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FROM APPRENDI TO BLAKELY TO CUNNINGHAM: POPULAR SOVEREIGNTY ENTERS THE COURTROOM

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I. Introduction

In January 2007, the United States Supreme Court invalidated California's Determinate Sentencing Law (DSL) in Cunningham v. California. [1] The case found unconstitutional the sentencing scheme governing most felony sentencing in the state. [2] The decision could invalidate the sentences in the approximately one-sixth of all California felony cases [3] where courts impose the highest of the three available sentencing options. Although few considered the decision a complete surprise, as it closely tracked the Court's reasoning in the 2004 case of Blakely v. Washington, [4] the decision raises further questions about the announced rules' future scope. This article will evaluate the case law leading up to Cunningham, with special emphasis on California law, and predict and prescribe future developments.

Part II traces the leading cases on the subject over the past decade. Part III explores the “recidivism exception,” which some (including Supreme Court justices) think should be abolished completely, and others (including lower courts) apparently favor expanding. Part IV describes the Court's countervailing trend in evaluating such sentencing error for prejudice rather than reversing per se. Part V critically evaluates how at least one California decision has cited the jury trial right while actually undermining it.

***112** Parts VI and VII examine the connection between the line of cases culminating in Cunningham (for now) and the death penalty. Part VI concludes that California's capital sentencing procedures should withstand Cunningham-based challenges. Part VII explores the distinct philosophical position of Justice Scalia (and Justice Thomas), who have simultaneously argued for fewer restrictions on the death penalty (and perhaps strict punishment generally), yet voted to restrict the death penalty where there was no requisite jury finding. The article will conclude that although on one issue, Justice Scalia appears to be favoring prosecutors and, on the other, he favors defendants, the positions are consistent. The availability of both trial by jury and the death penalty reveals some longstanding and exceptional American values.

II. The Road To Cunningham

The Cunningham decision was at least nine years in the making, the result of a series of sentencing precedents. The first case, in 1998, was Almendarez-Torres v. United States. [5] Hugo Almendarez-Torres pleaded guilty to the charge alleged in his indictment, re-entry into the United States by a deported alien, in violation of 8 U.S.C. § 1326. [6] The offense carried a maximum punishment of two years in prison. [7] The sentencing court, however, imposed a term of 85 months imprisonment, based on Almendarez-Torres' past commission of an aggravated felony, which he admitted prior to entering his plea. [8] Almendarez-Torres claimed on appeal that the indictment failed to allege the prior conviction. [9] Thus, any sentence beyond the ordinary two years for a § 1326 violation was constitutionally invalid. [10]

By a 5-4 vote, the Supreme Court rejected this claim. The majority, consisting of Justices Breyer, O'Connor, Kennedy, Thomas and Chief Justice Rehnquist, concluded that the prior convictions were a sentencing factor, and not elements of a separate crime, for which notice would have been constitutionally required. [11] The majority discerned it was Congress' intent to treat the prior convictions this way, [12] which was constitutionally permissible in light of, inter alia, the sentencing courts' traditional reliance on recidivism in increasing offenders' sentences. [13] Justice Scalia, joined by Justices Stevens, Souter and Ginsburg, dissented, finding it "genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal is subject . . . ." [14] The dissent ***113** perceived no rational basis for distinguishing recidivism from that of any other fact that could increase an offender's sentence. [15] Accordingly, the dissent favored an interpretation of the statute that would treat the prior convictions as elements of a separate offense, for which notice would be constitutionally required. [16]

The Court began to reverse course the following year when it construed the federal carjacking statute in Jones v. United States. [17] An indictment charged Jones with carjacking under 18 U.S.C. § 2119, which provided for a maximum sentence of 15 years. [18] The indictment (and subsequent jury instructions) failed to mention the statute's subdivision (2), which authorized a sentence of up to 25 years where serious bodily injury occurred. [19] The District Court, however, upon reading a pre-sentence report, found by a preponderance of the evidence that the victim had suffered a serious bodily injury and imposed a 25-year sentence for the subdivision (2) violation. [20]

The nine justices adhered to their Almendarez-Torres positions, except Justice Thomas, who joined the majority. It concluded injury subdivision was a separate offense, thereby requiring the serious injury be (1) charged in the indictment, (2) submitted to the jury, and (3) proved beyond a reasonable doubt. [21] The majority limited Almendarez-Torres' holding to the special context of recidivism. [22] The Court minimized the significance of the case as involving only the interpretation of a federal statute, [23] but acknowledged its doubt regarding the constitutionality of the dissent's interpretation foreshadowed a more sweeping rule. [24]

That came the next year in Apprendi v. New Jersey. [25] Apprendi pleaded guilty to an offense that carried a maximum sentence of 10 years, unless the court found by a preponderance of the evidence that the defendant committed the crime "with a purpose to intimidate . . . because of race," in which case the maximum punishment was 20 years. [26] The justices composing the Jones majority made express the implication of that case: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [27] The Court not only deemed Almendarez-Torres "at best an exceptional departure from the historic practice," [28] but also emphasized ***114** "Almendarez-Torres had admitted the three earlier convictions," [29] apparently obviating any concerns about the absence of a jury finding beyond a reasonable doubt. The Court noted some tension between Almendarez-Torres and Apprendi: "[I]t is arguable that Almendarez-Torres was incorrectly decided . . . and that a logical application of our reasoning today should apply if the recidivist issue were contested." [30] The same justices who dissented in Jones dissented in Apprendi, reflecting, as the majority acknowledged, that Jones "foreshadowed" Apprendi's sweeping rule. [31]

In Blakely v. Washington, [32] the Supreme Court clarified the term "statutory maximum," beyond which a defendant may not be sentenced without a jury finding, determined beyond a reasonable doubt. [33] Blakely committed a kidnapping, an offense punishable ordinarily by no more than 10 years' imprisonment. [34] Other provisions, however, limited the available sentencing range to a term of 49 to 53 months, from which the court could depart only if it set forth supporting findings of fact and conclusions of law that reflected "substantial and compelling reasons" for the departure. [35] The sentencing court found that Blakely had acted with "deliberate cruelty," a fact neither admitted by the defendant nor found by the jury, and consequently imposed a sentence of 90 months. [36]

The State of Washington argued the 90-month term was less than the 10-year maximum prescribed by statute, and thus did not violate Apprendi, but the Court rejected that definition of "statutory maximum":

> [T]he "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant . . . . [i]n other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. [37]

Because the maximum sentence the court could impose without additional findings was 53 months, the jury needed to determine beyond a reasonable doubt the truth of any findings used to increase the sentence beyond that term. [38]

No justice switched positions between Jones, Apprendi and Blakely. Justices Stevens, Scalia, Souter, Thomas, and Ginsburg had remained in the majority, whereas Chief Justice Rehnquist, Justices O'Connor, Kennedy and Breyer had dissented. [39] Accordingly, ***115** the departure from the Court of Rehnquist and O'Connor in 2005 did not threaten Apprendi's broad rule.

Before those departures, the California Supreme Court had attempted to distinguish Blakely in People v. Black. [40] The Court recalled that most felonies offer a sentencing triad, in which there is a lower, middle and upper term available to the sentencing court. [41] The sentencing provisions prescribed "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." [42] Relying on United States v. Booker, [43] where the high Court had invalidated the federal sentencing guidelines insofar as they mandated a sentencing range but upheld them insofar as they were discretionary, [44] the Black court sought to characterize the middle term as a sentencing suggestion to judges rather than a command. [45] Noting the history and legislative purpose of California's Determinate Sentencing Law, the Court decided, "the California sentencing scheme does not present the type of problem that the high court had in mind when it decided Blakely." [46] Foreshadowing the Cunningham dissent, Black concluded that the sentencing court enjoyed authority to impose any sentence in the trial, so long as the court reasonably exercised its discretion. [47]

In Cunningham, [48] which presented facts comparable to those in Black, the Court found that the California scheme violated the Apprendi-Blakely rule. [49] A jury convicted Cunningham of continuous sexual abuse of a minor, [50] which is punishable by a prison term of 6, 12 or 16 years. [51] The trial court found, by a preponderance of the evidence, six aggravating circumstances, including the victim's particular vulnerability, while finding only one circumstance in mitigation, Cunningham's lack of a prior criminal record. [52] Balancing these circumstances, the court imposed the upper term. [53] Cunningham failed to obtain relief from California courts. [54]

A six-justice majority (the Apprendi-Blakely majority and Chief Justice Roberts) found the sentence violated Cunningham's right to a jury trial and proof beyond a ***116** reasonable doubt for any fact that exposed him to a greater potential sentence. [55]

The Court construed the Penal Code section § 1170(b) prescription of the middle term as mandatory, absent an aggravating circumstance. [56] Accordingly, any aggravating fact used to justify an upper term requires submission to the jury and proof beyond a reasonable doubt. [57] To summarize:

> Contrary to the Black court's holding, our decisions . . . point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because [California's Determinate Sentencing Law] authorizes the judge not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent. [58]

Cunningham compelled sentencing reform in California. The Court observed "the ball now lies in [California's] court." [59] Several states, the decision noted, had responded to Apprendi and Blakely by authorizing juries to find facts needed to justify sentences beyond the statutory maximum, whereas others had widened the judicial discretion to select sentences, thereby elevating the statutory maximum. [60] California chose the latter route by making section 1170(b) discretionary rather than requiring an aggravating fact to justify the upper term. [61] After the section's opening, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms," the provision at the time of Cunningham read, "the court shall order imposition of the middle term unless there are circumstances in aggravation or mitigation of the crime." [62] The new law amends this text to "the choice of the appropriate term shall rest within the sound discretion of the court." Accordingly, it is now the upper term and not the midterm that is the statutory maximum for Blakely purposes.

