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# The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction

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# Article

## The Civil Case at the Heart of Criminal Procedure: *In re Winship*, Stigma, and the Civil-Criminal Distinction

W. David Ball\*

### Abstract

In criminal cases, any fact which increases the maximum punishment must be found by a jury beyond a reasonable doubt. This rule, which comes from *Apprendi v. New Jersey*, looks to what facts do, not what they are called; in Justice Scalia's memorable turn of phrase, it applies whether the legislature has labeled operant facts "elements, enhancements, or Mary Jane." Civil statutes, however, can expose an individual to the same or greater deprivation of liberty on identical facts without needing to meet the "beyond a reasonable doubt" standard of proof. If *Apprendi* is, indeed, functional, why is it limited to formally criminal cases? Why does it not apply to all punishments, no matter whether they are called civil, criminal, or Mary Jane?

One often-proposed answer is that *Apprendi* derives its holding exclusively from the Sixth Amendment, and the Sixth Amendment applies only to "criminal prosecutions." *Apprendi* is not, however, just a Sixth Amendment case. Its "beyond a reasonable doubt" requirement comes from a formally civil case, *In re Winship*, which itself explicitly rejected the idea that civil labels could insulate a state from the heightened standards of proof required under due process. Because part of *Apprendi*'s rule comes

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from a civil case, I argue that *Apprendi*'s application cannot, therefore, be limited on formal grounds to criminal cases. To determine the limits of *Apprendi*'s application, one must instead return to the interests that both *Winship* and *Apprendi* identified as worthy of protection: the imposition of stigma and the deprivation of liberty.

This Article proposes that stigma is the substantive concern that separates retribution from regulation, punishment from public safety. Using sociology's modified labeling theory, I provide a substantive definition of stigma and explore how a unified due process approach, with stigma as one of its concerns, might provide a more meaningful way to separate punishment from risk management. This approach would move judicial discourse away from empty, taxonomic arguments about legislative labels towards an examination of the effects laws have on the lives of those subjected to them. This new direction would more accurately and comprehensively address the values and interests at the heart of the justice system. It would also provide some judicial oversight of so-called collateral consequences, which use formally civil statutes to impose significant liberty restrictions based on predicate criminal behavior. This Article examines the specific example of civil commitments for sexually violent predators (SVPs), but the arguments also apply to any civil restrictions placed on offenders or ex-offenders.

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## Introduction

The distinction between civil and criminal has at least one indisputable real-world consequence: the constitutionally-guaranteed procedural protections that attach to each. Defendants facing criminal sanctions are granted specific procedural protections under the Constitution, such as the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to a jury in all criminal proceedings. We often explain these particular protections by noting that when criminal defendants have their liberty at stake, the interest in ensuring that the innocent are not wrongly punished is at its height. The problem, however, is that civil regulations can restrict liberty to an equal degree without the same set of enumerated procedural protections.

The importance of this procedural distinction has grown sharper in recent years: the procedural protections attaching to civil and criminal penalties have grown more divergent even as the potential liberty impacts have equalized. This is the result of two phenomena: first, the revolution in criminal procedure following *Apprendi v. New Jersey*<sup>1</sup> in 2000, and second, a series of late 1990’s cases which failed to provide substantive constitutional limits on civil commitment statutes targeting sexually violent predators (SVPs). *Apprendi* held that any fact leading to an increase in the statutory maximum punishment must be found by a jury beyond a reasonable doubt.<sup>2</sup> This means that all facts justifying incarceration (or any other type of punishment) must be proven or admitted by the highest standard of proof. For civil laws aimed at sexual predators, which carry a potential of life confinement, these same facts about criminal predicate behavior need not be found beyond a reasonable doubt. A state can incarcerate an SVP indefinitely without proving any of the relevant facts beyond a reasonable doubt, provided the offender has been convicted of a sex offense<sup>3</sup> and is deemed currently dangerous. The subject matter,

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1. 530 U.S. 466 (2000).

2. *Id.* at 490.

3. The term sex offense is defined broadly. At least thirteen states require registration for public urination (although two states limit the registration requirement to those who urinated in the view of a

predicate facts, and consequences of a pair of civil and criminal cases could therefore be exactly the same, but the procedures governing both could be completely different. The way a law is labeled—civil or criminal—is crucial for determining the level of constitutional protection. Yet if there is something about the nature of civil and criminal penalties that justifies their different procedural treatment, criminal and civil cases have not made that sufficiently clear.

The issue is not simply that changing coalitions of justices have been able to get at least five votes—individual justices themselves treat civil and criminal deprivations as entirely distinct processes. In the criminal justice context, Justice Scalia is adamant that labels on a given fact do not change the constitutional analysis. A fact’s impact on the amount of time a criminal defendant serves is all that matters: “all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or *Mary Jane*—must be found by the jury beyond a reasonable doubt.”<sup>4</sup> If a law is civil, however, Justice Scalia no longer cares about the effects a given fact has on liberty. Indeed, it is error to look beyond the “statute on its face” to “the character of the actual sanctions imposed.”<sup>5</sup> Instead, “the question of criminal penalty *vel non* depends upon the intent of the legislature.”<sup>6</sup> Thus, even when a civil law results in the same deprivation of liberty—or potentially greater deprivations of liberty—Justice Scalia is willing to defer to the legislature, even though he holds the line in the criminal context.

The positions taken by other justices are less striking than Justice Scalia’s,<sup>7</sup> but there is nevertheless a willingness on the part of some justices to take the opposite position: deferring to the legislature in criminal cases while simultaneously scrutinizing civil cases. Ultimately, despite the fact that *Apprendi* has resulted in a new focus on the distinction between formal

minor), while at least twenty-nine states require registration for consensual sex between teenagers. SARAH TOFTE, HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 39 (2007), available at <http://www.hrw.org/en/reports/2007/09/11/no-easy-answers>. Prostitutes in New Orleans are also charged as sex offenders, contributing to difficulties they face in finding housing and employment. Jordan Flaherty, *Her Crime? Sex Work in New Orleans*, COLORLINES (Jan. 13, 2010, 12:00 PM), [http://www.colorlines.com/archives/2010/01/her\\_crime\\_sex\\_work\\_in\\_new\\_orleans.html](http://www.colorlines.com/archives/2010/01/her_crime_sex_work_in_new_orleans.html).

4. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

5. *Seling v. Young*, 531 U.S. 250, 268 (2001) (Scalia, J., concurring) (internal citations omitted).

6. *Id.* at 269.

7. In this Article, I focus on Justice Breyer and Justices Scalia and Thomas. These three justices wrote for different sides throughout the *Apprendi* line, see, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Cunningham v. California*, 549 U.S. 270 (2007); *Oregon v. Ice*, 129 S. Ct. 711 (2009), and in the sex offender cases I discuss. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Kansas v. Crane*, 534 U.S. 407 (2002); *Smith v. Doe*, 538 U.S. 84 (2003). The other justices voted as follows: Justice Ginsburg, who wrote the majority in *Ice*, joined the majority in *Apprendi*, *Blakely*, *Cunningham*, and (notoriously) in *Booker*, and joined Justice Breyer in the sex offender cases. Justice Kennedy joined Justice Breyer in the *Apprendi* cases and voted with the majority in all the sex offender cases, including *Crane*. Justice Souter voted with Justices Scalia and Thomas in the *Apprendi* cases (including *Ice*) and in *Doe*, but voted with Justice Breyer in *Hendricks* and *Crane*.

and functional approaches to reading criminal statutes, none of this conversation has extended to civil cases, nor has the Supreme Court made any effort to reify the two approaches. After *Apprendi*, labels do not matter within criminal statutes, but they serve to cordon off whole areas of state action from *Apprendi*'s requirements. Can it be true that labels don't matter—unless the label in question is the word “civil,” in which case labels are almost all that matters?<sup>8</sup>

Justice Scalia has repeatedly characterized *Apprendi* as a Sixth Amendment jury right,<sup>9</sup> and the Sixth Amendment itself specifies “criminal prosecutions.”<sup>10</sup> Under this reading, then, the textual anchor in the Constitution means that only those laws labeled criminal deserve *Apprendi*'s protections. The problem with this line of argument is that *Apprendi* is, emphatically, not just a Sixth Amendment case:<sup>11</sup> it is “the Due Process Clause of the United States Constitution” which requires that findings of fact on which sentences are based “be proved to a jury beyond a

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8. Nancy King and Susan Klein, in passing, saw the link between civil commitment laws and *Apprendi* very early on. See Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1467–68 (2001) (comparing the role of legislative labels in determining whether a law is civil or criminal to their role in determining whether a fact is an element or an enhancement). Their article fails to address the unique role of *In re Winship*, 397 U.S. 358 (1970) in the *Apprendi* line as a civil/criminal bridge, and they do not use stigma as a means of distinguishing between civil and criminal penalties. William Stuntz approached the problem in a seminal article from a perspective largely concerned with the overcriminalization of civil activity. William Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996). Because the rules of criminal procedure “let the government do things to criminal suspects or defendants that it can't do to civil litigants,” Stuntz argued that legislators have incentives to “broaden the scope of criminal liability.” *Id.* at 7–8. In this Article, however, I am concerned with precisely the opposite phenomenon. Because the hard and fast rules of criminal procedure do not apply to civil statutes, the government has every incentive to avoid the procedural tax of criminal law and “overcivilize” criminal conduct, particularly in the case of SVP laws.

9. See, e.g., *Ice*, 129 S. Ct. at 723 (Scalia, J., dissenting) (“*Apprendi*'s interpretation of the Sixth Amendment's jury-trial guarantee”); see also *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (describing *Apprendi* as “the jury-trial guarantee of the Sixth Amendment”). Of course, as early as *Winship*, it was noted that the beyond a reasonable doubt standard of proof is not textually tied to any provision in the constitution. See, e.g., *In re Winship*, 397 U.S. at 377 (Black, J., dissenting) (“[N]owhere in [the Constitution] is there any statement that conviction of a crime requires proof of guilt beyond a reasonable doubt.”).

10. U.S. CONST. amend. VI.

11. Indeed, this is why I have elsewhere referred to it as the *Apprendi* right or the *Apprendi* rule, to avoid conflating it with the Sixth Amendment. See, e.g., W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 896 (2009). Nevertheless, at least one commentator argues that I unduly focused on the jury. See Douglas A. Berman, *Should Juries Be the Guide for Adventures Through Apprendi-Land?*, 109 COLUM. L. REV. *SIDE BAR* 65 (2009), [http://www.columbialawreview.org/Sidebar/volume/109/65\\_Berman.pdf](http://www.columbialawreview.org/Sidebar/volume/109/65_Berman.pdf). But because my prior article was focused on the relative roles of the jury and the parole board, spending time discussing the institutional role of the jury made sense. It was not, however, my intention to give short shrift to *Winship* due process rights and the standard of proof. Indeed, I noted in that Article that the standard of proof part of the *Apprendi* rule was distinct from the jury component. See Ball, *supra*, at 961 (“*Apprendi* requires both that the jury find facts and that it find those facts beyond a reasonable doubt. Since both of these parts of the rule involve the jury and touch on similar interests, they are often conflated, but the requirement that facts be proven beyond a reasonable doubt is a distinct part of the *Apprendi* rule.” (internal citations omitted)).

reasonable doubt.”<sup>12</sup> *Apprendi*’s requirement that facts be found beyond a reasonable doubt comes, ironically, from *In re Winship*,<sup>13</sup> a formally *civil* case which itself rejected the idea that a civil “label of convenience” could allow a state to shirk its procedural obligations.<sup>14</sup>

Winship, a juvenile, faced a civil proceeding that would have resulted in his confinement in a civil institution (reform school).<sup>15</sup> The New York Court of Appeals held that the formal civil label meant that Winship didn’t deserve criminal due process protections, but the Supreme Court rejected this argument, holding that the civil label on the law was not dispositive and that it had to look to the substance of the liberty deprivation in question.<sup>16</sup> In other words, *Winship* functionally analyzed a civil statute in concluding that some of the protections associated with criminal procedure applied.<sup>17</sup> *Apprendi* has since incorporated *Winship* into a line of criminal cases, and *Winship*’s holding is now such a part of criminal procedure that this formally civil case has almost no influence in the analysis of civil statutes.<sup>18</sup>

In this Article I hope to change that. I propose that *Winship*’s focus on due process provides a way to unify civil and criminal approaches, to enable us to analyze the function of a statute whether it is called civil, criminal, or Mary Jane. The key to using *Winship* is its identification of two separate interests: the imposition of stigma and the deprivation of liberty, interests which *Apprendi* also identified.<sup>19</sup>

The flexibility of *Winship*’s due process method accommodates the necessary shades of gray between civil and criminal. Any other approach<sup>20</sup> is too binary, providing for the complete application of criminal procedure (if a civil statute is deemed punitive) or none at all. *Winship* suggests that we attach protections not to types of statute, but to types of deprivation.<sup>21</sup> A formally civil law, then, might have a little, a lot, or all of the protections of criminal procedure, but the kinds of protection and their intensity will depend on the liberty interests involved and the degree to which they might be infringed. Due process is better suited to the criminal/civil distinction than a formalistic rule based on legislative labels, and it forces us to look at the values we are protecting. This focus has an added benefit: it

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12. *Apprendi*, 530 U.S. at 471 (citing *In re Winship*, 397 U.S. 358 (1970)).

13. *Id.* at 477 (2000) (citing *In re Winship*, 397 U.S. at 364).

14. See *infra* Part II.A.

15. *In re Winship*, 397 U.S. at 360.

16. *Id.* at 365.

17. It did so without employing the methodology developed by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), and used elsewhere to deem civil laws punitive. See *infra* Part III.B.

18. See *infra* Part II.A.

19. *Apprendi*, 530 U.S. at 476–77.

20. Including the *Mendoza-Martinez* test, which I discuss in greater detail in Part III.B, *infra*.

21. See *infra* Part II.A.

underscores the fact that *Apprendi* is a bundle of procedural protections designed to protect a bundle of rights, not an all-or-nothing rule applied mechanically after a certain threshold.

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While this Article begins with an analysis of sex offender statutes, this is not an Article about sex offender statutes per se. There are other areas of the law where the civil/criminal divide results in different legal consequences for similar behavior.<sup>22</sup> What I intend to explore in this Article is how these doctrinal difficulties stem from what I see as a more fundamental tension: the ways in which morality is often used as a proxy for risk, and risk is often used as a proxy for morality.

This Article uses *Apprendi* and sex offender laws as an entry point for these discussions. My goal is to contribute both to our understanding of *Apprendi* and to see the ways in which *Apprendi* contributes to the risk management and retribution issues at the heart of the civil/criminal distinction. So, while this Article, in many ways, builds off my prior article *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*,<sup>23</sup> this Article looks at the issue of punishment in a slightly different way: is there a *substantive* difference between actions taken under the auspices of a civil statute and actions taken under the auspices of a criminal statute?

Although I suggest ways in which the stigma and liberty interests identified in *Winship* might operate in both formally civil and formally criminal cases, this Article should not be read as a concrete policy proposal. My main point is that we need to go beyond labels themselves to see what interests they represent, and to go beyond a formalistic understanding of the rules—particularly *Apprendi*—to see how we might more precisely match individual procedures to individual interests. I hope to move the substance of the discussion toward the constitutional values that *Apprendi* and the Due Process Clause vindicate. At the very least, because the term stigma is already invoked regularly throughout criminal law as a material liberty

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22. As a far from exhaustive list, consider three examples. Immigrants are often detained in prison-like conditions, or in actual prisons, but they are not granted the procedural guarantees of criminal defendants in similar situations because immigration violations are formally civil. For an in-depth discussion of immigration detention in the national security context, see David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002). The civil/criminal distinction is also blurred when assets used in association with drug trafficking are forfeited civilly. The Supreme Court, in *Austin v. United States*, 509 U.S. 602 (1993), held that the Eighth Amendment's excessive fines clause could apply to civil forfeiture claims, but on its face this does not mean the civil actions are criminal: the Eighth Amendment does not use the term "civil" or "criminal", merely "punishment." U.S. CONST. amend. VIII. Finally, one might also consider the civil/criminal distinction through an examination of punitive damages in civil cases. For a discussion of punitive damages in the civil context that largely tracks my usage of functional and formal analysis, see Lydon F. Bittle, Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CALIF. L. REV. 1433 (1987).

23. See Ball, *supra* note 11 (explaining that the meaning of punishment in *Apprendi* forecloses the practice of using the same set of facts to make one ineligible for parole in a parole-eligible sentence).



interest—not least in the text of *Apprendi* itself<sup>24</sup>—this Article seeks to offer an initial working definition of stigma.

This Article proceeds in four parts. In Part I, I lay out the limitations of formalism in both the criminal and civil context, using the *Apprendi* line and a line of cases dealing with civil penalties for criminal predicate offenses (specifically, sex offenses). I conclude that formalism is not a coherent, administrable way to resolve the issue. In Part II, I look to a substantive conception of the under-defined interest identified in both *Winship* and *Apprendi*: stigma. Drawing on sociology's modified labeling theory, I sketch out a substantive account of stigma and examine its use as an interest in itself, showing how labels like "sexual predator" or "juvenile delinquent" affect individuals profoundly and are therefore worthy of a heightened standard of proof whether the law imposing them is formally civil or criminal.<sup>25</sup> In Part III, I analyze how due process protections might apply to formally civil punishments. By focusing on values, not taxonomy, a due process framework can better explain what interests are at stake and what is needed to protect them. In Part IV, I use the discussion of stigma to shed some light on what I call public safety punishments: nominally criminal penalties that are designed to control risk. I show how the analysis used in this Article can contribute to the *Apprendi* line by providing an alternative reading to the otherwise inexplicable decision in the recent *Apprendi* case, *Oregon v. Ice*.<sup>26</sup>

## I. The Limits of Labeling

Within the criminal realm, *Apprendi* is clear: function, not form, is all that matters. The state cannot use criminal law to deprive an individual of his liberty without proving beyond a reasonable doubt any fact which increases his maximum punishment,<sup>27</sup> and legislators cannot circumvent these constitutional limits by labeling these facts something besides elements of crimes. A state need not worry about functional analysis, however, if it uses a civil law to deprive an individual of these same liberties.<sup>28</sup> Laws that serve the same function are thus treated differently because they are labeled differently, even when the effect of these statutes is the same. If a law has a civil label, labels are all that matters; after a law is labeled criminal, labels no longer matter. If the function of the law is the

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24. *Apprendi*, 530 U.S. at 485.

25. In Part III, I also use stigma as a means of distinguishing between liberty restrictions that serve to punish and liberty restrictions that serve to regulate public safety. Stigmatic designations, in this instance, are based less on particularized evidence and more on stereotypes, thereby reinforcing values, not controlling risk.

26. 129 S. Ct. 711 (2009).

27. *Apprendi*, 530 U.S. at 490.

28. *See id.* at 490.

same, how can so much turn on a formality? How, too, can we explain why justices who defer to the legislature in civil cases do not defer in criminal cases,<sup>29</sup> and vice-versa?<sup>30</sup>

In this Part, I focus primarily on cases authorizing indefinite civil commitment for sexually violent predators (SVPs), offenders who have completed criminal sentences for sexual assaults who are deemed to pose, by a preponderance of the evidence, a future danger to society. SVP laws require criminal predicates and involve restrictions on liberty, but because they are formally civil, they have not been held to require all of the protections of criminal procedure.<sup>31</sup>

My aim here is not to recount all the history—arguments over the civil/criminal distinction have been going on for a long time, with lots of twists and turns<sup>32</sup>—but to isolate individual justices’ recent attitudes towards legislative deference in the civil context and compare them to their attitudes in the *Apprendi* line.<sup>33</sup> That is, after *Apprendi*, functionalism is dominant in criminal procedure, but its method appears to have made no inroads in the analysis of civil cases. So, while there are similar (and

29. *Compare Ice*, 129 S. Ct. 711, 720 (2009) (Scalia, J., dissenting) (“If, we said, ‘a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.’”)(quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002))), with *Seling v. Young*, 531 U.S. 250, 269–70 (2001) (Scalia, J., concurring) (“The short of the matter is that, for Double Jeopardy and *Ex Post Facto* Clause purposes, the question of criminal penalty *vel non* depends upon the intent of the legislature. . . . Only this approach, it seems to me, is in accord with our sound and traditional reluctance to be the initial interpreter of state law.”).

30. *Compare Blakely v. Washington*, 542 U.S. 296, 329 (2004) (Breyer, J., dissenting) (“I agree with the majority’s analysis, but not with its conclusion . . . I agree that, classically speaking, the difference between a traditional sentencing factor and an element of a greater offense often comes down to a legislative choice about which label to affix. But I cannot jump from there to the conclusion that the Sixth Amendment always requires identical treatment of the two scenarios.”), with *Kansas v. Hendricks*, 521 U.S. 346, 381 (1997) (Breyer, J., dissenting) (“If these obvious similarities [between criminal procedure and civil commitment procedures] cannot by themselves prove that Kansas’ ‘civil commitment’ statute is criminal, neither can the word ‘civil’ written into the statute . . . by itself prove the contrary.”).

