantity under § 841(b) as “elements of the offense”); *United States v Rogers*, 228 F3d 1318, 1327 (11th Cir 2000) (holding that drug quantity under § 841(b) “must be charged in the indictment”). But see *United States v Bjorkman*, 270 F3d 482, 489–90 (7th Cir 2001) (denying that *Apprendi* facts constitute “elements” of substantive crimes).

¹⁵³ *Apprendi*, 530 US at 494 n 19.

¹⁵⁴ See *id* at 483 n 10.

¹⁵⁵ See *id* at 489 n 15 (quoting 1 Bishop § 81 at 51 (cited in note 6)); *id* at 510 (Thomas, J, concurring) (same).

factfinding prerogatives have often extended beyond the “elements” of substantive crimes required to be alleged in indictments and proved beyond a reasonable doubt.

B.

Justice Scalia's *Monge* dissent first propounded the idea that sentencing enhancements should be deemed “elements” of substantive crimes whenever they expose a defendant to a new range of punishment.¹⁵⁶ Two years later, the *Apprendi* Court endorsed this view, claiming that, as an historical matter, “facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition ‘elements’ of a separate legal offense.”¹⁵⁷ To support this historical assertion, the Court cited nineteenth-century treatises.¹⁵⁸ One of these was the Second Edition of Bishop's Criminal Procedure treatise, which claimed that “every fact which is legally essential to the punishment” must be charged in an indictment and be treated as an ingredient of a substantive crime.¹⁵⁹ Bishop was among the preeminent nineteenth-century treatise writers on American law, and had been described by the Central Law Journal in 1885 as “the foremost law writer of the age.”¹⁶⁰ Justice Thomas's *Apprendi* concurrence also relied on Bishop's treatise as evidence of “the traditional understanding . . . regarding the elements of a crime,”¹⁶¹ along with a handful of nineteenth-century state-court decisions.¹⁶² The Supreme Court later endorsed all of these sources as “relevant authorities” supporting *Apprendi*'s expansive theory of elements.¹⁶³ None of these opinions, however, considered actual nineteenth-century court decisions involving sentencing categories in first-degree murder statutes. If they had, they would have realized that state courts almost uniformly rejected Bishop's view of the indictment, as well as the proposition that sentencing enhancements must be treated as elements of substantive criminal offenses whenever they increase a defendant's maximum allowable punishment.

Although *Apprendi* claimed that distinctions between “elements” and “sentencing factors” were unknown “during the years surrounding our Nation's founding,”¹⁶⁴ the

¹⁵⁶ See 524 US at 737–38 (1998) (Scalia, J, dissenting). See also notes 90–92 and accompanying text.

¹⁵⁷ *Apprendi*, 530 US at 483 n 10. See also *Cunningham v California*, 127 S Ct 856, 864 (2007) (“*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime . . . by those who framed the Bill of Rights.”) (quoting *Harris v United States*, 536 US 545, 557 (2002) (plurality opinion)).

¹⁵⁸ See *id* at 480, citing John Archbold, *Pleading and Evidence in Criminal Cases* 51 (H. Sweet, 15th ed 1862) (John Jervis, ed); *id* at 489 n 15 (relying on 1 Bishop at § 81 at 51 (cited in note 6)). See also *Blakely*, 542 US at 301–02 (quoting Bishop in support of its claim that the jury must determine “all facts ‘which the law makes essential to the punishment’”) (quoting 1 Bishop at § 87 at 55 (cited in note 6)).

¹⁵⁹ See *Apprendi*, 530 US at 489 n 15, quoting 1 Bishop at § 81 (cited in note 6).

¹⁶⁰ Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 Law and Hist Rev 215, 215 (1995) (quoting Note, *Mr. Bishop as Law Writer*, 21 Cent L J 81, 81 (1885)). A note in the American Law Review heaped similar praise on Bishop. See Note, *A Deserved Tribute*, 18 Am L Rev 853, 853–54 (1884).

¹⁶¹ *Apprendi*, 530 US at 510–12 (Thomas, J, concurring) (citing Bishop (cited in note 6) and Joel Prentiss Bishop, *New Criminal Procedure or New Commentaries on the Law of Pleading and Evidence and the Practice in Criminal Cases* (Flood, 4th ed 1895)).

¹⁶² See *id* at 502–09; 512–518 (Thomas, J, concurring) (citing relevant state-law cases).

¹⁶³ See *Blakely*, 542 US at 302.

¹⁶⁴ *Apprendi*, 530 US at 478.

states have in fact employed “sentencing factors” since the early days of the Nation’s history. And numerous state-court decisions recognized that these facts were not “elements” of substantive crimes and did not need to be charged by prosecutors, even when they increased the maximum allowable punishment.¹⁶⁵ In 1794, only three years after ratification of the Bill of Rights, Pennsylvania enacted a statute that divided the crime of murder into two degrees: Murder in the first degree was limited to murders “perpetrated by means of poi- ****332** son, or lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary.”¹⁶⁶ All other kinds of murders were second degree. Many other states adopted similar schemes. But only murder in the first degree was punishable by death, so a first-degree finding was the nineteenth-century analogue to a statutory “aggravating factor” in modern death-penalty statutes. Each would be a quintessential “*Apprendi* fact” under the Supreme Court’s current jurisprudence, which would be treated as the “functional equivalent of an element of a greater offense.”¹⁶⁷

But nineteenth-century courts did not regard a first-degree murder finding as an “element” of an aggravated crime, even though such findings increased the maximum allowable sentence from life imprisonment to death, and even though the law required jury determinations as to the degree of murder in cases that went to trial. *White v Commonwealth*¹⁶⁸ was the first published decision construing Pennsylvania’s first-degree murder statute, and all the Justices of the state supreme court agreed that the first-degree murder statute did not divide murder into separate offenses. The majority opinion held that indictments need not charge the degree of murder because “first-degree” murder was merely a sentencing category within a unitary offense rather than an element of a separate, aggravated crime:

“All that [the statute] does, is to define the different kinds of murder, which shall be ranked in different classes, and be subject to different punishments. *It has not been the practice since the passing of this law, to alter the form of indictments for murder in any respect; and it plainly appears by the act itself, that it was not supposed any alteration would be made.* It seems taken for granted, that it would not always appear on the face of the indictment of what degree the murder was.”¹⁶⁹

The dissenting opinion agreed that Pennsylvania’s first-degree ****333** murder statute “creates no new offence as to willful and deliberate murder. . . . Different degrees of guilt exist under the general crime of murder.”¹⁷⁰ Even though the Pennsylvania statute

¹⁶⁵ See, e.g., *Hanon v State*, 63 Md 123, 126 (1885) (“The mere affixing by statute of a penalty different from that at common law, or adjusting it to specified circumstances of aggravation or mitigation, where the crime or misdemeanor is in its nature susceptible of such variations, without losing its essential character, *is not the creation of a distinct offence.*”) (emphasis added).

