INSTITUTIONS

FROM *WINSHIP* TO *APPRENDI* TO *BOOKER*: CONSTITUTIONAL COMMAND OR CONSTITUTIONAL BLUNDER?

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INTRODUCTION 195
I. FROM *WINSHIP* TO *BOOKER:* AFFIRMATIVE DEFENSE AND PRESUMPTION DEBATES REDUX? 202
II. THE HANDS OF GOVERNMENT ARE ALL OVER THE CRIMINAL JURY'S INFERENTIAL PROCESS 208
A. *Judicial Branch* 209
B. *Legislative Branch* 212
C. *Executive Branch* 214
CONCLUSION 216

INTRODUCTION

The Supreme Court has a remarkable history of blunders and retreats when it comes to the relationship between the Constitution and substantive criminal law, and it is in the process of committing another one, in our view. There are at least eight instances in which the Court has handed down a case with dramatic potential to subvert substantial parts of the criminal law, only to later more or less withdraw from the field:

1. In *Robinson v. California*,[1] the Court implied that the Constitution

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1. 370 U.S. 660 (1962).

permitted the federal courts to patrol the relationship between culpability and punishment and to override legislative judgments about such matters. In only a few years (a typical pattern, as we shall see), in *Powell v. Texas*,[2] the Court, perhaps recognizing its blunder,[3] converted its wide-ranging opinion about culpability into a narrow opinion about voluntary acts.

2. In a conceptually identical and thus equally misguided foray, the Court implied that the mental element was subject to constitutional regulation in *United States v. Dotterweich*,[4] only to retreat from that implication in *Morissette v. United States*[5] and *United States v. Park*.[6]

3. In 1972, the Court seemed to announce to the world that the death penalty was unconstitutional,[7] only to note in 1976 that reports of its demise were greatly exaggerated.[8]

4. In a series of cases that bear on the subject of this Issue, the Court suggested that the many ways in which the law influences jury deliberations through instructions on inferences and presumptions raised serious constitutional difficulties,[9] only to relegate the entire area to practical insignificance.[10]

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2. 392 U.S. 514 (1968).

3. *Compare* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (arguing that the Supreme Court should indeed be patrolling and regulating the substantive criminal law), *with* Ronald J. Allen. & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998) (cautioning against Stuntz's call for the Supreme Court to regulate the substantive criminal law and suggesting instead that any changes in the substantive criminal law be incremental and conducted at the local level).

4. 320 U.S. 277 (1943); *see also* Lambert v. California, 355 U.S. 225 (1957).

5. 342 U.S. 246 (1952); *see* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 956 (1999); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 832-34 (1999); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107; Note, *Mens Rea in Federal Criminal Law*, 111 HARV. L. REV. 2402, 2402 (1998).

6. 421 U.S. 658 (1975).

7. Furman v. Georgia, 408 U.S. 238 (1972) (striking down then-existing death penalty statutes as unconstitutional violations of the Eighth Amendment's Cruel and Unusual Punishments Clause because their enforcement was arbitrary, capricious, and discretionary).

8. Gregg v. Georgia, 428 U.S. 153 (1976) (upholding post-*Furman* death penalty "guided-discretion" statutes as compliant with the Eighth Amendment); *see also* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

9. *See* Tot v. United States, 319 U.S. 463 (1943). The *Tot* Court held that the statutory presumption in question could not be sustained because there was no "rational connection between the fact proved and the ultimate fact presumed." *Id.* at 467. The statute in question in *Tot* allowed for a presumption that a felon in possession of a "firearm or ammunition which has been shipped or transported in interstate or foreign commerce" was also the person responsible for the actual shipping or transporting of the firearm or ammunition. *Id.* at 464.

10. *See* United States v. Gainey, 380 U.S. 63 (1965). The *Gainey* Court upheld a statutory presumption allowing for conviction for operating an unregistered still upon a

5. In a series of cases directly relevant to this Issue, the Court first announced that it was taking seriously the offhand reference in *In re Winship*[11] that "every fact necessary to constitute the crime with which [the defendant] is charged"[12] has to be proved beyond a reasonable doubt, including the venerable common law affirmative defense of provocation,[13] only to discover two years later that that was not really so if the State substituted an updated but highly similar defense of extreme emotional disturbance.[14] As it turned out, it was "not really so" with a vengeance—even self-defense, which plainly negates culpability, could be made into an affirmative defense,[15] leaving the obvious question of whether anything at all was left of *Mullaney*, besides the quite curious constitutionalizing of drafting instructions to the effect that "[i]f you want to have the common law defense of provocation, just say so directly rather than accomplishing the identical result through the use of the word 'presume' or its derivatives."

6. Even the drafting lesson of *Mullaney* and *Patterson* did not long survive. It seemed to be applied when, in *Sandstrom v. Montana*,[16] the Court struck down a statute that employed the term "presume," largely because it did apply the term (there being no other obvious reason for the decision[17]). Yet, earlier in the same Term the Court, in *Ulster County Court v. Allen*,[18] upheld a statute that used the term multiple times—ironically, in a situation where the defendant was more significantly disadvantaged by its use than the defendant in *Sandstrom*.

7. *Solem v. Helm*[19] seemed to redeem the promise of *Weems v. United States*[20] and *Rummel v. Estelle*[21] that the federal courts were going to begin patrolling the imposition of criminal sentences through the Eighth Amendment proportionality principle, a redemption quickly undone in a series of subsequent cases.[22]

8. Similarly, the Court seemed to suggest in *Thompson v. City of*

showing that the accused was in the "site or place" of the unregistered still. *Id.* at 64. After *Gainey*, the "rational relationship" test seems to not much matter anymore.

11. 397 U.S. 358 (1970).

12. *Id.* at 364.

13. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975).

14. Patterson v. New York, 432 U.S. 197 (1977).

15. *See* Martin v. Ohio, 480 U.S. 228 (1987) (upholding a statute that required the accused to prove a self-defense affirmative defense by a preponderance of the evidence).

16. 442 U.S. 510 (1979).

17. *See* Ronald J. Allen, *Structuring Jury Decision Making in Criminal Cases: A Unified Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 355-58 (1980).

18. 442 U.S. 140 (1979).

19. 463 U.S. 370 (1983).

20. 217 U.S. 349 (1910).

21. 445 U.S. 263 (1980).

22. Lockyer v. Andrade, 538 U.S. 63 (2003); Ewing v. California, 538 U.S. 11 (2003); Harmelin v. Michigan, 501 U.S. 957 (1991); Hutto v. Davis, 454 U.S. 370 (1982).

Louisville[23] that every criminal case could be converted into a constitutional question of sufficiency of the evidence, but shortly thereafter closed this potentially wide-open door to a very small crack in *Jackson v. Virginia*.[24]

The obvious explanation for this remarkable pattern is ignorance checked by good sense. The Court collectively is not, and never has been, stocked with individuals possessing substantial experience with the criminal law,[25] an ignorance that obviously could contribute to the otherwise inexplicable evolution of the cases: To wit, they knoweth not what they do. Each of the decisions noted above (with the possible exception of *Furman v. Georgia*) had the potential to justify large excursions into the substantive criminal law of the states, an area historically within state control, and to convert virtually every criminal trial into a prolific generator of difficult constitutional questions. Even if not stocked with criminal law experts, the Court is almost always well stocked with individuals possessing abundant good sense and refined political judgment, and perhaps this composition explains the fast retreats. As the members of the Court come to learn of the true nature and implications of their various incursions into the substantive criminal law, they look for ways to cabin the damage their less-tutored preliminary decisions might wreak.

