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Stephanos Bibas

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CRIMINAL LAW

***APPRENDI* IN THE STATES: THE VIRTUES OF FEDERALISM AS A STRUCTURAL LIMIT ON ERRORS**

STEPHANOS BIBAS*

In *Apprendi v. New Jersey*, the U.S. Supreme Court held that any fact (except recidivism) that increases a defendant's statutory maximum sentence must be proved to a jury beyond a reasonable doubt.¹ This federal constitutional ruling disrupted not only the federal courts, but also the far larger number of criminal cases handled in state courts. In addition, state courts are free not only to interpret *Apprendi*, but to find broader *Apprendi*-type rights under their own state constitutions. Thus, one might have expected *Apprendi* to unleash a variety of creative interpretations in state court, many of which could have gone beyond the federal constitutional minimum.

The big surprise of the last three years is that there is no surprise. State courts have by and large interpreted *Apprendi* very cautiously and narrowly. Only in select areas have a few courts interpreted their own constitutions more broadly than the Federal Constitution. Evidently, the *Apprendi* firecracker has fizzled out at the state level just as it has at the federal level.² As I will argue, this welcome development shows the virtues of federalism as a structural limit on errors. As state judges saw *Apprendi*'s novelty, disruption, and errors, they wisely braked and confined its scope.

* Associate Professor, University of Iowa College of Law; former Assistant U.S. Attorney, Criminal Division, U.S. Attorney's Office for the Southern District of New York (bibas@philo.org). B.A., Columbia; B.A., M.A., Oxford; J.D., Yale. I originally presented this paper at the 2003 ABA Council of Appellate Staff Attorneys' Seminar.

¹ 530 U.S. 466, 490, 496 (2000).

² For a discussion of how the Supreme Court has declined to extend *Apprendi* to its radical but logical conclusion, see Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending Apprendi to Upset Most Sentencing*, 15 FED. SENTENCING REP. 79 (2002).

While remaining faithful to the Supreme Court's supremacy, they brought their own wisdom to bear in limiting *Apprendi*. They thus avoided compounding its errors, showing how federalism uses the practical wisdom of many actors in a decentralized system. The state courts are far from lock-step implementers of Supreme Court decisions or mindless bastions of conservatism; they are truly valuable partners in our federalist system of criminal procedure.

I. INDICTMENTS

The first area that *Apprendi* could have affected is the right to indictment. *Apprendi*'s logic (though not its holding) required federal indictments to charge all facts that raise maximum sentences.³ This rule, however, did not bind state courts because the Grand Jury Clause of the Fifth Amendment has not been incorporated against the states.⁴ Based on *Apprendi*, a few state courts have required state indictments to allege the facts and statutory subsections supporting penalty enhancements. For example, the Supreme Court of North Carolina has required prosecutors to plead firearm enhancements in their indictments.⁵ Likewise, the Supreme Court of Alaska has required a state indictment to allege that a burglary took place at night in an occupied dwelling.⁶

More courts, however, have held that state indictments need not charge the facts and statutory subsections that support enhancements. The Alabama Court of Criminal Appeals has held that state indictments need not charge enhancements for selling drugs near schools or housing projects.⁷ The New Mexico Court of Appeals has held that *Apprendi* does not require state indictments to charge firearm enhancements. That court declined to apply complex federal pleading practices to New Mexico's simpler pleading system, and it expressed a preference for construing *Apprendi* narrowly.⁸ The Rhode Island Supreme Court has held that a state indictment need not give notice of a sentence enhancement for aggravated

³ See 530 U.S. at 476-77 n.3.

⁴ See *Hurtado v. California*, 110 U.S. 516, 538 (1884).

⁵ *State v. Lucas*, 548 S.E.2d 712, 732 (N.C. 2001).

⁶ *State v. Malloy*, 46 P.3d 949, 952-54 (Alaska 2002) (based on *Apprendi* and approving of *Donlun*); *Donlun v. State*, 527 P.2d 472, 473-74 (Alaska 1974) (on state-law grounds).

⁷ *Skinner v. State*, 843 So. 2d 820, 828 (Ala. Crim. App. 2002) (per curiam); *Poole v. State*, 846 So. 2d 370, 387-88 (Ala. Crim. App. 2001) (per curiam) (holding that the prosecution must give notice that it will seek to enhance a sentence for selling drugs because the sale occurred near a school and a housing project, but that this notice need not be in the indictment).