III. The "Recidivism Exception"

Apprendi declined to overrule Almendarez-Torres. [63] "Other than a fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [64] Considerable doubt continues to surround this "recidivism exception." Does it concern only the existence of a prior conviction, or does it also exclude findings regarding the nature of the prior conviction from Apprendi's requirements? Several post-Apprendi decisions have decided there is no right to a jury trial or proof beyond a ***117** reasonable doubt for factual issues regarding the nature of prior convictions. [65] Contrariwise, Justice Thomas has renounced his Almendarez-Torres vote, and has called for its overruling, observing that a majority of justices consider it wrongly decided. [66] The recidivism doctrine thus faces countervailing pressures for its expansion and its abrogation. This part will examine these contrasting pressures and conclude the exception should remain limited to its literal Apprendi formulation.

In Shepard v. United States, defendant Reginald Shepard pleaded guilty to unlawful possession of a firearm [67] in federal court. [68] The prosecution claimed he should be sentenced as a habitual offender under the Armed Career Criminal Act (ACCA) due to his prior burglary convictions. [69] However, because federal law defined burglary more narrowly than Massachusetts law, [70] it was not self-evident that Shepard's state burglary convictions qualified as predicate felonies under the federal sentencing provisions. Examining the nature of those prior burglaries was necessary to determine if they qualified as burglaries under federal law. A four-justice plurality of the court relied on Taylor v. United States [71] to limit the scope of the sentencing court's review of the prior convictions. Taylor (whose facts also concerned the nature of a burglary, but whose rule extended to the entire ACCA), held the ACCA generally prohibits examination of the prior conviction's record, requiring the later court to consider only the statutory definition of the offense. [72] The Taylor court provided a limited exception where it could be shown that the state jury actually decided the defendant committed all the elements of the crime according to the federal definition. [73] Accordingly, it permitted federal sentencing courts to consider, in addition to the elements of the state offense, the charging document and jury instructions to see if the state jury had found the defendant had committed a predicate ACCA offense. [74]

Shepard extended the logic of Taylor to convictions by plea. [75] The Court concluded federal sentencing courts could consider the charging document, the terms of a plea, a transcript of colloquy between judge and defendant that confirmed the factual basis for the plea, or some comparable record, to determine the nature of the prior conviction. [76] These documents could establish the elements to which the defendant necessarily pleaded guilty. [77]

***118** The plurality noted an additional basis for not broadening the scope of a sentencing court's inquiry into the nature of the prior conviction: the Court's holdings in Jones and Apprendi. [78] The plurality, as had the Jones majority, rejected the prosecution's position because it would present serious doubts regarding its constitutionality. [79] Although Shepard construed only the federal recidivism statute, Jones likewise construed only a federal carjacking statute; one year after Jones came Apprendi. [80] A similar constitutionalization of Shepard may follow. [81]

Justice Thomas believed the Court should have constitutionalized the rule in Shepard; he contended that delving more deeply into the record would have raised not constitutional doubt, but constitutional error. [82] He noted that he, combined with the four Almendarez-Torres dissenters, now form a majority of justices opposed to any "recidivism exception": "Almendarez-Torres . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of this Court now [agrees] that Almendarez-Torres was wrongly decided." [83] The parties do not request it here, but in an appropriate case, this Court should consider Almendarez-Torres' continuing viability. "Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of Almendarez-Torres, despite the fundamental 'imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.'" [84] Significantly, the majority opposing Almendarez-Torres exists without the two new justices.

Notwithstanding the apparently precarious status of the exception, many courts, including the California Supreme Court, have interpreted the exception more expansively than its Almendarez-Torres incarnation. Some of these decisions concerned judicial findings that the defendant had served a prior prison term before the instant conviction(s). [85] Others concerned judicial findings regarding the facts underlying the prior convictions. [86] McGee closely resembles Shepard, and thus warrants careful examination.

A jury convicted James McGee of several violent felonies including assault with a firearm and attempted robbery. [87] Under California's Three Strikes Law, a convicted felon may receive a sentence of up to life imprisonment if he has two prior ***119** serious felony convictions. [88] In addition to a prior California conviction for selling a controlled substance, McGee had sustained two prior convictions for robbery in Nevada; thus if either Nevada robbery counted as a "strike," McGee would be subject to the life sentence. [89]

Similar to the federal recidivist statute at issue in Shepard, however, California law recognizes a foreign conviction as a strike only where the offender's conduct would qualify as a strike under California law. [90] There are two significant differences between the elements of robbery in Nevada and in California. [91] First, Nevada requires only a general criminal intent to commit robbery, whereas California requires a specific intent to deprive the victim of property. [92] Second, Nevada permits a finding of robbery based on the victim's fear of immediate or future harm; California requires the feared harm be immediate. [93] Due to these disparities, the court could not determine from the face of the prior convictions whether they qualified as strikes for California sentencing purposes; McGee's prior robbery convictions could qualify as strikes for the instant sentencing only if he actually harbored a specific intent in committing the robberies and the victims feared immediate harm. [94]

McGee asserted that he had a constitutional right to have a jury make this determination. [95] The trial court rejected this assertion, and examined the evidence for itself. [96] The court examined various evidence, including each case's preliminary hearing and

plea colloquy, and concluded that each Nevada robbery satisfied the elements of a California robbery. [97] The Court of Appeal agreed with McGee's constitutional argument but affirmed the sentence because the Apprendi error was harmless beyond a reasonable doubt. [98]

Five justices of the California Supreme Court affirmed McGee's sentence, and rejected the Court of Appeal's assignment of error to the trial court's evaluation of the Nevada convictions. [99] The Court broadly construed the exception identified in Apprendi: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [100] The Supreme Court interpreted the "fact of prior conviction" to include not only the existence of a prior conviction but any fact regarding recidivism. [101] The McGee court recalled a California Court of Appeal decision ***120** where the trial court rather than a jury had determined the defendant had served two prior prison terms. [102] The Court of Appeal there rejected the defendant's claim that the prior prison terms did not concern the "fact of prior conviction" stating:

> . . .Courts have not described Apprendi as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of recidivism. . . . [103]

McGee thus characterized the Almendarez-Torres exception as applying to any fact concerning a prior conviction. [104]

The Court of Appeal in McGee had distinguished the case before it from the prison term cases:

> [W]e conclude that the Almendarez-Torres exception to Apprendi is confined to determinations about the past legal consequences of a defendant's conduct, such as whether his conduct has given rise to a conviction or prison term, and does not extend to determinations about the conduct itself, such as the intent with which a defendant acted. [105]

Such a distinction honors the underlying rationale of the exception. The Jones court justified the exception because the defendant already received the procedural protections in the prior proceeding, which created the recidivist status. [106] "[O]ne basis for [the exception] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." [107] The Court in Apprendi attributed its Almendarez-Torres holding to these protections:

> Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies--all of which had been entered pursuant to proceedings with substantial safeguards of their own--no question concerning the right to jury trial or the standard of proof that would apply to a contested issue of fact was before the Court. [108]

The prior conviction exception thus depends on an estoppel rationale. A prior jury established beyond a reasonable doubt that the defendant committed a crime. If a subsequent jury again convicts the defendant, the defendant is not entitled to a jury finding beyond a reasonable doubt that he is a recidivist offender. On the basis of the two convictions, that finding already was made in accordance with the procedural protections of the Fifth, Sixth and Fourteenth Amendments (jury trial and the reasonable doubt standard). Therefore, because a prior jury found a defendant guilty beyond a ***121** reasonable doubt, he is estopped from denying the conduct reflected by the conviction. "The Constitution guarantees the right to present a defense, to a fair trial by an impartial jury, to the presumption of innocence, to due process, and to proof beyond a reasonable doubt. But it does not guarantee the defendant the right to exploit those guarantees over and over again to determine the same issue." [109]

The estoppel principle works well regarding the existence of the prior conviction but does not justify extending the exception to the facts of McGee. [110] A jury convicted McGee beyond a reasonable doubt of robbery---under Nevada law. [111] No jury ever determined beyond a reasonable doubt that he committed robbery as defined by California law. As the Court of Appeal reasonably found, the mental state with which McGee (or his victims) acted far more closely resembled the motive in Apprendi, which required a jury determination, than the existence of prior convictions in Almendarez-Torres, which did not. [112] The Shepard plurality supports this conclusion: "While the disputed fact here [the nature of the structure burglarized] can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to Jones and Apprendi, to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute." [113] The issue in McGee, the mental state of the offender and/or victim, seems even more open to interpretation (and thus in need of a jury determination) than the nature of the burglarized structure that the Shepard court held could not be determined conclusively by the court. [114]

Notwithstanding Justice Thomas' enthusiasm for abrogating any exception to Apprendi, [115] there are grounds for distinguishing "the fact of prior conviction" from other sentencing factors. As Shepard itself observed, there need not always be a jury finding regarding the nature of a prior conviction (like McGee's). First, the court may rely on the defendant's admission at sentencing (as in Almendarez-Torres) regarding the facts of the prior crime. [116] The court may likewise rely on the defendant's admission at the time of the prior crime (whether in a written plea agreement, a plea colloquy, or the defendant's assent to an explicit factual finding by the court). Furthermore, the court may rely on the charging document's description of the offense, the terms of which are essentially incorporated by reference by the plea. Likewise, when trial is by jury, the later sentencing court may rely on the jury instructions as well.

