

The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea

Richard Singer*

Alice, a FedEx deliverer, carries a suitcase across town, and has no idea that the suitcase contains heroin. She is arrested, and charged with (knowingly) possessing heroin.

Bill knowingly burgles a store, his switchblade visible from his back pocket. The penalty for burglary is three to twenty years; carrying a visible weapon during a burglary requires a mandatory minimum sentence of five years.

Charlotte receives a box which she believes to contain five grams of heroin. Instead, there is a kilogram. The penalty for “knowingly” possession five grams is two years; for one kilogram, twenty years.

Daniel is recruited to smuggle dope into the country. Daniel believes the drug to be heroin, but in fact it is cocaine. The penalty for smuggling the amount of heroin

* Distinguished Professor of Law, Rutgers University (Camden). This paper was written and presented at a conference at the State University of Buffalo Law School before the United States Supreme Court had even granted certiorari in, much less decided, the Apprendi case, discussed in Section I of the article. Because Apprendi may so dramatically undercut the method by which courts denominate statutory facts as “sentencing factors” to which mens rea does not apply, and even the greater crime theory, it is possible that only the last two methods discussed in this paper will remain when the dust has settled. But since that is not totally clear, I have altered the title to allow for the possibility that courts may still use the “sentencing factors” or greater crime ploy in some, or even many, cases.

I need to thank the participants in the Buffalo conference, especially Markus Dubber, for affording me the opportunity to gather my thoughts on all this. Josh Dressler, Alan Michaels, Ben Priester, Ken Simons, George Thomas, and John Wiley commented on various versions of this paper, and each deserves my thanks. Finally, although editors usually struggle with manuscripts without acknowledgement, in this case the work of Erin Pemberton and Johanna Oreskovic was so significantly above the call, in light of the myriad of changes mandated by the Apprendi case (and my changing views on it), as well as the minefield of technology that is e-mails, that I must expressly thank them for their efforts.

that Daniel believed he had is two years. The penalty for smuggling the same amount of cocaine is twenty. He is charged with smuggling cocaine.

Elaine believes that she is smuggling diamonds into the country. It turns out that her stash is also cocaine. The penalty for smuggling diamonds is three years. For cocaine the penalty is twenty years. She is charged with smuggling cocaine.

Hana, angry at Karyn, goes out one night intending to assault Karyn. On a dark moonless night, she finds a person she believes to be Karyn and beats her several times with brass knuckles. The victim turns out to be not Karyn, but a plain clothes police officer. The penalty for assault is a maximum of one year; for assault on a police officer, five years; for assault on an officer while on duty, ten years.

Laurel sees several dollar bills and some loose pocket change on a table in front of her; with no one around, Laurel grabs all of the money and runs. The penalty for petty larceny, which is defined as larceny of property under the value of \$500, is one year; the penalty for grand larceny (anything worth more than \$500) is ten years. One of the coins Laurel stole is a buffalo nickel worth \$50,000.

Mary Ann goes hunting for rabbit, a perfectly legal act in New Jersey, where she begins her pursuit. Unhappily she unknowingly crosses the state line into Pennsylvania, which prohibits bunny killing. Dead bunny.

Nancy is similarly hunting in Utah (which permits rabbit hunting) when she unknowingly crosses into a National Park (which does not).

Ophelia is aware that she is lying on a state form for unemployment compensation. The state forwards the form to the federal government, which funds the unemployment scheme. Ophelia is charged with making a false claim to the federal government.

Each of these hypotheticals raises the question of whether the defendant can be held strictly liable for lack of knowledge about a statutorily enunciated fact. The first example—Alice—is the classic case of strict criminal liability: whether one's mens rea (knowledge) must extend

not only to the conduct (possession)¹ but to the factual element (heroin). There are at least two approaches to this basic question. While most courts allow any mistake of fact to exculpate, some courts hold that Alice's belief must be reasonable.² Some courts and commentators, in assessing the reasonableness of that belief (mistake), would argue that circumstances would impose upon Alice a "duty to inquire" about the facts (and possibly about the law).³

I have discussed the basic strict liability issue elsewhere,⁴ and do not intend to rehearse that discussion here, except as those issues may become relevant to the question at hand. My project here is to discuss the remaining hypotheticals, which involve variations on this theme of strict liability and knowledge. In each instance, courts—in some instances a majority of courts—have used a variety of distinct, but related, doctrines to impose strict liability as to the disputed fact upon the defendants in each of these situations. These techniques are:

1. To determine that the circumstance is not an "element of the crime" at all, but a "sentencing factor," removing from the prosecution any burden at trial, and requiring only that the state prove the circumstance at sentencing, using a lower proof standard, (usually

1. The question of what kind of conduct constitutes an "act" is beyond the scope of this paper. However that is resolved, see Michael Moore, *Act and Crime* (1993), the question here is whether one must, for criminal liability, know the precise nature of what one "possesses," whether considered an act or not. The Model Penal Code solves this problem by explicitly requiring knowledge before or after "control" is obtained. Model Penal Code, § 2.01 (Proposed Official Draft 1962).

2. See Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. Rev. 459 (1987); Richard G. Singer & John Q. LaFond, *Criminal Law: Examples and Explanations* 75-111 (1997).

3. See Andrew Ashworth, *Principles of Criminal Law* 209, 249 (2d ed. 1995); Douglas Husak & Andrew von Hirsch, *Culpability and Mistake of Law, in Action and Value in the Criminal Law* 169 (Stephen Shute et al. eds., 1993); Douglas Husak, *Ignorance of Law and Duties of Citizenship*, 14 *Legal Stud.* 105 (1994); see also Richard Singer, *The Proposed Duty to Inquire as Affected by Recent Court Decisions*, 3 *Buff. Crim. L. Rev.* 701 (2000).

4. Richard Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337 (1989).

preponderance of the evidence);

2. To determine that while it is an element, to which trial burdens of proof attach, the circumstance (a) merely creates a "greater crime" or (b) is "only" a "jurisdictional element" of an offense, neither of which requires mens rea. All three of these methods have been employed by courts over the recent past, but have gone relatively unnoticed.

Moreover, the distinction among these techniques is often blurred in practice. Thus, for example, one jurisdiction may hold that a circumstance (*e.g.*, proximity to a schoolyard in a drug sale) is a sentencing factor, while another will hold that it *is* an element, but one which carries strict liability. For purposes of analysis, however, I will not distinguish the caselaw on these questions, generally treating the majority approach as though it were "the" approach of American law. In that spirit, the first few hypotheticals (Bill, Charlotte, Daniel, and Elaine) will be treated as versions of two prongs of what appear to be the same question—whether the attendant circumstance is an element of the crime. The second group of cases (Hana, Laurel) presents the issue of the "greater crime." The last hypotheticals (Mary Ann, Nancy, Ophelia) are often discussed as raising the issue of a "jurisdictional element"—a concept which requires no proof of mens rea at all.

Each of these questions is intriguing in itself. The intrigue becomes more interesting, however, when the Model Penal Code is consulted, since the Code appears to be agnostic on the first method, and schizophrenic on the second and third methods, discarding the greater crime theory, but adopting the view that mens rea as to jurisdictional elements is not required. This internal conflict is unexplained in the Code commentary; indeed, it is hardly mentioned at all.

I. SENTENCING FACTORS v. ELEMENTS

A. The Beginning: McMillan v. Pennsylvania

Between 1986 and 2000, federal courts (and to some extent their state counterparts) often avoided the question of whether mens rea applied to a statutorily enunciated fact by denying that the fact was an element at all but was, rather, a “sentencing factor.” Although the nomenclature had appeared in a few sporadic earlier cases, it was given real life by the Court’s decision in *McMillan v. Pennsylvania*.⁵ Against a due process challenge,⁶ the Court held that legislatures had virtually unfettered power to decide which factors were elements of crimes and which were sentencing factors, so long as (1) the legislature was bona fide,⁷ and (2) the “tail did not wag the dog”—i.e., so

5. 477 U.S. 79 (1986).

6. In light of the Court’s decision in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), which was based on the Sixth Amendment, it is important to note that the Court’s opinion in *McMillan* discussed only the defendant’s Fifth Amendment, due process claim; the Sixth Amendment claim was relegated to a simple sentence at the end of the opinion which declared that the Sixth Amendment analysis was the same. *Id.* at 93. Unfortunately, that is not true—the Court’s Fifth Amendment jurisprudence requires the defendant to show both discriminatory impact and discriminatory intent, while the Sixth Amendment cases focus solely on impact. This is one reason, for example, that the Court has been careful to decide its peremptory challenge cases on equal protection grounds, which means that mere untoward impact upon a cognizable group would be insufficient even to generate a prima facie case. See *Batson v. Kentucky*, 476 U.S. 79 (1986). As one of the leading treatises on jury selection has put it: “[T]he Court has established extraordinarily stringent standards aimed at guaranteeing jury representativeness. This is nowhere clearer than in recent discrimination cases regarding other, non-jury areas, in which the Court has explicitly excepted jury challenges from its emphasis on discriminatory intent as opposed to impact.” National Jury Project, *Jurywork 5-7* (1990) (citing *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Dep’t Corp.* 429 U.S. 252 (1977); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Duren v. Missouri*, 439 U.S. 357 (1979); *Batson v. Kentucky*, 476 U.S. 79 (1986)).

7. One major problem with the *McMillan* line of cases was the procedural background with which it began. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Maine Supreme Judicial Court, in its initial decision affirming *Wilbur*’s conviction, had interpreted its own homicide statute to establish only one class of homicidal act “felonious homicide.” For that “crime,” said the court, heat of

passion and malice aforethought were *not* elements, much less complementary elements, a transparent attempt to uphold the conviction and avoid the impact of *In re Winship*, 397 U.S. 358 (1970). But the federal habeas courts quite rightly rejected this thrust, and parried by saying that the Maine court's interpretation was not rational.

The Maine Supreme Judicial Court then responded by reemphasizing, in *State v. Lafferty*, 309 A.2d 647 (Me. 1973), its holding in the original *Mullaney* case. Thus, when the United States Supreme Court initially considered the case on certiorari, it was clearly unable to take the path the two earlier federal courts had taken; whatever ambiguity might have been present in the state supreme court's decision in *Mullaney* was demolished in *Lafferty*. When the Supreme Court remanded to the First Circuit for reconsideration in light of *Lafferty*, that Circuit stressed two factors: (1) the actual impact on a defendant's sentence; (2) the apparent ease with which *Winship* could be avoided *unless* there was a focus on the first factor. Unhappily, Mr. Justice Powell's subsequent opinion in the Supreme Court, affirming the Circuit, concerned itself primarily with the second aspect of the case. The Court's opinion is mesmerized by the nefarious "state" institution (unnamed) which would merely turn all elements into affirmative defenses. The state institution which had done so was the state court, but the Supreme Court's unnamed bete noire was the state legislature. This worry shifted the focus away from the impact on the defendant, and away from the Sixth Amendment issues, to the mala fides of the state.

This choice was an initially happy one, for in *Patterson v. New York*, 432 U.S. 197 (1977), the Court saw not a malevolent, but a benevolent, legislature which was affording the defendant *more* protection than the common law would have provided. Moreover, this greater protection was generated by the Model Penal Code, which was then sweeping the country as a result of the Great Society's War Against Crime. The Court's reference, in footnote 13, to Judge Brietel's opinion in the New York Court of Appeals, makes this pellucid. *Id.* at 211 n.13 (citing *People v. Patterson*, 347 N.E.2d 898, 909-10 (N.Y. 1976) (Brietel, J., concurring)). Brietel had discussed the need for reform of the substantive criminal law, and specifically mentioned the Model Penal Code, which had formed the basis of the New York legislation, albeit with a slight twist. *Patterson*, 347 N.E.2d at 909-10. The point here, however, was that the defendant in *Patterson*, who would never have been able to plead heat of passion under the common law so as to reduce his killing to manslaughter, was receiving a "bonus" from the legislature. Requiring the defendant to prove that he had earned that bonus was a quid pro quo which the Court did not wish to invalidate, lest other legislatures not adopt the Code (or some other reform).

By the time of *McMillan*, the fear of duplicitous state institutions had been relaxed. In light of the Court's growing concern with protecting federalism, *McMillan* recast the "presumption" of *Mullaney* that states might well manipulate their laws, and instead put upon the defendant a "heavy burden" to show that the legislature was nefarious.

Jones v. United States, 526 U.S. 227 (1999) and *Apprendi*, 120 S. Ct. 2348 (2000) have put an end to this line of analysis. Rather than discussing whether the legislature has somehow altered the common law balance, these opinions returned the focus to where it was in *Mullaney*, and where it should have remained—the impact on the defendant. Thus, in the future, the Court should

long as the sentencing element did not so excessively increase the base sentence so as to shock the conscience. The Court further observed that the Pennsylvania statute in question did not allow the statutory fact (possession of a weapon) to increase the maximum sentence possible for the underlying felony, but merely inserted a mandatory minimum sentence which the judge might have imposed even without the statute's mandate. The conclusion that a circumstance is a sentencing factor allows the Court to hold that the government need not prove the circumstance at trial, but can relegate it to a sentencing hearing, where the normal rules of evidence, and the normal criminal burden of proof, do not apply.⁸

B. Federal Case Law from McMillan to Almendarez-Torres

While the state courts were somewhat divided on when this doctrine applies,⁹ many federal courts after *McMillan* had held that many statutorily enunciated facts which significantly increased a sentence were sentencing factors. Because these cases had involved federal statutes, the

not have to call into question the bona fides of the legislature in order to assess the Sixth Amendment issue involved. Instead, as suggested below, the inquiry will be one into the proportionality of the penalty increase. Even if the proportionality inquiry is a difficult one, it is a cleaner one, untainted by politics, federalism, or separation of powers concerns: The sole question will be whether there is a "significant" impact upon the defendant such that the jury, rather than a judge, should determine the presence of a fact.

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

9. See, e.g., *People v. Hernandez*, 757 P.2d 1013 (Cal. 1988) (sentencing enhancer that kidnapping was for purposes of rape must be proved to jury beyond a reasonable doubt); *People v. Wims*, 895 P.2d 77 (Cal. 1995) (under state law, a "sentence enhancer" of use of a deadly and dangerous weapon must be submitted to the jury and proved beyond a reasonable doubt); *State v. Villarreal*, 450 N.W.2d 519 (Wis. Ct. App. 1989) (carrying dangerous weapon is an element of offense, which cannot be stipulated to). Contra: *State v. Turner*, 687 P.2d 1225 (Ariz. 1984) (serious bodily harm is an aggravating circumstance for court); *State v. Hurley*, 741 P.2d 257 (Ariz. 1987) (judge may determine whether defendant was on release status when crime was committed); *State v. Krantz*, 788 P.2d 298 (Mont. 1990) (weapon enhancement is not an element of crime, and can be proved to judge by preponderance of evidence).

issue had been addressed universally as one of statutory construction, rather than constitutional limitation.

1. Drugs

The most important of these areas for the federal courts were drug offenses, which constitute over one third of the federal caseload.¹⁰ Although, as will be suggested below, this line of decisions is almost certainly a dead letter as a result of *Apprendi*, the history of the development of the interpretation of the drug statutes is worth reporting, both for its intrinsic interest, and because it reflects the general federal paranoia about drug crimes.

First, a preliminary point. In the federal drug statute,¹¹ as in virtually all states,¹² the state must show that the defendant “knew” that he had “some” drug. Thus, there is no “strict criminal liability” if the defendant does not know he had a drug—Alice will be exonerated in all jurisdictions today. This is a significant change from the law as it stood at the beginning of this century, but today it is firmly fixed in the legal sphere. Instead, as Charlotte and Daniel suggest, the question today is whether the *type* or the *amount* of drugs is an element and, if so, whether it requires some form of mens rea.

Prior to 1970, most states enacted versions of the Uniform Narcotic Drug Act (UNDA), which had not made amount relevant.¹³ When Congress passed the 1970 Comprehensive Drug Abuse Prevention and Control Act, the amount of the drug remained unimportant; the focus was on recidivism. Unlawful manufacture or distribution of any schedule I narcotic drug carried a sentence of zero to

10. Task Force on Federalization of Criminal Law, American Bar Association Criminal Justice Section, *The Federalization of Criminal Law* 89 (1998).

11. The statute declares that the defendant must act “knowingly.” 21 U.S.C. § 841 (a) (1994).

12. The one exception appears to be Washington, which allows an “affirmative defense” of “unwitting possession.” See Richard Singer, *Strict Criminal Liability in Washington* (manuscript on file with Buffalo Criminal Law Review).

13. See Note, *Criminal Liability for Possession of Nonusable Amounts of Controlled Substances*, 77 Colum. L. Rev. 596 (1977).

fifteen years; a subsequent conviction, zero to thirty; for a non-narcotic drug, the sentences were zero to five and zero to ten. Drugs on other schedules carried lesser penalties. Simple possession of any of these drugs carried zero to one year, and subsequent offense zero to two. The amount of drugs was relevant only with regard to importation or manufacture of regulated drugs.¹⁴

Partially in response to the federal statute, the Commissioners redrafted the UNDA, and promulgated the Uniform Controlled Substances Act.¹⁵ The Act significantly changed the prior law, by requiring knowledge on the part of the defendant,¹⁶ but left the amount irrelevant. By 1977, forty-three states had enacted the UCSA.¹⁷ The major issue concerning amount was not possible increases in sentence depending on the amount involved, but whether an amount so small that it could not be used would nevertheless render the defendant liable.

In 1980, as a last-minute rider to the Infant Formula Act of 1980, Congress added to section 841 subsection (b) (6), which provided a heightened penalty if the amount of marijuana possessed was more than 1000 pounds. This relatively innocuous section gave rise to cases which were first misread and then misapplied to later amendments which made amount of other drugs critical. The first such case was *United States v. McHugh*,¹⁸ in which the jury was asked to determine the amount of marijuana involved. Defendant argued that the amount was an element of the offense, and that the government had not shown that the bales which he possessed did not contain so many mature stalks of the plant (which did not "count" in accessing weight) that the "real weight" was less than 1000 pounds. *McHugh* decided, under the first, earlier, statute, that the

14. See H. Rep. No 91-1444 (Sept. 10, 1970); 3 U.S. Code Cong. & Admin. News 4566 (1970); see also Harvey Levine, *Legal Dimensions of Drug Abuse in the United States* (1974).

15. 9 Uniform Laws Ann. 145 (1973).

16. See *id.* at 401(c).

17. See *supra* note 13, at 598.

18. 769 F.2d 860 (1st Cir. 1985).

jury's conclusion that the defendant possessed more than 1000 pounds of marijuana was not clearly wrong. From the samples taken, concluded the court, "the jury could have inferred beyond a reasonable doubt that less than one quarter of the total amount . . . consisted of mature stalks and sterilized seeds."¹⁹ The court then went on to say that *if* there were a basis for reasonable doubt, the amount of marijuana was an essential element only under the statute, and defendant's sentence would not be affected by a possible error. This dictum in *McHugh* was repeated in other cases, again where any possible error was actually harmless because the sentence the defendant actually received was not affected,²⁰ or because the indictment gave sufficient notice of the amount of drugs actually alleged to be involved.²¹ *Morgan* cited *Gibbs*, *Normandeau*, and *Simmons* for the proposition that the amount of marijuana was not an element of the offense. It also cited *United States v. Sims*,²² for the same proposition, but *Sims* explicitly recognized that, as to heroin and cocaine, "[t]here is no minimum quantitative amount necessary to support a conviction."²³ This misreading of the precedents was aggravated by the *Morgan* court's citation to legislative

19. *Id.*

20. See, e.g., *United States v. Morgan*, 835 F.2d 79 (5th Cir. 1987).

21. See *United States v. Gibbs*, 813 F.2d 596 (3d Cir. 1987). Other cases were also misread. For example, *Gibbs* cites *United States v. Normandeau*, 800 F.2d 953 (9th Cir. 1986), as holding that the amount is not an element. *Normandeau*, however, involved whether the defendant had to *know* of the amount. The court declared that:

Appellant's argument presupposed that knowledge of the amount of marijuana involved is an element We hold that it is not It may be that the indictment must allege that more than 1000 pounds of marijuana was involved . . . [b]ut proof of the amount involved is far different from proof that the defendants knew of the amount.

Id. at 956. The same argument regarding defendant's knowledge of the amount was made, and rejected, in *United States v. Simmons*, 725 F.2d 641 (11th Cir. 1984). These cases, however, actually support the inference that amount is an element. See also *United States v. Alvarez*, 735 F.2d 461 (11th Cir. 1984) (amount had to be alleged in the indictment).