31. See generally *Hendricks*, 521 U.S. 346 (1997).

32. See Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 681 (1999) (noting that after the 1970’s the Court increasingly accepted the civil designation at face value); *id.* at 682 (observing a change from 1989 to 1994 as the Supreme Court started to look at the substance of laws—“independent and principled distinctions between punitive and non-punitive sanctions”—in a series of cases dealing with civil in rem forfeiture); *id.* at 683 (the Court “now routinely blesses whatever label a legislature places on a sanction”).

33. Part of the problem is that there is no uniform approach—no *Glucksberg* equivalent for the analysis of civil statutes—although the Court often applies *Mendoza-Martinez*’s seven factor test “[i]n fact if not in theory.” *Smith v. Doe*, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting) (internal citations and quotation marks omitted). *Kennedy v. Mendoza-Martinez* held that a law allowing for the denationalization of draft dodgers violated the Eighth Amendment’s prohibition of cruel and unusual punishment. 372 U.S. 144, 146 (1963); see also *infra* at Part I.A.2 and Part III.B (discussing the *Mendoza-Martinez* test in greater detail). Much of the analysis of civil cases focuses on precedent from cases with similar subject matter (e.g., other civil commitment cases or cases involving mental illness).

similarly interesting) distinctions in older cases such as *Trop v. Dulles*,<sup>34</sup> I will focus on three cases just before and after *Apprendi*: *Kansas v. Hendricks*,<sup>35</sup> which upheld an SVP law, *Seling v. Young*,<sup>36</sup> which denied an as-applied challenge to an SVP law, and *Smith v. Doe*,<sup>37</sup> which upheld post-sentence sex offender registration. In these three cases,<sup>38</sup> the Court grew increasingly deferential towards the legislature, and Justices Scalia and Thomas reversed course from their *Apprendi* positions and argued that the words in a statute—not their effects—were all that mattered.<sup>39</sup> Ultimately, this Part aims to prove that deference to legislative labels cannot provide a meaningful—or workable—distinction between civil and criminal, and that there needs to be a substantive distinction between the two.

## A. Civil Deference, Criminal Functionalism

Justices Scalia and Thomas take a functional approach to criminal statutes, but if a law is civil, they defer to the legislature. I call this approach formal functionalism: functional analysis begins only when the formal “criminal” label has been applied. In civil SVP statutes, then, as long as there is any *possible* civil effect, these justices defer to the legislature. In criminal statutes, any possible effect on time served means the Supreme Court cannot defer to the legislature.

### 1. *Apprendi* Functionalism

Under *Apprendi*, a jury must find, beyond a reasonable doubt, facts which increase punishment, no matter in what section of a state’s code they might be found: “merely because the state legislature” deems a given fact a sentence enhancement does not mean the fact “is not an essential element of the offense.”<sup>40</sup> When a sentence enhancement “describe[s] an increase beyond the maximum authorized statutory sentence, it is the functional

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34. 356 U.S. 86, 87 (1958) (holding that a law that provided for loss of citizenship following desertion violated the Eighth Amendment’s prohibition on cruel and unusual punishment); *see also id.* at 95 (legislative labels are not dispositive; “[t]he inquiry must be directed to substance.”).

35. 521 U.S. 346 (1997).

36. 531 U.S. 250 (2001).

37. 538 U.S. 84, 89 (2003).

38. I will also look at a fourth case—*Kansas v. Crane*, 534 U.S. 407 (2002)—when I explore the functionalist position taken by Justice Breyer and other members of the *Ice* majority. *See infra* notes 120–130.

39. Justices Scalia and Thomas voted with the majority in the “deferential” sex offender cases, *see Hendricks*, 521 U.S. at 350, and *Doe*, 538 U.S. at 89, and dissented in the “functional” case. *See Crane*, 534 U.S. 415. Justice Thomas wrote the *Hendricks* opinion and Justice Scalia wrote the *Crane* dissent.

40. *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000). For a more extensive analysis, see Ball, *supra* note 11, at 950–52, 962–63.

equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."<sup>41</sup> Ultimately, "the relevant inquiry is one not of form, but of effect."<sup>42</sup>

In *Apprendi* itself, the defendant, Charles Apprendi, pleaded guilty to three weapons charges, two of which subjected him to a five- to ten-year sentence, and one which subjected him to a three- to five-year sentence.<sup>43</sup> When a judge found that Apprendi acted with racial animus, triggering a sentence enhancement, he was sentenced to twelve years on one of the charges.<sup>44</sup> The Supreme Court held that this practice was the functional equivalent of convicting him of an aggravated crime, which "allow[ed] a jury to convict a defendant of a second-degree offense . . . [and] after a subsequent and separate proceeding . . . allow[ed] a judge to impose punishment identical to that New Jersey provides for crimes of the first degree . . . ."<sup>45</sup> The legislature's decision to call the practice "sentence enhancement" was irrelevant.

Justice Scalia wrote for the majority in *Blakely v. Washington*,<sup>46</sup> which applied *Apprendi* to Washington State's sentencing guidelines, and with this opinion his anti-formalism grew stronger.<sup>47</sup> He criticized deference to legislative sentencing schemes, arguing that they provided no clear limit to legislative power.<sup>48</sup> In fact, Justice Scalia's functionalism extends to the definition of the statutory maximum itself. Despite the use of the term "statutory," the statute is not, under *Blakely*, the last word in defining the statutory maximum. Instead, courts must look to how the law operates functionally to determine the maximum sentence.<sup>49</sup>

If the judge had not found any facts in aggravation, *Blakely* faced a

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41. *Apprendi*, 530 U.S. at 494 n.19.

42. *Id.* at 494.

43. *Id.* at 469–70.

44. *Id.* at 471. While I have chosen to focus initially on time served to explain *Apprendi*'s holding, the imposition of stigma is central to *Apprendi*'s concerns. My initial focus on time served is only for the sake of clarity. I do not mean to suggest that stigma is an afterthought either in *Apprendi* or in this analysis. Stigma is central to both. For more on *Apprendi*'s discussion of stigma, see *infra* Part II.B.1.

45. *Apprendi*, 530 U.S. at 491.

46. 542 U.S. 296 (2004).

47. *Id.* This article largely bypasses *United States v. Booker*, 543 U.S. 220 (2005). Doctrinally, *Booker* applies *Blakely* to the federal sentencing guidelines. *Id.* at 226–27. The one exception is the remedy—severing the portion of the statute which makes the guidelines mandatory—but this is particular to the federal sentencing statute. *Id.* at 227. Moreover, while I realize that law professors (including this one) generally clerk at the federal level and thus tend to normalize the federal experience, I do not feel that the federal guidelines are the Platonic ideal of sentencing, nor are they necessarily the best model with which to study sentencing doctrines. The federal system is just one system, and the number of offenders sentenced in the federal system is dwarfed by those sentenced in state systems. *Total Correctional Population*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11> (last modified Mar. 24, 2011) (showing that, at the end of 2009, 1,405,622 prisoners were in the state system, while 208,118 were in the federal system).

48. *Blakely*, 542 U.S. at 306–07.

49. See Ball, *supra* note 11, at 950–52.

presumptive sentence of fifty-three months. Because the judge did find aggravating facts, however, Blakely was sentenced to ninety months. Both of these sentences, however, were below the maximum term of 120 months allowed by statute. The Supreme Court nevertheless vacated the sentence, holding that the defendant was “sentenced to prison for more than three years beyond what the law allowed . . . on the basis of a disputed finding that he had acted with ‘deliberate cruelty.’”<sup>50</sup> The reasoning the Court used

turns on *Blakely*’s functional definition of the statutory maximum . . . . Washington’s sentencing guidelines were binding; the judge could only sentence Blakely to a maximum of fifty-three months on the facts to which he pleaded guilty. The judge was not permitted to impose a ninety-month sentence unless a jury had found, or Blakely admitted, deliberate cruelty . . . . Pleading guilty to the presumptive crime is not the same as pleading guilty to the aggravated version of that crime, even if the [formal] maximum sentence for the crime the legislature calls kidnapping is greater than either.<sup>51</sup>

The statutory maximum, then, is not defined by statute, but by practice. Even when a legislature *explicitly* defines the statutory maximum, Justice Scalia’s rule in *Blakely* requires courts to look beyond the statute to its operation. This method, however, only applies to criminal statutes. Justice Scalia’s approach to civil statutes is another matter.

## 2. Civil Formalism: the *Hendricks*, *Seling*, and *Doe* Majorities

In *Hendricks*, *Seling*, and *Doe*, the Supreme Court majority upheld civil penalties for sex offenders—civil commitment in *Hendricks*<sup>52</sup> and *Seling*<sup>53</sup> and post-release registration in *Doe*.<sup>54</sup> In all three cases, the defendant argued that the statute was functionally criminal, punishing him without the protections of criminal procedure (e.g., the prohibitions on ex post facto punishments and/or double jeopardy).<sup>55</sup> The majority in these cases relied on the legislative text—though not exclusively—and denied that it had or should have the power to look at how the statute functioned.<sup>56</sup> Justices Scalia and Thomas, diehard functionalists in the *Apprendi* context, turned shy and deferential towards legislatures in the context of civil

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50. *Id.* at 951 (internal quotation marks omitted).

51. *Id.*

52. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

53. *Seling v. Young*, 531 U.S. 250, 266–67 (2001).

54. *Smith v. Doe*, 538 U.S. 84 (2003).

55. *Hendricks*, 521 U.S. at 361; *Seling*, 531 U.S. at 263; *Doe*, 538 U.S. at 91–93.

56. *Hendricks*, 521 U.S. at 361; *Seling*, 531 U.S. at 262; *Doe*, 538 U.S. at 92–93.

penalties.<sup>57</sup>

*Kansas v. Hendricks* analyzed an SVP commitment statute and laid out the general framework for analysis of civil statutes targeting sex offenders.<sup>58</sup> The Court used a two-part test, first looking to “ascertain whether the legislature meant the statute to establish ‘civil’ proceedings.”<sup>59</sup> If it did, the Court could “reject the legislature’s manifest intent only where a party . . . provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention to deem it civil.”<sup>60</sup> In other words, functional analysis can come in, but the presumption is weighted heavily in favor of the legislature—a presumption that is the opposite of what the state gets in the criminal context.

In holding the Kansas statute constitutional, Justice Thomas, writing for the majority, wrote that the civil/criminal distinction is a question of statutory construction—whether, upon initial view, “the legislature meant the statute to establish ‘civil’ proceedings.”<sup>61</sup> Defendant Hendricks had argued that the statute’s stated intent to provide treatment was insincere, since the state had failed to provide any treatment for him.<sup>62</sup> Justice Thomas replied that even if treatment were not the “‘overriding’ or ‘primary’ purpose in passing the Act” it did “not rule out the *possibility* that an *ancillary* purpose of the Act was to provide treatment, and it does not require us to conclude that the Act is punitive.”<sup>63</sup> In other words, as long as there is *some* part of the statute that is *possibly* civil, the Court must defer to the legislature’s civil label.

Four years later, *Seling v. Young* rejected an as-applied challenge to Washington State’s SVP law,<sup>64</sup> and further established that labels, not effects, govern the analysis of civil statutes. Young alleged that his conditions of confinement were “punitive”—that the “conditions and restrictions at the Center [for sex offenders] were not reasonably related to a legitimate nonpunitive goal.”<sup>65</sup> In rejecting Young’s challenge, Justice O’Connor, writing for the majority, reiterated that only “the clearest proof that the statutory scheme is *so punitive* in either purpose or effect” would

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57. *Hendricks*, 521 U.S. at 361; *Seling*, 531 U.S. at 269 (Scalia, J., concurring), 272 (Thomas, J., concurring); *Doe*, 538 U.S. at 106 (Thomas, J., concurring).

58. *Hendricks*, 521 U.S. at 361.

59. *Id.*

60. *Id.* (internal citations and quotation marks omitted). It is unclear why the majority did not discuss the *Mendoza-Martinez* factors in any detail, citing the case only once. *Id.* at 362. Justice Breyer’s dissent, however, concluded by referencing the *Mendoza-Martinez* factors: “This is not to say that each of the factors the Court mentioned in *Mendoza-Martinez* on balance argues here in favor of a constitutional characterization as ‘punishment.’” *Id.* at 394 (Breyer, J., dissenting). I discuss *Mendoza-Martinez* in greater detail at Part III.B, *infra*.

61. *Id.* at 361.

62. *Id.* at 365.

63. *Id.* at 367 (emphasis added).

64. *Seling v. Young*, 531 U.S. 250, 253 (2001).

65. *Id.* at 259.

negate the State's civil label.<sup>66</sup> The Court would, instead, look to the statute "on its face,"<sup>67</sup> since an as-applied standard "would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity . . . ."<sup>68</sup> The Court concluded that "[t]he civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute."<sup>69</sup>

Justice Scalia concurred separately to emphasize that an as-applied challenge to the implementation or the actual conditions of confinement was foreclosed.<sup>70</sup> Justice Scalia was even more deferential to the legislature than O'Connor: it was error to look beyond the "statute on its face" to "the character of the actual sanctions imposed."<sup>71</sup> Instead, "the question of criminal penalty vel non depends upon the intent of the legislature."<sup>72</sup> Deference is in greater "accord with our sound and traditional reluctance to be the initial interpreter of state law."<sup>73</sup> This deferential Justice Scalia, of course, bears little resemblance to the justice whose rulings in the *Apprendi* line have, in Justice O'Connor's words, shown little hesitation in rolling back "over 20 years of sentencing reform" and jeopardizing "tens of thousands of criminal judgments . . . ."<sup>74</sup> Nor is this method at all consistent with the way in which the statutory maximum sentence was defined in *Blakely*.<sup>75</sup> *Blakely* was nothing if not an "as applied" challenge, since, to use Justice Scalia's language from his *Seling* concurrence, the "statute on its face" in *Blakely* provided for a punishment greater than "the character of the actual sanctions imposed."<sup>76</sup>

In *Smith v. Doe*, the Court went out of its way to construe an Alaska sex offender registration statute as civil, even though part of it was codified in the criminal code.<sup>77</sup> The statute required that defendants pleading guilty to the relevant criminal sexual offenses be notified in advance of the registration requirements<sup>78</sup> and required that written judgments for the relevant criminal offenses include the civil notification requirements.<sup>79</sup> Justice Kennedy, writing for the majority, concluded that

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66. *Id.* at 261 (emphasis added).

67. *Id.* at 262.

68. *Id.* at 263.

69. *Id.*

70. *Id.* at 267 (Scalia, J., concurring).

71. *Id.* at 268 (internal citations omitted).

72. *Id.* at 269.

73. *Id.*

74. *Blakely v. Washington*, 542 U.S. 296, 326 (2004) (O'Connor, J., dissenting).

75. *See supra* notes 46-51 and accompanying text.

76. *Seling*, 531 U.S. at 268 (Scalia, J., concurring).

77. *See Smith v. Doe*, 538 U.S. 84, 93 (2003) (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)) ("Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm.").

78. *Smith*, 538 U.S. at 95.

79. *Id.*

“partial codification of the Act in the State’s criminal procedure code is not sufficient to support a conclusion that the legislative intent was punitive.”<sup>80</sup> In this case, notice—itsself used as key evidence of the statute’s civil nature<sup>81</sup>—was particularly “important, for the scheme is enforced by criminal penalties.”<sup>82</sup> Justice Kennedy’s point here bears repeating: notice made the law *civil*, particularly because its violations were punished *criminally*.

On the second part of the *Hendricks* test, the effects of the law, Justice Kennedy’s opinion incorporated *Kennedy v. Mendoza-Martinez* into its analysis of whether the statute was so punitive “in nature or effect” to overcome the civil label.<sup>83</sup> *Mendoza-Martinez*, a case from the 1960’s, held that a law allowing for the denationalization of draft dodgers violated the Eighth Amendment’s prohibition on cruel and unusual punishment<sup>84</sup> and proposed a seven-factor test to determine whether a law was criminal or civil:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .<sup>85</sup>

Even under *Mendoza-Martinez*, Justice Kennedy airily dismissed any and all evidence that the civil law was criminal, no matter how damning the evidence was.

Justice Kennedy rejected the argument that the registry resembled the historical practice of shaming punishments;<sup>86</sup> the essence of shaming punishments was, he said, that they “staged a direct [physical] confrontation between the offender and the public.”<sup>87</sup> He conceded that the information in the Alaska registry was posted on the internet, whose geographic reach “is greater than anything which could have been designed in colonial

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80. *Id.*

81. Notwithstanding the fact that notice is one of the key interests Justice Scalia identifies in the *Apprendi* rule, he joined the majority. See Ball, *supra* note 11, at 954, 967.

82. *Smith*, 538 U.S. at 96.

83. *Id.* at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

84. *Mendoza-Martinez*, 372 U.S. at 193.

85. *Id.* at 168–69 (internal citations omitted). *Mendoza-Martinez*’s test has been widely used in other cases, but it was, technically, dictum because congressional intent indicated “conclusively that the provisions in question can only be interpreted as punitive.” *Id.* at 169 (internal citations omitted).

86. *Smith*, 538 U.S. at 98.

87. *Id.* at 98.



times”<sup>88</sup> and included the offender’s “name, aliases, identifying features, address, place of employment, date of birth . . . [and] information about vehicles to which he has access,”<sup>89</sup> but the law was still not punitive because the *stated purpose* of the statute was “to inform the public for its own safety, not to humiliate the offender.”<sup>90</sup> As to the question whether the law imposed “an affirmative disability or restraint,”<sup>91</sup> any restraints were relatively minor: the law “imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint.”<sup>92</sup>

The fact that the statute served to deter crime—heretofore one of the central goals of criminal punishment<sup>93</sup>—did not make it criminal, because “[a]ny number of governmental programs might deter crime without imposing punishment.”<sup>94</sup> Ultimately, “[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.”<sup>95</sup> A civil law need only use means that are “reasonable in light of the nonpunitive objective.”<sup>96</sup> Justice Kennedy thus used his premise to drive his conclusion: *given* that the statute was not punitive, evidence of its punitive effects was irrelevant. Justice Kennedy’s opinion still did not go far enough for Justice Thomas, who wrote separately to reiterate that there could be no as-applied challenge to a statute imposing civil penalties.<sup>97</sup>

## B. Criminal Deference, Civil Functionalism

There is no clear cut symmetry on the other side of the argument: no Justice takes positions that are equal and opposite to the positions of Justices Scalia and Thomas, so it is not the case that both sides are equally inconsistent in their approaches to civil and criminal statutes. Nevertheless, I will discuss the positions taken by Justice Breyer in the *Apprendi* and sex offender lines to argue that Justice Breyer is more deferential towards criminal statutes than civil ones, and that he is more likely to analyze civil statutes by looking at their effects on liberty. I will also note here that throughout his opinions, there continues to be no effort to reify the methodology used in one set of cases with another. It is as though

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88. *Id.* at 99.

89. *Id.* at 90.

90. *Id.* at 99.

91. *Id.* at 97.

92. *Id.* at 100.

93. See Klein, *supra* note 32, at 699–702 (noting that deterrence is one of two traditional goals of criminal punishment).

94. *Smith*, 538 U.S. at 102.

95. *Id.* at 103.

96. *Id.* at 105.

97. *Id.* at 106 (Thomas, J., concurring).

*Apprendi* and the sex offender cases occupied different legal universes.

### 1. Legislative Deference: the *Apprendi* Dissents

Because I focus on Justice Breyer's opinions in civil cases,<sup>98</sup> I will here briefly recap his position about legislative deference in the *Apprendi* line. The problem is that Justice Breyer's sentencing jurisprudence is not so much formal as pragmatic. Sentencing is a product of three branches of government;<sup>99</sup> accordingly, compromises need to be made. Justice Breyer's *Apprendi* dissent argues that "the real world of criminal justice" prevents any theoretical, ideal answer to the problem of what limits (if any) can be placed on the legislature's ability to define elements and enhancements.<sup>100</sup> Criminal justice "can function only with the help of procedural compromises, particularly in respect to sentencing. And those compromises, which are themselves necessary for the fair functioning of the criminal justice system, preclude implementation of the procedural model that [*Apprendi*] reflects."<sup>101</sup> To the element/enhancement distinction, then, "theory does not provide an answer."<sup>102</sup> Ultimately, Justice Breyer sees the use of sentencing as a practical means of bridging the gap between charges and real conduct,<sup>103</sup> and while labeling is a power reserved by the legislature, the Due Process Clause protects against its arbitrary exercise.<sup>104</sup>

Thus, although Justice Breyer acknowledged in *Blakely* that "classically speaking, the difference between a traditional sentencing factor and an element of a greater offense often comes down to a legislative choice about which label to affix," he disagreed that the Sixth Amendment therefore required "identical treatment of the two scenarios."<sup>105</sup> Justice Breyer argued that the goal of the system was fairness, and that radically restricting the legislature's power "prevents the legislature from seeking sentencing systems that are consistent with, and indeed may help to advance, the Constitution's greater fairness goals."<sup>106</sup> In some ways, then, Justice Breyer is a functionalist—albeit one who uses legislative labels as a

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98. *See supra* note 7.