¹⁶⁶ See 4 Journal of the Senate 242–46 (Pa 1794); see also Gen Laws Pa, ch 124 § 2 (Johnson 1849)

¹⁶⁷ See *Ring v Arizona*, 536 US at 609 (2002) (quoting *Apprendi*, 530 US at 494 n 19).

¹⁶⁸ 6 Binn 179 (Pa 1813).

¹⁶⁹ See *id* at 183 (opinion of Tilghman, CJ) (emphasis added).

¹⁷⁰ *Id* at 188 (Yeates, J, concurring in part and dissenting in part).

conferred a right to a jury determination as to the first-degree murder finding,¹⁷¹ no one on the court regarded this jury fact as part of a substantive criminal offense, even as it increased the maximum allowable punishment from life imprisonment to death.

After *White*, the Pennsylvania Supreme Court continued to hold that prosecutors need not charge the degree of murder in indictments.¹⁷² Other jurisdictions that divided murder into degrees likewise held that murder indictments need not mention the degree of the crime. These included the highest courts of Alabama,¹⁷³ Arkansas,¹⁷⁴ California,¹⁷⁵ Colorado,¹⁷⁶ Idaho,¹⁷⁷ Maine,¹⁷⁸ Maryland,¹⁷⁹ Massachusetts,¹⁸⁰ Michigan,¹⁸¹ Minnesota,¹⁸² the territory of Montana,¹⁸³ Nevada,¹⁸⁴ New Jersey,¹⁸⁵ New Hampshire,¹⁸⁶ New York,¹⁸⁷ Tennessee,¹⁸⁸ Texas,¹⁸⁹ Virginia,¹⁹⁰ West Virginia,¹⁹¹ and Wisconsin.¹⁹² While each of these courts held that murder indictments need not specify the degree of the crime, courts would not hold indictments invalid when they did so.¹⁹³ The California Supreme Court, for example, held that courts should simply disregard attempts in indictments to designate a degree of murder.¹⁹⁴ And it allowed such indictments to sustain convictions for *any* degree of murder, even if higher than the

¹⁷¹ See Gen Laws Pa, ch 124, §2 (Johnson 1849).

¹⁷² See, e.g., *Commonwealth v Gable*, 7 Serg & Rawle 423, 427 (Pa 1821) (opinion of Tilghman, CJ); id at 429 (Gibson, J, dissenting); *Commonwealth v Flanagan*, 7 Watts & Serg 415, 418 (Pa 1844); *O'Mara v Commonwealth*, 75 Pa 424, 429–30 (1874) (quoting *White*, 6 Binn at 182–83 (opinion of Tilghman, CJ)).

¹⁷³ See, e.g., *Noles v State*, 24 Ala 672, 693 (1854).

¹⁷⁴ See, e.g., *McAdams v State*, 25 Ark 405, 416 (1869). But see *Cannon v State*, 31 SW 150, 153 (Ark 1895) (suggesting that first-degree murder should be alleged in indictments).

¹⁷⁵ See, e.g., *People v Murray*, 10 Cal 309, 310 (1858).

¹⁷⁶ See, e.g., *Garvey v People*, 6 Colo 559, 563 (1883).

¹⁷⁷ See, e.g., *State v Ellington*, 43 P 60, 61 (Idaho 1895).

¹⁷⁸ See, e.g., *State v Verrill*, 54 Me 408, 415–16 (1867).

¹⁷⁹ See, e.g., *Ford v State*, 12 Md 514, 529–30 (1859).

¹⁸⁰ See, e.g., *Green v Commonwealth*, 94 Mass 155, 170–71 (1866).

¹⁸¹ See, e.g., *People v Doe*, 1 Mich 451, 457–58 (1850).

¹⁸² See, e.g., *State v Lessing*, 16 Minn 75, 78 (1870).

¹⁸³ See, e.g., *Territory v Stears*, 2 Mont 324, 327–28 (1875).

¹⁸⁴ See, e.g., *State v Millain*, 3 Nev 409, 442 (1867).

¹⁸⁵ See, e.g., *Titus v State*, 7 A 621, 623 (NJ 1886) (stating that New Jersey's first-degree murder statute "did not create any new crime, but 'merely made a distinction, with a view to a difference in the punishment, between the most heinous and the less aggravated grades of the crime of murder.' . . . [I]t [is] not necessary to set out in the count that the alleged killing was 'willful, deliberate, and premeditated,' [and] it cannot be necessary to show that the killing was in the commission of a rape, which is another of the categories of the same section.") (quoting *Graves v State*, 45 NJL 347, 358 (NJ 1883)).

¹⁸⁶ See, e.g., *State v Williams*, 23 NH 321, 324 (1851).

¹⁸⁷ See, e.g., *Cox v People*, 80 NY 500, 514 (1880).

¹⁸⁸ See, e.g., *Mitchell v State*, 16 Tenn 514, 527 (1835); id at 530–34 (Catron, CJ, concurring); see also *Hines v State*, 27 Tenn 597, 598 (1848).

¹⁸⁹ See, e.g., *Gehrke v State*, 13 Tex 568, 573–74 (1855).

¹⁹⁰ See, e.g., *Commonwealth v Miller*, 3 Va 310, 311 (1812).

¹⁹¹ See, e.g., *State v Schnelle*, 24 W Va 767, 779 (1884).

¹⁹² See, e.g., *Hogan v State*, 30 Wis 428, 439–42 (1872).

¹⁹³ See, e.g., *People v Dolan*, 9 Cal 576, 583 (1858).

¹⁹⁴ See *People v King*, 27 Cal 507, 512 (1865). See also *People v White*, 22 Wend 167, 175–76 (NY 1839); *Stears*, 2 Mont at 328; *Kirby v State*, 15 Tenn 259, 264 (1834).

degree specified in the indictment.¹⁹⁵ In so holding the court stressed that prosecutors and grand juries should not be allowed to designate sentencing categories at the charging stage; rather, such decisions should be made at the time of defendant's conviction for a crime by the relevant factfinder, either a jury (in cases where the defendant opts for a trial) or trial judge (in cases where the defendant waives his right of trial by pleading guilty).¹⁹⁶ The court seemed intent on preventing these sentencing categories from becoming a regime of "charge-offense" sentencing, and would not allow indictments to control sentencing decisions.¹⁹⁷ All these decisions are directly contrary to the views of Bishop, who wrote that according to ****335** "those principles of natural reason and justice which are inherent in the case, . . . the indictment for murder, where the statute divides it into two degrees, should, if murder of the first degree is meant to be proved against the prisoner, contain those allegations which show the offence to be in this degree."¹⁹⁸

Several of these state-court decisions considered and rejected the claim in Bishop's treatise that indictments "must contain an allegation of every fact which is legally essential to the punishment to be inflicted."¹⁹⁹ *State v Millain*²⁰⁰ expressly disapproved Bishop's views while rejecting a claim that first and second-degree murder were separate offenses, requiring distinct indictments.²⁰¹ The Court noted that "Mr. Bishop has laboured with zeal and ingenuity to show the distinct nature of the two offenses,"²⁰² but nevertheless concluded that "it was not the intention of the legislature, in making the distinction in the two classes of murder, to require a distinct indictment for each."²⁰³ Indeed, the Court noted the "almost [] uniform practice" in other States allowing a generic murder indictment to sustain convictions for first-degree murder.²⁰⁴ In denying the petition for rehearing, the Court emphasized that it had "read with great care and attention the arguments of Mr. Bishop as to the necessity of an indictment for murder

¹⁹⁵ See, e.g., *People v Nichol*, 34 Cal 211, 217 (1867). See also *Stears*, 2 Mont at 327.