22. 529 F.2d 10 (8th Cir. 1976)

23. *Id.* I thank Mr. Henry Bemporad, Deputy Federal Defender, Western District of Texas, for first alerting me to the checkered background of *McHugh* and its progeny.

2000]

AVOIDING MENS REA

149

history, citing to the history of the *earlier*—1970—statute in which amount was not even relevant, much less an arguable element of the offense.²⁴

In 1984, Congress enacted the Comprehensive Crime Control Act. The Senate Report explained the decision to make amount of drugs relevant to many drug crimes:

First, with the exception of offenses involving marijuana . . . the severity of current drug penalties is determined exclusively by the nature of the controlled substance involved . . . (but) another important factor (should be) the amount of the drug involved. Without the inclusion of this factor, penalties for trafficking in especially large quantities . . . are often inadequate. . . . The only instance in which the amount of controlled substance influences the severity of the penalty is in the case of marihuana.²⁵

In 1986, Congress increased the penalties for specified amounts with regard to most specifically named drugs, creating the complex scheme we now follow. Subsection (A) was made more precise, extending to more drugs, and subsection (B) was added, more precisely delineating the amounts of each drug which would spur sentences of ten to life or twenty to life.²⁶

This new approach really made amount a proxy for “serious dealing” as the House declared: “(T)he Federal government’s most intense focus ought to be on major traffickers who are responsible for creating and delivering very large quantities of drugs. . . . (T)he committee selected quantities of drugs which . . . would likely be indicative of operating at such a high level.”²⁷ As to whether amount was an element of the crime which should be proved at trial beyond a reasonable doubt, the report

24. See 835 F.2d at 81.

25. S. Rep. No. 225, at 255-57 (1983) (Comprehensive Crime Control Act). The bill also abolished the distinction between Schedule I and II substances which were narcotic drugs and those which are not.

26. 21 U.S.C. § 801 (1986) (Anti-Drug Abuse Act of 1986).

27. H.R. Rep. No. 99-845, (Narcotics Penalties and Enforcement Act) at 11-12 (1986).

says only the following:

The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distributing chain. *The Committee was advised by U.S. Attorneys that to prove these kinds of cases there is no sufficiency of the evidence requirement that they need to introduce into evidence a minimum quantity of drugs. The testimony of witnesses that large quantities were bought and sold or ordered bought and sold is sufficient.*²⁸

Neither the source nor the accuracy of this statement is clear. If the U S Attorneys were speaking to the question of whether there was case law as to whether they would have to prove an amount at all, the alleged statement is highly dubious. After all, quantity had become relevant only two years earlier—scarcely enough time to prosecute cases and obtain opinions and appellate decisions that would even address the question. And, as seen above, the federal precedent, even that which *had* been decided by 1986, leaned in the direction of finding that amount *was* an element. At worst, the picture was muddled. If, on the other hand, the US Attorneys were simply saying that a “kingpin” statute might not require a specific amount, so long as it was “large,” this strongly suggests that even they thought the government had to carry the burden as to the “largeness” of the amount of drugs involved.

The first cases involving the 1986 statute continued to require proof of the amount as an element of the offense of possession.²⁹ But then a strange process occurred. The newly promulgated Sentencing Guidelines used “amount” as a method for increasing the base offense level (not increasing the maximum sentence). In a series of cases, the courts began holding that the judge could consider quantities of drugs involved in a crime but not charged in

28. *Id.* at 12 (emphasis added).

29. See, e.g., *United States v. Crockett*, 812 F.2d 626 (10th Cir. 1987) (recognizing that the earlier cases had been decided under a different statute, but citing as analogous cases on value in theft cases). For a fuller discussion of these cases, see Knoll & Singer, *supra* note 8.

the indictment *in determining the base offense level* during sentencing under the guidelines.³⁰ This was quickly transformed to holdings—virtually unanimous³¹—that amounts were *not* elements of the crime and did not have to be proved at trial, *even if they increased the maximum sentence significantly*.

This conclusion, which prior to *Apprendi* was universally held by the federal courts, led to appalling results. A defendant charged with possession with the intent to manufacture marijuana, for example, had his sentence increased 400% based on the number of plants he possessed—a finding made not by a jury, but by a judge using a preponderance standard.³² And since this was not an element of the crime, there was no need for a jury instruction on amount nor on mens rea. Thus, Charlotte would have been found criminally liable for possessing a kilo of cocaine, and, because amount is not an element, her mens rea as to amount would never be put at issue. Similarly, a defendant like Daniel who, according to government concession, believed that he was possessing heroin, and not cocaine, would have been given the much lengthier sentence for cocaine possession because his mistake as to the type of drug was irrelevant, since the type of drug was not a part of the crime.³³

30. See, e.g., *United States v. Mann*, 877 F.2d 688, 690 (8th Cir. 1989); *United States v. Sailes*, 872 F.2d 735, 738-39 (6th Cir. 1989); *United States v. Sarasti*, 869 F.2d 805, 806 (5th Cir. 1989); *United States v. Ware*, 897 F.2d 1538 (10th Cir. 1990).

31. See *United States v. Campuzano*, 905 F.2d 677 (2d Cir. 1990); *United States v. Gibbs*, 813 F.2d 596 (3d Cir. 1987); *United States v. Drolouis*, 107 F.3d 248 (4th Cir. 1997); *United States v. Valencia*, 957 F.2d 1189 (5th Cir. 1992); *United States v. Hodges*, 935 F.2d 766 (6th Cir. 1991); *United States v. Acebedo*, 891 F.2d 607 (7th Cir. 1989); *United States v. Wood*, 834 F.2d 1382 (8th Cir. 1987); *United States v. Sotelo-Rivera*, 931 F.2d 1317 (9th Cir. 1991); *United States v. Reyes*, 40 F.3d 1148, 1151 (10th Cir. 1994); *United States v. Cross*, 916 F.2d 622 (11th Cir. 1990). A notable quasi-exception is the uniquely scholarly opinion of Judge Weinstein in *United States v. Cordoba-Hincapie*, 825 F. Supp. 485 (E.D.N.Y. 1993), in which he posited a rebuttable presumption that defendant knew the weight of the drug she was carrying.

32. See *United States v. Madkour*, 930 F.2d 234 (2d Cir. 1991).

33. See *United States v. Valencia-Gonzalez*, 172 F.3d 344 (5th Cir. 1999), where the Fifth Circuit rejected defendant's argument that the type of drug

The federal courts rather consistently explained this result by a statutory interpretation analysis, noting that section 841 has two subsections. The basic federal drug statute³⁴ provides in its first subsection that possession with intent to distribute, or the manufacture of, a controlled dangerous substance, is a crime. The next subsection delineates, in painstaking detail, and with many subsections, the “penalties” which accompany each CDS, and each level of quantity possessed or manufactured. This statutory structure allowed the courts to conclude that the “crime” was articulated in the first subsection, and that the amounts and type of drug were not related to the “crime” at all, but merely to the sentence as a particular method of violating the statute.³⁵ The courts have uniformly found this to be important in concluding that Congress did not seek to make amount or type of the drug an element of the crime. But this assumes that the purpose of the separation was for substantive reasons, rather than for ease of drafting (listing each drug and amount separately, with

possessed was an element of the crime, and thus held no mens rea was required. In another drug case where defendant believed he was carrying cocaine, but the drug turned out to be heroin, Judge Jack Weinstein, in an erudite and thorough opinion examining strict criminal liability generally, held that in determining the federal guideline to be used in sentencing a defendant under 21 U.S.C. § 960 (1988) (the importation equivalent of section 841), the kind of drug he believed he was importing, rather than the drug he was actually carrying, should be used. See *United States v. Cordoba-Hincapie*, 825 F. Supp. 485 (E.D.N.Y. 1993).

34. 21 U.S.C. § 841 (1994).

35. The serendipity of the statutory phrasing is even more apparent when the cases involving section 844, which penalizes mere possession (as opposed to possession with intent to distribute), are considered. See 21 U.S.C. § 844 (1994). The Circuit Courts have been split as to whether section 844 creates a new offense with amount an element, or simply enunciates sentencing factors. Taking the first view, see *United States v. Stone*, 139 F.3d 822 (11th Cir. 1998); *United States v. Puryear*, 940 F.2d 602 (10th Cir. 1991); *United States v. Michael*, 10 F.3d 838 (D.C. Cir. 1993); *United States v. Sharp*, 12 F.3d 605 (6th Cir. 1993); *United States v. Deisch*, 20 F.3d 139 (5th Cir. 1994). That the amounts only constitute sentencing factors, see *United States v. Butler*, 74 F.3d 916 (9th Cir. 1996); *United States v. Smith*, 34 F.3d 514 (7th Cir. 1994); *United States v. Monk*, 15 F.3d 25 (2d Cir. 1994). It is possible, though unlikely, that Congress carefully considered the greater culpability of someone who possessed with intent to distribute, and purposely structured the statutes so as to make amount possessed relevant only in the “less” culpable case of mere possession.

each act, and with each punishment, might be more unwieldy, although some state statutes achieve it rather nicely). Suffice it to say here that, as seen above, there is no legislative history that would support this interpretation, except statements that Congress intended to increase the punishments for kingpins. That, of course, is not inconsistent with requiring the government to prove the facts from which the jury draws the conclusion that the defendant is a kingpin.³⁶

In contrast to Charlotte and Daniel, consider Elaine—charged with “possessing (or smuggling) cocaine.” She, too, is unaware of the kind of contraband she is carrying. But since, by a mere chance of legislative drafting,³⁷ the predicate crime she “knows” she is committing is not stated as “knowingly possessing contraband items” but possessing cocaine, she cannot be said to “knowingly possess drugs.” Thus, her mens rea as to the *type of contraband* is almost surely going to be relevant. At the very least, the government will be required to prove, at trial, that it was diamonds she possessed, and, depending on the applicability of the “greater crime” theory discussed below, it may have to prove she *knew* she possessed cocaine.

The federal concern with drugs spread strict liability into other statutes as well. Federal law, and virtually every state, enhances a sentence when drugs are sold, manufactured, or possessed with intent to distribute near a

36. In contrast to the federal government, most states do require proof as to amount, although they still do not require mens rea with regard to the amount. Appendix A reflects an attempt to elucidate the law in all 50 states and the District of Columbia with regard to whether amount is an element of a drug offense. This is very slippery, as the Appendix indicates. Nevertheless, with the proper caveats made, the basic findings are these: Of the 48 jurisdictions that use amount in all or most drug crimes, 45 (92%) appear to consider amount of a drug to be an element of a crime, which the state must prove to a jury beyond a reasonable doubt, while only three (North Dakota, Pennsylvania, and Washington) send the question of amount to the judge, as does the federal system.

37. The legislature could have created a statute called “possession of contraband goods,” and then, in a section called “penalties” listed the different kinds of contraband and penalties. This would track 21 U.S.C. § 841 (1994) precisely.

“protected place.”³⁸ And virtually every court has held that the defendant need not know that the sale or possession is occurring near such a place.³⁹ Often this is based on the notion that the place is a sentencing factor; sometimes on the greater crime theory discussed below. Thus, for example, in one case in New Jersey, the defendant brought drugs to her boyfriend who was incarcerated in a county jail which, unhappily for her, was located within 1000 feet of school property. Although there was no possibility that the drugs would be distributed to children, and no likelihood that the defendant knew—or cared about—the presence of the school, her knowledge was irrelevant.⁴⁰ In

38. 21 U.S.C. § 860 (1994). The federal statute began by prohibiting drug activity near a “school yard,” but many amendments have increased the coverage to include public housing projects, public or private youth centers, public swimming pools, or video arcades. Many states have also broadened the net. It is sometimes said that these statutes are so prevalent, and the “protected places” so numerous, that it is virtually impossible in many cities (e.g., Manhattan) to find a location that is not covered by the statute.

39. See, e.g., *United States v. Falu*, 776 F.2d 46 (2d Cir. 1985); *United States v. Lewin*, 900 F.2d 145 (8th Cir. 1990); *State v. Morales*, 539 A.2d 769 (N.J. Super. Ct. Law Div. 1987); *State v. Moore*, 782 P.2d 497 (Utah 1989). See generally Tracy Bateman, Annotation, Validity, Construction and Application of State Statutes Prohibiting Sale or Possession of Controlled Substances Within Specified Distance of School, 27 A.L.R. 5th 593 (2000); William Phelps, Annotation, Validity and Construction of 21 U.S.C.A. § 860: Enhancing Penalty for Drug Distribution if Offense Occurs Within 1000 Feet of School, College or University, 108 A.L.R. Fed. 783 (1999).

40. See *State v. Ogar*, 551 A.2d 1037 (N.J. Super. Ct. App. Div. 1989). New Jersey’s statute expressly makes lack of knowledge of the location irrelevant: “It shall be no defense . . . that the actor was unaware that the prohibited conduct took place while on or within 1000 feet of any school property.” N.J. Stat. Ann. § 2C: 35-7 (West 1999); see also 16 Del. Code Ann. Tit. 16, § 4767(c) (1999) (“It shall not be a defense to a prosecution . . . that the person was unaware that the prohibited conduct took place on or within 1,000 feet of any school property”); La. Rev. Stat. Ann. § 40:981.3(B) (West 1999); Mass. Ann. Laws ch. 94C, § 32J (Law Co-op. 1999); S.D. Codified Laws § 22-42-19 (Michie 1999); Utah Code Ann. § 58-37-8(4)(d) (1999); Wash. Rev. Code Ann. § 69.50.435(b) (West 1999) (same). Intriguingly, Montana provides that “[i]t is not a defense to prosecution . . . that the person did not know (the distance involved)” leaving open the possibility of a defense that defendant did not know that the property was not a public or private elementary or secondary school. Mont. Code Ann. § 45-9-109(3) (1999). Most state legislatures and Congress, however, have not even taken the small step of articulating such a rule, relying instead on the courts to impose strict liability with regard to such complaints.

*Jones v. United States*⁴¹ the Supreme Court adopted a principle which would have made clear that amount and type of drugs were elements of the offense, but the federal courts unanimously refused to recognize the import of that decision.⁴² Now, in light of *Apprendi* (discussed below), it is

41. 526 U.S. 227 (1999).

42. Thus, the courts all found ways of distinguishing *Jones* and its impact. See *United States v. Hester*, 199 F.3d 1287 (11th Cir. 2000) (reading *Jones* narrowly); see also *United States v. Rutherford*, 175 F.3d 899 (11th Cir. 1999); *United States v. Williams*, 194 F.3d 100 (D.C. Cir. 1999) pet. for reh'g en banc pending, (viewing *Jones* as potentially applying to section 841, but, in light of past precedent, holding that it cannot alone overrule past decisions of the Circuit). Accord *United States v. Gosha*, 78 F. Supp. 2d 833 (S.D. Ind. 1999); *United States v. Magana*, 1999 WL 691854 (N.D. Ill. 1999); *United States v. Foye*, 68 F. Supp. 2d 730 (S.D. W. Va. 1999); *United States v. Curry*, 1999 WL 1100928 (N.D. Ill. 1999); *United States v. Hall*, 1999 WL 1144932 (N.D. Ill. 1999); *United States v. Lee*, 1999 WL 11449928 (N.D. Ill. 1999); *United States v. (Carless) Jones*, 194 F.3d 1178 (10th Cir. 1999); *United States v. Talley*, 202 F.3d 262 (4th Cir. 1999) (applying plain error rule to trial which occurred before *Jones*); *United States v. Porter*, 202 F.3d 283 (10th Cir. 1999); *Bledsue v. Johnson*, 188 F.3d 250 (5th Cir. 1999) (semble); *United States v. Harris*, 66 F. Supp. 2d 1017 (N.D. Iowa 1999); *United States v. Lilly*, 56 F. Supp. 2d 856, (W.D. Mich. 1999); *United States v. Bennett*, 60 F. Supp. 2d 1318, (N.D. Ga. 1999). In *United States v. Rios-Quintero*, 204 F.3d 214 (5th Cir. 2000), the court, saying that it was "constrained" to review for only plain error, held that a failure to submit the question of amount to the jury was not plain error. Defendant had received notice, contemporaneous with the indictment, that the government was seeking enhancement, and he stipulated to the amount of heroin (his claim was that he didn't know the kilo was in the clothes he was wearing). *Id.* However, the panel reaffirmed the Fifth Circuit's general openness to considering the constitutional parameters of *Jones*, and spoke of *Jones*' note 6 as embodying the "relevant constitutional principle" of *Jones*. *Id.* The opinion recognized that several panels of the Circuit had read *Jones* broadly, although no panel had yet held that *Jones* required reading section 841 as considering amount an element. *Id.*

United States v. Edwards, 523 U.S. 511 (1998), has also been interpreted as reaching the precise question of whether amount and kind of drug are elements of the offense. See also *United States v. Lilly*, 56 F. Supp. 2d 856 (W.D. Mich. 1999). In accord with this reading, see *Foye*, 68 F. Supp. 2d 730; *Curry*, 1999 WL 1100928; *Hall*, 1999 WL 1144932; *Lee*, 1999 WL 11449928. But that issue was not directly argued in *Edwards*, which essentially held that *if* amount or kind was a sentencing factor, it was not erroneous to have the issue decided by the judge. The case was a guidelines case, not a constitutional, or even a statutory interpretation, case. And see the discussion in *Harris*, 66 F. Supp. 2d at 1030 n.8, where the court indicated that it did not read *Edwards* as deciding that question, particularly since *Edwards* did not involve an increase in the maximum sentence.

The courts gave numerous explanations for not applying *Jones* to section 841:

- (1) The Court in Jones cited *other* statutes, including some which considered serious bodily injury, as sentencing factors, thereby suggesting that not even serious bodily injury is always an element of a crime. See Lilly, 56 F. Supp. 2d 856.
- (2) Other statutes, cited by Jones, are structured like the drug statute, distinguishing between “offense” and “penalty”: Id.
- (3) Unlike 18 U.S.C. section 2119, 21 U.S.C. section 841 is unambiguous and therefore, Jones is inapplicable. See Bennett, 60 F. Supp. 2d 1318; Gosha, 78 F. Supp. 2d 833; Harris, 66 F. Supp. 2d 1017 (pointing particularly to the “penalties” designation); see also Foye, 68 F. Supp. 2d 730; Carless, 194 F.3d 1178; Jones, 526 U.S. 227.
- (4) Jones expressly said it did not adopt a new constitutional rule. See Bennett, 60 F. Supp. 2d 1318; Foye, 68 F. Supp. 2d 730; Carless, 194 F.3d 1178, Jones, 526 U.S. 227.
- (5) That Justices Scalia and Stevens wrote separately to enunciate a constitutional rule shows that Jones is not a constitutional decision. See Bennett, 60 F. Supp. 2d 1318; Harris, 66 F. Supp. 2d 1017.
- (6) Drug quantity has traditionally been a sentencing element. See Bennett, 60 F. Supp. 2d 1318 (though in light of the discussion supra of the evolution of § 841, this is an extremely difficult argument to sustain);
- (7) Guideline factors generally should not be considered as elements. See Gosha, 78 F. Supp. 2d 833 (focusing on relevant conduct rather than charged amount and noting that “[t]his Court sees no sign in the Jones majority opinion that the ‘court is prepared to extend its reasoning to other guideline factors in general or to the drug quantity table in particular”).
- (8) Prior pre-Jones caselaw in circuit Williams (panel); Magana, 1999 WL 691854; Foye, 68 F. Supp. 2d 730; Carless, 194 F.3d 1178; Jones, 526 U.S. 227; Porter, 202 F.3d 283 (citing and relying on Jones); Curry, 1999 WL 1100928; Hall, 1999 WL 1144932;
- (9) The Jones “principle” has not yet gelled into a Jones Rule. See Harris, 66 F. Supp. 2d 1017.
- (10) It is not plain error to deny motion of acquittal, since Jones had not been decided when the trial occurred, or when the defendant was sentenced. See Talley, 202 F.3d 262.
- (11) The Court’s discussion of statutory interpretation would have been unnecessary if Jones had articulated a constitutional rule. See *United States v. Favors*, 54 F. Supp. 2d 1328, (N.D. Ga. 1999); Hester, 199 F.3d 1287.

This extraordinary unanimity would be exceptionally imposing, except that, prior to Jones, the circuit courts of appeals had all held that 18 U.S.C. § 2119, the statute interpreted in Jones to make serious bodily injury or death elements of the crime of carjacking rather than merely sentencing factors, did not establish an element of the offense. See Harris, 66 F. Supp. 2d 1017 (noting this).

