Making Sense of *Apprendi* and its Progeny

Erwin Chemerinsky*

It is not hyperbole to say that no Supreme Court decision in years has had more practical effect than *Apprendi v. New Jersey*.[1] In *Apprendi*, the Supreme Court held that any factor, other than a prior conviction, that leads to a sentence greater than the statutory maximum must be proven to the jury beyond a reasonable doubt. In the fewer than six years since *Apprendi*, there have been several important Supreme Court decisions[2] and thousands of lower federal court rulings[3] concerning its applications.

The law surrounding *Apprendi* has produced a bewildering series of distinctions. *Apprendi* requires any factor that leads to a sentence greater than the statutory maximum to be proven beyond a reasonable doubt, but not a prior conviction.[4] *Apprendi* applies to sentencing under "guideline" systems,[5] but not to mandatory minimum sentences.[6] *Apprendi* applies to the Federal Sentencing Guidelines ("Guidelines"), but means that the Guidelines can remain in force so long as they are advisory and not mandatory.[7]

Each of these distinctions seems arbitrary and highly questionable. For example, why should everything that leads to a sentence greater than the statutory maximum have to be proven beyond a reasonable doubt, but not a prior conviction? Why should brandishing a weapon have to be proven to a jury if the sentence is under a guideline system, but the same factor can be proven to a judge if it is under a mandatory minimum law? If it is the mandatory nature of the Guidelines that made them unconstitutional, then why doesn't *Apprendi* apply to mandatory minimum sentences?

In reality, many of these distinctions seem to be based on the views of a single Justice, often one who hasn't written an opinion explaining his or her reasoning. Almost all of the Supreme Court's decisions in this area have been by

---

* Alston & Bird Professor of Law and Political Science, Duke University. I want to thank Garrick Sevilla for his outstanding research assistance. I also want to thank Sara Beale and Laurie Levenson for enormously helpful conversations that are reflected throughout this article.

1. 530 U.S. 466 (2000).

2. *See, e.g.*, United States v. Booker, 543 U.S. 220 (2005) (holding that *Apprendi* applies to the Federal Sentencing Guidelines and the remedy is that they are advisory, not mandatory); Blakely v. Washington, 542 U.S. 296 (2004) (holding that any factor, other than a prior conviction, that leads to a sentence greater than the crime the defendant pled guilty to or the jury convicted of must be proven to the jury beyond a reasonable doubt); United States v. Harris, 536 U.S. 545 (2002) (holding that *Apprendi* does not apply to mandatory minimum sentences); Ring v. Arizona, 536 U.S. 584 (2002) (holding that, based on *Apprendi*, juries, not judges, must find the aggravating factors warranting imposition of a death sentence).

3. An attempt to do a Westlaw search of cases citing *Apprendi* generated a response that there were too many documents to produce a result.

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

5. *Booker*, 543 U.S. 220; *Blakely*, 542 U.S. 296.

6. *Harris*, 536 U.S. 545.

7. *Booker*, 543 U.S. at 233.

five to four margins.[8] As a result, the shift of a single Justice is responsible for distinctions in the law. For example, in *Harris v. United States*, the four dissenters from *Apprendi*—Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer—were joined by Justice Scalia, who had been in the majority in *Apprendi*, to hold that *Apprendi* does not apply to mandatory minimum sentences. Justice Scalia did not write an opinion to explain why he saw a distinction. Even more dramatically, in *United States v. Booker*, Justice Ginsburg voted with the other Justices who had been in the majority in *Apprendi*—Justices Stevens, Scalia, Souter, and Thomas—to hold that *Apprendi* applies to the Federal Sentencing Guidelines. But she joined the four dissenters from *Apprendi* to hold that the remedy is that the Guidelines could continue so long as they are advisory. She did not write an opinion to explain her switch.

My goal in this article is to offer a way to make sense of the law in this area. I suggest that *Apprendi* and its progeny should be seen as establishing a simple proposition: under the Sixth Amendment, it is wrong to convict a person of one crime and sentence that person for another. I then apply this principle to criminal sentencing and suggest that if *Apprendi* is taken as establishing this basic rule, then many of the Supreme Court's decisions in the area of sentencing are wrong and will need to be changed.

This is a particularly important time to reexamine *Apprendi* and its progeny because of the change in the composition of the Supreme Court. Chief Justice Rehnquist and Justice O'Connor were in the majority in crucial five to four decisions limiting the application of *Apprendi*, such as in holding that *Apprendi* does not apply to mandatory minimum sentences and that the Guidelines are constitutional so long as they are advisory and not mandatory. If either Chief Justice Roberts or Justice Alito disagrees, the Court could revisit these issues and come to the opposite conclusion. And this, of course, is an area where ideology offers no prediction of a Justice's likely vote. Justices Scalia and Thomas were in the majority in *Apprendi* and *Booker I*.[9] If either Roberts or Alito agrees with their view, and that is at least a reasonable possibility, the law in this area could change dramatically, and soon.

