Appraising and Appreciating *Apprendi*

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Except with regard to the death penalty, the story of modern sentencing reform has not been about constitutional law. While changes in capital sentencing have been required and shaped by interpretations of the Eighth Amendment, most other reforms to state and federal sentencing systems have been legislative developments driven principally by policy considerations rather than constitutional concerns. Indeed, in numerous cases challenging various sentencing laws over the last half century, the Supreme Court regularly upheld a wide array of non-capital sentencing systems and often stressed the considerable deference to be shown to legislative judgments in the sentencing arena.4

The Supreme Court’s recent decision in *Apprendi v. New Jersey* has significantly altered this story. In *Apprendi*, the Court struck down a New Jersey sentencing scheme which raised a defendant’s maximum possible sentence based upon a sentencing judge’s finding, by a preponderance of the evidence, that the defendant’s crime was committed with a racially biased purpose. Drawing upon ideas developed in cases from the last two terms interpreting federal statutes,5 the Supreme Court in *Apprendi* concluded that “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 . . . [and] such facts must be established by proof beyond a reasonable doubt.”6 In short, the *Apprendi* Court held that the Due Process Clause requires that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

By establishing this constitutional limitation on the procedures attending a legislative sentencing scheme, *Apprendi* is indisputably a significant decision for modern sentencing reforms. However, the split 5–4 vote and the five separate opinions delivered by the Justices raise many questions about the exact scope and import of the Court’s ruling. Following up our examination of sentencing procedures in Issue 12.4, FSR devotes this issue to an appraisal of the meaning and likely impact of the Supreme Court’s decision in *Apprendi*. In this issue, leading academics provide analysis and commentary which helps bring into focus just what the *Apprendi* decision may entail for federal and state sentencing reform efforts. Our commentators’ examination of *Apprendi* also reveals that the ultimate meaning and impact of the decision will depend not only on the future rulings of federal and state courts, but also on the future work of legislatures and sentencing commissions.

**Appraising *Apprendi***

The majority opinion in *Apprendi* intimated that the Court’s ruling was “a matter of simple justice,”7 but the split vote by the Justices, as well as the length and contentiousness of the five separate opinions, demonstrate that the decision was anything but simple. Indeed, the scope and import of the *Apprendi* ruling appears dramatically different depending on whose opinion one reads. According to the majority opinion authored by Justice Stevens, the Court’s ruling is the straightforward and sensible extension of history and precedent concerning what aspects of a crime must be treated as “elements” with the full panoply of procedural protections. According to the main dissenting opinion authored by Justice O’Connor, the decision is a radical departure from settled caselaw which threatens to “halt the current debate on sentencing reform in its tracks and to invalidate with the stroke of a pen three decades’ worth of nationwide reform.”
The additional separate opinions delivered in *Apprendi*, particularly those authored by Justices Thomas and Breyer, exacerbate the uncertain nature of the Court’s ruling. In support of his vote to strike down the New Jersey sentencing law at issue, Justice Thomas draws on a wealth of historical materials to argue that the Constitution actually “requires a broader rule than the Court adopts.” Justice Thomas contends that “every fact that is by law a basis for imposing or increasing punishment” must be treated procedurally as an element of a crime (which, according to Justice Thomas, makes constitutionally suspect not only previous Supreme Court sentencing decisions, but also the workings of the federal sentencing guidelines). Writing in dissent, Justice Breyer expresses concerns about the potential breadth of the Court’s ruling and Justice Thomas’s arguments. He warns that “the rational that underlies the Court’s rule suggests a principle—jury determination of all sentencing-related facts—that, unless restricted, threatens the workability of every criminal justice system (if applied to judges) or threatens efforts to make those systems more uniform, hence more fair (if applied to commissions).”

Professor Alan Michaels provides helpful perspective on the exact scope and meaning of *Apprendi* through a thoughtful and thorough textual analysis of the Justices’ opinions. Professor Michaels ultimately concludes that, despite Justice O’Connor’s fears to the contrary, “the Court’s constitutional restriction on legislative discretion in defining the elements of crimes is a limited one.” Professor Michaels details why the *Apprendi* decision cannot be fairly interpreted as a broad invalidation of the procedures employed in all structured sentencing schemes. (This conclusion has already been confirmed in a number of lower court rulings, such as the Seventh Circuit’s decision in *Talbott v. Indiana* reprinted in this issue, which have concluded that the reach of *Apprendi* is limited.) Professor Michaels also explains how a legislature, faced with some statutes that might now be constitutionally problematic under *Apprendi*, would need only to make relatively minor revisions to those statutes in order to avoid running afoul of the *Apprendi* rule.