In non drug cases the results regarding Jones were mixed. In *United States v. Chestaro*, for example the Second Circuit found that Jones applied to the federal assault statute which increased penalties if the assault were done with a specific kind of weapon, notwithstanding that the section in question was explicitly entitled “enhanced penalty.” 197 F.3d 600 (2d Cir. 1999). The court found that the steeply higher penalties (from 1 year to 3 years to 10 years) based upon the use of a weapon “are of the type that the states and federal government

clear that these refusals were incorrect.⁴³

traditionally have considered elements of an offense rather than sentencing factors.” (The Chestaro Court did not cite *McMillan*). *Id.* The Chestaro Court also focused on the “gatekeeping” point of *Jones*. *Id.* at 608 (“Interpreting § 111 as creating only one offense would . . . relegate to the sentencing judge fact-finding that is traditionally reserved for the jury and that goes to the elements of the crime.”); see also *United States v. Davis*, 200 WL 51291 (4th Cir. Jan. 24, 2000). Perhaps one of the more interesting decisions is *United States v. Nunez*, 180 F.3d 227 (5th Cir. 1999), in which the Fifth Circuit held *Jones* applicable to the federal assault statute, 18 U.S.C. § 111 (1994). That statute provides that resisting arrest with a firearm is to be punished more severely than merely resisting arrest. The court *peremptorily* held that *Jones* applied:

Jones . . . teaches us to avoid encroaching on a defendant’s Fifth Amendment rights by construing statutes setting out separate punishments as creating separate, independent criminal offenses rather than single criminal offense with different punishments. . . . We read 18 U.S.C. § 111 as creating three separate offenses, to-wit, resistance by means of (1) simple assault; (2) more serious assaults but not involving a dangerous weapon; and (3) assault with a dangerous weapon.

Id.

In *United States v. Davis*, 184 F.3d 366 (4th Cir. 1999), the Fourth Circuit interpreted a South Carolina statute similar to section 2119 involved in *Jones*, and held that *Jones* applied, thus obviously adopting a constitutional analysis of *Jones*. Finally consider *United States v. Allen*, 190 F.3d 1208 (11th Cir. 1999). 18 U.S.C. section 1791(a)(2) makes it unlawful for a federal inmate to possess a “prohibited object.” Subsection (b) sets out the punishments, based on the type of prohibited object, as defined in subsection (d). Section (d)(1) defines prohibited object to include an object that is “intended to be used as a weapon.” 18 U.S.C. § 179 (d)(1) (1994). The court found the intent with which the object was held to be an element of the crime. D, an inmate who worked at the prison mattress factory was found with three (nine and a half inch) needles and a wooden dowel in his pocket. The indictment charged him with possession of these items “which were intended to be used as weapons.” *Allen*, 190 F.3d at 1208. The trial judge ruled that the Government need not prove *Allen*’s intent. The Eleventh Circuit reversed, relying upon *Jones*. See also *United States v. Thomas*, 2000 WL 228218 (2d Cir. 2000). Cf. *United States v. Jackson*, 207 F.3d 910 (7th Cir. 2000); *United States v. Hardin*, 209 F.3d 652 (7th Cir. 2000); *United States v. Parker*, 89 F. Supp. 2d 850 (W.D.Tex. 2000).

43. The first action which the United States Supreme Court took after deciding *Apprendi* was to remand, for reconsideration in light of *Apprendi*, a pending case raising the question in section 841. See *Jones (Carless) v. United States*, 120 S. Ct. 2739 (2000). Even in the two months between the *Apprendi* opinion and the final version of this article, the federal courts have quickly concluded that *Apprendi* requires finding that amount is an element of the crime under section 841. Indeed, in at least one case, the government conceded that *Apprendi* covers section 841. See *United States v. Meshack*, 2000 WL 1532802 (5th Cir. 2000); see also, e.g., *United States v. Henderson*, 105 F. Supp. 2d 523, 535 (S.D. W. Va. 2000) (the “sweeping pronouncements in *Apprendi* apply” to section 841); *United States v. Sheppard*, 219 F.3d 766, 768 (8th Cir. 2000)

2. Guns

Another example of the use of the “sentencing factor” approach is 18 U.S.C. section 924(c)(1), under which a person committing a felony with a firearm receives an additional sentence of five years consecutive to his underlying felony sentence.⁴⁴ If, however, the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the additional punishment is ten years, and if the firearm is a machine gun, destructive device or equipped with a silencer, thirty years.⁴⁵ Prior to the 1999 term of the Court, the decisions had been divided on whether the type of firearm was an element of the crime or a sentencing factor, though most agreed that it was an element, because of the steep increase in punishment attached to the finding.⁴⁶ That

(although “the landscape changed dramatically” with *Apprendi*, harmless error where jury nevertheless made specific finding of amount); *United States v. Aguayo-Delgado*, 200 F.3d 926 (8th Cir. 2000) (no reversible error where sentence was at mandatory minimum range which could have been set even without amount); *In re Joshua*, 2000 WL 1227966 (11th Cir. 2000) (*Apprendi* not retroactive, but appears to assume it applies to section 841); *Scott v. Baldwin*, 2000 WL 1233959 (9th Cir. 2000) (same). But see *United States v. Smith*, 223 F.3d 544 (7th Cir. 2000) (section 848(b), eliminating possible thirty year minimum sentence and setting mandatory sentence at life for drug kingpin, still only a sentencing statute, not enunciating element). One district court, attempting to distinguish *Apprendi*, and loathe to overturn Circuit precedent based upon pre-*Apprendi* holdings, has purported to find a distinction between factors which “increase” the maximum sentence, and those which, as in section 841, “determine” the maximum sentence to begin with. See *United States v. Kelly*, 105 F. Supp. 2d 1107 (S.D. Cal. 2000). That distinction is likely to be extremely short-lived; it would eviscerate any constitutional rule of jury protection without any clear purpose at all.

44. 18 U.S.C. § 924(c)(1) (1994).

45. *Id.*

46. Most Circuits that addressed the question held that the kind of weapon was an element of the crime. Thus, the Ninth Circuit, focusing on the “immense consequences that follow a determination whether a firearm . . . is an ordinary firearm or . . . a machine gun,” held that the type of firearm “must be found by the jury; that is to say, it is an element of the crime.” *United States v. Alerta*, 96 F.3d 1230, 1235-36 (9th Cir. 1996); see also *United States v. Martinez*, 7 F.3d 146, 148 (9th Cir. 1993). Accord: *United States v. Sims*, 975 F.2d 1225, 1235-36 (6th Cir. 1992), cert. denied, sub nom., *Gardner v. United States*, 507 U.S. 932 (1993) (relying on the “difference between the applicable sentences”); *United States v. Shepard*, No.94-5307, 1995 U.S. App. Lexis 5802 (4th Cir. March 22, 1995); *United*

view was adopted by a unanimous United States Supreme Court in *Castillo v. United States*,⁴⁷ as a matter of statutory interpretation. *Castillo*, however, was merely the harbinger of the decision obviously crucial to this discussion—*Apprendi v. New Jersey*.⁴⁸

3. Other sentencing factors

The issue of “sentencing factors” versus “elements” is by no means exhausted by the federal cases on drugs and guns, although these are the most glaring examples of *McMillan’s* nefarious impact. In a number of other cases, courts have held, for example, that statutes imposing additional sentences for drug violations for non-addicts do not establish “non-addiction” as an element of the crime.⁴⁹

C. Apprendi v. New Jersey: An End to Sentencing Factors as we have come to Know and Love Them?

As the author’s note on page 139 of this paper

States v. Roriguez, 841 F. Supp. 79, 81 (E.D.N.Y. 1994), aff’d, 53 F.3d 545 (2d Cir.1995), cert. denied, 516 U.S. 893 (1995). In *United States v. Melvin*, 27 F.3d 710 (1st Cir. 1994), the government conceded that section 924 required specific jury findings on the firearm type. The Fifth Circuit initially agreed, see *United States v. Correa-Ventura*, 6 F.3d 1070, 1087, n.35 (5th Cir. 1993), but had since held that the type of firearm was only a sentencing factor. See *United States v. Gonzales*, 121 F.3d 928 (5th Cir. 1997), cert. denied, 522 U.S. 1131 (1998); *United States v. Branch*, 91 F.3d 699 (5th Cir. 1996), cert. denied, 520 U.S. 1185 (1997). On a “plain error” basis, the court in *United States v. Alborola-Rodriguez*, 153 F.3d 1269 (11th Cir. 1998), held that it was not plain error to instruct that the type of firearm was not an element of the crime but did not discuss the reasons for this conclusion. But see *United States v. Wiggins*, 1999 U.S. App. LEXIS 30695 (4th Cir. 1999) (finding no “plain error” under instruction, but clearly suggesting that section 924(c) constitutes a separate offense, and that the kind of weapon should be submitted to the jury).

47. 120 S. Ct. 2090 (2000). For a state case finding that use of a firearm which increases the sentence requires a jury resolution as a matter of statutory interpretation, see *State v. Velasco*, 751 A.2d 800 (Conn. 2000).

48. 120 S. Ct. 2348 (2000).

49. E.g., *State v. Hart*, 605 A.2d 1366 (Conn. 1992); *State v. Rodriguez*, 1993 Del. Super LEXIS 172 (Del. Super. Ct. 1993) (finding *McMillan* persuasive), aff’d on other grounds, 1994 Del. LEXIS 199 (1994). Contra: *State v. Helson*, 304 A.2d 210 (N.J. 1973).

suggested, much has happened in the last eight months to the entire notion of “sentencing factors.” In late June 2000, the United States Supreme Court, in *Apprendi v. New Jersey*,⁵⁰ held—or appeared to hold—that any statutorily enunciated factor which increased the maximum sentence to which a defendant was exposed, however labeled, must be proved to the trial jury beyond a reasonable doubt.⁵¹ When this paper was initially presented, in November 1999, the United States Supreme Court had already decided two cases, with clearly contrasting results, which had laid the cornerstone for the decision in *Apprendi*. This most recent decision cannot be fully understood without at least some mention of those decisions.

The first of these cases, *Almendarez-Torres v. United States*,⁵² involved a statute which provided:

(a) Subject to subsection (b) of this section, any alien who (1) has been deported . . . and thereafter (2) enters . . . or is at any time found in, the United States . . . shall be . . . imprisoned not more than 2 years

(b) Notwithstanding subsection (a) . . . In the cases of any alien described in such subsection (1) whose deportation was subsequent to a conviction for commission of (certain misdemeanors) or a felony . . . such alien shall be . . . imprisoned not more than 10 years (2) whose deportation was subsequent to a conviction for commission of an aggravated felony such alien shall be . . . imprisoned

50. 120 S. Ct. 2348. Full disclosure requires noting that the author was one of the attorneys representing Apprendi in the United States Supreme Court and helped prepare both the cert. petition and the brief on the merits.

51. The Court did not decide whether the fact had to be pled in the indictment, which would seem to be the easiest of the questions surrounding the “sentencing factor” debate. See Knoll & Singer, *supra* note 8. The basis for this avoidance, said the Court, was that the defendant had not expressly argued that point in the brief or below. But the three procedural issues (notice, standard of proof, trier of issue) had always been discussed—perhaps in error, see *id.*—in tandem.

52. 523 U.S. 224 (1998).

not more than 20 years. . . .⁵³

The Court, in an opinion by Mr. Justice Breyer,⁵⁴ concluded that the past criminal record, which increased the potential maximum sentence by 1000% (from two to twenty years), was not an element of the crime. That is, there were not three crimes (entering after being deported, entering after being deported for a felony, and entering after being deported for an aggravated felony), but only one—entering after being deported. The government did not have to prove, at trial, the basis of the deportation; that could wait for sentencing. The Court relied heavily both on statutory interpretation analysis, and on the view that recidivism had “traditionally” been decided by a judge at sentencing.⁵⁵ Justice Scalia issued a stinging dissent which, while technically hinging on the doctrine of constitutional doubt⁵⁶ essentially argued that taking this fact from the jury deprived the defendant of his Sixth Amendment right.

Three weeks after *Almendarez-Torres*, the Court granted certiorari in *Jones v. United States*,⁵⁷ which concerned the federal carjacking statute. That statute provided:

53. 8 U.S.C. § 1326 (1994).

54. Justice Breyer has written many of the Court's more recent opinions concerning sentencing, including the majority opinions in *Edwards v. United States*, 523 U.S. 511 (1998); *Almendarez-Torres*, 523 U.S. 224; and *Lewis v. United States*, 518 U.S. 322 (1996). He was an original member of the United States Sentencing Commission and has consistently supported the Guidelines in articles written both before and after he assumed his current position. See, e.g., Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14 *Crim. Just.* 28 (Spring 1999); *Tribute to the Honorable Jack Weinstein*, 97 *Colum. L. Rev.* 1947 (1997); *On the Uses of Legislative History in Interpreting Statutes*, 65 *S. Cal. L. Rev.* 848 (1992); *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 *Hofstra L. Rev.* 1 (1988). The dissenting opinions in *Jones* and *Apprendi*, while not bearing his signature, clearly reflect his concern that the Guidelines themselves may be in jeopardy.

55. 523 U.S. at 239, 242-44.

56. The doctrine of constitutional doubt requires that the Court construe a statute to avoid a constitutional issue whenever there is a doubt as to whether a different construction would create such an issue.

57. 526 U.S. 227 (1999).

162 *BUFFALO CRIMINAL LAW REVIEW* [Vol. 4:139]

Whoever, possessing a firearm . . . takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation or attempts to do so, shall:

(1) be fined under this title or imprisoned not more than 15 years or both;

(2) if serious bodily injury . . . results, be fined under this title or imprisoned not more than twenty five years, or both;

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.⁵⁸

Lower federal courts had split over whether the facts of serious bodily harm (which increased the sentence from fifteen to twenty-five years) or death (which increased the sentence from fifteen years to life) were elements of the crime or sentencing factors. The Supreme Court, 5-4,⁵⁹ in an opinion by Mr. Justice Souter, decided that they were elements.

The Court's opinion was cast in terms of statutory interpretation, but there was a major overlay of constitutional analysis. The opinion recounted in great detail the history of English attempts to deprive colonial juries of the power to decide key facts, or even to remove juries from deciding specific kinds of cases. These attempts, each of which had been protested by the colonists, said Mr. Justice Souter, helped shape the Sixth Amendment, and were critical to an understanding of the full role of the jury.⁶⁰ Lest the point be lost, the opinion, albeit in what has now become a famous footnote, declared:

58. 18 U.S.C. § 2119 (1994).

59. Mr. Justice Thomas proved to be the swing vote from *Almendarez-Torres* to *Jones*.

60. *Jones*, 526 U.S. at 243.

Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.⁶¹

Any other rule, said the text of the opinion, could allow legislatures⁶² to relegate a jury to the trivial role of “gatekeeper,”⁶³ while leaving the critical determinations of level of guilt and punishment to the sentencing court.

The precise parameters of *Jones* were not clear. Even assuming that the language in footnote six articulated a constitutional rule that the Court would follow in later cases, whether *Jones* applied to factors which do not increase the maximum sentence was certainly open. In the generating case—*McMillan*⁶⁴—the Court had emphasized that the legislature had not increased the maximum, but “merely” imposed a mandatory minimum within the already established statutory range.⁶⁵ Although this language had been cavalierly dismissed by *Almendarez-*

61. *Id.*

62. As explained, *supra* note 7, earlier decisions—including *Almendarez-Torres*—had focused on the wrong target. The bedrock decision establishing the “sentencing factor” language is *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), in which the Pennsylvania legislature had imposed a mandatory minimum sentence of five years upon a defendant committing any one of a list of enumerated crimes who, while committing the crime, and carried a visible weapon. The legislature had explicitly declared that possession of such a weapon was not an element of the crime. The Court treated the due process (not Sixth Amendment) challenge to the statute as an attempt to expand *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *McMillan* put the focus on the bona (or mala) fides of the legislature rather than upon the *impact* of the legislation upon the defendant and his Sixth Amendment rights. This was corrected only by *Jones*, where the concern moved back to jury trial rights.

63. *Jones*, 526 U.S. 227, 244.

64. 477 U.S. 79.

65. Thus, the Court in *McMillan* declared: “Petitioner’s claim . . . would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment . . . but it does not.” *Id.* at 88. The Court put the notion nicely: in this case the “increased” punishment was not a “tail that wagged the dog” of the predicate crime. *Id.*

Torres,⁶⁶ its thrust was resuscitated in *Jones*.⁶⁷

One year later, however, the issue was resolved—in *Apprendi*, a majority of the Court, led by Justice Stevens,⁶⁸ made clear that *Jones* had, in fact, articulated a constitutional rule: Any statutorily enunciated fact *which could increase the maximum sentence* was to be submitted to the jury, and proved beyond a reasonable doubt. Justice Thomas, in a concurring opinion, went further and contended that *any* increase in sentence, even within the maximum, was historically required to be submitted to the jury.⁶⁹ Four Justices, in several separate opinions, dissented, primarily on the grounds of federalism, and of protecting rational sentencing reform (read here the Federal Sentencing Guidelines) .

Both the opinion and the decision in *Apprendi* firmly establish a bright line rule regarding facts which increase maximum sentences. Unlike *Jones* and *Almendarez*, which were—or could have been—narrowed to be merely statutory interpretation cases, *Apprendi* clearly and unequivocally resolved the constitutional issue. Moreover, the breadth of *Apprendi* is even more significant because the Court could easily have resolved the cases in the defendants' favor without such a sweeping position. The

66. “[W]e should take McMillan’s statement to mean no more than it said, and therefore not to make a determinative difference here.” *Almendarez-Torres*, 523 U.S. 224, 244.

67. See, e.g., 526 U.S. at 244.

68. Justice Stevens thus confirmed his earlier views that it was in *McMillan* that the Court had gone awry. See *Monge v. California*, 524 U.S. 721 (1998).

69. Justice Thomas’ opinion is the most surprising of the group. See *Apprendi*, 120 S. Ct. at 2367 (Thomas, J., concurring). He had concurred with the majority in *Almendarez-Torres*, and had “switched” in *Jones*. During the preparation of the brief, and in preparation for oral argument, the defendant, and presumably the government also, saw his vote as the most problematic. Yet Thomas assumed in *Apprendi* a position which completely repudiated *Almendarez-Torres*, and which put him as the strongest protector on the Court of the jury right, at least in this context. Much of Justice Thomas’ dissent was based upon his reading of nineteenth century state cases, which had been previously cited in *Knoll & Singer*, *supra* note 8. His reading went even further than that suggested in that article. He also recognized the possibility, discussed *infra*, pp. 171-72 that his views might significantly affect the sentencing guidelines movement.

New Jersey hate crimes statute in question explicitly gave to the judge, to decide by a preponderance of the evidence, whether a defendant acted with a “purpose” to intimidate a victim based upon race.⁷⁰ Upon such a finding, the court could increase the defendant’s sentence by ten years (or, in some extreme cases, up to life imprisonment).⁷¹ As both the defendant’s brief and oral argument suggested, the Court could have reversed the defendant’s conviction simply by adopting a rule that any mental state, such as purpose,⁷² was traditionally within the jury’s power to decide. Moreover, because the statute in question explicitly enunciated the standard of proof, the Court might have adopted either of two other lesser positions: (1) the question could go to a judge, but the standard had to be BRD; (2) the issue must go to a jury, but the standard could be preponderance. That the Court chose, instead, to accept a broad, clear constitutional line strongly suggests that that line is unlikely to be altered in the foreseeable future.

Whether a particular statutorily enunciated circumstance is an element of the crime is not the question with which this part of this paper is primarily concerned. This paper focuses (or was initially written to focus) on whether the government must prove mens rea with regard to that circumstance. There should be no magic in the label “element”—one might well require proof of the circumstance, and mens rea regarding it, even if it were not

70. N.J. Stat. § 2C:44-3(e) (2000).

71. In contrast, the current federal sentencing guidelines, pursuant to specific Congressional guidance, provide only for a three level increase in sentence *if* the trier of fact finds, beyond a reasonable doubt, racial motivation. See 28 U.S.C. 994 note (1994), Pub. L. 103-322 § 280003(b) (1994); U.S. Sentencing Guidelines Manual 3A1.1(a) (1998). USSCG § 3A1.1(a) (1990). A three level increase will, in the average case (Criminal history of III), result in an average increased sentence of roughly one-third, depending on the underlying crime. An appendix to the Apprendi brief found no other state statutes that *explicitly* allowed an increase of this much by a judge determining the issue by a preponderance, although several state statutes were ambiguous or silent on the procedural issues.