Part I of the article defends my interpretation of *Apprendi*: that it is wrong to convict a person of one crime and then sentence the person for another. Part II traces the implications of this for the law of criminal sentencing.

---

8. The only exception was *Ring v. Arizona*, applying *Apprendi* to capital sentencing, which was a seven to two decision. 536 U.S. 584 (2002).

9. By *Booker I*, I mean the decision holding that *Apprendi* applies to the Guidelines. By *Booker II*, I mean the decision holding that the appropriate remedy is to make the Guidelines advisory and not mandatory.

I. THE BASIC PRINCIPLE OF *APPRENDI*

My central thesis is that *Apprendi* stands for the proposition that it is wrong to convict a person for one crime and sentence the individual for another. Initially, as a descriptive matter, this is apparent from the *Apprendi* decision itself.

In December 1991, Charles Apprendi ("Apprendi") fired several shots "into the home of an African-American family that had moved recently into a previously all-white neighborhood."[10] Apprendi was quickly arrested and told police that he had done this "because they are black in color" and he did not want them in the neighborhood.[11] Apprendi ultimately pled guilty to second-degree possession of a firearm for an unlawful purpose.[12] Under New Jersey law, the penalty for this offense is a sentence of five to ten years in prison.

Additionally, under the terms of the plea agreement, the state reserved the right to ask the judge to impose a greater sentence under the New Jersey hate crime law.[13] New Jersey, like many states, has a statute that provides for greater penalties when it is proven that a crime is hate motivated. New Jersey law provides for an "extended term" of imprisonment if the judge finds, by a preponderance of the evidence, that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."[14] Under the terms of the plea agreement, Apprendi reserved the right to challenge the hate crime enhancement of his sentence as violating the United States Constitution.

The trial judge sentenced Apprendi to the maximum sentence of ten years in prison for possession of a firearm for unlawful purposes.[15] Although Apprendi recanted his statement to the police about his reasons for the shooting and said that it was not accurately described, the judge found that the evidence supported a finding "that the crime was motivated by racial bias."[16] The judge imposed an additional two years of imprisonment based on the New Jersey hate crimes law.

The issue before the Supreme Court was whether the penalty enhancement requires proof, to a jury, beyond a reasonable doubt. More precisely, the question for the Court was whether such a penalty enhancement should be regarded as a sentencing factor, which can be proven by a preponderance of the evidence to the judge, or an element of the offense, which must be proven to a jury beyond a reasonable doubt. In a five to four decision, the Supreme Court took the latter view. In an unusual division among the Justices, Justice Stevens wrote the

---

10. Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).
11. *Id.*
12. *Id.* at 469-70.
13. *Id.* at 470.
14. N.J. STAT. ANN. § 2C-44-3(e) (West 1995).
15. *Apprendi*, 530 U.S. at 470.
16. *Id.* at 471.

opinion for the Court, which was joined by Justices Scalia, Souter, Thomas, and Ginsburg.[17]

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 proven beyond a reasonable doubt."[18] The Court stated, quoting a concurring opinion from Justice Stevens in a decision from a year before: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."[19]

The Court explained that the constitutional guarantee of due process of law, together with the Sixth Amendment's right to trial by jury, entitle a criminal defendant to a jury determination that he is guilty, beyond a reasonable doubt, of every element of the crime for which he is convicted and sentenced. Simply put, the Court held that it violates due process and the Sixth Amendment to convict a person of one crime, but punish him or her for another. Apprendi was convicted of possession of a firearm for an unlawful purpose, but he was sentenced both for this crime and for the separate offense of having acted with an impermissible hate-based motive. The Court ruled that this latter factor essentially was a separate crime and it too must be proven to a jury beyond a reasonable doubt.

To be sure, subsequent cases have not articulated the *Apprendi* principle this way. But it explains exactly what the Court did in *Apprendi* and from a normative perspective it is a desirable principle under the Sixth Amendment. *Apprendi*, and all of the subsequent decisions applying it, are about applying to basic principles of the Sixth Amendment: proof beyond a reasonable doubt and trial by jury. My interpretation of *Apprendi* would have it stand for the basic notion that any crime a person is convicted of committing should have to be independently proven beyond a reasonable doubt and have to be found by the jury. As a normative matter, it seems basic and even uncontroversial to say that all crimes should have to be proven beyond a reasonable doubt and to a jury. It seems intuitively unfair to convict a person for one crime and then sentence the person for a different offense.

This interpretation of *Apprendi* has another virtue: it provides a manageable principle to separate the role of the judge and the jury in the criminal justice system. If *Apprendi* means that *any* factor that leads to a greater sentence must be proven to the jury, then it will truly mean the end of judge-imposed sentencing. For example, judges frequently impose greater sentences based on their sense that a defendant has not shown remorse for the crime. Few would think that this is a determination for the jury, but it is if *Apprendi* means that *any* factor that

17. *Id.* at 468.

18. *Id.* at 490.