⁸ *State v. Badoni*, 62 P.3d 348, 351-52 (N.M. Ct. App. 2002).

battery in the course of a murder.⁹ Because the Grand Jury Clause does not bind the states, the court reasoned, state prosecutors are free to notify defendants of enhancements in other ways.¹⁰ For instance, prosecutors can give notice of enhancements in bills of particulars.¹¹ Finally, courts in Georgia, Oregon, and Tennessee have held that indictments need not charge aggravating factors that trigger death sentences.¹²

II. GUILTY PLEAS

Apprendi issues can also arise at guilty-plea hearings. Many defendants who pleaded guilty before *Apprendi* have later tried to raise *Apprendi* claims. Unfortunately for them, state courts have routinely rejected these claims. They regularly hold that entry of a plea agreement and guilty plea waives *Apprendi* claims. Their reasoning makes sense: in bargaining away their rights to trial and confessing guilt, defendants who plead guilty waive their rights to jury determinations beyond a reasonable doubt.¹³ The only exception to this rule is in Kansas. Kansas courts have held the entire system of judicially administered presumptive sentencing guidelines invalid on its face. Even a defendant's agreement to a judicial upward departure as part of a plea bargain cannot waive this objection.¹⁴

III. TRIALS

Apprendi also portended important changes in trial procedure. One danger of allowing juries to find aggravating facts is possible prejudice to their determinations of guilt. In response, some Justices in the *Apprendi* majority suggested that trial courts bifurcate trials to keep juries from learning of aggravators until after they convict of the base crime.¹⁵ Some

⁹ State v. Edwards, 810 A.2d 226, 233-34 (R.I. 2002).

¹⁰ *Id.*

¹¹ See FED. R. CRIM. P. 7(f) (authorizing bills of particulars).

¹² Terrell v. State, 572 S.E.2d 595, 602-03 (Ga. 2002); State v. Oatney, 66 P.3d 475, 485-87 (Or. 2003); State v. Dellinger, 79 S.W.3d 458, 466-67 (Tenn. 2002).

¹³ Sanchez v. People, 126 Cal. Rptr. 2d 200, 208 (Cal. 2002); Weeks v. State, 761 A.2d 804, 806 (Del. 2000) (per curiam); Hindenach v. State, 807 So. 2d 739, 743-44 (Fla. Dist. Ct. App. 2002); People v. Jackson, 769 N.E.2d 21, 26-28 (Ill. 2002); Colwell v. State, 59 P.3d 463, 473-74 (Nev. 2002).

¹⁴ State v. Cullen, 60 P.3d 933, 937 (Kan. 2003). This ruling appears to rest on the idea that the judge triggered the upward departure by making factual findings that apparently were not contained in the defendant's plea allocution and plea agreement. Had the defendant alluded to these facts, the result probably would have been different.

¹⁵ *Apprendi*, 530 U.S. at 521 n.10 (Thomas, J., concurring); Monge v. California, 524 U.S. 721, 739 n.1 (1998) (Scalia, J., dissenting).

state courts have followed this suggestion and approved bifurcated trials.¹⁶ Furthermore, *Apprendi* also requires specific findings of aggravating facts, and courts have grappled with how to ensure these findings. State courts are split on whether *Apprendi* requires judges to submit special verdict forms listing aggravating facts to juries.¹⁷ Where *Apprendi* requires juries to find an aggravating fact (such as that a park was run by the government), judges may not instruct juries to take judicial notice of that fact.¹⁸

IV. SENTENCING

Apprendi's main impact, of course, has been on sentencing. State courts have held that judges can continue to make many of the determinations that they have traditionally made at sentencing. For example, the courts have agreed that judges may find facts that trigger consecutive rather than concurrent sentences. They reason that because the ultimate sentence does not exceed the combined statutory maxima, there is no *Apprendi* problem.¹⁹ The Illinois courts briefly took a contrary stance and held that *Apprendi* required juries to make the consecutive-sentence determination, but they have since overruled that approach.²⁰

Another area in which judges can find facts involves sex-offender registration. So-called Megan's Laws require convicted sex offenders to register with the police.²¹ Some of these laws are triggered by a judge's finding that an offender committed an offense with a sexual purpose.²² Is this a factual finding that triggers a sentence enhancement and thus requires a finding by a jury beyond a reasonable doubt? The courts that have considered the issue have rejected this claim. They uniformly agree that

¹⁶ *State v. Nichols*, 33 P.3d 1172, 1176 (Ariz. Ct. App. 2001).