99. *United States v. Booker*, 543 U.S. 220, 330 (2005) (Breyer, J., dissenting).

100. *Apprendi v. New Jersey*, 530 U.S. 466, 555 (2000) (Breyer, J., dissenting).

101. *Id.*

102. *Id.* at 559.

103. *Booker*, 543 U.S. 220, 250–51 (2005).

104. *Apprendi*, 530 U.S. 562–63 (Breyer, J., dissenting); *see also Blakely v. Washington*, 542 U.S. 296, 344 (2004) (Breyer, J., dissenting).

105. *Blakely v. Washington*, 542 U.S. 296, 329 (2004) (Breyer, J., dissenting).

106. *Id.* at 345; *see also Cunningham v. California*, 549 U.S. 270, 296 (2007) (Kennedy, J., dissenting) ("Judges and sentencing officials have a broad view and long-term commitment to correctional systems. Juries do not. Judicial officers and corrections professionals, under the guidance and control of the legislature, should be encouraged to participate in an ongoing manner to improve the various sentencing schemes in our country.").

means of best achieving fairness.<sup>107</sup>

## 2. Civil Functionalism: *Hendricks*, *Crane*, and *Doe*

The dissents in *Hendricks* and *Doe* argued that the constitutionality of the laws in question depended on how they functioned, not simply on the legislature's label.<sup>108</sup> While Justice Breyer's positions in these cases and the *Apprendi* line provide less contrast than the positions taken by Justices Scalia and Thomas,<sup>109</sup> Justice Breyer does, in fact, look to function, not form, in these cases.

In *Hendricks*, Justice Breyer's dissent centered on the limits of legislative labels. Even though Kansas called its law civil, the way in which the statute operated convinced Justice Breyer that it was "an effort to inflict further punishment upon [Hendricks]."<sup>110</sup> Some of the statute's provisions bore an "obvious" resemblance to criminal punishments, including secure confinement, incarceration against one's will, and incapacitation—which Justice Breyer, citing Blackstone, said was an objective of the criminal law.<sup>111</sup> The procedures surrounding the commitment looked criminal, particularly the requirement that the District Attorney begin the commitment proceedings.<sup>112</sup> Even if one were to conclude that these similarities to criminal law could not prove a civil law was, in fact, criminal, "neither can the word 'civil' written into the statute . . . by itself prove the contrary."<sup>113</sup> Justice Breyer argued that the state's failure to provide treatment to the plaintiff *Hendricks* belied the real goal of the Act: that it was designed to punish, not treat. "[A] statutory scheme that provides confinement that does not reasonably fit a practically available, medically oriented treatment objective, more likely reflects a primarily punitive legislative purpose."<sup>114</sup> Actions and implementation spoke louder than words.

Justice Breyer was also unwilling to defer to the Kansas legislature's policy decisions: Even if treatment were the goal of the law, he was skeptical about the way in which treatment was structured. Kansas waited to treat offenders until they had served almost all of their prison

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107. As I shall discuss in Part II, *Apprendi* incorporated *Winship*, a case which used the Due Process Clause to achieve this very end: fundamental fairness. See *infra* note 140 and accompanying text.

108. *Smith v. Doe*, 538 U.S. 84, 85 (2003); *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997).

109. See *supra* note 39. Perhaps this impression is due to Justice Breyer's less colorful and/or absolutist style.

110. *Kansas v. Hendricks*, 521 U.S. 346, 373–74 (1997) (Breyer, J., dissenting).

111. *Id.* at 379 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*11–12).

112. *Id.* at 380.

113. *Id.* at 381.

114. *Id.* at 383; see also *id.* at 381–82 (discussing *Allen v. Illinois*, 478 U.S. 364 (1986), in which the presence of treatment programs was evidence that the goal of a state's civil commitment statute was treatment, not punishment).

sentences.<sup>115</sup> Justice Breyer thought that if the state were serious about treatment, it would have begun treatment programs soon after an offender arrived in prison.<sup>116</sup> “[I]t is particularly difficult to see why legislators who specifically wrote into the statute a finding that ‘prognosis for rehabilitating . . . in a prison setting is poor’ would leave an offender in that setting for months or years before beginning treatment.”<sup>117</sup> Ultimately, what a state did was more important than what it said. “[W]hen a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive.”<sup>118</sup>

Although Justice Breyer joined the majority in invalidating an as-applied challenge to an SVP law in *Seling*,<sup>119</sup> one year later he wrote the opinion invalidating the Kansas SVP statute in *Kansas v. Crane*<sup>120</sup> (over the dissent of Justices Scalia and Thomas),<sup>121</sup> holding that a state must make some factual determination of an offender’s lack of control before confining him.<sup>122</sup> In *Crane*, Justice Breyer looked beyond the text of the statute to see what “constitutional requirements *substantively* limit[ed] the civil commitment of a dangerous sexual offender.”<sup>123</sup> After acknowledging the Court’s traditional deference to the legislature where mental illness was concerned,<sup>124</sup> Justice Breyer wrote that the state was required to make some determination that an SVP could not control himself,<sup>125</sup> concluding that it was required to prove “serious difficulty in controlling behavior.”<sup>126</sup> This substantive requirement separated the SVP from the “dangerous but typical recidivist convicted in an ordinary criminal case”<sup>127</sup> and prevented civil commitments from becoming a mechanism for retribution or deterrence—which remain the province of criminal law.<sup>128</sup> The control requirement was phrased as a standard, not a rule, because protection of liberty when it comes to mental illness is “not always best enforced through precise bright-

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115. *Hendricks*, 521 U.S. at 385 (Breyer, J., dissenting) (noting that this “time-related circumstance seems deliberate”).

116. *Id.* at 385.

117. *Id.* at 386 (quoting KAN. STAT. ANN. § 59-29a01 (1994)).

118. *Id.* at 390.

119. *Seling v. Young*, 531 U.S. 250, 252 (2001). For a discussion of *Seling*, see *supra* notes 64–76 and accompanying text.

120. 534 U.S. 407 (2002).

121. *Id.* at 415 (Scalia, J., dissenting).

122. *Id.* at 409.

123. *Id.* (emphasis added).

124. See *id.* at 410 (noting that the Court has traditionally left the task of defining such terms as “personality disorder,” “mental abnormality,” and “mental illness” to the legislature (quoting *Hendricks*, 521 U.S. at 359)).

125. See *id.* at 412 (holding that the Constitution does not permit the “commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination”).

126. *Id.* at 413.

127. *Id.* at 413.

128. *Id.* at 412.

line rules.”<sup>129</sup> Justice Scalia, in dissent, again argued that the judiciary should defer to legislative labels: “we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance.”<sup>130</sup>

Finally, in *Doe*, the dissent used the *Mendoza-Martinez* factors to argue that the formally civil statute was “punitive in effect.”<sup>131</sup> Justice Ginsburg, in a dissent which Justice Breyer joined, wrote that the statute’s “onerous and intrusive obligations on convicted sex offenders,” as well as the “profound humiliation and community-wide ostracism” resulting from public notification of their crimes, meant that that it was “[b]eyond doubt” that the statute involved an “affirmative disability or restraint.”<sup>132</sup> The statute’s restrictions were triggered by “past crime alone, not current dangerousness.”<sup>133</sup> Ultimately, the statute’s “excessiveness in relation to its nonpunitive purpose” was dispositive: the scope of the statute went well beyond the “legitimate civil purpose” of alerting the public to dangerous offenders in their midst because it included “all convicted sex offenders, without regard to their future dangerousness” and keyed the duration of the reporting requirement not to any determination of “a particular offender’s risk of reoffending, but to whether the offense of conviction qualified as aggravated.”<sup>134</sup> What was accorded heaviest weight was the statute’s failure to make any provision whatever for the possibility of rehabilitation: “[o]ffenders [could not] shorten their registration or notification period even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.”<sup>135</sup> *Doe* himself had completed a treatment program, remarried, and was deemed “a very low risk of re-offending.”<sup>136</sup> Nevertheless, Alaska could “publicly . . . label him a ‘Registered Sex Offender’ for the rest of his life.”<sup>137</sup>

## II. *In re Winship*, *Apprendi*, Due Process, and Stigma

*Apprendi* is a functional case, not a formal one,<sup>138</sup> and it seems strange that its protections should stop at the formal line between civil and criminal. But *Apprendi*’s holding about the beyond a reasonable doubt standard of proof comes from a case that itself rejects the formal line

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129. *Id.* at 413.

130. *Id.* at 420 (Scalia, J., dissenting) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997)).

131. *Smith v. Doe*, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting).

132. *Id.* (internal citations and quotation marks omitted).

133. *Id.* at 116.

134. *Id.* at 116–17.

135. *Id.* at 117.

136. *Id.* (internal citations omitted).

137. *Id.* at 117–18.

138. *See supra* Part I.A.1.

between civil and criminal: *In re Winship*.<sup>139</sup> *Winship* grounded its holding in due process,<sup>140</sup> and its holding was imported into *Apprendi* itself.<sup>141</sup> *Apprendi* is not, therefore, just a “criminal” rule that applies via the Sixth Amendment, but a due process rule that applies via standards of fundamental fairness. Reclaiming the central role in criminal procedure played by a nominally civil case suggests that something beyond formalism—something substantive—should govern the level of procedural protection in a given case.

*Winship* identifies two liberty interests—first, the interest in avoiding a commitment to reform school, and second, the stigma of being adjudged a delinquent.<sup>142</sup> This stigmatic interest is a liberty interest in its own right, one which *Apprendi* also identifies separately.<sup>143</sup> This Part does not argue that stigma should be part of the due process calculation—rather, it points out that stigma is *already* a part of the calculation, via *Winship* and *Apprendi*. There are two problems this raises: stigma has been invoked without being defined, and the work it is doing has not been fully explored.

In this Part, I begin by revisiting *Winship* and *Apprendi* and pointing to the many places in both cases where stigma, not just time in confinement, is identified as a liberty interest. I argue that the presence or absence of stigma explains the difference between deprivations which require *Apprendi/Winship* protections and those which do not. Without stigma, it is difficult to draw a principled distinction between civil and criminal commitments. That is, when Justice Scalia ignores stigma and looks solely at time served (the “pure time” approach), he fails to justify why there is no *Apprendi* right in civil commitment cases. In Section B, I sketch out a preliminary definition of stigma, drawing on sociology’s modified labeling theory. In this theory, stigma is defined as “labeling, stereotyping, separation, status loss, and discrimination” in a context where power allows these components to take hold.<sup>144</sup> That is, stigma involves the indiscriminate application of overbroad labels that generate socioeconomic deprivation. I discuss the implications of this definition in Part III.

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139. 397 U.S. 358 (1970).

140. *See id.* at 368 (“[W]here a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt.” (quoting *W. v. Family Court*, 247 N.E.2d 253, 260 (N.Y. 1960) (Fuld, J., dissenting))).

141. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (citing *In re Winship*, 397 U.S. at 364).

142. *See In re Winship*, 397 U.S. at 363 (noting that “the accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction”).

143. *Apprendi*, 530 U.S. at 484 (quoting *In re Winship*, 397 U.S. at 363). As I discuss in the following sections, stigma also operates within the criminal context to distinguish between retributive punishments and utilitarian ones. *See infra* Part II.B.

144. Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 380 (2001).

### A. *In re Winship*, the Civil Case at the Heart of Criminal Procedure

*Winship* rejected the idea that the beyond a reasonable doubt standard of proof applied only in formally criminal cases.<sup>145</sup> The irony is that *Winship*, via *Apprendi*, has influenced criminal law much more than civil law, even though *Winship* itself is civil.

*Winship* was a twelve-year-old boy who stole \$112 from a woman's purse.<sup>146</sup> He was not subjected to a criminal trial: he was a juvenile subject to civil commitment,<sup>147</sup> charged not with a crime but with "an act which would constitute a crime if committed by an adult."<sup>148</sup> A judge (not a jury)<sup>149</sup> found by a preponderance of the evidence that *Winship* had done the acts with which he was charged.<sup>150</sup> *Winship* appealed, arguing that "proof beyond a reasonable doubt is among the essentials of due process and fair treatment required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult."<sup>151</sup> The New York Court of Appeals affirmed the adjudication,<sup>152</sup> and the U.S. Supreme Court reversed.<sup>153</sup>

The New York Court of Appeals used a formal approach in upholding the trial court's use of the preponderance standard of proof: because delinquency adjudication was not (formally) a conviction, delinquency status was not (formally) a crime, and the proceedings were not (formally) criminal, the rules of criminal procedure did not apply.<sup>154</sup> The Supreme Court expressly rejected this line of thinking in its reversal,

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145. See *In re Winship*, 397 U.S. at 365–66 (holding that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts" (citing *In re Gault*, 387 U.S. 1, 36 (1966))).

146. *In re Winship*, 397 U.S. at 360.

147. See *id.*

148. *Id.* at 359.

149. I mention the distinction here only to underscore the fact that, *pace* Justice Scalia, the standard of proof and the jury right are analytically—and precedentially—distinct, and that one can be present without the other. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 354 (1997) (SVP adjudication made before a jury, even though the case was civil). The jury right was not at issue in *Winship*—indeed, the Supreme Court later decided that juvenile proceedings did not require juries. *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971) (holding that a trial by jury not required in juvenile delinquency proceedings). But while *Winship* is silent on the matter, judicial factfinding in juvenile contexts is consistent with the medical/rehabilitative role of the judiciary that I explore in Part IV, *infra*. See, e.g., *In re Winship*, 397 U.S. at 366 (discussing whether the case will impair the court's opportunities for "a wide-ranging review of the child's social history and for his individualized treatment"). This might be one area where the potentially punitive nature of SVP proceedings would be more pronounced if juries were introduced. See Editorial, *Let Juries Determine Sex Offenders' Fate*, BOSTON GLOBE, Nov. 1, 2009, at 8 (arguing that current practice—allowing sex offenders to decide whether a judge or a jury will hear their case—should be changed to allow prosecutors to seek jury trials).

150. *In re Winship*, 397 U.S. at 359.

151. *Id.* (internal citations and quotation marks omitted).

152. *Id.* at 360.

153. *Id.* at 361.

154. *Id.* at 365.

looking beyond “the civil label of convenience” to the functional effect of the proceeding: “civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts.”<sup>155</sup> Despite the rehabilitative interests of the juvenile system, the state could not subject a “child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.”<sup>156</sup>

The Supreme Court was not simply saying that juvenile proceedings were the same as criminal proceedings;<sup>157</sup> it was identifying what particular interests in the criminal context were analogous to those in *Winship*'s case. The first part of the *Winship* opinion dealt exclusively with the standard of proof required for a criminal charge<sup>158</sup> as a means of identifying the reason for these protections, finding two interests of “immense importance”: “the possibility that [the accused] may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction.”<sup>159</sup> Given both the stigma and liberty interests at stake, “a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.”<sup>160</sup> Due process, then, is required by the nature and weight of the interests in criminal cases,<sup>161</sup> not because there is something magical about the word “criminal.” The Court then identified similar interests in the juvenile context: “[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child.”<sup>162</sup> Namely, “the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.”<sup>163</sup>

Justice Harlan, concurring, expounded on the reasoning behind the majority's holding. The lower standard of proof for civil proceedings is grounded on the assumption that civil suits are largely private.<sup>164</sup> Society has nothing invested in the outcome, which merely alters the distribution between one party and another. In criminal cases, however, “one party has at stake an interest of transcending value,” and our society has determined that it is “far worse to convict an innocent man than to let a guilty man go free.”<sup>165</sup> The beyond a reasonable doubt standard of proof reflects a

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155. *Id.* at 365–66 (internal citations omitted).

156. *Id.* at 367.

157. *Id.* at 359 n.1.

158. *Id.* at 361–64.

159. *Id.* at 363.

160. *Id.* at 363–64.

161. *Id.* at 364.

162. *Id.* at 365.

163. *Id.* at 367.

164. *See id.* at 371–72 (Harlan, J., concurring).

165. *Id.* at 372 (Harlan, J., concurring).



“fundamental assessment of the comparative social costs of erroneous factual determinations.”<sup>166</sup>

While the consequences of a juvenile proceeding were not identical to those of a criminal case, Harlan wrote, factual errors exposed “the accused to a complete loss of his personal liberty through a state-imposed confinement” and “stigmatize[d] a youth in that it is by definition bottomed on a finding that the accused committed a crime.”<sup>167</sup> The heightened standard of proof, ultimately, required merely that the finder of fact “be more confident” in the judgment that he was making.<sup>168</sup>

In the years immediately following *Winship*, the case was cited as authority that a statute’s effects, not its civil or criminal label, governed due process analysis. Two years after *Winship*, Justice Douglas observed in dissent:

It is no answer to say that petitioners’ commitments were in ‘civil’ proceedings and that the requirement for proof beyond a reasonable doubt is required only in ‘criminal’ cases. *In re Gault* and *In re Winship* specifically rejected this distinction and looked instead at the interests involved and the actual nature of the proceedings.<sup>169</sup>

Juvenile cases immediately preceding and following *Winship* also used this analysis. *In re Gault*, several years earlier, stated that “commitment is a deprivation of liberty. It is incarceration against one’s will, whether it is called ‘criminal’ or ‘civil.’”<sup>170</sup> But after a while, *Winship*’s civil provenance was forgotten. In 1987, the Supreme Court cited *Winship* as a criminal case, not a civil one.<sup>171</sup> Indeed, in 1981 the Supreme Court even cited *Winship* itself for the proposition that the beyond a reasonable doubt standard of proof had never been applied to a civil case.<sup>172</sup>

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166. *Id.* at 370.

167. *Id.* at 374.

168. *Id.* at 375 (noting that, in this case, “the youth did the act with which he has been charged.”).

169. *Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 364 (1972) (Douglas, J., dissenting) (citations omitted) (dissenting to the dismissal of a writ of certiorari deemed improvidently granted in the case of a challenge by delinquents to Maryland’s Defective Delinquency Law on the grounds that it was vague and imposed civil commitment without proper procedural safeguards).

170. 387 U.S. 1, 50 (1967).

171. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (“Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case, *see In re Winship*, 397 U.S. 358 (1970), or a civil case.”).

172. *See California ex rel. Cooper v. Mitchell Bros’ Santa Ana Theater*, 454 U.S. 90, 93 (1981) (“However, the [Supreme] Court has never required the ‘beyond a reasonable doubt’ standard to be applied in a civil case. This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the moral force of the criminal law, *In re Winship*, 397 U.S. at 364, and we should hesitate to apply it too broadly or casually in noncriminal cases.” (quoting *Addington v. Texas*, 441 U.S. 418, 428 (1979)) (internal quotation marks omitted)).

*Winship* is, of course, both a civil case itself and an important case in criminal procedure because *Apprendi* relies on it for its standard of proof holding.<sup>173</sup> One reason to focus on *Winship* is to underscore a seldom-acknowledged feature of the *Apprendi* rule: that it derives not just from the jury guarantee of the Sixth Amendment, but also from the Due Process Clause of the 14th Amendment. Though Justice Scalia's opinions in later cases in the line (e.g., *Booker* and *Blakely*) tie *Apprendi* to the Sixth Amendment alone,<sup>174</sup> *Apprendi* itself makes frequent reference to due process and cites *Winship* in support of its due process holding.<sup>175</sup> Indeed, any cursory reading of the *Apprendi* opinion uncovers numerous examples of how important due process is to the holding of the case, especially the standard of proof holding, which relies entirely on *Winship* and which does not, in any way, involve the Sixth Amendment.<sup>176</sup> *Apprendi*'s due process analysis is hiding in plain sight; discussing *Apprendi* while focusing exclusively on the Sixth Amendment misses much of *Apprendi*'s central concern.

Justice Stevens's *Apprendi* opinion framed the question presented solely in terms of due process,<sup>177</sup> and characterized *Apprendi*'s argument as, "inter alia, that the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt," citing *Winship* in support.<sup>178</sup> These due process concerns were not simply the result of the incorporation of the Sixth Amendment jury right against the states. Stevens clearly isolated both due process incorporation of the Sixth Amendment and the discrete due process right to have every element proven beyond a reasonable doubt.<sup>179</sup> *Jones v. United States*, which first formulated the *Apprendi* rule before deciding on other grounds, could not have used incorporation: it was a federal case which used the Due Process Clause of the Fifth Amendment.<sup>180</sup>

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173. *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000).

174. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J, concurring); *Oregon v. Ice*, 129 S. Ct. 711, 723 (2009) (Scalia, J, dissenting). For two examples, see *supra* note 9.

175. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 469, 523 (2000).

176. Ball, *supra* note 11, at 961–64.

177. *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000) ("The question presented is whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.").

178. *Id.* at 471 (citing *In re Winship*, 397 U.S. 358 (1970)). The New Jersey Supreme Court had also used due process to analyze whether a given fact was an element or a sentence enhancement, since "labels . . . would not yield an answer to *Apprendi*'s constitutional question." *Apprendi*, 530 U.S. at 472 (internal citations omitted).

