*APPRENDI*CITIS: A TROUBLING DIAGNOSIS FOR THE SENTENCING OF HACKERS, THIEVES, FRAUDSTERS, AND TAX CHEATS

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> [T]he immediate aim of criminal legislation cannot be any of the things which are usually mentioned as justifying punishment: for until it is settled what conduct is to be legally denounced and discouraged we have not settled from what we are to *deter* people, or who are to be considered *criminals* from whom we are to exact *retribution*, or on whom we are to wreak *vengeance*, or whom we are to *reform*.[1]

> The difficulty I have is that nowhere have we defined what the distinction is between an element of the offense and an enhancement factor.[2]

> It's just drafting. Is that what it is?[3]

INTRODUCTION

On June 26, 2000, the United States Supreme Court issued a momentous, but nearly overlooked, decision regarding constitutional

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[1] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 8 (1968).

[2] Justice Thomas, Transcript of Oral Argument at 44, *Apprendi v. New Jersey* (No. 99-478).

[3] Justice Breyer, Transcript of Oral Argument at 6, *Apprendi v. New Jersey* (No. 99-478).

limitations on the imposition of penalty enhancements.[4] In *Apprendi v. New Jersey*,[5] the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[6] This constitutional rule, however, does not so much limit the type of "sentencing factor"[7] a judge may consider when enhancing a sentence so much as it limits the effect of that enhancement. As the Court noted in *Apprendi*, "the relevant inquiry is one not of form, *but of effect*—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[8]

Post-*Apprendi* circuit court decisions indicate that the majority of circuits read *Apprendi* as providing nothing more than a constitutional ceiling on the effect sentencing enhancements may have on a sentence. Courts may enhance a sentence up to, but not over, the statutory maximum penalty for the offense of conviction.[9] This focus on the literal holding of *Apprendi*, however, is overly formalistic, as the implications of *Apprendi*'s rationale are more far-reaching. That *Apprendi* signals something more is indicated by the avalanche of motions and appeals that have inundated state and federal courts regarding the constitutional validity of potentially thousands of sentences. As of this writing, well over one hundred United States Circuit Courts of Appeals decisions have been issued discussing *Apprendi*'s impact on federal sentences, and many more are certain to follow. So quickly has "*Apprendi*citis" infected the federal appellate

4 On the same day as the *Apprendi* decision, the Supreme Court also issued a highly anticipated opinion regarding whether *Miranda v. Arizona*, 383 U.S. 903 (1966), had been overruled in 1968 by 18 U.S.C. § 3501. *See* United States v. Dickerson, 530 U.S. 428 (2000). In all likelihood, however, the Court's 1999 term will be remembered not for reaffirming a suspect's *Miranda* rights, but rather, as discussed below, for ushering in a revolution in sentencing reform not seen since the implementation of determinate sentencing schemes nearly two decades ago. Ironically, this second revolution may signal the demise of the first.

5 120 S. Ct. 2348 (2000).

6 *Id.* at 2362-63.

7 According to the Court, the term "sentencing factor" may be described as follows:

> a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. [However], when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense.

Id. at 2365 n.19.

8 *Id.* at 2365 (emphasis added).

9 *Compare* United States v. Hernandez, 228 F.3d 1017 (9th Cir. 2000) (holding that because sentencing enhancement did not exceed ten-year statutory maximum sentence for conspiracy, the rule in *Apprendi* was not violated), *with* United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000) (holding that because sentencing enhancement exceeded five-year statutory maximum for drug trafficking where no amount was specified in the indictment, rule in *Apprendi* was violated). For a summary of selected post-*Apprendi* decisions, see Carmen D. Hernandez, Apprendi v. New Jersey -Lower Court Decisions (Nov. 2000) (unpublished manuscript), *at* http://www.dcfpd.org/fdtg/apprendi/apprendi.htm.

courts with sentencing appeals that one federal appellate court judge has implored both federal and state defendants to "hold their horses and stop wasting everyone's time with futile [*Apprendi*] applications" for leave to commence successive collateral attacks on their sentences.[10] Needless to say, Judge Easterbrook's plea has fallen on deaf ears as the horses continue to haul *Apprendi* appeals to the circuit courts' doors.

The onslaught of sentencing appeals should come as no surprise. Justice O'Connor anticipated this result when she stated in her dissenting opinion in *Apprendi* that "[i]n one bold stroke the Court today casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of Congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder."[11] Justice O'Connor emphasized further that the rule in *Apprendi* may very well apply "to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (e.g., the United States Sentencing Guidelines)."[12] Thus, not only is *Apprendi*citis infecting the dockets of both state and federal courts, but it also may infect the very foundations of the Sentencing Guidelines.

This Article discusses *Apprendi*'s implications for the Federal Sentencing Guidelines (Guidelines), specifically with respect to sentencing offenders convicted of economic crimes. As the authors discuss below, "relevant conduct"[13] determinations made by judges to enhance an offender's sentence, rather than the nature of the offense, "drive"[14] the sentences for offenders convicted of federal economic crimes. As *Apprendi* impacts most directly those crimes whose sentences are driven by relevant conduct, and the sentences for economic crimes are driven almost entirely by relevant conduct, the authors contend that *Apprendi*citis necessarily will infect—perhaps more than any other type of offense—the substantive sentencing law for economic offenses. The authors conclude that in light of *Apprendi*'s constitutional rule, the cure for *Apprendi*citis may require overhauling the current Guidelines for economic crimes, especially with regard to the Guidelines' near-exclusive reliance on "loss"

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10 United States v. State of Indiana, 226 F.3d 866, 867 (7th Cir. 2000) (Easterbrook, J.). Writing for a unanimous panel, Judge Easterbrook stated:

> Richard Talbott is among the throngs of state and federal prisoners who believe that *Apprendi v. New Jersey* undermines their sentences . . . . If the Supreme Court ultimately declares that *Apprendi* applies retroactively on collateral attack, we will authorize successive collateral review of cases to which *Apprendi* applies. Until then *prisoners should hold their horses and stop wasting everyone's time with futile applications.*

Id. at 868 (emphasis added) (internal citations omitted).

11 *Apprendi*, 120 S. Ct. at 2381 (O'Connor, J., dissenting).

12 *Apprendi*, 120 S. Ct. at 2391 (O'Connor, J., dissenting).

13 *See infra* Pt. II.A.

14 *See infra* Pt. III.

as the determinative sentencing factor.

I. A BRIEF HISTORY OF SENTENCING FACTORS

A. *The Move Away from Unfettered Sentencing Discretion*

In 1972, Judge Marvin Frankel of the United States District Court Judge for the Southern District of New York, famously articulated the need for sentencing guidelines.[15] According to Judge Frankel, judges were being afforded too much discretion in sentencing because only the statutory minimums (if any) and maximums bounded their discretion.[16] Additionally, judicial exercise of this broad sentencing discretion essentially was placed beyond appellate review.[17] Indeed, even the Supreme Court, quoting Judge Frankel, acknowledged that "while judges are required to explain other rulings, . . . '[t]here is no such requirement in the announcement of a prison sentence.'"[18] Not surprisingly, the *de facto* unfettered discretion afforded judges at sentencing led to enormous disparities in the penalties similar offenders received for similar offenses.[19]

On October 12, 1984, in response to the growing presence of unwarranted sentencing disparities in the criminal justice system, the United States Congress passed bipartisan legislation intended to make federal sentencing more uniform among offenders, and more proportional to the seriousness of the various federal offenses.[20] The legislation—known as the Sentencing Reform Act of 1984—created "an independent commission in the judicial branch of the United States,"[21] whose purpose is "to establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoid[] unwarranted sentencing disparities among defendants with similar records . . . while maintaining sufficient flexibility

15 *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972).

16 *See* 18 U.S.C. § 3581 (1999) (setting forth the maximum terms of imprisonment for felony and misdemeanor offenses).

17 *See* United States v. Tucker, 404 U.S. 443, 447 (1972) ("[A] sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review.").

18 *See* Dorszynski v. United States, 418 U.S. 424, 441-42 n.15 (1974) (quoting Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 9 (1972)).

19 *See* Boyce F. Martin, Jr., *The Cornerstone Has No Foundation: Relevant Conduct in Sentencing and the Requirements of Due Process*, 3 SETON HALL CONST. L. J. 25, 27-28 (1993) (describing various studies illustrating gross sentencing disparities among judges sentencing similar offenders for similar offenses).

20 *See* 28 U.S.C. §§ 991-998 (1999); William W. Wilkins & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 495 (1990); USSG Ch. 1. Pt. A(2) (noting Congress' delegation of "broad authority to the Commission to review and rationalize the federal sentencing process").

21 *See* 28 U.S.C. at § 991(a).

to permit individualized sentences when warranted . . . ."[22] The policies and practices developed by the United States Sentencing Commission (Commission) first took effect on November 1, 1987.[23] Pursuant to the Sentencing Reform Act, however, the Guidelines are subject to periodic review and revision "in consideration of comments and data coming to [the Commission's] attention."[24]

B. *Mandatory Federal Sentencing Guidelines and Statutory Constraints*

The Guidelines are not discretionary. "The court, in determining the particular sentence to be imposed, *shall* consider . . . the kind of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission . . . ."[25] According to Justice Scalia, "[w]hile the products of the Sentencing Commission's labors have been given the modest name 'Guidelines,' they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed."[26]

Indeed, a sentencing judge may only depart from the Guidelines if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the [G]uidelines," such that a different sentence would be warranted. [27] Consequently, if a sentence "was imposed as a result of an incorrect application of the sentencing [G]uidelines," either the defendant or the government may appeal the sentence.[28] On appeal, "[i]f the court of appeals determines that the sentence was imposed in violation of law or imposed *as a result of an incorrect application of the sentencing [G]uidelines*, the court *shall* remand the case for further sentencing proceedings . . . ."[29] Thus, "[f]rom a defendant's perspective, the legislature's decision to cap the possible range of punishment at a statutorily prescribed 'maximum' would affect the actual sentence imposed no differently than a sentencing commission's

22 *Id.* § 991(b)(1)(B).