¹⁷ *Compare Poole v. State*, 846 So. 2d 370, 388 (Ala. Crim. App. 2001) (per curiam) (instructing trial courts to submit two verdict forms to juries, one of which seeks a verdict on the base crime and the other of which seeks a verdict on the enhancement) *with Kormondy v. State*, 845 So. 2d 41 (Fla. 2003) (per curiam) (holding that trial courts need not submit special verdict forms to juries for aggravating circumstances that make defendants eligible for the death penalty).

¹⁸ *State v. Harvey*, 647 N.W.2d 189, 197 (Wis. 2002).

¹⁹ *See Wright v. State*, 46 P.3d 395, 398 (Alaska 2003); *People v. Clifton*, 69 P.3d 81, 82-85 (Colo. Ct. App. 2001), *vacated and remanded by* No. 02SC80, 2003 WL 1906360 (Colo. Apr. 21, 2003); *Hall v. State*, 823 So. 2d 757, 764 (Fla. 2002); *People v. Harris*, 784 N.E.2d 792, 798 (Ill. 2003); *State v. Jacobs*, 644 N.W.2d 695, 698-99 (Iowa 2001); *State v. Bramlett*, 41 P.3d 796, 798 (Kan. 2002); *State v. Wilson*, No. 2002-Ohio-5920, 2002 WL 31420758, at *8-*9 (Ohio App. Oct. 25, 2002).

²⁰ *People v. Clifton*, 750 N.E.2d 686, 703-04 (Ill. App. Ct. 2000), *overruled by People v. Wagener*, 752 N.E.2d 430, 440-42 (Ill. 2001).

²¹ *E.g.*, N.J. STAT. ANN. § 2C:7-2 (West 1994).

²² *E.g.*, CONN. GEN. STAT. ANN. § 54-256 (West 1999).

sex-offender registration is a regulatory measure, not a punitive one, and so is not within *Apprendi*'s scope. Registration is a collateral consequence of conviction and not punishment for an additional, aggravated crime.²³ This approach is in keeping with the Supreme Court's treatment of sex-offender civil commitment laws as regulatory civil measures rather than punitive criminal ones.²⁴ By the same reasoning, involuntary commitment of incompetent defendants is regulatory, not punitive, and so not subject to *Apprendi*.²⁵

In some states, conviction of a sex offense automatically triggers an extended term of post-release supervision. Judges may impose these extended terms, notwithstanding *Apprendi*, because the extensions are automatic and do not depend on any additional findings of fact.²⁶

Juvenile-court judges often find by a preponderance of the evidence facts that trigger transfer to adult court, where the possible penalties are much higher. Defendants have raised *Apprendi* challenges, claiming that juries should find these facts beyond a reasonable doubt. State courts routinely reject these challenges. They reason that determining whether a child is amenable to juvenile-court processes requires a complex assessment of the child's age, maturity, environment, past behavior, and likely future behavior.²⁷ This forward-looking assessment of the prospects for rehabilitation is complex and laden with discretion, unlike the finding of historical facts about a particular crime.²⁸ In addition, the transfer finding is a purely jurisdictional threshold issue, and a jury will ultimately have to find each element beyond a reasonable doubt before sentencing.²⁹

Apprendi carved out an exception to its rule for enhancements based on prior convictions.³⁰ It preserved the holding of *Almendarez-Torres*, which allowed judges to find prior convictions that trigger recidivism

²³ *State v. Pierce*, 794 A.2d 1123, 1128-32 (Conn. App. Ct. 2002); *Young v. State*, 806 A.2d 233, 250 (Md. Ct. App. 2002).

²⁴ See *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997).

²⁵ *State v. Spriggs-Gore*, 64 P.3d 506, 513 (N.M. Ct. App. 2003).

²⁶ *State v. Walker*, 60 P.3d 937 (Kan. 2003).

²⁷ *State v. Gonzales*, 24 P.3d 776, 783-85 (N.M. Ct. App. 2001), *cert. granted*, 23 P.3d 929 (N.M. 2001).

²⁸ *Walker*, 60 P.3d at 937.