19. *Id.* at 487 (quoting Jones v. United States, 526 U.S. 227, 252 (1998) (Stevens, J., concurring)).

leads to a greater sentence must be proven to the jury. However, if *Apprendi* is taken as establishing a more limited proposition—that it is wrong to convict a person of one crime, but sentence the person for a different crime—then it explains why the judge can impose a greater sentence for failure to show remorse. That, of course, does not involve a separate criminal offense. In *Apprendi*, by contrast, there were violations of two separate criminal statutes and the Court was simply requiring that both offenses be proven beyond a reasonable doubt.

I do not assume that it always will be clear and obvious whether there were two crimes involved. But I believe that this approach will focus the inquiry on the right question. *Blakely v. Washington* illustrates the potential difficulty of deciding if there were two crimes involved, but also why this is the right inquiry.[20] Ralph Howard Blakely, Jr. was a man in Washington who was convicted by a jury of kidnapping his estranged wife.[21] The sentence for this crime, under Washington law, is fifty-three months in prison.[22] But the judge, in sentencing, found that the defendant committed the crime with "deliberate cruelty" and increased the penalty to ninety months in prison.[23] The ninety months was still within the statutory maximum for the crime.

The issue was whether the finding of deliberate cruelty was a sentencing factor that could be determined by the judge, or whether it was deemed an element of the offense, which must be found by the jury. The Supreme Court, in a five to four decision, with Justice Scalia writing the majority, held that *Apprendi* applies.[24] The Court concluded that any factor, other than a prior conviction, that leads to a sentence greater than the crime that the defendant pled guilty to, or that the jury convicted for, must be proven to the jury beyond a reasonable doubt.[25] The significance of *Blakely*, of course, is that the Supreme Court extended *Apprendi* to sentences *within* the statutory maximum.

Yet, the question is why should "deliberate cruelty" be a factor to be found by the jury? Why is it an element of the offense rather than a sentencing factor, like the failure to show remorse? The answer seems straightforward: deliberate cruelty makes it a different crime than the same offense with a different mental state. Blakely was convicted just of the crime of kidnapping, but he was sentenced for the separate criminal offense of kidnapping with deliberate cruelty. The enormous difference in the sentence reflects that this was regarded as a separate crime. As a separate crime, it was necessary to require that it be proven beyond a reasonable doubt and to a jury.

---

20. Blakely v. Washington, 542 U.S. 296 (2004).
21. *Id.* at 298-99.
22. *Id.* at 299.
23. *Id.* at 300.
24. *Id.* at 303-05.
25. *Id.* at 301, 313.

This, of course, will require courts to decide when factors constitute a different criminal offense, which often will mean deciding when something is a difference in kind as opposed to a difference in degree. For example, when is the increase in the quantity of drugs sufficient to make it a separate crime? When is the difference in mental state sufficient to make it a separate crime? But I contend that these are the right questions to focus on in applying the Sixth Amendment's requirements for proof beyond a reasonable doubt and trial by jury.

Ultimately, this will require analysis of what constitutes a crime. Justice Thomas recognized exactly this when he declared in a concurring opinion in *Apprendi*: "This case turns on the seemingly simple question of what constitutes a 'crime.'"[26] The question, of course, is not simple at all. For example, Justice Thomas's definition of a crime is enormously broad. He said that "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment."[27] The Court's definition of crime in *Blakely* is similar to this.[28] But this would seemingly make every factor that increases the sentence, even the failure to show remorse, into a crime.

That isn't right because the failure to show remorse is not, by any conception, a separate crime. On the other hand, in *Apprendi* and *Blakely*, for the reasons described above, it makes sense to see there having been separate criminal offenses.

My focus in this article is not to elaborate on how to determine what is a crime or if there are separate criminal offenses.[29] Rather, my goal is to suggest that this is the appropriate question for courts to focus on and to sketch the implications of this being the central issue.

II. IMPLICATIONS

What would be the implications of interpreting *Apprendi* and *Blakely* as standing for the proposition that it is wrong to convict a person of one crime and sentence the person for another? In this section, I suggest that a number of the Supreme Court's decisions concerning sentencing and aspects of criminal proceedings would need to be revisited and changed.

---

26. Apprendi v. New Jersey, 530 U.S. 460, 499 (2000) (Thomas, J., concurring).

27. *Id.* at 501.

28. *Blakely*, 542 U.S at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment.'" (quoting 1 JOEL P. BISHOP, CRIMINAL PROCEDURE § 87 at 55 (2d ed. 1872))).

29. For an excellent discussion of this, comparing charge-offense sentencing with real-offense sentencing in terms of what is a crime, see David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993).

A. *Using Acquittals as Bases for Enhancements and the Implications for Double Jeopardy*

Perhaps the most obvious implication of the approach that I am suggesting is that no longer should acquittals be used to increase sentences. In *United States v. Watts*, the Court held that acquittals may be used to enhance sentences.[30] Watts was convicted of possessing cocaine with intent to distribute.[31] He was tried, but acquitted of possessing a firearm in connection with a drug crime.[32] Nonetheless, the judge found firearm possession by a preponderance of the evidence and increased the length of the sentence.[33] The Court said that it was "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted."[34] In a per curium opinion the Court declared: "We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[35]

In his majority opinion in *Booker II*, Justice Breyer cited *Watts* with approval.[36] Indeed, across the country every day, in federal court and state court, defendants are receiving additional punishments—often very large increases—for crimes for which they were acquitted.