23 *See* Pub. L. No. 98-473, Title II, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3559 (1999); 28 U.S.C. §§ 991-998 (1999)), § 235(a)(1), as amended by Pub. L. No. 99-217, §§ 2, 4, 99 Stat. 1728 (Dec. 26, 1985); Pub. L. No. 99-646, § 35, 100 Stat. 3599 (Nov. 10, 1986); Pub. L. No. 100-182, § 2, 101 Stat. 1266 (Dec. 7, 1987).

24 28 U.S.C. § 3553(o) (emphasis added).

25 18 U.S.C. § 3553(a), (4)(A).

26 Mistretta v. United States, 488 U.S. 361, 413 (1986) (Scalia, J., dissenting) (citations omitted).

27 *See* 18 U.S.C. § 3553(b).

28 *See* 18 U.S.C. § 3742 (a)(2), (b)(2) (1999).

29 18 U.S.C. § 3742(f)(1) (emphasis added).

(or a sentencing judge's) similar determination."[30] In light of the fact that the Guidelines essentially are laws, Justice Scalia has contended that the Sentencing Commission really is "a sort of junior-varsity Congress."[31]

According to the Guidelines themselves, "the sentence may be imposed at any point within the applicable guideline range, provided the sentence (1) is not greater than the statutorily authorized maximum sentence, and (2) is not less than any statutorily required minimum sentence."[32] If the Guidelines require the imposition of a sentence greater than the statutory maximum, then the statutory maximum becomes the guideline sentence.[33] The same holds true for sentences in which the Guidelines would impose a sentence below the applicable statutory minimum sentence; in those cases, the statutory minimum becomes the Guideline sentence.[34] For example, "[i]f the applicable Guideline range is 51-63 months and the maximum sentence authorized by statute for the offenses of conviction is 60 months, the Guideline range is restricted to 51-60 months."[35]

Under the federal system, therefore, the Guidelines play a much more important role in sentencing than statutory maximums, for it is the Guidelines' sentencing range, and not statutory maximums, that ultimately determine the maximum and minimum terms of imprisonment. Consequently, statutory maximum and minimum terms of imprisonment set only the outer bounds for valid Guidelines application, and otherwise do not affect the Guidelines' application or the Guidelines' status as *de facto* sentencing laws.[36]

C. McMillan v. Pennsylvania*: Distinguishing Sentencing Factors from the Elements of a Crime*

In 1986, just prior to the enactment of the first version of the Guidelines, the Supreme Court enunciated a distinction between "sentencing factors" and elements of crimes. In *McMillan v. Pennsylvania*, the Supreme Court upheld the constitutionality of a Pennsylvania statute providing for a mandatory minimum five-year sentence "if the sentencing judge—upon considering the evidence introduced at the trial and *any additional evidence offered by either the*

30 Apprendi v. New Jersey, 120 S.Ct. 2348, 2401 (Breyer, J., dissenting).

31 *Mistretta*, 488 U.S. at 427.

32 USSG § 5G1.1(c).

33 *See id.* at § 5G1.1(b).

34 *See id.* at § 5G1.1(b).

35 *Id.* at § 5G1.1, comment., backg'd.

36 For statutory minimum sentences in certain specified contexts, however, a judge may sentence below the mandatory minimum sentence via the "safety valve" provision. *See* 18 U.S.C. § 3553(f)(1)-(5); USSG § 5C1.2.

defendant or the Commonwealth at the sentencing hearing—finds, by a preponderance of the evidence, that the defendant 'visibly possessed a firearm' during the commission of the offense."[37] Although acknowledging that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged,"[38] the Court specifically rejected the claim that "whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt."[39] Instead, the Court held that states have broad discretion in defining the elements of crimes and in defining the sentencing factors that may enhance the punishment for those crimes.[40] Moreover, the states, as well as the federal government, may delegate their authority to define sentencing factors to sentencing commissions.[41]

The only check on states' discretion in defining the elements of crimes and sentencing factors is the Due Process Clause of the Fifth and Fourteenth Amendments. According to *McMillan*, states may not define the elements of a crime or the attendant sentencing factors in such a manner that would "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[42] Quite famously, then Associate Justice Rehnquist, writing for the majority in *McMillan*, offered—with respect to whether a particular statutory construction would offend fundamental traditions of justice—only that "[t]he statute [must not] give [the] impression of having been tailored to permit the [sentencing factor] to be a tail which wags the dog of the substantive offense."[43]

Just when a sentencing factor tail begins to wag the dog of the substantive offense, however, has never clearly been explained by the Court.[44] Nevertheless, it is clear that the Court believed that an appropriate balance could be struck between sentencing based upon only those facts making up the elements of the offense of conviction, and sentencing based upon those facts plus additional facts determined by a judge at a sentencing hearing. The rule in *McMillan,* then, essentially is that if judge-

37 McMillan v. Pennsylvania, 477 U.S. 79, 81 (1986) (emphasis added).

38 *Id.* at 84 (quoting In re Winship, 397 U.S. 358, 364 (1970)) (internal quotations omitted).

39 *Id.* (quoting Patterson v. New York, 432 U.S. 197, 214 (1977)).

40 *Id.* at 85.

41 *See Mistretta*, 488 U.S. 361, 389 (holding that the Constitution does not "prohibit[] Congress from assigning to courts or auxiliary bodies within the Judicial Branch administrative or rulemaking duties"); *id.* at 374 (determining that "Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements").

42 *McMillan*, 477 U.S. at 85 (citations and internal quotations omitted).

43 *Id.* at 88; *see also* Tot v. United States, 319 U.S. 463 (1943) (invalidating criminal statute that created presumption that convicted felon who possessed a weapon obtained it in interstate commerce).

44 *See infra* note 109.

determined sentencing facts, rather than jury-determined convicting facts, primarily determine the sentence, then fundamental principles of justice are compromised.

The diagram below illustrates the sentencing factor universe after *McMillan*. The black disc in the middle of the diagram represents the elements of a crime that either must be proved to a jury beyond a reasonable doubt, or stipulated to by the defendant in a plea agreement. Although the overwhelming majority of convictions are the result of plea agreements,[45] for purposes of brevity, we denominate such facts as *jury-determined elements*. In contrast to the black inner disc, the white area surrounding the disc represents those facts a judge may consider in enhancing the sentence. We denominate such facts as *judge-determined enhancements*. Although both are factual—as opposed to legal—determinations, *McMillan* also set forth the rule that both jury-determined elements and judge-determined enhancements may contribute to the determination of an offender's ultimate sentence without offending Constitutional principles.

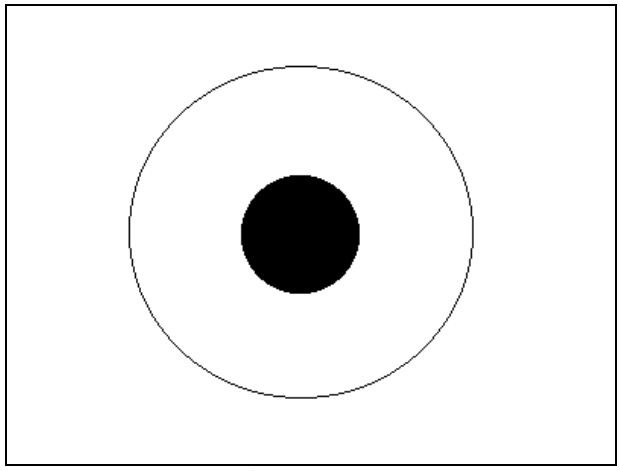

Figure 1: Sentencing Universe after *McMillan*

D. Jones v. United States: *Reining in Sentencing Enhancements*

More recently, in *Jones v. United States*,[46] the Supreme Court, echoing Chief Justice Rehnquist's caveat in *McMillan* that the sentencing

45 According to Commission statistics for fiscal year 1999, over 94% of approximately 55,000 federal convictions were the result of plea agreements. *See* UNITED STATES SENTENCING COMMISSION, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 20.

46 526 U.S. 227 (1999).

factor "tail" should not "wag[] the dog of the substantive offense,"[47] emphasized that "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration."[48] Indeed, determining whether a fact is a criminal element or a sentencing factor is of paramount importance to procedural due process. The elements of a crime must be charged in the indictment and proven to a jury beyond a reasonable doubt; sentencing factors, however, need only be determined by a judge by the preponderance of the evidence standard.[49] Still, "the question of which factors are which is normally a matter for Congress."[50]

In *Jones*, the Court found that a federal carjacking statute that specifically provided a sentencing enhancement for serious bodily injury was an unconstitutional penalty enhancement.[51] As in *McMillan*, the Court reiterated that there are due process limitations, as well as notice and jury trial limitations, to what a state can define as a crime.[52] Likewise, the Court held that these same constitutional limitations also apply to what a state can define as a sentencing factor. According to the Court in *Jones*, "*McMillan* is notable not only for acknowledging the question of due process requirements for fact-finding that raises a sentencing range, but also for disposing of a claim that the Pennsylvania law violated the Sixth Amendment right to jury trial as well."[53] Nevertheless, the Court recognized the very real danger that would arise from legislatures' being afforded too much discretion in denominating certain factors as criminal elements, and others as sentencing enhancements.