²⁹ *In re Matthew M.*, 780 N.E.2d 723, 733-34 (Ill. App. Ct. 2002); *People v. Beltran*, 765 N.E.2d 1071, 1075-76 (Ill. App. Ct. 2002); *State v. Hartpence*, 42 P.3d 1197, 1205 (Kan. 2002); *In re Personal Restraint Petition of Massey*, 115 Wash. App. 1016 (Wash. Ct. App. 2003) (unpublished); see also *State v. D.J.*, No. 0003002567, 2001 WL 1671085, at *1 (Del. Fam. Ct. May 17, 2001).

³⁰ *Apprendi*, 530 U.S. at 487-90.

enhancements.³¹ States have followed the Supreme Court's lead and continued to allow judges to find facts that trigger recidivism enhancements.³²

Once a jury has found a fact that raises the statutory maximum sentence, judges may weigh and determine other facts in deciding where the sentence should fall within the new range. For example, in one case a jury's verdict necessarily found that the victim was over the age of sixty, which raised the statutory maximum sentence. Because the jury had already raised the maximum by finding one aggravating factor, the judge could consider and find other aggravating factors in deciding where to sentence within the new range.³³ A New Mexico court has allowed judges to find facts that limit an inmate's possibility of earning good-time credit, because these findings limit mitigation rather than aggravating sentences beyond the statutory maximum.³⁴ In a similar vein, the Nebraska Supreme Court has allowed judges to find whether a kidnapping victim had been voluntarily released unharmed. This fact distinguishes two grades of kidnapping that carry different punishments. Nonetheless, the court noted that the statute makes ordinary kidnapping a class IA felony and allows voluntary release and lack of harm to mitigate the felony down to class II.³⁵ These rulings are faithful to *Apprendi*'s clear line between aggravating and mitigating punishment. They also highlight how arbitrary the line is. Why should it matter whether Nebraska's kidnapping statute treats harm as an aggravating factor or absence of harm as a mitigating factor? The distinction is an arbitrary artifact of drafting. It also opens the door to legislative evasion of *Apprendi*'s strictures by simply redrafting every aggravator as a mitigator. Nonetheless, most courts are faithfully applying the unprincipled line between aggravating and mitigating factors, as required by *Apprendi*.

The same reasoning allows judges to participate in capital sentencing. A year and a half ago, the Supreme Court struck down capital sentencing by judges. In *Ring v. Arizona*, the Court held that a jury must first raise the maximum sentence to death by finding at least one aggravating circumstance.³⁶ But *Ring* left room for judges to participate after such a

³¹ *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998).

³² *State v. Lebaron*, 808 A.2d 541, 544-45 (N.H. 2002); *see also infra* note 41 and accompanying text (citing state cases that continue to allow judges to find recidivism as an aggravating factor in capital sentencing).

³³ *People v. Hopkins*, 773 N.E.2d 633, 640 (Ill. 2002).

³⁴ *State v. Morales*, 39 P.3d 747, 748 (N.M. Ct. App. 2001).

³⁵ *Garza v. Kenney*, 646 N.W.2d 579, 582-83 (Neb. 2002).

³⁶ 536 U.S. 584 (2002).

jury finding, and most state courts have upheld this judicial participation. For example, the process of weighing aggravating against mitigating circumstances is not a determination of historical fact, but a moral or legal judgment. Thus, once a jury finding has raised the maximum sentence to death, a majority of states let judges find that the aggravating circumstances outweigh the mitigating circumstances and so warrant death.³⁷ Likewise, judges may find that there are no mitigating circumstances sufficient to preclude the death penalty.³⁸ The upshot is that states may give judges the power to impose death sentences after advisory juries have made sentence recommendations, so long as the jury has first found at least one aggravator.³⁹ Judges may find that defendants are not mentally retarded and therefore eligible to die.⁴⁰ And judges may decide, as a matter of law, that certain prior convictions would count as “serious assaultive criminal convictions,” so long as the capital jury ultimately finds that the defendant in fact had those convictions.⁴¹ So long as a jury finds beyond a reasonable doubt that an aggravating factor was present, it need not agree on which aggravator was present or which evidentiary theory proves an element.⁴²