72. The state sought to argue that the mental state in the statute was “motive” and not “purpose,” but even the New Jersey Supreme Court had rejected that semantic distinction as ephemeral.

an “element.”⁷³ But without a finding that the circumstance *is* an element, it is unlikely that courts will move in that direction. Yet restricting the Sixth Amendment’s reach only to those factors which increase the maximum sentence, as *Apprendi* purported to do, is, as the dissent in that case suggested,⁷⁴ to adopt an arbitrary line which is easily manipulable as well as irrational. The dissents in *Jones*⁷⁵ and *Apprendi*⁷⁶ both feared the legislatures might remove such details, and simply establish high maximums, which then could not be reached unless the judge, at sentencing, found particular facts. The actual wording of the *Apprendi* test would not be violated since the maximum sentence would not be increased. But this is an extremely uncharitable view of legislatures. It is unlikely in the real world that a legislature would engage in such an obvious ploy. Moreover, as the *Apprendi* majority suggested,⁷⁷ were a legislature to attempt such a blatant manipulation of constitutional principles, the limitations enunciated even by *McMillan* might well find *mala fides* and reject the attempt.

The truly unsettling point of *Apprendi* is that the line adopted there cannot stand except by ipse dixit. The point is made by looking at *Kikumura*,⁷⁸ in which the trial judge, while still within the maximum statutory range, increased the defendant’s “presumed” sentence from three years to thirty, based upon information in the pre-sentence report.

73. See Richard G. Singer & Mark D. Knoll, Elements and Sentencing Factors: A Reassessment of the Alleged Distinction, 12 Fed. Sent. Rep. 203 (2000). As Judge Friendly put it:

We assume the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than the sentencing judge. There is, of course a certain incongruity in asking a jury to exercise such expertise in the ways of the underworld as to determine the “value” of money orders that can be or have been forged; but the omniscience of the jury extends to harder questions than that.

United States v. Kramer, 289 F.2d 909 (2d Cir. 1961).

74. *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

75. 526 U.S. 254.

76. *Apprendi*, 120 S. Ct. 2348.

77. *Id.* at n.16.

78. *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990).

Leaving aside due process questions such as notice, a literal reading of the *Apprendi* test would allow the judge to impose such an increase, using a preponderance standard, since the maximum sentence had not been affected. On this point, the *Apprendi* dissenters (and Justice Thomas in concurrence) are undoubtedly correct: If *Apprendi* and other felons are entitled to a jury trial on the existence of a fact which increases the sentence by ten years, it is difficult to perceive why an increase of twenty-seven years would not similarly activate the Sixth Amendment.⁷⁹ The question should be impact on the defendant, not the method by which the legislature has sought to make the impact.

What alternative approaches to the *Apprendi* rule might be employed? Benjamin Priester, in a well-considered note,⁸⁰ has generated seven possible views. One extreme, the pro-government position,⁸¹ would accept the legislature's decision as binding, and avoid any constitutional inquiry at all. This position, however, seems dead wrong and is obviously rejected by *Apprendi*. It is concerned primarily, if not exclusively, with questions of deference to legislatures. But the issue is not merely legislature power per se, but the constitutional one of when the defendant may be deprived of a jury trial on issues

79. For example, see *Malloy v. State*, 1 P.3d 1266 (Ala. Ct. App. 2000), where the state's first degree murder statute provided a sentence of 20-99 years but required a mandatory 99 years if certain factors were found by a judge using a preponderance standard. The court held, as a matter of state constitutional law, but informed by *Jones*, that the obvious impact on the defendant required proof of those factors to a jury. *Id.*

80. Benjamin Priester, Further Developments on Previous Symposia: Sentenced for a "Crime" the Government Did Not Prove: *Jones v. United States* and the Constitutional Limitations on Factfinding by Sentencing Factors Rather than Elements of the Offense, 61 *Law & Contemp. Prob.* 249 (1998). Other pre-*Apprendi* articles include Stephanie Slatkin, The Standard of Proof at Sentencing Hearings Under the Federal Sentencing Guidelines: Why the Preponderance of the Evidence Standard is Constitutionally Inadequate, 1997 *U. Ill. L. Rev.* 583; Frank Hermann, Understanding Maximum Sentence Enhancements, 46 *Buff. L. Rev.* 175 (1998); Susan Herman, The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process, 66 *S. Cal. L. Rev.* 289 (1992).

81. See *id.* at 281.

critical to her freedom and reputation.

Other approaches explored by Priester—for example that “any non-mitigating fact,” or that any part of “the crime” must be proved beyond a reasonable doubt—are initially appealing: If the legislature thinks the fact is important enough to restrict judicial discretion in sentencing and to increase automatically a sentence, even for a month, then the prosecution should be required to prove that fact to the jury. But this would mean that any factor which a judge would consider relevant might have to be proved beyond a reasonable doubt, a proposition which would either increase significantly the process of fact-finding, or which would lead to pious judicial perjury. Neither of these possibilities is particularly attractive.

Priester adopts, ultimately, the *Apprendi* rule—the maximum “increase of sentences” approach.⁸² Here, any statutorily enunciated fact which increases the maximum sentence would activate the jury right. This position has the virtue of moving the focus away from the legislative power—and the nefariousness of the legislature—to where it belongs: the effect of the finding upon the defendant.

The real tension here—as the dissenters and Justice Thomas saw, and as the *Apprendi* plurality simply shelved out of hand—is that, unless restricted to the “increase the maximum” position, *Apprendi* seems to jeopardize the sentencing guidelines movement. Justice Breyer argued vigorously that to undercut that movement, which has valiantly sought to bring rationality to the former amorphous “unfettered discretion” of indeterminate sentencing, would be indeed to throw the baby out with the bathwater.⁸³ In the Federal Sentencing Guidelines context, for example, a finding that the defendant played the role of manager will result in a level increase of three levels.⁸⁴ In the case of a defendant with a criminal history of III, convicted of operating a common carrier while intoxicated would normally receive a sentence of eighteen to twenty-

82. *Id.* at 283.

83. See *id.* at n.9.

84. U.S. Sentencing Guidelines Manual 3B1.1(b) (1998)USSCG § 3 B1.1 (b).

four months. A finding of managerial role increases that sentence to twenty-seven to thirty-three months—a significant increase no matter how calculated. Such an increase is too severe to leave to a judge, using a diluted standard of proof. Justice Thomas' suggestion in *Apprendi*⁸⁵ that *any* increase in a sentence would activate the jury right is intellectually sound—any other line would be arbitrary. But his reliance on history is itself suspect—as the dissent argued, many of the cases he cited dealt with increases in the statutory maximum. Moreover, as an intuitive matter, an increase of one week in a defendant's sentence would not seem to warrant the Sixth Amendment protection.

Even more importantly, however, jettisoning the entire guidelines movement is a step which, if taken at all, should be taken extremely cautiously. This is not the place to discuss the guidelines movement even sketchily, much less in detail, but this much needs to be said: However heatedly and correctly some manifestations of the idea—particularly the federal guidelines project—have been attacked,⁸⁶ the attempt to rationalize and regularize the process is manifestly desirable. Some of the state guidelines systems, although varying widely and sometimes suffering from difficulties as immense as those of the federal system, have shown real possibility of achieving most of the goals set out by the initial reformers.

If Justice Thomas' view, however salient, is not to prevail, however, some method of determining what factors activate the jury right must be found. Several methods of determining when the impact of the fact is "too large" to leave to a judge alone suggest themselves. First, a fixed percentage increase in the sentence (say thirty percent)

85. *Apprendi*, 120 S. Ct. at 2359 n.11 (Thomas, J., concurring)

86. The attacks range from those on the procedures used by the Commission to the very core of the substantive provisions of the Guidelines. The literature is vast. Perhaps the best single source of criticism is Kate Stith & Jose A. Cabranes, *Fear of Judging* (1998). The *Federal Sentencing Reporter* is the best source of short articles which have followed the vagaries of the federal commission since its inception.

could be used to activate the jury trial right. Second, a variable percentage, depending on the actual maximum involved might be invoked: An increase of ten percent might be insubstantial when dealing with a sentence, e.g., under, two years, but substantial for a more severe maximum. (This would, of course, turn into an “absolute” increase of months standard quickly, but would exclude at least some minimal increases). Third, one could select an absolute number of months or years as the bright line test.

Although each of these standards has something to support it, there may be another solution already at hand. The Court itself has held that the right to a jury trial is activated only if the potential sentence is longer than six months.⁸⁷ This Plimsoll line could be implemented here: The state would be required to prove, beyond a reasonable doubt, and to a jury, any factor which, under either statute or sentencing guideline, could increase the sentence by more than six months.⁸⁸

This approach still carries some problems. First, under at least some guideline systems, the impact which a particular finding would have depends on the criminal history of the defendant—a factor which itself might be at issue at trial. Moreover, since *Apprendi* itself did not overrule, but distinguished *Almendarez-Torres*, and exempted (however irrationally) prior criminal history from the factors which would have to be submitted to the jury, there is no obvious way to avoid this “timing” consideration. A prosecutor who sought to have a sentence increased on the basis of recidivism but who had not “yet” proved the criminal history, would have to decide whether

87. *Baldwin v. New York*, 399 U.S. 66 (1970) has already limited the Sixth Amendment right to crimes involving a sentence of more than six months.

88. See *United States v. Mobley*, 956 F.2d 450 (3d Cir. 1992) (using the six-month increase line as relevant under *McMillan*). Under then prevailing Second Circuit precedent, see *United States v. Collado-Gomez*, 834 F.2d 280 (2d Cir. 1987), there might well be such a requirement under the Guidelines themselves. The court then concluded that while there would be no mens rea requirement, even under the guidelines, the defendant should be able to rebut a presumption of mens rea, which would then activate a burden requiring the government to prove mens rea.

to move forward with the charge before he knew the actual potential effect which the factor would have. In almost all instances, that would likely require proof of the item beyond a reasonable doubt, since most prosecutors would be loath to try to prove a factor which increased a sentence less than six months.

A second problem arises from the “accumulation” issue. The Court has also held that potential sentences are *not* to be accumulated for Sixth Amendment purposes: A defendant who faces ten charges, each carrying a six month maximum, does not have a right to a jury trial.⁸⁹ A legislature (or sentencing commission) could therefore establish six months as the maximum increase for any one factor, but allow for accumulation in such a way as to provide prosecutors an easy way to avoid the implications of *Apprendi-Baldwin*. This, however, seems unduly pessimistic. First, the specter of nefarious state agencies—which so shaped *McMillan* and *Almendarez-Torres* and which was generated by the actions of the Maine Supreme Judicial Court in *Mullaney*⁹⁰—is rarely a problem in the real world. Legislatures are often unaware of the implications of constitutional doctrine, much less so anxious to avoid their implications as to manipulate statutory guidelines.⁹¹ If such an attempt were made, of course, the courts could examine the bona fides of the legislation; but that is both undesirable (from a separation of powers viewpoint) and unlikely. Second, where accumulation was contemplated, *Lewis* and *Baldwin* might not apply in all their fervor. Those decisions, after all, determined that there would simply be no jury right. But in the situation we are considering here, a jury has already been impaneled; the costs and administrative difficulties

89. *Lewis v. United States*, 518 U.S. 322 (1996).

90. See discussion, *supra* note 7.

91. Legislatures are usually far too busy with other items to pay much attention to the intricacies of sentencing. Sentencing commissions, on the other hand, would have sufficient time to devise schemes which could end run *Winship*. I have no reason to think that commissions *would* act in such a manner, but the possibility cannot be ignored.

associated with finding a jury—and which might have shaped those decisions—are not present. The only question is whether asking the jury to resolve another fact issue is desirable. Thus, the argument that accumulating does not count might not apply here, and we might reach a rule that whenever the prosecution seeks to prove one or more factors that, together, could increase the sentence more than six months, the Sixth Amendment right obtains.⁹²

Whatever the resolution of this issue—even adoption of Justice Thomas' view that any increase activates the Sixth Amendment—it does not lead to the view that the sentencing guidelines movement is dead. Even read in the form most damaging to the judicial power, *Apprendi* means merely that the jury must find the presence of any factor which has “too severe” an impact on the sentence—it does not mean that the jury would actually sentence the defendant. Instead, the jury would essentially be provided with a list of special factors which the Sentencing Commission (or the legislature) thought sufficiently important and be asked whether those factors had been proved beyond a reasonable doubt. Thus, the rationalization of sentencing could continue, with various state commissions discussing and adopting views on the importance of various factors, allowing juries to determine the presence of those factors in a specific case, and leaving the final impact on sentence to the judge (again, within quantitative limits set by the Commission).

One possible objection to this is that it smacks of a “special verdict,” which is at best of dubious validity or

92. Of course, the determination that a circumstance is a sentencing factor does not necessarily mean that mens rea is to be abandoned. See *United States v. Burke*, 888 F.2d 862 (D.C. Cir. 1989), holding that the government must show that defendant was at least criminally negligent with respect to a weapon he possessed before increasing his base offense level by two in calculating a sentence. However, the provision involved in *Burke* in the “general application principles” of the Federal Guidelines which had stated that the defendant's state of mind should be taken into account has since been repealed. See U.S. Sentencing Guidelines Manual 1B1.3 (1998) USSCG § 1B1.3. But see *United States v. Taylor*, 937 F.2d 676 (D.C. Cir. 1991); *United States v. Singleton*, 946 F.2d 23 (5th Cir. 1991), cert. denied 502 U.S. 1117 (1992); *United States v. School*, 982 F.2d 216 (7th Cir. 1992); *United States v. Mobley*, 956 F.2d 450 (3d Cir. 1992).

desirability in criminal proceedings.⁹³ I certainly agree that special verdicts should be avoided, in part because they may cabin “irrational” nullification powers. But in many cases we already ask juries similar questions. Specific intent crimes, for example, raise the issue: The jury is asked (a) whether the defendant committed crime A (e.g., assault), *and if so*, (b) whether that assault was committed with a specific intent (to rape, rob, etc.). Viewed from this perspective, specific intent crimes already create special verdicts, yet no one has suggested that the question of specific intent should be removed from the jury.⁹⁴ Similarly, charges which have lesser included offenses could be seen as asking the jury for a “special verdict”: (1) Did D do the act (2) if so, did D do so with malice; (3) if not, did D do so while provoked; (4) etc. These “special verdicts” are accepted every day.⁹⁵ In short, concern that adoption of an *Apprendi* approach to “every factor,” or even every “significant” factor, or even “every factor which raises the sentence six months,” would create havoc by introducing special verdicts is overblown.

Indeed, the real objection to this procedure seems administrative, not substantive: that the issues, for example, raised by federal sentencing guideline factors would simply overwhelm the trial and guilt would become a secondary matter.⁹⁶ But that smacks again of distrust of

93. See *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

94. I note in passing that, as a usual matter, the specific intent will raise the possible maximum sentence, but that may not always be the case.

95. This is not to say that the law with regard to lesser included offenses is in any respect clear, much less understandable. See Kyron Huigens, *The Doctrine of Lesser Included Offenses*, 16 U. Puget Sound L. Rev. 185 (1992).

96. Jacqueline Ross, among others, has suggested that in some instances the defendant may actually be prejudiced by having some issues—such as his prior record—submitted to the jury during the trial. See Jacqueline Ross, *Unanticipated Consequences of Turning Sentencing Factors into Offense Elements: The Apprendi Debate*, 12 Fed. Sent. Rep. 197 (2000). Leaving aside the particular point as to prior record, which the *Apprendi* court simply excised from the *Apprendi* rule, I believe that processes could be established to avoid such prejudice. See, e.g., *United States v. Old Chief*, 519 U.S. 172 (1997). In *Old Chief*, the Court suggested that a defendant worried about possible prejudice at his trial could stipulate as to his prior convictions. But even if that were not the case no one (at least not I) has ever suggested that defendants should not be put

the ability of the jury to deal with difficult and complex issues. We must simply reject that position because it undermines the entire reason for juries—to cut through the smog and, using common sense, to reach the truth.

D. THE LARGER IMPORTANCE OF APPRENDI: BEYOND SENTENCING FACTORS

It is far too early, of course, to know exactly how *Apprendi* will be applied by the lower federal courts, much less the Supreme Court. Any impact it might have on the sentencing guidelines movement would alone warrant calling it a landmark decision. But I would like to suggest here two further observations. First, *Apprendi* (and *Jones* before it) is a paean to the power of the jury. At a time when (particularly after the OJ Simpson verdict) some are calling for the abolition of, or at least the restriction of, the jury right, *Apprendi* starkly rejects those positions. Second, *Apprendi* may be seen as even a greater reaffirmation of the general requirement of guilt (and true moral guilt as confirmed by the conscience of the community—the jury)—as to all facts—as a central part of the criminal process.

Doug Husak and I have argued recently that the Supreme Court has adopted a position against strict criminal liability, and for requiring mens rea with regard to every element, in order to protect persons the Court sees as “innocent.”⁹⁷ John Wiley has similarly argued (convincingly

to hard choices. Suppose, for example, that a sentence could be increased (as under the Federal Sentencing Guidelines) based upon the amount of drugs. Even at a trial today, when that factor has been considered (in the federal courts) a sentencing factor, it would be the rare case in which a defendant could successfully object to, or a prosecutor purposely withhold, information relating to the amount of drugs involved in a transaction on the grounds of irrelevance. Moreover, a defendant who feared that evidence of the extent of the operation might persuade the jury to convict on shakier counts might “stipulate” as to that aspect of the charge, while still maintaining his innocence (e.g., on the basis of misidentification or lack of mens rea).

97. Douglas Husak & Richard Singer, Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer, 2 *Buff. Crim. L. Rev.* 859 (1999).

in my view) that in these cases the Court has gone out of its way to create hypothetical defendants who are innocent.⁹⁸ For example, in *X-Citement Video*,⁹⁹ the Court read into a statute prohibiting knowing transportation of child pornography a requirement of mens rea, thereby overthrowing the conviction of a pornography dealer, by conjuring up a FedEx deliverer (Alice) who was unaware of the (illegal) contents of the package she possessed. Characterizing the FedEx courier as “innocent,” the Court exonerated the obviously unknowledgeable transporter. Husak and I—and several others¹⁰⁰—see in these cases a new concern with innocence, and a heartening realism about prosecutorial discretion. On the other hand, Professor Davies has quite rightly indicated that the Court did not “define” that term,¹⁰¹ but it seems fairly clear that the defendants about whom we are now concerned (Bill, Charlotte, Daniel, Elaine) are not “innocent” in any significant sense. *Apprendi*, though not directly concerned with mens rea, might well combine with these earlier cases to require mens rea with regard to each of these “items” that severely increase (maximum) sentences.

If *Apprendi* reaches *that* far, then it is also likely to alter, and perhaps ban, the “greater crime” doctrine which is discussed in the next part of this article. That conclusion is by no means mandated by *Apprendi*. But the emphasis on the role of the jury—and the insistence that actual guilt as to every important factor be proved to the jury—may well portend such a resolution in the next decade.

Still, the position should not be overstated. Knowledge is not the only mens rea state which might be relevant here. As suggested later in this paper, a defendant, even

98. John S. Wiley, Jr., Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation, 85 Va. L. Rev. 1021 (1999).

99. United States v. X-Citement Video, 513 U.S. 64 (1994).

100. See Alan Michaels, Constitutional Innocence, 112 Harv. L. Rev. 829 (1999); Wiley, *supra* note 98.

101. Sharon L. Davies, The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance, 48 Duke L.J. 3412 (1998); Rachael Simons, Ratzlaf v. United States: The Meaning of “Willful” and the Demands of Due Process, 28 Colum. J. Law & Soc. Prob. 397 (1995).

Alice, might be found to be reckless with regard to the contents of the film, at least if it were marked "Sex Film," or "XXX." A jury might well find the FedEx deliverer for whom the Court showed so much solicitude in *X-Citement Video* was aware of a risk—depending on the context a sizeable risk—that the contents of her package were contraband.