For example, if a potential penalty might rise from 15 years to life on a non-jury determination of fact, the jury's role and relevance would correspondingly shrink from the significance usually carried by determinations of guilt to a low-level, marginally relevant gate-keeping function.[54] In such cases, a jury finding of fact necessary for a maximum 15-year sentence simply would open the door to a judicial finding of fact sufficient for life imprisonment. This example illustrates how unlimited legislative power to articulate sentencing factors, and the weight those factors have on a sentence, invites erosion of the jury's function to a point against which a line necessarily must be drawn.[55] Such was the problem the Court sought to address in *Jones*.

Justice Kennedy's dissent in *Jones* noted that "[t]he rationale of the

47 *McMillan*, 477 U.S. at 88.

48 Jones v. United States, 526 U.S. 227, 232 (1999).

49 *See id.*

50 United States v. Almendarez-Torres, 523 U.S. 224, 228 (1998).

51 *See Jones*, 526 U.S. at 236 (noting that "Congress probably intended serious bodily injury to be an element defining an aggravated form of the crime").

52 *See id.* at 242.

53 *Id.*

54 *See* Apprendi v. New Jersey, 120 S. Ct. 2348, 2359 (2000).

55 *Id.* at 243-44.

Court's constitutional doubt holding makes it difficult to predict the full consequences of today's holding, but it is likely that it will cause disproportion and uncertainty in the sentencing systems of the States."[56] Justice Kennedy was concerned, in other words, that the holding of *Jones* would confront those states that had adopted sentencing guideline regimes "with an unexpected rule mandating that what were once factors bearing upon the sentence now must be treated as offense elements for determination by the jury."[57] Thus, it was clear that at least some of the Justices believed that a principle for distinguishing elements of crimes from sentencing factors needed to be articulated.

E. Apprendi v. New Jersey: *Toward a Principled Distinction of Elements and Enhancements*

Close on the heels of *Jones*, the Supreme Court decided *Apprendi v. New Jersey*.[58] Charles Apprendi pleaded guilty in a New Jersey state court to felony firearm possession.[59] In New Jersey, felony firearm possession carries a 10-year statutory maximum term of imprisonment.[60] Pursuant to the New Jersey hate crime statute, however, a finding that there was racial bias involved in the felony firearm possession increased the maximum penalty from 10 years to 20 years.[61] The prosecutor moved the court to enhance Mr. Apprendi's sentence pursuant to the hate crime statute.[62] At the sentencing hearing, the judge found, by a preponderance of the evidence, that Mr. Apprendi's offense—felony firearm possession—was conducted with racial bias.[63] As a result of, and pursuant to, the hate crime sentencing enhancement, the court sentenced Apprendi to a 12 year term of imprisonment.[64]

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56 *Id.* at 271 (Kennedy, J., dissenting).

57 *Id.*

58 120 S. Ct. 2348 (2000).

59 *Id.* at 2352.

60 The New Jersey statute in question classifies the possession of a firearm for an unlawful purpose as a "second-degree" offense. *See* N.J. Stat. Ann. § 2C:39-4(a) (West 1995). Such an offense is punishable by imprisonment for "between five years and 10 years." § 2C:43-6(a)(2).

61 N.J. Stat. Ann. § 2C:44-3(e) (West Supp.2000).

> A separate statute, described by that State's Supreme Court as a 'hate crime' law, provides for an 'extended term' of imprisonment if the trial judge finds, by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' N.J. Stat. Ann. § 2C:44-3(e) (West Supp.2000). The extended term authorized by the hate crime law for second-degree offenses is imprisonment for 'between 10 and 20 years.' § 2C:43-7(a)(3).

Apprendi, 120 S. Ct. at 2351.

62 *See id.* at 2352.

63 *Id.*

64 *See id.*

Mr. Apprendi appealed his sentence arguing that the hate crime statute violated his constitutional right to due process of law, and that the hate crime enhancement in fact was an element of a separate offense—an offense that should have been included in the indictment and proved beyond a reasonable doubt.[65] Both the New Jersey appellate court[66] and the New Jersey Supreme Court affirmed Mr. Apprendi's sentencing enhancement and ultimate sentence.[67] The New Jersey Supreme Court held that "the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor."[68] Therefore, in the view of the New Jersey Supreme Court, both the enhancement and the hate crime statute were constitutionally valid.

The United States Supreme Court granted *certiorari* on November 29, 1999,[69] heard oral arguments on March 28, 2000, and issued its opinion on June 26, 2000,[70] in which it reversed the New Jersey Supreme Court and remanded the case for resentencing.[71] In doing so, the Court held, as previously noted, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[72]

In essence, the Court held that if a sentencing factor increases the penalty beyond the statutory maximum for the conviction, then, following *McMillan*, the sentencing factor has become the "tail" which "wags the dog of the substantive offense," i.e., the sentencing factor has become the "functional equivalent" of a criminal element.[73] Consequently, following

65 *See id.*

66 *See* State v. Apprendi, 698 A.2d 1265 (N.J. Super. Ct. App. Div. 1997).

67 *See* State v. Apprendi, 731 A.2d 485 (N.J. 1999).

68 *Id*. at 494-495.

69 *See* State v. Apprendi, 731 A.2d 485 (N.J. 1999).

70 *See Apprendi*, 120 S. Ct. at 2348.

71 *Id.* at 2367.

72 *Id.* at 2362-63. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (5-4), the Court held that a prior criminal conviction may be treated as a sentencing factor and may constitutionally increase the statutory maximum penalty beyond the statutory maximum penalty for the offense of conviction. *See id.* In *Apprendi*, however, although declining to overrule *Almendarez-Torres*, the Court did note that "it is arguable that *Almendarez-Torres* was incorrectly decided." *Apprendi*, 120 S. Ct. at 2362. Furthermore, Justice Thomas, who sided with the bare majority in *Almendarez-Torres*, stated in his concurrence in *Apprendi* that he had "succumbed" to "one of the chief errors of *Almendarez-Torres*" by "attempt[ing] to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence." *Apprendi*, 120 S. Ct. at 2379 (Thomas, J., concurring). In light of the bare majority in *Almendarez-Torres*, Justice Thomas' concurrence suggests that if *Almendarez-Torres* was decided today, even prior convictions would be considered elements of crimes.

73 *Apprendi*, 120 S. Ct. at 2365 n.19 ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.").

Jones, when a legislatively ordained sentencing factor increases the statutory maximum punishment, the defendant's Fifth and Fourteenth Amendment rights to due process, and Sixth Amendment right to a jury trial, are violated inasmuch as the sentencing factor in question really is a criminal element.[74] Thus, *Apprendi* clarified the holding in *McMillan* and expanded the holding in *Jones* by enunciating a new "constitutional rule"[75] —a constitutional rule that sets the outer bounds a sentencing factor may play in determining a defendant's ultimate punishment.

Figure Two, below, indicates how *Apprendi* has changed the sentencing landscape since *McMillan* and *Jones*. As before, the black center represents the elements of a crime that either must be proved to a jury beyond a reasonable doubt, or pleaded to by the defendant. The dark gray area surrounding the black center indicates those sentencing factors that may be considered by a court for purposes of enhancing a sentencing. If those sentencing factors increase the statutory maximum penalty to which the defendant is exposed, then those sentencing factors become elements of a substantive offense and, accordingly, must be determined by a beyond a reasonable doubt standard.

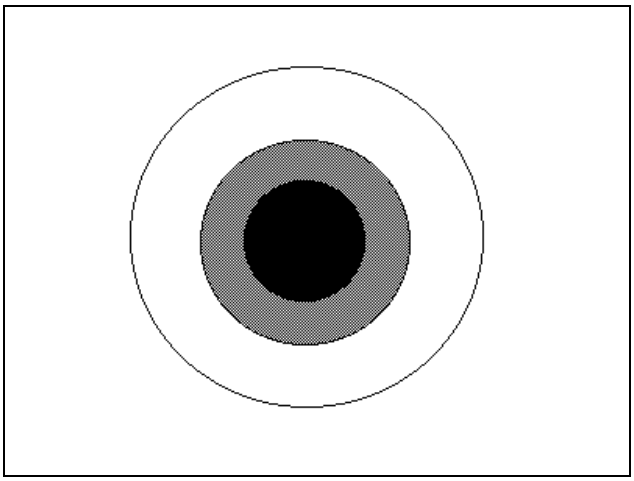

Figure 2: Sentencing Factor Universe after *Apprendi*

The Court in *Apprendi* noted "the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict

74 *See id.* at 2355.
75 *See id.* at 2363.

alone."[76] Especially in light of this novelty, legislative schemes such as the Guidelines must "remain true to the principles that emerged from the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion.'"[77] As such, "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that *expose* a defendant to a punishment greater than that otherwise legally prescribed [ar]e by definition 'elements' of a separate legal offense."[78]

Unfortunately, *Apprendi*'s "constitutional rule" seems to place the cart before the horse, for *Apprendi* appears only to limit the effect that sentencing factors may have on enhancing a penalty, rather than provide a rule for distinguishing sentencing factors from criminal elements. This sentiment was articulated by Justice Thomas during oral argument in *Apprendi*: "[t]he difficulty I have is that nowhere have we defined what the distinction is between an element of the offense and an enhancement factor."[79] This short-coming of *Apprendi* already appears to be creating a split in the circuits.