³⁷ *Ex parte* Waldrop, 2002 WL 31630710, at *6-*7 (Ala. Nov. 22, 2002); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003); *State v. Gales*, 658 N.W.2d 604, 626-27 (Neb. 2003); *Murphy v. State*, 54 P.3d 556, 565-66 (Okla. Crim. App. 2002). *Cf.* *People v. Ballard*, 794 N.E.2d 788, 819 (Ill. 2002) (holding that the state need not prove beyond a reasonable doubt that the mitigating circumstances are outweighed by the aggravating circumstances); *Murphy*, 54 P.3d at 566 (Okla. Crim. App. 2002) (holding that juries need not find beyond a reasonable doubt that the aggravators outweigh the mitigators). Arizona and Nevada courts disagree. They have overread *Ring* as reserving for juries the finding and weighing of mitigators, even though *Ring*'s rationale is limited to the initial aggravator that raises the maximum to death. *See State v. Ring*, 65 P.3d 915, 942-43 (Ariz. 2003) (en banc); *State v. Pandeli*, 65 P.3d 950, 952 (Ariz. 2003); *State v. Johnson*, 59 P.3d 450, 460-61 (Nev. 2002).

³⁸ *People v. Harris*, 794 N.E.2d 181, 202 (Ill. 2002).

³⁹ Four states use advisory juries as part of their capital-sentencing process: Alabama, Delaware, Florida, and Indiana. ALA. CODE § 13A-5-46 (1975); DEL. CODE ANN. tit. 11, § 4209 (2003), amended by 2003 Del. Laws 174 (2003); FLA. STAT. ch. 921.141 (2003); IND. CODE ANN. § 35-50-2-9 (West 2003).

⁴⁰ *State v. Williams*, 831 So. 2d 835, 860 n.35 (La. 2002); *see also People v. Smith*, 751 N.Y.S.2d 356, 357 (N.Y. App. Div. 2002) (holding that prosecution does not bear the burden of disproving the defendant's mental retardation).

⁴¹ *State v. Williams*, 97 S.W.2d 462, 474 (Mo. 2003). Indeed, one would expect that judges could find all prior criminal convictions, based on *Apprendi*'s exception for recidivism enhancements. *Ex parte Smith*, 2003 WL 1145475, at *7-*8 (Ala. Mar. 14, 2003); *Ring*, 65 P.3d at 936-37; *Bottoson v. Moore*, 893 So. 2d 693, 722-23 (Fla. 2002) (Pariente, J., concurring in result). This exception is on shaky ground, however, as Justice Thomas has suggested that he would supply the fifth vote to abolish the recidivism exception. *Apprendi*, 530 U.S. at 520-21 (Thomas, J., concurring).

⁴² *People v. Snow*, 65 P.3d 749, 799 n.32 (Cal. 2003) (specific aggravating factor); *People v. Ochoa*, 28 P.3d 78, 108 (Cal. 2001) (same); *Commonwealth v. Obershaw*, 762 N.E.2d 276, 289-90 (Mass. 2002) (specific “evidentiary consideration”).

A few states have found ways around *Apprendi* and *Ring*. If a jury's verdict has already implicitly found an aggravating factor, that finding by itself raises the statutory maximum sentence to death. There is thus no need for a second jury finding. For example, if a jury convicts a defendant of murder in the course of a robbery, it has necessarily found the aggravating circumstance of robbery.⁴³ States may follow up this idea by doing more to build aggravating circumstances into the charge of conviction, obviating jury input later. It is not clear how far this trend can go, however, as the Supreme Court has underscored the importance of an individualized narrowing step after the guilt phase.⁴⁴

In contrast with this long list of decisions about what judges may find, there is a much shorter list of what they may not find. Simply put, judges may not find facts that raise maximum sentences. They may not find aggravating circumstances that trigger the death penalty⁴⁵ (with the possible exception of prior convictions, as noted above). Thus, in addition to the Arizona law invalidated in *Ring* and Nevada's provision allowing judges to break jury deadlocks, Colorado, Idaho, and Nebraska courts have struck down their judicial capital sentencing schemes.⁴⁶ Montana should follow suit, as it too allows judges to impose death sentences without jury authorization.⁴⁷ Judges may not find that an arson was aggravated rather than simple, as that fact raises the maximum sentence.⁴⁸ Judges may not take judicial notice that a park was run by the government in order to trigger an enhancement for selling drugs near a government-run park.⁴⁹ They may not enhance sentences for gang-related crimes, as this infringes on the jury's prerogative to find whether the crime was gang-related.⁵⁰

⁴³ *Stallworth v. State*, No. 98-0366, 2003 Ala. Crim. App. LEXIS 21 at *6 (Ala. Crim. App. Jan. 31, 2003), *cert. denied*, *Ex parte Stallworth*, No. 1020941, 2003 Ala. LEXIS 210 (Ala. June 27, 2003).