One of the more intriguing constitutional questions of the day is whether we are in the midst of another of the Court's cycles of blunder and damage control as it tries to determine the limits of the *Apprendi v. New Jersey*[26] line of cases.[27] A scientist looking at the situation would have considerable reason to think that this is perhaps so. Not only is there the decisional history of the Court, but remarkably this particular controversy is almost a rerun of the progression from *Winship* through *Mullaney* to *Patterson*, on the one hand, and to *Sandstrom* and *Ulster County Court*, on the other.[28] In those cases, the Court took a perfectly defensible original case involving the general requirement of

23. 362 U.S. 199 (1960).

24. 443 U.S. 307 (1979).

25. For instance, none of the Justices involved in these decisions seem to have had any extensive experience in the substantive criminal law. Justices Rehnquist, Stevens, Kennedy, and O'Connor all spent time in private practice. Justices Ginsberg, Scalia, and Breyer have been in academia or on the bench for most of their careers. Justices Souter and Thomas have spent most of their careers in government service—Justice O'Connor served in the Arizona State Senate as well. Justice Breyer was involved with the Federal Sentencing Commission. *See* LEGAL INFO. INST., U.S. SUPREME COURT 2001, *at* http://www.law.cornell.edu/supct/justices/fullcourt.html (last visited Sept. 24, 2005).

26. 530 U.S. 466 (2000).

27. *See* United States v. Booker, 125 S. Ct. 738 (2005) (combining the cases of *United States v. Booker*, 375 F.3d 508 (7th Cir., 2004) and *United States v. Fanfan*, No. 03-47-P-H, 2004 U.S. Dist. LEXIS 18593 (D. Me. June 28, 2004)); Blakely v. Washington, 124 S. Ct. 2531 (2004).

28. *See also* Montana v. Egelhoff, 518 U.S. 37 (1996) (upholding a statute that prevented defendants from presenting evidence of voluntary intoxication as evidence that they lacked the mens rea necessary to commit the crime charged).

proof beyond reasonable doubt,[29] blew it out of all proportion with dramatic implications for the criminal law,[30] and subsequently had to limit the damage.[31]

The present controversy is almost an exact reflection of the earlier one, with the primary differences being that the Court has replaced as its foci the proof requirement with the requirement of jury decisionmaking[32] and variables that increase, rather than decrease, the potential punishment. Moreover, the denouement of both lines of cases may be eerily reminiscent of each other. The earlier controversy resolved once it became clear that the direction of the cases was inexplicable unless the Court was willing to articulate the scope of the constitutional interest in the substantive criminal law and thus to begin to patrol its boundaries with care.[33] For good historical and practical reasons, the Court declined this invitation to a war with the nation's various legislatures. But the invitation has been reissued, and, if anything, the nation's legislatures have even more tools in their arsenal to deal with this particular encounter. Unless the Court is willing to say that all of its jurisprudence concerning affirmative defenses is mistaken, the present form of the Federal Sentencing Guidelines can simply be replaced with either higher maximums and more robust affirmative defenses, higher maximums and a parole system, or even more simply with higher maximums and sentencing guidelines that permit reductions from the maximum. All the present turmoil thus would reduce, as it did previously, to, at most, statutory drafting lessons.[34]

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29. *In re* Winship, 397 U.S. 358 (1970).

30. *See* Sandstrom v. Montana, 442 U.S. 510 (1979); Mullaney v. Wilbur, 421 U.S. 684 (1975).

31. *See* Martin v. Ohio, 480 U.S. 228 (1987); Ulster County Ct. v. Allen, 442 U.S. 140 (1979); Patterson v. New York, 432 U.S. 197 (1977).

32. The two are conventionally related but are not necessarily so. As we discuss below, the *Apprendi* line of cases could call cases like *Patterson* into doubt, or the Court could separate the scope of the two requirements of proof beyond reasonable doubt and jury decision.

33. *See* Ronald J. Allen, Mullaney v. Wilbur, *the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977) [hereinafter Allen, *Examination of the Limits of Legislative Intervention*]; Allen, *supra* note 17, at 321; John C. Jeffries & Paul B. Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979).

34. Consider the Texas Penal Code. The Texas legislature has defined "voluntary manslaughter" not as a separate crime—to be decided at the guilt-innocence phase—but as a mitigator to be decided at sentencing following an intentional or knowing homicide trial. TEXAS PENAL CODE ANN. § 19.02 (Vernon 2004). The statute reads in pertinent part:

> At the punishment stage of a [homicide] trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

Id. § 19.02(d) (added by 1993 Tex. Sess. Law Serv. 900 (Vernon)). If the defendant fails to prove that he acted in "sudden passion" beyond a reasonable doubt, then he is to be found guilty of a felony of the first degree. *Id.*

Under this statute the fact of "sudden passion arising from an adequate cause" gets litigated at sentencing, by a preponderance of the evidence, and not necessarily by a jury.

The interesting question to us is whether the Court will see this, and thus beat a retreat as it has in the past. The most recent cases, *Booker* and *Fanfan*, are unclear. The Court both struck down and upheld the Federal Guidelines at the same time. If Congress can give teeth to the meaning of "reasonableness review," and we can see no good reason why it cannot, then in fact the Guidelines will function virtually unchanged. This is indeed the conclusion our hypothetical scientist might draw, but there are two differences between the present controversy and the previous ones. First, this case may not involve judicial ignorance so much as judicial hypocrisy—while some members of the Court talk about protecting jury decisionmaking, the obvious solution to the problem the Court has created is to return to discretionary judicial sentencing. The potential hypocrisy is obvious. And bizarre. Plainly, "discretionary" sentences coupled with appellate review would be constitutional, and thus so too would be the resultant common law of sentencing that would constrain that very discretion. Nowhere has the Court seemed to notice that it is quite difficult if not impossible to distinguish a common law of sentencing from legislatively enacted sentencing guidelines, and it is impossible to distinguish the two with respect to protecting jury decisionmaking.

The second new and unpredictable variable is the peculiar form of "original intent" and its attendant epistemology that Justices Scalia and Thomas are attracted to that may immunize them to some extent from concern about the havoc the Court's decisions might create. Others better qualified than us have elaborated on the constitutional methodology;[35] thus, we will comment solely on its epistemological handmaiden that counsels for a form of the relative plausibility theory to determine the proof rules for constitutional adjudication.[36]

Under Texas law, the defendant must affirmatively request to have a jury determine his sentence. TEX. CRIM. PROC. CODE ANN. § 37.07(2)(b) (Vernon 2001) ("It shall be the responsibility of the judge to assess punishment . . . provided, however, that . . . where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury. . . ."). However, even if the defendant elects for jury sentencing, the defendant still bears the burden of proving "whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. . . ." *Id.* The implications of this statute are obvious. TEX. PENAL CODE ANN. § 19.02(d) squarely forces the consideration of the *Apprendi*/*Blakely*/*Booker* and *Mullaney*/*Patterson*/*Winship* interplay by fashioning the "sudden passion" affirmative defense as an *Apprendi* sentencing factor. *See also* Joseph L. Hoffmann, Apprendi v. New Jersey*: Back to the Future?*, 38 AM. CRIM. L. REV. 255 (2001).