F. United States v. Garcia-Guizar: *Expanding* Apprendi

Shortly after the Court's decision in *Apprendi*, the Eighth Circuit Court of Appeals decided *United States v. Aguayo-Delgado*.[80] There, the Eighth Circuit held that under *Apprendi*, "if the government wishes to seek penalties in excess of those applicable by virtue of the elements of the offense alone, then the government must charge the facts giving rise to the increased sentence."[81] If the government does not seek a penalty increase in excess of the statutory maximum penalty for the offense of conviction, then the court may consider those factors that otherwise *would* increase the sentence beyond the *Apprendi* limit, provided that the court does not *use*

76 *Id.* at 2359.

77 *Id.*

78 *Id.* at 2359 n.10 (emphasis original). In his concurrence, Justice Thomas reiterated this point regarding the distinction between elements of a crime and sentencing factors, but with a slightly different flavor: "What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element." *Apprendi*, 120 S. Ct. at 2379 (Thomas, J., concurring).

Presumably, Justice Thomas' definition of what constitutes an element is far more encompassing than the majority's insofar as Justice Thomas' definition does not incorporate reference to "a punishment greater than that otherwise legally prescribed," i.e., the statutory maximum punishment. Indeed, on its face, Justice Thomas' definition of an element would subsume all sentencing factors for they are a "basis for. . . increasing punishment" and for "increasing the prosecution's entitlement". *Id.*

79 Transcript of Oral Argument, at 48, *Apprendi v. New Jersey* (No. 99-478), available at 2000 WL 349724 (Edward C. DuMont, Esq., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as *amicus curiae*, supporting the Respondent).

80 220 F.3d 926 (8th Cir. 2000).

81 *Id.* at 933.

those factors to exceed the *Apprendi* limit.[82]

Soon after the Eighth Circuit's decision, however, the Ninth Circuit expanded *Apprendi*'s holding. In *United States v. Garcia-Guiza*,[83] the Ninth Circuit held that where a "judge's finding, made under a preponderance-of-the-evidence standard, increased the statutory maximum penalty to which [a defendant] was *exposed*[,] . . . the constitutional rule recognized by *Apprendi* [was violated]."[84] Thus, the Ninth Circuit appears to be indicating that those types of sentencing factors that merely *expose* a defendant to a higher statutory maximum penalty violate *Apprendi*. In contrast, the Eighth Circuit in *Aguayo-Delgado* clearly states that mere exposure is not enough to violate *Apprendi*—actual effect must be given to the sentencing factors in order for there to be an *Apprendi* violation.

Figure Three below indicates this additional realm in the sentencing universe as articulated by the Ninth Circuit: if a sentencing factor merely *exposes* a defendant to a penalty beyond the statutory maximum for the offense of conviction, then it violates the constitutional rule in *Apprendi*. The medium-gray ring indicates those additional sentencing factors that may be affected by this reading of *Garcia-Guizar* that sentencing factors that merely expose an offender to a higher statutory maximum penalty really are criminal elements.

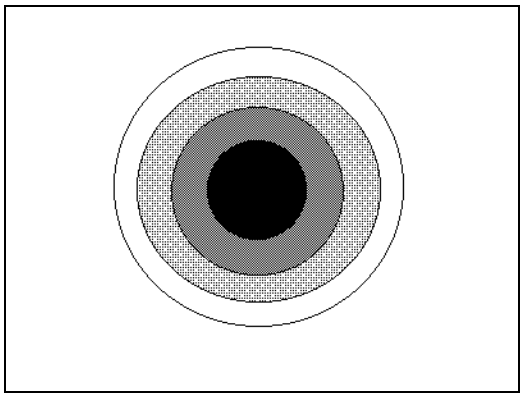

Figure 3: Sentencing Universe after *Garcia-Guiza*

82 *Id.* at 934; *see* United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000).

83 227 F.3d 1125 (9th Cir. 2000).

84 *Id.* at 1129 (quoting *Nordby*, 225 F.3d at 1058-59). The Ninth Circuit, however, held that because the defendant had failed to object to the enhancement at the sentencing hearing, the *Apprendi* violation was subject to plain error review. *See Nordby*, 225 F.3d at 1060. As the *Apprendi* error did not affect the defendant's substantial rights, the circuit court did not take notice of it. *See id.* Nevertheless, had the defendant timely objected to the enhancement, the circuit court would have reviewed the error under the less deferential *de novo* standard. Consequently, but for the absence of an objection, *Garcia-Guizar* may have resulted in a substantially different outcome for the defendant.

II. SENTENCING FACTORS AND CRIMINAL ELEMENTS: IS IT JUST DRAFTING?

A. *The Role of Relevant Conduct*

McMillan concerned the extent to which a state may delegate sentencing decisions to its judiciary. To be sure, the Court's holding affirmed the constitutionality of sentencing enhancements, and also reaffirmed the constitutionality of a federal court's consideration of "specific offense characteristics" for sentencing purposes: "we reject[] the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt."[85] Indeed, a "State need not 'prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment.'"[86] Rather, proof by a preponderance of the evidence standard for sentencing factors is sufficient for purposes of due process.[87]

As contemplated under the Guidelines, specific offense characteristics are nothing more than those facts identified by the Commission, "the existence of which" the Commission recognizes either as an aggravating or a mitigating circumstance "affecting the degree of culpability or the severity of the punishment."[88] Aggravating specific offense characteristics—sometimes known as adjustments—include the defendant's "role in the offense, the presence of a gun, or the amount of money actually taken."[89] In contrast, mitigating specific offense characteristics consist of acceptance of responsibility,[90] and in the case of organizational defendants, the presence of a compliance program.[91]

As already noted, conduct constituting sentencing factors (i.e., conduct identified either as a specific offense characteristic or as grounds for an adjustment) often is not charged in the indictment, inasmuch as sentencing factors do not constitute an element of the offense charged. For example, 26 U.S.C. § 7201 provides that "[a]ny person who willfully

85 *McMillan*, 477 U.S. at 84 (quoting Patterson v. New York, 432 U.S. 197, 214 (1977)).

86 *McMillan*, 477 U.S. at 84 (quoting *Patterson*, 432 U.S. at 207).

87 *See McMillan*, 477 U.S. at 91.

88 *Id.* at 84 (quotations omitted).

89 USSG Ch.1 Pt. A(4)(a)(3).

90 *See* USSG § 3E1.1(a) (providing for sentence mitigation "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense").

91 *See* USSG § 8C2.5(f) (providing for sentence mitigation "[I]f the offense occurred despite an effective program to prevent and detect violations of law"); *see also id.* § 8C2.5(g) (providing for sentence mitigation if organization self-reported offense to government in timely manner and prior to commencement of investigation).

attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony."[92] Thus, the specific amount of tax a defendant has attempted to evade is not an element of the offense of federal tax evasion.[93] The amount of tax involved, however, is relevant for guidelines sentencing purposes—the greater the amount of taxes evaded, the greater the punishment.[94] Thus, the *amount* of taxes evaded serves as a specific offense characteristic, which is provable by a mere preponderance of the evidence, even though the amount of taxes evaded is not an element of the crime of tax evasion.

This additional conduct—conduct not alleged in the indictment—that a sentencing judge may consider for sentencing purposes is denominated "relevant conduct" by the Guidelines. Relevant conduct consists of

> all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection for that or responsibility for that offense; [and] . . . all harm that was the object of such acts and omission.[95]

Just as the Pennsylvania state legislature required only a preponderance of the evidence standard to prove the existence of a sentencing factor, so the Commission also has adopted the position "that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the [G]uidelines to the facts of a case."[96] Indeed, the federal circuit courts uniformly have held that "the burden of proof for all factual

92 26 U.S.C. § 7201 (2000).

93 Although not explicitly enunciated in 26 U.S.C. § 7201, numerous circuit courts of appeals require proof of a substantial tax due and owing in tax evasion cases. *See e.g.*, United States v. Citron, 783 F.2d 307, 314-15 (2d Cir. 1986); United States v. Marcus, 401 F.2d 563, 565 (2d Cir. 1968). Nevertheless, an exact amount of tax due and owing need not be charged. *See Citron*, 783 F.2d at 314-15; *Marcus*, 401 F.2d at 565. The Ninth Circuit has held, however, that as there is no substantiality requirement in 26 U.S.C. § 7201, only "some tax deficiency" needs to be proved to warrant conviction. *See* United States v. Marashi, 913 F.2d 724 (9th Cir. 1990). Still, and in any case, no circuits require a specific amount of tax to be alleged in order sustain a conviction for tax evasion.

94 *See* USSG § 2T1.4. This section of the Guidelines sets forth the "Tax Table." The Tax Table increases the amount of punishment according to the amount of "tax loss" involved. Tax loss simply is "the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." USSG § 2T1.1(c)(1). So, for example, if an individual defendant underreports $100,000 on his personal income tax return, the Guidelines presume that the defendant would have had to pay income tax at a rate of 28% on that unreported income. *See* USSG § 2T1.1(c)(1)(A). Consequently, in that case, the tax loss would be $28,000, unless "a more accurate determination of the tax loss can be made." *See* USSG § 2T1.1(c)(2).

95 USSG § 1B1.3(a)(1-3) ("Relevant Conduct (Factors that Determine the Guideline Range)").

96 USSG § 6A1.3, comment. The Commission added this language to the Guidelines' commentary by amendment 387, effective November 1, 1991. *See* USSG App. C.

matters at sentencing is preponderance of the evidence."[97]

When applying the Guidelines, the sentencing judge must consider relevant conduct.[98] Relevant conduct represents a purposeful policy decision on the part of the Commission to incorporate "real offense" sentencing, into an otherwise "charge offense" sentencing scheme.[99] So-called "pure real offense" sentencing bases sentencing determinations "upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted . . . , or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted . . . ."[100] In contrast, "pure charge offense" sentencing considers only the conduct that constituted the elements of the offense for which the defendant was convicted.[101] Consequently, "[a] pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted."[102]

The Commission ultimately opted for a hybrid approach that "moved closer to a charge offense system [, but one that] . . . contain[ed] a significant number of real offense elements."[103] Some of these "real offense elements" include the offender's "role in the offense, the presence of a gun, or the amount of money actually taken."[104] These real offense elements are codified in the Guidelines as specific offense characteristics and adjustments. The Commission justified incorporating "real offense" considerations into the Guidelines' sentencing structure by emphasizing the fundamental distinction between the assessment of guilt for criminal conduct and the determination of penalties for such conduct.