These "exceptions" are consistent with Jones' reasoning that a defendant is entitled to the procedural protections of jury trial and proof beyond a reasonable doubt. [117] Where a disputed issue like the defendant's intent (in the prior robbery) is ***122** found beyond a reasonable doubt by the jury, the later sentencing court may rely on that finding in imposing a higher sentence. Estopping defendants from challenging the existence of their prior convictions enhances rather than diminishes the jury trial system.

The strongest basis for overruling Almendarez-Torres lies in its particular facts. The asserted violation in Almendarez-Torres was not the lack of jury trial or lowered burden of persuasion but the absence of notice in the charging document. [118] A defendant's right to jury trial and proof beyond reasonable doubt need not be coextensive with the constitutional right to notice of the charges against her. After all, where a defendant has already been convicted by a jury beyond a reasonable doubt, that prior conviction is a fait accompli. Combined with the instant conviction, two juries have combined to establish her status as a recidivist offender for sentencing purposes. The cherished imperative of "a jury standing between a defendant and the power of the state" [119] has been fulfilled. By contrast, the fact of the prior conviction does not render nugatory the value of the constitutional right to notice. [120] Especially where the existence of prior conviction may increase punishment tenfold as in Almendarez-Torres (from 2 to 20 years), [121] a defendant's awareness of such pending allegations may substantially shape her trial strategy. The Supreme Court could (and perhaps should) hold Apprendi's "fact of a prior conviction exception" [122] frees the prosecution from redundant compliance with the jury trial and reasonable doubt guarantees--but not the right to notice.

IV. Cunningham and Harmless Error

The California Supreme Court is currently reviewing several post-Cunningham cases, one of which has been held since 2004. [123] These cases will address whether the failure to prove the aggravating factor to a jury beyond a reasonable doubt was harmless or prejudicial. This harmless error review stems from the conclusion of the United States Supreme Court's decision in Washington v. Recuenco, where the court stated: "Failure to submit a sentencing factor to the jury, like failure to submit

an element to the jury, is not structural error." [124] The Washington Supreme Court had concluded the error was reversible per se [125] under the authority of Sullivan v. Louisiana. [126] The high Court, however, followed Neder v. United States [127] in reviewing the ***123** error for prejudice. [128] Recuenco is a surprising decision, as Sullivan, not Neder, is arguably the more apposite precedent.

The Supreme Court has distinguished errors that may be reviewed for prejudice from those that are reversible per se. The former are "trial errors," "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." [129] But there are also errors, like the absence of an impartial judge or of counsel, that are "structural," "which defy analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial." [130] As Sullivan and Neder each offerred the Recuenco court a plausible precedent, these cases warrant full description.

The Sullivan [131] court found structural error where there was no jury verdict finding guilt beyond a reasonable doubt. [132] Trial counsel had argued there was reasonable doubt as to the identity of the murderer and his intent, but the jury convicted Sullivan after being instructed with an incorrect definition of "reasonable doubt" that impermissibly lowered the prosecution's burden of proof. [133] The Sullivan court observed that the most important element of the Sixth Amendment right to trial by jury was the "right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" [134] The Court further noted the interrelation between the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine . . . whether he is guilty beyond a reasonable doubt." [135] The incorrect definition of "reasonable doubt" deprived Sullivan of a jury verdict within the meaning of the Sixth Amendment. [136]

The Sullivan court recalled the rule of Chapman v. California [137] that some constitutional errors may be harmless but denied the error in Sullivan could be thus reviewed for prejudice. [138] The Court found the jury never returned a verdict of guilt beyond a reasonable doubt within the meaning of the Sixth Amendment, [139] and thus Chapman did not apply. [140]

***124** There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt--not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. [Citation.] The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. [141]

Considering the contrast between "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards" [142] and "trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented,'" [143] the Supreme Court unanimously held the denial of a jury verdict of guilt fell on the unreviewable side of the line. [144]

Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, [citation]. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." [Citation.]The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error." [145]

The error in Neder, by contrast, was "trial" rather than "structural." Neder was tried for tax fraud, [146] an element of which was the materiality of the defendant's false statements. [147] The Neder trial court erroneously instructed the jury that it "need not consider" [148] the materiality of the false statements because materiality "is not a question for the jury to decide." [149] A bare majority of the United States Supreme Court concluded Neder's conviction was trial error rather than structural error. [150] The Court analogized an instruction that omits an element of the offense (materiality) to ***125** one that misdescribes it, an error that the Court has held to be reviewable for prejudice. [151]

Neder distinguished Sullivan, where the defective instruction "vitiate[d] all the jury's findings." [152] Such comprehensive error amounted to structural error, which "infect[s] the entire trial process." [153] By contrast, the error in Neder involved only one element. [154] Unlike Sullivan, "Neder was tried . . . under the correct standard of proof and . . . a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to Neder's defense." [155]

The Neder court acknowledged "[i]t would not be illogical to extend the reasoning of Sullivan from a defective 'reasonable doubt' instruction to a failure to instruct on an element of the crime." [156] Indeed, three justices from the unanimous Sullivan court dissented in Neder. [157] Justice Scalia, Sullivan's author, wrote a dissenting opinion asserting "that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged - - which necessarily means his commission of every element of the crime charged - - can never be harmless." [158] His dissent argued that the Sixth Amendment precludes appellate judges from substituting their opinion of evidence for a nonexistent jury opinion; [159] if it is impermissible for judges to direct verdicts of conviction (for every element) no matter how strong the evidence, it must likewise be forbidden to direct a verdict as to one element "since failure to prove one, no less than failure to prove all, utterly prevents conviction." [160] The Court ultimately found, however, that the error was sufficiently limited; it concerned only a single element, which was uncontested at trial. [161]

The Court found Neder not Sullivan the applicable precedent for Recuenco. [162] An information charged Recuenco with assault against his wife. [163] The crime of assault by itself carried a sentence of 3 to 9 months. [164] The information further alleged he was armed with a deadly weapon during the assault, [165] which, if true, would add an additional year to his sentence. [166] The jury found Recuenco guilty of the assault and ***126** found true beyond a reasonable doubt that he was armed with a deadly weapon. [167] After receiving this verdict, however, the court determined, that Recuenco was armed with a firearm during the offense [168] and imposed a mandatory 3-year sentence enhancement. [169]

The trial court violated Blakely by finding on its own a fact that exposed the defendant to a greater sentence. The Washington Supreme Court had determined the error to be structural, like the one in Sullivan. [170] In fact, if one analogizes the reasoning of Jones, it would appear assault, assault with a deadly weapon, and assault with a firearm are three separate offenses under Washington law. [171] The error in Recuenco thus appears even more serious than that in Sullivan (albeit for a lesser offense): Sullivan received a jury verdict, albeit under a standard less than reasonable doubt. On the charge of assault with a firearm, however, (as opposed to assault with a deadly weapon), Recuenco received no jury verdict at all, and the court used a preponderance standard, far lower than the Sullivan burden of proof.

The United States Supreme Court, however, affirmed the trial court's sentencing Recuenco on the assault with a firearm charge. [172] Considering trial errors to be the rule and structural errors to be the exception, the Court found the instant error similar to the trial error in Neder. [173] Rather surprising was the addition of Neder dissenters Justices Scalia and Souter to this seven-justice majority. [174] The Court declined to "foreclose the possibility that an error could be found harmless because

the jury which convicted the defendant would have concluded, if given the opportunity, that a defendant was armed with a firearm." [175] Such language seems difficult to reconcile with Sullivan:

> The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt- . . . That is not enough. [Citation]. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. [176]

***127** The Recuenco votes of those in the Neder majority are easier to understand. Nevertheless, Recuenco could still have been distinguished from Neder. The Neder court found significant the fact that finding the instructional error reversible per se would have required a full retrial. [177] No such retrial would be necessary here, as the discrete error applied only to the assault with a firearm charge; the conviction for assault-- while armed with a deadly weapon--was beyond reproach.

The section of Neder that may have had the greatest role in convincing the Court to affirm in Recuenco, was its citation to the wisdom of Justice Oliver Wendell Holmes. [178] After acknowledging the logical basis for extending Sullivan, where there was no proper jury verdict as to any element, to Neder, where there was no proper jury verdict as to one of them, the Neder court emphasized "the life of the law has not been logic but experience." [179] The Court essentially decided that it would create an intolerable level of disturbance to criminal prosecutions if full reversal were required every time there was an omitted (or "misdescribed") element. [180] Other structural errors, like a biased trial judge, the complete absence of counsel (or post-Sullivan), misinstruction of the reasonable doubt standard, will likely be rare, but instructional error as to one element will likely be far more common. [181] This elevating experience over logic thus may explain how the Court has strengthened the right to a jury trial in Jones, Apprendi and Blakely, but declined to demand reversal per se of the many cases decided before the announcement of these rules.

The Supreme Court thus appears to have retreated somewhat from Sullivan. As the Neder court acknowledged, the logic of Sullivan could support the Neder's argument, [182] and, even assuming Neder was correctly decided, the Court could have distinguished Recuenco in that reversal would have swept away not the entire conviction (as in Neder) but only the most severe enhancement. In any event, Recuenco's reiteration of the Apprendi rule "that elements and sentencing factors must be treated the same for Sixth Amendment purposes" [183] is producing a thorough re-examination of California sentencing law, which has long distinguished between the two.