179. *Id.* at 477 n.3 ("[Appellant] relies entirely on the fact that the 'due process of law' that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury and the right to have every element of the offense proved beyond a reasonable doubt." (internal citations omitted)).

180. *Apprendi*, 530 U.S. at 476 (citing *Jones*, 526 U.S. at 243, n.6). Justice Stevens noted:

Stevens's *Apprendi* opinion did not, of course, deny the importance of the Sixth Amendment. My point is not to replace a Sixth-Amendment-only reading of *Apprendi* with one that focuses exclusively on due process. *Apprendi* is indisputably about both due process and the Sixth Amendment:

At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," and the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."<sup>181</sup>

*Apprendi* is not, therefore, just about the Sixth Amendment; it is about a bundle of rights.

#### B. The *Winship/Apprendi* Due Process Interest in Stigma

*Winship* and *Apprendi* both clearly identified stigma as a liberty interest in its own right.<sup>182</sup> Due process analysis, then, must account for *both* the deprivation of liberty *and* the imposition of stigma. In this Section, I establish that stigma is a key part of the *Winship/Apprendi* analysis and examine how the presence or absence of stigma might begin to better explain the difference between civil and criminal punishments.

##### 1. Stigma in *Winship/Apprendi*

The first part of the *Winship* opinion dealt exclusively with the standard of proof required for a criminal charge.<sup>183</sup> The reason criminal charges require a heightened standard of proof is because there are two "interests of immense importance" at work: "the possibility that [a defendant] may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction."<sup>184</sup> Due process, then, is required due to the nature and weight of these interests: condemnation (or calumny)

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We there noted that 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' The Fourteenth Amendment commands the same answer in this case involving a state statute.

181. *Apprendi*, 530 U.S. at 476–77 (citations omitted) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

182. *In re Winship*, 397 U.S. at 363; *Apprendi*, 530 U.S. at 495.

183. *In re Winship*, 397 U.S. at 361–64.

184. *Id.* at 363.

and the deprivation of his freedom.<sup>185</sup>

Justice Harlan's concurrence underscored the point. The New York statute used in *Winship* distinguished between a juvenile delinquent and a "[p]erson in need of supervision" (PINS).<sup>186</sup> While findings of fact could result in supervision for either category, only the delinquent label was stigmatic. The PINS category merely described someone who was incorrigible, and the consequences of error in "a PINS type case" were "by no means identical to those involved [in a delinquency adjudication]."<sup>187</sup>

In his *Apprendi* opinion, Justice Stevens incorporated *Winship*'s analysis of the liberty interests at stake, identifying not just restraints on liberty, but the imposition of stigma. "Prosecution subjects the criminal defendant both to 'the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction.'"<sup>188</sup> The *Apprendi* rule kicked in when "both the loss of liberty and the stigma attaching to the offense are heightened."<sup>189</sup> Ultimately:

The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.<sup>190</sup>

In *Apprendi*'s case, "Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance."<sup>191</sup>

## 2. Is Stigma Doing Any Work? The Limitations of the "Pure Time" Approach

The mere fact that Justice Stevens's *Apprendi* opinion relied on stigma is not, in itself, dispositive of how *Apprendi* should be read. After all, Justice Scalia did not deem either stigma or due process important enough to spend much time on them in *Blakely*, *Booker*, or any of his other decisions, concurrences, and dissents in the *Apprendi* line. In this section I will argue, however, that Justice Scalia's decision to ignore these two

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185. *Id.* at 364.

186. *Id.* at 374 n.6 (Harlan, J., concurring).

187. *Id.*

188. *Apprendi*, 530 U.S. at 484 (quoting *In re Winship*, 397 U.S. at 363).

189. *Apprendi*, 530 U.S. at 484. The opposite was also true; *Apprendi* did not apply when a defendant was not exposed to "a deprivation of liberty greater than that authorized by the verdict according to statute" or "a greater stigma than that accompanying the jury verdict alone." *Id.* at 490 n.16.

190. *Id.* at 495.

191. *Id.* (emphasis added).

interests is a mistake: stigma plays an important role in the analysis of criminal and civil penalties, one which due process is best suited to address.

Justice Scalia, dissenting in the recent *Apprendi* case *Oregon v. Ice*, explained *Apprendi* functionally.<sup>192</sup> In his view, the sole question was whether a given finding of fact increases the potential maximum amount of time a defendant would serve in prison.<sup>193</sup> I call this the “pure time” approach. Justice Scalia’s view is that the relative magnitude of punishment can be measured only by duration. Consecutive sentences therefore necessarily result in greater punishment. In fact, the decision to sentence concurrently or consecutively “is more important than a jury verdict of innocence on any single count: Two consecutive 10-year sentences are in most circumstances a more severe punishment than any number of concurrent 10-year sentences.”<sup>194</sup>

Justice Scalia’s interpretation reaches a result which, on first blush, is more consistent with *Apprendi*, but fails to explain why *Apprendi* does not govern advisory systems<sup>195</sup> or civil commitments. In both of these instances, factual findings can also increase time served. Time served is thus the only important dimension of punishment—unless we are talking about time served for civil penalties, in which case it is irrelevant.<sup>196</sup> But if function trumps form, it should not matter if confinement is called civil commitment, criminal punishment, or Mary Jane.<sup>197</sup> After all, a civil label on time served doesn’t affect the amount of time served, just its name. Moreover, *Apprendi* would clearly govern a criminal statute that punished only by fines; time in prison is thus neither a necessary nor sufficient

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192. 129 S. Ct. 711, 720 (2009) (Scalia, J., dissenting). I discuss *Ice* in greater detail in Part IV, *infra*.

193. *Ice*, 129 S. Ct. at 720.

194. *Id.* at 721.

195. For more on the particular definition of this term, and the ways in which a lack of common understanding of phrases such as “indeterminate sentencing” and “determinate sentencing” create genuine doctrinal difficulties, see Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 382–83 (2005) (explaining that “indeterminate systems use discretionary parole release while determinate systems do not” and that both systems can be discretionary or nondiscretionary, and guided or unguided).

196. *Ice*, 129 S. Ct. at 720–23.

197. For a view that labels are the sine qua non of stigma, see Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L. J. 1325, 1353 (1991) (“[S]tigma might be measured by the legislature’s intention. In fact, the cases indicate that the key factor used to separate civil from criminal proceedings is the label affixed by the legislature. If stigma is to be our benchmark, this is how it should be determined.”). Cheh grounds her position in the argument that courts are ill-suited to figure out the community’s moral positions and that legislation “clearly reflects the community’s moral judgment that it is deviant, unacceptable, and, therefore, to be officially and publically condemned.” *Id.* at 1353. See also King & Klein, *supra* note 8, at 1487 (arguing that *Apprendi*’s value is akin to a “clear statement” rule requiring legislatures to “be clear . . . about the discretion they are delegating to judges and about the extent of punishment they are authorizing for an offense.”). Cheh’s position to me overstates the efficiency of the democratic “market” for morality, while simultaneously underestimating the ability of the jury to discern community values. See, e.g., Ball, *supra* note 11, at Part II.B.1.a. In Cheh’s defense, her paper was written before *Apprendi*.

condition of either punishment or a criminal statute.<sup>198</sup> In the end, it seems a “strange exception” to commit oneself to a functional method except in certain formal circumstances.<sup>199</sup> That is, if “sentence enhancement” is not a magic phrase that relieves a state of *Apprendi*’s burdens, it is uncertain why the word “civil” is. Justice Scalia’s approach does not ask or explain why we have the rule; it instead seeks only to ask whether certain predicates exist, and, if they do, applies the rule.<sup>200</sup>

### C. What We Talk About When We Talk About Stigma

An obvious criticism of using stigma as the dividing line between civil and criminal is that it merely shifts the problem without solving it. Without a substantive definition of stigma, stigma itself is just another label. If we reject the use of the magic words “enhancement” and “civil” only to encourage the use of a new magic word, “stigma,” we have gained nothing. We may, in fact, actually have lost something: even if Justice Scalia’s mechanical view is unsatisfying, we can all at least agree on what incarceration is, and we can all do Justice Scalia’s math (more time equals more punishment).<sup>201</sup> Perhaps a clear but imperfectly nuanced rule is preferable to an unclear but perfectly nuanced one.

In this section, I draw on both theoretical and empirical sociological findings about stigma in an attempt to lend the term some substance and make it more than just a simple tautology (e.g., we punish those actions we deem stigmatic, and they are stigmatic because we punish them). The sociological literature has the added benefit of explaining and empirically demonstrating how stigmatic labels result in real-world privations.

The word “stigma” comes from a Greek word (literally “mark, made by a punctured instrument, brand”) used to denote the ancient Greek practice of branding slaves and other outcasts, people who were not full

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198. See *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (“[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.” (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987))); see also *Hendricks*, 521 U.S. at 363 (“If detention for the purpose of protecting the community from harm necessarily constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.”); *Seling v. Young*, 531 U.S. 250, 272–73 (2001) (Thomas, J., concurring) (noting that confinement is not a dispositive factor in making something criminal).

199. *Ice*, 129 S. Ct. at 720 (Scalia, J., dissenting).

200. Justice Scalia has argued in other circumstances that procedural rules do not guarantee substantive outcomes. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (finding that the Confrontation Clause provides for the particular mechanism of cross-examination, not a guarantee of evidentiary reliability). This is, of course, quite a formalistic approach at odds with the functionalism he uses elsewhere, and it means that civil commitments tend, in reality, to get less protection, because they do not have specific procedural guarantees associated with them.

201. Of course, the notion of the statutory maximum isn’t exactly straightforward, as the maximum sentence in *Blakely* shows. See *supra* at notes 49–51 and accompanying text.

members of ancient Greek society.<sup>202</sup> Stigma now refers to a permanent sign or mark which devalues.<sup>203</sup> Sociologists use the term stigma to refer to non-physical marks that nevertheless isolate certain segments of society from the mainstream.<sup>204</sup> One initial theory posited that stigmatic labels in some way acted as self-fulfilling prophecies. This theory, “labeling theory,” suggested that individuals who were labeled as deviants internalized those labels and became the deviants they were branded to be.<sup>205</sup>

In this Article, I will use “modified labeling theory” to define stigma. Modified labeling theory suggests a new mechanism by which stigmatic isolation occurs: the individual’s desire to manage shame leads him to follow strategies such as withdrawal and secrecy, and it is these reactions which generate “secondary deviance.”<sup>206</sup> Secondary deviance is, therefore, “not a direct result of labeling, but rather an indirect result of coping, or stigma management, which has the ironic effect of shaping the conditions under which secondary deviance is more likely.”<sup>207</sup>

In particular, the modified labeling framework I will use comes from the work of Bruce Link and Jo Phelan, both because it has given rise to a number of empirical studies and because it provides a comprehensive structural framework for theorizing how stigmatic labels burden those to whom they are applied. Link and Phelan identify five components of stigma—“labeling, stereotyping, separation, status loss, and discrimination”—and conclude that stigmatization occurs when these five factors are present “in a power situation that allows the components” to take hold.<sup>208</sup> In other words, stereotypes of, say, law professors cannot be stigmatic, since these members of society are relatively powerful and will suffer no isolation or status loss as a result of these stereotypes.

Each of the five factors of stigma deserves a bit more explanation. The first, labeling, refers to the ways in which salient differences are

202. 16 OXFORD ENGLISH DICTIONARY 689 (2d ed. 1989).

203. *Id.* (defining “stigma” as “a mark of disgrace or infamy; a sign of severe censure or condemnation, regarded as impressed on a person or thing.”).

204. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (Simon & Schuster, Inc. 1986) (1963).

205. Terri A. Winnick & Mark Bodkin, *Anticipated Stigma and Stigma Management Among Those to be Labeled “Ex-Con,”* 29 *DEVIANT BEHAV.* 295, 298 (2008).

206. *Id.* at 299–300.

207. *Id.* at 301 (discussing Bruce Link et al., *A Modified Labeling Theory Approach to Mental Illness*, 54 *AM. SOC. REV.* 400 (1989)).

208. Link & Phelan, *supra* note 144, at 377. Link and Phelan focus on power because “it takes power to stigmatize.” *Id.* at 375. As they argue:

[I]f we only used the cognitive components of labeling and stereotyping to define stigma, groups like lawyers, politicians, and white people would have to be considered stigmatized groups. Our incorporation of power, status loss, and discrimination allows the formal definition we derived to cohere with current understandings of what a stigmatized group is.

*Id.* at 377.

identified (e.g., “that person is a sex offender”).<sup>209</sup> Link and Phelan use the word “label” rather than “attribute” because these categories are socially constructed.<sup>210</sup> That is, the word “attribute” (perhaps subtly) connotes a quality *in* the person; a label is something others attach *to* the person. The second factor describes how these labels are associated with negative stereotypes (e.g., “sex offenders are incorrigible”).<sup>211</sup> Stereotypes need not fit the label exactly, nor need they be empirically valid. Invoking a negative set of characteristics is enough. Third, the stigmatized person is separated, becoming a “them” distinct from “us,” and, in extreme cases, “the stigmatized person is thought to be so different from ‘us’ as to be not really human” (e.g., “sex offenders are so incorrigible that they cannot be reintegrated into society”).<sup>212</sup> Fourth, the now-isolated person suffers status loss, which refers to changes in life outcomes “like income, education, psychological well-being, housing status, medical treatment, and health” (e.g., “sex offenders are so incorrigible and incapable of reentry that they cannot live near parks and schools”).<sup>213</sup> The final component is discrimination, where “successful negative labeling and stereotyping [results in] a general downward placement of a person in a status hierarchy” (e.g., “sex offenders living under freeway overpasses”).<sup>214</sup> Again, the

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209. *Id.* at 367 (“The vast majority of human differences are ignored and are therefore socially irrelevant.”).

210. *Id.* at 368.

211. *Id.* at 369; *see also*, e.g., Robert Doyle & Craig Haney, Proposition 83, Framing and Public Attitudes Toward Sex Offenders: An Application of Heuristic Models of Social Judgment 1 (Aug. 3, 2009) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1444688](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444688) (noting that newspaper articles “tended to portray sex offenders as predatory and non-human, focusing primarily on the most extreme cases and prolific offenders, without regard for the vast heterogeneity of individuals and offenses subsumed by the term ‘sex offender . . . .’”).

212. Link & Phelan, *supra* note 144, at 370. The idea of incorrigibility might be a crucial part of what makes civil commitments punitive. If we identify someone as dangerous but then argue that we cannot treat him, we are justified in locking him up. While we acknowledge that the incorrigible are not as morally culpable as the criminal, we nevertheless need make no effort to help them. The results end up looking the same: we don’t need to rehabilitate someone because we’re punishing them, or we don’t need to rehabilitate someone because even though they are not being punished, there’s nothing we can do for them anyway. Incorrigibility also feeds into the Greek notion of stigma as a permanent (unremovable) mark. *See* Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 253 (2009). As Dolovich notes:

If prisoners are ‘a breed apart,’ and if, despite knowing the consequences, they persist in their ‘choice to be bad,’ then perhaps there is nothing left for society but to shut them out of the public space altogether, in a place where the threat they pose can be contained. In this way, society never has to confront the fact that the perceived need to control an out-of-control population may stem from the conditions, both inside and outside the prison, to which the incarcerated have been subjected.

213. Link & Phelan, *supra* note 144, at 371.

214. *Id.* One author has suggested that this downward placement in society is not a bug, but a feature. *See* Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON 519, 536 (1996) (using a law and economics analysis to suggest that stigma is “a cheap and efficient punishment” that effectively increases the cost of offending by increasing the costs of re-entering the labor market, thus improving deterrence without increased government outlays).



stigmatized person is not merely spoken of poorly—she does not and cannot participate meaningfully in society.

Labeling theory originally considered non-penal contexts, dealing with labels such as race, gender, IQ, sexual orientation, and physical handicaps.<sup>215</sup> Subsequent research has examined the stigma associated with the civil adjudication of juvenile delinquents, the civil/collateral regulation of sex offenders, and criminal adjudication.

*Winship*'s analysis of juvenile delinquency was prescient: the juvenile delinquent label is, itself, a stigmatic label, which ironically drives "delinquents" towards further delinquent behavior. A recent study of urban adolescents found that official adjudication as a delinquent "may create or enhance the reputation of a juvenile as a criminal in his or her community," most notably among peers and parents.<sup>216</sup> Deviant labels then embed juveniles into deviant social groups through association and exclusion.<sup>217</sup> Other "delinquents" accept actual delinquent behavior and simultaneously provide "social shelter from those who react negatively" to the delinquent label itself.<sup>218</sup> Juvenile delinquents are more comfortable among similarly stigmatized people away from the "righteous gaze" of parents,<sup>219</sup> and they structure their lives to avoid the uneasiness, embarrassment, and ambiguity of interactions with non-delinquents; interactions that require "intense efforts at impression management."<sup>220</sup> *Winship*, then, got it right when it held that the stigma attached to the label of delinquency—and not merely the loss of liberty that resulted from that label—deserved the protection of the beyond a reasonable doubt standard of proof.<sup>221</sup> Stigma is a sentence of its own, with real impacts on juveniles' lives.

A study of registered sex offenders in Kentucky also reported stigmatizing effects from the (formally) civil registration process,<sup>222</sup> directly countering Justice Kennedy's assertion in *Doe* that the fact of conviction, not sex offender registration, is the cause of economic loss.<sup>223</sup> Subjects lost friends, jobs, or housing, and were harassed or treated rudely

215. Link & Phelan, *supra* note 144, at 367.

216. Jon Gunnar Bernburg et al., *Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory*, 43 J. RES. CRIME & DELINQ. 67, 69 (2006). When deviance "is publicly announced and defined as immoral, as occurs during formal sanctions, the immoral character of the actor is highlighted." *Id.*

217. *Id.* at 70.

218. *Id.* at 68.

219. *Id.* at 70.

220. *Id.* at 69.

221. *In re Winship*, 397 U.S. 358, 367 (1970) (holding that the state could not subject "the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.").

222. Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67 (2005).

223. *Smith v. Doe*, 538 U.S. 84, 101 (2003).

as a result of registration.<sup>224</sup> Registration imposed a stigma that was “visible” and durable: “for almost all offenders . . . all or nearly all persons knew of the offenses.”<sup>225</sup> Stigma management strategies led to perverse results, suggesting that even though we can shame offenders upon release, we might not want to. The actual stigma of registration in Kentucky tended to be most pronounced for offenders who assaulted adults, not those who assaulted children.<sup>226</sup> Because the added shame of registration provided those who sexually assaulted children “with yet another piece of information to protect and hide,” the result was that “such offenders are pushed toward isolation and they may actually lose support systems that can be critical to preventing reoffending.”<sup>227</sup>

Bruce Western<sup>228</sup> and Devah Pager<sup>229</sup> have each examined ways in which criminal stigma—particularly when coupled with race—leads to economic disenfranchisement. Though neither Western nor Pager explicitly uses the Link/Phelan framework,<sup>230</sup> their findings fit it neatly. A criminal record, which Pager calls “the credentialing of stigma,”<sup>231</sup> establishes the stigmatic label. While there might be some evidence that a criminal record is an accurate signal of, say, untrustworthiness, and that given the potential harms, it might be rational to exaggerate the threats a particular ex-felon might pose,<sup>232</sup> Pager’s research suggests that racial and criminal stereotypes reinforce and amplify each other,<sup>233</sup> and that “the combination of minority status and a criminal record results in almost total exclusion from [the] labor market.”<sup>234</sup> Western has observed that criminal populations are separated from the economic marketplace: indeed, incarcerated men are “literally invisible because the penal population is

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224. Tewksbury, *supra* note 222, at 76.

225. *Id.* at 74.

226. *Id.* at 75 (“Only 39.2% of registrants with child victims report that 90% or more of others in their lives know of their registration/offenses, compared with 59.6% of registrants without child victims.”).

227. *Id.* at 78. There is a proposal to combine the doubly stigmatic labels of juvenile delinquent and sex offender into a national juvenile sex offender registry, but opponents have pointed out that the move would impose stigma, prevent social reintegration, and fail to improve public safety. See Mike Cruz, *Group Opposes Sex-Offender Registry for Youths*, SAN JOSE MERCURY NEWS, Oct. 18, 2009.

228. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

229. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (Univ. of Chi. Press 2009) (2007).

230. While Pager cites Link and Phelan, *see id.* at 147, she does not adopt their framework explicitly.

231. *Id.* at 4 (“The ‘credential’ of a criminal record, like educational or professional credentials, constitutes a formal and enduring classification of social status, which can be used to regulate access and opportunity across numerous social, economic, and political domains.”).

232. *Id.* at 38–39.

233. *Id.* at 101 (“Racial stereotypes triggered by the appearance of a young black man (already containing an age, race, and gender profile) are further intensified by the revelation of his criminal past.”).