> The principles and limits of sentencing accountability . . . are not always the same as the principles and limits of criminal liability. Under [the sentencing guidelines], the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.[105]

97 FEDERAL JUDICIAL CENTER, GUIDELINE SENTENCING: AN OUTLINE OF APPELLATE CASE LAW ON SELECTED ISSUES 287 (Sept. 1998)(citations omitted).

98 *See id.* (stating that the guideline sentence "*shall* be determined on the basis of [relevant conduct]") (emphasis added).

99 USSG Ch.1 Pt. A(4)(a), p.s.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 USSG § 1B1.3, comment. (n.1).

B. *The Limits of Legislative Authority as to Sentencing Factors*

Relevant conduct long has been given considerable importance in sentencing jurisprudence. Over fifty years ago, the Court stated that "[h]ighly relevant[,] if not essential to[,] [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."[106] This sentiment is codified at 18 U.S.C. § 3661: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[107] According to the Court, relevant conduct merely "corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment."[108]

Perhaps most important for purposes of constitutional due process is the fact that relevant conduct determinations need only be established by a preponderance of the evidence. According to Judge William W. Wilkins, Jr. (first Chair of the Commission), and Commission Vice-Chair John R. Steer (former General Counsel of the Commission), a preponderance of the evidence standard for relevant conduct determinations provides sufficient due process protection.

> Pre-guidelines pronouncements by the United States Supreme Court and other courts indicate that a preponderance of the evidence standard comports with fifth amendment due process requirements when sentencing factors, including those within the ambit of Relevant Conduct, are contested . . . . The guidelines enhance procedural fairness by largely determining the sentence according to specific, identified factors, each of which a defendant has an opportunity to contest, through evidentiary presentation or allocution, at a sentencing hearing. The advent of guideline sentencing thus presents no convincing reason to conclude that constitutional standards are somehow stricter when guidelines are used to assist in fashioning the appropriate sentence, or that policy considerations compel use of a higher standard. Hence, courts should apply the guideline adjustments within the realm of Relevant Conduct when those adjustments are established by the preponderance of the evidence.[109]

As the Court noted in *McMillan*, courts generally are to defer to the legislature in making this determination: an element of a crime is whatever a legislature says it is, and likewise, legislatures, or their designees (e.g., sentencing commissions) may determine what factors will count as sentencing enhancements, and the weight those factors are to be given. Nevertheless, even the legislature does not have unfettered

106 Williams v. New York, 337 U.S. 241, 247 (1949) (quoted in United States v. Watts, 519 U.S. 148, 151-52 (1997)).

107 18 U.S.C. § 3661 (2000).

108 *Watts*, 519 U.S. at 152 (internal quotations omitted).

109 Wilkins & Steer, *supra* note 20, at 518-19 (footnotes omitted).

discretion in drafting criminal legislation.[110]

Articulating exactly where to draw the line between an element of a crime and a sentencing factor is difficult, if not impossible, to identify. Nevertheless, it is important not only to recognize that there is distinction between elements of crimes and sentencing factors, but to understand the necessity of the distinction. Without a clear conceptual distinction between elements of crimes and sentencing factors, there is no reason in principle why a legislature simply could not recognize just one general crime—wrong-doing—and then proceed to enunciate dozens of sentencing factors for that crime ranging from mere jay-walking to homicide.[111] Under such a sentencing scheme, even jaywalkers conceivably could be exposed to a term of life imprisonment, depending on the sentencing enhancements imposed.

In the language of Chief Justice Rehnquist, such a criminal statute would be impermissibly "tailored to permit the [sentencing enhancement] to be a tail which wags the dog of the substantive offense."[112] Thus, the essential problem with a single criminal statute for mere wrong-doing, for which there may be dozens of associated sentencing enhancements, is that the sentencing enhancements drive the sentence, rather than the nature of the offense itself. Under such a regime, the conduct associated with the enhancement is what is penalized, rather than the conduct associated with

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110 Indeed, the following excerpt from oral argument in *Apprendi* between Justice Thomas and Respondent Lisa S. Gocham, Deputy Attorney General for New Jersey, illustrates an example of legislative over-reaching, but also notes a remaining problem for identifying the line over which criminal legislation may not pass.

> QUESTION: What if a legislature had a statute that authorized a crime called wrongdoing, just prove anything wrong, and then it had a—and the jury has to find the wrong, but then the judge is directed to impose a whole range of sentences, depending on what the wrong is, and he has to do it just by a preponderance of the evidence. I suppose that would be perfectly okay.
>
> MS. GOCHMAN: No. That would probably go way too far. That would be too extreme. It's very vague. It's very overbroad. It wouldn't give notice to criminal defendants of exactly what their conduct was, what the requisite *mens rea* was.
>
> QUESTION: Well, they could perhaps have a checklist of 95 different things that would qualify as wrongdoing. Any one of those is found, then you turn over the matter to the judge, and from there on it's up to the judge on the basis of the preponderance of the evidence, and no jury required.
>
> MS. GOCHMAN: Well, we're not suggesting at all that we can take away from the prosecutor's burden to prove *mens rea* beyond a reasonable doubt, or any of the traditional elements of traditional offenses. That's not at all what we're arguing here, so that that hypothetical would, of course—
>
> QUESTION: Well, what is the constitutional line, in your view, about what can be an element, and what can be a sentencing factor? *What's the line?*

Transcript of Oral Argument at 29-30, *Apprendi v. New Jersey* (No. 99-478) (emphasis added).

111 Justice Scalia posed a similar hypothetical in his dissenting opinion in Monge v. California, 524 U.S. 721, 738 (1998) (Scalia, J., dissenting). "Although California's system is not nearly that sinister, it takes the first steps down that road. The California Code is full of 'sentencing enhancements' that look exactly like separate crimes, and that expose the defendant to additional maximum punishment." *Id.* at 739.

112 *McMillan*, 477 U.S. at 88.

the elements of the crime. This situation would have the unpalatable effect of turning the judge essentially into a jury—a jury, moreover, that need only be convinced by a preponderance of the evidence.

Somewhere between drafting one crime with dozens of associated enhancements and drafting a different statute to cover every possible permutation of criminal conduct lies a practical and just reality. Although it is well-settled that legislatures have the authority to draft legislation criminalizing certain conduct, and likewise, to identify enhancements for such conduct, there are constitutional limitations on the exercise of this authority. Thus, in response to Justice Breyer's query during oral argument in *Apprendi*—"It's just drafting. Is that what it is?"[113]—the answer, of course, must be "No." Indeed, as the Court held in *McMillan*, legislative fiat alone does not dictate the validity of a sentencing factor.[114] After all, according to Justice Scalia in *Monge v. California*[115]—a case addressing the constitutionality of a state sentencing enhancement based upon prior criminal conduct, "[i]f the protections extended to criminal defendants by the Bill of Rights can be so easily circumvented [by legislatures]," then most of those rights would be nothing more than "vain and idle enactment[s], which accomplished nothing."[116] Accordingly, "[t]he fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence*. . . delimits the boundaries of. . . important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt."[117]

In order to avoid "flouting" common morality "and bringing law into contempt" through *ad hoc* drafting of criminal statutes, Professor Hart has suggested that the concepts of proportionality and uniformity should inform legislatures when distinguishing elements of crimes from sentencing enhancements: "The guiding principle is that of a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a commonsense scale of gravity."[118] So as to maintain the integrity of this system of penalties, legislatures and sentencing commissions should avoid filling their criminal codes with " 'sentencing enhancements' that look exactly like separate crimes."[119]

With this in mind, Justice Stevens—foreshadowing the issue he would later confront in *Apprendi*—noted the following in his dissenting opinion in *McMillan*.

113 Justice Breyer, Transcript of Oral Argument at 6, *Apprendi v. New Jersey* (No. 99-478).

114 *See McMillan*, 477 U.S. at 86.

115 524 U.S. at 738 (1998).

116 *Monge*, 524 U.S. at 738 (1998) (internal quotations omitted) (quoting Slaughter-House Cases, 83 U.S. 36, 96 (1872)).

117 *Monge*, 524 U.S. at 738 (Scalia, J., dissenting).

118 *See* HART, *supra* note 1, at 24-25.

119 *Monge*, 524 U.S. at 738.

> Today the Court holds that state legislatures may not only define the offense with which a criminal defendant is charged, but may also authoritatively determine that the conduct so described—i.e., the prohibited activity which subjects the defendant to criminal sanctions—is not an element of the crime which the Due Process Clause requires to be proved by the prosecution beyond a reasonable doubt. However, a state legislature should not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties. Because the Pennsylvania statute challenged in this case describes conduct that the Pennsylvania Legislature obviously intended to prohibit, and because it mandates lengthy incarceration for the same, the conduct so described should be considered an element of the criminal offense, requiring proof beyond a reasonable doubt.[120]

In light of the potential impact such a distinction has on the applicability of fundamental constitutional rights, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[121] Certainly, if a defendant is punished for conduct that properly should have been charged in an indictment and proved beyond a reasonable doubt—but otherwise was not, then indeed, the moral force of the criminal law is left open to question.[122] In such situations, the imposition of the sentencing enhancement becomes a *de facto* conviction, and the judge has become the jury.