⁴⁴ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (striking down a state statute that mandated the death penalty for all first-degree murders because it did not leave enough room to consider the character and circumstances of the individual defendant).

⁴⁵ *State v. Gales*, 658 N.W.2d 604, 622-24 (Neb. 2003).

⁴⁶ *Ring v. Arizona*, 536 U.S. 584 (2002); *Woldt v. People*, 64 P.3d 256, 263 (Colo. 2003); *State v. Fetterly*, 52 P.3d 874, 875 (Idaho 2002); *State v. Gales*, 658 N.W.2d 604, 624 (Neb. 2003); *Johnson v. State*, 59 P.3d 450, 458 (Nev. 2002). Several of these states have since rewritten their capital-sentencing laws to give juries greater roles. ARIZ. REV. STAT. ANN. § 13-703.01 (West 2003); COLO. REV. STAT. ANN. § 18-1.3-1201 (West 2003); NEB. REV. STAT. §§ 29-2519 to -2521 (2003).

⁴⁷ MONT. CODE ANN. § 46-18-305 (2003).

⁴⁸ *State v. Palermo*, 818 So. 2d 745, 752-53 (La. 2002).

⁴⁹ *State v. Harvey*, 647 N.W.2d 189, 196-97 (Wis. 2002).

⁵⁰ *State v. Lopes*, 980 P.2d 191, 196 (Utah 1999).

Very few decisions have expanded *Apprendi*'s ambit beyond facts that raise statutory maximum sentences. Kansas, for example, has a sentencing-guidelines system that sets forth presumptive sentences for certain crimes but allows judges to depart up or down upon finding certain facts. Prosecutors have argued that *Apprendi* applies only to the maxima set by Kansas's statutes and not its sentencing guidelines. Kansas courts have rejected this argument, holding that because findings of facts are prerequisites for heavier sentences, juries must find these facts beyond a reasonable doubt.⁵¹

California, though recognizing that *Apprendi* applies only to facts that raise statutory maxima, has interpreted its own statutes to impose broader requirements. The California Supreme Court has held that state law requires prosecutors to prove beyond a reasonable doubt all facts that trigger sentence enhancements, even if these enhancements do not raise statutory maxima.⁵²

The other extension of *Apprendi* has come in New Jersey. Under New Jersey's No Early Release Act, convicted defendants must serve at least eighty-five percent of their sentences if a sentencing hearing determines that their crimes were violent. The statute does not specify who should find these facts, so some judges found them at sentencing. The New Jersey Supreme Court found that *Apprendi* casts serious constitutional doubt on whether judges could find facts that trigger minimum sentences. Thus, the court construed the statute to require juries to find these facts beyond a reasonable doubt.⁵³

These state courts adopted these expansive readings while it was still unclear whether *Apprendi* might reach sentencing guidelines or mandatory minima. In other words, these readings look like mistaken predictions of where the Supreme Court was going as opposed to efforts to innovate. Since then, however, the Supreme Court has decided *United States v. Harris*,⁵⁴ which held that judges can find facts that trigger statutory mandatory minima. *Harris* also implicitly held that judges can find facts that raise sentencing guidelines ranges, as the fact at issue in *Harris* raised Harris's guidelines sentence by two years.⁵⁵ I suspect that in the wake of *Harris*, other courts are unlikely to follow these states' leads.

⁵¹ *State v. Cullen*, 60 P.3d 933, 937 (Kan. 2003); *State v. Gould*, 23 P.3d 801, 814 (Kan. 2001).

⁵² *People v. Sengpadychith*, 27 P.3d 739, 745-47 (Cal. 2001).

⁵³ *State v. Johnson*, 766 A.2d 1126, 1138 (N.J. 2001).

⁵⁴ 536 U.S. 545 (2002).