¹⁹⁶ See, e.g., *King*, 27 Cal at 512 ("The trial jury, and not the grand jury, determine the degree of the crime, and the former should not be embarrassed by the opinion of the latter."); *Nichol*, 34 Cal at 217 (noting that the duty to fix the degree of crime is "expressly cast upon the trial jury, and the designation of the degree by the Grand Jury is, therefore, as idle as a recommendation to the mercy of the Court appended to a verdict of guilty of murder in the first degree.").

¹⁹⁷ See also *Ellington*, 43 P at 61 ("How are the jury to find the degree? From the descriptive allegations in the indictment, or from the evidence on the trial? . . . [T]he answer is unavoidable, as it is conclusive, that the degree of the crime is *solely for the trial jury*, and it is not requisite or essential that the words defining the degrees of murder should be set forth in the indictment to constitute a good indictment for murder in the first degree under our statutes.") (emphasis added); *Stears*, 2 Mont at 327–328; *State v Thompson*, 12 Nev 140, 147–48 (1877); *State v Rover*, 10 Nev 388, 391 (1875); *Mitchell*, 16 Tenn at 533 (Catron, CJ, concurring).

¹⁹⁸ 2 Bishop at § 586 at 308 (cited in note 6).

¹⁹⁹ 1 Bishop at § 81 at 51 (cited in note 6). See also *id* at § 540 ("[T]he indictment must . . . contain an averment of every particular thing which enters into the punishment"); *Apprendi*, 530 US at 510 (Thomas, J, concurring) (citing these provisions in Bishop's treatise).

²⁰⁰ 3 Nev 409 (1867).

²⁰¹ See *id* at 439–40.

²⁰² *Id*.

²⁰³ *Id* at 442.

²⁰⁴ *Id*.

drawing the distinction between murder of the first and second degree.”²⁰⁵ But this did not persuade the Court to change its previous decision upholding the indictment.²⁰⁶

*Hogan v State*²⁰⁷ also rejected Bishop’s views in a case where a murder indictment omitted the degree. The dissenting opinion invoked Bishop’s treatise and argued that the indictment was ****336** bad,²⁰⁸ but the majority opinion rejected this view, even while recognizing that an indictment “must fully set out the crime charged.”²⁰⁹ The majority noted the longstanding view in Wisconsin that murder indictments need not specify a degree to sustain a conviction for murder, even in the first degree. And it wrote that “[t]he acquiescence of a bar so able and learned as the bar of Wisconsin, and for so long a period, . . . and this without a word of dissent from the bench, brings such rule almost within the operation of the maxim, ‘*stare decisis*.’”²¹⁰ The Court also observed that the state legislature had expressly approved the use of common-law form indictments in prosecutions for first-degree murder, and the Court refused to hold the statute unconstitutional. It therefore felt “constrained to hold that such express averment in unnecessary, and that an indictment in the common law form is sufficient.”²¹¹

Finally, in *State v Verrill*,²¹² the defendant had been convicted and sentenced for first-degree murder based on an indictment that did not allege the degree, even though the state constitution had been construed to require “that *all the elements of*, or facts necessary to, the crime charged, shall be fully and clearly set out” in an indictment.²¹³ On appeal, the defendant cited Bishop’s treatise²¹⁴ to support his claim that his indictment should have alleged first-degree murder. But the Court rejected the defendant’s claim. Even though the first-degree murder finding increased the maximum punishment, it did not need to be charged in the indictment because it was not an element of a crime. The Court explained: “*There is still but one crime denominated murder*, as at the common law, although by the provisions of the statute there are two degrees of that crime, liable to different punishments.”²¹⁵

****337** All these jurisdictions made clear that they did not regard first and second-degree murder as separate offenses. Instead, they viewed the degrees of murder as

²⁰⁵ Id at 479.

²⁰⁶ Id.

²⁰⁷ 30 Wis 428 (1872).

²⁰⁸ See id at 443 (Dixon, CJ, concurring in part and dissenting in part).

²⁰⁹ Id at 439 (majority).

²¹⁰ Id at 441.

²¹¹ Id at 440.

²¹² 54 Me 408 (1867).

²¹³ Id at 414 (emphasis added).

²¹⁴ See id at 410, citing Joel Prentiss Bishop, 2 *Criminal Procedure* §§ 562–97 at 317–53 (Little, Brown, 1st ed 1866).

²¹⁵ Id at 415 (emphasis added). Other decisions rejected Bishop’s claim that indictments should allege every fact essential to guilt. See, e.g., *Ellington*, 43 P at 61–62; *Territory v Bannigan*, 46 NW 597, 599 (Dakota 1877) (noting that “a long array of authorities” stands against Bishop’s assertion that indictments for first-degree murder “should” allege the degree).

nothing more than sentencing categories within a unitary offense, even though a first-degree murder finding boosted the maximum punishment from imprisonment to death.²¹⁶

A few jurisdictions did require murder indictments to allege the degree of the crime.²¹⁷ The Iowa Supreme Court, for example, held in *Fouts v State*²¹⁸ that a common-law indictment for murder, which did not specify the degree of crime, could not support conviction and punishment for first-degree murder. But the court recognized that its approach was in the minority, noting that common-law murder indictments were “perhaps good in nearly every other state in the Union.”²¹⁹ And subsequent Iowa Supreme Court decisions again noted that *Fouts* was opposed to the views expressed in court decisions from other jurisdictions.²²⁰ The Missouri Supreme Court likewise acknowledged that other states had adopted a “different practice,” refusing to require indictments to allege first-degree murder, even under “statutes using somewhat similar phrases in declaring what shall be murder in the first degree, and what in the second degree.”²²¹