Given Justice Stevens' dissent in *McMillan* coupled with Justice Scalia's dissent in *Monge*, and Justice Thomas' concern expressed during oral argument in *Apprendi* regarding "the constitutional line. . . [dividing] what can be an element, [from] what can be a sentencing factor,"[123] it is telling that Justice Stevens authored the majority opinion in *Apprendi*, in which both Justices Scalia and Thomas joined. Although the constitutional rule enunciated in *Apprendi* appears, on its face, only to concern those situations wherein sentencing enhancements increased the statutory maximum penalty, the rule in *Apprendi* should be read more expansively, especially considering the constituents of the majority. For if the rule in *Apprendi* is applicable only in situations where the statutory maximum penalty has increased, then in the words of Justice O'Connor, the rule amounts to nothing more than a "mere formalism."[124] Legislatures easily could comply with this purported rule simply by making all crimes subject to high statutory maximum penalties.[125] Thus, under such a formalistic reading, "the Court's principle amounts to nothing more than

120 *McMillan*, 477 U.S. at 96 (Stevens, J., dissenting).

121 Boyce F. Martin, *The Cornerstone Has No Foundation: Relevant Conduct in Sentencing and the Requirements of Due Process*, 3 SETON HALL CONST. L. J. 25, 37 (1993) (citing In re Winship 397 U.S. 358, 363-64 (1970)).

122 *See* HART, *supra* note 1.

123 Transcript of Oral Argument at 29-30, *Apprendi v. New Jersey* (No. 99-478). In *Monge v. California*, 524 U.S. 721 (1998), Justice Scalia also expressed a concern regarding the limits on legislative authority in drafting sentencing factors. *See Monge*, 524 U.S. at 738 (Scalia, J., dissenting).

124 *Apprendi*, 120 S. Ct. at 2389 (O'Connor, J. dissenting).

125 *See id.* at 2390.

chastising [the legislature] for failing to use the approved phrasing in expressing its intent as to how [sentencing factors] should be punished."[126] Consequently, this reading of the majority's opinion "accords, at best, marginal protection for the constitutional rights that it seeks to effectuate."[127]

As Justice O'Connor noted, "given the pure formalism of the above reading[] of the Court's opinion, one suspects that the constitutional principle underlying its decision is more far reaching."[128] Certainly, it must be. Rather than reading *Apprendi* formalistically, the holding should be read as a clarification of a rule—albeit, a still somewhat vague, and perhaps incomplete rule—delineating the distinction between elements of a crime and sentencing enhancements. Under this reading of *Apprendi,* the fact that a sentencing enhancement increases the statutory maximum penalty serves only as an *indicator* that the rule is being violated, but should not be read as the rule itself. Rather, the rule in *Apprendi* should be read as requiring that "a state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for *severe* criminal penalties."[129] In essence, the substantive, as opposed to formalistic, rule in *Apprendi* is that the more severe the sentencing enhancement imposed for particular conduct, the more likely that the conduct in question should be considered an element of a crime.[130] Whether the sentencing enhancement increases the statutory penalty to which the offender is exposed is irrelevant.

Support for this substantive reading of *Apprendi* recently was provided by the Court when it summarily vacated *United States v. Valensia*.[131] In *Valensia*, the defendant had pleaded guilty to possession with intent to distribute, and conspiracy to distribute, 35.71 kilograms of methamphetamine.[132] Pursuant to 21 U.S.C. § 841(b)(viii), the statutory minimum sentence for conspiracy to manufacture and possess such an amount of methamphetamine is ten years, and the statutory maximum is life. Based on the amount of drugs involved, the district court calculated the defendant's base offense level to be 38, which translated into a sentencing guideline range of 235-293 months imprisonment.[133] The district court then enhanced the defendant's base offense level by four levels based upon the defendant's leadership role in the drug conspiracy,

126 *Id.* (quoting *Jones*, 526 U.S. at 267 (Kennedy, J., dissenting)).

127 *Id.*. at 2389.

128 *Id.* at 2391 (O'Connor, J., dissenting).

129 *McMillan*, 477 U.S. at 96 (Stevens, J., dissenting).

130 Of course, precisely when the severity of a penalty turns a sentencing factor into an element of a crime is uncertain. Nevertheless, as we argue below, in some instances the answer is clear.

131 222 F.3d 1173 (9th Cir. 2000), *vacated*, 121 S. Ct. 1222 (2001) (Mem.).

132 *See id.* at 1181.

133 *See id.*

and possession of a firearm during the course of the conspiracy, bringing the defendant's adjusted offense level to 42.[134] The district court then deducted three levels for the defendant's acceptance of responsibility, which reduced the defendant's offense level to 39 for a sentencing range of 262-327 months imprisonment. Had the four-level enhancement not applied, however, then the three-level reduction for acceptance of responsibility would have reduced the defendant's offense level from 38 to 35, or down to a sentencing guideline range of 168-210 months imprisonment.[135]

On appeal, the defendant argued that the four-level enhancement, which increased his minimum sentence by 94 months, or nearly eight years, was "extremely disproportionate and may not be imposed unless the district court has applied the clear and the convincing evidence standard."[136] The Ninth Circuit disagreed noting, in part, that "the enhanced sentence f[e]ll within the maximum sentence for the crime alleged in the indictment," and therefore a preponderance of the evidence standard was sufficient.[137] Moreover, the Ninth Circuit cited *Apprendi* in support of this rationale for refusing to require the district court to apply any standard greater than a preponderance of the evidence.[138] As the relevant statutory maximum sentence in *Valensia* was life, the "formalistic" reading of the rule in *Apprendi* was not violated inasmuch as no sentencing factor possibly could increase the defendant's sentence beyond the statutory maximum.

Although the Ninth Circuit's decision appeared to be consistent not only with *Apprendi*, but with every circuit court of appeals decision interpreting *Apprendi*,[139] on March 5, 2001, the Supreme Court summarily vacated *Valensia*.[140] Ironically, the Court remanded the case to the Ninth Circuit with instructions to reconsider its decision in light of *Apprendi*.[141] Thus, as it appears that the Ninth Circuit's decision in *Valensia* was based on a formalistic reading of the rule in *Apprendi*, the Court's decision to vacate *Valensia* signals that there indeed is more to *Apprendi* than mere

134 *See id*.

135 *See id*.

136 *Id*.

137 *Id*. at 1182.

138 *See id*. at 1182 n.4.

139 *See* United States v. Robinson, 241 F.3d 115, 119 (1st Cir. 2001) (holding that no Apprendi violation occurs when sentence is below default statutory maximum); *accord* United States v. Houle, 237 F.3d 71, 79-80 (1st Cir. 2001); United States v. Garcia, 240 F.3d 180, 184 (2d Cir. 2001); United States v. Thompson, 237 F.3d 1258, 1262-63 (10th Cir. 2001); United States v. Williams, 235 F.3d 858, 863 (3d Cir. 2000); United States v. Kinter, 235 F.3d 192, 202 (4th Cir. 2000); United States v. Keith, 230 F.3d 784, 787 (5th Cir. 2000) (per curiam), cert. denied, 121 S. Ct. 1163 (2001); Hernandez v. United States, 226 F.3d 839, 841-42 (7th Cir. 2000); United States v. Aguayo-Delgado, 220 F.3d 926, 933-34 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000); *see also* discussion *supra* Part I.F.

140 *See* Valensia v. United States, 121 S. Ct. 1222 (2001) (Mem.).

141 *See id*.

formalism.

C. *Two Roads Converged in a New Jersey Wood, and That Is Making All the Difference*

There are two "roads" in the history of Supreme Court sentencing jurisprudence that lead to *Apprendi.* One road regards the constitutionality and role of relevant conduct in sentencing determinations. Along this road, the Court has recognized and legitimized the distinct role of sentencing factors in the sentencing process. For purposes of determining whether to enhance a sentence, courts may consider certain conduct—sentencing factors—that otherwise is not included in the indictment. Furthermore, the Constitution permits such conduct to be proved by a mere preponderance of the evidence, for only elements of a crime need to be proved to a jury beyond a reasonable doubt.

The other road to *Apprendi* regards the constitutional limit imposed on legislative discretion in drafting criminal statutes. Although legislatures generally are free to identify the elements of a crime and the factors that may enhance punishment for that crime, recent Supreme Court sentencing jurisprudence suggests strongly that legislatures may not draft criminal statutes in such a way that sentencing factors trump criminal elements. In other words, legislatures may not draft criminal statutes that make the conduct underlying the sentencing factor the focus of punishment, rather than the conduct constituting the elements of the criminal offense.[142] As legislatures may not delegate to another body authority they themselves do not possess, it follows that sentencing commissions, to whom legislatures have delegated authority to promulgate sentencing guidelines,[143] likewise may not draft sentencing guidelines to include sentencing factors that trump the elements of the crime.

The tension between the impact sentencing factors have in determining sentences on one hand, and the integrity of due process on the other, is exemplified in a line of circuit courts of appeals cases upholding higher standards of proof for severe sentencing enhancements. In these cases, the appellate courts favored a clear and convincing standard of proof for enhancements that had a significant impact on the defendant's sentence.[144] Although the Supreme Court has yet to address the issue

142 *See McMillan*, 477 U.S. at 88.

143 *See Mistretta*, 488 U.S. at 371.