234. *Id.*

omitted from the data sources used to track economic trends.”<sup>235</sup> We therefore “mask a substantial component of persisting racial disparities by ‘removing’ the problem from our tracking systems.”<sup>236</sup> At the same time, offenders are excluded from labor markets via legal mechanisms (prohibitions on ex-felons in certain lines of work) and social mechanisms (as a sign of “general disrepute”).<sup>237</sup> This downward spiral can lead to self-reinforcing exclusion from the labor market, through the mechanisms of stigma management.<sup>238</sup> The ultimate result is that “incarceration is associated with limited future employment opportunities and earnings potential, which themselves are among the strongest predictors of desistance from crime.”<sup>239</sup> Ultimately, then, stigma reinforces criminality.

There are two aspects of the Link/Phelan stigma framework that are thus particularly useful when returning to legal analysis. The first is the degree of particularization of an individual: that is, whether the label is the result of stereotyping or the result of a considered judgment.<sup>240</sup> The second is the analysis of power: given that stigmatized groups are, perforce, those without power, counter-majoritarian legal protections will be the only way to keep regulation from spilling over into oppression.<sup>241</sup>

Some sex offenders are, undoubtedly, dangerous and incorrigible. The issue is whether the state has to make this finding, or whether it can

235. WESTERN, *supra* note 228, at 87.

236. PAGER, *supra* note 229, at 30. This “counting” issue cuts another way, as well: for census purposes, prisoners are generally counted as “residents” of the county where they are imprisoned, not their county of (former) legal residence. The result is that political districts are drawn to include prison populations—even though prisoners can’t vote in almost every state—and the prisoners’ “home” districts are underrepresented politically. Eric Lotke & Pete Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 PACE L. REV. 587, 588 (citing U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, SUMMARY FILE 3, 2000 CENSUS OF POPULATION AND HOUSING, TECHNICAL DOCUMENTATION, app. C at C-2 (2002)).

237. PAGER, *supra* note 229, at 33–35.

238. *Id.* at 147–48 (The stigmatized “may act less confidently and more defensively, or they may simply avoid a potentially threatening contact altogether. The result may be strained and uncomfortable social interactions with potential stigmatizers, more constricted social networks, a compromised quality of life, low self-esteem, depressive symptoms, unemployment and income loss.” (citing Link & Phelan, *supra* note 144, at 374)).

239. PAGER, *supra* note 229, at 3.

240. For a discussion of myth versus risk in another context, see *School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987). *Arline* concerned the dismissal of a teacher with tuberculosis. The Court noted the danger that “public fear and misapprehension” about contagiousness would overcome “reasoned and medically sound judgments” without the protection of the statute at issue. *Id.* at 284–85. For that reason, it concluded, Congress sought to prevent “discrimination on the basis of mythology,” since “society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.” *Id.*

241. Of course, criminals are not insular minorities in the traditional sense, but race and crime are intermingled. See, e.g., WESTERN, *supra* note 228, at 3 (detailing the ways in which “African American history has been entwined with the history of America’s prisons”); see also *id.* at 6 (African Americans “routinely contend[] with long terms of forced confinement and bear[] the stigma of official criminality in all subsequent spheres of social life, as citizens, workers, and spouses. This is a profound social exclusion that significantly rolls back the gains to citizenship hard won by the civil rights movement.”).

assume it. Saying “all sex offenders are dangerous” without differentiating between them or meeting a high standard of proof unfairly and incorrectly stereotypes. Deciding that a *particular* sex offender is dangerous is not stereotyping. The difference between stereotyping and risk assessment has to do with the quality of deliberation—ensuring that the stigma that attaches itself to the term “sex offender” matches up to an individual’s risk. This is precisely what due process protections are designed to ensure.

### III. Retributive Regulations

The issue with which I began this Article is whether we can or should unify our approach to civil and criminal statutes, and, if so, how it might be done.<sup>242</sup> Currently courts use a mishmash of approaches, although the Supreme Court appears to have settled on a two-step approach to SVP cases: looking at the legislative label and then determining whether the civil label is misapplied under the *Mendoza-Martinez* test.<sup>243</sup> My approach is a bit different. I suggest that courts look to the imposition of stigma and adjust procedural protections accordingly.

Using stigma, not civil/criminal labels, to apportion due process protections would, I believe, have some advantages over the current approach. The flexibility of the due process standard, rather than the rigidity of a rule, is well-suited to the problems at hand, since the balance between the public interest in public safety and the individual interest in avoiding confinement and stigma necessarily involves shades of gray. A rule is bound to be over- and under-inclusive, excluding some punitive civil laws and providing for the full weight of criminal procedure when the protections would accomplish little.

Moreover, a focus on criminal and civil labels presumes that these labels are, themselves, meaningful (or at least illustrative of) constitutional values. *Mendoza-Martinez* still, in some ways, enshrines labels over functions, and creates a threshold of all-or-nothing protection. The taxonomy of statutes remains the central part of the *Mendoza-Martinez* analysis—we focus on what statutes should be *called*, perhaps at the expense of what they *mean*.<sup>244</sup> The problem is that meaning changes through usage, and the definition of whether something “should be called” civil or criminal depends on how these laws are, in fact, labeled.<sup>245</sup> And even if a law stops short of being effectively punitive, it might nevertheless restrict liberty and impose stigma in a way that necessitates some of the

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242. See *supra* Part I.

243. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); see also *Kansas v. Hendricks* 521 U.S. 346 (1997).

244. See *supra* notes 83–96 and accompanying text.

245. This is akin, in some ways, to the debates about the meaning of “cruel and unusual” in the Eighth Amendment. Is a practice necessarily neither cruel nor unusual if a majority of states does it, or is there an inherent value enshrined in those words independent of popular usage (or practice)?

protections of due process. It makes much more sense to talk about individual liberties from the point of view of the individual, not the division of government (or the part of the code) that is affecting her. Shifting the discussion to these simple dimensions—liberty and stigma—allows us to speak more meaningfully of the difference between incapacitating offenders on the basis of risk or moral judgment. In short, it weeds out public safety regulations from retributive regulations.

In suggesting that *Winship* govern our inquiry, I am actually not suggesting something new, but rather a return to what once was. The Supreme Court has already used *Winship* to analyze the due process ramifications of formally civil laws, most notably in *Addington v. Texas*,<sup>246</sup> a civil commitment case involving mental illness.<sup>247</sup> This example, however, does more than demonstrate that deciding cases using *Winship* is feasible; it also demonstrates that using *Winship* focuses us on the substance of the deprivations at stake. It bears repeating that *Winship* was a civil case involving the deprivation of liberty and the imposition of stigma on the basis of predicate criminal behavior<sup>248</sup>—just like the SVP civil commitment statutes at issue in Part I.

#### A. *Winship* Due Process: The Example of *Addington v. Texas*

Using *Winship* due process to analyze the protections due in civil deprivations of liberty is something the Supreme Court has done before. In this section, then, I am not so much proposing something new as suggesting a return to something old.<sup>249</sup> In *Addington v. Texas*, which dealt with civil

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246. 441 U.S. 418 (1979).

247. See *id.* at 432-33 (“To meet due process demands, the standard has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases.”). However, “the reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment.” *Id.* at 432.

248. See *In re Winship*, 397 U.S. at 359–61.

249. The fact that *Winship* has been so extended on the civil side, and that it is a staple of criminal procedure, should address any concerns that *Winship* is somehow an anomalous situation that cannot, or should not, be extended to other areas of the law. I concede that *Winship* concerns juvenile proceedings where the underlying behavior would be criminal if committed by an adult, *id.* at 359, but this argues for functionalism, not formalism. Indeed, the issue of how to characterize juvenile proceedings has long puzzled courts, leading Justice Blackmun to conclude, “Little, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either ‘civil’ or ‘criminal.’” *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971) (holding that a trial by jury is not required in juvenile delinquency proceedings). This is not to say that the issues are not important; they are. Juveniles often find themselves in limbo, caught between categories, when a substantive analysis of the issues at stake would be better suited to resolving them. See, e.g., Jesse McKinley, *A Killer at 16, and Still in California’s Juvenile Justice System Decades Later*, N.Y. TIMES, Apr. 26, 2009, at A14 (reporting that a thirty-seven-year-old man remains in California’s juvenile justice system, beyond the normal maximum age of twenty-five; because he was “convicted as a juvenile and continue[s] to be held under the mental health code, he cannot be transferred to an adult facility”).

commitments of the mentally ill<sup>250</sup> and, later, *Santosky v. Kramer*,<sup>251</sup> which concerned the termination of parental rights,<sup>252</sup> the Court did not decide that either of the statutes under examination was, in essence, criminal. Instead, it looked to the liberty interests at stake and found that due process required the facts at issue to be proven by clear and convincing evidence.<sup>253</sup> This functional approach has a ready analogue in Eighth Amendment jurisprudence. There, because the Eighth Amendment is not textually limited to criminal cases,<sup>254</sup> the question is not whether a statutory penalty is “civil or criminal, but rather whether it is punishment.”<sup>255</sup>

*Addington* applied *Winship* to find that the state had to prove future dangerousness of a mentally ill person by a standard of proof greater than a preponderance of the evidence.<sup>256</sup> Because the stigma and liberty issues at stake were not identical to those in *Winship*, however, the state did not need to prove its claims by *Winship*'s beyond a reasonable doubt standard; clear and convincing evidence was sufficient.<sup>257</sup> *Addington* was arrested on a misdemeanor assault charge against his mother when she filed a petition to have him civilly committed.<sup>258</sup> *Addington* had a long history of being committed to mental hospitals<sup>259</sup> and had been assaultive while in the hospital; he was therefore “probably dangerous” in the opinions of two psychiatric experts.<sup>260</sup> *Addington* conceded his mental illness, but challenged the dangerousness finding,<sup>261</sup> arguing that “any standard of proof for commitment less than that required for criminal convictions, i.e. beyond a reasonable doubt, violated his procedural due process rights.”<sup>262</sup>

The Supreme Court looked at Justice Harlan's concurrence in *Winship*, which examined the ways in which standards of proof allocate risk of error and “indicate the relative importance attached to the ultimate decision.”<sup>263</sup> Because society has a “minimal” concern in the outcome of a typical civil case, preponderance of the evidence is sufficient, while the

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250. 441 U.S. 418 (1979).

251. 455 U.S. 745 (1982).

252. *See id.* at 768–69 (using *Addington* to require clear and convincing evidence of parental neglect in proceedings to terminate parental rights).

253. *Addington*, 441 U.S. at 424; *Santosky*, 455 U.S. at 768.

254. *See, e.g.,* *Austin v. United States*, 509 U.S. 602, 608 (1993) (applying the Eighth Amendment's excessive fines clause to civil forfeiture claims).

255. *Id.* at 610 (“The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law. . . . It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.” (internal citations omitted)).

256. *Addington*, 441 U.S. at 432–33.

257. *Id.* at 427–28.

258. *Id.* at 420.

259. *Id.*

260. *Id.* at 420–21.

261. *Id.* at 421.

262. *Id.* at 421–22.

263. *Id.* at 423 (citing *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

defendant's interests in a criminal case are of "such magnitude that . . . our society imposes almost the entire risk of error upon itself."<sup>264</sup> The clear and convincing standard is appropriate for cases where the interests are greater than "mere loss of money" but where it is nevertheless appropriate to "reduce the risk to the defendant of having his reputation tarnished."<sup>265</sup> The Court found that there were, indeed, "adverse social consequences" to a civil commitment, and that "[w]hether we label this phenomena [sic] 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual."<sup>266</sup>

*Addington* distinguished civil commitments from the juvenile adjudication in *Winship*, finding "no meaningful distinctions" between criminal adult trials and juvenile commitments,<sup>267</sup> and argued that a civil commitment "can in no sense be equated to a criminal prosecution"<sup>268</sup> (even though much of the evidence about *Addington*'s dangerousness came from his criminal history of assaults). The beyond a reasonable doubt standard of proof was not required in the civil commitment case because the "layers of professional review . . . and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected."<sup>269</sup> Finally, the Court noted that issues about future dangerousness were necessarily more speculative than the retrospective questions in either criminal prosecutions or delinquency proceedings. The latter proceedings involve "a straightforward factual question—did the accused commit the act alleged?"<sup>270</sup> In commitment proceedings, facts are just the starting point: the real issue is about whether these facts mean that someone is both mentally ill and dangerous, and "there is a serious question whether a state could ever prove [this] beyond a reasonable doubt."<sup>271</sup>

Justice Stevens, *Apprendi*'s author, has himself suggested in a series of dissents that stigma gives rise to procedural protections for sex offender civil commitments. In *Allen v. Illinois*,<sup>272</sup> Stevens dissented from the majority's holding that an SVP law was civil,<sup>273</sup> writing that a civil label "cannot change the character of a criminal proceeding."<sup>274</sup> What mattered,

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264. *Addington*, 441 U.S. at 423–24.

265. *Id.* at 424.

266. *Id.* at 425–26.

267. *Id.* at 428. I disagree with this characterization, *see supra* note 157 and accompanying text, but it does not affect whether *Winship*'s general framework is applicable to formally civil cases, as *Addington* itself demonstrates.

268. *Id.*

269. *Id.* at 428–29.

270. *Id.* at 429.

271. *Id.*

272. 478 U.S. 364 (1986).

273. *See id.* at 368 (holding that SVP law's civil nature meant use of defendant's statements in therapy were not barred by the Fifth Amendment privilege against self-incrimination).

274. *Id.* at 376 (Stevens, J., dissenting).

ultimately, was that “the stigma associated with an adjudication as a ‘sexually dangerous person’ is at least as great as that associated with most criminal convictions.”<sup>275</sup> Even if a state declared that the goal of a conventional criminal statute was “treatment” and “rehabilitation,” the procedural protections of the Fifth Amendment—due process—would still apply.<sup>276</sup> If labels were all that mattered, “nothing would prevent a State from creating an entire corpus of ‘dangerous person’ statutes to shadow its criminal code.”<sup>277</sup> That is, any statute could be rewritten so its “goal would be ‘treatment’; the result would be evisceration of criminal law and its accompanying protections.”<sup>278</sup>

Justice Stevens was also the lone dissenter in *Seling*, which rejected an as-applied challenge to an SVP law, arguing that “the question whether a statute is in fact punitive cannot always be answered solely by reference to the text of the statute.”<sup>279</sup> Conditions of confinement were “evidence of both the legislative purpose behind the statute and its actual effect.”<sup>280</sup> Stevens also dissented to the sex offender registry law in *Doe*, writing separately that he thought the law was criminal because it restricted liberty and imposed “severe stigma.”<sup>281</sup>

## B. The *Mendoza-Martinez* Approach

Recent cases from the Supreme Courts of Kentucky<sup>282</sup> and Maine<sup>283</sup> used the *Mendoza-Martinez* approach to find that formally civil sex offender residency restrictions were “so punitive in effect as to negate any intention to deem them civil,” holding that their retroactive application violated the ex post facto clause of the United States and state constitutions.<sup>284</sup> The Supreme Court of Indiana also held a sex offender registration statute unconstitutional under the Indiana constitution’s Ex Post Facto clause, again using *Mendoza-Martinez*.<sup>285</sup>

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275. *Id.* at 377.

276. *Id.* at 380.

277. *Id.*

278. *Id.*

279. *Seling v. Young*, 531 U.S. 250, 275 (2001) (Stevens, J., dissenting).

280. *Id.*; see also Eric S. Janus & Brad Bolin, *An End-Game for Sexually Violent Predator Laws: As-Applied Invalidation*, 6 OH. ST. J. CRIM. L. 25, 38 (2008) (noting that a law might escape a facial challenge because it is drafted the right way, but an impermissible purpose—“the extra-legal punishment of sex offenders, cannot be judicially discerned until it is implemented.” (emphasis in original)). These arguments have merit—the *Seling* majority did not convincingly explain how a legislature could be duped by an executive bent on implementing a civil law in a punitive fashion without at least the legislature’s tacit consent.

281. *Smith v. Doe*, 538 U.S. 84, 111 (2003) (Stevens, J., dissenting); see also *id.* at 112 (noting that the widespread access to information “has a severe stigmatizing effect.”).

282. *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009).

283. *State v. Letalien*, 985 A.2d 4 (Me. 2009).

284. *Baker*, 295 S.W.3d at 439; see also *Letalien*, 985 A.2d at 26–27.

285. *Wallace v. Indiana*, 905 N.E.2d 371, 378 (Ind. 2009).



In this section, however, I will focus on *People v. Mosley*,<sup>286</sup> a case from the California Court of Appeal, which used *Mendoza-Martinez* to determine that a sex offender registry was punitive, and from there held that *Apprendi* required the factual findings justifying placement on the registry to be found by a jury beyond a reasonable doubt.<sup>287</sup> Because the statute at issue, which stiffened residency restrictions on sex offenders after their release from prison, “increase[d] the penalty for the underlying offense beyond the statutory maximum,” the judicial fact finding used to impose these restrictions violated *Apprendi*.<sup>288</sup> *Mosley* is instructive not only because it considers *Apprendi* in light of civil restrictions, but also because it cites the *Apprendi* definition of punishment highlighted in this Article: that punishment means “both the loss of liberty and the stigma attaching to the offense.”<sup>289</sup>

*Mosley* was acquitted of a sex offense but was nevertheless required to register as a sex offender and comply with the residency restrictions that attached.<sup>290</sup> The judge who ordered registration second-guessed the jury’s acquittal on the charge of sexual assault, opining: “We simply don’t know what the jury—why the jury acquitted the defendant.”<sup>291</sup> He then made his own finding that “the evidence established beyond a reasonable doubt that the defendant sexually assaulted the victim”<sup>292</sup> and that the assault was committed “as a result of sexual compulsion or for purposes of sexual gratification.”<sup>293</sup> The California statute gave the judge discretion to impose residency restrictions for “any offense . . . if the court finds . . . that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification . . . even if the defendant was not convicted of a sexual offense.”<sup>294</sup>

The Court of Appeal affirmed the conviction (for non-sexual assault) but reversed the residency requirement.<sup>295</sup> Although registration had been deemed civil by the California Supreme Court,<sup>296</sup> the new burdens imposed by Jessica’s Law (passed in 2006 as Proposition 83)<sup>297</sup> changed the calculation.<sup>298</sup> The California court used the *Mendoza-Martinez* factors to decide whether the new registration law as modified in 2006 was punitive,

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286. 86 Cal. Rptr. 3d 23 (Cal. Ct. App. 4th Dist. 2008).

287. *Id.* at 38–39.

288. *Id.* at 34 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

289. *Id.* at 31 (citing *Apprendi*, 530 U.S. at 484).

290. *Id.* at 24.

291. *Id.* at 27.

292. *Id.*

293. *Id.*

294. *Id.* at 27 n.3.

295. *Id.* at 24–25.

296. *Id.* at 29.

297. CAL. PENAL CODE § 3003.5 (West 2006).

298. *Mosley*, 86 Cal. Rptr. 3d at 30.

and thus whether *Apprendi* applied.<sup>299</sup> Factors indicating that the law was punitive were the “heavy affirmative restraint” of the residency restriction,<sup>300</sup> the similarity to the traditional punishment of banishment,<sup>301</sup> the aim of deterring recidivism—one of the traditional aims of punishment,<sup>302</sup>—and the law’s overbroad application to all sex offenders, even those whose offenses did not involve children.<sup>303</sup> Civil factors were the law’s express statement of no punitive intent<sup>304</sup> and the rational connection to the nonpunitive purpose of protecting children.<sup>305</sup> The Court of Appeal concluded that the law had an “overwhelming punitive effect.”<sup>306</sup>

### C. Comparing the *Mendoza-Martinez* and *Winship* Approaches

The *Mendoza-Martinez* cases prove that it is at least possible to find some limits on the civil label. However, these cases arrive at protections in an odd sort of all-or-nothing manner. They find that the civil laws are effectively criminal, and then apply all of the protections of criminal procedure to them.<sup>307</sup> Looked at another way, in evaluating whether a given statute is criminal, *Mendoza-Martinez* is also defining punishment. The question then becomes how well it does that. Some of *Mendoza-Martinez*’s tests determine whether the law should have been put into a different part of the code (e.g., is the behavior criminal and has it historically been criminal),<sup>308</sup> while other parts of the test look to the function of the law (does it involve an affirmative disability or restraint, does it involve culpability (scienter)).<sup>309</sup> At best, *Mendoza-Martinez* identifies some of the substantive issues in criminal law and some of the features of statutes legislatures have labeled criminal, but it does not identify all of them in either category.

A *Winship*/due process test would provide a substantive—and simpler—definition of punishment: the stigmatic deprivation of liberty. It could also scale its protections to the degree of deprivations involved. Restrictions exist on a continuum and could be met with procedural protections along the same continuum. Thus, even if a civil restriction were stigmatic, all of *Apprendi*’s protections—and those of the rest of criminal

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299. *Id.* at 35–36; see also *Smith v. Doe*, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting) (finding the Alaska sex offender registry “punitive in effect” using the *Mendoza-Martinez* factors).

300. *Mosley*, 86 Cal. Rptr.3d 36.