35. *See, e.g.*, Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 238 (1980); Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (discussing the virtues of original intent jurisprudence). Apropos to our current discussion, Justice O'Connor called Justice Scalia's original intent interpretation into question in *Apprendi*. *See* Apprendi v. New Jersey, 530 U.S. 466, 525 (2000) (O'Connor, J., dissenting) ("None of the history contained in the Court's opinion requires the rule it ultimately adopts.").

36. *See* Ronald J. Allen & Sarah A. Jehl, *Burdens of Persuasion in Civil Cases:*

The relative plausibility theory has many virtues in the context of private adjudication of disputes, such as likely minimizing the total errors in a system and treating the parties equally.[37] Constitutional adjudication serves a different function, however, one which looks more like scientific decisionmaking than private dispute resolution. There are substantial externalities to erroneous constitutional decisionmaking that are avoided by not deciding and leaving a question open, just as with many forms of science.[38] There are costs, too, to not deciding, but they tend to be limited to the present parties. If, for example, the Court is unconvinced that the *Miranda* rules are constitutionally justified on the basis of present knowledge, some will then not get the benefit of the ruling until further knowledge exists. By contrast, locking in a constitutional decision on the basis of a scanty record has inertial force that makes reconsideration difficult and thus, if erroneous, likely imposes on average considerably greater costs.[39]

The significance of the epistemological point is that it suggests that Justices Scalia and Thomas are willing to employ their constitutional methodology even when answers are only weakly supported, thus further suggesting a lack of concern about data. That, in turn, suggests a close-mindedness that may make evolution of their thinking problematic.

All this is made even more interesting and complicated by an unnoticed variable. The entire *Apprendi* debate has proceeded as if it were sensible to conceive of unfettered jury decisionmaking, as though the concern is not to let judges impinge, at legislative direction, on jury prerogatives,[40] and that the jury must be hermetically sealed off from inappropriate influences. But in fact both the legislative and judicial branches, and to a lesser extent the executive as well, have their hands all over the inferential process. Indeed, this point can be made dramatically in a way that ties the various points we have made so far together. Under the present configuration of the cases, it is unconstitutional to define murder as intent, causation, and a voluntary act; to provide for a twenty-year sentence; but to direct the trial judge to add ten years if the judge finds that the defendant did not act in self-defense. And this all aims at protecting the jury inferential process from being infected by the judiciary and legislature. Yet, as *Martin v. Ohio* makes clear, it would plainly pass constitutional muster for the

Algorithms v. Explanations, 2003 MICH. ST. L. REV. 893; Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604 (1994); Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491 (2001).

37. *See* Allen & Jehl, *supra* note 36.

38. *See* Ronald J. Allen, *Expertise and the* Daubert *Decision*, 84 J. CRIM. L. & CRIMINOLOGY 1157 (1994).

39. Although it is an empirical question.

40. *See* United States v. Booker, 125 S. Ct. 738, 756 (2005) ("[T]he Sixth Amendment requires juries, not judges, to find facts relevant to sentencing."); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("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.").

legislature to define the crime in precisely the same way, provide for a thirty-year sentence, and direct the sentencing judge to reduce the sentence to twenty years (or nothing, for that matter) if there is satisfactory proof of self-defense (or, if the judges really get recalcitrant, create an affirmative defense or a parole system directed to do the same thing). In all these examples, the jury finds the same things—intent, causation, and voluntary act—and someone else (excepting only the creation of an affirmative defense) finds self-defense. Thus, plainly the jury's role is not guaranteed to be protected by the *Apprendi* line.[41]

We briefly elaborate below on the two central conceptual points we are making. First, we demonstrate in a bit more detail the similarities between the present debate and the previous debate over *In re Winship*, and in particular how this debate, like that one, can primarily amount to drafting advice unless the Court articulates a constitutional theory of the substantive criminal law, which it is very unlikely to do. To the extent what emerges from the cases is something other than drafting advice, it will most likely redound to the detriment of defendants, a curious result in a line of cases ostensibly designed to protect defendants' rights. Second, we elaborate the substantial constraints on the criminal jury's inferential process simply to bolster the point that the configuration of the present controversy is quite odd.

I. FROM *WINSHIP* TO *BOOKER:* AFFIRMATIVE DEFENSE AND PRESUMPTION DEBATES REDUX?

Although there are some differences between the current *Apprendi* debate and the controversy thirty years ago over the meaning of *In re Winship*, there are deep conceptual similarities. Both deal with the constitutional proof mechanisms at trial, with the *In re Winship* debate concentrating on the requirement of proof beyond reasonable doubt and the *Apprendi* debate on jury fact-finding. One would think the two would go hand in hand, with a jury decision required if but only if an issue has to be proved beyond a reasonable doubt. Nonetheless, one possible outcome of the present controversy may be to find that this is not so, and that, say, affirmative defenses such as self-defense must be decided by juries even if by a preponderance of the evidence. Another distinction without much of a difference is that the debate thirty years ago

41. And even more curiously, the protection of the jury, which one would think is designed to protect a defendant's right to a jury, comes at a potentially high cost to the defendant whose right it is. As one can tell from the textual discussion, one solution to the *Apprendi* problem is to convert any enhancement into a sentence reducer, leaving everything else more or less the same. But, such a change functionally means that defendants would have to adduce evidence of the sentence reducers, regardless whether they are denominated as affirmative defenses. This puts the defendant in the position of having to choose between arguing for an acquittal or a reduction. Otherwise, the defendant would be in the untenable position of, say, arguing that the defendant did not commit the crime. However, if the defendant did, it was in self-defense, or maybe it was provoked. The problem is obvious.

focused on factors that lowered punishment,[42] whereas the debate today is on those that increase it. Still, the presence of a negative sign does not much affect the contours of the problem. If a state could punish the common law elements of murder with thirty years of imprisonment even if the person acted in self-defense, yet reduce the punishment in the presence of self-defense, it seems to follow that the state can do so whether it is characterized as a reduction from thirty years to something less if the person did act in self-defense, or an increase from something less to thirty years if the person did not.[43] Thus, the debate over the constitutionality of sentencing guidelines schemes is today as it was when the court was considering affirmative defenses and presumptions decades ago and seems to reduce to: What is the constitutional interest in the substantive criminal law? Perhaps, then, how the final chapters of the Federal Sentencing Guidelines debate will read may be foreshadowed by the previous debates over the limits of *In re Winship*. In this Part, we review this history to emphasize its relevance to whether the Court is indeed in the midst of an analogous blunder.