144 In *United States v. Kikumura*, 918 F.2d 1084, 1098-1102 (3d Cir. 1990), the Third Circuit upheld a district court's use of the clear and convincing standard of proof at sentencing. Likewise, the Second Circuit has held that "a more rigorous standard should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence." United States v. Shonubi, 103 F.3d 1085, 1089 (2d Cir.1997). Two other circuits have suggested the same. *See* United States v. Townley, 929 F.2d 365, 369-370 (8th Cir. 1991); United States v. Restrepo, 946 F.2d

directly, in light of its recent sentencing jurisprudence discussed above, it is likely that the Court will side with those circuit courts that opt for higher standards of proof in cases where relevant conduct "would dramatically increase the sentence." Indeed, as the Court stated in *Apprendi*,

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances–be deprived of protections that have, until that point, unquestionably attached.[145]

In light of the law-like nature of the Guidelines[146] and a non-formalistic reading of *Apprendi*,[147] it follows that potentially any sentencing factor may have to be proved by a higher standard depending on how much the sentencing factor enhances the sentence. To paraphrase the Court, as sentencing factors increase punishment under the Guidelines, "both the loss of liberty and the stigma attaching to the offense are heightened."[148] As a result, a more rigorous standard may be appropriate.

In Figure Four below, the remainder of the sentencing universe is shaded light gray to indicate the potential that all sentencing factors may have to be determined under a higher standard of proof if they would dramatically increase the sentence. If the increase is so dramatic that the sentencing enhancement tail wags the dog of the substantive offense, the enhancement becomes an element of the offense.

654, 661, n.12 (9th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 961 (1992); *Restrepo*, 946 F.2d, at 661-663 (Tang, J., concurring), *id*. at 664-679 (Norris, J., dissenting); *id*. at 663-664 (Pregerson, J., dissenting) (advocating the beyond-a-reasonable-doubt standard).

Specifically within the context of the Federal Sentencing Guidelines, the Supreme Court has "acknowledged" this line of cases that require a higher standard of proof for conduct that significantly enhances the sentence. In *United States v. Watts*, the Court noted the following:

> The Guidelines state that it is "appropriate" that facts relevant to sentencing be proved by a preponderance of the evidence, and we have held that application of the preponderance standard at sentencing generally satisfies due process. We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence.

United States v. Watts, 519 U.S. 148, 156 (1997) (citing *Kikumura*, 918 F.2d at 1102, for the proposition "that [the] clear-and-convincing standard is implicit in 18 U.S.C. § 3553(b), which requires a sentencing court to 'find' certain facts in order to justify certain large upward departures").

145 *Apprendi*, 120 S. Ct. at 2359.

146 *See supra* Part I.B.

147 *See supra* Part II.B.

148 *Apprendi*, 120 S. Ct. at 2359.

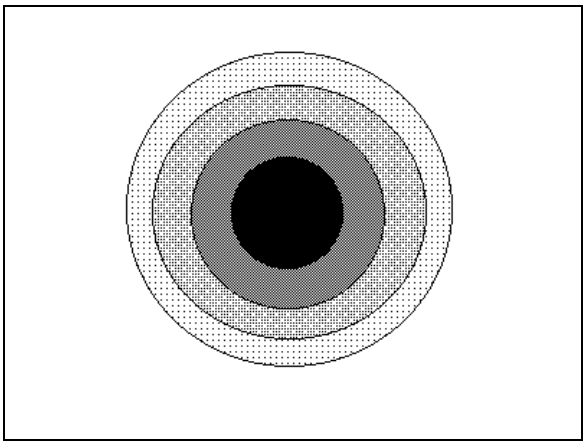

Figure 4: Present Sentencing Universe

III. *APPRENDI'S* IMPACT ON SENTENCING OFFENDERS CONVICTED OF ECONOMIC CRIMES

Although the current sentencing jurisprudence largely is focused on *Apprendi*'s effect on drug sentences,[149] the Court's rationale in *Apprendi* is just as applicable to economic crimes. Applying *Apprendi* to the sentencing regime for economic crimes is significant inasmuch as roughly one quarter of all federal offenses sentenced under the Guidelines concern some form of economic crime.[150] In light of the so-called "new technology" offenses—e.g., hacking, distributed denial of service attacks, and computer-based "pump-and-dump" securities fraud schemes,[151] this proportion is likely to increase.

Unlike sentencing for virtually all other federal crimes, sentencing for the most common forms of economic crimes[152] is driven *entirely* by sentencing factors. In contrast to economic crimes, sentencing for other offenses, such as drug and violent crimes, is determined predominately by

149 *See, e.g.*, United States v. LaFreniere, 236 F.3d 41 (1st Cir. 2001) (holding that *Apprendi* does not require drug amount to be charged in indictment when district court sentences defendant within statutory maximum); United States v. Angle, 230 F.3d 113 (4th Cir. 2000) (holding that *Apprendi* requires drug amount to be charged in indictment if amount increases statutory maximum penalty); *accord* United States v. Doggett, 230 F.3d 160 (5th Cir. 2000); United States v. Flowal, 234 F.3d 932 (6th Cir. 2000); Aguyao-Delagado, 220 F.3d 926 (8th Cir. 2000); United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000).

150 *See* UNITED STATES SENTENCING COMMISSION, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 12.

151 *See, e.g.*, Vogel v. Sands Bros. & Co., 126 F. Supp.2d 730 (S.D.N.Y. 2001) (involving a pump-and-dump scheme); United States v. Zeneski, 912 F. Supp 43 (E.D.N.Y. 1996) (involving hacking).

152 According to the most recent Commission data available, fraud, theft, and tax offenses constitute the vast majority of economic crimes sentenced under the guidelines. *See id.*

the *nature* of the offense, the severity of which is reflected in their respective "base offense levels."[153] The base offense level represents the Commission's assessment of the relative severity of particular crimes,[154] and serves as the initial starting point for Guideline sentencing adjustments.[155] The base offense levels range from a low of one, which corresponds to a term of zero to six months imprisonment, to a high of 43, which corresponds to a term of life imprisonment.[156] For drug crimes, the base offense level ranges from six to 38 depending on the type and amount of drug involved in the offense.[157] For violent crimes resulting in death, the base offense level ranges from 10 to 43 depending on whether the homicide constituted involuntary manslaughter or first degree murder.[158]

In contrast, the base offense level for tax and fraud only is six,[159] and for theft, the base offense level only is four.[160] No term of imprisonment is required for sentences corresponding to these low offense levels.[161] As these base offense levels indicate, the Commission does not view economic crimes as being necessarily as serious as, for example, violent offenses.[162] As a result, sentencing for economic crimes has little, if

153 The Guidelines assign a "base offense level" to each class of criminal conduct. *See* USSG § 1B1.2(a); 28 U.S.C. § 994(m) ("The Commission shall. . . independently develop a sentencing range that is consistent with the purposes of sentence described in section 3553(a)(2) of Title 18, United States Code."); 18 U.S.C. § 3553(a)(2) (articulating, *inter alia*, need for sentences "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense").

154 *See* United States v. Gurgiolo, 894 F.2d 56, 57 (3d Cir. 1990).

155 *See* USSG § 1B1.1(a).

156 *See* USSG Ch. 5 Pt. A ("Sentencing Table").

157 *See* USSG § 2D1.1(c) ("Drug Quantity Table").

158 *See generally*, USSG § 2A1.1 - 2A1.4.

159 *See* USSG § 2F1.1(a). If no tax loss is involved, the base offense level for tax fraud is six. *See* USSG § 2T1.1(a)(2). Unlike the fraud guidelines, however, which contain a "loss table" in the specific offense characteristic section, (*see* USSG § 2F1.1(b)(1)) the tax guidelines provide for alternative base offense levels depending on the amount of loss involved. *See* USSG §§ 2T1.1(a)(1), 2T4.1. The distinction is unimportant for our purposes inasmuch as relevant conduct determines the ultimate offense level whether through adjustments, as is the case in the fraud guidelines, or through selection of the initial base offense level, as is the case for tax.

160 *See* USSG § 2B1.1(a).

161 *See* USSG Ch. 5 Pt. A; USSG § 5B1.1 (authorizing, generally, term of probation for low offense levels).

162 This is not to say that the Commission views economic offenses as minor offenses *per se*. Indeed, it does not. *See, e.g.*, USSG § 2T1.1, comment., backg'd ("Tax offenses, in and of themselves, are serious offenses."). Rather, the point is that economic offenses can range from relatively minor offenses, e.g., a $500 tax fraud, to extremely serious offenses, e.g., a $500 million tax fraud. *See id.* ("[A] greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics."). Hence, economic offenses are not *inherently* very serious offenses, but very well can be (and often are). In contrast, inasmuch as all aggravated assaults are *inherently* dangerous, they are *inherently* very serious offenses, which is why the base offense level for aggravated assault is higher than it is for tax evasion. *Compare* USSG § 2A2.2(a) (setting base offense level at 15 for aggravated assault), *with* USSG § 2T1.1(a)(2) (setting base offense level at 6 for tax evasion resulting in no tax loss). Thus, the base offense levels reflect that aggravated assault *simpliciter* is viewed as more serious than tax evasion *simpliciter*.

anything, to do with the nature of the economic crime, but practically everything to do with the amount of "loss" involved, i.e., "the value of the property taken, damaged, or destroyed,"[163] including the value of any money taken[164] or taxes evaded.[165]

Indeed, the tax Guidelines' own background commentary states that the tax fraud "[G]uideline relies most heavily on the amount of loss that was the object of the offense."[166] Similarly, the background commentary to the fraud Guidelines provides that the "primary factors upon which this [G]uideline has been based" are "the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated."[167] Finally, the background commentary to the theft Guidelines states that "[t]he value of the property stolen plays an important role in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant."[168]

For example, depending only on the amount of loss involved, a defendant convicted of fraud pursuant to 18 U.S.C. § 1001, although he initially would receive a base offense level of six (zero to six months imprisonment), theoretically could have his sentence increased to an offense level of 23 (46 to 57 months imprisonment). Pursuant to 18 U.S.C. § 1001, the statutory maximum term of imprisonment for fraud is five years.[169] Thus, based upon loss determinations alone, an offender's sentence can increase from potentially zero months imprisonment, up to almost the statutory maximum term of imprisonment. Indeed, it appears that economic crimes are the only sorts of offenses that can swing from potentially no prison time to close to 100% of the statutory maximum term of imprisonment based on relevant conduct determinations alone. Clearly, the expression that loss "drives" the sentences for economic crimes could not be more accurate.[170] In light of our analysis of *Apprendi*, therefore, we consider whether loss wags the dog of the substantive economic offenses.