V. The Constitutionally Insignificant Difference Between Elements and Enhancements

Recuenco analogized the failure to instruct on the firearm enhancement with the failure to instruct on an element of the crime, [184] denying there is any meaningful difference between a jurisdiction that has two offenses, assault and aggravated assault, ***128** (assault with a weapon), and a jurisdiction that has one offense, assault, with an enhancement for deadly use. [185] Whether the extra element of a deadly weapon is an additional element thus makes no difference; either way, the failure to instruct the jury on the weapon issue may be harmless beyond a reasonable doubt. [186]

But what if a reviewing court declines to find harmlessness? What will result? Current California law has long maintained a substantial disparity in procedures that conflicts with Recuenco's reasoning. [187] Where the People charge the defendant with an offense and the jury finds all the elements except one (due to either deadlock or misinstruction), the People have long been permitted to retry the unresolved element without risking the other properly resolved elements if the additional element (e.g., weapon use) is charged as an "enhancement" but not if it is an "element" of a greater offense. [188] The California Attorney General pointed out this inconsistency in its brief in People v. Fields, [189] and recent cases have recognized the formerly

recognized distinction between elements and sentencing factors is no longer tenable. [190] The question that remains to be decided, however, is whether retrial should be permitted in both the context of elements and enhancements, or neither.

In People v. Fields, [191] the California Supreme Court barred prosecutors from simultaneously retrying greater offenses while retaining lesser included convictions. In Fields, the People charged Paul Fields with a greater offense, gross vehicular manslaughter while intoxicated (count I), and, inter alia, two lesser included offenses: vehicular manslaughter while intoxicated (count II) and gross vehicular manslaughter (count III). [192] The latter two offenses were lesser included offenses because neither required any element not also present in the greater offenses, and lacked one or more elements of the greater offense; count II lacked the element of gross negligence (simple negligence sufficed for conviction), whereas count III lacked the element of intoxication. The jury deadlocked on counts I and III and convicted the defendant on the lesser included offense of count II. [193] The California Supreme Court concluded that because Fields was already convicted of the lesser included offense, state law (though not the Fifth Amendment's double jeopardy bar) precluded retrial on the deadlocked greater included offense of gross vehicular manslaughter with intoxication. [194] If the People wished to retry the greater count, they could not accept the verdict of conviction on the lesser count. [195]

***129** This rule unjustifiably presents prosecutors with a dilemma. If a jury unanimously agrees a defendant is guilty of murder, but the jury deadlocks (or the trial court either fails to instruct or misinstructs on a missing element like premeditation that could elevate the offense to first degree or capital murder), the People must accept a lesser conviction of only second degree murder, or pursue the aggravated count. If they elect to retry the greater charge, however, the defendant regains the full presumption of innocence, thereby requiring the People to prove again all the elements of (second degree) murder already found beyond a reasonable doubt by a unanimous jury. [196] Receunco casts doubt upon this rule of complete reversal as the condition of retrial. [197] Recuenco established that a limited instructional error or omission on the greater element (Recuenco's use of a firearm) should not even invalidate that greater element; a fortiori, the misinstruction should not invalidate the other elements (assault and deadly weapon use) properly found by the jury beyond a reasonable doubt. [198]

The People in Fields unsuccessfully pointed to other contexts in which the People could retry a deadlocked element without sacrificing the lesser conviction already returned. [199] For example, California cases had permitted the People to retry a deadlocked enhancement without requiring a full retrial on the underlying offense. [200] Similarly, in People v. Ghent, [201] the jury convicted the defendant of first-degree murder but deadlocked on whether he committed it during a rape or attempted rape (necessary for a special circumstance finding that justifies a sentence of death or life imprisonment without possibility of parole). The Court authorized the empanelling of a second jury to decide the special circumstance allegation without requiring the People to forfeit the underlying first-degree murder or attempted rape convictions. [202]

The California Supreme Court expressly embraced this inconsistency in People v. Bright. [203] The jury convicted Bright of attempted murder, but deadlocked on the question of premeditation. [204] The Supreme Court explained that the permissibility of retrial on the premeditation element (without retrying the underlying attempted murder) depended on whether premeditation was an element of attempted premeditated murder or a penalty provision. [205]

[I]f the phrase “willful, deliberate, and premeditated murder” in section 664, subdivision (a), establishes a greater degree of the offense of ***130** attempted murder . . . The prohibition against double jeopardy therefore would bar retrial of the greater degree of attempted willful, deliberate, and premeditated murder. If, on the other hand, this provision constitutes a penalty provision related to the single offense of attempted murder, a conviction of attempted murder would not . . . bar retrial of [ ] the penalty allegation that the attempted murder was willful, deliberate, and premeditated. [206]

Bright created the striking anomaly that where a jury found a defendant had acted with intent to kill but could not conclude (or had been misinstructed) as to whether this intent was premeditated, the People could retry the defendant on the limited issue of premeditation--but only if the victim survived; if the victim died, the People would need to retry the entire murder charge to establish the element of premeditation. [207]

The California Supreme Court recently acknowledged this dichotomy could not survive Apprendi, which recognized the "functional equivalen[ce]" between sentencing enhancements and elements of a greater offense. [208] The case of People v. Seel [209] resembled Bright. A jury convicted Seel of attempted premeditated murder, and the Court of Appeal found insufficient evidence of premeditation. [210] Retrial of an element is barred when an appellate court finds insufficient evidence of that element, [211] and the parties thus presented the Court with the question raised in Bright: Was premeditation an element of the greater offense of attempted premeditated murder or a penalty provision? [212] The Court deemed the distinction constitutionally meaningless; so long as the jury's finding of the fact of premeditation exposed Seel to additional punishment, double jeopardy principles applied. [213]

The application of the double jeopardy rule in Seel barred retrial because an appellate court had already deemed the evidence of premeditation insufficient as a matter of law, which effectively served to acquit the defendant of the charge. [214] The double jeopardy principles of both the federal and California constitutions, however, permit retrial when the jury deadlocks (or is misinstructed) on the greater element. [215] (Indeed, every other state has rejected the Fields retrial restriction.) [216] Therefore, where a jury fails to find (either through deadlock or instructional error) a fact alleged ***131** by the People, retrial on that element should be permissible, regardless of its label. A recent opinion, however, sought to eliminate the inconsistency not by permitting retrial in the contexts of both elements and enhancements but by prohibiting it.

In its not-yet final opinion in Porter v. Superior Court, [217] the California Court of Appeal equated offense elements and sentencing enhancements, precluding retrial of each. A jury convicted Anthony Porter of attempted premeditated murder, and found true the charged enhancement that he committed the offenses as part of his connection to a criminal street gang. [218] The Court of Appeal did not find insufficient evidence of premeditation or gang involvement, which would have barred retrial. [219] Instead, the Court of Appeal independently weighed the evidence, "in effect acting as a "13th juror." [220] The Porter court recognized there was no double jeopardy bar to retrial as the evidence was sufficient, but held retrial was still barred by Fields. [221] Relying on Apprendi's recognition of the functional equivalence between elements and enhancements, Porter extended the Fields rule, which prevents the People from retrying a greater included element unless they forfeit the lesser conviction, to enhancements as well. [222] Accordingly, after having accepted the lesser included offense of attempted murder, the People could not retry either the element of premeditation or the enhancement of gang involvement.

The holding is troubling as it purports to vindicate the imperative of trial by jury, yet has the effect of conclusively overruling the jury's decision. If the appellate court acts as a 13th juror, it at most creates a jury deadlock: 12 votes for conviction and 1 vote for acquittal. As the California Supreme Court recognized in Seel, there is a fundamental distinction between such a deadlock and evidentiary insufficiency. "Neither a court nor a jury made a determination that the prosecution failed to prove its case. Significantly, '[a] mistrial does not constitute a termination of jeopardy, and accordingly double jeopardy does not arise from the legal necessity of a mistrial."' [223] Porter, however, effectively eliminates that distinction; retrial is barred regardless of whether the evidence was sufficient at trial.

It is paradoxical that Porter purports to derive its authority from Apprendi and Blakely, because the appellate court's preclusive overruling of the unanimous jury's findings of guilt beyond a reasonable doubt contradicts the very essence of those cases. Porter concluded the fundamental right to a jury trial "would be eviscerated if the government could obtain a criminal conviction that did not reflect a single jury's determination that all elements of an offense [plus enhancements] had been proved beyond a reasonable doubt. The People's position would permit a succession of trials on discrete elements of an offense following the

grant of a new trial on fewer than all elements ***132** until each element had been found true by some jury and a new trial had not been granted." [224] Of course, the recidivism exception endorsed in Almendarez-Torres, Jones and Apprendi contemplates that very succession of trials. Where the People charge a defendant with being a habitual offender, the first (prior) jury establishes his guilt of the predicate offense and the later jury finds his guilt of the instant offense.

The "parade of horribles" contemplated by Porter, a series of retrials in which the appellate court reverses the jury's findings on some elements and then the jury again finds all those elements, seems unlikely and unwieldy. But if there is one lesson to be learned from Apprendi, it is that what is paramount is the jury's opinion of the evidence, not the court's. To the extent there is disagreement, it is not only permissible but essential for the jury's findings to control.