Non-lawyers are shocked when I tell them about this routine occurrence. A defendant can be acquitted of nine of ten counts—or for that matter ninety-nine of 100 counts—in an indictment and the judge can use the acquittals to increase the sentence so long as the judge finds, by a preponderance of the evidence, that the crime was committed.

This is obviously inconsistent with the principle that it is wrong to convict a person of one crime and then to sentence the person for another. The basic constitutional principles that underlie *Apprendi* and *Blakely*, proof beyond a reasonable doubt and trial by jury, are undermined when a judge ignores the jury's verdict of acquittal and imposes a greater sentence by finding a crime was committed by a preponderance of the evidence.

Watts thus must be overruled as inconsistent with *Apprendi* and *Blakely*. Doing so actually would have broader implications in terms of the law of double jeopardy. Integral to the Court's holding in *Watts* was its conclusion that it does

30. 519 U.S. 148, 157 (1997).
31. *Id.* at 149.
32. *Id.* at 149-50.
33. *Id.* at 150. The district court added two points to his base offense level under the Guidelines. *Id.*
34. *Id.* at 152.
35. *Id.* at 157.
36. United States v. Booker, 543 U.S. 220, 240 (2005).

not violate double jeopardy for the sentencing judge to enhance a sentence based on a crime for which the defendant was committed.[37]

If it were wrong to convict for one crime and punish for another, then the Court's puzzling double jeopardy jurisprudence would be rendered obsolete or overruled. The Court has found double jeopardy protections inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an "offense."[38] Also, sentencing enhancements are not additional punishment for the previous offense. Rather, they act to increase the sentence "because of the manner in which [the defendant] committed the crime of conviction."[39] In *United States v. DiFrancesco*,[40] the Supreme Court articulated three reasons why facts determined at sentencing proceedings should be treated differently than facts determined at trial. First, "[h]istorically, the pronouncement of sentence has never carried the finality that attaches to an acquittal."[41] Second, facts determined at sentencing do not "approximate the ordeal of trial on the basic issue of guilt or innocence."[42] The defendant is not subject to the same "embarrassment, expense, anxiety, and insecurity and the possibility that he may be found guilty even though innocent."[43] Third, a sentence is determined "in large part on the basis of information, such as the presentence report, developed outside the courtroom."[44] Moreover, it is "purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature."[45]

While it is debatable whether the Court's reasons are persuasive, they are obsolete if it were wrong to convict a person for one crime and punish for another. Since every fact legally essential to imposing a sentence must be charged and proved to a jury to avoid punishing a person for another crime, it is no longer true that a pronouncement of a sentence does not carry the finality of an acquittal. Furthermore, it is no longer true that the determination of a sentence does not "approximate the ordeal of a trial." Lastly, since facts essential to punishment must be proved to a jury, it is no longer true that a sentence is "purely a judicial determination" involving nonadversarial facts.

Hence, some of the Court's highly questionable jeopardy decisions would be overruled. For example, in *Witte v. United States*, a defendant pleaded guilty to marijuana possession.[46] The judge enhanced the sentence based on the pre-

37. 519 U.S. at 156 ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." (quoting Dowling v. United States, 493 U.S. 342 (1990))).

38. *See, e.g.*, Nichols v. United States, 511 U.S. 738, 747 (1994).

39. *Watts*, 519 U.S. at 154.

40. 449 U.S. 117 (1980).

41. *Id.* at 133.

42. *Id.* at 136.

43. *Id.*

44. *Id.* at 136-37.

45. *Id.* at 137.

46. 515 U.S. 389, 393 (1997).

sentence report's indication that the defendant was involved in a prior attempt to import cocaine.[47] Later, a grand jury indicted the defendant for that same attempt to import cocaine.[48] The Court rejected the double jeopardy challenge, since the first indictment did not charge the same offense for which the defendant plead guilty.[49] Furthermore, the Court has rejected the argument that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered for sentencing for a separate crime.[50] The only limitation is when the sentencing range is so broad and the enhancing role of the defendant's conduct so significant, that the conduct becomes "a tail which wags the dog of the substantive offense."[51] But so far, the "tail which wags the dog" principle has not been a meaningful limitation.[52]

In *Monge v. California*, the Court held a prosecutor may again seek a sentencing enhancement for a prior conviction without violating the Double Jeopardy Clause, when the sentence was vacated and remanded by an appellate court due to insufficient evidence of the prior conviction.[53] At issue in *Monge* was California's "three-strikes" sentencing scheme, under which defendants are entitled to separate jury trial concerning their prior convictions.[54] The beyond a reasonable doubt standard as well as other procedural safeguards are applied in these proceedings during a guilt/innocence trial.[55] Evidence of a defendant's prior convictions was found insufficient by a California appellate court, which remanded the case for further sentencing proceedings.[56] The court also held that the Double Jeopardy Clause barred retrial of the defendant's prior conviction.[57] In rejecting the defendant's double jeopardy argument, the Court affirmed that double jeopardy protections are inapplicable at sentencing.[58] Thus, a prosecutor may take as many bites at the apple as required to prove a sentencing enhancement by whatever standard of proof a state adopts.