The critical decisions following *In re Winship* were embodied in the *Mullaney*/*Patterson* line of affirmative defense cases.[44] *Mullaney* and *Patterson* examined whether and how a state legislature, through changes in the substantive criminal law, may allocate the burden of persuasion[45] to the defense.[46] In 1975, the *Mullaney* Court held that requiring a defendant to rebut a presumption of malice aforethought by proving that he acted in the heat of passion was a "transparent effort to circumvent *Winship*."[47] According to the Court, any "fact" that affected the degree of criminality or sentence needed to be proved beyond a reasonable doubt.[48] Unfortunately, that means every fact,

42. The presumption and inference line of cases do not fit easily within this characterization. These cases most directly deal with the meaning of proof beyond a reasonable doubt rather than its scope.

43. *See* Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 42-43 (1977). Nor would such statutes be completely innovative. Texas already provides for provocation as a sentence mitigator. *See supra* note 34 and accompanying text.

44. This line of cases has been roundly criticized not for its false start and hasty retreat but for its elevation of form over substance. *See, e.g.*, Ronald J. Allen, *Foreword* to Montana v. Egelhoff—*Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633 (1997); Allen, *Examination of the Limits of Legitimate Intervention*, *supra* note 33; Jeffries & Stephan, *supra* note 33.

45. For a discussion on the burdens that the parties bear in a criminal trial, see Allen, *supra* note 17, at 327-29.

46. Shifting the burden of production to a defendant might deny him the right to a jury trial. *See, e.g.*, *id.* at 329 ("[W]hen a litigant is forced to bear a burden of production—the judge, rather than the jury, will determine whether the burden has been met. If a judge decides that the burden of production on an issue has not been satisfied, he will not instruct the jury on that issue. Accordingly, the defendant will not receive a jury determination of the issue because, in effect, the judge has directed a verdict on it.") (internal citations omitted).

47. Mullaney v. Wilbur, 421 U.S. 684 (1975).

48. *See id.* at 704.

including preliminary facts that go to the admissibility of evidence, facts that go to intermediate evidentiary propositions, and, as one of us pointed out, even, shockingly, "if a state specifically deems a fact relevant to a sentence, then the prosecution must prove that fact beyond reasonable doubt."[49] This holding was taking the *In re Winship* dicta with a vengeance and would have required the reworking of the substantive criminal law. It also would have required a remarkable rewriting of evidence and procedure rules. The foundational facts of the admission of evidence just as much are facts necessary for conviction as are those that go directly to substantive elements. The conclusion that a purported eyewitness actually was an eyewitness is as critical to conviction as what the witness may say.

Not surprisingly, in light of the case's unintended consequences, two years later the Court rejected the position it had taken in *Mullaney*. In *Patterson*,[50] the Court upheld a virtually identical New York statute purportedly because it did not require the defendant to rebut an element of the crime charged. Since the statute did not require the State to prove the absence of "extreme emotional disturbance" in order to convict, the Court found that it did not run afoul of *Mullaney*.[51] The Court professed *Mullaney* still to be good law,[52] but this is obvious nonsense. The Maine statute merely allocated the burden of persuasion on provocation, as did the New York statute; and even if there were substantive differences in the statutes (which are not obvious), they were highly similar and in any event their substantive differences played virtually no part in the decision. Thus, *Mullaney* and *Patterson* reduce to nothing more than statutory drafting lessons.[53] They tell us that in order for an affirmative defense to pass

49. Allen, *Examination of the Limits of Legitimate Intervention*, *supra* note 33, at 291.

50. Patterson v. New York, 432 U.S. 197 (1977). The Court held that a New York statute providing that a defendant was required to prove an affirmative defense of extreme emotional disturbance by a preponderance of the evidence does not require the defendant to disprove "any facts of the crime which the State is to prove in order to convict of murder" and thus passes constitutional muster. *Id.* at 207. The New York legislature had defined the elements of murder as "causing the death of another person with intent to do so." *Id.* at 205.

51. *See id.*

52. *Id.* at 215.

53. An alternative approach can be found in Allen, *supra* note 17, at 344 n.85. Rather than relying on the rigid formalism of *Mullaney* and *Patterson*, this approach applies a unified constitutional approach to "functionally similar methods of shifting burdens of persuasion." *Id.* at 325. This approach looks less at the device in question and more on how the device affects the respective burdens of persuasion on the state and the defendant. "[B]y placing the burden of persuasion on the defendant," a device "reduce[s] the state's burden on the fact in issue to less than having to prove guilt beyond reasonable doubt, and the appropriate question" then becomes "whether the fact [is] one that [has] to be established in light of the potential punishment to which the defendant was subject." *Id.* at 344 n.85. A court must review the "relationship between what the state [has to] prove[] the defendant [has] done beyond reasonable doubt and the sanction the state [is] authorized to impose upon the defendant." *Id.* at 358. If, following this review, the sentence imposed on the accused is too harsh considering what the state has proven beyond a reasonable doubt, then the court should find that the device has unjustly exposed the accused to too high a punishment "in

constitutional muster, the legislature must identify it as an "affirmative defense"[54] rather than requiring an accused to "rebut a presumption" even though the different words have the same meaning.[55] Indeed, a decade later the Court upheld an Ohio statute requiring an accused to prove the "affirmative defense" that a killing was in self-defense by a preponderance of the evidence.[56]

The interesting points are, first, that *Patterson* was inevitable unless the Court was going to require the reworking of state substantive criminal, evidentiary, and procedural law; and second, that the Court had failed to articulate any way out of the box it had gotten itself into precisely because it failed to attach its holding to a constitutional theory that could not be avoided merely by substantively irrelevant drafting changes to statutes. In short, the prior and current debates are identical in this respect. If Congress can merely flip the statutory Guidelines and make all aggravators into mitigators, and there is no obvious reason why not, then *Apprendi*, like *In re Winship*, is largely a case of meaningless formalism.

In the subsidiary *In re Winship* debate in the *Sandstrom*/*Ulster County Court* line of presumption cases, the Court made a similar bold constitutional pronouncement that was flatly inconsistent with a decision only two weeks old.[57] In *Sandstrom* and *Ulster County Court* the debate was how, if at all, the government can shift from the State to the accused the burden of proving elements of a given crime through the use of inferences and "presumptions"[58] that modify the "burden of persuasion that the parties bear on a particular factual issue."[59]

In *Sandstrom* the Supreme Court held that presumptions may not relieve the prosecution from the burden of proving the elements of a crime, but again no good reason was given why not.[60] Specifically, the *Sandstrom* Court held that an instruction to the jury that the "law presumes that a person intends that ordinary consequences of his voluntary acts" deprives a criminal defendant of due process because the instruction functions as a "mandatory presumption" that effectively relieves the prosecution from proving intent beyond a reasonable doubt.[61] But if the State could do so directly, why can it not do so

light of proportionality considerations implicit in the eighth amendment and substantive due process." *Id.*

54. *See Patterson*, 432 U.S. at 197.

55. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975).

56. Martin v. Ohio, 480 U.S. 228 (1987).

57. *Ulster County* was decided on June 4, 1979, and *Sandstrom* was decided on June 18, 1979.