Notwithstanding the contrary rhetoric, the combination of Recuenco and Porter now threatens to render jury verdicts irrelevant. Recuenco authorizes affirmance of a conviction even though a jury (due to incomplete or incorrect instruction) never found all the elements so long as the appellate court finds that a hypothetical properly instructed jury would have found them. Porter holds that even if a jury does unanimously find true every element (with proper instruction), the appellate court can conclusively overturn its findings if it believes the jury should not have found them. In others words, the appellate court has the final say; the jury is a passive bystander. A more sweeping renunciation of Apprendi can scarcely be imagined.

In Seel, the California Supreme Court finally recognized there was no tenable distinction between elements and enhancements; the same analysis must apply to each. [225] Unfortunately, Porter may further restrict the People's opportunity to obtain a full conviction where supported by the evidence. The current election forced upon prosecutors recalls the 1970's game show "Let's Make a Deal," where contestants could exchange their modest winnings for the mystery prize behind the next curtain. California prosecutors face a similar choice---they must trade in valid lesser convictions to pursue the greater offense, thereby risking a complete acquittal, notwithstanding the first jury's conviction. [226]

VI. California Capital Procedures

In the 2002 case of Ring v. Arizona, [227] the Court invalidated the very capital sentencing scheme it had upheld 12 years earlier in Walton v. Arizona. [228] Defendants sentenced to death have likewise cited Apprendi and Ring in challenging California's capital sentencing scheme. [229] The California Supreme Court has rejected these challenges, ***133** but with Cunningham reflecting that Court's underestimation of Apprendi's significance, the challenges will likely continue. Unlike Black, however, the California Supreme Court's capital decisions appear to rest on firmer ground.

When the People charge a defendant with first-degree murder in California, they may allege one or more special circumstances that would render the defendant eligible for either death or life imprisonment without possibility of parole ("LWOP"). [230] If the jury returns both a conviction regarding the murder and a true finding on the special circumstance(s), a penalty phase follows the guilt phase. [231] Both the People and defense may present evidence to convince the jury that death or LWOP is the appropriate penalty. [232] The jury may consider numerous factors in aggravation and/or mitigation, as well as any other unenumerated factor supporting mitigation. [233] Each juror then must decide for herself which is the appropriate penalty; death will be the sentence only if every juror favors it over LWOP. [234]

The Arizona procedure invalidated in Ring rendered eligible for death or life imprisonment any defendant convicted of first-degree murder. [235] The trial court would then conduct a hearing and determine by itself the presence or absence of aggravating and mitigating circumstances. [236] Death was a permissible sentence only where (1) there was at least one aggravating circumstance; and (2) "there are no mitigating circumstances sufficiently substantial to call for leniency." [237] Because "A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual

determination that a statutory aggravating factor exists . . . the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty . . .” [238] Accordingly, Arizona's capital sentencing scheme did not comply with Apprendi. [239]

The California Supreme Court has distinguished California's capital sentencing procedure from Arizona's. California entrusts penalty phase determinations to the jury, so defense objections have instead focused on the absence of a reasonable doubt standard and presumption of innocence in the penalty proceedings. [240] In People v. Prieto, the court emphasized that an Arizona defendant could not be sentenced to death absent a factual finding by the court; the statutory maximum based on the jury's finding was life imprisonment. [241] In California, by contrast, “once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory ***134** maximum . . . .” [242] The Prieto court acknowledged that each juror must decide that the aggravating factors substantially outweigh the mitigating circumstances but emphasized that each juror determines individually the balance between aggravating and mitigating factors, and they need not agree as to the existence of any particular factor. [243] Unlike the Arizona procedure, no factual finding beyond the special circumstance is legally necessary to justify a death sentence.

Prieto emphasized each juror's decision between death and LWOP “‘is inherently moral and normative, not factual . . . .”’ [244] The Court noted juries receive instruction that:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. [245]

Under this holistic evaluation, the People need not establish any new fact (beyond a special circumstance) to justify a death sentence.

The Prieto conclusion is not above criticism; after all, if a death sentence requires that each juror “. . . must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants [a] death [sentence],” [246] then an aggravating circumstance must, at a minimum, exist. A defendant could plausibly argue that until the presence of an aggravating factor appears, a death sentence is impermissible.

Still, there is a sound basis for the conclusion that aggravating factors are factors to be considered, not elements to be proved. [247] Some of the factors are actually incapable of being proved true. For example, one factor is the age of the defendant. [248] California law does not specify a minimum or maximum age necessary for this to count as an aggravating factor; it is for each individual juror to determine the significance, if any, of this factor. Some have actually criticized the malleability of this factor, because some jurors may deem the defendant's youth a factor in aggravation (perhaps because he will remain dangerous and perhaps have a negative impact on other inmates) whereas other jurors may consider the defendant's advanced age to be a factor in aggravation (perhaps because he would be more culpable than a younger ***135** offender). [249] But this malleability, for better or worse, distinguishes the aggravating factors in California's capital sentencing from the racial motive in Apprendi or the deliberate cruelty in Blakely.

Challenges to California law may become harder after Kansas v. Marsh. [250] The Supreme Court there upheld a sentencing scheme where a death sentence would result upon a unanimous finding by the jury that the aggravating and mitigating factors

were in equipoise. [251] The Court further endorsed the invalidated Arizona scheme insofar as it imposed upon the defendant the burden of proving the mitigating circumstances outweighed the aggravating ones. [252] Thus, prosecutors are not constitutionally obligated to prove death is the appropriate penalty by a preponderance of the evidence, let alone beyond a reasonable doubt. [253]

Marsh produced an aggressive exchange of views between Justice Scalia and Justice Souter on the substantive propriety of capital punishment. Yet the two have agreed on the value of the jury in every case in the series: Almendarez-Torres, Neder, Jones, Apprendi, Ring, Blakely, Shepard and Cunningham. The final Part of this article will examine this apparent divergence.

VII. Jury Trials and Death Penalties

A somewhat unusual coalition of justices has produced the Apprendi-Blakely-Cunningham line of cases. Justices Scalia and Thomas, who may be among the most "pro-punishment" justices, at least in a capital context, have joined Justices Stevens, Souter and Ginsburg, who often favor a relatively lenient approach to criminal defendants. The decisions of the latter three appear consistent with their overall jurisprudence; the votes of Justices Scalia and Thomas appear at first glance more puzzling. Deeper analysis, however, reveals the important connection between punishment, particularly the death penalty, and trial by jury.

Justice Scalia formally acknowledged in his Ring concurrence the tension between his objections to creating procedural obstacles to capital punishment and his insistence that a jury find beyond a reasonable doubt any factor necessary to support Ring's sentence of death. On the one hand, he doubted the validity of Court holdings requiring the existence of aggravating factors as a prerequisite for a death sentence. [254] On the other hand, he embraced the Sixth Amendment imperative of jury participation ***136** regarding any element needed to enhance a punishment. [255] "The quandary is apparent: Should I continue to apply the [jury requirement] when I know the only reason the fact is essential is that this Court has mistakenly said that the Constitution requires state law to impose such 'aggravating factors'?" [256] Justice Scalia ultimately resolved this dilemma by requiring the jury to find the aggravating fact needed (correctly or not) to justify the death sentence. [257]

Justice Scalia thus made clear his disagreement with Justice Breyer, who also concurred. Justice Scalia emphasized that a jury finding beyond a reasonable doubt was needed to find the aggravating factor used to support the death sentence, but not the sentence itself. In other words, so long as the jury found the aggravating factor beyond a reasonable doubt, a state could constitutionally leave the final sentencing choice to a judge. [258] Justice Breyer, by contrast, based his vote not on his support for the values underlying Apprendi, in which he wrote a dissenting opinion, but his belief that the jury trial requirement would serve as a much-needed check on capital punishment, of which he was critical. [259] But Justice Breyer, like Justice Scalia, found a connection between jury trial and capital punishment, although he was substantially more skeptical of both traditions. Justice Breyer observed the primary rationale underlying capital punishment is retribution, and the jury, rather than judge, is best suited for determining the extent of the defendant's blameworthiness and deserved sentence.

In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to "the community's moral sensibility" [citation omitted] because they "reflect more accurately the composition and experiences of the community as a whole." [citation omitted]. Hence they are more likely to "express the conscience of the community on the ultimate question of life and death" [citation omitted] and better able to determine in the particular case the need for retribution, namely, "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." [citation omitted] [260]

Long before Ring, C.S. Lewis identified the connection between the role of the jury and desert-based punishment.

[S]o long as we are thinking in terms of Desert, the propriety of the penal code, being a moral question, is a question on which every man has the right to an opinion, not because he follows this or that profession, but because he is simply a man, a rational

animal enjoying the ***137** Natural Light. But all this is changed when we drop the concept of Desert. The only two questions we may now ask about a punishment are whether it deters and whether it cures. But these are not questions on which anyone is entitled to have an opinion simply because he is a man. . . Only the expert "penologist" . . . in the light of the previous experiment, can tell us what is likely to deter: only the psychotherapist can tell us what is likely to cure. The Humanitarian theory, then, removes sentences from the hands of jurists whom the public conscience is entitled to criticize and places them in the hands of technical experts whose social sciences do not even employ such categories as rights and justice. [261]

Not only, as Justice Breyer observed, are jurors essential to determining desert, but as Lewis noted, they are superfluous to other penal purposes. [262]

The Sixth Amendment jury trial guarantee has long ensured a relationship between an offender's desert and his penalty that has often been absent in Europe. The fate of nineteenth-century European defendants lay less in the hands of their fellow citizens than of mercurial monarchs; [263] punishment befell political opponents as well as conventional criminals. [264] By contrast, American populism (effected through trial by jury) ensured that serious punishment was reserved for serious, usually violent criminals rather political dissidents and debtors. [265] In short, America, unlike Europe, imprisoned offenders who deserved incarceration. Blakely itself linked the greater American commitment to popular government to trial by jury: "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." [266]

The distinction offered by Alexis de Tocqueville between the European and the American method of preventing tyranny offers special insight into the contemporary debate over punishment.