301. *Id.*

302. *Id.* at 37.

303. *Id.*

304. *Id.* at 35.

305. *Id.* at 37.

306. *Id.* at 38.

307. See *supra* Part III.B.

308. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

309. *Id.*

procedure—would not necessarily apply. Protections would be tailored to individual unfairnesses.

States have, in fact, already put a variety of procedural protections in their SVP commitment statutes.<sup>310</sup> Four states (Arizona, Iowa, Kansas, and South Carolina) require a full complement of procedural protections: proof beyond a reasonable doubt, finding by a jury, right to counsel, right to appeal, hearing before a judge, and annual review where the state bears the burden of proving beyond a reasonable doubt that continued confinement is justified.<sup>311</sup> Five states have all but one of the above protections: Washington, California, and Massachusetts are missing only the right to appeal, Illinois provides for a clear and convincing standard to justify continued confinement, and Texas provides for biennial, not annual, review.<sup>312</sup> Three other states provide for a lower standard of proof on the initial confinement: Florida, Missouri, and New York.<sup>313</sup>

Due process, then, would not provide courts with the same answer to all statutes that provide for the civil commitment of SVPs; it would give different answers tailored to the different statutes. But, as *Addington* demonstrates, a court's analysis of all the factors involved is also useful to explain *why* we have the rules we have. That is, *Addington* does more than just decide a particular case: it also educates those who read it about the values of due process, not simply through the personal whim of the judges involved, but through a close analysis of the actual interests involved, both on the state's side and the individual's side.

The addition of stigma to the equation means that the due process analysis would have to take notice that labels can be both inaccurate and incredibly debilitating. It's not simply the case that a civil commitment SVP law (as in *Hendricks*) is only about a restriction on liberty; the SVP law also imposes a stigmatic label. It's also not simply the case that a sex offender registry (as in *Doe*) deserves less scrutiny due to its lesser effects on liberty; its stigmatic effects are profound. The expanded understanding of stigma the Link/Phelan framework provides us underscores the very real consequences that come from having to register<sup>314</sup>—so it does not matter if

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310. For an overview of the state SVP commitment statutes, see Appendix, *infra*.

311. See ARIZ. REV. STAT. ANN. §§ 36-3701 to 36-3717 (2009); IOWA CODE §§ 229A.1-16 (2009); KAN STAT. ANN. §§ 59-29a01-922 (2005 & Supp. 2010); S.C. CODE ANN. §§ 44-48-10 to 170 (2002 & Supp. 2010).

312. See CAL. WELF. & INST. CODE §§ 6600-6609.3 (West 2010); 725 ILL. COMP. STAT. 207/60(d) (2008) (providing that a petition for conditional release must be granted unless the State proves by clear and convincing evidence that the person has not made sufficient progress for release); MASS GEN. LAWS ch. 123A, §§ 1-16 (2003 & Supp. 2010); TEX. HEALTH & SAFETY CODE ANN. § 841.101-03 (West 2010) (providing for biennial review of civil commitment orders); WASH. REV. CODE §§ 71.09.10-903 (2008 & Supp. 2011).

313. FLA. STAT. § 394.917(1) (2006) (establishing a clear and convincing evidence standard for confinement); MO. REV. STAT. § 632.495(1) (2006) (same); N.Y. MENTAL HYG. LAW § 10.07(d) (McKinney Supp. 2011) (same).

314. See *supra* Part II.C.

these effects are deemed “collateral” or “incidental” as long as the imposition of their very real bite is done more carefully, with proper procedural protections. Stigma, then, is not merely a quaint holdover from the “death before dishonor” days; even today, when social mores are perhaps less rigorously enforced than before, we can use the Link/Phelan framework to help decide when something is simply unflattering and when it becomes stigmatic.<sup>315</sup>

Given the fact-intensive nature of the inquiry, it is difficult to say what a given result might be if an SVP civil commitment statute, for example, were analyzed using due process. SVP laws are different in each state that has them, employing different procedures (e.g., jury, cross-examination), providing for different durations of confinement, and even providing for different standards of proof.<sup>316</sup> At least three state courts have used due process to analyze the level of protection required in SVP statutes, but, again, generalizations are difficult to come by, given the variety of procedures used.<sup>317</sup> The point here, though, is to underscore that stigma is an important liberty interest in itself. Procedures need to protect not only wrongful confinement, but also wrongful imposition of stigma. Due process can separate stigmatic judgments—that is, condemnatory ones based on stereotypical labels—from analyses of risk. A higher standard of proof can be seen as a way to put stigmatic presumptions to the test, to make them more particularly related to the very real public safety interests they are designed to protect, while ensuring they are not simply expressions of fear.<sup>318</sup> In other words, we need to make sure that the sanctions we

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315. Consider another paradigmatic civil restraint based on criminal activity: domestic violence based temporary restraining orders (TROs) barring an abuser from coming near his or her victim. Liberty and stigma are affected by these orders, but we can see how a one-size-fits-all approach would not, in fact, be able to fit a *Hendricks* situation, a *Doe* situation, and a TRO situation. This illustrates a key advantage to using due process analysis: that it is “flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

316. For an overview of the state SVP commitment statutes, see Appendix, *infra*.

317. See, e.g., *People v. McKee*, 73 Cal. Rptr.3d 661 (Cal. Ct. App. 4th Dist. 2008) (concluding, on the issue of first impression, that *Addington* does not apply to SVP commitment, and therefore dangerousness need not be proven by clear and convincing evidence); see also *Washington v. Stout*, 159 N.W.2d 357, 369–70 (2007) (rejecting claim that due process requires confrontation in SVP context). The Missouri Supreme Court recently rejected a challenge to an SVP statute which required a clear and convincing standard of proof; petitioners had argued that beyond a reasonable doubt was required. *In re van Orden*, 271 S.W.3d 579, 584–85 (Mo. 2008).

318. Courts might also want to use the *Mathews v. Eldridge*, 424 U.S. 319 (1976), due process framework, which provides a more detailed algorithm than *Winship*. Under *Eldridge*, due process inquiries must examine:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335. Private interests here would include both stigma and restrictions on liberty, erroneous deprivations would be addressed by making findings more particular, and all of these would be weighed

impose actually make us safer. Categories of offender do not threaten public safety, individual offenders do.

I realize that an obvious realist critique is that the real problem has nothing to do with standards and everything to do with judges' unwillingness to strike down popular laws aimed at extremely unpopular subsections of the population. Arguing that courts must consider liberty deprivation and stigma imposition won't get the job done by itself.<sup>319</sup> In fact, the due process analysis of *Doe*'s statute would probably not look that different from Justice Ginsburg's *Mendoza-Martinez*-based dissent,<sup>320</sup> and the Indiana Supreme Court incorporated stigma into the *Mendoza-Martinez* "affirmative disability or restraint" prong.<sup>321</sup>

Nevertheless, I believe that using *Winship* still has some benefits. It explains what is being protected, why it needs protection, and how it should be protected more than a simple "mislabeling" test does. In other words, I can accept both that courts will find violations of due process only in the breach (and even then, only rarely), and that most of the procedural protections that result will come not from courts' interventions but from legislative design, but still maintain that the choice of a *Winship* standard would have some benefits. Even if the outcomes of courts' decisions do not change (much), using a rubric which more clearly identifies the interests at stake will benefit whatever civic conversation surrounds decisions about procedure. Focusing on civil and criminal labels pushes the conversation towards categories, towards deciding what a statute is called and whether that label is accurate. Focusing on liberty and stigma pushes the conversation towards what the statute does and how it affects important individual interests. Focusing on these effects has a better chance of generating procedures that protect these interests; focusing on labeling (or relabeling) is more likely to promote compliance with formal categories, whether or not those categories map onto the interests they purport to reflect.

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against the government's substantial interest in preventing future harms.

319. Indeed, the ineffectiveness of due process to protect rights at parole was the subject of my earlier Article. There, however, the problem was not so much the standard as the way in which it was applied. See generally Ball, *supra* note 11.

320. See Smith v. Doe, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting). For a discussion of Justice Ginsburg's dissent in *Doe*, see *supra* note 132 and accompanying text.

321. See Wallace v. Indiana, 905 N.E.2d 371, 379 (Ind. 2009) ("[T]he act imposes significant affirmative obligations and a severe stigma on every person to whom it applies."); see also *id.* at 380 ("[T]he Act exposes registrants to profound humiliation and community-wide ostracism. Further the practical effect of this dissemination is that it often subjects offenders to 'vigilante justice' which may include lost employment opportunities, housing discrimination, threats, and violence."). A concurrence to the Maine Supreme Court's sex offender ruling would use "the additional factor of stigma" alongside the *Mendoza-Martinez* factors. State v. Letalien, 985 A.2d 4, 30-1 (Me. 2009) (Silver, J., concurring) (arguing that the stigma associated with registration renders the statute punitive).

#### IV. Public Safety Punishments

I have argued that the presence or absence of stigma determines what procedural protections should apply to nominally civil laws, and in so doing have focused on the *Winship* portion of *Apprendi*'s rule. I now turn to the jury portion of *Apprendi*'s rule, and examine statutes with criminal labels. If, as I have argued, some civil penalties might be sufficiently "criminal" to require more due process protection, are there criminal penalties that are sufficiently "civil" to require less procedural protection—and, more specifically, can these criminal penalties be based on facts not found by juries?

Drawing on the institutional competence analysis I provided in my earlier article, where I argued that juries serve as moral experts and nonjuries serve as public safety experts,<sup>322</sup> I will again argue that juries are required only for retributive sanctions, not those which sound in public safety. Juries must decide questions with factual dimensions bearing on wrongfulness, while nonjuries can decide everything else. Juries are the conscience of the community, and when the purpose of a given sentence is punitive—a deprivation of liberty with the stigma of wrongdoing—a jury needs to find it. Judges and other bodies, on the other hand, have repeat-player expertise about how to treat offenders in order to maximize public safety. They need access to all relevant information to determine how best a given offender can best be rehabilitated or quarantined. Because nonjuries have neither special moral expertise nor greater moral standing, they may not find facts leading to greater opprobrium.

The presence or absence of stigma here, then, is not a liberty interest deserving of due process protections itself (as in Part II), but a way of asking whether the criminal penalties address risk or desert—whether they are either retributive sanctions or what I will call public safety punishments. Public safety punishments are a kind of hybrid of retribution and regulation, sanctions based on predicate criminal behavior which serve only to quarantine. The presence or absence of stigma indicates the category of a given sanction: the presence of stigma indicates some kind of moral judgment, which makes a sanction punitive, while the absence of stigma indicates that what we are doing is truly regulatory.

In this Part, I will first analyze the recent decision *Oregon v. Ice*, which held that judges could find facts justifying the imposition of consecutive sentences.<sup>323</sup> I aim to demonstrate how the law in *Ice* might have been read to incorporate non-retributive, public safety concerns about future dangerousness, thus avoiding the need for jury involvement without tearing at the fabric of the *Apprendi* line. I will then point out some

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322. Ball, *supra* note 11, at 922–31.

323. 129 S. Ct. 711 (2009).

problems with the division between risk and desert: the ways in which criminal law treats extreme risks in moral terms, and the ways in which the interdependence of civil and criminal penalties means that the imposition of stigma often has neither a clear first cause nor a clear last cause.

#### A. Cracking *Ice*: Using Public Safety to Decode the Meaning of Consecutive Sentencing

In *Oregon v. Ice*, Justice Ginsburg sought to limit *Apprendi* by relying on two factors outside the doctrine: the need for legislative deference and the fact that judges have historically had the power to impose sentences consecutively.<sup>324</sup> As Part I demonstrates, legislative deference is a rule that provides few limits, particularly given the inconsistent—or incoherent—way in which it has been applied. The history of the judicial power has also changed as a result of judicial decisions, exemplified by *Apprendi* itself. In this section, I argue that the Oregon statute at issue in *Ice* could instead have sanctioned judicial fact-finding within *Apprendi* by focusing on future dangerousness. This distinction would have served to prevent the state from imposing punishment without procedural protections while limiting *Apprendi* in a manner more consistent with the rest of the doctrine.

##### 1. *Ice* and the Search for an Administrable Boundary

Thomas Ice twice entered a unit of the apartment building he managed and sexually assaulted an eleven-year-old girl.<sup>325</sup> He was convicted of six crimes: two counts of first-degree burglary (entering with the intent to commit sexual abuse), two counts of first-degree sexual assault for touching the victim's vagina, and two counts of first-degree sexual assault for touching her breasts.<sup>326</sup>

The Oregon law governing sentencing presumes that sentences will be imposed concurrently for offenses that are part of the “same continuous and uninterrupted course of conduct.”<sup>327</sup> The judge can, however, impose consecutive sentences for the same course of conduct if she finds either: “(a) That the criminal offense . . . was an indication of defendant’s willingness to commit more than one criminal offense; or (b) The criminal offense . . . caused or created a risk of causing greater or qualitatively

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324. See *id.* at 717 (noting that “twin considerations—historical practice and respect for state sovereignty—counsel against adopting the *Apprendi* rule for the imposition of sentences for discrete crimes.”).

325. *Id.* at 715.

326. *Id.*

327. *Id.* (citing OR. REV. STAT. §§ 137.123(1) and (2) (2007)) (noting that sentences “shall run concurrently” unless the judge find certain statutorily described facts).

different loss, injury or harm to the victim or . . . to a different victim.”<sup>328</sup> If a judge finds that the offenses of conviction were different events, the concurrent sentencing presumption does not apply, and she retains the authority to sentence consecutively.<sup>329</sup>

At sentencing, Ice’s judge found that each count of burglary was a separate incident, allowing him to impose consecutive sentences for each count.<sup>330</sup> Given that each sexual assault was part of a continuous course of conduct (the burglary), he could not sentence Ice to consecutive sentences for the sexual assault counts unless he also found evidence that the defendant was both “willing[] to commit more than one . . . offense” and that his conduct “caused or created a risk of causing greater, qualitatively different loss, injury, or harm to the victim.”<sup>331</sup> He did make this finding, which gave him the authority to sentence Ice to consecutive sentences for the sexual assaults he committed during each burglary.<sup>332</sup> The judge ultimately sentenced Ice consecutively on four charges (all except those for touching the victim’s breasts).<sup>333</sup> On appeal, the Oregon Supreme Court held that Ice’s consecutive sentences violated *Apprendi* because they were based on judicial findings of fact.<sup>334</sup>

The issue of whether to apply *Apprendi* depends on whether these findings of fact increased Ice’s statutory maximum punishment. As stated earlier in Part I, *Blakely* defines the statutory maximum as the presumptive sentence that can be imposed based on the jury’s verdict or the plea.<sup>335</sup> In Oregon, the presumptive sentence was concurrent; only upon an additional finding of fact could a judge impose a consecutive sentence.<sup>336</sup> This means that the practice violated *Apprendi* because the facts increased the maximum punishment without a jury finding them beyond a reasonable doubt.<sup>337</sup>

The United States Supreme Court reversed, however,

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328. *Id.* (citing OR. REV. STAT. § 137.123(5) (2007)).

329. *Id.* (citing OR. REV. STAT. § 137.123(2) (2007)).

330. *Id.* at 715–16

331. *Id.* at 716 (ellipsis in original, internal citations omitted). Somewhat confusingly, the phrase used here, “willingness to commit more than one offense,” goes to the offender’s blameworthy mens rea, not his propensity for future dangerousness. In other words, the phrase means the defendant intended to commit the separate crimes with which he was charged; therefore he deserves punishment for them.

332. *Id.*

333. *Id.*

334. *Id.*

335. See Ball, *supra* note 11, at 950 (“[T]he Supreme Court defined the statutory maximum as the presumptive sentence for a given set of facts, not the maximum sentence under which the offender is charged.”) (emphasis added); see also *id.* at 951 (“Pleading guilty to the presumptive crime is not the same as pleading guilty to the aggravated version of that crime, even if the taxonomic maximum sentence the legislature calls kidnapping is greater than either.”) (emphasis added).

336. See *Ice*, 129 S. Ct. at 715.

337. See *State v. Ice*, 170 P.3d 1049, 1058 (Or. 2007) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).



distinguishing between an increase in punishment for a particular offense and the imposition of multiple sentences.<sup>338</sup> Justice Ginsburg's opinion did not announce that it was overruling *Apprendi*; instead it argued that because Ice's sentencing judge did not increase the maximum punishment for any *individual* sentence, the fact that his total time in prison increased was irrelevant.<sup>339</sup> (I note that *Apprendi* itself raised and dismissed the issue of consecutive versus concurrent sentences,<sup>340</sup> that which went unmentioned in the *Ice* majority.)

Justice Ginsburg's opinion reinserted legislative deference into the criminal realm.<sup>341</sup> Because the power to specify how a judge may administer "multiple sentences has long been considered the prerogative of state legislatures,"<sup>342</sup> it "goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government."<sup>343</sup>

Justice Ginsburg argued that the decision to impose concurrent or consecutive sentences is not part of the jury's "traditional domain," but is instead part of "the prerogative of state legislatures."<sup>344</sup> For support, she cited *Patterson v. New York*,<sup>345</sup> a case that *Apprendi* probably overruled<sup>346</sup> and which had not been cited in years.<sup>347</sup> Because Oregon's law gave Ice more procedural protection than he would have enjoyed historically (because judges used to have wide-ranging discretion to sentence consecutively), Justice Ginsburg argued that the Court should be reluctant

338. *Ice*, 129 S. Ct. at 714–15.

339. *See id.* at 720 (Scalia, J., dissenting) (noting that the *Ice* majority "attempts to distinguish Oregon's sentencing scheme by reasoning that the rule of *Apprendi* applies only to the length of a sentence for an individual crime and not to the total sentence for a defendant.").

340. *Apprendi v. New Jersey*, 530 U.S. 466, 474 (2000). The defendant in *Apprendi* could have been sentenced consecutively for the three charges to which he pleaded guilty. *Id.* The time he served would have totaled more than twenty years, *id.* at 470, far greater than the twelve years to which he was eventually sentenced. *Id.* at 471. *Apprendi* got an enhanced sentence on just one of his charges, and that sentence was increased because of a finding that he acted with racial animus. *Id.* The key here, again, is not just time, but the moral opprobrium attached to it. Sentence time tells you something about punishment, but not everything. After all, Justice Thomas has said repeatedly in the civil context that detention is not a synonym for punishment. *See supra* note 198. In Charles *Apprendi*'s case, the judge's finding made his crime more stigmatic *and* it increased the time he would spend in prison. Both of these factors, however, were necessary constituents of his increased punishment. Ball, *supra* note 11, at 925–26.

341. *Ice*, 129 S. Ct. at 717 (majority opinion) (noting that "our opinions make clear that the Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain.").

342. *Id.*

343. *Id.* at 718 (citing *Patterson v. New York*, 432 U.S. 197, 201 (1977)).

344. *Id.* at 717 (noting that this power to specify how a judge may administer "multiple sentences has long been considered the prerogative of state legislatures.").

345. *Id.* at 717 (citing *Patterson v. New York*, 432 U.S. 197, 201 (1977)).

346. *See Apprendi*, 530 U.S. at 531 (O'Connor, J., dissenting) (questioning why *Apprendi*'s rule "would not require the overruling of *Patterson*").

347. *Patterson* is not mentioned in *Blakely*, *Booker*, or *Cunningham*, and gets only a brief mention in Justice O'Connor's *Ring* dissent. *See Ring v. Arizona*, 536 U.S. 584, 619 (2002) (O'Connor, J., dissenting) (noting that the *Apprendi* rule contradicts the holding of *Patterson*).

to thwart the will of the legislature.<sup>348</sup> Because Ice had no “entitlement” to a lesser sentence, again referring to the “historical role of the jury at common law,”<sup>349</sup> there was no constitutional violation. In other words, because the legislature labeled a given fact a consecutive/concurrent sentencing factor, not an element of an aggravated crime, its effects were irrelevant and *Apprendi* did not apply.

Justice Scalia, dissenting, was understandably bewildered by the majority’s reliance on “artificial limitations” on *Apprendi*.<sup>350</sup> *Apprendi*’s “guarantee turns upon the penal consequences attached to the fact, and not to its formal definition as an element of the crime.”<sup>351</sup> If an increase in punishment turns on the finding of a fact, “that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”<sup>352</sup> The rule “leaves no room for a formalistic distinction between facts bearing on the number of years of imprisonment that a defendant will serve for one count (subject to the rule of *Apprendi*) and facts bearing on how many years will be served in total (now not subject to *Apprendi*).”<sup>353</sup> Ultimately, he argued, legislative deference only goes so far. “The right to trial by jury and proof beyond a reasonable doubt is a given, and *all* legislative policymaking—good and bad, heartless and compassionate—must work within the confines of that reality.”<sup>354</sup>

## 2. The Limits of Justice Ginsburg’s Approach

The ultimate problem Justice Ginsburg appeared to be trying to address is how to draw clear boundaries around *Apprendi*’s rule. She argued that the line should remain where she thinks it is—excluding it from any new applications—because ruling otherwise would disturb so much of contemporary state judicial practice.<sup>355</sup> In support, she cited examples where judicial fact finding led to dispositional departures, such as decisions about post-release supervision, drug rehabilitation, and fines.<sup>356</sup> Because there was no rule she could find that would limit *Apprendi*’s “expansion” to these circumstances, she concluded that courts should defer to legislative policymaking.<sup>357</sup> While Justice Ginsburg noted that “not every state initiative will be in harmony with Sixth Amendment ideals,” we are left

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348. *See Ice*, 129 S. Ct. at 718.