Professor Michaels goes on to explain, however, that though the *Apprendi* decision is “modest in scope, [it is] nonetheless significant.” First, says Professor Michaels, *Apprendi* is meaningful from a broader theoretical perspective because its narrow rule still “provides what might be called ‘truth-in-convicting’ values:” the holding forces legislatures to state explicitly the true maximum penalty for offenses, and ensures that the public and defendants have notice of such maximum possible sentences. Second, continues Professor Michaels, even as a limited holding, *Apprendi* has concrete and immediate ramifications for federal drug prosecutions. Professor Michaels details how the penalty structure of 21 U.S.C. § 841 as it has had been previously interpreted by lower federal courts is now constitutionally infirm under *Apprendi*. Thus, explains Professor Michaels, *Apprendi* will require federal courts to start treating the weight of drugs in prosecutions under § 841 as an element, with the corresponding procedural protections, in order to be able to rely on such facts to increase potential maximum sentences under that statute. Finally, Professor Michaels defends the Court’s decision against arguments that *Apprendi* either went too far or did not go far enough. Professor Michaels suggests that those in favor of a broader holding might discover that the Court’s narrow rule will prove to have greater ultimate influence, while those concerned with the impact of the *Apprendi* decision might come to appreciate its cautious approach to constitutional intervention in legislative procedures.

The article by Professors Nancy King and Susan Klein reveals that, while the Supreme Court may have been trying to move cautiously, the *Apprendi* decision may still have a caustic effect. Their work confirms the impact of *Apprendi* on drug prosecutions brought under 21 U.S.C. § 841, and further details the vast range of federal and state sentences that may now be constitutionally problematic after *Apprendi*. Through two appendices to their article, Professors King and Klein set forth numerous existing federal and state statutes with provisions that seem to authorize the imposition of sentences which could transgress *Apprendi*’s constitutional rule.

Helpfully, Professors King and Klein go far beyond simply listing statutes under which constitutionally flawed sentences may have been already rendered. Through a cogent and clear elaboration of constitutional law and habeas corpus rules, Professor King and Klein develop an analytical road-map for the consideration of the many *Apprendi*-related claims.
already being pressed in lower courts by previously sentenced defendants. With copious references to pre- and post-Apprendi case law, Professors King and Klein provide an illuminating explanation of the legal intricacies that will surround the consideration on direct and collateral review of past convictions in state and federal courts.

Significantly, Professors King and Klein – in addition to greatly aiding those who are “laboring in the trenches of the criminal justice system” to resolve challenges to completed criminal prosecutions called into question by Apprendi – reach a number of important conclusions through their analysis. Professors King and Klein note, for example, that in determining the ultimate fate of certain defendants who were perhaps unconstitutionally sentenced under existing federal statutes, “[m]uch, perhaps too much, will turn on the pleading practices of various United States Attorneys offices.” Professors King and Klein also explain that the usual relief for defendants prevailing on Apprendi claims will be resentencing, which in some cases may involve “a significant sentence reduction,” but in other cases may “result in the very same term of incarceration.”

Professors King and Klein close by noting that a “considerable quantity of criminal justice resources will be spent sorting out the proper punishment for those state and federal prisoners who were convicted by the time the Court announced its decision in Apprendi.” Here, again, the Seventh Circuit’s decision in Taibott v. Indiana confirms the insight of our commentators: Circuit Judge Frank Easterbrook’s blunt opinion in Taibott reveals his frustrations in having to deal with habeas petitions from “throngs” of prisoners who “seem to think that Apprendi reopens every sentencing issue decided by a federal court in the last generation.” In the end, Judge Easterbrook’s statements in Taibott, coupled with the analysis of Professors King and Klein, at the very least substantiates one of Justice O’Connor’s expressed concerns in Apprendi. Justice O’Connor prophetically warned in her dissent that the Apprendi Court’s ruling “threatens to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences,” and even “threatens to cast sentencing in the United States into what will likely prove to be a lengthy period of considerable confusion.”