⁵⁵ See *Bibas*, *supra* note 2, at 81. The Supreme Court, however, has recently granted certiorari in a case that will revisit whether *Apprendi* applies to facts that result in upward

V. APPEAL AND HABEAS

Though many defendants have raised *Apprendi* claims after conviction, few have been successful. The two biggest hurdles to raising *Apprendi* claims are the doctrines of retroactivity and harmless error. Most courts that have addressed the issue have held that *Apprendi* is not retroactive on collateral review. They reason that *Apprendi* is not a watershed rule that seriously affects the fairness of a trial.⁵⁶ This logic is questionable, since *Apprendi* extends the fundamental safeguard of proof beyond a reasonable doubt to new elements of crimes.⁵⁷ Nonetheless, only Texas applies *Apprendi* retroactively to cases on collateral review, though Texas courts have done so without analyzing the retroactivity issue.⁵⁸

Harmless-error analysis also precludes many defendants from receiving relief under *Apprendi*. One might have thought that the identity of the factfinder and the proof-beyond-a-reasonable-doubt requirement were structural errors not susceptible to harmless-error review.

departures under state sentencing guidelines but do not raise statutory maxima. *Blakely v. Washington*, 47 P.3d 149 (Wash. Ct. App. 2003), cert. granted, 71 U.S.L.W. 3724 (U.S. Oct. 20, 2003) (No. 02-1632).

⁵⁶ See *Sanders v. State*, 815 So. 2d 590, 592 (Ala. Crim. App. 2001); *State v. Sepulveda*, 32 P.3d 1085, 1087-88 (Ariz. Ct. App. 2001); *Hughes v. State*, 826 So. 2d 1070, 1073-75 (Fla. Dist. Ct. App. 2002) (applying a balancing-test approach to retroactivity and concluding that *Apprendi* is not retroactive because it is not essential to preventing individual miscarriages of justice, it curbs traditional judicial fact-finding at sentencing, and retroactivity would unleash a wave of post-conviction claims); *People v. Scullark*, 759 N.E.2d 565, 581 (Ill. 2001); *State v. Gould*, 23 P.3d 801, 814 (Kan. 2001); *State v. Tallard*, 816 A.2d 977, 981 (N.H. 2003); *Colwell v. State*, 59 P.3d 463, 473 (Nev. 2002); *Teague v. Palmateer*, 57 P.3d 176, 184-86 (Or. Ct. App. 2002) (reasoning that because *Apprendi* is subject to harmless-error and plain-error analysis, it cannot be a watershed rule); *Commonwealth v. Abdul-Salaam*, 812 A.2d 497, 501 (Pa. 2002) (refusing to apply *Apprendi* retroactively because the Supreme Court of the United States has not yet made it retroactive); *Greenup v. State*, 2002 WL 31246136 (Tenn. Crim. App. Oct. 02, 2002); see also *McCoy v. United States*, 266 F.3d 1245, 1257 (11th Cir. 2001); *United States v. Moss*, 252 F.3d 993, 1003 (8th Cir. 2001); *Dukes v. United States*, 255 F.3d 912, 914 (8th Cir. 2001); *United States v. Sanders*, 247 F.3d 139, 151 (4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1239 (9th Cir. 2000).

⁵⁷ A few judges have recognized this point. See *Moss*, 252 F.3d at 1003 (Arnold, J., dissenting) (finding *Apprendi* retroactive under *Teague v. Lane* doctrine); *United States v. Clark*, 260 F.3d 382, 389 (5th Cir. 2001) (Parker, J., dissenting from remand for reconsideration) (same); *United States v. Murphy*, 109 F. Supp. 2d 1059, 1064 (D. Minn. 2000); *Darity v. United States*, 124 F. Supp. 2d 355, 367 (W.D.N.C. 2000); see also *Apprendi*, 530 U.S. at 523 (O'Connor, J., dissenting) (describing *Apprendi* as a "watershed change in constitutional law").

⁵⁸ *Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001) (not discussing the retroactivity issue).

Nonetheless, every state court to consider the issue has held that *Apprendi* errors can be, and in many cases are, harmless.⁵⁹

Finally, procedural bars foreclose many *Apprendi* claims. If a defendant waives an *Apprendi* claim, for example by asking a judge to determine a fact to avoid prejudice, he cannot on appeal invoke his right to a jury determination.⁶⁰ One Texas court, however, has treated the newness of the *Apprendi* rule as a justification for failing to raise the claim at trial.⁶¹

VI. THE MORAL OF THE STORY

What lessons can we draw from this experience in the states? The state courts appear to be following the Supreme Court almost in lock-step. One might doubt state courts as a source of variety, creativity, and experimentation, viewing them instead as merely ministerial implementers of the Supreme Court's dictates.

This interpretation strikes me as uncharitable, however. Plenty of state courts have experimented with creative criminal procedure doctrines broader than the federal minima. Nor are they always hostile to criminal defendants. State discovery rules, for example, often go far beyond federal requirements. Rather, I think the states are reading *Apprendi* narrowly because of several features of that case.