So while a few jurisdictions adopted Bishop's view that indictments must charge every fact that increases a defendant's punishment, the first-degree murder cases show that most jurisdictions rejected it, and did not necessarily regard sentencing enhancements as “elements” of separate, aggravated crimes that must be ****338** charged in indictments, even when they raise the maximum punishment. The Supreme Court has not acknowledged or discussed these nineteenth-century first-degree murder cases, yet it relies on Bishop's views to support revisionist understandings of “elements” and “crimes.” The first-degree murder cases demonstrate, however, that these statements from Bishop's treatise were aspirational rather than an accurate description of nineteenth-century American practice (much less evidence of what the US Constitution requires). Bishop himself recognized that the law of first-degree murder could not be reconciled with his claim that indictments must charge “every fact which is legally essential to the punishment” as an element of a crime.²²² Indeed, he bemoaned the holdings of those cases, writing that “to a lamentable extent have our courts, not consulting the teachings of our books of the law, or resorting to accurate reasonings, done, upon the subject of the

²¹⁶ See also *Commonwealth v Gardner*, 77 Mass 438, 444 (1858); *People v Haun*, 44 Cal 96, 98 (1872); *Thompson*, 12 Nev at 146; *Simpson v State*, 19 SW 99, 102 (Ark 1892); *State v Tatro*, 50 Vt 483, 493 (1878), quoting Francis Wharton, *A Treatise on the Criminal Law of the United States* § 1103 at 500 (Kay, 4th ed 1857); *Mitchell*, 16 Tenn at 526.

²¹⁷ See, e.g., *Finn v State*, 5 Ind 400, 403 (1854); *Fouts v State*, 4 Greene 500, 503 (Iowa 1854); *State v McCormick*, 27 Iowa 402, 411–12 (1869) (citing Joel Prentiss Bishop, 2 *Commentaries on the Law of Criminal Procedure, or Pleading, Evidence, and Practice in Criminal Cases* § 584 at 333 (Little, Brown 1st ed 1866) to support *Fouts*'s holding, and reiterating that “the degree [of murder] must be alleged”); *State v Jones*, 20 Mo 58, 60–61 (1854); *State v Brown*, 21 Kan 38, 49–50 (1878).

²¹⁸ 4 Greene 500 (Iowa 1854).

²¹⁹ *Id* at 503.

²²⁰ See *State v Johnson*, 8 Iowa 525, 529 (1859) (discussing *Fouts*); *McCormick*, 27 Iowa at 408 (“We are aware that the cases are not uniform respecting the question whether, to constitute a good indictment for murder in the first degree, it is necessary to allege that the killing was willful, deliberate and premeditated.”).

²²¹ See *Jones*, 20 Mo at 61.

²²² See, e.g., Joel Prentiss Bishop, 3 *New Criminal Procedure* §§ 500, 561–589 (Flood, 2d ed 1913).

indictment [in first-degree murder cases], the very highest champion blundering.”²²³ The Supreme Court might prefer Bishop’s aspirations to the actual practice of nineteenth-century state courts as a matter of policy, but that by itself is not a legitimate basis on which to impose a constitutional rule regarding the meaning of “elements” or the requirements of the Fifth Amendment’s Indictment clause.²²⁴

Although Justice Thomas’s *Apprendi* concurrence supplemented his reliance on Bishop’s treatise with a handful of nineteenth-century state-court decisions that spoke favorably of Bishop’s views, many of those same courts interpreted their first-degree murder statutes in a manner irreconcilable with Bishop’s views of the indictment and Justice Thomas’s understanding of “elements.”²²⁵ At most, Justice Thomas’s historical evidence shows that ****339** *some* sentencing enhancements were charged in indictments in *some* situations. But there was no obligation, constitutional or otherwise, to treat *every* fact that increases the maximum allowable punishment as an element of a substantive crime.

As further proof that the states did not regard sentencing enhancements as “elements” of substantive crimes, some states *would not permit* a criminal defendant to plead guilty to a specific degree of murder. They allowed him to plead guilty only to the unitary offense, and the trial judge would fix the degree and sentence, given that the defendant’s guilty plea waived his right to a jury.²²⁶ This was an early example of “real-

²²³ See, e.g., *id* at § 500 at 277.

²²⁴ See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L J 1097, 1132 (2001) (noting that Bishop’s “speculation about ‘natural reason’ and ‘abstract justice’ is no basis for discerning the original meaning of the Fifth and Sixth Amendments”); cf. John Hart Ely, *Foreward: On Discovering Fundamental Values*, 92 Harv L Rev 5, 16–22 (1978).

²²⁵ Compare *Apprendi*, 530 US at 511–512 (Thomas, J, concurring) (citing, among others, state-court decisions from Texas, Maryland, and Maine that spoke approvingly of Bishop’s views) with *Gehrke*, 13 Tex at 573–74 (holding that an indictment charging murder in its common-law definition sufficient to sustain conviction and punishment for murder in the first degree); *Ford*, 12 Md at 549 (holding that there was “no defect in the indictment” that charged the defendant with common-law murder without specifying the degree). See also *Verrill*, 54 Me at 415–16 (rejecting the defendant’s argument that “the indictment does not set out a murder in the first degree, therefore insufficient to sustain the verdict”).

²²⁶ See, e.g., *Weighorst v State*, 7 Md 442 (1855) (“[T]he act does not authorize the accused to plead guilty of murder in the second degree. If he confesses at all he must plead to the indictment for murder, and it is then made the duty of the court, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.”); *Dick v State*, 3 Ohio St 89, 93 (1853) (“The prisoner is not allowed to determine the degree of the crime, by a confession with reference to the form and manner of the charge against him; but the degree must be found by the court, from the evidence, without regard to the form of the confession, or the mode in which the crime is charged in the indictment.”); *Wells v State*, 104 SW2d 451, 452 (Ark 1937) (jury must find degree of murder even when defendant pleads guilty to an indictment charging first-degree murder); *Martin v State*, 38 SW 194, 196 (Tex Crim 1896) (“[A defendant] may plead guilty to murder, but the degree must be found by a jury.”); *Wicks v Commonwealth*, 4 Va 387, 392–93 (1824) (“But the Law goes on to say, ‘but if such person be convicted by confession, the Court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.’ Now, if the Indictment must charge the offence to be murder in the first degree or second degree, and if the accused confesses he is guilty of the crime charged upon him by the Indictment, what further enquiry upon that subject can be had?”). But see *State v Kring*, 74 Mo 612, 620 (1881) (noting that defendant entered a plea of guilty to murder in the second degree); *State v Shanley*, 18 SE 734, 736 (W Va 1893) (noting that a defendant “may plead guilty of murder in the first degree”).

offense” sentencing based on the defendant’s actual conduct, rather than charging decisions or plea-bargains.²²⁷ And this continued well into the twentieth century. The California Supreme Court, for example, held that trial courts must fix the degree of burglary whenever the defendant pleaded guilty to a generic burglary indictment.²²⁸ These state-court decisions regarded “degrees” of crimes as real-offense sentencing categories rather than “elements” of substantive offenses that could be the subject of plea-bargaining. The federal courts have no historical basis for mandating that sentencing enhance- ****340** ments be treated as elements of separate, aggravated criminal offenses that prosecutors must charge and prove beyond a reasonable doubt.