E. The Model Penal Code and Sentencing Factors

Surprisingly, the Model Penal Code is ambiguous on the question. The Code *does* contain a definition of "element of an offense" which at first blush seems to incorporate virtually every noun in a statute. Thus, section 1.13(9) provides:

- (9) "element of an offense" means (i) such conduct or (ii) such attendant circumstances or (iii) such result of conduct as
 - (a) is included in the description of the forbidden conduct in the definition of the offense;
 - (b) establishes the required kind of culpability; or
 - (c) negatives an excuse or justification for such conduct; or
 - (d) negatives a defense under the statute of limitations; or
 - (e) establishes jurisdiction or venue.¹⁰²

This seems to include virtually every part of every definition of every crime. But consider the following statute:

- (1) A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein. . . . It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

- (2) Grading. Burglary is a felony of the second degree if it is perpetrated in the dwelling of another at night, or if, in the

102. Model Penal Code § 1.13(9) (Proposed Official Draft 1962).

course of committing the offense, the actor (a) purposely, knowingly or recklessly inflicts or attempt to inflict bodily injury on anyone; or (b) is armed with explosives or a deadly weapon. Otherwise, burglary is a felony of the third degree.

Are “dwelling,” “of another,” or “at night” elements of the crime of “second degree” burglary? Or is the “crime” of burglary, with its elements outlined in section (1), simply “enhanced” by the factors in subsection (2)? Suppose, for example, that the defendant believes (reasonably or not) that it is not nighttime, or that he is entering his own house, or that the place he is entering is not a “dwelling”? Does this avoid liability for second degree burglary, or are these not elements, but, as the heading itself suggests, merely “grading” factors, not relevant to mens rea at trial?

The problem is aggravated by the very fact that the statute—like section 841 of the federal code’s drug statute¹⁰³—designates section (2) “Grading,” as though the only “offense” has already been defined in section (1). In the absence of such a label, the argument that everything in (2) is an element would be much easier; the label attached to (2) makes that argument more difficult.

These questions might appear to be unrelated to the Code’s definitions and approaches. But the statute just quoted is from the Code itself—it is section 221.1, defining burglary. Yet neither the explicit words of the Code nor the commentary to this part of the Code would unequivocally resolve the questions posed above. Ironically, the question as to what is an element in burglary is answered not in the burglary section, nor in the section defining material element, but in the commentary to 2.04 (2)—the section on mistake, in which the Code makes clear that “of another,” “dwelling,” and “at night” are elements of the crime.¹⁰⁴ The Code comments:

To deny the relevance of the defense of mistake in this

103. See supra note 11.

104. Model Penal Code § 2.04(2) cmt. at 272-74 (Official Draft and Revised Comments 1985).

situation would be in effect to re-characterize, for this special purpose, the culpability level normally required by the Code for the material element of the more serious offense. The doctrine that when one intends a lesser crime he may be convicted of a grave offense committed inadvertently leads to anomalous results if it is generally applied in the penal law. . . .¹⁰⁵

One might have reached this conclusion anyway—after all, the Code gives us the concept of “material element,” which goes to any harm the legislature is attempting to curtail.¹⁰⁶ That concept would surely lead to the conclusion that the legislature believes the “harm” of breaking into “another’s” “home” “at night” is more serious than other harms which also qualify as burglary under section (1). Moreover, the notion that the “degree” of the burglary is “raised” suggests that we should read the “at night” entry as a “new crime.” I suspect that we would all agree that these arguments, either separately or combined, are sufficient to answer the question here, even if there were no answer in section 2.04(2).

On the other hand, in another statute which was not so parsed by Code commentary, it would be possible to argue that, because the Code endorsed a highly discretionary and open-ended sentencing structure, based upon a combination of traditional goals of criminal law,¹⁰⁷ the Code would not require proof at trial of some circumstances—“night”; “of another”—even though they significantly increased punishment within the maximum

105. *Id.*; see also *State v. Elton*, 680 P.2d 727, 731 (Utah 1984) (“To hold one liable for a greater crime which he actually sought to avoid committing on the ground that he committed a lesser crime turns the doctrine of lesser included offenses on its heads. . . .”).

106. Model Penal Code § 1.13(10) (Proposed Official Draft 1962) (“[M]aterial element of an offense means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with the harm or evil, incident to conduct, sought to be prevented by the law defining the offense. . . .”).

107. Reflecting the view prevalent in the 1960s that indeterminate sentences with wide judicial discretion was the best system, the Code endorses rehabilitation, incapacitation, deterrence, and retribution. See *id.* § 7.01.

term permissible. Given the Code's general concern with mens rea, however, and its views on the "greater crime" theory discussed below, I believe that it would hold that any statutorily enunciated factor was both an element—and a material element—to which mens rea had to apply.

II. THE GREATER CRIME APPROACH

Hana and Laurel personify the paradigmatic cases of the "greater crime" theory. In contrast to the first tactic, in which a circumstance is held not be an element which the state must prove at trial, this approach concedes that it must be proven at trial, but holds that no mens rea is required for the circumstance. Of course, this is also true with regard to every "true" strict liability element. The difference here is that the defendant is already engaged in criminal activity; thus, if the defendant is, and knows he is, engaged in some criminal act, he is held strictly liable if the result is "more criminal" than he knew. Thus, Hana "knows" that assault is a crime. If assaulting a police officer is punished more seriously, that is a risk she took; with regard to the element of police officer, she is held strictly liable.

Although the doctrine of greater crime can be seen as incorporated in and as a variant of the felony murder doctrine,¹⁰⁸ its first appearance in a non-felony murder

108. Without exploring that doctrine at length here, it suffices to say that at least as first enunciated and applied by the courts in England during the 17th and 18th century, the doctrine, though alluring, is in fact not analogous. That is, although the defendant might well be found guilty of the crime of murder which would carry a greater moral stigma to it than the predicate felony for which he was actually guilty and which he undertook with the requisite mens rea, felony murder obviates the requirement that the prosecution prove a mental state of any kind as with regard to the greater harm. Moreover, at least in the time in which it was generated, the felony murder doctrine imposed no greater punishment upon the defendant for the greater crime since all the felonies (at least the felonies which Lord Coke seemed to have in mind when he cited Lord Dacre's case) were capital in and of themselves. The addition of a second capital felony as a second sentence of capital punishment as a generic matter would have had little practical impact upon the defendant. This ignores of course the fact that many judges imposed sentences other than capital hanging upon many defendants convicted of crimes which were, at least in theory, capital. But the imposition and

setting appears to have been in a case decided just before, and cited in, *The Queen v. Prince*.¹⁰⁹ In *The Queen v. Forbes & Webb*,¹¹⁰ the classic “alter-ego” good Samaritan case,¹¹¹ defendant saw an adult, in plain clothes, dragging (and perhaps beating) a “boy.” The defendant intervened and took hold of the adult, striking him several times. A second adult then grabbed the boy, and defendant struck him also. It turned out that both adults were plain-clothes police officers who were arresting the boy. The defendant argued that there was no evidence to convict him of “assaulting any peace officer in the due execution of his

execution of those non-capital sentences appears to have been quite random and does not appear to have been based necessarily upon the underlying predicate offense whether there was a homicide or death during the felony or not. That is, judges seemed to sentence some burglars, thieves, robbers, and rapists to transportation and others to death without any particular concern about the underlying crime. Thus, the defendant in a burglary which then “led to” a death which was then characterized as murder under the felony murder doctrine would at least in theory receive no greater punishment than if the death had not occurred. He was then, at least in theory, equally culpable with the burglar whose crime did not result, or lead to death. Nevertheless, many commentators and others, supporting the greater crime theory, have cited felony murder as an analog without noting the initial distinction between the two doctrines. Of course, by the middle of the 19th century when many *non-homicide* felonies began to be punished as non-capital, the analog is a valid one and could be cited as at least peripheral support. However, even by that time, the judges of the 19th century were beginning to restrict the reach of the felony murder doctrine to felonies which were “inherently dangerous.” Thus, with regard to felonies which were indeed life threatening (arson, robbery, rape, mayhem) it can easily be argued that the defendants were commonly reckless with regard to the possibility of aggravated harm, at least in the run of the mill case. While this restriction is still loose in many jurisdictions and the definition is itself ambiguous and of flexible application, most endorse the view that the doctrine should be restricted to serious felonies which seem to exclude the vast majority of those felonies in which there is no risk of death. Moreover, the supplementation of this limitation with the so-called “merger” or “included felony” rule would also seem to suggest that in most jurisdictions in this country, as we begin the 21st century, the vast majority of felonies would not serve as predicate felonies for a conviction where the defendant was non-reckless as to the possibility of death during the commission of a felony.

109. L. R. 2 C.C.R. 154 (1874); 80 ALL E.R. 881.

110. 10 Cox C.C. 362.

111. See also *People v. Young*, 183, N.E.2d 319 (N.Y. 1962). The “alter ego” rule itself is based upon dictum in *Stanley’s Case*, 84 Eng. Rep. 1094 (circa 1700) (J. Kelyng), which misconstrued Dacre’s case. That, however, is a story for a different time.

duty. . . .” as required by the statute, because the defendant “did not know that they were constables.”¹¹² The Recorder, dismissing the argument in one sentence, responded that the offence was “not assaulting them knowing them to be in execution of their duty, but assaulting them being in the execution of their duty.”¹¹³ *Forbes*, however, is not, as Lord Bramwell in *Prince* seemed to think, a “greater” crime case—the penalty for the assault on a police officer was in fact no greater than that for a general assault.¹¹⁴ Thus, the case is indeed one of strict liability, but not of a “greater crime”: it holds “merely” that a mistake (even a reasonable mistake) as to a justification (defense of others) is irrelevant. While this question has everything to do with the general position of mistake, it has little to do with the greater crimes issue.

Lord Bramwell posed a second hypothetical about a “greater crime”: A burglar who, obviously knowing himself to be guilty of (the lesser crime of) housebreaking could not be acquitted, if charged with burglary, on the grounds that he believed he was only committing housebreaking.¹¹⁵ Bramwell did not provide any explanation as to why the defendant was guilty of the greater crime; he did not point to any precedent, and there is nothing in *Forbes* which elucidates or even supports this point.¹¹⁶ The absence of explanation in *Forbes* (and *Prince*) is even more perplexing because, at almost exactly the same time, the court in the

112. *Forbes*, 10 Cox C.C. 362.

113. *Id.*

114. The statutes in question, 24 & 25 Vict. c. 100, §. 38, made such an assault a misdemeanor, not even a high misdemeanor. Glanville Williams declares that *Forbes* was “not based on the lesser crime doctrine, but on the ground that the statute did not require knowledge.” Glanville Williams, *The Criminal Law: The General Part* 194 (1953). He says that “[t]he only useful comment that can be made upon *Forbes* is that it is a mere direction to the jury by a Recorder and is unsound” *Id.* Williams also notes that Lord Brett, in *Prince*, had stressed that, in *Forbes*, “the prisoners certainly had strong ground to suspect, if not to believe, that he was a policeman.” *Id.* But as Williams says, this explanation does not work because there is no indication that the victim in any way announced his authority.” *Id.* Whether a defendant like *Forbes*, or *Hana*, or *Laurel*, might be convicted on the basis of recklessness will be discussed *infra* Section II E.

115. *Forbes*, 10 Cox C.C. 362.

116. See *id.*

famous case of *Faulkner*¹¹⁷ was rejecting the concept in another, broader context. *Faulkner*, a sailor, went into the hold of his ship to grab (a prohibited) nightcap. When he sought to recork the cask, he lit a match, which started a fire, which destroyed the ship. The prosecutor argued that because *Faulkner* was guilty of the felony of larceny, he was criminally liable for any other results that ensued. The Court of Crown Cases Reserved rejected what Judge Barry called a “very broad proposition” for which the state contended, and required the state to prove some mens rea (possibly even accepting negligence) as to the actual result.¹¹⁸

It is possible to reconcile *Forbes* (and *Prince’s* affirmation of *Forbes*) with *Faulkner* because the former was (according to Bramwell’s misunderstanding) being charged with a greater degree of the same crime, whereas *Faulkner* was being charged with a “totally different” crime. But that explanation seems unlikely, since just three years earlier the Court of Criminal Appeals had exonerated *Pembliton*, who had thrown a rock intending to hit people, when he had been charged with “maliciously” breaking the window behind those people.¹¹⁹ The concern of the court in both *Pembliton* and *Faulkner*, was with the defendant’s actual mental state regarding the actual result, not with whether his actual mens rea was less malicious than his purported mens rea. Thus, we are left in the dark as to why the *Forbes* and *Prince* courts thought it so obvious that the defendant in a situation such as this should be convicted of the greater crime. Nevertheless, both the specific rule of assaults engendered in *Forbes-Prince* and the more general rule of the “greater crime” has persisted.

117. *The Queen v. Faulkner*, 13 Cox C.C. 550 (Court of Crown Cases Reserved - Ireland) (1877).

118. *Id.*

119. *The Queen v. Pembliton*, 12 Cox C.C. 607 (1874).

A. Assaults

Under the greater crime theory as adopted in many states today, Hana will almost certainly be facing ten years in prison, even though she knew neither her victim's status, nor that she was on duty.

The alleged principle of the *Forbes* case has been adopted by virtually every state and expanded to reach virtually every conceivable possible "vulnerable" or "specially protected" victim. Aside from increased punishments for assaults on law enforcement officers,¹²⁰ state codes now specially protect, among others, firefighters,¹²¹ school employees (variously described),¹²² judges,¹²³ emergency medical personnel,¹²⁴ jurors,¹²⁵ public transportation workers,¹²⁶ conservation officers,¹²⁷ the "young,"¹²⁸ the "old,"¹²⁹ the disabled,¹³⁰ and those officiating

120. E.g., 18 Pa. Cons. Stat. § 2702 (1999); N.Y. Penal Law § 120.05(3) (McKinney 1998); 21 Okla. Stat. Penal § 649 (1999); Nev. Rev. Stat. § 200.471 (2000); N.C. Gen. Stat. § 14-34.7 (1999); Or. Rev. Stat. § 163.208 (1997); R.I. Gen. Laws § 11-5-5 (2000); N.J. Stat. Ann. 2C:12-1(b)(5) (West 2000); W. Va. Code § 61-2-10b (2000); Va. Code Ann. § 18-2-51.1 (Michie 2000).

121. E.g., 18 Pa. Cons. Stat. § 2702 (1999); N.Y. Penal Law § 120.05(3) (McKinney 1998) (while rendering aid); S.C. Code Ann. § 16-3-635 (Law Co-op. 1999) (in lawful discharge of duties); Nev. Rev. Stat. § 200.471 (2000) (only volunteer firefighters); Or. Rev. Stat. § 163.208 (1997); R.I. Gen. Laws § 11-5-5 (2000); N.J. Stat. Ann. 2C:12-1(b)(5)(b) (West 2000); W. Va. Code 61-2-10b (2000).

122. E.g., 18 Pa. Cons. Stat. § 2702 (1999); 21 Okla. Stat. Ann. § 650.7 (1999) (by parent or student; not knowingly; if in performance of duties); S.C. Code Ann. § 16-3-612 (Law Co-op. 1999) (includes a long list of persons, including food service staff, volunteers, school bus drivers, school crossing guards, and teachers' assistants); Nev. Rev. Stat. § 200.471 (2000); N.M. Stat. Ann. § 30-3-9 (Michie 1999); Or. Rev. Stat. § 163.208 (1997) (includes school bus drivers, chaperones); Utah Code Ann. § 76-5-102.3 (2000); R.I. Gen. Laws § 11-5-7 (2000); W. Va. Code § 61-2-15 (2000).

123. E.g., 18 Pa. Cons. Stat. § 2702 (1999); Nev. Rev. Stat. § 200.471 (2000); R.I. Gen. Laws § 11-5-5 (2000); N.J. Stat. Ann. 2C:12-1(f) (West 2000).

124. E.g., 18 Pa. Cons. Stat. § 2702 (1999); 21 Okla. Stat. Ann. § 650.4 (West 1999) (in lawful discharge of duties); S.C. Code Ann. § 16-3-635 (Law Co-op. 1999); N.C. Gen. Stat. § 14-34.6 (1999); Utah Code Ann. § 76-5-102.7 (2000); N.J. Stat. Ann. § 2C:12-1(5)(c) (West 2000); W. Va. Code § 61-2-10b (2000).

125. E.g., 21 Okla. Stat. Ann. § 650.6 (West 1999).

126. Pa. Cons. Stat. § 2702 (1999); R.I. Gen. Laws § 11-5-5 (2000); W. Va. Code § 61-2-10b (2000).

127. R.I. Gen. Laws § 11-5-5 (2000).

128. N.H. Rev. Stat. Ann. § 631:1(d) (1999); (under 13 knowingly); Tex. Penal

or coaching at athletic events.¹³¹

The statutes also have a wide gamut of mens rea requirements. Most use the term “knowingly,”¹³² but it is not clear whether this modifies only the conduct or the victim as well. Some use the phrase “knowing or having reason to know”¹³³ and others are silent.¹³⁴

In a recent Washington State decision, the rule of “greater crime” strict liability continues. The Washington statute provides that:

A person is guilty of assault in the third degree if he or she. . . . Assaults a law enforcement officer or other employee of a law enforcement agency who was performing

Code Ann. § 22.04 (West 2000) (under 14); R.I. Gen. Laws § 11-5-14.2 (2000) (under 10); Mont. Code Ann. § 45-5-212 (1999) (under 14).

129. 21 Okla. Stat. Ann. § 646(2) (West 1999); S.C. Code Ann. § 22.04 (Law Co-op 1999) (over 65); Wis. Stat. § 940.19(6) (1999) (over 62); R.I. Gen. Laws § 11-5-10 (2000) (over 60); see also 73 A.L.R. 4th 1123 (1999).

130. Tex. Penal Code Ann. § 22.04(c)(3) (2000); N.C. Gen. Stat. § 14-32.1 (1999); Wis. Stat. § 940.19(6)(b) (1999); R.I. Gen. Laws § 11-5-10.2 (2000) (severely impaired).

131. 21 Okla. Stat. Ann. 650.1 (1999) (no knowledge required, but intent); W. Va. Code § 61-2-15a (2000).

132. Ariz. Rev. Stat. § 13-1204(A)(5) (2000); Ark. Code Ann. § 5-13-204 (a) (Michie 1999); Cal. Penal Code § 243 (West 2000); Colo. Rev. Stat. § 18-3-201 (1999); Idaho Code § 18-915 (2000); Ill. Comp. Stat. § 720, para 5/12-2(a)(6) (2000); Iowa Code Ann. § 708.3A(1) (West 1999); La. Rev. Stat. Ann. § 14:34.2 (West 2000); Neb. Rev. Stat. § 28-308 (2000); N.H. Rev. Stat. Ann. § 631:1(d) (1999); N.C. Gen. Stat. § 14-16.7 (1999); 21 Okla. Stat. Ann. § 649, 650 (1999); 18 Pa. Cons. Stat. § 2702 (1999); S.C. Code Ann. § 22.01 (Law Co-op 1999); S.D. Codified Laws § 22-18-1 (Michie 2000); Tenn. Code Ann. § 39-13-101 (1999); R.I. Gen. Laws § 11-5-7 (2000) (schoolteacher). Some state courts, moreover, have read an implied knowledge requirement into statutory provisions. See *Fletcher v. United States*, 335 A.2d 248 (D.C. App. 1975); *State v. Morey*, 427 A.2d 479 (Me. 1981).

133. Nev. Rev. Stat. § 200.471(2)(c) (1999); N.D. Code 12.1-17-01 (2000) (knows to be a fact); Utah Crim. Code § 76-5-102.3; 102.4; 102.7 (2000) (knowing victim is peace officer or school employee or health care provider and basic life support worker); Wis. Rev. Stat. § 940.19(6) (1999) (physical disability which is discernable by an ordinary person viewing the physically disabled person); id. § 940.0(2) (battery on law enforcement officers and fire fighters acting in official capacity); W.Va. Code Ann. 61-2-10b (2000); Va. Code Ann. § 18.1-51.1 (2000).

134. S.D. Code § 22-18-1.2 (2000).

his or her official duties at the time of the assault.¹³⁵

In *State v. Brown*,¹³⁶ the Washington State Supreme Court, rejecting the view of two of the three divisions of the Washington appellate court which had held that the defendant must know that his victim is a police officer,¹³⁷ held that, as a matter of statutory interpretation and legislative intent, no such knowledge was required.¹³⁸

Statutes which increase the punishment of those who assault “elderly” or “vulnerable” victims present the same problem. In *People v. White*,¹³⁹ the court held that while the victim’s age, like any other aggravating factor, was an element which had to be proved beyond a reasonable doubt to the jury,¹⁴⁰ there was no requirement that the defendant know his victim’s age.¹⁴¹ Similarly, a Texas court held that a defendant who fired a shotgun into a house need not know that one of the persons to whom he caused serious bodily injury was a four-year-old, although the statute explicitly criminalized “intentionally, knowingly, recklessly, or with criminal negligence . . . cause(ing) to a child, elderly individual, or disabled individual . . . serious

135. Rev. Code Wash. § 9A.36.031(1)(g) (2000).

136. 998 P.2d 321 (Wash. 2000) (also known as “Palmer”).