58. Sandstrom v. Montana, 442 U.S. 510 (1979); Ulster County Ct. v. Allen, 442 U.S. 140 (1979).

59. Allen, *supra* note 17, at 333.

60. *Sandstrom*, 442 U.S. 510.

61. *Id.* at 513, 524.

indirectly? This is the *Mullaney*/*Patterson* question all over again, of course. Not surprisingly, again the Court gave no answer, and again the answer would have to come from a constitutional theory of the substantive criminal law. Within the confines of the Court's cases, the only plausible answer to what was actually wrong with the Montana statute was that it used the language of "presumptions," and perhaps such language has sufficient bad karma to be constitutionally banned. The problem, though, is that even this did not reconcile easily with *Ulster County Court*.[62] There, the Court upheld the use of presumptive language and did so even though the defendant was very likely to be seriously disadvantaged by the resultant jury instructions.

The Court tried to articulate a mandatory/permissive distinction, but this, too, fails, as the effect of each of these devices is virtually the same. Their differences lie only in matters of degree, and actually in any particular case it is impossible *a priori* to know which will disadvantage a defendant more. The effect of conclusive, or mandatory, presumptions is that they

> serve[] to modify the burden of persuasion that the parties bear on a particular factual issue. . . . When a jury is instructed to "presume" or "infer" fact B from fact A, unless the defendant proves the nonexistence of fact B by a preponderance of the evidence (or by any other standard), the result surely is that fact B will be taken as given by the jury upon proof of fact A, in the absence of evidence tending to show the nonexistence of fact B.[63]

Permissive presumptions function in much the same way as mandatory presumptions:

> They encourage the jury to find fact B once it finds fact A, even though the government retains the explicit burden of persuasion on fact B. That encouragement comes from informing the jury either that it is permissible to infer B from A, or that proof of A gives rise to something called a presumption that is itself evidence of B.[64]

The point, obviously, is that the undeniable effect of presumptions—all presumptions—is that they "modify the jury's inferential process by enhancing the impact of fact A . . . and thus modify the parties' relative burdens of persuasion."[65]

So, *Sandstrom* implied, and *Ulster County Court* rejected, that all "presumptions" violated *In re Winship*'s command, but the only distinctions in the Court's reasoning were truly meaningless formal ones, and even they were not rigorously adhered to. And the reason for the muddle is that the Court failed to tie its holding to a constitutional theory of the substantive criminal law. The obvious implication of the *In re Winship* mess comprises a curious set of rules

62. *Ulster County Court*, 442 U.S. at 142 (involving a defendant that challenged a New York statute that provided that "the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle").

63. Allen, *supra* note 17, at 333-34 (internal citations omitted).

64. *Id.* at 334.

65. *Id.* at 335.

to the effect that: (1) elements had to be proven beyond a reasonable doubt; (2) elements were what the legislature said they were; (3) one could not "presume" an element, although you could provide for its "inference," but you could provide for an "inference" through a "presumption"; and (4) beyond that, the legislature could do whatever it wants in defining a crime and what need necessarily be proved to convict. If all this is true, it is difficult to see what would be wrong with the legislature requiring that a defendant's sentence be determined by a sentencing judge by a preponderance of the evidence—i.e., the Federal Sentencing Guidelines—at least if the statutory "elements" permit the higher sentence. In short, at this level of conceptual analysis, the *Apprendi* mess is identical to the *In re Winship* mess.

It is true that when the Court was considering presumptions and affirmative defenses decades ago the focus was exclusively on proof beyond a reasonable doubt, rather than that standard coupled to the right of trial by jury. *Apprendi* and its progeny have married the beyond a reasonable doubt standard with the Sixth Amendment right to trial by jury. Now the "companion right [to trial by jury is] to have the jury verdict based on proof beyond a reasonable doubt,"[66] and the right to a jury verdict includes the right to have all facts that are sentence determinative put to, and found by, a jury beyond a reasonable doubt.[67] This does not change, however, that the ultimate effect of presumptions, affirmative defenses, and the Sentencing Guidelines is that the burden of persuasion is allocated to the defendant in highly analogous ways.[68]

Insofar as affirmative defenses, presumptions, and sentencing factors all shift the burden of persuasion from the State to the accused,[69] they all "depart from the reasonable doubt standard by allowing guilt to be determined in part on the basis of the defendant's failure to prove exculpatory facts."[70] To the extent that any of these devices abridge a defendant's right to have every fact that is to be sentence determinative—i.e., an element or a sentencing factor—proved by the State beyond a reasonable doubt, the device would appear unconstitutional under the Supreme Court's holdings in *Apprendi*, *Blakely*, and *Booker*. However, the Court did not indicate that it would reconsider its affirmative defense or presumptions holdings even though those devices are the functional equivalents of the Sentencing Guidelines. The obvious alternative to reduce the tension in the cases is to cut back on the *Apprendi* line.

If the Court does cut back the implications of the *Apprendi* line of cases,

66. United States v. Croxford, 324 F. Supp. 2d 1230, 1240 (D. Utah 2004).

67. *See* United States v. Booker, 125 S. Ct. 738 (2005); Blakely v. Washington, 124 S. Ct. 2531 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

68. *See, e.g.*, Allen, *supra* note 17.

69. *See, e.g.*, *id.* at 326 ("[A]ffirmative defenses, the placement of burdens of production, judicial comment on the evidence, shifts in burdens of persuasion or production by presumptive language [], and permissive inferences [] are [all] primarily [] method[s] of allocating burdens of persuasion on the relevant factual issues in a criminal case.").

70. *Id.* at 340.

Booker, like *Mullaney* and *Patterson* on the one hand, and *Sandstrom* and *Ulster County Court* on the other, will end up as little more than a lesson in statutory drafting. Under *Apprendi*, *Blakely*, and *Booker*, it is plainly constitutional for Congress to provide for a statutory maximum sentence that is equal to the maximum sentence that would have been handed down for that same crime under the pre-*Booker* Federal Sentencing Guidelines and direct the sentencing judge to reduce that sentence if he finds satisfactory proof of mitigating circumstances. This system does not violate the *Blakely* Court's formalistic holding that for *Apprendi* purposes "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[71] It simply is silly to say that the same functional result can be reached in a constitutional manner by tweaking the sentencing system found unconstitutional, but that is exactly where the Court's reasoning leads.

In any event, that the present controversy mirrors the past is no guarantee that the resolution of the present will reflect the past as well. Nonetheless, we suggest that perhaps it already does, and that this is the best explanation of the curious holding in the cases that, as we said earlier, seems both to strike down and uphold the Federal Sentencing Guidelines more or less in their entirety. Perhaps the next generation of scholars will add this episode as the Court's ninth incursion and retreat into the substantive criminal law.

II. THE HANDS OF GOVERNMENT ARE ALL OVER THE CRIMINAL JURY'S INFERENTIAL PROCESS

Whatever the Court did to the Federal Sentencing Guidelines in *Booker* and *Fanfan*, it was motivated in part by the Court's insistence that the Sixth Amendment requires that a *jury*—and *not* a judge—decide all facts that are sentence determinative.[72] Indeed, the entire Guidelines debate appears to be premised on the idea that the jury is supposed to be hermetically sealed off from the influences of the judiciary and the legislature[73] and presumably the executive as well. Unfortunately for the premise, the legislative, judicial, and—to a lesser extent—executive branches substantially influence a criminal jury's inferential process. The significance of the point is that it casts in sharp relief much of the constitutional rhetoric in the cases that the objective is protecting jury decisionmaking.