The first observation is that *Apprendi* is novel. It breaks sharply with two centuries of judicial discretion at sentencing. *Apprendi* tries to recreate an eighteenth-century vision of jury supremacy, but it does so in a way that is sharply discontinuous from what went before. Innate conservatism may constrain some state courts more than it does the Supreme Court of the United States.

The second reason is that *Apprendi* is disruptive. It upsets settled practices at many stages of criminal proceedings, from indictments to pleas to trials to sentencing. It challenges the identity of the factfinder and the standard of proof. If taken to an extreme, this principle could have upset every case in which a judge sentenced a defendant to more than the bare minimum sentence. The cost of reopening and retrying or resentencing hundreds of thousands of cases would have been staggering. Practical-

⁵⁹ *People v. Sengpadychith*, 27 P.3d 739, 745-48 (Cal. 2001); *State v. Davis*, 772 A.2d 559, 567-68 (Conn. 2001); *People v. Thurow*, 786 N.E.2d 1019, 1030 (Ill. 2003); *State v. Burdick*, 782 A.2d 319, 329 (Me. 2001); *Clark v. State*, 621 N.W.2d 576, 581-82 (N.D. 2001); *Palmateer*, 57 P.3d at 185; see also *Sanders*, 247 F.3d at 150; *United States v. Anderson*, 236 F.3d 427, 429 (8th Cir. 2001); *United States v. Nealy*, 232 F.3d 825, 829 (11th Cir. 2000).

⁶⁰ *Abrego v. State*, 38 P.3d 868, 871-72 (Nev. 2002).

⁶¹ *Ex parte Boyd*, 58 S.W.3d at 136.

mind state judges, who would hear many more of these challenges, were understandably reluctant to broaden this new rule.

The third reason is that *Apprendi* is wrong. As I have argued elsewhere, *Apprendi*'s abstract principle undervalues the benefits of insulated, expert judicial sentencing. It disrupts procedures that worked well to reduce bias and ensure equality in favor of untested jury sentencing. And by fragmenting crimes, it gives prosecutors more power to manipulate indictments and plea bargain, while hobbling judges' power to check prosecutors at the sentencing stage.⁶² State courts, which rarely speak with one voice, have united to interpret *Apprendi* narrowly because they agree that it was a mistake. This consensus is a powerful indictment of *Apprendi*'s correctness. The state courts would probably undo *Apprendi* if they could, but because *Apprendi* ratchets up the federal minimum, the most that they can do is to interpret it narrowly.

If one takes this perspective, the state courts appear much wiser. *Apprendi* was decided by a bare majority of five Justices, most of whom lacked significant experience in criminal law.⁶³ State judges often have more experience and are more sensitive to how abstract doctrine will fare in the real world. Thus, state courts have buffered this mistaken innovation by construing it narrowly and cautiously to minimize disruption and harmonize *Apprendi* with existing law and sentencing practice. Fans of federalism often praise states as laboratories of experimentation, but the process here worked in reverse: decentralized implementation allowed states to cushion the blow and reduce the damage inflicted by a central mistake. Practical concerns that are more visible to lower-level judges wisely temper *Apprendi*'s theoretical principle and hem in its unintended consequences. The state courts have been faithful to *Apprendi*'s central rule, but they have been careful not to compound its error.

Apprendi, then, is an example of how the system's self-correcting mechanisms worked as damage control. State judges remain important as

⁶² See generally Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001).

⁶³ Though Justice Stevens practiced law for two decades in addition to teaching, Justices Ginsburg and Scalia spent most of their careers as academics and on the bench, and Justices Thomas and Souter worked in government. None of them had significant experience prosecuting or defending criminal cases. In contrast, Chief Justice Rehnquist spent sixteen years in private practice, Justice Kennedy spent fourteen years in private practice, Justice O'Connor served as a deputy county attorney and in private practice as well as in a state legislature, and Justice Breyer was deeply involved in creating the Federal Sentencing Guidelines. See LEGAL INFORMATION INSTITUTE, U.S. SUPREME COURT 2001, at <http://supct.law.cornell.edu/supct/justices/fullcourt.html> (last visited Nov. 16, 2003) (containing links to the Justices' biographies).

much for what they refrain from doing as for what they do, and the brakes on runaway action are as valuable as the spurs to reform.