137. See *State v. Allen*, 840 P.2d 905 (Wash. Ct. App. 1992); *State v. Tunney*, 895 P.2d 13 (Wash. Ct. App. 1995).

138. *Brown*, 998 P.2d 321. The court pointed out, quite cogently, that “[t]he Legislature has in other statutes relating to crimes against law enforcement officers specifically required knowledge by an offender that the victim is a law enforcement officer,” and concluded that the legislature here intended to make the crime one of strict liability. *Id.* The court did not, however, cite, much less discuss, any actual statements by the legislators to this effect, or the timing of the statutes (i.e., had the current statute been enacted *before* the *in pari materia* statutes, the inference of intent would be weakened). The general problems of statutory interpretation are well known, and need not be repeated here. See Knoll & Singer, *supra* note 8. The case law on the question of knowledge is also mixed. For cases holding that knowledge of the status of the victim is required, see, e.g., *State v. Moll*, 502 A.2d 87 (N.J. Super. Ct. App. Div. 1986); *People v. Pineiro*, 497 N.Y.S.2d 460 (N.Y. App. Div. 1986). But see *Commonwealth v. Flemings*, 652 A.2d 1282 (Pa. 1995).

139. 608 N.E.2d 1220 (Ill. App. 1993).

140. Citing, e.g., *People v. Clark*, 388 N.E.2d 1107 (Ill. App. 1979); *People v. Sanders*, 548 N.E.2d 103 (Ill. App. 1989).

141. Accord *People v. Jordan*, 430 N.E.2d 389 (Ill. App. 1981).

bodily harm.”¹⁴² Although that case could easily be explained on grounds that the defendant was reckless,¹⁴³ that was not the basis of the court’s decision.¹⁴⁴

B. Drugs

As seen above,¹⁴⁵ the federal courts have held that the amount or type of drugs involved in an offense, although sometimes significantly increasing the punishment, was not an “element” of the crime but a “sentencing factor.” Most state courts, however, disagree, holding that the amount is an element provable at trial.¹⁴⁶ However, the vast majority also held that the mens rea applicable to possession, usually knowledge, does not apply to the amount.

The most (in)famous contrary state case is *People v. Ryan*,¹⁴⁷ in which Ryan, who had previously ordered mushrooms impregnated with psilocybin, received a phone call from the intermediary that a shipment had arrived. In the intermediary’s words, there were a “shitload” of mushrooms. When Ryan received them, he was immediately arrested. The mushrooms turned out to have weighed 933 grams (two pounds) and contained 796 milligrams of the drug. The New York statutes provided seven different levels of punishment, depending on the amount. Ryan successfully argued that the amount of psilocybin was a material element of the crime, and the state had to prove knowledge. The New York legislature was not amused, and quickly rewrote the statute so that amount was not a material element as to which mens rea

142. *Zubia v. State*, 998 S.W.2d 226 (Tex. Crim. App. 1999).

143. See *infra* Section II E.

144. A dissenting judge argued that because of the wording of the statute, the mens rea terms had to modify the victim as well as the injury. See *Zubia*, 998 S.W.2d at 228-29 (Meyers, J., dissenting). That analysis would have paralleled that in *X-Citement Video*, 513 U.S. 64 (1994).

145. *Supra*, Section I B 1.

146. See Appendix A.

147. 626 N.E.2d 51 (N.Y. 1993).

applied.¹⁴⁸

Similar results occur when a defendant delivers drugs to a minor¹⁴⁹ or uses a minor in distributing drugs.¹⁵⁰ The “school zone drug cases” discussed above could similarly be explained, and some legislatures have expressly declared mens rea inapplicable to this element.

Of course drugs and assaults are not the only areas where the greater crime theory can raise its head. For example, must a defendant know that the bribe he is taking involves more than a statutory amount?¹⁵¹ Must a thief such as Laurel “know” the amount she has taken is in excess of the grand larceny line?

148. N.Y. Penal Law § 220.18 (1995).

149. See 21 U.S.C. § 859 (1994); *United States v. Pruitt*, 763 F.2d 1256 (11th Cir. 1985). But see *United States v. Moore*, 540 F.2d 1088 (D.C. Cir. 1976). The states seem to agree that age is an element, though there is also consensus that knowledge of age is not required. See, e.g., *People v. Montalvo*, 482 P.2d 205 (Cal. 1971); *State v. Welch*, 507 N.W.2d 580 (Iowa 1993); *State v. Wientjes*, 341 So. 2d 390 (La. 1976); *State v. Platt*, 525 S.W.2d 637 (Mo. Ct. App. 1975) (statute explicitly says mens rea as to age is not required); *State v. Saunders*, 241 S.E.2d 351 (N.C. Ct. App. 1978) (same); *State v. Hernandez*, 770 P.2d 641 (Wash. Ct. App. 1989) (age is element, but knowledge of age is not).

150. For example, in one case the defendant called his drug supplier and asked the person who answered the phone to convey to the supplier a message about the location of a drug drop. Unhappily for the defendant, the answerer was only 12 years of age. Defendant was convicted of knowingly delivering a controlled dangerous substance, see 21 U.S.C. § 841 (1994), by using a minor, see 21 U.S.C. § 861 (1994), although he obviously had no knowledge—and probably took no conscious risk at all—that the answerer was a minor. See *United States v. Valencia-Roldan*, 893 F.2d 1080 (9th Cir. 1990). All the cases are in accord. See *United States v. Chin*, 981 F.2d 1275 (D.C. Cir. 1992); *United States v. Cook*, 76 F.3d 596 (4th Cir. 1996); *United States v. Williams*, 922 F.2d 737 (11th Cir. 1991); *United States v. Carter*, 854 F.2d 1102 (8th Cir. 1988). These cases, of course, are similar to the typical sale to minor liquor cases, where the courts frequently hold that defendant’s mistake, however reasonable, would not be a defense. The Valencia-Roldan case is particularly severe, since there was no way for the defendant to hazard a guess as to the age of the telephone answerer. In contrast, in sale-to-minor cases the defendant usually sees the purchaser, and can therefore be required to make a (reasonable) assessment as to age.

151. See, e.g., *State v. Reynolds*, 667 N.Y.S.2d 591 (N.Y. Sup. Ct. 1997) (interpreting N.Y. Penal Law §§ 180.03, 180.08 and holding that knowledge is not required).

C. Moral Luck

The greater crime theory has a related cousin in the theory of “aggravated harm,” which Ron Allen discussed twenty-five years ago.¹⁵² The rule—sometimes but not always applied—is that if I intentionally stab, or even push, X, with no intent to kill, but intent to harm, and death results, there is a good likelihood that, under the rubric of malice, or of gross recklessness, or of some other explanation, I will be held responsible for “intending” that death. Of course, this is related as well to the overarching notion of a “general intent.” To the extent that that doctrine looks only at my mens rea with regard to the conduct, not the result, and possibly not even the attendant circumstances, it is a variant of strict liability.

Any strict liability of this kind depends in part upon the notion of moral luck. Kenneth Simons has recently canvassed the relation of moral luck and moral culpability, and concluded that if moral luck is ever allowable, it is in this case:

Why does allowing a fortuity. . . to increase a punishment seem more justifiable than allowing such a fortuity to turn a non-criminal act into a criminal act . . . the decision to impose the stigma of a criminal condition might seem more momentous than the decision to increase the penalty of a person who is sufficiently culpable. . . . On the other hand, the latter decision is hardly a trivial one, given the possible size of the disparity in penalty.¹⁵³

Simons essentially turns the question into one of proportionality, not unlike that we have already suggested with regard to distinguishing sentencing factors from crime elements: If the increase in punishment is “too” severe, then the circumstance must be treated as an element of the crime (and, ostensibly, require a mens rea). It is not

152. Ronald Allen, *Retribution in a Modern Penal Law: The Principle of Aggravated Harm*, 25 *Buff. L. Rev.* 1 (1975).

153. Kenneth W. Simons, *When Is Strict Criminal Liability Just*, 87 *J. Crim. L. & Criminology* 1075, 1119 (1997).

surprising, perhaps, that the concept of proportionality, which informs all of retributivism, also shapes one's answers here.

Although Simons is dubious about whether a theory of retribution can ever encompass a moral luck aspect, he argues that:

The substitute culpability principle is not a genuine instance of moral luck at all. The principle of moral luck asserts that equally culpable individuals can deserve different punishments in light of the difference that actually makes in the world. It is a principle of responsibility for actual outcomes.¹⁵⁴

Simons argues that Clara, a pickpocket who does "all that she believes necessary to complete the crime," suffers from the "pure example of moral luck" called "luck as to circumstances."¹⁵⁵ But what "crime" does Clara believe she is committing—petty larceny, grand larceny, or simply attempted larceny? Simons contrasts Clara with Fred, who enters a train with the intention of pickpocketing, *if* he can find a pocket, but finds no one there. Fred, Simons argues, should be punished less than Clara: "A retributive theory that values personal autonomy . . . properly treats an actor such as Fred as less blameworthy because of his (good) circumstances luck."¹⁵⁶ But while one must value personal autonomy, if indeed there were evidence of Fred's intent to commit a crime, he would be guilty of an attempt under the Model Penal Code, which requires only a substantial step strongly corroborative of Fred's intent. I see no trouble with convicting Fred of attempt, assuming that, as the Code does, we provide an avenue of renunciation for Fred.¹⁵⁷ It is true, of course, that Fred has not manifested his internal intent quite as much as Clara, and that he might withdraw once confronted with an actual pocket, but

154. *Id.* at 1110.

155. Simons, *supra* note 153, at 1116.

156. *Id.*

157. See Model Penal Code §§ 5.01(1), (4) (Official Draft and Revised Comments 1985).

such speculation, particularly weighted against the Code's requirement of "strong" corroboration, is not necessarily required by retributivism.¹⁵⁸

Ultimately, Simons suggests three situations in which formal strict liability can be consistent with retributivism:

1. When it expresses no more than the moral luck principle;
2. When it is a (justifiable) rule-like form of negligence;
3. When the comparable culpability principle applies.

Each of these categories seems to apply to our greater crime case. I do not—now—wish to explore these issues, except to say that moral luck is itself an uncertain claim, and that even a rule-like form of negligence is usually seen as incompatible with retribution, which requires subjective liability.

D. The Model Penal Code

The Model Penal Code rejects the greater crime theory. Section 2.04(2) explicitly provides that "[t]he ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed."¹⁵⁹

The Code and the Code commentary, however, are stunningly silent on the explanation for this view. The commentary published with tentative draft number 4, in 1955, says merely that "it may not be right to hold him for the graver crime. . . . The doctrine that when one intends a lesser crime he may be convicted of a grave offense committed inadvertently leads to anomalous results . . . (and) its generality has rightly been denied."¹⁶⁰

158. The Code argues that the line should be drawn much earlier so as to allow police intervention. But that seems wrong—early stops, for example, might be allowed without convicting the defendant, even if there were otherwise strong evidence of his intent to act later. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968).

159. Model Penal Code, § 2.04 (Proposed Official Draft 1962).

160. Model Penal Code § 2.04 cmt. at 137 (Tent. Draft #4, 1955). The commentary cites only Glanville Williams, *Criminal Law*, 156-61 (1953).

Nor is the discussion at the ALI more enlightening. There is some suggestion in the comments of the Reporter (Professor Herbert Wechsler) that the provision was intended to assure that the defendant was indeed punished for something. Positing the case of a defendant who abducts a child whom he thinks is twelve when she is actually nine,¹⁶¹ he declared “[o]bviously if he is prosecuted (for removing a child of ten from the custody of a parent) he should not be acquitted. That is the one thing that is clear. But how to attain that result is not so clear.”¹⁶² Indeed, Miss Kelly commented from the floor: “I have a feeling that you are a little too concerned with catching a few people that might otherwise get away.”¹⁶³ This colloquy stands in sharp contrast to the rationale offered by the Commentary, and to Professor Wechsler’s later observation that:

(While) courts would now hold that the ignorance of mistake . . . is not a defense. . . . It is only because we are attempting to be strict and rigorous about culpability requirements relating to the elements of the offense that we really are brought to this as a serious problem.¹⁶⁴

The major point of dispute at the ALI was not whether to allow the mistake as relevant, but the procedural question of whether to convict the defendant of the lesser crime, or to convict him of the greater crime, but punish him for the lesser offense. The ALI overruled the Reporter, who proposed the first alternative, and adopted the current version. The Code provision itself (as opposed to the idea of allowing lack of knowledge as relevant to a greater crime charge) has been markedly unsuccessful. Six states appear to follow the Code, but the vast bulk of jurisdictions have

Williams has nothing but disdain for the greater crime doctrine. See Williams, *supra* note 114.

161. Very similar to the two sections of the Offences Against the Persons Act *not* involved in Prince, see *supra* note 118.

162. A.L.I. Proc. at 165 (1955).

163. *Id.*

164. *Id.* at 167.

made no special provision for the situation.¹⁶⁵

Notwithstanding Simons' observation that *this* defendant, among all those upon whom strict liability is imposed, is the "most likely" one to inculcate, the argument of the Code rings true: If punishment must be proportionate to harm and culpability, even defendants such as these should not be visited with sanctions for unintended and unrisks harms,¹⁶⁶ at least unless the crime charged provides for (criminal) negligence as a basis for liability.

E. Lesser Included Mens Reas—Recklessness and Acceptance

Nevertheless, the lesson of the Code is clear: Adherence to basic notions of culpability should mean that defendants charged with "knowingly" committing the greater crime should be exonerated. But this does not end the inquiry. The defendant may have a lesser mens rea, and thus be liable for a lesser offense, if the state does not seek its full pound of flesh. Many of the greater crimes cases could easily be analyzed in terms of recklessness. Surely where the defendant knows that he is already committing a crime, it is easily argued that he was (or a jury could reasonably find that he was) reckless with regard to the likelihood that he would cause more injury than he expected. This would depend, of course, upon the likelihood of the greater harm being present or occurring and of the significance of the likelihood. This turns upon our definition of recklessness.

We begin with Laurel, our thief. On the one hand, most thieves probably want to steal as much as they possibly can. To say that they take a substantial risk that there will be a great deal of money in the heist is cognitive dissonance at its worst: They *hope* there will be a great

165. Model Penal Code § 2.04 cmt. at 274 (Official Draft and Revised Comments 1985).

166. Professor Wechsler mentioned only glancingly possible liability based on recklessness. A.L.I. Proc., *supra* note at 162, 167 (1955).

deal of value in the heist. In the terms of the Model Penal Code, their mens rea with regard to the attendant circumstance of value is not merely recklessness or knowledge, but purpose.¹⁶⁷ But suppose that Laurel Two only wanted to steal fifty cents for bus fare and believed that she had taken only that amount. Did she, nevertheless, take a “substantial risk” that there would be more than she bargained for? Perhaps. But the likelihood that anyone will be carrying an item worth \$50,000 is extremely small. Can she then be said to be reckless?

The Model Penal Code requires that a risk to be reckless must be “substantial,”¹⁶⁸ but the term cannot be quantitative. If Peter is asked to pick one of ten thousand guns, only one of which is loaded and pull the trigger at Jon’s head, Peter is clearly “reckless” or “wanton” or “heedless” if the gun discharges, whatever the statistical probability of that event occurring. This may require a definition of recklessness that does not depend on, or even imply, quantification; indeed, it would be easier and more understandable if we talked about the Code’s “substantial and unjustifiable risk” as a term of art connoting mostly lack of justification, and having little to do with the statistical likelihood of risk.¹⁶⁹

If that is the proper definition of recklessness, then even Laurel, who had no thought about whether there might be a buffalo nickel in the purse, would be reckless with regard to the value of the item stolen. Indeed, only if Laurel Two, having obtained all the change in the purse, stopped to replace all but that which she “needed,” would there be a plausible argument not to hold her for *recklessly* stealing the buffalo nickel.

Applying that definition to most of our greater crime

167. Model Penal Code, § 2.02 (1) (Proposed Official Draft 1962).

168. *Id.* § 2.02(3).

169. *Id.* For a similar analysis of recklessness, see *People v. Hall*, 99 P.2d 207 (Colo. 2000). The court there held reckless a former ski racer trained in ski safety who lost control of his skis and killed a patron on the slopes. *Id.* The court explicitly adopted a “balancing” test of the kind suggested here: Whether the risk is “substantial” requires weighing not only the magnitude of the risk that the harm will occur but also the magnitude of that harm.” *Id.*

cases would yield convictions in most instances: It would be the extremely unique case in which the defendant could persuade us that he did not wish to risk the greater crime under any circumstances and did everything he could to avoid it. Hana would also probably be held liable. But another assaulter, who (we were persuaded) specifically intended *not* to beat up a police officer, might have a claim of mistake.

Thus, Hana and Laurel (one) might be guilty of recklessly assaulting or stealing, or possessing, but not of knowingly doing so. This would be consistent with the notion of “equal culpability”—and “non-equal culpability”—of which Douglas Husak has spoken eloquently.¹⁷⁰

One might also consider Alan Michaels’ suggestion of another level of mens rea: “acceptance.”¹⁷¹ An actor is “accepting” of a possible result, says Michaels if, knowing that the result would certainly occur, he nevertheless proceeds.¹⁷² Of course, this asks the jury to determine even more on a counterfactual basis than does “recklessness,” but it also proposes some intermediate point, short of knowledge, under which many defendants might actually be found guilty.

Arguably, the recklessness-acceptance analysis is not inconsistent with, and may in fact find support in, recent Supreme Court cases. In *Staples*¹⁷³ and *X-Citement Video*¹⁷⁴ in particular, the Court suggested that defendants engaged in an activity in which there was a substantial risk (against which they might protect themselves more easily) of a harmful result might fairly be held liable if they did not take such steps as a precaution. Thus, in *X-Citement Video*, the Court suggested, in a footnote, that producers of films might be held liable (whether under a strict liability

170. Douglas N. Husak & Craig A. Callender, Willful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality, 1994 Wis. L. Rev. 29.

171. Alan C. Michaels, Acceptance: The Missing Mental State, 71 S. Cal. L. Rev. 953 (1998).

172. See *id.* at 962.

173. *Staples v. United States*, 511 U.S. 600 (1994).

174. *United States v. X-Citement Video*, 513 U.S. 64 (1994).

notion or one of recklessness) for employing a minor in a sex film because they had available methods to ascertain the age of an actor which were not available to a distributor of the same film. That is, if the defendant were engaged in an activity which should put him on notice that there was a possibility of regulation,¹⁷⁵ it is not unfair more readily to hold him liable. Although I believe that the Court's opinions should be read as requiring knowledge in all cases,¹⁷⁶ it is not implausible to construe the opinions as consistent with a "duty to inquire." The major difficulty with this duty, however, is that it appears to sound in negligence (whether tort or criminal is not clear), a standard which, in the criminal law in particular, would be enormously complex to administer.

III. JURISDICTIONAL ELEMENTS

A. *The General Theory of Jurisdictional Elements*

The greater crime theory presents one example, beyond strict liability simpliciter, in which mens rea is not required for an element of a crime. A second such example is where the element is deemed a "jurisdictional" element—a circumstance which "solely" or "primarily" has nothing to do with guilt, but "merely" establishes jurisdiction for the court to act. Mary Ann, Nancy, and Ophelia are designed to test the parameters of this approach.

In state cases, jurisdictional provisions, of course, are usually not in the criminal statute which the defendant has been accused of violating, but in a separate section of the code (perhaps not even the penal code) that provides, for example, all crimes committed within a county shall be tried in the county seat court of that county. Thus, the venue or jurisdiction provision is clearly not an element of the "offense" because it is not contained in the legislative

175. See *Staples*, 511 U.S. at 600, 606-07 n.3, 611 n.6; *X-Citement Video*, 513 U.S. at 64, 77 n.5.

176. See *Singer*, *supra* note 3.

statement of what constitutes the crime. But, assuming a statute where the legislature has specifically declared a venue or jurisdictional aspect to the crime, it would seem that it ought to be a material element and not simply an element of the crime.