While the criminal jury has a measure of autonomy, it is nonetheless constrained and influenced by innumerable legal practices and devices that

71. *Blakely*, 124 S. Ct. at 2537 (emphasis in original).

72. *See Booker*, 125 S. Ct. at 749.

73. *See id.* at 756 ("[T]he Sixth Amendment requires juries, not judges, to find facts relevant to sentencing."); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("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 . . . .").

affect a criminal jury's decisions of guilt, innocence, and sentencing. The judiciary conducts the trial, including deciding questions of admissibility and sufficiency, and actually oversees the truth-finding function. The legislature defines criminal conduct and plays a significant role in determining the procedures by which criminal trials are conducted and the evidentiary rules that apply to them. And the executive branch chooses how to enforce various criminal statutes and whether to prosecute individual defendants. It is formalistic in the extreme to say that juries must have unfettered power to decide if a person is insane, intended an act, held a leadership role in the commission of a crime, and so forth, but must permit judges or legislatures to determine how and upon what bases those decisions are made.

A. *Judicial Branch*

The power that a trial judge exercises over a criminal jury's inferential process presents the most powerful example of the problem with the *Apprendi* and *Booker* Courts' view of a criminal jury as being hermetically sealed off from external influences. There are numerous ways in which judges constrain jury decisionmaking, including making potentially outcome-determinative decisions at almost every stage of the criminal process. In light of *Apprendi* and *Booker*, must admissibility questions be decided by juries? How about judicial comment on the evidence? Need the jury instruct itself? What about the ways that judges affect juries through other, nonformal behavior—e.g., nonverbal cues like body language?

Consider first the Federal Rules of Evidence, which provide trial judges with enormous power over what information reaches the jury. The Federal Rules of Evidence allow judges to make determinations relating to admissibility,[74] witness qualification,[75] and the existence of a privilege.[76] The judge may exclude a rape victim's prior sexual history at trial.[77] And the judge may exclude some of the defense's evidence as a sanction for the defendant's noncompliance with pretrial discovery rules.[78] One reason for excluding evidence—especially hearsay, character, prior misconduct, and expert evidence—is the fear that it may be overvalued by the jury.[79] This directly permits a judge in many circumstances to substitute the court's judgment for

74. *See* FED. R. EVID. 104(a).

75. *Id.*; *see also* FED. R. EVID. 702 (regarding expert testimony).

76. *See* FED. R. EVID. 104(a).

77. FED. R. EVID. 412 (excluding victims' past sexual history from jury consideration).

78. *See, e.g.*, Michigan v. Lucas, 500 U.S. 145 (1991); Taylor v. Illinois, 484 U.S. 400 (1987); *see also* Williams v. Florida, 399 U.S. 78, 83 (1970) ("[T]he privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses.").

79. *See* Richard D. Friedman, *Minimizing the Jury Over-Valuation Concern*, 2003 MICH. ST. L. REV. 955, 967-68.

that of the jury and to keep from the jury information that may affect a determination of guilt or length of sentence based on the judge's assessment of the probability of the very issues a jury is supposed to decide—a victim or accused's sexual conduct, for instance. It is painfully obvious that the person acting as gatekeeper of the evidence to be considered has an enormous capacity to influence the outcome.[80]

Judicial control over evidence adduced at trial does not end at run-of-the-mill admissibility decisions. Trial judges in many jurisdictions can decide certain factual issues themselves through judicial notice.[81] One important example of judicial notice in federal criminal litigation concerns the many federal criminal statutes[82] that require a jurisdictional showing that the crime in question occurred in the United States' "special maritime and territorial jurisdiction."[83] Federal district judges routinely take judicial notice of disputed jurisdictional facts without submitting them to the jury, notwithstanding Federal Rule of Evidence 201(g).[84]

Judicial comment on the evidence provides judges another method to influence a jury's decisionmaking: "[T]he judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts . . . ."[85] Although judicial comment has become disfavored in many jurisdictions,[86] it still exerts judicial influence over the criminal jury's inferential process in others.[87] Judicial comment on the evidence is most

80. Though the question of whether or how often this actually happens is an empirical one.

81. Federal Rule of Evidence 201 provides that a trial judge can take judicial notice of certain facts in criminal cases, but she must instruct the jury that, even though she believes a given fact to be true, the jury is free to find to the contrary. Judicial notice is also common in the states and may even mirror Rule 201. *See* 60 AM. JUR. 3D *Proof of Facts* § 175 (2004) ("States typically have their own Rules and procedures regarding judicial notice, and those states which have enacted codes of evidence similar to the Federal Rules of Evidence will often have enacted analogues of the Federal Rules regarding judicial notice.").

82. For a compendium of such federal statutes, see William M. Carter, Jr., *"Trust Me, I'm a Judge": Why Binding Judicial Notice of Jurisdictional Facts Violates the Right to Jury Trial*, 68 MO. L. REV. 649, 651 n.6 (2003).

83. *See* 18 U.S.C. § 7 (2005).

84. *See* United States v. Lavender, 602 F.2d 639, 641 (4th Cir. 1979) (holding that the district court may take judicial notice that the crime being prosecuted occurred within federal jurisdiction); United States v. Blunt, 558 F.2d 1245, 1247 (6th Cir. 1977) (same).

85. Vicksburg & M.R. Co. v. Putnam, 118 U.S. 545, 553 (1886); *see* MCCORMICK ON EVIDENCE § 8 (John William Strong ed., 5th ed. 2003) ("[T]he federal courts and [a] few states retain[] the common law power to comment.").

86. S*ee* MCCORMICK ON EVIDENCE, *supra* note 85, § 8; Nancy J. King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 47-48 (1999).

87. The Supreme Court has not overruled its holdings that empower trial judges to "instruct [the jury] on the law and to *advise them on the facts* . . . ." Capitol Tractors Co. v. Hof, 174 U.S. 1, 13-16 (1899) (emphasis added); *see also* Starr v. United States, 153 U.S.

frequently used when a trial judge "fears that the jury might return an erroneous verdict because of a failure for some reason to understand the implications of the evidence that has been produced at trial."[88] Such comments on the evidence may be directed at producing a more rational verdict, which indeed is a laudable goal, but one that affects a jury's inferential process nonetheless.

Finally, the informal authority and control that a judge can bring to bear on a jury deserve mention. Jurors are a captive audience. They are "immediately and repeatedly instructed that they must listen to the judge's each and every word, obey the judge's rulings, and follow the judge's instructions."[89] The trial judge instructs jurors regarding their behavior,

> including who they can communicate with about the subject matter of the trial and when they can do so. The judge tells the jurors the time they are to arrive at court, as well as when they can leave. The judge also instructs the jurors about which portions of the trial they can consider during the deliberations, as well as the words and statements—usually in the form of objections that were sustained—that they must erase from their minds as if they were never uttered.
>
> Accordingly, the judge is vested with extraordinary power and control over the jury. Quite simply, the jury must do as the judge says. The jury looks solely to the judge for guidance and is loath to determine factual issues contrary to what it perceives are the judge's beliefs or opinions about those issues—whether stated verbally or non-verbally, consciously or subconsciously.[90]

The trial judge's tacit control over a jury obviously could easily influence its deliberations.[91]

614, 624-26 (1894); *Vicksburg*, 118 U.S. at 553.