But the nineteenth-century law of first-degree murder fully supports *Apprendi*’s decision to expand the jury right to sentencing factors. Every jurisdiction that divided murder into degrees required juries to fix the degree of the crime, even though they did not treat this jury fact as an “element” of a substantive criminal offense. The only exception was when the defendant waived his right to trial by pleading guilty.²²⁹ But at the time, guilty pleas waived all rights that otherwise would apply at trial;²³⁰ even jurisdictions that regarded the criminal jury as “nonwaivable” recognized that guilty pleas obviated any factfinding role for the jury.²³¹ In cases that did go to trial, many state courts jealously guarded the jury’s prerogative to fix the degree of murder, holding that a jury verdict of “guilty” that did not specify the degree of murder was a nullity, and could not support *any* punishment, even for the lowest possible degree.²³² They would not permit

²²⁷ See, e.g., Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L Rev 1, 8–12 (1988) (explaining the differences between “charge-offense” and “real-offense” sentencing).

²²⁸ See *People v Jefferson*, 52 Cal 452, 454–55 (1877) (citing section Cal Penal Code § 1192 (1872)); see also *People v Stratton*, 24 P2d 174, 176 (Cal App 1933).

²²⁹ See *Hallinger v Davis*, 146 US 314 (1892). A few states, however, still required juries to determine the degree of murder even if the defendant pleaded guilty. See, e.g., Dig Laws Ala 412–413, at §§ 1–2 (Slade 1843).

²³⁰ See, e.g., *People v Popescue*, 177 NE 739, 744 (Ill 1931); *State v Kaufman*, 2 NW 275, 276 (Iowa 1879); *People v Noll*, 20 Cal 164, 165 (1862).

²³¹ See, e.g., S. Chesterfield Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 Mich L Rev 695, 715 (1927).

²³² See, e.g., *State v Reddick*, 7 Kan 143, 154–55 (1871) (noting “[a] long train of decisions . . . [that] have held such a defect fatal” and holding that a murder verdict that fails to specify the degree “is not sufficient to base a judgment upon”); *Williams v State*, 60 Md 402, 403 (1883) (“A general verdict of ‘guilty’ on an indictment for murder, is a *bad verdict*, and on such a verdict no judgement can be pronounced.”); *Tully v People*, 6 Mich 273, 273 (1859) (“[It] is imperative that the jury in their verdict . . . shall determine the degree of crime. The judgment must be reversed.”); *Robertson v State*, 42 Ala 509, 510 (1868) (“The verdict, in this case, fails to ascertain the degree of murder in which the defendant was guilty, and the court erred in passing sentence upon the verdict.”); *People v Marquis*, 15 Cal 38, 38 (1860) (“[T]he jury shall designate in their verdict the degree of the offense. This they have not done, and the Court . . . cannot assume that they designed, from a general finding, to fix the grade of the crime. . . . For this error, the judgment must be reversed, and the case remanded for a new trial.”); *State v Rover*, 10 Nev 388, 391 (1875) (“[A] verdict which fails to designate the degree of murder of which the jury find the defendant guilty, is so fatally defective that no judgment or sentence can be legally pronounced thereon.”); *State v Redman*, 17 Iowa 329, 331 (1864) (“[A] verdict in such a case is fatally defective, unless the jury find specifically the degree of murder.”); *Stears*, 2 Mont at 331 (“[T]he verdict in the case of murder must express the degree of the crime, or no judgment can be entered thereon.”). See also *McGee v State*, 8 Mo. 495, 496 (1844); *Hogan*, 30 Wis at 435–36; *People v Campbell*, 40 Cal 129, 138–40 (1870); *Kearney v*

trial ****341** judges to fix the degree of crime when the jury verdict failed to do so; to hold otherwise would allow judges to overstep limits on their power imposed by the constitutional jury guarantees.²³³

All these jurisdictions insisted that juries should determine the degree of murder, not because it was an “element” of a criminal “offense” (it wasn’t), but because they thought juries should resolve disputed questions of fact that affect a defendant’s sentence. The Texas Court of Criminal Appeals, for example, held that juries should decide “every grade of crime”²³⁴ suggested by the evidence, and based its conclusion on the ground that degrees of crime presented “question[s] of fact upon which the jury alone may speak.”²³⁵ It rejected any suggestion that trial courts could decide questions of fact for the jury: “A doctrine more subversive of our law, more alarming in its tendency, and more fatal to that bulwark of Anglo-Saxon liberty, the jury system, could not be suggested *than that this court could settle questions of fact for the jury.*”²³⁶ Similar views were expressed in other state-court decisions.²³⁷ These first-degree murder regimes clearly understood the jury’s factfinding responsibilities as extending well beyond the “elements” of criminal offenses or their “functional equivalents.”

Of course, none of these nineteenth-century legal authorities purported to interpret the meaning of the Sixth Amendment’s jury guarantee. These all involved state court decisions and laws enacted before the Sixth Amendment even applied to the states. Yet ****342** even before incorporation, every state constitution has always guaranteed the right of jury trial in criminal cases,²³⁸ and in many such provisions the wording is identical to the Sixth Amendment.²³⁹ And while there was very little case law interpreting the Sixth

People, 17 P 782, 782 (Colo 1888); *People v Shafer*, 1 Utah 260, 264 (1875); *Buster v State*, 42 Tex 315, 319–20 (1874); *Allen v State*, 26 Ark 333, 333–334 (1870); *M’Pherson v State*, 17 Tenn 279, 279 (1836); *Cobia v State*, 16 Ala 781, 783 (1849); *Hall v State*, 12 So 449, 452 (Fla 1893). But see *Simpson*, 19 SW at 102 (allowing prisoner to be sentenced for second-degree murder when jury’s verdict failed to specify the degree).

²³³ See, e.g., *State v Montgomery*, 11 SW 1012, 1013 (Mo 1889) (“[N]o one else but the jurors can perform the duty thus enjoined.”); *Kirby*, 15 Tenn at 263 (“[T]he court has no power to proceed to judgment unless the degree of the crime be ascertained by the verdict of the jury.”); *Cobia*, 16 Ala at 783 (“[T]he degree [must] be ascertained by the verdict of the jury, and if this be not done, the court has no power to render judgment at all. The judge without the intervention of the jury cannot ascertain the degree of guilt.”).

²³⁴ *Jones v State*, 26 SW 1082, 1086 (Tex Crim 1894).

²³⁵ *Id.* (quoting *Halliburton v State*, 22 SW 48 (Tex Crim 1893)).

²³⁶ *Id.* (emphasis added).