In sum, the idea that it is wrong to convict a person for one crime and punish for another undermines the rationale for treating sentencing proceedings different from guilt/innocence proceedings for double jeopardy purposes.

---

47. *Id.* at 394.

48. *Id.*

49. *Id.* at 396; *see also* Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

50. *Witte*, 515 U.S. at 398; *see also* Williams v. Oklahoma, 358 U.S. 576 (1959).

51. *Witte*, 515 U.S. at 403 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).

52. I could find no Supreme Court cases using this principle as a limit.

53. 524 U.S. 721 (1998).

54. *See id.* at 725.

55. *Id.*

56. *Id.* at 725-26.

57. *Id.* at 726.

58. *Id.* at 728.

B. Booker II *Was Wrongly Decided*

In *United States v. Booker*, the Supreme Court held that *Apprendi* applies to the Guidelines, but that it is constitutional so long as the Guidelines are advisory and not mandatory. Justice Breyer, writing for the Court, stated: "That is to say, without this provision—namely the provision that makes 'the relevant sentencing rules mandatory and impose[s] binding requirements on all sentencing judges'—the statute falls outside the scope of Apprendi's requirement."[59]

Lower courts have been struggling ever since *Booker* to figure out what it means to have the Guidelines be advisory and how appellate courts are to decide what is reasonable. It appears that the law is that federal district courts must consider the Guidelines and justify any departures. If so, it is difficult to see how this is much different than the approach before *Booker*. That, of course, would please four of the five Justices in the majority in *Booker II* since they dissented as to the application of *Apprendi* and *Blakely* to the Guidelines and, for that matter, dissented in *Apprendi* and *Blakely*.

But if the Court were to embrace the principle that it is wrong to convict a person of one crime and sentence the person for another, the error in *Booker II* would be obvious. It would not matter whether the sentencing court was required to impose the sentence or if the court had discretion; either way it is wrong to sentence a person for a crime for which he or she was not convicted. Indeed, it is simply impossible to reconcile *Booker II* with *Apprendi* and *Blakely* if they are seen as establishing the principle that a person should not be convicted of one offense and sentenced for another.

C. Mandatory Minimum Sentences

Harris stands for the proposition that judicial factfinding is permissible under the Sixth Amendment when it enhances a mandatory minimum sentence.[60] This decision gives full scope to the Court's sentencing factor/offense element jurisprudence, which began with *McMillan v. Pennsylvania*.[61] *McMillan* was affirmed in *Jones v. United States*, which declared "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt."[62]

If it is wrong to convict for one crime but punish for another, then there is no meaningful distinction between a fact that increases a mandatory minimum and one that increases a maximum penalty. Justice Thomas, in his *Harris* dissent, wrote, "[t]he Court's holding today rests on either a misunderstanding or a

59. United States v. Booker, 543 U.S. 220, 259 (2005).
60. 536 U.S. 545, 560-61 (2001).
61. 477 U.S. 79 (1986).
62. 526 U.S. 227, 243 n.6 (1999).

rejection of the very principles that animated *Apprendi* just two years ago."[63] Even Justice Breyer who concurred in the judgment could not "easily distinguish [*Apprendi*] from [*Harris*] in terms of logic."[64]

Apart from *Harris*'s conceptual inconsistency with the idea that it is wrong to convict for one crime but punish for another, it also makes little sense from a practical perspective. A mandatory minimum sentencing rule "carries far greater significance for the actual punishment in most cases" then the increase of a maximum penalty.[65] That is because a "statutory minimum binds a sentencing judge; a statutory maximum does not."[66]

More importantly, *Harris* is a sizable hole in the jury trial right guarantee, and thus still exposes defendants to punishment for crimes they did not commit. For example, following *Blakely* a proposal was submitted to the United States Sentencing Commission to simply increase the top of each guideline range to the statutory maximum for the convicted offense.[67] Hence, "Guidelines factors would not be elements" and the factors could "still be constitutionally determined by post-conviction judicial findings of fact."[68]

A simple example shows why *Harris* cannot be reconciled with *Apprendi*. *Harris* involved a criminal defendant who received a mandatory minimum sentence of seven years for brandishing a weapon while engaged in drug trafficking.[69] The Court said that since it was a mandatory minimum scheme, the factor did not have to be proven beyond a reasonable doubt. But imagine that the defendant had been convicted under a system that used sentencing guidelines and brandishing a weapon during a drug crime led to an increase in the sentence by seven years. Then brandishing would have to be proven beyond a reasonable doubt. There is no imaginable basis for this distinction.