88. Allen, *supra* note 17, at 330-31.

89. Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 271-72 (2000) (internal citations omitted).

90. *Id.*

91. Other examples exist outside the rules of evidence where a judge is allowed or required to invade the jury's fact-finding province. Consider the bail system in the United States. The Court noted: "The Bail Reform Act of 1984 (Act) allows a federal court to *detain an arrestee pending trial* if the Government demonstrates by *clear and convincing evidence* after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community." United States v. Salerno, 481 U.S. 739, 741 (1987) (upholding 18 U.S.C. § 3142(e) (1987) against a charge that it is facially unconstitutional) (emphasis added). By *Booker*'s standards this act, too, is unconstitutional. The Bail Reform Act allows the judge to make a factual determination that results in a deprivation of freedom that weighed so heavily on the Court's reasoning in *Apprendi*. *See* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (holding that the Sixth and Fourteenth Amendments proscribe that there not be "any deprivation of liberty without due process of law" and that due process requires that any finding resulting in punishment be made beyond a reasonable doubt and by a jury) (internal citations omitted). The Bail Reform Act also provides that the pretrial detention decision is to be based upon clear and convincing evidence, 18 U.S.C. § 3142(f) (2005)—below the reasonable doubt standard that *Winship* and *Apprendi* require.

B. *Legislative Branch*

Legislatures constrain jury decisionmaking through defining the elements and defenses of the substantive criminal law[92] and through the rules and procedures that govern criminal trials.[93] This authority is constrained considerably by the panoply of protections guaranteed a criminal defendant—e.g., proof beyond a reasonable doubt, right to trial by jury, right against self-incrimination, and right to assistance of counsel. However, all of these protections can be avoided by converting a criminal statute into a civil sanction or regulatory issue.[94] To the extent that Congress can label what would otherwise be a "crime" as "civil," it can deny a would-be defendant of constitutional protections, including in some cases the right to a jury trial.[95]

In addition to the use of criminal/civil labels, legislatures have other means to restrict the applicability of constitutional rights. It is beyond dispute that Congress can designate the punishment for a crime.[96] Despite the Sixth

92. Since the beginning of the Republic, Congress has defined the substantive criminal law. *See, e.g.*, Punishment of Crimes Act, ch. 9, 1 Stat. 112 (1790) (defining a set of crimes and providing the appropriate sentence upon conviction).

93. Legislatures have the authority to control evidentiary and procedural rules that govern how the fact-finding process is carried out. *See* Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution."); Patterson v. New York, 432 U.S. 197, 201 (1977) ("[I]t is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion' . . . .").

94. Though the U.S. Constitution does provide for the right to a civil jury trial in certain instances, it does not do so in all cases. The Seventh Amendment reads: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. Generally, where the issue being litigated is a legal claim, then the Seventh Amendment right to a civil jury trial attaches and where the claim sounds in equity it does not. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472-73 (1962); Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 510-11 (1959). Also, the Seventh Amendment has not been incorporated into the Fourteenth Amendment and is therefore not enforceable against the states. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996).

95. The extent of Congress's authority to define an enactment as "civil"—and thus deny the accused the suite of constitutional protections provided in criminal procedure—has a long and storied history in the Supreme Court. *See* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1555 (2001) (discussing the civil/criminal line and chronicling the Supreme Court's holdings on the subject). The Supreme Court polices the line between a legislature's declaration of an act as civil or criminal and "will reject the legislature's manifest intent only where a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention." Seling v. Young, 531 U.S. 250, 261 (2001).

96. Congress has "the power to fix the sentence for a federal crime, *United States v. Wiltberger*, [18 U.S. (5 Wheat.)] 76 (1820), and the scope of judicial discretion with respect to a sentence is subject to congressional control. *Ex Parte United States*, 242 U.S. 27 (1916)." Mistretta v. United States, 488 U.S. 361, 364 (1989). "In the early days of the Republic," Congress and the legislatures did set the "period of incarceration" for every crime

Amendment's guarantee of a jury trial "in all criminal prosecutions," the Sixth Amendment guarantee to a jury trial does not attach if only "petty" offenses are charged.[97] Even when multiple petty offenses put a defendant in jeopardy of an aggregate sentence of over six months, the Sixth Amendment right to trial by jury does not attach,[98] which obviously provides Congress substantial authority to restrict a trial by jury.

The two previous points do not go to the core sentencing problem dealing with decade-long changes in the sentences defendants receive, but they set the stage for the enormous control that legislatures exercise over jury fact-finding. Legislatures can and do affect the inferential process of the criminal jury in less extreme ways than taking the extraordinary step of denying a criminal trial outright. Consider affirmative defenses. They have existed as long as our criminal law has,[99] and, as noted above, *Patterson* and *Martin v. Ohio* confirm that a legislature can provide for affirmative defenses. Affirmative defenses—like presumptions and sentencing factors—shift the burden of persuasion from the State to the accused.[100] Such a burden shift will obviously affect how a jury will view a case.

The Supreme Court has referred to Congress's "ultimate authority" to control practice and procedure.[101] In addition to the creation of affirmative defenses, that undoubted right includes providing for statutory inferences that

"with specificity." United States v. Grayson, 438 U.S. 41, 45 (1978); *see also* Punishment of Crimes Act, ch. 9, 1 Stat. 112 (1790). Besides being the United States' first penal law, the Punishment of Crimes Act provided the appropriate range of fines and imprisonment that a person convicted of various crimes was to be subject to upon a finding of guilt. *Id.* §§ 3, 7 ("And be it [further] enacted, That if any person or persons shall . . . commit the crime of willful murder, such person or persons on being thereof convicted shall suffer death. . . . And be it [further] enacted, That if any person or persons shall . . . commit the crime of manslaughter, and shall be thereof convicted, such person or persons shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars . . . .").

97. *See* Duncan v. Louisiana, 391 U.S. 145 (1968). In determining pettiness, the Court uses "seriousness" as its touchstone. The Court, in turn, determines seriousness based on the penalty the legislature authorized. *See* Lewis v. United States, 518 U.S. 322, 326 (1996). The *Lewis* Court noted: "An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious." *Id.* And in making the seriousness determination, "[t]he judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task . . . ." Blanton v. N. Las Vegas, 489 U.S. 538, 541 n.5 (1989).

98. *Lewis*, 518 U.S. at 327.

99. *See* Patterson v. New York, 432 U.S. 197, 202 (1977) (noting that when the Fifth Amendment was adopted and the Fourteenth Amendment was ratified, "'all . . . circumstances of justification, excuse or alleviation' rested on the defendant").