One could envision, for example, statutes which increased liability depending upon the generic risk to persons created because of the population. In some instances, of course, the reason for the distinction may not be obvious. Nevada, for example, allows legalized houses of prostitution except "in a county whose population is 400,000 or more."¹⁷⁷ The purpose, apparently, is to preclude such businesses in Las Vegas, the major city in the only county whose population exceeds 400,000. On the other hand, consider a statute which makes it a misdemeanor to drive a car without proper emission controls in a town of 50,000 or less, but a felony to do the same thing in a town of one million or more, on the theory that the emissions are more dangerous to human safety or health in the latter situation. To the extent that the size of the town or population is a "jurisdictional" element of the offense, however, it would seem to be more than a mere jurisdictional element, since it is not "exclusively related to the jurisdiction or venue" but it is also related "to the harm or evil sought to be prevented" by the legislation. Thus, in the code's terms, the designation of the size of the town would be not merely an element, but would become a "material" element of the crime requiring mens rea.

The problem with this analysis is that it would apply to all statutory phrases which related to location or other items not immediately perceivable as relevant to culpability. Thus, a statute which prohibited selling liquor on Sunday or in a town of less than 20,000 would seem to be aimed at specific evils relating to selling liquor in such towns or on such days. Or consider the following statute:

It shall be a crime in cities beginning with the letters "a," "f"

177. Nev. Rev. Stat. Ann. § 244.345(8) (1999).

or “m” to possess a blue pen; otherwise in all other cities it shall not be a crime.

The designation of cities beginning with “a,” “f,” and “m” would seem to be jurisdictional or possibly relating to venue, but surely that cannot be the case. The argument that cities beginning with “a,” “f” or “m” must have been seen by the legislature as in need of specific kinds of protection from persons possessing blue pens is obvious; otherwise the legislature would not have restricted the reach of the crime to those cities. Thus, the designation of the cities by capitals must have “something” to do with the harm or evil sought to be regulated by the legislature, even if that relationship is not immediately apparent to the uninformed observer. If that is the case, the argument becomes clear that the “jurisdictional” aspect of the statute (the specific cities in which possessing blue pens is a crime) is not merely a jurisdictional element, but is an element relating to the harm or evil, and is therefore a material element with respect to which the defendant must have a mens rea. All of these would therefore become material elements. In short, the close distinction drawn by the Model Penal Code (and the common law) between material elements on the one hand and “jurisdictional or venue elements” on the other would disintegrate, because every line in a criminal statute would seem to be related in one way or another to the evil sought to be controlled. The conundrum is even greater, however.

Take the hypothetical case of Mary Ann. She begins her hunt in New Jersey, but inadvertently crosses the state line and shoots a rabbit in Pennsylvania, and is prosecuted for rabbit hunting in Pennsylvania. There is no statement in the Pennsylvania statute which says rabbit hunting in Pennsylvania is prohibited; rather than the statute says merely “rabbit hunting is prohibited.” But even if there were a clause such as “in Pennsylvania” in the statute, the common law would make that phrase a jurisdictional element as to which mens rea would be irrelevant. But why? Let us elaborate the hypothetical and assume that

Mary Ann has taken every reasonable step (or perhaps every step) possible to assure that she is not in the State of Pennsylvania, but that the designation of the boundary lines upon which she relied is wrong. Mary Ann has sought to avoid committing the crime at all, yet her law abiding mental state becomes irrelevant.¹⁷⁸

Or consider Jack, a tourist to Nevada who, unaware of the Nevada statute cited above but generally aware of the openness of Nevada, finds a hospitable site in Las Vegas. Beyond the question of mistake of law, which may determine this issue, would his mistake be relevant if he were prosecuted for “knowingly engaging in illegal prostitution”? Or suppose that Jack has studied the statutes of Nevada, and has discovered that Las Vegas is the “targeted” city. Assume, then that he purposely goes to Reno for diversion rather than risk being in Las Vegas, but is unaware that, within the last week, Reno’s population has passed the 400,000 mark. Should these hypothetical defendants be denied the possibility of arguing that they did not “know” they were in a prohibited county?

But, as we have said, the problem does not often arise in state proceedings, because there is rarely, within a specific statute itself, a phrase that relates to jurisdiction. Since elements are only those words actually in a statute, the problem of defining the jurisdictional element does not often arise. Instead, the issue presents itself most forcefully in federal law. Since that law is of restricted jurisdiction, it is only if there is some jurisdictional predicate—the Commerce Clause, the use of the mails,¹⁷⁹ the presence of a federal agency,¹⁸⁰ etc.—that there is a federal crime. Accordingly, every statute explicitly states a federal basis for jurisdiction.

178. George Fletcher has declared that a “mistake about whether the crime was carried out in California or Nevada” is irrelevant. See George P. Fletcher, *Rethinking Criminal Law* 713 (1978), but that appears to be based on the assumption that the same conduct is punished—and probably punished equally—in both jurisdictions.

179. See, e.g., 18 U.S.C. § 1341 (1994).

180. See, e.g., *id.* § 1001.

Thus, take the case of Nancy, who is hunting in Utah, where it is permissible to shoot rabbits, but who inadvertently wanders onto a corner of a National Park, e.g., Brice or Zion, in which rabbit hunting is prohibited. If Nancy is not aware of a risk that she might have stumbled into a federal reserve, is the requirement that the hunting occur on a federal reserve or enclave a jurisdictional element alone, so that her lack of knowledge, awareness, or even negligence is not relevant?¹⁸¹ To make the point even clearer and more direct, suppose the federal enclave onto which she stumbles is merely a slim finger in land otherwise constituting the State of Utah, such that it would not be negligent not to be aware that one was in a federal enclave or even to be aware of the risk that it was a federal enclave. If it is not negligent to be in such a enclave or to be aware of the risk, why should ignorance of the fact of being in an federal enclave and therefore being unaware of the law be irrelevant to culpability?

Although it might be possible to conclude that the “federal fact” is only a sentencing factor, and hence not even an element at all, all federal courts have rejected that approach. But virtually all have concluded that most federal jurisdictional facts do not require a mens rea.

A typical case is Ophelia, who knows that she is lying to a state agency, but (by hypothesis) does not know, and could not reasonably know, that the federal government is involved.¹⁸² The leading United States Supreme Court case on false statements, *United States v. Yermian*,¹⁸³ closely parallels Ophelia’s situation.

Yermian, an employee of a defense contractor, was required to obtain a Department of Defense Security

181. Cf. *United States v. Osguthorpe*, 13 F. Supp. 2d 1215 (D. Utah 1998) (defendant’s sheep wandered onto a National Forest in Utah. Although defendant was in fact aware of such a risk, since this had happened before, the court held that he had not “allowed” his sheep to be on the land.).

182. The facts, of course, may be such as to persuade the jury that the defendant *did* know, or was at least reckless as to whether the federal government was involved. But the issue is whether the prosecution should have to so persuade the jury.

183. 468 U.S. 63 (1984).

Clearance, and therefore filled out a "Worksheet for Preparation of Personal Security Questionnaire," which was captioned "Defense Department." He failed to disclose that he had been convicted of mail fraud and lied about prior employment. At the bottom of the form was a line that indicated that a misrepresentation could subject him to prosecution under 18 U.S.C. section 1001.¹⁸⁴ When he was prosecuted under that section, Yermian argued that the government was required to prove that he "knew" that the statements were to the federal government, but the trial court instructed the jury that mere negligence would suffice for liability.

On appeal, the United States Supreme Court affirmed. Pointing out that the jurisdiction language appeared in a phrase separate from the prohibited conduct, the Court concluded that the "natural reading"¹⁸⁵ of section 1001 was that the mens rea terms in the statute modified only the making of the statements and not the jurisdiction of the agency.

Once this is clear, said the Court, there is no basis for requiring proof that the defendant had actual knowledge of federal agency jurisdiction:

The statute contains no language suggesting any additional

184. 18 U.S.C. § 1001 (1994):

Statements or entries generally. Whoever, in any matter within the jurisdiction of [the executive, legislative, or judicial branch of the Government of the United States], knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry, shall be fined . . . imprisoned not more than five years, or both.

185. 468 U.S. 63, 69 (1984). The reliance on "natural reading," however, is extraordinarily precarious. In *X-Citement Video*, for example, the Court acknowledged that the "natural reading" of the statute was to allow conviction without showing that the defendant *knew* that the sex film he was distributing involved minors. 513 U.S. 64 (1994). Nevertheless, the Court held that such knowledge was requisite to conviction. Moreover, the entire theory of "natural reading" assumes that Congress intended such a natural reading. While such an assumption is not necessarily invalid, the vagaries of statutory interpretation are such as to make such a rule highly suspect. *Id.*

element of intent. . . . On its face, therefore, section 1001 requires that the government prove that false statements were made knowingly and willfully, and it unambiguously dispenses with any requirement that the Government also prove that these statements were made with actual knowledge of federal agency jurisdiction.¹⁸⁶

The Court then suggested in a footnote that there might nevertheless be “some” mens rea requirement: “[a]s the Government did not object to that reasonable-foreseeability instruction, it is unnecessary for us to decide whether that instruction erroneously read a culpability requirement into the jurisdictional phrase.”¹⁸⁷

Despite this somewhat unclear statement, the lower federal courts have virtually unanimously concluded that there is no mens rea requirement with regard to whether the statement is made to a person who turns out to be a federal officer. Many of these cases have involved attempts by a defendant to obtain funds from a federal source or cases where it was “beyond credulity” that the defendant did not know that the federal government was involved.¹⁸⁸ But other cases are not so easily explained. In one of the most bizarre, the defendant sought the assistance of a real estate broker in finding an apartment in New York City. While looking at apartments, the defendant indicated to the broker that he worked at the State Department and

186. *Id.*

187. *Id.* at 75 n.14. One comment on this footnote has said:

This footnote cannot be explained. The Court could have held that the federal agency jurisdiction was part of the substantive offense by noting that the states do not prosecute people who lie on federal forms Alternatively the Court could have held that no state of mind at all is required for the jurisdictional matter, which would have followed its holding in *Feloa*. The Court declined to do either, and the decision seems to cast doubt on the continued vitality of *Feola*.

Matthew Fricker & Kelly Gilchrist, *United States v. Nofziger on the Revision of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law*, 65 *Notre Dame L. Rev.* 803 n.108 (1990).

188. The phrase is from *United States v. Cella*, 208 F.2d 783 (7th Cir. 1953), but certainly applies to many of the other cases, see, e.g., *United States v. Kraude*, 467 F.2d 37 (9th Cir. 1972); *Gilbert v. United States*, 359 F.2d 285 (9th Cir. 1966); *United States v. Heuer*, 4 F.3d 723 (9th Cir. 1993).

might have to install high security devices in the apartment. The broker, concerned, called the FBI, who sent an agent—posing (for some unclear reason) as an attorney—on the next round of apartment hunting. As soon as defendant repeated to the (attorney) his claim to the attorney that he worked for the State Department, he was arrested and charged with making a false statement to a federal agent. His claim that the government needed to prove that he knew, or at least that he knew there was a risk, that he was making his false statement to a federal officer was rejected by the Second Circuit.¹⁸⁹ It is difficult, if impossible, to believe that Bakhtiari could have even the faintest notion that the “attorney” who accompanied him on his house hunting trip was a federal agent.¹⁹⁰

The same is true of the jurisdictional element in wire fraud.¹⁹¹ As one text on the subject has put it:

189. See *United States v. Bakhtiari*, 913 F.2d 1053 (2d Cir. 1990), cert. denied, 499 U.S. 924 (1991). The remaining facts of the case are equally bizarre. Defendant had with him a brief case containing numerous firearms and explosive devices. The briefcase, according to the evidence, bore a tag which declared “FIREARMS.” Moreover, defendant argued that he possessed the weapons because the Iranian government, which had executed his father after the fall of the Shah, had threatened him and his family (still living in Iran) unless he complied with certain demands, including the possession of the weapons. The Second Circuit might have been excused for thinking Mr. Bakhtiari was “sanity challenged.”

190. See, e.g., *United States v. Baker*, 626 F.2d 512 (5th Cir. 1980); *United States v. Stanford*, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); *United States v. Lewis*, 587 F.2d 854 (6th Cir. 1978); *United States v. Green*, 745 F.2d 1205 (9th Cir.), cert. denied, 474 U.S. 9125 (1985); *United States v. Oren*, 893 F.2d 1057 (9th Cir. 1990); *United States v. Gibson*, 881 F.2d 318 (6th Cir. 1989); *United States v. Suggs*, 755 F.2d 1538 (11th Cir. 1985). The courts have been divided, however, over whether a false statement to an agency funded wholly by the State comes within the federal jurisdiction at all if the federal government financially supports the program, but does not pay for any of the actual benefits. See *United States v. Herring*, 916 F.2d 1543 (11th Cir. 1990) (finding jurisdiction), cert. denied, 500 U.S. 946 (1991). For cases finding no jurisdiction, see *United States v. Holmes*, 111 F.3d 463 (6th Cir. 1997); *United States v. Facchini*, 874 F.2d 638 (9th Cir. 1989). Obviously, where there is no federal jurisdiction to begin with, no mistake as to whether there is a federal element is relevant. Intriguingly, the Department of Justice has determined that it is inappropriate for the Department of Labor to investigate such false statement, making future prosecutions unlikely. See *United States v. Herring*, 500 U.S. 946 (1991) (White, J., dissenting from the denial of certiorari).

191. See 18 U.S.C. § 1343 (1994).

The most litigated issue regarding the interstate aspect of wire fraud jurisdiction appears to be the mens rea requirement. Most circuits that have addressed this issue say that the defendant merely had to know he was making a phone call or other transmission, not that the transmission was interstate.¹⁹²

An example is *United States v. Bryant*.¹⁹³ Defendants, in Kansas City, Missouri, sent two telegrams to Bridgeton, Missouri. Unknown to them, Western Union routed them through Virginia. The Sixth Circuit held that there had indeed been interstate use of the wires and that this was sufficient, even if it was totally unforeseeable that this would occur.

If *Yermian* was unclear in the context of the false statement statute, two other decisions from the United States Supreme Court are not so uncertain. The first is *United States v. Feola*,¹⁹⁴ where the defendants, engaged in a drug sale, assaulted the buyer in an attempt to wrest the drugs back from the buyer after the sale had occurred. Unfortunately for the defendants, the buyer was an undercover federal narcotics agent and defendants were prosecuted not only for the sale of drugs, but also for both assault on a federal officer and conspiracy to assault a federal officer. Obviously, the defendants did not know the alleged buyer was a federal officer; had they known, they would not have gone through with the transaction. The Court held nevertheless that no mens rea was required with regard to the status of the victim. It is not possible to read *Feola* as dealing with a "sentencing factor," for two reasons: (1) nowhere did the Court suggest that the status of the officer was not an element of the crime; (2) without the status of the officer, there would have been no federal crime to begin with. It is more plausible to argue that *Feola* is a "greater crime" case, but there is no "lesser"

192. 1 Sarah N. Welling et al., *Federal Criminal Law and Related Actions: Crimes, Forfeiture the False Claims Act and RICO* 68 (1998).

193. 766 F.2d 370 (8th Cir. 1985).

194. 420 U.S. 671 (1974).

federal crime of “mere” assault; assaulting a “non-federal person” is not a federal crime. Thus, one might have to read *Feola* as expanding the “greater crime theory to encompass other jurisdictions, or as embracing the “greater legal wrong” or “greater wrong” doctrine. These alternatives, however, would seem implausible. Instead, one should read *Feola* as suggesting that the status of the officer was not a material element of the crime, but merely a jurisdictional element—that the federal government would have had no jurisdiction over the assault at all had the defendant not been a federal officer.¹⁹⁵

The recent case of *Bryan v. United States*,¹⁹⁶ however, may be more troublesome. Bryan was an illegal firearms seller. Using “straw purchasers” in Ohio, he obtained weapons from which he filed the serial numbers and proceeded to sell these firearms from the back of a car in New York City. Bryan was charged with selling unregistered firearms and with dealing in firearms without obtaining a federal license. Bryan argued that the prosecution would have to prove beyond a reasonable doubt that he knew that he qualified as a firearms dealers under the federal law and that he was aware that his transactions were in violation of the federal statute. The Court, in a 6-3 decision, disagreed.

195. George Fletcher has suggested that the majority in *Feola* was concerned with “other policy values”—protecting federal officers—that it believed justified requiring that “considerations bearing on culpability be disregarded.” Fletcher, *supra* note 178, at 715-16. Judge Weinstein, in *Cordoba-Hincapie*, says about *Feola*:

The Court’s treatment of the mens rea problem is clouded by confusion regarding the statute’s purpose. . . . The Court concluded that Congress intended both to provide special federal protection for federal law enforcement personnel and to deter obstruction of federal functions. . . . The trouble with *Feola* as a guiding precedent is that it purported to treat the statute as both an aggravated assault statute, (Stewart, J. dissenting) and as one involving a federal provision that was “jurisdictional only.” . . . At a minimum, the defendant must know that the assault victim is some kind of official, whether federal or state . . . or such a provision has no additional deterrent effect beyond the existing general laws prohibiting assaults.

825 F. Supp. 485, 511 (E.D.N.Y. 1993).

196. 524 U.S. 184 (1998).

The trial court instructed the jury that they would have to find that the defendant knew that he was violating “the law.” There was no apparent reference in the instruction as to *which* law the jury would have to find the defendant knew he was violating. As Justice Scalia pointed out in dissent,¹⁹⁷ it is possible that the jury might have concluded that Bryan knew that he was in one way or another violating some aspect of New York State law; Scalia even suggested, with his typical scathing pen, that under the majority’s view, Bryan might have been knowingly violating the law against double parking in the City of New York; if so, the jury instruction would have allowed the jury to conclude that the defendant did not have to know that he was also violating federal firearms law.¹⁹⁸ In such a reading, the element of “required to be registered under federal law” becomes not a material element, but a jurisdictional element of the statute. This makes *Bryan* consistent with both *Feola* and the Model Penal Code.

This may well be a stretched reading of the *Bryan* case. But the majority in *Bryan* did not respond to Mr. Justice Scalia’s point that Bryan may have known that he was violating state law but had no concept that he was violating federal law. It is plausible, therefore, to suggest that the majority indeed accepted Scalia’s view that if the defendant knows violating state law he takes a risk with regard to whether he is violating federal law. In other words the federal law becomes jurisdictional rather than material.

Almost all of these decisions—the three Supreme Court cases, the false statement cases, and the wire fraud case—might be reconciled with some version of the “greater crime” theory mentioned in Section II. Virtually all of these defendants knew that their actions were violating at least state law; their error was as to federal law. In *Yermian*, defendant was knowingly engaged in at least a

197. See *id.* at 202 (Scalia, J., dissenting).

198. See *id.*

“wrong”; even if he did not know that there was federal jurisdiction (for a defense contractor?), a lesser mens rea of recklessly would certainly snare him. In *Feola*, the defendants committed what they knew was a (state) criminal assault. And there is much in the *Bryan* opinion to suggest such an interpretation: the Court distinguished its earlier holdings in *Ratzlaf*¹⁹⁹ and *Cheek*²⁰⁰ and claimed that these cases required knowledge of the law broken only when it was complex.²⁰¹ More importantly the Court recognized that a common theme in those cases had been the concern that truly innocent, “non-nefarious” persons would be made criminal if some exception were not adopted in those cases.²⁰² Bryan was clearly a bad actor, and he knew he was such; the rationale of protecting the innocent was hardly involved in the case.

This explanation, however, cannot apply to MaryAnn or Nancy, and probably not even to Jack’s case (although one could argue there that Jack is charged with awareness of the general immorality, except in Nevada, of prostitution). For them, the only “explanation” of their liability is the doctrine of strict liability.²⁰³

B. Jurisdictional Elements and the Model Penal Code

The Model Code distinguishes material from non-material elements, and requires proof of mens rea with

199. *Ratzlaf v. United States*, 510 U.S. 135 (1994).

200. *Cheek v. United States*, 498 U.S. 192 (1991).

201. See 524 U.S. 184, 194-95.

202. See Husak & Singer, *supra* note 97. The Yermian Court was strident in making clear that Yermian was in no way “innocent,” either morally or otherwise. *United States v. Yermian*, 468 U.S. 63 (1984).