²³⁷ See, e.g., *People v Constantino*, 47 NE 37, 41 (NY 1897) (holding that juries must resolve the degree of murder because it “was plainly a question of fact.”); *Craft v State*, 3 Kan 450, 485 (1866) (stating that juries must fix the degree of murder as “the exclusive judges of all questions of fact” and “[i]n that behalf their power is exclusive and supreme.”); *People v Kennedy*, 54 NE 51, 53 (NY 1899) (describing degrees of homicide as presenting “a question of fact for the jury” while recognizing that “the jury is the ultimate tribunal” for resolving “questions of fact arising upon conflicting evidence”); *State v Welch*, 15 SE 419, 422 (W Va 1892) (“The question whether the act was murder in the first or second degree was one of fact for the jury exclusively.”).

²³⁸ See *Duncan v Louisiana*, 391 US 145, 153 (1968).

²³⁹ See, e.g., SD Const art VI, § 7 (“In all criminal prosecutions the accused shall have the right . . . to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.”).

Amendment in the eighteenth and nineteenth centuries, the unanimous view among the states that juries should fix the degree of murder in cases that went to trial, even though this fact was not charged in indictments as an “element” of a substantive crime, is at least persuasive evidence of what the right of jury trial meant in the early years of our nation’s history.²⁴⁰ And it further shows that there is nothing anomalous or unprecedented about extending the jury right beyond the facts that prosecutors must charge and prove as components of a substantive offense.

VI.

The problems discussed in the two preceding sections are a direct result of the Court’s decision to link the jury right with the reasonable-doubt rule and the concept of “elements.” This section will sketch and defend a much broader view of the jury right, one that is not tied to the Court’s standard-of-proof requirements, but that is based on the traditional understanding of the jury as a separation-of-powers mechanism within the judiciary that limits the power of judges over factfinding.

On this view, the jury right should, at a minimum, extend to all disputed questions of fact that determine a defendant’s guilt or punishment, regardless of standards of proof. This approach would limit the sentencing judge’s powers to resolving questions of law or applying law or exercising discretion in accordance with undisputed facts or facts found by a jury. Although commentators have shown that this distinction between factual and legal ques- **343** tions is not always clear,²⁴¹ and difficult cases will arise at the margins, the Constitution’s text assumes the soundness of this distinction. In defining the civil jury’s role, the Seventh Amendment provides that “*no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law,*”²⁴² which not only recognizes the distinction between factual and legal questions but also reinforces the principle that resolving disputed questions of fact is central to a jury’s constitutional task. The Supreme Court continues to use this distinction to define the roles of judge and jury in civil litigation,²⁴³ and it has shown to be workable, even as the Court must occasionally step in to resolve hard cases.²⁴⁴ In the criminal context, any distinction between “questions of fact” and “questions of law” will necessarily be one of degree. A relatively easy case would involve sentencing categories that depend on whether a defendant “visibly possessed a firearm” during his crime, as

²⁴⁰ Cf. generally Eric A. Posner and Cass R. Sunstein, *The Law of Other States*, 59 Stan L Rev 131 (2006) (relying on the Condorcet Jury Theorem to claim that when a large majority of states make a certain decision based on a certain shared belief, and the states are well motivated, there is good reason to believe that the decision is correct, provided that certain conditions are met).

²⁴¹ See generally, e.g., James Bradley Thayer, “*Law and Fact*” in *Jury Trials*, 4 Harv L Rev 147 (1890); Nathan Isaacs, *The Law and the Facts*, 22 Colum L Rev 1, 11–12 (1922) (“[W]hether a particular question is to be treated as a question of law or a question of fact is not in itself a question of fact, but a highly artificial question of law.”).

²⁴² US Const, Amend VII (emphasis added).

²⁴³ See, e.g., *Colgrove v Battin*, 413 US 149, 157 (1973) (“[T]he purpose of the jury trial in . . . civil cases [is] to assure a fair and equitable resolution of factual issues.”); *Gasoline Prods. Co. v Champlin Ref. Co.*, 283 US 494, 498 (1931) (“All of vital significance in trial by jury is that issues of fact be submitted for determination . . . by the jury. . .”).

²⁴⁴ See generally, e.g., *Markman v Westview Instruments, Inc.*, 517 US 370 (1996).

this would involve a particularized inquiry into what happened. Still, this might present “questions of law” for the court if the parties disagree over the meaning of “visibly possessed.” In such situations the judge could instruct the jury on the meaning of those words, leaving the jury to apply the court’s interpretation of the law to the facts of the case. Or the court might require the jury to return specialized findings limited to factual questions about past conduct. Recidivist sentencing enhancements will also involve questions of fact for the jury: the existence of prior felony convictions. Although, again, questions of law for the court may arise if the parties disagree over the legal definitions of “felony” or “misdemeanor.”

Expanding the jury right along these lines would raise important questions for quasi-discretionary sentencing regimes that depend on judicial factfinding, such as the post-*Booker* Federal Sentencing Guidelines. After finding the pre-*Booker* Guidelines unconstitutional, the *Booker* Court held that sentencing courts must calculate and consider the Federal Guidelines range, but may impose sentences outside that range in light of other concerns.²⁴⁵ Appellate courts must review these sentences for “reasonableness.”²⁴⁶ Under this regime, judicial factfinding will influence the ultimate sentence imposed, but, unlike the sentencing regimes considered in *McMillan*, *Apprendi*, *Harris*, and *Blakely*, it will not fix concrete minimum and maximum sentences.

The *Booker* remedy was a product of the Court’s cramped interpretation of the Sixth Amendment jury right, limited to facts subject to the Court’s reasonable-doubt rule. From that perspective, the Court needed only to amend the Guidelines so that no finding of fact increased a defendant’s maximum allowable sentence, and the constitutional objections melted away. But once one jettisons the Court’s link between the jury right and the reasonable-doubt rule and focuses on the jury’s role as a structural constitutional guarantee, then the real constitutional problem lies with the Guidelines’ failure to maintain a proper division of power between judge and jury. They allow judges to intrude on the jury’s factfinding responsibilities by resolving disputed questions of fact that determine a defendant’s range of punishment. *Booker*’s “remedy” does little to allay these constitutional concerns. It continues to allow judges to decide factual issues that alter a defendant’s range of punishment, but softens the impact of such findings by allowing judges to consider other factors in the process.²⁴⁷ Given the importance of the jury’s role as factfinder to constitutional structure, one should look askance at any scheme that allows judges rather than juries to resolve disputed questions of fact that must be considered when deciding what sentence to impose, especially in light of empirical evidence suggesting that “voluntary guidelines” affect judges’ sentencing practices like mandatory guidelines.²⁴⁸ The need, recognized by Blackstone, to protect the

²⁴⁵ See 543 US at 245–246, 261.

²⁴⁶ Id at 261.