163 *See, e.g.*, USSG § 2B1.1, comment., n.2.

164 *See* USSG § 2F1.1, comment., n.8.

165 *See* USSG § 2T1.1(c)(1).

166 USSG § 2T1.1, comment., backg'd.

167 USSG § 2F1.1, comment., backg'd.

168 USSG § 2B1.1, comment., backg'd.; ROGER W. HAINES, JR., ET. AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 220 (2000) ("The principal determinant of sentence length for cases of theft, embezzlement, receipt of stolen property, and property destruction sentenced under § 2B1.1 is the amount of the 'loss.'").

169 *See* 18 U.S.C. § 1001(a) (2000).

170 *See* Bruce Zucker & Michelle Carey, *Capturing the Harm: Defining "Tax Loss" for use in Federal Sentencing*, 15 AKRON TAX J. 1, 5 (2000) (referring to sentencing guidelines for economic crimes as "loss driven"); Frank O. Bowman, *Coping With Loss: A Reexamination of Sentencing Federal Economic Crimes under the Guidelines*, 51 VAND. L. REV. 461, 464 (1998) ("The primary determinant of sentence length for federal economic criminals is the amount of 'loss' resulting from an offender's conduct.").

According to Mark Knoll and Professor Richard Singer, the traditional methods used by the federal courts to find elements of crimes were relatively straightforward. "If the fact in dispute was part of the statutory scheme and directly related to the defendant's level of punishment, then it had to be (1) alleged in the indictment, (2) proved to the jury, and (3) proved beyond a reasonable doubt in order to sustain the sentence imposed."[171] Given that loss is inextricably intertwined both with the nature of economic crimes and with the sentencing provisions for economic crimes, there is no obvious reason why loss should not be considered an element of a criminal offense. According to Mr. Knoll and Professor Singer, "prior to *McMillan* and the [Guidelines], value was considered an element by federal courts."[172] Indeed, thirty years ago, the Second Circuit held that "[a]lthough. . . the section of the Criminal Code here in question does not make value in excess of a certain figure an element of the crime but rather a fact going only to the degree of punishment, we assume the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge."[173]

At the very least, recalling Justice Stevens' dissent in *McMillan*,[174] where loss operates to increase dramatically a defendant's sentence, a high loss amount should be treated as an element of the offense. Merely because the loss may not increase a defendant's sentence above an otherwise applicable statutory maximum term, however, is of no consequence; the tail may still wag the dog from under the statutory maximum table. The non-formalistic reading of *Apprendi* advocated earlier still speaks against allowing large loss amounts to remain mere sentencing factors.[175]

After all, according to Justice Stevens' majority opinion in *Apprendi*, "the relevant inquiry is one not of form, *but of effect*-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[176] Consequently, if "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury,"[177] then a jury's guilty verdict authorizes a sentence consistent only with the base offense level for the applicable Guideline, which, for economic crimes, will be equivalent to zero to six months imprisonment. If, according to Justice Thomas,[178] it literally is

171 Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania*, 22 SEATTLE U. L. REV. 1057, 1078 (1999).

172 *See Id.* at 1079.

173 United States v. Kramer, 289 F.2d 909, 921 (2d Cir. 1961) (Friendly, J.).

174 *See McMillan*, 477 U.S. at 96 (Stevens, J. dissenting).

175 *See supra* Part II.B.

176 *Apprendi*, 120 S. Ct. at 2365 (emphasis added).

177 *Id.* at 2359 n.10.

178 *Id.* at 2369 (Thomas, J., concurring) (arguing against validity of sentencing enhancements).

true that "a crime includes *every* fact that is by law a basis for imposing or increasing punishment,"[179] the upshot, of course, would be that *all* sentencing factors must be determined beyond a reasonable doubt, which would eviscerate real-offense sentencing. Concededly, such a literal reading is rather extreme and likely untenable in this era of determinate sentencing schemes. Nevertheless, in light of what we have argued, *Apprendi* suggests strongly that the days are numbered at least for sentencing factors like "loss," where they essentially function as elements of a crime.

CONCLUSION

Apprendi v. New Jersey has irrevocably altered the sentencing landscape at both the federal and state levels. *Apprendi*'s impact likely will be felt not only by legislatures in terms of how they draft new criminal statutes, but also by sentencing commissions in terms of how they draft sentencing guidelines. Justice O'Connor's fear that *Apprendi* has placed in jeopardy all determinate sentencing schemes—including the Guidelines—remains to be seen, but the prognosis of their demise is unlikely. Whether particular Guidelines are sufficiently immunized from *Apprendi*citis, however, is another matter. We have argued that given their near-exclusive reliance on loss, the fraud, theft, and tax Guidelines are so vulnerable to *Apprendi*citis, that they likely will require substantial modification.

For the time being, federal and state sentencing case law will continue to exhibit symptoms of *Apprendi*citis. Until the Supreme Court articulates a principled distinction between criminal elements and sentencing enhancements, *Apprendi*citis will continue to spread unchecked.

ADDENDUM

On April 6, 2001, shortly before the publication of this Article, the Commission voted unanimously to adopt a group of proposed amendments to the Guidelines collectively known as the "Economic Crime Package."[180] The Package fundamentally alters sentencing for offenders convicted of economic crimes by, *inter alia*, consolidating under one Guideline the Guidelines for theft,[181] fraud,[182] and property destruction,[183] and by

179 *Id.* at 2372 (Thomas, J. concurring) (emphasis added).

180 *See* UNITED STATES SENTENCING COMMISSION, FOURTH REVISED PROPOSED AMENDMENT: ECONOMIC CRIME PACKAGE §2B1.1, comment. (n.2(A)(i)) (4th rev. ed., Apr. 6, 2001) [hereinafter ECONOMIC CRIME PACKAGE].

181 *See* USSC §2B1.1 (2000).

182 *See* USSC §2F1.1 (2000).

adopting a new loss table.[184] As was the case with respect to each of these individual Guidelines, "loss"[185] remains the principal sentencing factor for determining the sentence under the new, consolidated Guideline. Loss, however, has taken on an altogether new meaning.

Whereas loss previously was thought to include only "direct damages"[186] and exclude "consequential damages,"[187] loss now is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense,"[188] with pecuniary harm defined as "harm that is monetary or that otherwise is readily measurable in money."[189] Reasonably foreseeable pecuniary harm, in turn, simply "means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense."[190] Consequently, as reasonably foreseeable pecuniary harm may include consequential, or otherwise indirect, damages,[191] the definition of loss now encompasses a greater range of pecuniary harms. As a result, loss, as a sentencing factor, will play an even greater role in, and have more of an effect on, the determination of sentences for offenders convicted of economic crimes. In light of this modification, loss may now be even more susceptible to *Apprendi*citis than ever before.

183 *See* USSC §2B1.3 (2000).

184 *See* ECONOMIC CRIME PACKAGE, *supra* note 180, §2B1.1(b)(1).

185 *See supra* notes 163 - 165 (defining previous definition of loss for fraud, theft, and tax offenses).

186 *See* Fred S. Tryles, *A Critique of the Operation of the Theft and Fraud Guidelines from the Perspective of One Probation Officer*, 10 FED. SENT. R. 131 (1997) (stating that "[t]he current theft or fraud guidelines limit the functioning of relevant conduct by counting only direct loss").

187 *See, e.g.*, United States v. Thomas, 62 F.3d 1332, 1346 (11th Cir. 1995) ("The fact that the Commission deliberately allowed an increase for consequential damages in some but not all types of frauds indicates that 'the absence of an increase. . . is a result of design rather than inadvertence.") (citation omitted); United States v. Newman, 6 F.3d 623, 630 (9th Cir.1993) ("[i]f the Sentencing Commission had intended to include consequential losses, it could have included them in the definition of loss."); *see also* United States v. Marlatt, 24 F.3d 1005, 1007-1008 (7th Cir. 1994) (suggesting that exclusion of consequential damages from loss calculation "is no doubt to prevent the sentencing hearing from turning into a tort or contract suit"); United States v. Wilson, 993 F.2d 214, 217 (11th Cir. 1993) ("[W]e note that avoiding the calculation of consequential injury relieves the district court of a potentially onerous factfinding burden and may also promote the objective of uniformity in sentencing outcomes."); *Newman*, 6 F.3d at 630 (holding that calculation of consequential damages for arson or theft "would be too complex and would not necessarily reflect the defendant's culpability accurately").

188 *See* ECONOMIC CRIME PACKAGE, *supra* note 180, §2B1.1, comment. (n.2(A)(i)).

189 *Id.*, §2B1.1, comment. (n.2(A)(iii)).

190 *Id.*, §2B1.1, comment. (n.2(A)(iv)).

191 *See id.*, §2B1.1, comment. (n.2(A)(v)) (including in certain types of cases losses that previously had been denominated as "consequential damages" under prior versions of Guidelines).