349. *Id.* (“It is no answer that, as Ice argues, ‘he was “entitled” to’ concurrent sentences absent the fact findings Oregon law requires.” (emphasis in original)).

350. *Ice*, 129 S. Ct. at 720 (Scalia, J., dissenting).

351. *Id.*

352. *Id.* (citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

353. *Id.*

354. *Id.* at 722 (emphasis in original).

355. *Id.* at 718–19.

356. *Id.* at 719 (majority opinion).

357. *Id.*

with no idea what might distinguish an *Apprendi* violation from an acceptable law.<sup>358</sup> Because Oregon's law was not an example of legislative "manipulation," the Court did not provide a rule to distinguish between deferring to sound policy and tacitly approving of unconstitutional legislation.<sup>359</sup>

If institutional and policy concerns were to demarcate the limits of the *Apprendi* rule, however, *Apprendi* itself would not survive *Ice*'s interpretation of it. Before *Apprendi*, judges had great discretion to find facts which determined sentences, and the legislatures who created sentence enhancements made it equally clear that they wanted judges to find facts and sentence offenders based on those facts.<sup>360</sup>

Without a unifying theory, then, it is difficult to draw the boundaries of the *Apprendi* rule. The "jury as bulwark" theory is a black box. These are the rules, and we follow them, Justice Ginsburg says, unless the state legislature (and our reading of history) says otherwise. Justice Ginsburg cannot explain why *Apprendi* would or would not extend to fines or drug treatment; she can only say that if it did, it would invalidate a great deal of state practice that the court should be reluctant to throw out. She cannot provide reasoning internal to *Apprendi*'s rule that would limit its application, but instead must look to other principles to balance against it.

The principle Justice Ginsburg offered, whether the practice has "traditionally belonged to the jury,"<sup>361</sup> presumes that *Apprendi* is about institutions and phases of trials—that it is about forms, not functions. The *Ice* majority might have been right if *Apprendi* were concerned only with the roles the players play, not the reasons those roles are important. Under this view, it makes sense to talk about reining in the "wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries," because there is no "principled rationale" involved.<sup>362</sup> Without some animating principle behind *Apprendi*, it is easy to discount its importance and see it simply as a pointless hoop through which the legislature needs to jump.<sup>363</sup>

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358. *Id.*

359. *Id.*

360. See *Apprendi v. New Jersey*, 530 U.S. 466, 562 (2000) (Breyer, J., dissenting) (noting that "under traditional sentencing law . . . legislation, silent as to sentencing factors, grant[ed] the judge virtually unchecked discretion to sentence within a broad range.").

361. *Ice*, 129 S.Ct. at 719.

362. *Id.* (citing *Cunningham v. California*, 549 U.S. 270, 295 (2007) (Kennedy, J., dissenting)).

363. This is, I think, where courts are in the area of their greatest expertise—not as taskmasters who leave us only to ask "how high" when they say "jump", but as a kind of deliberative or narrative body that helps explain policies and principles. Courts, in other words, need to convince and explain, not simply to issue orders. Even if courts ultimately overturn some statutes, they can do so in a way that ultimately strengthens legislative choices—by making them more meaningful (or more sincere). This transparency can extend beyond mere policy choices to deeper issues concerning the nature of justice in society at large. See Kenneth Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L.

*Apprendi* is more than just a wooden rule, however, and judicial discussion of the interests identified in *Winship* and *Apprendi* would make that clear. I will now propose an alternative reading for the statute in *Ice* that could have preserved a judge's ability to sentence consecutively, but only when she is acting in her area of greatest institutional competence: public safety.

### 3. A Public Safety Reading of the *Ice* Statute

The statute at issue in *Ice* provides that a judge may impose consecutive sentences if she finds that the offenses of conviction were not a part of a continuous and uninterrupted course of conduct, or if she finds that the offenses "caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or . . . to a different victim."<sup>364</sup> There are thus three conditions under which the statute might apply.

The first condition—whether the convictions were part of the same course of conduct—addresses *Blockburger*/double jeopardy concerns.<sup>365</sup> If a prosecutor has duplicatively charged the same behavior, sentences are served concurrently and the offender effectively serves time only for the offense with the greatest penalty attached to it, not all of the effectively "lesser included" offenses with which he was (over)charged. The second condition is purely retributive. A judge can sentence an offender to serve sentences consecutively—even when she cannot find that the charged offenses arose from discrete events—when she finds that the offense facts caused or increased the risk of greater harm to "the victim."<sup>366</sup> This finding about the offense and its wrongfulness is retrospective<sup>367</sup> and clearly allows the judge to find facts about the severity of the instant offense. The judge is stepping on the jury's territory when she finds these facts.

But what to make of the third condition, the phrase "or to a different victim?"<sup>368</sup> Eliminating wording about "the" victim gives us this condition under which a judge may impose consecutive sentences: when she finds that the offenses "caused or *created a risk* of causing greater or

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REV. 247, 312 (2000) ("Law is made undemocratic in a step-by-step process that reduces each complex struggle to a formal contest over a rule. . . . Legal meaning, and therefore, legal power is contested, and should be produced on that basis.").

364. *Ice*, 129 S. Ct. at 715 (internal citations omitted).

365. See *Blockburger v. United States*, 284 U.S. 299 (1932) (holding that the government may prosecute an individual for more than one offense stemming from a single course of conduct only when each offense requires proof of an element that the other offenses do not require).

366. *Ice*, 129 S. Ct. at 715.

367. Arguably, the finding about separate offenses is also retributive: the offender deserves more punishment based on mens rea or attempt liability (or however else one might describe the reasoning behind "a willingness to commit more than one offense" that was not, in fact, charged and found. *Id.* at 716) (internal citations and alterations omitted).

368. *Ice*, 129 S. Ct. at 715 (alterations omitted).

qualitatively different loss, injury or harm to . . . a different victim.”<sup>369</sup> This presents a third alternative reading of the statute—one that is concerned not with punishment for this crime, but with guarding against the risk of future dangerousness. A judge can find facts about the instant offense provided she uses them not to punish, but as evidence for future dangerousness—the way criminal history is used as evidence of danger, not justification for punishment, in civil commitment proceedings.<sup>370</sup>

Under this reading, a judge would not be making any retributive findings: she would not change the number of crimes of which a defendant were convicted, nor would she make any findings of fact that made any crime a more aggravated version of the offense. Her decision would sound in public safety and would use facts to apply the appropriate “treatment” for the offender, a practice in line with the medical model of sentencing typified by *Williams v. New York*.<sup>371</sup> The reason *Apprendi* would not apply, then, is because the defendant was not *punished* more by the imposition of consecutive sentences. The judge’s fact finding would not increase the stigma related to any individual offense; instead, the sentences would be imposed for reasons of public safety.

## B. Risk and Retribution

The issue of public safety punishments is not merely an interesting anomaly at the fringes of criminal law: the issue of risk is embedded in criminal law. Consider, for example, the depraved-heart murder doctrine. Homicides that are the result of substantial and unjustifiable risk-taking are generally punished as voluntary manslaughter. But, in some extreme circumstances when the risk-taking is so substantial (or even so

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369. *Id.* at 715 (internal citations omitted, emphasis added).

370. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997) (showing that past behavior is just evidence of future dangerousness). I note also that the puzzle presented by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding that prior convictions need not be proven to a jury beyond a reasonable doubt) involves the same problem: does the stiffer sentence given to those with prior criminal convictions sound in greater punishment or a greater threat to public safety? *See Ball, supra* note 11, at 930 n.215 (discussing whether recidivism is a measure of punishment or evidence of dangerousness).

371. 337 U.S. 241 (1949) (using judge-found facts of uncharged criminal behavior as justification for a death sentence does not violate due process). For a longer discussion of this point, *see Ball, supra* note 11, at 926–27; *see also Specht v. Patterson*, 386 U.S. 605 (1967). *Specht* is a civil commitment case that cited *Williams* for the proposition that individualized treatment requires information that might otherwise be excluded by the protections of criminal procedure such as cross-examination. *Specht*, 386 U.S. at 606–07. *Specht* held that the civil commitment procedure at issue violated due process:

The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact that was not an ingredient of the offense charged.

*Id.* at 608 (internal citations omitted).

unjustified), malice can be implied and murder found.<sup>372</sup> In these extreme circumstances, risk generates culpability. The ways in which this operates are unclear, however. Even the American Law Institute, in its notes to the Model Penal Code, states that the line between voluntary manslaughter and depraved-heart murder cannot be drawn with any precision, but must instead be left to the jury: “Whether recklessness is so extreme that it demonstrates [extreme indifference to the value of human life] is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact . . . .”<sup>373</sup> These examples suggest that, at some level, danger is stigmatic.

Danger is often associated with what seem to be moral judgments: future dangerousness is often cited as an aggravating factor in death penalty cases,<sup>374</sup> as it was in *Williams v. New York*.<sup>375</sup> Thus, even the death penalty, often seen as the apotheosis of retributive punishments,<sup>376</sup> has a public safety component. Punishments for felony murder, too, are often justified on a theory that an offender deserves blame for unintentional homicides—sometimes even those committed by non-confederate third parties—on an assumption of the risk theory.<sup>377</sup> The behavior is so risky that the defendant deserves to be punished for the actual, if unintentional, consequences of his actions.

Returning to a case discussed in this Article, the sex offender registration requirements in *Doe* were linked to the seriousness of the

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372. See, e.g., *Pagotto v. State*, 127 Md. App. 271, 277 (1999) (discussing the line between depraved-heart murder and involuntary manslaughter).

373. MODEL PENAL CODE & COMMENTARIES PART II § 210.2 cmt. 4 (1980).

374. See, e.g., Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 147 (2008). As Meghan Shapiro notes:

[W]hile an inquiry into a defendant's future dangerousness seems to align with a Supreme-Court-approved purpose of capital punishment (“the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future”), in application the incapacitation rationale is severely undermined by alarmingly unreliable predictions of future threat. Of even graver concern should be the effect of future dangerousness to obscure any culpability determination, resulting in a high number of death sentences for vulnerable defendants most people would never consider “deserving of execution,” and undercutting another common rationale for capital punishment: retribution.

See also John H. Blume et al., *Future Dangerousness in Capital Cases: Always “At Issue”*, 86 CORNELL L. REV. 397 (2000–2001).

375. 337 U.S. 241, 244–45 (1949) (holding that when a judge “consider[s] information about the convicted person's past life, health, habits, conduct, and mental and moral propensities” during sentencing, it does not violate due process).

376. One author has argued that a recent Supreme Court decision requiring the condemned to be competent depends on the retributive meaning conveyed by the act. See Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163 (2009).

377. See Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1924 (1986).

offense, not to the current risk the registrant posed.<sup>378</sup> In other words, Doe was regulated on the basis of what he had done, not what he was at risk of doing. Offense level—which one might associate with the moral “seriousness” of the crime—often stands in for risk, even though, of course, the heinousness of a prior crime is not necessarily an indicator of present danger.<sup>379</sup> Desert and risk are also tied together in pre-trial release decisions. Bail amounts cannot possibly be punitive, because they are set for offenders who have only been charged, not convicted, of a crime. Instead, bail—in theory—serves to ensure that the individual will appear in court, or, if no bail is given, to quarantine dangerous offenders to protect the community. While both of these goals are justified on morally neutral, risk-based terms, bail is commonly set (or denied) not on the individual risks posed by a particular offender, but on a uniform schedule that looks only at the offense charged.<sup>380</sup> That is, offense level is used to measure risk, mixing the seriousness of the offense—what we might associate with its blameworthiness—with the risk the offender poses.

Evidence of prior criminal activity is obviously one indicator of risk. “Indeed, this concrete evidence generally may be at least as persuasive as any predictions about dangerousness that might be made in a civil-commitment proceeding.”<sup>381</sup> The issue is how to account for both risk management and punishment in criminal law, and to determine whether these issues have different constitutional implications. Indeterminate sentences like California’s fifteen years-to-life sentence, I have suggested,<sup>382</sup> should be read to explicitly represent both concerns. “Fifteen years” covers what the offender deserves. The subsequent decision the parole board makes to release him or keep him up “to life” should be read as the risk management portion of the sentence.<sup>383</sup> The point is that our understanding of what criminal penalties do is muddled: we should approach risk management and punishment differently.

The indeterminacy of these issues might mean that the legislature should do most of the work here, and that at least some deference is due to their decisions. We do not want to enshrine a judicial view of social science or risk prediction any more than we want to make “Mr. Herbert Spencer’s Social Statics” part of the Fourteenth Amendment.<sup>384</sup> But the

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378. See *supra* notes 134-137 and accompanying text.

379. Decisions about suitability for parole in California relied, until very recently, almost exclusively on the gravity of the offense, not contemporary evidence of dangerousness. Ball, *supra* note 11, at 915-18.

380. See, e.g., CAL. PENAL CODE § 1296b(c) (West 2010) (mandating superior court judges in each California county to establish and annually revise a county-wide uniform schedule of bail for all bailable felony and misdemeanor offenses).

381. *Jones v. United States*, 463 U.S. 354, 364 (1983).

382. Ball, *supra* note 11, at 935-39.

383. *Id.* at 938.

384. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Indeed, what seems

fact remains that risk is an issue in the criminal law, and one that existed before the writing of this Article. Criminal law says that danger melds into opprobrium some of the time, and that opprobrium can be a proxy for risk.<sup>385</sup> The question is what, if anything, we should do about these hybrid doctrines. Is there a way of cutting them more finely?

Justice Scalia has, in this context and others, been opposed to standards.<sup>386</sup> In the *Apprendi* context he lampooned such standards as being prone to self-serving decisions: standards involve a judge ruling that a practice “must not exceed the judicial estimation of the proper role of the judge.”<sup>387</sup> In *Seling* he argued further that an as-applied challenge would leave the law unsettled, and that in the name of finality the Court needs to concern itself only with the law on its face.<sup>388</sup> Justice Scalia’s concern seems to be the potential for abuse—that standards are always somehow more manipulable than bright-line rules.<sup>389</sup>

It is unclear, however, that rules are always self-evident: courts hear cases about rules all the time. The issues rules cover—and their importance—are arguably what drives litigation, not whether a rule or a standard per se governs the issue. Defendants appeal decisions because they have important issues at stake. Though rules are more easily stated, they are not necessarily more easily implemented. Parties argue both about

to be the criminological state of the art in one era can seem like barbarism in another. See, e.g., Ethan Blue, *The Strange Career of Leo Stanley: Remaking Manhood and Medicine at San Quentin State Penitentiary, 1913–1951*, 78 PAC. HIST. REV. 210 (2009) (describing San Quentin chief surgeon Leo Stanley’s endocrinological theory of crime, which led him, *inter alia*, to take the testicles of the executed and implant them in elderly inmates).

385. Recently, the Court discussed the issue of risk and harm in *Dean v. United States*, 129 S. Ct. 1849 (2009), which concerned whether an accidental discharge of a gun during a robbery should be analyzed according to whether it caused harm or the risk of harm (or a feeling of “trauma” in bystanders, *id.* at 1856), or culpability.

386. Of course, the Court has not historically shared Justice Scalia’s aversion to standards. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 524 (2000) (O’Connor, J., dissenting). As Justice O’Connor noted in her *Apprendi* dissent:

We have therefore declined to establish any bright-line rule for making such judgments and have instead approached each case individually, sifting through the considerations most relevant to determining whether the legislature has acted properly within its broad power to define crimes and their punishments or instead has sought to evade the constitutional requirements associated with the characterization of a fact as an offense element.

387. *Blakely v. Washington*, 542 U.S. 296, 307 (2004).

388. *Seling v. Young*, 531 U.S. 250, 269–70 (2001) (Scalia, J., concurring); see also *supra* note 71 and accompanying text.

389. See, e.g., *Blakely v. Washington*, 542 U.S. 296, 308 (2004) (“Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi*’s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges’ intuitive sense of how far is *too far*.”). For a critical view of Justice Scalia’s preference for bright-line rules, see Frank O. Bowman, III, *Debauch: How the Supreme Court has Mangled American Sentencing Law and How it Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 474 (“[T]he Court’s quest for a bright-line rule has produced not certainty, but confusion and absurdity. And in the end, the Court has been forced to answer the boundary question anyway, but its answer . . . is logically ridiculous and pragmatically counterproductive.”).



the borders of the rules and the standards one should use in implementing them. When courts suggest that there are no standards underlying rules—as is the case with Justice Scalia’s mechanical version of *Apprendi*—courts might arguably see even more litigation, because parties cannot easily discern the borders of a rule that has no underlying formula describing it.

In any case, Justice Scalia is, in fact, wedded to a case which grounds its holding in due process: *In re Winship*. The beyond a reasonable doubt standard of proof has no foundation in the text of the Constitution (much less the text of the Sixth Amendment). He cannot abandon due process without abandoning one of the two prongs of the *Apprendi* rule. He deploys the rule in a mechanical way, but the standard of proof holding from *Winship* was and always will be, at its core, about “fundamental fairness.”<sup>390</sup> Ironically, then, the best safeguard against abuse might be the Due Process Clause itself<sup>391</sup>—a prospect that, admittedly, would be cold comfort to Justice Scalia.<sup>392</sup>

My goal in raising these issues is not to grind discussion to a hopeless, white-flag-waving halt, but to suggest that judicial, legislative, and civic thinking about the meaning of criminal and civil penalties has a long way to go. Statutes, judicial decisions, and the impulses of ordinary citizens have not clearly delineated what criminal punishments mean—what we are doing and why. I doubt we will find a single answer to the problem, but we can be more explicit about the goals of criminal punishments, how these goals are served in particular circumstances, and what protections a defendant is due.

### C. The Endogeneity Problem: The Interdependence of Civil and Criminal Penalties

There is one final problem with stigma to discuss: endogeneity. Stigma comes not only from a criminal conviction, but from the collateral (civil) consequences that attach to that conviction. Once someone gets out of prison and off parole, the stigma of conviction has not left them: their criminal record follows them around.<sup>393</sup> The length and breadth of the stigma of criminal convictions, in other words, comes in part from the civil disabilities an ex-con faces upon re-entry.

Because the process by which stigma is created, reinforced, and

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390. *In re Winship*, 397 U.S. 358, 363 (1970).

391. *See Blakely*, 542 U.S. at 345 (Breyer, J., dissenting).

392. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring).

393. Applying the Link/Phelan factors to SVP laws, for example, a state affixes a label (SVP) with negative stereotypes (SVP’s cannot control their behavior, even though the identified mental defect does not have to be empirically linked), separation from “us” (residency restrictions as in Jessica’s law), status loss, and discrimination. *See supra* notes 208-214 and accompanying text. The state has both soft and hard power, and sex offenders have no political power. With the Internet recording the registry and making it freely available to all who search, the status is both long-lasting and notorious.

expanded is so complex, we might know both that stigma exists and how it creates secondary deviance but nevertheless not know the exact mechanisms by which it is created—and therefore how it should best be regulated. Having suggested that stigma is important, I must acknowledge that the interrelationships between criminal and collateral/civil penalties make it unclear whether stigmatization is primarily a civil problem, a criminal problem, or some combination of the two. Justice Scalia's approach, despite its failure to take into account the nuances of each situation, succeeds on one level: it gives us a clear decision-making rule. If figuring out the just result—or the accurate result—is impossible, perhaps we should at least seek to maximize utility by making judges' lives easier. Stigma might leave us with more questions than answers.

For example, if the jury is really imposing stigma when it convicts, it is told nothing about collateral sanctions at the time of conviction. (To be fair, most of the time, juries are also not told anything about the criminal sanctions an offender will face upon conviction.<sup>394</sup>) Alternatively, the length of a criminal sentence imposed is going to be a significant part of the stigma imposed under the Link/Phelan framework, since physical isolation in prison isolates and renders powerless all those inside. Thus, on some level, part of stigma collapses into Justice Scalia's "pure time" analysis. And even though the use of criminal history in the civil context is nonpunitive when it is used to determine who must register as a sex offender, cases considering the use of criminal history in a *criminal* context to calculate aggravated sentences hold that the use of criminal history is punitive.<sup>395</sup>

The temptation is to avoid the issue, to point out that these problems have been exposed by this Article, not generated by them. After all, this Article did not introduce the concept of stigma to criminal law, *Apprendi* and other cases did. This Article merely tries to give an account of stigma. Perhaps the only contribution I am making here is to identify where the fault lines are about risk and desert.

But perhaps the real source of the problem is that retribution is impossible to theorize in a way that we all agree with.<sup>396</sup> We acknowledge that retribution—punishment—is at the heart of the criminal law, but we

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394. In a recent article, Jeffrey Bellin has proposed that juries be informed of the consequences of conviction. See Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B. U. L. REV. 2223 (2010).