> The first is to weaken the supreme power in its very principle, by forbidding or preventing society from acting in its own defense under certain circumstances. To weaken authority in this manner is the European way of establishing freedom. The second manner of diminishing the influence of authority does not consist in stripping society of some of its rights, nor in paralyzing its efforts, but in distributing the exercise of its powers among various hands and in multiplying functionaries, to each of whom is given the degree of power necessary for him to perform his duty. [267]

***138** In the contemporary context, Europe prevents tyranny by limiting the extent of substantive punishment available (abolishing the death penalty and restricting life imprisonment), whereas American pursues that goal by procedural protections, the most significant of which is taking sentencing power away from government agents and entrusting it to citizens. [268] Thus, Tocqueville's observation remains true today: Rather than rely on a judicial elite, American justice depended on the jury. This popular involvement has alternately been a boon and a bane to criminal defendants: juries shielded American defendants from the politically-motivated incarceration prevalent in nineteenth-century Continental Europe, but juries today expose defendants to the full range of retributive punishment, including death, that juries believe they deserve. [269]

The experiences of the Old World and New World in more recent years have furthered the "continental divide" with respect to opinions of capital punishment. Stalin, Hitler, and other dictators so abused state power in executing individuals who were undeserving of death that Europeans understandably grew fearful of allowing their governments to impose the ultimate sanction. [270] By contrast, because American death sentences have borne a much closer relationship with individual desert, Americans have opted merely to refine capital procedures rather than abandon the punishment altogether.

If one reason for European skepticism regarding the death penalty in Continental accusatorial jurisdictions is their lack of procedural protections for the individual, another is a weaker belief in personal desert. Europeans are far more likely than American or Japanese respondents to subscribe to a deterministic worldview, in which individuals are not fully (or mostly) responsible for their actions. [271] One survey asked whether "success in life is pretty much determined by forces outside our control." [272] A majority of Japanese and two-thirds of Americans disagreed with this deterministic attitude, yet fewer than

half of Britons and less than one-third of Germans and Italians disagreed.[273] Likewise, when asked whether personal failure should be attributed to the individual or society, only 12 percent of Americans and 13 percent of Japanese were inclined to blame societal causes, whereas the figure among continental Europeans was more than twice as high.[274] The fairness of capital punishment obviously depends on the personal blameworthiness of the offender; if society is to blame, execution is unjust.

The connection between desert, capital punishment and jury trial remains today. Just as the United States Constitution but not the European Convention on Human Rights permits the death penalty, so too does only the former protect the right ***139** to trial by jury, which is largely absent from the European Continent.[275] Even the United Kingdom, which retains a jury trial right in serious criminal cases, limits the role of juries far more than does the United States.[276] (Notably, Japan, which maintains capital punishment, will adopt a system of trial by jury by 2009.)[277] To some extent, America's continued embrace of capital punishment stems from its more direct form of democracy than that extant in Europe.[278] America's broad right to trial by jury, including the rules announced in Apprendi and Ring, similarly reflect a distinctly American position regarding the diffusion of political power.

The same notion of rational moral agency, which finds the individual capable of personal self-government (and fully culpable for his misconduct), likewise justifies his engagement in civic self-government, whether through the democratic lawmaking process or through serving as a juror.[279] Tocqueville's observations about jury service express assumptions about personal responsibility that help explain the exceptional American belief in self-government: “He who punishes the criminal is therefore the real master of society. Now, the institution of the jury raises the people itself . . . to the bench of judges. The institution of the jury consequently invests the people . . . with the direction of society.”[280]

The Supreme Court in Roper v. Simmons[281] recognized the link between the death penalty and jury service. The Court held that minors could not be subject to the death penalty in part due to their immaturity.[282] The Court emphasized that minors were considered not fully responsible adults, proof of which could be found from their incapacity to serve on a jury.[283] Adults, by contrast, were eligible for both jury service and execution.[284] In Europe, the same connection applies, although it is both minors and adults who are simultaneously deemed insufficiently responsible either to serve on a jury or face execution.[285]

Thus both Europe and America maintain what may be considered consistent positions. Europe provides fewer procedural protections to defendants, but protects them from severe substantive punishment. America, by contrast, provides defendants with autonomy in conducting their defense and greater procedural protections, jury trial perhaps foremost among them, yet where those protections are unavailing, allows a more serious punishment. In other words, the result may be harsher because the ***140** process is fairer. Accordingly, Justice Scalia's quandary reflects both sides of the coin of American exceptionalism: greater rights and greater responsibilities.

VIII. Conclusion

In the last decade, the Supreme Court has reinvigorated the right to jury trial, finding it applicable where defendants face additional punishment. This restores to jurors, rather than judges, the ultimate authority for the fate of their fellow citizens. The Court has recognized a limited exception to this rule for the fact of prior convictions, an exception justified by the procedural protections enjoyed by the defendant in that prior proceeding. This exception has an uncertain future: on the one hand, a majority of justices have expressed disagreement with the holding of Almendarez-Torres, whereas only two justices are on record as endorsing it. Notwithstanding the exception's potential abrogation, lower courts, including the California Supreme Court, have been expanding the reach of the recidivism exception beyond the “fact” of a prior conviction. The high Court decision in Shepard could be a precursor, though, of an opinion rejecting this expansion, just as Jones soon led to Apprendi.

Although the Court has taken a strict stand against judicial factfinding in sentencing, the Court has balanced this position by allowing harmless error analysis when the judge does engage in limited fact-finding rather than instruct the jury on every element necessary to justify an enhanced sentence. This practical tolerance of judicial fact-finding allows for more sweeping theoretical pronouncements against it, as the new rules will not lead to an intolerable number of reversals that are factually unwarranted.

The Apprendi line of cases does not seem to jeopardize California's capital procedures, which appear distinguishable from the sentencing procedures found invalid in Ring v. Arizona. Nevertheless, the Court of Appeal's attempt in Porter to equate treatment of elements and enhancements after Apprendi has the paradoxical effect of undermining the authority of the jury in both contexts. The California Supreme Court ought to review this decision.

Finally, the broader right to a jury trial cannot be seen as a victory for the “defense” (and defeat for the prosecution), but one exalting the autonomy of the individual. American law vindicates the perception of the individual as a rational moral agent in her role as a voter, who may select candidates and the laws they should to enact (including sentencing provisions), in her role as a defendant, who may choose how to conduct her own defense, in her role as a juror, who may pass on the guilt or innocence of the defendant (and find any required sentencing facts), and finally, (and perhaps most controversially) in her role as capital convict, who is considered responsible enough for her misconduct to be held fully accountable for it. Most European nations champion a much more limited view of individual autonomy. They protect the individual from execution, but also from the more expansive view of liberty championed by America in the other contexts. The American view of the individual as fully ***141** rational moral agent may be correct or incorrect, but it is highly consistent, and as the European experience shows, the loss of one of these rights may call into question the existence of all the others.

Footnotes

a1 Associate Professor, Western State University College of Law (keiter @stanfordalumni.org). The author (1) briefed and argued People v. Fields for the People of the State of California (see Part V); (2) briefed and argued the Cunningham issue for the defense before the California Court of Appeal in the unpublished case of People v. Fountain, (B174655); (3) was an attorney at the California Supreme Court when it decided People v. Prieto, 30 Cal. 4th 226 (2003), and People v. Anderson, 25 Cal. 4th 543 (2001) (see Part VI). Special thanks are due to the Western State University library staff, without whose help I could not have completed this project so quickly. Also a thank you to Jacki Brown.

1 Cunningham v. Cal., 127 S. Ct. 856 (2007).

2 Id.

3 People v. Black, 35 Cal. 4th 1238, 1259 n.14 (2005).

4 Blakely v. Wash., 542 U.S. 296 (2004).

5 Almendarez-Torres v. U.S., 523 U.S 224 (1998).

6 Id. at 227.

7 Id.

8 Id. at 226. Section 1326, subd. (b)(2) authorized a sentence of up to 20 years where the defendant had previously committed an aggravated felony.

9 Id. at 227.

10 Id.

11 Id. at 226-227.

12 Id. at 235.

13 Id. at 243.

14 Id. at 251.

15 Armendarez-Torres, 523 U.S. at 258.

16 Id. at 270.

17 Jones v. U.S., 526 U.S. 227 (1999).

18 Id. at 230.

19 Id. at 230-231.

20 Id. at 231.

21 Id. at 252.

22 Id. at 248-249.

23 Id. at 252.

24 Id.

25 Apprendi, 530 U.S. 466.

26 Id. at 468-469.

27 Id. at 490. Elsewhere in the opinion the Court indicated that the fact must also be charged in the indictment, and that these requirements are derived from the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, and applied to the states through the Fourteenth Amendment. Id. at 476.