Appreciating Apprendi

The commentary in this issue reveals that even the short-term impact of Apprendi will not be clear until lower courts fully address the many interpretive questions that the decision raises for already completed prosecutions and for existing statutes that now appear constitutionally suspect. Moreover, our contributors also suggest that Apprendi’s long-term effect will depend upon the repercussions of the decision on the future work of the Supreme Court, legislatures and other sentencing rulemakers. Speaking to this very point, Professors King and Klein conclude their commentary by asserting that the “more lasting impact” of Apprendi “will be its effect on legislative efforts to draft crimes and punishments in its wake, and its implications for constitutional limits on the shape of substantive criminal law.” In a somewhat similar vein, Professor Michaels, reflecting on how the Supreme Court has “famously zigzagged” when previously trying to establish constitutional limits in this area, lauds the cautious steps taken by Apprendi Court while foreshadowing a day when the Court will have to decide “whether, where and how to take the next step beyond Apprendi.”

To add a final thought, I see the ultimate significance and value of Apprendi depending upon whether the decision has positive reverberations for the work of sentencing lawmakers beyond its concrete constitutional impact. Unfortunately, Congress’s development of statutory sentencing rules and the Sentencing Commission’s development of the federal guidelines have given little explicit attention to important procedural matters such as appropriate burdens of proof, proper fact-finders, sensible evidentiary rules and sound hearing procedures.” Consideration of such matters by state legislatures and state sentencing commissions have not been markedly better. Apprendi and future constitutional rulings may ultimately force sentencing lawmakers to revise the procedures attending existing sentencing schemes. However, even without any further guidance from the courts, legislatures and sentencing commissions should appreciate the simple, fundamental policy message which Apprendi radiates: procedures really matter at sentencing.

Read together, the five opinions in Apprendi provide a wonderful primer on the significance and the centrality of procedural issues in the actual operation of a sentencing

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scheme. If reviewed carefully and thoughtfully by sentencing lawmakers, the *Apprendi* decision could effectively inform a long-overdue policy dialogue by legislatures and sentencing commissions concerning procedural matters that have heretofore been incompletely contemplated in the modern sentencing reform movement. The *Apprendi* decision will truly be a “watershed” event if it not only brings needed light to critical procedural issues raised in modern sentencing schemes, but also manages to prod sound procedural reforms that go beyond whatever constitutional minimums are ultimately established by the Supreme Court.

Notes


2 See, e.g., Harmelin v. Michigan, 501 U.S. 957 (1991) (rejecting Eighth Amendment challenge to mandatory sentence of life imprisonment for first-time drug offense); McMillan v. Pennsylvania, 477 U.S. 79 (1986) (rejecting constitutional challenge to mandatory minimum sentencing scheme triggered by facts which only had to be proven to a sentencing judge under a preponderance standard); Williams v. New York, 337 U.S. 241 (1949) (rejecting constitutional claim that offender had a right confront and cross-examine witnesses whose statements were relied upon by sentencing judge); see also Mistretta v. United States, 488 U.S. 361 (1989) (rejecting constitutional challenges to sentencing scheme created by Sentencing Reform Act of 1984); Watts v. United States, 519 U.S. 148 (1997) (rejecting constitutional challenges to use of “acquitted conduct” under the federal sentencing guidelines).

3 120 S. Ct. 2348 (2000).


5 *Apprendi*, 120 S. Ct. at 2364 (quoting Jones, 526 U.S. at 252-53 (opinion of Stevens, J.)).

6 Id. at 2363-64.

7 Id. at 2355.

8 *Apprendi*, 120 S. Ct. at 2394-95 (O’Connor, J., dissenting).

9 *Apprendi*, 120 S. Ct. at 2367 (Thomas, J., concurring).

10 See id. at 2377-80 & n.11.

11 *Apprendi*, 120 S. Ct. at 2402 (Breyer, J., dissenting).

12 *Apprendi*, 120 S. Ct. at 2394-95 (O’Connor, J., dissenting).