Furthermore, *Harris* cannot be reconciled with the Court's reasoning and holding in *Booker II*. The Court, in an opinion by Justice Breyer, held that what was constitutionally objectionable about the Guidelines was that they were mandatory. The Court concluded that if they were advisory and not mandatory, then they were permissible. But if it is the mandatory nature of the Guidelines that made them unconstitutional, then it is impossible to understand why *Apprendi* would not apply to mandatory minimum sentences.

In fact, it would seem that in light of *Harris*, Congress could circumvent *Booker II* by imposing mandatory minimum sentences. This is not just a hypothetical danger. Attorney General Alberto Gonzalez recently indicated that

---

63. 536 U.S. at 572 (Thomas, J., dissenting).

64. *Id.* at 569 (Breyer, J., concurring in part and concurring in the judgment).

65. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1097 (2005).

66. *Almendarez-Torres*, 523 U.S. at 244.

67. Frank Bowman, *Memorandum Presenting a Proposal for Brining the Federal Sentencing Guidelines into Conformity with* Blakely v. Washington, 16 FED. SENT'G REP. 364 (2004).

68. *Id.*

69. This was imposed pursuant 18 U.S.C § 924(c)(1)(a) (2000). *Harris*, 536 U.S. at 551.

the Department of Justice would support the creation of a mandatory minimum guidelines system to fix the advisory system *Booker* left in place.[70] An advantage of such a system, according to Gonzalez, is that it would "preserve the protections and principles of the Sentencing Reform Act."[71] Apart from the unfairness and undesirability of mandatory minimum sentences, it makes no sense under the principles of *Apprendi* and *Blakely* for the same factors to lead to the same increases in sentencing, but for the increase to be allowed because it is under a mandatory minimum scheme rather than a guideline system.

Simply put, following the principle that it is wrong to convict a person of one crime but sentence the person for another would necessitate the overruling of *Harris v. United States*.

D. Prior Crimes

In *United States v. Almendarez-Torres*, decided two years before *Apprendi*, the Supreme Court held that prior convictions do not have to be proven to a jury.[72] In other words, *Almendarez-Torres* exempts prior convictions from the general rule that any fact used to increase a sentence beyond the statutory maximum must be charged in an indictment and proved to a jury beyond a reasonable doubt.[73] It is because of *Almendarez-Torres* that the holdings in *Apprendi* and *Blakely* exempted prior convictions from the need for proof beyond a reasonable doubt to the jury.

Ever since *Apprendi* it has been predicted that *Almendarez-Torres* would be overruled because Justice Thomas, in his *Apprendi* concurring opinion, made it clear that his vote had been a mistake.[74] Furthermore, four of the dissenting Justices in *Almendarez-Torres* were in the majority in *Apprendi* and *Blakely*.[75] There have been hundreds of petitions for certiorari raising this issue and not one has been granted. One would surmise, for whatever reason, that there aren't five votes on the Court to overrule *Almendarez-Torres*. Yet, just last year, in *Shepard v. United States*, Justice Thomas declared:

> [A] majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. The parties do not request it here, but in an appropriate

---

70. Attorney General Alberto Gonzalez, Prepared Remarks of Attorney General Alberto R. Gonzalez at the American Bar Association House of Delegates (Aug. 8, 2005) (transcript available http://www.usdoj.gov/ag/speeches/2005/080805agamericanbarassoc.htm) (on file with the *McGeorge Law Review*).

71. *Id.*

72. 523 U.S. 224 (1998).

73. *Id.* at 243-46.

74. Apprendi v. New Jersey, 530 U.S. 466, 520-21 (2000) (Thomas, J., concurring) ("[A]n error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence.").

75. Justices Scalia, Stevens, Souter, and Ginsburg dissented in *Almendarez-Torres*, but were in the majority in *Blakely*. *Compare Almendarez-Torres*, 523 U.S. at 248 (Scalia, J., dissenting), *with* Blakely v. Washington, 542 U.S. 296, 298 (2003).

> case, this Court should consider *Almendarez-Torres'* continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres* despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements."[76]

Thus, one would predict that the Court will soon overrule *Almendarez-Torres*, but that has been the prediction ever since *Apprendi*. But if the Court were to adopt the principle that it is wrong to convict a person of one crime and sentence the person for another, the error of *Almendarez-Torres* would be clear. Additional punishment is being imposed for another crime, even though that crime has not been proven beyond a reasonable doubt.[77]

E. Indeterminate Sentencing

Williams v. New York stands for the proposition that, in an indeterminate sentencing system, a judge is:

> [N]ot confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant–if not essential–to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.[78]

But in a determinate system that provides a statutory maximum, *Apprendi* and *Blakely* require any fact that enhances a sentence beyond that maximum to be charged in an indictment and proved to a jury beyond a reasonable doubt.[79] There appears to be no principled justification for why, in an indeterminate system, a judge's discretion is somehow immunized from the jury trial guarantee.[80] Indeed, this schizophrenia is reflected in Justice Stevens's majority opinion in *United States v. Booker*.[81] On the one hand under *Blakely*, a defendant has the "right to have the jury find the existence of 'any particular fact' that the

---

76. 544 U.S. 13, 28 (2005).