395. See, e.g., *Almendarez-Torres v. United States*, 523 U.S. 224, 244 (1998) (recidivism "goes to the punishment" (internal citations omitted)); see also *United States v. Rodriguez*, 128 S. Ct. 1783, 1789 (2008) (explaining that recidivism bears on both seriousness of offense and public safety). For an in-depth discussion of this issue, see Ball, *supra* note 11, at 929–30.

396. Recent research suggests that our sense of a statute's "criminality" follows from our moral feelings about it, whether or not we are consciously aware of them. In other words, moral concerns determine whether we think of a law as criminal, not the other way around. See Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice in Advances in Experimental Social Psychology*, in 40 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 193–236 (M.P. Zanna ed. 2008).

cannot find ways of agreeing on what it means. Desert is axiomatic;<sup>397</sup> we have all this retribution and nowhere to put it.<sup>398</sup> So rather than make an a priori case for the necessity or value of punishment, one way to read *Apprendi* is that it delegates that which cannot be proven. Most defendants will admit their guilt and accept their punishment via a plea bargain.<sup>399</sup> As long as we are going to punish those defendants who do not admit guilt, we should let the jury do it. Punishment cannot be fully captured by utilitarian calculations or policy analysis: so as long as it's a question about what feels just in the individual case, with all the systemic uncertainty that entails, we should let the jury sort it out.<sup>400</sup> The jury is a black box best equipped to deal with the black box issue of the appropriate level of punishment.<sup>401</sup> Judges aren't going to be able to explain or reason their way around punishment, because punishment isn't about reason: "[T]he emotions are in fact in charge of the temple of morality, and . . . moral reasoning is really just a servant masquerading as the high priest."<sup>402</sup> Juries aren't going to be

397. See Michael H. Marcus, *Conversations on Evidence-Based Sentencing*, 1 CHAPMAN J. CRIM. JUSTICE 61, 71 (2009) ("Because we have allowed 'just deserts' to remain unspecified, vague, and elastic, it offers all participants in the process—including policy makers, prosecutors, defense attorneys, and judges—wholesale exemption from any accountability for accomplishing *any* public purpose. Because we genuflect to such ultimately useless proclamations as 'the purpose of sentencing is punishment,' we achieve quite a catalog of exemptions from responsibility for serving public safety or public values.").

398. For a fascinating argument that acknowledging retribution might be a way of preserving rehabilitative interests, see Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WIS. L. REV. 1019, 1021 (noting that the "furies of revenge" must be "paid deference" since they are "entrenched in the general population and cannot be ignored" (internal quotation marks and citations omitted)); see also Carlsmith & Darley, *supra* note 396, at 218. As Carlsmith and Darley note:

[I]f legal codes differ markedly from citizens' moral intuitions, then the legal system needs to . . . persuade them of the moral correctness of the court-held laws. Otherwise citizens will not agree with the criminal codes . . . and . . . this will have negative consequences for their willingness to voluntarily obey the law.

Wechsler's critique is less clearly operational in the contemporary context, at least when it comes to the passage of the Three Strikes law in California. See *Guest Post: The Uses of Revenge, Redux*, SENTENCING LAW & POLICY (June 3, 2009, 8:52 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2009/06/guest-post-the-uses-of-revenge-redux.html#comments](http://sentencing.typepad.com/sentencing_law_and_policy/2009/06/guest-post-the-uses-of-revenge-redux.html#comments).

399. See Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2036 (2006) (noting that, in the federal system, over 97% of defendants waive their right to a trial and plead guilty).

400. Carlsmith & Darley, *supra* note 396, at 194 ("[T]he formal U.S. justice system is becoming increasingly utilitarian in nature, but . . . citizen intuitions about justice continue to track retributive principles.").

401. *Id.* at 207 (reviewing experimental psychology literature to conclude that "people do not have a good sense of their own motives for punishment").

402. Jonathan Haidt, *The Moral Emotions*, in HANDBOOK OF AFFECTIVE SCIENCE 852, 852 (R. J. Davidson, K. R. Scherer, & H. H. Goldsmith eds., 2003). Haidt here is talking of research beyond just his own, but he later cites his own research for the proposition that "the emotions [are] firmly in control of the temple of morality, while reason is demoted to the status of not-so-humble servant" which people use primarily "to persuade others, not to figure things out for themselves." *Id.* at 866. See generally JONAH LEHRER, HOW WE DECIDE (2009).

able to explain or reason their way through their decisions, they're just going to work it out.

In sum, issues about public safety are reasonable: we can argue about whether someone is going to be dangerous or not and about what we might do to make them less dangerous. We might even be able to prove the rectitude of our position. But we cannot really resolve questions about the appropriateness of a given level of punishment. As long as we have a cross section of the community hashing it out, making sure beyond a reasonable doubt that they agree, then we have provided as much protection as we possibly can.<sup>403</sup>

## Conclusion

In this work and in my prior article<sup>404</sup> I have tried to tease out the principles and approaches *Apprendi* uses and to indicate how they might apply to a new context. I do not see *Apprendi* as mindless or mechanical, but that position means that the ramifications take a while to sort out. This is an evolving issue, and my point has been not necessarily to suggest where the new bright lines should be but to point out areas that need closer examination.

It is not clear what the impacts might be if the civil commitment process became "Apprendized." Under the Sixth-Amendment-only reading, *Apprendi* would change little about current practices. Kevin Carlsmith, John Monahan, and Alison Evans have done a compelling survey of jurors that suggests that retribution is actually at the heart of jury decisions about civil commitments.<sup>405</sup> This study has two ramifications.

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403. In arguing that the *Apprendi* jury right gives us a place to put retribution, I do not claim that juries are skilled at retribution, just that they are not as bad at it as other institutions are. Or, more cynically, maybe the reason we have the jury decide about punishment is because they are not as bad at morality as they are at other things. See, e.g., Carlsmith & Darley, *supra* note 396, at 205 ("[P]eople spontaneously punish in a manner that is highly consistent with a theory of retributive justice and not in a manner consistent with the utilitarian goals of incapacitation."). So we take this concept that is often discussed, but seldom analyzed (maybe because it can't really be analyzed), and we marry it to a rough, randomizing procedure that we can't ever really predict (the jury of one's peers), and we are satisfied (or satisfied) because we can't possibly do any better than that. The amoebic nature of the jury and the amoebic nature of punishment match perfectly with one another. All we have is anyone's best guess. This is perhaps one reason why courts only hear cases or controversies—we cannot make rules, we can only hash out what is right in an individual case using principles derived from cases that are always different in some colorable particulars. The principles to be derived from these cases, in turn, match imperfectly onto the next series of cases and controversies. Ironically, though, this puts me back to a Scalia view of criminal procedure: that it is about mechanisms, not the kind of fairness those mechanisms provide. See *supra* note 200.

404. Ball, *supra* note 11.

405. Kevin M. Carlsmith, John Monahan, & Alison Evans, *The Function of Punishment in the "Civil" Commitment of Sexually Violent Predators*, 25 BEHAV. SCI. & L. 437, 439 (2007) (noting that "recent empirical work has demonstrated that although people frequently articulate incapacitative motivations in sentencing criminal offenders, their behavior is more consistent with the retributive perspective"). All participants were presented with a vignette describing the offender's criminal history

One, it might suggest that Justice Scalia's mechanical view might be justified—jurors punish even when they say they aren't. At the same time, it suggests that the jury might not serve any limiting factor—their appetite for punishment is unbounded.<sup>406</sup>

A unified due process approach might do nothing more than remind all players in the system that there isn't "criminal" liberty and "civil" liberty, there is just liberty. The civil and criminal subcategories really have to do with different effects on the same thing, not different effects on two different things. Taking a more holistic view of liberty deprivations, particularly those that result from the same kinds of behavior (e.g., sexual predation), can lend coherence to how we approach the problem. Focusing on the due process aspects of the *Apprendi* line, then, and imbuing civil protections with the kind of scary absolutism that seemingly takes hold whenever *Apprendi* is invoked might mean that judges and prosecutors take these protections more seriously.

Theoretical concerns aside, few would disagree that no matter how one describes stigma, sex offenders are stigmatized: they commit as close to a permanent and unforgivable offense as we have today.<sup>407</sup> Is there *any* way of imposing restrictions on sex offenders that isn't inherently punitive, given the stigma associated with them? Or is this merely a reason why courts should examine nominally civil restrictions more closely—because the politics around the issue are so unbelievably punitive? Consider how much these laws even reflect the real dangers about sex offenders. SVP laws must include some proof of mental defect, but the largest study of

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which described his conviction on two counts of child molestation. *Id.* at 440. From here, different participants were given different proxies for risk and punishment. Participants were given one of three estimates of the offender's likelihood of recidivism (zero, four, or seventy percent). *Id.* Participants were also given two different accounts of the offender's time in prison: a low punishment account, where the offender served "3 years in a comfortable minimum-security prison with full access to sports, movies, libraries, and visitors," and the high punishment account, where the offender served "25 years in a harsh, maximum security prison" in which he was alternately violently assaulted and confined to solitary. *Id.* at 441. "[W]hen the punishment was insufficient, people paid less attention to the likelihood of recidivism and uniformly expressed their desire to incarcerate the prisoner." *Id.* at 444. When punishment was adequate, recidivism "became more relevant." *Id.*

406. The current situation isn't much better, however: The use of factors related to future conduct is much less constrained in the civil commitment context than it is in the criminal context. See John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 395 (2006). Ultimately, the levels of protection aren't necessarily controlling here. This Article looks at why we have the rules we have, not necessarily how to game the rules to achieve the right policy outcomes.

407. "Regular"—that is, non sex-offending—criminal offenders, while stigmatized, can enjoy some post-release "civil" rehabilitation, for example by "expunging" their records in order to relieve themselves of the obligation to disclose prior convictions on employment applications. Some have suggested that formalizing these expungements (or holding "graduation ceremonies") has important benefits, which speaks to the social power of criminal stigma. See David B. Wexler, *Therapeutic Jurisprudence*, in JUSTICE AS A BASIC HUMAN NEED 64–65 (Anthony J.W. Taylor ed., 2006) (citing studies which suggest that "redemption rituals," such as graduation ceremonies following the successful completion of a criminal sentence, are effective at confirming the authenticity of a person's reform and therefore at preventing recidivism).

predictors for future violence concluded that mental illness, by itself, “was associated with a *lower* rate of violence than a diagnosis of a personality or adjustment disorder.”<sup>408</sup> Even if the evidence showed a relationship between mental defects and higher rates of sexual violence,<sup>409</sup> consider how few resources are deployed towards treatment.<sup>410</sup> Though this consideration might impinge on legislative deference, it certainly suggests that legislators are less interested in minimizing threats to public safety than in scoring political points.

Although this paper has focused on post-release issues related to sex offenders, the analysis applies to a wider range of subjects where public safety and retribution are intermingled.<sup>411</sup> Pre-trial detention is based on dangerousness and threats to public safety—but the primary evidence of that danger is the charge against the detainee,<sup>412</sup> and the case which established the constitutionality of the practice, *United States v. Salerno*, relied heavily on the stated civil intent of the authorizing statute.<sup>413</sup> What about restrictions short of confinement—voting restrictions, for example? These aren’t punishments, but they do restrict liberty, and many are stigmatic. In *Trop v. Dulles*,<sup>414</sup> in many ways the precursor to *Mendoza-*

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408. *The MacArthur Violence Risk Assessment Study: Executive Summary*, MACARTHUR RESEARCH NETWORK ON MENTAL HEALTH AND THE LAW (Apr. 2001), <http://www.macarthur.virginia.edu/risk.html>. However, “[a] co-occurring diagnosis of substance abuse was strongly predictive of violence.” *Id.* Violence in the study included sexual assaults. *Id.*

409. See, e.g., JAMI KRUEGER, N.Y. STATE DIV. OF PROB. AND CORR. ALT., RESEARCH BULLETIN: SEX OFFENDER POPULATIONS, RECIDIVISM AND ACTUARIAL ASSESSMENT 2, 4 (2007), available at <http://dpcr.state.ny.us/pdfs/somgmtbulletinmay2007.pdf> (noting differences in recidivism between sex offenders and the general offender population; among the factors particularly important in assessing sex offender risk include prior sexual offenses, age at first sexual offense, diversity of victims, and measures of antisocial personality, but not “general psychological problems such as anxiety and depression”). But see Marnie E. Rice & Grant T. Harris, *Cross-Validation and Extension of the Violence Risk Appraisal Guide for Child Molesters and Rapists*, 21 LAW AND HUM. BEHAV. 231, 232 (1997) (noting that “there is considerable evidence that some factors predict all crime, whether violent or non-violent, sexual or nonsexual, trivial or serious,” although psychopathy is important for both rapists and child molesters). For a basic treatment of why psychopathy and mental illness are not synonymous, see John Seabrook, *Suffering Souls: The Search for the Roots of Psychopathy*, NEW YORKER, Nov. 10, 2008, at 64.

410. In California, for example, the state prison system has no programs for incarcerated sex offenders. CAL. DEP’T OF CORR. AND REHAB., REPORT TO THE CALIFORNIA STATE LEGISLATURE: A ROADMAP FOR EFFECTIVE OFFENDER PROGRAMMING IN CALIFORNIA 35 (2007), available at <http://www.cdcr.ca.gov/news/docs/ExpertPanelRptPart1.pdf>.

411. The Supreme Court has recently held that effective assistance of counsel includes advising one’s client about the immigration consequences of a guilty plea. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). For a general criticism of the collateral consequences rule and its conflict with the ethical duty to give accurate advice, see Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences of Criminal Convictions, Silence and Misinformation in the Guilty Plea Process*, 95 IOWA L. REV. 119 (2009). For a proposed legislative response to this problem, see NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS, UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2009), available at [http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009am\\_approved.pdf](http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009am_approved.pdf).

412. *United States v. Salerno*, 481 U.S. 739, 742–43 (1987).

413. *Id.* at 747.

414. 356 U.S. 86 (1958).

*Martinez*, Chief Justice Warren wrote that denationalization was punitive because it meant the individual had “lost the right to have rights.”<sup>415</sup> It was “a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”<sup>416</sup> Trop deserted the army on the field of battle, but did not lose his membership in society as a result. Is depriving ex-felons of the right to have rights—of participation in society’s political, employment, and housing activities—any different?<sup>417</sup>

The extent of the legislature’s power depends, in some ways, on not being second-guessed by the judiciary. At the same time, constitutional protections are meaningful only if the legislature can’t label its way out of them. Unifying the approach courts use for civil and criminal statutes would be more consistent and sensible than dividing functionalism according to form. In so doing, courts should embrace the ways in which retributive and utilitarian concerns overlap and are potentially present no matter whether we’re talking about civil statutes, criminal statutes, or public safety punishments. *Apprendi*, it turns out, has something of a specious clarity to it, one that comes only if one jettisons its very real due process concerns and remakes the doctrine into a creature of the Sixth Amendment. But this *Apprendi* loses something—the advantage of flexibility in dealing with situations where differences are, in many ways, more a question of degree than of type.

*Apprendi*, ultimately, is not an entirely new doctrine whose application to novel situations should be avoided for fear of unintended consequences. It’s a collection of older doctrines. The Court already knows how to deal with due process—it should not shy away from due process analysis with an *Apprendi* label slapped on it.

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415. *Id.* at 102.

416. *Id.* at 101.

417. See Christopher Uggen et. al, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 283 (2006). As a recent article notes:

The barriers to full polity membership faced by convicted felons are substantial and wide ranging, although they are usually ignored in public debates. A dizzying array of informal barriers also impedes the performance of citizenship duties, in particular those related to employment, education, and reestablishing family and community ties. As we will see, the civil penalties imposed with a criminal conviction effectively deny felons the full *rights* of citizenship. This denial, in turn, makes performing the *duties* of citizenship difficult.

Appendix: Overview of State SVP Confinement Laws

	Section	Standard	Initiate	Jury	Counsel	Witness	Appeal	Judge	Mar	Release
Arizona	ARIZ REV. STAT. ANN. §§ 36-3701 to 3717 (2009)	BRD	CA	R	AC	N	Y	Y	AR	BRD
California	CAL. WELF. & INST. CODE §§ 6660-6693 (West 2010)	BRD	CA	R	AC	N	N	Y	AR	BRD
D.C.	D.C. CODE §§ 22-3801 to 3811 (2001 & Supp. 2010)	BRD	SA	R	AC	N	Y	Y	I	BRD
Florida	FLA. STAT. §§ 394.910-991 (2006 & Supp. 2011)	CC	SA	R	AC	N	Y	Y	AR	CC
Illinois	725 ILL. COMP. STAT. 207/1-99 (2008 & Supp. 2010)	BRD	AG, SA	R	AC	N	Y	Y	AR	CC
Iowa	IOWA CODE §§ 229A.1-16 (2009)	BRD	AG, CA	R	AC	N	Y	Y	AR	BRD
Kansas	KAN. STAT. ANN. §§ 59-29601-922 (2005 & Supp. 2010)	BRD	AG	R	AC	N	Y	Y	AR	BRD
Massachusetts	MASS. GEN. LAWS ch. 172A, §§ 1-16 (2005 & Supp. 2010)	BRD	AG, DA	Y	AC	S	N	Y	AR	BRD*
Minnesota	MINN. STAT. § 253B.183 (2007 & Supp. 2010)	CC	CA	N	AC	Y	Y	Y	I	CC
Missouri	MO. REV. STAT. §§ 632.480-513 (2006 & Supp. 2011)	CC	AG	R	AC	N	Y	Y	AR	CC
Nebraska	NEB. REV. STAT. §§ 71-1201 to 1226 (2009)	CC	CA	N	AC	S	Y	N**	I	CC
New Hampshire	N.H. REV. STAT. ANN. §§ 135E:1-24 (Supp. 2010)	CC	AG, CA	R	AC	N	Y	Y	5/R	CC
New Jersey	N.J. STAT. ANN. §§ 30-4-27.24 to 26 (West Supp. 2010)	CC	AG	N	AC	Y	N	Y	AR	CC
New York	N.Y. MENTAL HYG. LAW §§ 10.01-17 (Ockene/Supp. 2011)	CC	AG	Y	AC	S***	Y	Y	AR	CC
North Dakota	N.D. CENT. CODE §§ 25-08.1-01 to 24 (Supp. 2009)	CC	SA	N	AC	N	Y	Y	AR	CC
Pennsylvania	42 PA. CONST. STAT. §§ 6401-69 (Supp. 2010)	CC	§90B	N	AC***	N	Y***	Y	AR	CC
South Carolina	S.C. CODE ANN. §§ 44-48-10 to 170 (2002 & Supp. 2010)	BRD	AG	R	AC	N	Y	Y	AR	BRD
Tennessee	TENN. CODE ANN. §§ 33-6-801 to 895 (2007 & Supp. 2010)	CC	CFD	R	AC	Y	Y	Y***	I	CC
Texas	TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-150 (West 2010)	BRD	SA	R	AC	N	Y	Y	BR	BRD
Virginia	VA. CODE ANN. §§ 37.2-900 to 971 (2005 & Supp. 2010)	CC	AG	Y	AC***	N	N	Y	AR/BR	CC
Washington	WASH. REV. CODE §§ 71.09.10-903 (2008 & Supp. 2011)	BRD	CA	R	AC	N	N	Y	AR	BRD
Wisconsin	WIS. STAT. §§ 980.01-14 (2008 & Supp. 2010)	BRD	DA	R	AG	N	N	Y	AR	CC



Appendix Key

- \* Presumably. Not Explicitly Stated.
- \*\* Mental Health Board
- \*\*\* Inferred
- \*\*\*\* Various types of Judges

Standard of Proof (“Standard”)

- BRD—Burden on state, beyond a reasonable doubt
- CC—Burden on state, clear and convincing evidence
- U—Unclear

Who May Initiate Proceedings (“Initiate”)

- AG—Att’y Gen.
- CA—County Att’y
- SA—State’s Att’y
- DA—District Att’y
- CFD—Correctional Facility Director
- SSOB—State Sexual Offenders Board

Right to Jury Trial (“Jury”)

- Y—Yes
- N—No
- R—Upon Request

Right to Counsel (“Counsel”)

- AC—Appointed Counsel
- N—No

Right to Call Witnesses (“Witness”)

- Y—Yes
- N—No
- S—By subpoena

Right to Appeal (“Appeal”)

- Y—Yes
- N—No

Judicial Oversight (“Judge”)

- Y—Regular Judge
- N—Administrative Entity

Term of Commitment (“Max”)

- AR—Annual Re-evaluation
- BR—Biennial Re-evaluation
- I—Indefinite
- SR—Semi-Annual
- X/R—# of years/Re-evaluation

Burden of Proof for Release (“Release”)

- BRD—Burden on state, beyond a reasonable doubt
- CC—Burden on state, clear and convincing evidence
- P/P—Burden on prisoner, preponderance of the evidence