²⁴⁷ See, e.g., Michael W. McConnell, *The Booker Mess*, 83 Denver L Rev 665, 677–678 (2006) (noting that the *Booker* remedy does little to address the Sixth Amendment concerns under the pre-*Booker* Guidelines system).

²⁴⁸ See, e.g., John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines* 48, online at <http://ssrn.com/abstract=869977> (noting that judges often comply with “voluntary guidelines” because “(1) they provide useful information, (2) legislatures can

jury ****345** guarantee “from all secret machinations which may sap and undermine it,”²⁴⁹ should lead the Court to extend the jury right to disputed questions of fact even under advisory sentencing guidelines. This would also include factual findings in capital sentencing regimes that rely on “guided discretion.”

Finally, one must consider the constitutionality of fully discretionary sentencing regimes. Discretionary sentencing has a long pedigree; both at common law and throughout our nation's history, judges have been given discretion to choose levels of fines, whipping, or imprisonment up to a prescribed statutory maximum.²⁵⁰ And the Supreme Court has held that the Sixth Amendment imposes no barrier to fully discretionary sentencing, even though a judge might exercise his discretion in accordance with his own perception of the facts, without asking a jury to resolve any disputed factual issues that he might deem relevant.²⁵¹ On the other hand, a so-called “hanging judge” might systematically impose tough sentences without considering or resolving factual questions in the process. These discretionary regimes *allow* judges to base a defendant's sentence on factual determinations that were not submitted to a jury, but do not *require* them to do so. Still, the idea that an individual judge can act as a sentencing commission unto himself is troubling if the jury right is meant to limit judicial power over factfinding.

There are two possible approaches in considering the Sixth Amendment's implications for discretionary sentencing. One is to require sentencing judges to ask juries for special findings whenever there are genuine disputes between the parties as to issues of fact that the judge might deem relevant to his ultimate sentencing decision. This would be similar to a capital sentencing regime that gives the judge discretion whether to sentence a defendant to life imprisonment or death, but requires the jury to resolve relevant factual disputes and provide a non-binding sentencing recommen- ****346** dation to the judge.²⁵² Of course, such a rule will be difficult for appellate courts to enforce, as discretionary sentencing regimes allow trial judges to conceal their true motives and reasons for imposing a particular sentence. This may explain why even the most pro-*Apprendi* Justices have never been willing to impose such limitations on purely discretionary sentencing regimes, content to leave the jury right as an “underenforced constitutional norm” in this context. But declaring a rule that requires sentencing judges to submit factual disputes to juries would help preserve the jury's structural role without taking the more radical step of imposing a constitutional ban on discretionary sentencing regimes.

threaten to replace them with more-mandatory systems, and (3) judges can be held accountable for noncompliance (outside of appellate reversal”).

²⁴⁹ Blackstone, 4 *Commentaries* at *343 (cited in note 22).

²⁵⁰ See, e.g., An Act for the Punishment of certain Crimes against the United States §§ 23, 26, 1 Stat 112, 117, 118 (1790) (setting forth penalties of imprisonment “not exceeding” a certain number of years, and authorizing fines “at the discretion of the court”); John Baker, *An Introduction to English Legal History* 584 (Butterworths, 3d ed 1990).

²⁵¹ See, e.g., *Booker*, 543 US at 233 (“[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”).

²⁵² See, e.g., 11 Del Code Ann § 4209 (2006).

Another possibility is to draw a constitutional distinction between the binary factfinding required by sentencing guidelines and the probabilistic weighing of evidence allowed by a fully discretionary sentencing regime.²⁵³ Sentencing guidelines require the sentencer to treat a fact as established, or not, depending on whether a burden of proof is met. Fully discretionary sentencing imposes no such requirement. It allows the decisionmaker to adjust sentences based on mere probabilities and to calibrate the effect on a sentence in light of such probabilities. A sentencer might take into account a 10 percent likelihood that a defendant carried a gun during the crime, along with an 80 percent likelihood that his difficult upbringing affected his moral culpability. In doing this, a judge isn't forced to resolve questions of fact in a binary way; he's allowed to weigh different probabilities and use those to adjust his sentence. This at least provides a possible means by which to distinguish the "sentencing factors" that must be found by juries from the fully discretionary sentencing regimes that have always been thought constitutional.

In all events, defining the jury right in accordance with "questions of fact" would truly give "intelligible content" to that right by closing the door on most attempts to avoid the jury through legislative draftsmanship. And this approach has a substantial pedigree in historical sources and early state-court decisions that emphasize the jury's structural role in preventing judges from resolving factual questions. The Supreme Court, however, cannot extend the jury right in this manner unless it stops linking the jury right with the reasonable-doubt rule. Under the current case law, any expansion of "jury facts" leads to a concomitant expansion in facts subject to the reasonable-doubt standard, and the Justices will not (and should not) hold that all facts legally relevant to guilt or punishment must be proved beyond a reasonable doubt.²⁵⁴ Such a holding would overrule *Patterson v New York* and prohibit states from requiring criminal defendants to bear the burden of proof on affirmative defenses such as self-defense or insanity. Even Justice Thomas, who has embraced the most expansive theory of "elements," was unwilling to go that far.²⁵⁵ But if the Court severs its link between these constitutional protections, it could extend the jury right to *all* defenses and sentencing facts, without requiring prosecutors to charge and prove such facts beyond a reasonable doubt.

At the same time, the Supreme Court should limit the reasonable-doubt rule and the concept of "elements" to something akin to their pre-*Apprendi* scope. This would include facts labeled as "elements" in criminal codes, along with facts that the Supreme Court might deem a "tail which wags the dog of a substantive offense,"²⁵⁶ but not every sentencing fact that increases the ceiling on a defendant's punishment. The historical evidence described in Section V is merely the latest in a long string of criticisms leveled at court decisions that require prosecutors to charge and prove sentencing enhancements beyond a reasonable doubt, as if they were "elements" of a substantive crime. Professor Stephanos Bibas, for example, has criticized *Apprendi* for increasing prosecutorial power,

²⁵³ I thank Nicholas Quinn Rosenkranz for suggesting this concept of "probabilistic factfinding."

²⁵⁴ See Section II.B.

²⁵⁵ See, e.g., *Apprendi*, 530 US at 501 (Thomas, J. concurring); *Harris*, 536 US at 575 (Thomas, J. dissenting).