77. The United States Court of Appeals for the Fourth Circuit recently provided a vigorous defense of *Almendarez-Torres*. *See* United States v. Cheek, 415 F.3d 349 (4th Cir. 2005). The court argued that recidivism involves the *status* of a defendant as a repeat offender based on past conviction and the offense being tried before the court and that a prior conviction has already been determined under due process safeguards and need not be subjected to a jury for a second time. *Id.*

78. Williams v. People, 337 U.S. 241, 247 (1949).

79. *Blakely*, 542 U.S. at 301-02; *Apprendi*, 530 U.S. at 476.

80. *See* Reitz, *supra* note 65, at 1095.

81. 543 U.S. 220 (2005).

law makes essential to his punishment."[82] But on the other hand, "[i]f the Guidelines as currently written could be read as merely advisory provisions that recommend, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment."[83] Thus, the jury trial guarantee vanishes under an indeterminate sentencing system.

An example of this absurd result is if Washington had replaced its statutory guidelines with an indeterminate system allowing a ten-year maximum for second-degree kidnapping, the trial judge in Blakely could have imposed the same sentence without violating the Sixth Amendment. The difficulty is that *Williams* is simply incompatible with the idea that it is wrong to convict a person of one crime but punish them for another. Yet *Booker* cites *Williams* as a tautology, "[w]e have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within the statutory range."[84]

Thus, if the Court committed itself to the idea that it is wrong to convict for one crime but punish for another, *Williams* must be overruled unless there is meaningful reason why the jury trial guarantee disappears when going from a determinate to an indeterminate sentencing system.

Part of the reason why indeterminate sentencing systems are somehow immunized from the jury trial guarantee is that, for most of American legal history, constitutional law took a "hands off" approach to the process of sentencing defendants.[85] Indeed, in *United States v. Tucker*, the Court declared that a judge in the federal system has wide and largely unreviewable discretion in determining what sentence to impose, so long as the sentence is within statutory limits.[86] Because in an indeterminate system a judge need not state the basis for imposing a sentence, the procedural laxity embraced by *Tucker* is understandable. Through the 1970s, 1980s, and nearly all the 1990s, the Court tolerated nearly all federal and state punishment mechanisms, no matter how unfair or absurd.[87]

But as determinate sentencing systems emerged, so did the basis for a judge's sentence become the proper focus of inquiry. A collision course between the jury trial right and determinate sentencing systems requiring judges to impose certain sentences based on extra-verdict offense or offender information was inevitable. Thus, the schizophrenia in *Booker* reflects history and not logic.

---

82. *Id.* at 232 (quoting *Blakely*, 124 U.S at 303).

83. *Id.* at 233.

84. *Id.* (citing Williams v. People, 337 U.S. 241, 247 (1949)).

85. *See generally* Reitz, *supra* note 65, at 1083-86.

86. 404 U.S. 443, 446-47 (1972).

87. *See, e.g.*, United States v. Watts, 519 U.S. 148, 157 (1997) (holding that an acquittal on a gun possession charge does not preclude consideration of conduct underlying the charge at sentencing); Witte v. United States, 515 U.S. 148, 157 (1997) (holding that the Double Jeopardy Clause is not violated by prosecution for a cocaine charge when the underlying conduct had been considered at the prior sentencing in a separate case); Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (holding that a mandatory life sentence without parole for a first time cocaine possession offender does not violate the Eighth Amendment).

If, however, the Court embraced the idea that it wrong to convict for one crime and punish for another, then it would have to discard the procedural laxity reflected in *Williams* and *Tucker*.

F. Procedural Protections in Sentencing

In contrast to the procedural protections afforded during a guilt/innocence trial, a defendant is afforded far less protections at a sentencing proceeding. There is almost no constitutional protection for a defendant from a sentencing judge's wide discretion to conduct a broad inquiry "largely unlimited either as to the kind of information he may consider or the source from which it may come."[88] The idea that it is wrong to convict a person for one crime and punish him or her for another avoids this problem since all facts supporting a sentence must be charged in an indictment and proved to a jury beyond a reasonable doubt using the applicable rules of evidence. But in a sentencing proceeding a judge may consider evidence not admissible at trial.[89] Hence, sentences are often based on a "mishmash of data including blatantly self-serving hearsay."[90] Also, a judge may consider "reliable evidence that was obtained illegally in fashioning an appropriate sentence."[91] One circuit has even expressed doubt that evidence should be excluded when authorities have deliberately violated the defendant's constitutional rights for the purpose of acquiring evidence to boost his prospective sentence.[92]

Some evidence that a judge may consider creates perverse incentives. For example, in *United States v. Grayson*, it was proper for a judge to enhance a defendant's sentence based on his assessment that the defendant's testimony was "a complete fabrication without the slightest merit whatsoever."[93] Also, in *Roberts v. United States*, it was proper for a judge to enhance a defendant's sentence based on his refusal to cooperate with authorities in naming his heroin suppliers.[94] The Guidelines have essentially codified these holdings by allowing

---

88. United States v. Tucker, 404 U.S. 443, 446 (1972).

89. *See* Williams v. People, 337 U.S. 241, 247 (1949); *see also* FED. R. EVID. 1101(d)(3).