28 Id. at 487.

29 Apprendi, 530 U.S. at 488 (emphasis in original).

30 Id. at 489-490.

31 Id. at 476.

32 Blakely v. Wash., 542 U.S. 296.

33 Id. at 301.

34 Id. at 299.

35 Id.

36 Id. at 300-301.

37 Id. at 303-304 (emphasis in original).

38 Id. at 301.

39 See Jones, 526 U.S. 227; Apprendi, 530 U.S. 466; Blakely, 542 U.S. 296.

40 People v. Black, 35 Cal. 4th 1238 (2005).

41 Id. at 1247.

42 Id. (quoting Cal. Penal Code § 1170, subd. (b)).

43 U.S. v. Booker, 543 U.S. 220 (2005).

44 Id. at 269-271.

45 Black, 35 Cal. 4th at 1257.

46 Id. at 1255-1256. The Court also emphasized the practical fact that Washington courts imposed a term beyond the presumptive range in only three percent of their cases, whereas the California figure was thirteen and eighteen percent. Black, 35 Cal. 4th at 1259 n.14. Of course, after Cunningham, this fact reflects only a greater proportion of unconstitutional sentences in California.

47 Black, 35 Cal. 4th 1238.

48 Cunningham v. Cal., 127 S. Ct. 856.

49 Id. at 871.

50 Id. at 860.

51 Cal. Penal Code § 288.5 (2007).

52 Cunningham, 127 S. Ct. at 860-861.

53 Id. at 861.

54 Id. The California Court of Appeal affirmed his sentence, and the California Supreme Court, having decided Black nine days earlier, declined review.

55 Cunningham, 127 S. Ct. at 871.

56 Id. at 862.

57 See id. at 868-871.

58 Id. at 871.

59 Booker, 543 U.S. at 265.

60 Cunningham, 127 S. Ct. at 871.

61 Matthew Yi, Sentencing law OK'd by governor, S.F. Chron., Mar. 31, 2007, B3.

62 Cal. Penal Code § 1170(b) (2007) (emphasis added).

63 Apprendi, 530 U.S. 466.

64 Id. at 490 (emphasis added).

65 See People v. McGee, 38 Cal. 4th 682 (2006) and cases cited therein.

66 Shepard v. U.S., 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring).

67 18 U.S.C. § 922(g)(1) (2007).

68 Shepard, 544 U.S. at 16.

69 The Armed Career Criminal Act (ACCA) (18 U.S.C. 924(e)) provides a mandatory minimum sentence for any convicted defendant who has sustained three prior convictions for serious drug or violent offenses. Id.

70 Federal law requires the burglary be “generic,” i.e. of a building or structure. (Shepard v. U.S., 544 U.S. 13, 16-17). Massachusetts law defines as burglary entries into boats and cars as well. (Id. at 17.).

71 Taylor v. U.S., 495 U.S. 575 (1990).

72 Shepard, 544 U.S. at 17 (citing Taylor v. U.S., 495 U.S. 575, 602 (1990)).

73 Id. at 17 (citing Taylor, 495 U.S. at 602).

74 Id. at 20 (citing Taylor, 495 U.S. at 602).

75 Id. at 19-20.

76 Id. at 26.

77 Id.

78 Apprendi, 530 U.S. 466; Jones, 526 U.S. 227.

79 Shepard, 544 U.S. at 24-26 (citing Jones, 526 U.S. at 239).

80 Id. at 15; Apprendi, 530 U.S. 466; Jones, 526 U.S. at 229.

81 Id. at 13.

82 Id. at 28 (Thomas, J., concurring).

83 Id. at 27 (Thomas, J., concurring) (criticizing Almendarez-Torres, 523 U.S. 224; see also Scalia, J., joined by Stevens, Souter and Ginsburg, JJ., dissenting; Apprendi, 530 U.S. at 520-521 (Thomas, J., concurring)).

84 Id. at 28.

85 See State v. Stewart, 368 Md. 26, 40 (2002); People v. Thomas, 91 Cal. App. 4th 212, 222-223 (2001).

86 See Chamberlain v. Pillar, 307 F. Supp. 2d 1128, 1141-1142 (C.D. Cal. 2004) (whether defendant personally used a dangerous weapon in committing the offense); People v. McGee, 38 Cal. 4th 682 (2006) (whether the defendant maintained a specific intent in committing the robbery and whether the victim feared immediate rather than future harm).

87 See People v. McGee, 38 Cal. 4th at 688; Shepard, 544 U.S. 13.

88 Cal. Penal Code § 1170.12 (2007).

89 McGee, 38 Cal. 4th at 687-688; see Cal. Penal Code § 1170.12.

90 Cal. Penal Code § 1170.12(b)(2).

91 McGee, 38 Cal. 4th at 688.

92 Id.

93 Id.

94 See id.

95 Id. at 688.

96 Id. at 688-689.

97 Id. at 690.

98 Id. at 688 (see Part III regarding Apprendi error and prejudice).

99 Id. at 709.

100 Id. at 701 (quoting Apprendi, 530 U.S. at 490.

101 Id. at 701.

102 McGee, 38 Cal. 4th at 701 (citing People v. Thomas, 91 Cal. App. 4th at 221).

103 Id. (quoting Thomas, 91 Cal. App. 4th at 221).

104 Id. at 701-702.

105 Id. at 702.

106 Jones, 526 U.S. at 249.

107 Id.

108 Apprendi, 530 U.S. at 488.

109 In re Gutierrez, 51 Cal. App. 4th 1704, 1719 (1997) (Woods, J., concurring).

110 McGee, 38 Cal. 4th 682.

111 Id. at 688.

112 Id. at 690.

113 Shepard, 544 U.S. at 24.

114 McGee, 38 Cal. 4th 682; Shepard, 544 U.S. 13.

115 See Shepard, 544 U.S. at 27-28 (Thomas, J., concurring).

116 Apprendi, 530 U.S. at 469-470.

117 Jones, 526 U.S. at 249.

118 Almendarez-Torrez, 523 U.S. at 226.

119 Shepard, 544 U.S. at 25.

120 Almendarez-Torres, 523 U.S. at 226-227.

121 Id. at 226.

122 Apprendi, 530 U.S. at 491.

123 See e.g. People v. Towne, 2007 Cal. LEXIS 1437; 2004 Cal. LEXIS 6290.

124 Wash. v. Recuenco, 126 S. Ct. 2546, 2553 (2006).

125 State v. Hughes, 154 Wn. 2d 118, 142-143 (2005).

126 Sullivan v. La., 508 U.S. 275, 279-280 (1993).

127 Neder v. U.S., 527 U.S. 1, 19-20 (1999).

128 Recuenco, 126 S. Ct. at 2552.

129 Ariz. v. Fulminante, 499 U.S. 279, 307-308 (1991).

130 Id. at 309-310.

131 Sullivan v. La., 508 U.S. 275.

132 Id. at 281-282.

133 Id. at 276-277 (citing Cage v. La., 498 U.S. 39 (1990)).

134 Id.

135 Id. at 278.

136 Id. at 281-282.

137 Chapman v. Cal., 386 U.S. 18, 24 (1967).

138 Sullivan, 508 U.S. at 281-282.

139 Id. at 278.

140 Chapman, 386 U.S. at 24.

141 Sullivan, 508 U.S. at 280.

142 Id. at 281 (quoting Fulminante, 499 U.S. at 309).

143 Id. (quoting Fulminante, 499 U.S. at 307-308).

144 Id. at 281-282.

145 Id.

146 26 U.S.C. § 7206(1) (2007).

147 Neder, 527 U.S. at 4 (citing U.S. v. Gaudin, 515 U.S. 506 (1995)).

148 Id. at 6.

149 Id.

150 Id. at 9-10.

151 Neder, 527 U.S. at 9-14. The high Court emphasized the facts: (1) Neder's fraudulent misstatement underreported five million dollars; (2) Neder did not dispute the element of materiality; and (3) Neder did not suggest he would offer any evidence on this point if allowed. Id. at 15.

152 Id. at 11 (quoting Sullivan, 508 U.S. at 281 (Rehnquist, C.J., concurring)).

153 Id. at 8 (quoting Brecht v. Abrahamson, 507 U.S. 619, 630 (1993)).

154 Id. at 8.

155 Id. at 9.

156 Id. at 15.

157 Id. at 30.

158 Id. at 30 (Scalia, Souter & Ginsburg, JJ., concurring in parts I & III, and dissenting from part II).

159 Id. at 32 (Scalia, Souter & Ginsburg, JJ., concurring in parts I & III, and dissenting from part II).

160 Id. at 33 (Scalia, Souter & Ginsburg, JJ., concurring in parts I & III, and dissenting from part II).

161 Id. (Scalia, Souter & Ginsburg, JJ., concurring in parts I & III, and dissenting from part II).

162 Recuenco, 126 S. Ct. at 2552-53.

163 Id. at 2549.

164 Id. at 2554 (Ginsburg & Stevens, JJ., dissenting) (citing Wash. Rev. Code §§ 9.94A510, 9A.36.021(1)(c) (2004)).

165 Id. at 2549.

166 Id. at 2554 (Ginsburg & Stevens, JJ., dissenting) (citing Wash. Rev. Code § 9.94A.533(4)(b) (2004).

167 Recuenco, 126 S. Ct. at 2555 (Ginsburg & Stevens, JJ., dissenting).

168 Id.

169 Wash. Rev. Code § 9.94A.533(3)(b).

170 Recuenco, 126 S. Ct. at 2550 (citing State v. Hughes, 110 P.3d 192, 205 (Wash. 2005)).

171 Supra n. 21.

172 Recuenco, 126 S. Ct. at 2549.

173 Id. at 2551-2552.

174 See Neder, 527 U.S. at 30.

175 Recuenco, 126 S. Ct. at 2550 (emphasis added).

176 Sullivan v. La., 508 U.S. at 280; Furthermore, as Justice Scalia emphasized in his Neder dissent, the right to a jury trial depends on categorical, not utilitarian considerations. It may well be that the absence of complete instruction on every element does not necessarily impair the accuracy or reliability of the verdict. But the same, arguably, is true when there is racial discrimination in jury selection. Just as a judge may evaluate the evidence as effectively as the jury, so too could a juror ultimately chosen (of whatever race) evaluate the evidence as effectively as the impermissibly stricken juror. But there is a categorical command that deems racial discrimination in jury selection to be structural error due to its societal effects. Considering the significance to the Framers of the right to trial by jury (See e.g. Neder, 527 U.S. at 30-31 (Scalia, J., dissenting), the same might be said for denial of trial by jury).