²⁵⁶ *McMillan*, 477 US at 88.

giving them more “crimes” to charge and strengthening their hand in plea-bargaining negotiations.²⁵⁷ Justice Breyer has argued that *Apprendi* could harm criminal defendants by forcing them to contest prejudicial sentencing facts during the guilt phase of trial rather than a bifurcated sentencing proceeding,²⁵⁸ and he has further complained that *Apprendi* will lead to cruder ****348** punishments by requiring sentences to be based on facts charged by prosecutors rather than real-offense conduct.²⁵⁹

But these problems arise only because some courts regard *Apprendi*'s “jury facts” as components of substantive crimes that prosecutors must charge and prove beyond a reasonable doubt. If *Apprendi* had simply required juries to decide *all* disputed questions of fact at sentencing, without any expansion of the reasonable-doubt rule and the concept of “elements,” it could have protected the jury’s factfinding role without relying on false historical claims regarding the meaning of “elements,” and without giving rise to the pragmatic concerns noted by Professor Bibas and Justice Breyer. Indeed, the nineteenth-century first-degree murder cases demonstrate that jurisdictions *can* require juries to determine sentencing factors without adding new charging weapons to the prosecutor’s arsenal, and that jury factfinding can co-exist with “real-offense” sentencing and bifurcated sentencing proceedings.²⁶⁰ None of the concerns noted by Professor Bibas and Justice Breyer should undermine *Apprendi*'s Sixth Amendment holding, once we jettison the Court’s link between the jury right and the “elements” of crimes subject to the Court’s reasonable-doubt rule.

Factfinder:		
Standard of Proof:	Right to Jury Determination	No Right to Jury
Proof Beyond Reasonable Doubt Required	Elements	
Less than Proof Beyond Reasonable Doubt Allowed	Affirmative Defenses All Sentencing Factors	

Fig. 2

Figure 2 illustrates this alternative approach, which expands the jury right to all questions of fact, but limits the reasonable-doubt rule to its pre-*Apprendi* scope. Compare the above proposal to the Court’s current approach, shown in figure 3.

²⁵⁷ Bibas, 110 Yale L J at 1168–1170 (cited in note 224); see also *Blakely*, 542 US at 331 (Breyer, J, dissenting).

²⁵⁸ See, e.g., *Blakely*, 542 US at 335 (Breyer, J, dissenting) (“How can a Constitution that guarantees due process put these defendants, as a matter of course, in the position of arguing, ‘I did not sell drugs, and if I did, I did not sell more than 500 grams’ . . . ?”)

²⁵⁹ See *Apprendi*, 530 US at 555–556 (Breyer, J, dissenting).

²⁶⁰ See Section V.B.

Factfinder:		
Standard of Proof:	Right to Jury Determination	No Right to Jury
Proof Beyond Reasonable Doubt Required	Elements "Apprendi facts" (or "Functional Equivalents" of Elements)	
Less than Proof Beyond Reasonable Doubt Allowed		All Other Sentencing Factors

Fig. 3

One challenge for this proposed approach is the prospect that ****349** legislatures might evade the reasonable-doubt rule (and the Fifth Amendment's Indictment clause) by relabeling "elements" of crimes as "sentencing factors." Of course, this same problem is already present in the current *Apprendi* regime, which allows legislatures to avoid the reasonable-doubt rule by establishing "mitigating" sentencing factors or "affirmative defenses," or facts that establish mandatory minimum punishments. And one might think that *Winship*'s proof-beyond-a-reasonable-doubt requirement is best left as a default rule, given the historical and practical barriers to a more expansive regime.²⁶¹ But for those who are not content to leave *Winship* as a mere default rule, this possibility of legislative evasion must be taken seriously.

Fortunately, rejecting *Apprendi*'s reasonable-doubt holding will not necessarily leave the concept of "elements" completely at the mercy of the political branches. Even before *Apprendi*, the Supreme Court indicated that it would look past statutory labels if it deemed a fact to be a "tail which wags the dog of a substantive offense."²⁶² While the *Blakely* Court ridiculed this standard as hopelessly subjective,²⁶³ nothing prevents the Court from adopting a more determinative constitutional standard for "elements" that stops short of *Apprendi*'s historically indefensible view that includes every sentencing fact that increases the ceiling on a defendant's ****350** punishment.²⁶⁴ Exploring all the possibilities in this regard would require another article, but one should not conclude that the doctrinal benefits from avoiding *Apprendi*'s expansive concept of "elements" will come at the cost of eviscerating proof beyond a reasonable doubt as a constitutional requirement.

VII.

Although the Supreme Court uses the concept of "elements" to define boundaries for the reasonable-doubt rule, that should not define the scope of a criminal defendant's

²⁶¹ See Section II.B.

²⁶² See *McMillan*, 477 US at 88.

²⁶³ See *Blakely*, 542 US at 302 n 6, 307–08.

²⁶⁴ Cf. *Patterson*, 432 US at 216–32 (Powell, J, dissenting).

right of jury trial. The Supreme Court went off track in *McMillan v Pennsylvania*,²⁶⁵ when it collapsed the jury trial and standard-of-proof claims into a unitary inquiry, holding that the jury right extends only to “elements” of criminal offenses subject to the Court’s reasonable-doubt rule. This has infected the Court’s *Apprendi* jurisprudence, which proceeds as if the right of jury trial and the reasonable-doubt rule are co-extensive.

Because the Supreme Court has linked the jury right with the proof-beyond-a-reasonable-doubt standard, it is unable to extend the jury right in a manner that meaningfully protects the jury’s constitutional factfinding role, because it could not countenance a corresponding expansion in the reasonable-doubt rule and the concept of “elements.” At the same time, when the Court *has* extended the jury right to certain sentencing enhancements, the accompanying expansion in the reasonable-doubt rule has produced a revisionist concept of “elements” that cannot be justified on historical or pragmatic grounds. In sum, the *Apprendi* jurisprudence has given us the worst of both worlds: a circumscribed jury role that is easily evaded, and an overbroad theory of “elements” that lacks historical support, gives new powers to prosecutors that were not conferred by legislatures, and brings needless pragmatic and doctrinal complications to court decisions that broaden the right of jury trial. All of this stems from the Court’s assumption that the jury right goes hand-in-hand with the reasonable-doubt rule and the concept of “elements,” a premise that originalists and pragmatists alike should reject.

The Court should therefore sever its link between the jury right ****351** and the reasonable-doubt rule, expanding the former while constricting the latter. Juries should resolve any disputed question of fact that purports to aggravate *or mitigate* a defendant’s range of punishment. But sentencing factors should not be regarded as “functional equivalents of elements” that prosecutors must charge and prove beyond a reasonable doubt whenever they increase a defendant’s maximum allowable punishment. This approach would protect the jury’s constitutional factfinding prerogatives while avoiding the historical and doctrinal problems arising from an overbroad understanding of “elements.” And such a framework should satisfy most of *Apprendi*’s defenders and critics. *Apprendi*’s supporters should approve a regime that actually provides “intelligible content” for the jury right, unlike the Court’s current jurisprudence. And once “jury facts” are decoupled from the “elements” of crimes that must be proved beyond a reasonable doubt and charged in indictments in federal prosecutions, court decisions that expand the jury right will no longer increase prosecutorial power, limit the use of “real-offense” sentencing, or force prejudicial sentencing facts into the guilt phase of trial.

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²⁶⁵ 477 US 79 (1986).

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