90. United States v. Green, 346 F. Supp. 2d 259, 280 (D. Mass 2004).

91. United States v. Brimah, 214 F.3d 854, 858-59 (7th Cir. 2000). Nine other circuits have also determined that evidenced obtained by illegal searches and seizures are not bared from sentencing proceedings. United States v. Tauil-Hernandez, 88 F.3d 576, 580-81 (8th Cir. 1996); United States v. Kim, 25 F.3d 1426 1432-36 (9th Cir. 1994); United States v. Montoya-Ortiz, 7 F.3d 1171, 1181-82 (5th Cir. 1993); United States v. Jenkins, 4 F.3d 1338, 1344-45 (6th Cir. 1993); United States v. Tejada, 956 F.2d 1256, 1260-63 (2d Cir. 1992); United States v. Jessup, 966 F.2d 1354, 1356-57 (10th Cir. 1992); United States v. McCrory, 930 F.2d 63, 70 (D.C. Cir. 1991); United States v. Torres, 926 F.2d 321, 322-25 (3d Cir. 1991); United States v. Lynch, 934 F.2d 1226, 1234-37 (11th Cir. 1991).

92. United States v. Jewel, 947 F.2d 224, 238 (7th Cir. 1991) (Easterbrook, J., concurring) ("It is awfully hard to see why motive should matter on either prudential or doctrinal grounds.").

93. 438 U.S. 41, 44 (1978).

94. 445 U.S. 522 (1980).

judges to consider the offender's remorse[95] and cooperation with law-enforcement personnel in continued criminal investigations.[96] An undesirable consequence of permitting a judge to make an individual assessment of a defendant's truthfulness or remorse is the risk of intimidating genuinely innocent defendants from standing trial, testifying truthfully, and preserving their appeals.[97] Furthermore, rewarding guilty defendants for post-conviction admissions and assistance in solving other crimes "perversely twist[s] the law of sentencing into a prosecutor's crime-solving tool."[98]

In sum, these perverse incentives are avoided through the idea that it is wrong to convict for one crime but punish for another. That idea ensures defendants are punished only for what is admitted or for what is proven to a jury beyond a reasonable doubt under applicable evidentiary protections.

G. The Role of the Jury in Death Penalty Cases

If the Court were to follow the principle that it is wrong to convict a person of one crime but to sentence for another, there would be a need to reconsider the requirement that the jury find the aggravating factors warranting imposition of a death sentence.

In *Walton v. Arizona*, the Supreme Court upheld the constitutionality of a state allowing a judge to impose a death sentence.[99] In *Ring v. Arizona*,[100] the Court reconsidered *Walton* in light of *Apprendi* and overruled *Walton.* Justice Ginsburg, writing for the Court in a seven to two decision, declared:

> For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury.[101]

Justice Ginsburg concluded her majority opinion with the powerful statement: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a

---

95. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2005).
96. *Id.* § 5K1.1.
97. *See* ARTHUR CAMPBELL, LAW OF SENTENCING § 9.8 (3d ed. 2004).
98. *Id.*
99. 497 U.S. 639 (1990).
100. 536 U. S. 584 (2002).
101. *Id.* at 609.

defendant's sentence by two years, but not the factfinding necessary to put him to death."[102]

But if *Apprendi* is seen as resting on the proposition that it is wrong to convict a person for one crime and sentence the person for another, the distinction that Justice Ginsburg dismisses as "senseless" would make sense. If the additional two years of sentence are imposed for another crime, that crime would have to be proven to the jury beyond a reasonable doubt. If the additional two years of sentence were imposed for a reason other than another crime, such as the failure to show remorse, then it would not have to be proven to the jury beyond a reasonable doubt.

Thus, the question would be whether first degree murder with a death sentence should be regarded as a different crime than first degree murder without a death sentence. There certainly is an argument that the presence of aggravating factors makes it a different crime, for the same reason that the "deliberate cruelty" in *Blakely* made the kidnapping a different crime. But this would need to be the justification for applying *Apprendi* and *Blakely* to capital crimes and it was not the reasoning provided by the Supreme Court in *Ring*.[103]

III. CONCLUSION

It seems so simple and so basic to say that it is wrong to convict a person of one crime and then punish the person for another. Yet, an examination of the criminal justice system reveals that there are many ways in which it deviates from this elemental principle. *Apprendi* and *Blakely* provide a way of correcting these injustices if it is taken as establishing that any crime that is used as a basis for sentencing must be proven to the jury beyond a reasonable doubt.

---

102. *Id.*

103. As my colleague Sara Beale pointed out, there also may be other reasons for requiring the jury to find the basis for a death sentence beyond the application of *Apprendi* so that following the principle I suggest would not necessarily require overruling *Ring*. Those reasons, though, were not alluded to by the Court in *Ring* and would need to be developed by the Court.

* * *