177 Neder, 527 U.S. at 15 (“Reversal without any consideration of the effect of the error upon the verdict would send the case back for retrial - a retrial not focused at all on the issue of materiality, but on contested issues on which the jury was properly instructed.”).

178 Neder, 527 U.S. at 15 (citing Oliver Wendell Holmes, The Common Law 1 (1881)).

179 Id. (citing Holmes, The Common Law 1 (1881)).

180 Id. at 14.

181 Id.

182 Id. at 15.

183 Recuenco, 126 S. Ct. at 2552.

184 Id.

185 Recuenco, 126 S. Ct. at 2553.

186 Id. at 2552.

187 See People v. Fields, 13 Cal. 4th 289, 296 (1996).

188 Fields, 13 Cal. 4th at 296.

189 Fields, 13 Cal. 4th 289; the author briefed and argued this case on behalf of the People of the State of California.

190 People v. Seel, 34 Cal. 4th 535, 549-550 (2004); Porter v. Superior Court, 148 Cal. App. 4th 889, 32-35 (2007).

191 Fields, 13 Cal. 4th 289.

192 Id. at 296.

193 Id. at 296-297.

194 Id. at 305-307.

195 See Fields, 13 Cal. 4th at 311.

196 But see Herrera v. Collins, 506 U.S. 390, 399 (1993) ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.").

197 Recuenco, 126 S. Ct. at 2551.

198 Id. at 2556.

199 Fields, 13 Cal. 4th at 300.

200 People v. Schulz, 5 Cal. App. 4th 563, 569-570 (1992); see also People v. Guillen, 25 Cal. App. 4th 756, 762-763 (1994).

201 43 Cal. 3d 739 (1987).

202 People v. Ghent, 43 Cal.3d 739, 760-761 (1987). See also People v. Williams, 195 Cal. App. 3d 398, 406-409 (1987) (People may retry first degree felony murder charge without forfeiting underlying robbery conviction).

203 People v. Bright, 12 Cal. 4th 652, 658 (1996).

204 Id.

205 Id. at 662.

206 Bright, 12 Cal. 4th at 662 (emphasis added).

207 See Mitchell Keiter, The Mauled Verdict: The Knoller Case Shows Why Res Judicata Should Protect Partial Convictions As Well As Acquittals, 33 McGeorge L. Rev. 493, 498-499 n. 43 (2002); cf. People v. Seel, 34 Cal. 4th 535, 551-552 (2004) (Brown, J., concurring) (same double jeopardy principles must apply to premeditation element whether victim dies or survives).

208 Apprendi, 530 U.S. at 494 n. 19.

209 Seel, 34 Cal. 4th 535.

210 Id. at 540.

211 Id. at 544 (citing Burks v. U. S., 437 U.S. 1, 18 (1978)).

212 Id. at 541.

213 Id. at 544-547.

214 Id. at 544 (citing Tibbs v. Fla., 457 U.S. 31, 41 (1982)).

215 Fields, 13 Cal. 4th at 302-303; Seel, 34 Cal. 4th at 55.

216 Id. at 302 (1996); see also Mitchell Keiter, The Mauled Verdict: The Knoller Case Shows Why Res Judicata Should Protect Partial Convictions As Well As Acquittals, 33 McGeorge L. Rev. 493, 498 n. 37 (2002).

217 148 Cal. App. 4th 889 (2007).

218 Id. at 2.

219 See e.g. Tibbs v. Fla., 457 U.S. at 41; Burks v. U.S., 437 U.S. 1, 18 (1978).

220 Porter, 148 Cal. App. 4th at 7-8 (quoting, People v. Lagunas, 8 Cal. 4th 1030, 1038 fn. 6 (1994)).

221 Id. at 31-32.

222 Id. at 33-37.

223 Seel, 34 Cal. 4th at 550.

224 Porter, 148 Cal. App. 4th at 37.

225 Seel, 34 Cal. 4th at 550.

226 Mitchell Keiter, The Mauled Verdict: The Knoller Case Shows Why Res Judicata Should Protect Partial Convictions As Well As Acquittals, 33 McGeorge L. Rev. 493, 498 (2002).

227 536 U.S. 584 (2002).

228 Walton v. Ariz, 497 U.S. 639 (1990).

229 See e.g. People v. Stanley, 39 Cal. 4th 913, 963-964 (2006); People v. Prieto, 30 Cal. 4th 226, 262-263 (2003); People v. Snow, 30 Cal. 4th 43, 126 n. 32 (2003).

230 Cal. Penal Code § 190.2 (2007).

231 Id.

232 Id.

233 Id.

234 Id.

235 Ring, 536 U.S. at 592 (citing Ariz. Rev. Stat. § 13-1105(c)).

236 Id. at 592-593.

237 Id. at 593 (citing Ariz. Rev. Stat. § 13-703(e)).

238 Id. at 596 (quoting Ring, 200 Ariz. at 279).

239 Id. at 603-609.

240 See e.g. Prieto, 30 Cal. 4th at 262-263; Snow, 30 Cal. 4th at 126.

241 Id. at 262.

242 Prieto, 30 Cal. 4th 226 (quoting People v. Anderson, 25 Cal. 4th 543, 589-590 n. 14. (2001)).

243 Id. at 263.

244 Id. at 262 (quoting People v. Rodriguez, 42 Cal. 3d 730, 779 (1986)).

245 Id. at 264 n. 15 (quoting CALJIC No. 8.88).

246 Id.

247 See Snow, 30 Cal. 4th at 126 n. 32 ("facts which bear upon, but do not necessarily determine, which of [the] two alternative penalties is appropriate do not come within the rule of Apprendi.").

248 Cal. Penal Code § 190.3(i).

249 Even if each juror believed an aggravating factor should apply when the defendant was older, not younger, there is no rule requiring the finding of any specific age.

250 Kan. v. Marsh, 126 S. Ct. 2516 (2006).

251 Id. at 2524.

252 Id.

253 In light of the coextensiveness of the right to a jury trial and a reasonable doubt standard, Justice Scalia was correct in asserting that a state may assign to a court and not the jury the ultimate decision of whether to impose a sentence of death or life imprisonment, so long as no additional factual findings beyond the jury's prior verdict are necessary. Marsh, 126 S. Ct. at 2529 (Scalia, J. concurring).

254 Ring, 536 U.S. at 610 (Scalia, J., concurring).

255 Ring, 536 U.S. at 610.

256 Id. at 610-611 (Scalia, J., concurring).

257 Id. at 612 (Scalia, J., concurring).

258 Justice Scalia left little doubt, though, about his belief as to whether the judge or jury was best suited to make the final sentencing decision: "We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." Ring, 536 U.S. at 612 (Scalia, J., concurring).

259 Ring, 536 U.S. at 614-618 (Breyer, J., concurring).

260 Id. at 615-616 (Breyer, J., concurring).

261 C.S. Lewis, The Humanitarian Theory of Punishment, 6 Res Judicatae 224, 225-226 (1953).

262 Ring, 536 U.S. at 614-616 (Breyer, J., concurring).

263 James Q. Whitman, Harsh Justice 143-144, 186 (Oxford U. Press 2003).

264 Id. at 133-134.

265 Id. at 178-179.

266 Blakely, 542 U.S. at 306; see also Alexis de Tocqueville, Democracy in America (First Signet Classic Printing 2001) ("The jury system as it is understood in America appears to me to be as direct and extreme a consequence of the sovereignty of the people as universal suffrage.").

267 Alexis de Tocqueville, Democracy in America.

268 Alexis de Tocqueville, Democracy in America.

269 See e.g. James Q. Whitman, Harsh Justice 195-197 (Oxford U. Press 2003).

270 See e.g. Robert E. Hunter, Europe's Own Painful Past Shapes Its Reaction to U.S. Death Penalty, L.A. Times, June 12, 2001, B13.

271 The Pew Global Attitudes Project, Views of a Changing World 107-109 (2003).

272 Id.

273 Id.

274 Id.

275 Neil Vidmar, World Jury Systems.

276 See Neil Vidmar, World Jury Systems at 31, 38, 48-49

277 Ryan Oliver, In Japan, Jury System Gets A Second Chance: L.A. Prosecutors Teach the Basics as Nation Prepares for Upcoming Change, L.A. Daily Jour, June 1, 2006.

278 See e.g. Marsh, 126 S. Ct. at 2532-2533 (Scalia, J., concurring).

279 Alexis de Tocqueville, Democracy in America.

280 Id.

281 Roper v. Simmons, 543 U.S. 551 (2005).

282 Id. at 575.

283 Id. at 583.

284 Id.

285 Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, Article 1.

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