203. A sleight of hand is possible, of course. It might be argued that these defendants all suffer from a “mistake of law,” because, even though factually mistaken about “where they are” (either physically or conceptually), they are unaware of, or mistaken as to, the law of the vicinity. Thus, MaryAnn’s complaint that she did not know she was in Pennsylvania may be transmogrified into a complaint that she did not know the law applicable to her “situation.” This, of course, merely confirms the troubles with the doctrine of *ignorantia lex*. I have recently made a few comments about that doctrine, and will not repeat them here. See Singer, *supra* note 3.

regard only to the former.²⁰⁴ Among the latter are “jurisdictional elements.” There is virtually no discussion of this provision of the Code either in the Commentary or in the debates in the American Law Institute when the Code was promulgated. I conclude from this absence of discussion that the drafters of the Code must have had something in mind, but it is not apparent to me what that something was. Thus, the Code appears to have contemplated the arguments I raise here today, but the Commentary does not clarify the Code’s position at all.

Whatever the reason underlying the Code’s refusal to require mens rea with regard to jurisdictional elements, that refusal is inconsistent with two other stances of the Code. First, to the extent that the cases might be recast as incidents of the “greater crime” approach, the Code’s refusal to require mens rea here jars with its rejection of that doctrine.²⁰⁵ Second, the Code’s refusal is also inconsistent with its granting of a “reliance on authority” defense even in mistake of law cases.²⁰⁶ It is further inconsistent with the Code’s general requirement that the defendant be at least culpable with regard to every element that goes to a harm sought to be alleviated by the legislature.

CONCLUSION

This rather bumpy and eclectic journey through techniques by which courts have avoided requiring mens rea with regard to crucial circumstances stated in the statute has no happy ending. The attempt to define many of these circumstances as “non-elements” may shortly come

204. The Code is actually even less hospitable to the notion of a non-material element than this. Section 1.13(10) declares that a material element is any element that does not relate “exclusively” to such items as venue or jurisdiction. This strongly suggests there are few if any elements which are not material elements because it would appear that facts stated in a statute as opposed to being implicit in the statute would not be related exclusive to jurisdiction. Model Penal Code § 1.13(10) (Proposed Official Draft 1962).

205. See discussion *supra* Section II D.

206. See Model Penal Code § 2.04(3) (Proposed Official Draft 1962).

a cropper. But even if that occurs, there will still remain two doctrinal avenues—declaring the element to be one of jurisdiction, or invoking the greater crime mantra—down which courts can trod. The Model Penal Code, which many of us hold out as a hope to bring some sort of organization and coherence to the criminal law is, on these issues, schizophrenic—and schizophrenic without even so much as a full discussion of one, much less both, of these doctrines and how they interrelate. Any time the Code dispenses with requiring mens rea, academics—and hopefully courts—should ask for full explanation and rationalization. Here, alas, there is none. Perhaps as we move into the new millennium, we can provide some.

APPENDIX A

This Appendix contains an attempt to discover the status of drug amount as an “element” in the fifty states. I wish to acknowledge the help of Mr. Robert Wolf, a student at Rutgers (Camden) Law School, whose participation was important in this research. We have found, not surprisingly, more ambiguities than certainties. Some states, or decisions, are clear on the question. In many other states, where the statute is ambiguous as to whether amount is an element, we found cases discussing whether the method used to determine the amount was a reasonable one. In such states, the general question is whether taking a random sample from, for example, five bags of out fifty which the defendant possessed, and then multiplying by ten is allowed.²⁰⁷ We have construed such discussions to imply that amount *is* an element, since the method used at trial to show weight would be irrelevant if the issue were relevant only to sentencing.

We have also inferred from one set of cases that the holding on element and burden of proof would obtain in all other drug cases, though that might not be the case. For example, if a state allows a jury to infer “trafficking” from a finding of “x” amount of drugs, this suggests that “x amount” is an element of trafficking, but it might not be true that “y” amount is an element of simple possession. Three jurisdictions (District of Columbia, Oklahoma and West Virginia) do not appear to use amount of drugs to differentiate among drug crimes at all. The other forty-eight jurisdictions do use amount in all or most drug crimes.

With those caveats, we may summarize our findings:

207. See Michael Osteen, Sufficiency of Random Sampling of Drug of Contraband to Establish Jurisdictional Amount Required for Conviction, 45 A.L.R. 5th 1 (2000) (listing or discussing cases from 21 states—Alabama, Arkansas, Florida, Georgia, Idaho, Illinois, Louisiana, Massachusetts, Minnesota, Missouri, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia and Washington).

Of the forty-eight jurisdictions we have found with either statutes or case law that are reasonably clear on the subject, forty-five (ninety-two percent) appear to consider amount of a drug to be an element of a crime, which the state must prove to a jury beyond a reasonable doubt, while only three (North Dakota, Pennsylvania, and Washington) send the question of amount to the judge, as does the federal system.

Alabama: Requires proof of amount at trial.²⁰⁸

Alaska: The failure of the indictment to specify the drug involved did not mislead the defendant; the court implies that the drug should be specified in the indictment because it is an element of crime but does not go to amount.²⁰⁹

Arizona: *State v. Scott*,²¹⁰ appears to hold that the state must prove the defendant possessed a useable amount, which is required for guilt, but need not prove at trial that the amount was more than the "threshold" amount which denies probation. The class of felony is not determined by the threshold amount. But the court does say that the quantity of drugs has consistently been considered as an element of the crime.²¹¹

Arkansas: Quantity is used to prove intent to distribute.²¹²

California: By statute, sentencing enhancements based on the weight of the drug must be in the accusatory pleading and found by the trier of fact to be true.²¹³ By case law, the jury resolves most (and perhaps all) other enhancements.²¹⁴ The trial may be bifurcated at

208. See, e.g., *Ex parte Roberts*, 662 So. 2d 229 (Ala. 1995) (state failed to prove that the weight of the marijuana was more than required by statute, and second trial is barred by double jeopardy). State bears burden, see *Ex parte Presley*, 587 So. 2d 1022 (Ala. 1991); *Wright v. State*, 570 So. 2d 872 (Ala Cr. App. 1990).

209. See *Mustafoski v. State*, 867 P.2d 824 (Alaska Ct. App. 1994).

210. 924 P.2d 507 (Ariz. 1996)

211. See also *State v. Aragon*, 912 P.2d 1361 (Ariz. App. 1995).

212. See *Piercefield v. State*, 871 S.W.2d 348 (Ark. 1994).

213. See Cal. Health and Safety Code § 11370.4 (c) (2000).

214. See *People v. Wims*, 895 P.2d 77 (Cal. 1995); see also *People v. Simpson*,

2000]

AVOIDING MENS REA

211

defendant's request.²¹⁵

Colorado: Colorado appears to require amount as an element but *not that defendant knew the amount*.²¹⁶ Colorado distinguishes among three separate types of sentence enhancers:

- (1) Those which increase the level of punishment based upon circumstances that are connected to the commission of the crime itself. These must be proved beyond a reasonable doubt to the jury;
- (2) Those based on recidivism where the statute requires proof to the jury beyond a reasonable doubt;
- (3) Those based on recidivism where the statute is silent.
- (4) These are proved by preponderance and appear to allow only for aggravated sentencing range, which may be different from increased maximum.²¹⁷

Connecticut: Requires proof beyond a reasonable doubt as to amount.²¹⁸

Delaware: To prove conviction for trafficking, the state had to prove weight of more than fifteen grams²¹⁹ But the *state need not prove knowledge of defendant as to amount*.²²⁰

D.C.: The District of Columbia does not appear to differentiate drug offenses according to amount or weight.²²¹ Repeat offenders are subject to a double penalty.²²²

Florida: The jury's failure to find a specific amount precludes sentence under the mandatory minimum, even where there was no contest as to amount.²²³

192 Cal. App. 3d 1360 (1987).

215. *People v. Vera*, 934 P.2d 1279 (Cal. 1997).

216. See *People v. Ramirez*, 1999 Colo. App. Lexis 232 (Colo. App. Aug. 1999).

217. See *State v. Whitley*, 998 P.2d 31 (Colo. App. 1999).

218. See *State v. Delossantos*, 559 A.2d 164 (Conn 1989).

219. See *State v. Skyers*, 560 A.2d 1052 (Del. 1989).

220. See *Kelson v. State*, 599 A.2d 413 (Del. 1991).

221. See D.C. Code § 33-541 (2000).

222. See *id.* § 33-548.

223. See *State v. Estevez*, 753 So. 2d (Fla. 1999) (citing non drug cases and holding that jury must find factor before imposition of mandatory minimum is permitted); *Safford v. State*, 708 So. 2d 676 (Fla. App. 1998) (state's failure to

Georgia: The indictment must allege more than one ounce of marijuana in manufacture charge, but need not specify amount.²²⁴ The failure of the indictment to allege that the 400 grams of cocaine were more than ten percent pure was not fatal.²²⁵ In *Arena v. State*,²²⁶ the Georgia Court of Appeals suggests that amount is an element, holding that a typographical error in an allegation in the indictment—that the cocaine which the defendant possessed was one percent rather than ten percent pure—was not fatal error.²²⁷ Even though defendant must know he possesses cocaine, he does not need not know the weight.²²⁸

Hawaii: First degree promotion of a dangerous drug requires that there be a determination of the weight of the drug by the jury; the statute does not require a specific amount for distribution, a crime of the second degree.²²⁹

Idaho: In drug cases, the state has the burden, beyond a reasonable doubt, to show amount.²³⁰

Illinois: Amount is an essential element and must be proved beyond reasonable doubt.²³¹

Indiana: The jury determines the weight or the amount of the drug.²³²

establish amount of cocaine invalidates conviction on trafficking); see also *Atwaters v. State*, 519 So. 2d 611 (Fla. 1988) (since legislature has made amount of drugs important for different statutory offenses, judge may not consider amount in deciding whether to depart from sentencing guidelines).

224. See *Hunt v. State*, 473 S.E.2d 157 (Ga. Ct. App. 1996).

225. See *Guerrero v. State*, 401 S.E.2d 749 (Ga. Ct. App. 1991).

226. 392 S.E. 2d 264 (Ga. Ct. App. 1990)

227. See O.C.G.A § 16-13-31 (2000); see also *Green v. State*, 370 S.E.2d 348 (Ga. Ct. App. 1988) (upholding conviction because evidence was sufficient to prove beyond a reasonable doubt that defendant knowingly possessed more than twenty-eight grams of cocaine); *Payton v. State*, 338 S.E.2d 462 (Ga. Ct. App. 1985) (conviction invalid because insufficient evidence to show 100 pounds of marijuana beyond a reasonable doubt); *Mitchell v. State*, 393 S.E.2d 274 (Ga. Ct. App. 1990) (sufficient evidence to authorize finding, beyond a reasonable doubt, that defendant possessed more than 28 grams for trafficking charge).

228. *Cleveland v. State*, 463 S.E.2d 36 (Ga. Ct. App. 1995).

229. *State v. Mattiello*, 978 P.2d 693 (Haw. 1999).

230. See *State v. Payan*, 977 P.2d 228 (Idaho Ct. App. 1998) (structure of statute very similar to section 841).

231. .See *People v. Jones*, 675 N.E.2d 99 (Ill. 1996).

232. See *Riley v. State*, 711 N.E.2d 489 (Ind. 1999).

Iowa: Like many other states, Iowa has adopted the Uniform Controlled Substances Act.²³³ *State v. Atley*²³⁴ upholds random sampling, which implies the state must prove weight.

Kansas: The trier of fact finds amount.²³⁵

Kentucky: *Taylor v. Commonwealth*,²³⁶ appears to require the state to prove the amount for trafficking; the case involves the method of proof.

Louisiana: The state is required to prove the weight of the drug in a possession case.²³⁷

Maine: The state appears to carry the burden on the type and the amount of the drug.²³⁸

Maryland: *Wadlow v. State*²³⁹ clearly requires proof beyond a reasonable doubt to the jury of amount. This case is one of the strongest opinions on this issue, either way.

Massachusetts: The amount of the drug involved is an essential element of the crime of trafficking in cocaine.²⁴⁰

Michigan: The amount of drug is an element of the crime.²⁴¹

Minnesota: The burden of proof is on the state.²⁴²

Mississippi: The state bears the burden of proving weight.²⁴³

Missouri: The state bears the burden of proving the weight or the amount of the drug.²⁴⁴

233. See Iowa Code § 124 (1999).

234. 564 N.W.2d 817 (Iowa 1997).

235. See *State v. Luna*, 817 P.2d 1134 (Kan. 1991).

236. 984 S.W.2d 482 (Ky. Ct. App. 1998).

237. See *State v. Riley*, 731 So. 2d 409 (La. Ct. App. 1999).

238. See *State v. Navarro*, 621 A.2d 408 (Me. 1993).

239. 642 A.2d 213 (Md. 1994) (citing other, non-drug, instances where proof is beyond a reasonable doubt to jury of item increasing sentenced).

240. *Commonwealth v. Johnson*, 571 N.E.2d 623 (Mass. 1991).

241. See *People v. Wolfe*, 489 N.W.2d 748 (Mich. 1992); *People v. Lewis*, 444 N.W.2d 194 (Mich. Ct. App. 1989); *People v. Kryzstopaniec*, 429 N.W.2d 828 (Mich. Ct. App. 1988).

242. See *State v. Traxler*, 583 N.W.2d 556 (Minn. 1998); *State v. Gallus*, 481 N.W.2d 116 (Minn. Ct. App. 1992).

243. See *Drane v. State*, 493 So. 2d 294 (Miss. 1986); *Martin v. State*, 732 So. 2d 847 (Miss. 1998).

244. See *State v. Hyzer*, 811 S.W.2d 475 (Mo. Ct. App. 1991); see also *State v. Reinschmidt*, 984 S.W.2d 189 (Mo. Ct. App. 1998) (discussing method by which

Montana: Use of the random sample method of proving total quantity suggests that quantity is an element.²⁴⁵

Nebraska: Where the statute does not specify amount for possession of cocaine, amount is not an element; but most sections of the Nebraska statute, particularly with possession with intent to distribute, specify amount.²⁴⁶

Nevada: Weight is an element, which the state must prove beyond a reasonable doubt, but the *state need not prove knowledge of amount*.²⁴⁷

New Hampshire: Differentiates depending on amount, but there appears to be no case law on the subject of whether amount is an element.²⁴⁸

New Jersey: The state must prove amount, *but need not prove knowledge of amount*.²⁴⁹ Quantity is an essential element of possession with intent to distribute.²⁵⁰

New Mexico: The jury may infer trafficking from the amount of drugs possessed.²⁵¹

New York: Weight is an element, *but the state need not prove knowledge of weight*.²⁵²

North Carolina: The amount of drug is evidence of intent to sell, but it is not an element of the offense of possession.²⁵³

North Dakota: The statute regarding methamphetamine does not specify quantity, and the state is therefore not required to prove quantity at trial.²⁵⁴

Ohio: Amount is an essential element of the offense

state can prove weight or amount of drug).

245. See *State v. Hill*, 550 P.2d 390 (Mont. 1976).

246. See *State v. Thompson*, 505 N.W.2d 673 (Neb.1993).

247. See *State v. Second Judicial Dist. Court ex rel. County of Washoe*, 842 P.2d 733 (Nev. 1992). But see Nev. Rev. Stat. Ann. § 453.3383 (2000).

248. See N.H. Rev. Stat. Ann. 318-B:26 (1999).

249. See *State v. Torres*, 563 A.2d 1141 (N.J. 1989).

250. See *State v. Florez*, 636 A.2d 1040 (N.J. 1994).

251. See *State v. Quintana*, 534 P.2d 1126 (N.M. 1975).

252. See *People v. Serrano*, 618 N.Y.S.2d 945 (N.Y. App. Div. 1994); *People v. Ryan*, 82 N.Y.2d 497 (N.Y. 1993).

253. See *State v. Thobourne*, 279 S.E.2d 774 (N.C. Ct. App. 1982). But see *State v. Harding*, 429 S.E.2d 416 (N.C. Ct. App. 1993) (jury returned verdict of guilty of trafficking by possessing 14 -28 grams of heroin).

254. See *State v. Alles*, 216 N.W.2d 805 (N.D. 1974).

2000]

AVOIDING MENS REA

215

and must be pled in the indictment.²⁵⁵

Oklahoma: The statute does not differentiate on the basis of quantity; higher sentences are reserved for recidivists.²⁵⁶

Oregon: Sentence enhancing factors, if not admitted, must be proved to the trier of fact.²⁵⁷

Pennsylvania: By statute, weights are expressly declared not to be elements of the crime.²⁵⁸ However, the weight of drug is an element of the crime for the purpose of mandatory minimum sentence.²⁵⁹

Rhode Island: The statute expressly establishes different crimes and penalties, but there appears to be no case law holding that the amount is an element of either crime.²⁶⁰

South Carolina: The state appears to carry the burden at trial and in an indictment, but an indictment is not invalid for failing to specify the precise amount of drugs allegedly involved, even though the amount will affect sentence.²⁶¹

South Dakota: The statute appears not to vary sentence based upon weight, except with regard to marijuana.²⁶² With regard to marijuana, it appears that weight is an element of the offense but that *the prosecution need not prove that the defendant knew the weight of the drug*.²⁶³

Tennessee: In *State v. Holbrooks*,²⁶⁴ the state met its

255. See *State v. Headley*, 453 N.E.2d 716 (Ohio 1983); *State v. Powell*, 621 N.E.2d 1328 (Ohio Ct. App. 1993); *State v. Shuttlesworth*, 661 N.E.2d 817 (Ohio Ct. App. 1995).

256. See Okla. Stat. Ann. tit. 63 § 2-401 (2000)

257. See *State v. Moeller*, 806 P.2d 130 (Or. Ct. App. 1991); *State v. Hennings*, 894 P.2d 1192 (Or. Ct. App. 1995); see also Or. Rev. Stat. § 475.996(4) (1997).

258. See 18 Pa. Cons. Stat. § 7508(B) (1999).

259. See *Commonwealth v. Myers*, 722 A.2d 649 (Pa. 1998).

260. See R.I. Gen. Laws §§ 28-4.01-4.02 (2000).

261. See *Granger v. State*, 507 S.E.2d 322 (S.C. 1998).

262. See S.D. Codified Laws § 22-42-5 (Michie 2000); S.D. Codified Laws § 22-42-7 (Michie 2000).

263. See *State v. Goodroad*, 442 N.W.2d 246 (S.D. 1989).

264. 983 S.E.2d 697, (Tenn. Crim. App. 1998); see also *State v. Booker*, 1997 Tenn. Crim. App. Lexis 469.

burden of proving beyond reasonable doubt of possession with intent to sell more than twenty-six grams of cocaine.

Texas: The state must prove weight beyond a reasonable doubt, not including adulterants or dilutants.²⁶⁵

Vermont: The statute differentiates among amounts of drugs “knowingly” possessed or sold.²⁶⁶ There is no apparent case law interpreting the provision.

Virginia: The burden of proving amount is on the state.²⁶⁷

Washington: There are several cases suggesting that enhancements be proven only to the judge.²⁶⁸ However, there are no cases explicitly on drugs.²⁶⁹ In addition, there are several cases suggesting that errors in the indictment not specifying the kind of drug are not fatal.²⁷⁰

West Virginia: The statute does not appear to differentiate according to amount of drug involved.²⁷¹

Wisconsin: The amount of drugs is element for the fact-finder.²⁷²

Wyoming: The state has the burden of proving weight.²⁷³

265. See *Rodriguez v. State*, 970 S.W.2d 66 (Tex. Crim. App. 1998) (evidence enough to prove weight beyond a reasonable doubt); *Thompson v. State*, 885 S.W.2d 136 (Tex. Crim. App. 1992); see also *Maroquin v. State*, 746 S.W.2d 747 (Tex. Crim. App. 1988).

266. Vt. Stat. Ann. tit. 18 § 4230 (2000).

267. See *Hill v. Com.*, 438 S.E.2d 296 (Va. Ct. App. 1993); *Graves v. Comm.*, 363 S.E.2d 705 (Va. 1988).

268. See, e.g., *State v. Hendrickson*, 917 P.2d 563 (Wash. 1996).

269. But see *State v. Caldera*, 832 P.2d 139 (Wash. Ct. App. 1992) (random sampling sufficient to demonstrate weight).

270. See, e.g., *State v. Roberts*, 883 P.2d 349 (Wash. Ct. App. 1994).

271. See W.Va. Code §§ 60A-4-401 (2000).

272. See *State v. Martinez*, 563 N.W.2d 922 (Wis. 1997).

273. See *Smith v. State*, 964 P.2d 421 (Wyo. 1998).