100. *See, e.g.*, Allen, *supra* note 17, at 340 ("[A]ffirmative defenses, the placement of burdens of production, judicial comment on the evidence, shifts in burdens of persuasion or production by presumptive language [], and permissive inferences [] are [all] primarily [] method[s] of allocating burdens of persuasion on the relevant factual issues in a criminal case.").

101. *See supra* note 97 and accompanying text.

obviously affect the proof process directly. It includes the power to promulgate rules that admit and exclude evidence, such as the string of relevancy rules in Article IV of the Federal Rules of Evidence. Congress can articulate or eliminate privileges—or delegate that task to the courts as in the federal system.[102] It can decide that evidence will be easy to admit[103] or considerably more difficult to admit.[104] It can expand or contract the scope of permissible expert testimony, as it can expand or contract the scope of permissible lay opinion testimony. It can encourage the use of originals of documents, or it can make copies automatically admissible, and so on. While the Sixth Amendment rights to confront witnesses and present a defense may limit legislatures somewhat, their collective power over the evidence that can be used, and thus over the inferential process, is formidable.

C. *Executive Branch*

The executive branch exerts substantial control over a criminal jury's inferential process—though significantly less than the legislature and judiciary. Through prosecutorial discretion, the executive enjoys vast discretion in the enforcement of substantive criminal laws. The prosecution has the sole authority and discretion to initiate criminal proceedings.[105] Prosecutorial discretion bestows prosecutors with the power to decide whom to charge and what to charge them with, thus investing these agents of the executive with the power to decide whether to even subject a would-be defendant to a criminal jury. Plea bargaining gives the executive branch a rich method of avoiding juries as well. At trial, prosecutors decide what evidence to present, how to present it, and what story it will be used to instantiate.

Two Supreme Court cases dramatically demonstrate the implications of the point that all of the branches of government influence the inferential process of juries. *Montana v. Egelhoff*[106] dealt with a Montana statute that precluded the use of evidence of intoxication in determining mental states. This leads to a remarkably complicated morass that has been thoroughly dissected in the literature.[107] A majority agreed, however, that under this statute a person could be convicted of murder even though, due to intoxication, the defendant had no

102. *See* FED. R. EVID. art. V.

103. *See* FED. R. EVID. art. IX.

104. *See* FED. R. EVID. art. IV.

105. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

106. 518 U.S. 37 (1996).

107. See Allen, *supra* note 44, and the comments following Allen's article beginning at 87 J. CRIM. L. & CRIMINOLOGY 654 (1997); *see also* Peter Westen, Egelhoff *Again*, 36 AM. CRIM. L. REV. 1203 (1999).

intent, purpose, or volition. At the same time, a majority seemed to agree that the State had to produce some evidence of the pertinent mental states.[108] This leads to the remarkable state of affairs "that a conviction for murder could be obtained even though a rational person looking at all the available (but some not admissible) evidence would conclude that the probability of an intentional act is 0.0."[109] Now review the bidding. The *Apprendi* line of cases is concerned about protecting the jury's decisionmaking process, but *Egelhoff* permits a legislatively adopted exclusionary rule to be implemented by the judiciary that has the result of turning what an informed observer knows should be an acquittal into a jury verdict of guilt.

What *Egelhoff* does to the notion of protecting juries from legislative and judicial intrusion into their cognitive processes (which, to be blunt, is to confirm that it happens all the time in myriad ways) is at least mildly replicated with respect to the executive branch in *Old Chief v. United States*.[110] The question was whether the prosecution had to accept the defendant's agreement to stipulate that he had a prior conviction that qualified him as a potential felon in possession of a gun under the federal criminal law. Although the Court held that on the particular facts the prosecution did have to accept the stipulation, in general the prosecution can prove its case however it likes, even with logically unnecessary evidence. In the now-famous words of the Court, "[a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it."[111]

Together *Egelhoff* and *Old Chief* confirm our central point that the entire line of *Apprendi* cases is working off of a peculiarly erroneous assumption. The assumption is that it is sensible to think of preserving for the jury the task of finding beyond a reasonable doubt those facts necessary for conviction and, at least, an increase in sentence, free from the interference of government. The reality is that, in the world we actually inhabit, jury findings are heavily dependent on the actions of the various branches of government. The peculiarity of this state of affairs is obvious. The *Apprendi* line says that the government cannot, say, define murder as an act leading to death, punishable by a year in jail, but direct the sentencing judge to make it life in prison if the judge finds that the defendant acted intentionally, and all because this interferes with the jury's right to find facts beyond a reasonable doubt. But, the government can adopt a rule of evidence that converts what rationally should be a jury finding of no intentionality into a jury finding of intentionality, and thus a conviction for murder. How those two differ from the *Apprendi* perspective is a mystery.

108. Allen, *supra* note 44, at 643. Scalia's views on this question are not clear, thus the equivocation in the text.

109. *Id.*

110. 519 U.S. 172 (1997).

111. *Id.* at 189.

CONCLUSION

Although obviously we cannot say for certain whether we are in the midst of another of the Court's exercises in blunders and retreats, our hypothetical scientist has ample evidence to believe that to be the case. To believe otherwise may best be described as the triumph of hope over experience, as can the Court's continuing fitful incursions into the substantive criminal law. Unless the Court is willing to try to force wholesale changes in the criminal law, to overrule wholesale its own precedent (such as *Patterson*, *Martin*, and *Ulster County Court*), and to really take on the nation's legislatures in a battle over who controls the criminal law, the Court will have to retreat again. And as we have said a number of times, *Booker* and *Fanfan* may very well signify that retreat. Hovering over all of this is that the entire *Apprendi* debate seems to ignore the reality of a criminal jury's inferential process that, once processed and understood, underscores dramatically how the Court once again should look to get out of this particular line of work. Thus, we predict that either we have seen or soon will see a retreat of the kind we traditionally see when the Court crosses the line by attempting to regulate the substantive criminal law.[112]

112. Another perspective on the *Apprendi* mess is that it represents the Court's effort to impede two fundamental changes to the criminal process that have developed over the last few decades that together have marginalized juries. The first is the simple decline in the number of jury trials over the last thirty years. *See* Marc Galanter, *The Vanishing Trial, An Examination of Trial and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). Criminal trial rates in federal courts have decreased—from fifteen percent in 1962 to five percent in 2002—as have the absolute number of criminal jury trials in federal court per year—from 5097 in 1962 to 3574 in 2002. *Id.* at 48-49. Thus, there are only about one-third the number of criminal jury trials in federal courts now as compared to thirty years ago. Of the twenty-two states included in Mr. Galanter's findings, a similar picture emerges on the state level. From 1976 to 2002, criminal jury trial rates dropped from 3.4% to 1.3% of total criminal dispositions and the absolute number of criminal jury trials in state courts per year fell from 42,049 in 1976 to 35,664 in 2002. *Id.* at 72. Second, there has been a steady trend of converting liability rules into sentencing factors, of which the Federal Sentencing Guidelines is just the culmination. If this is what motivates the Court, and who knows what lurks in the heart of mankind, our critique would be analogous but different. The Court's success rate with impeding broad-based social change is just about zero, and it is not the business of the Court in any event. These points are beyond the scope of this inquiry, however.