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APPRENDI-LAND OPENS ITS BORDERS: WILL THE SUPREME COURT'S DECISION IN *SOUTHERN UNION CO. v. UNITED STATES* EXTEND APPRENDI'S REACH TO RESTITUTION?

INTRODUCTION

The right to a trial by jury has ancient roots in the Anglo-American legal system, being included in Magna Carta in 1215,¹ and later codified in the Bill of Rights of the United States Constitution.² The right to a trial by jury has been called “the great bulwark of [our] civil and political liberties,”³ requiring that “the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.’”⁴ When attempting to delineate the boundaries of this right, the tension between the government and its citizens is highlighted. The government has a strong interest in establishing and overseeing its regime of criminal law, empowering its judges and officers, as well as enabling its legislature to pass laws proscribing certain behavior and determining the appropriate punishment for violating these laws. However, a citizen’s right to know what behavior is prohibited and when and how the punishment for such behavior will be determined and distributed, as well as a fundamental right to fairness in the criminal process is well-documented.⁵ Due to the fundamental nature of the powers in question, the interests of the government and its citizens can often be found squarely at odds with each other along this spectrum.

The U.S. Supreme Court shifted this balance of power in *Apprendi v. New Jersey*,⁶ where it held for the first time that any fact relied upon to increase a

1. *Glasser v. United States*, 315 U.S. 60, 84 (1942) (“Since it was first recognized in Magna Carta, trial by jury has been a prized shield against oppression . . .”).

2. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

3. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540 (4th ed. 1873).

4. *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).

5. See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335 (2005) (defining and describing the “principle of legality”). Robinson describes the “principle of legality” as the proposition that “criminal liability and punishment can be based only upon a prior legislative enactment of a prohibition that is expressed with adequate precision and clarity.” *Id.* at 336.

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

sentence beyond the maximum prescribed by statute must be found by a jury beyond a reasonable doubt.⁷ This was a radical departure from established law to that point; the dissent in *Apprendi* complained that the Court had baselessly altered a significant paradigm of criminal law, taking away judicial discretion and limiting the options available to Congress and state legislatures to define criminal offenses and their sentences.⁸ The Court found that the common-law requirement that an “indictment must allege whatever is in law essential to the punishment sought to be inflicted” was a controlling concept in the United States’ history of criminal law and punishment,⁹ and the result was a bright-line rule that would be viewed as a “revolution in sentencing.”¹⁰ And so, “*Apprendi*-land”¹¹ was born.

Like many other constitutional issues, *Apprendi*’s rule presented a matter of balancing the government’s interests with its citizens’ interest in a constitutionally protected right. The government’s interest at stake is by no means inconsequential; *Apprendi* implicates long-standing norms in judicial discretion and Congressional powers to legislate,¹² but there is a significant interest in efficiency and practicality as well.¹³ This is counter-balanced by a defendant’s Sixth Amendment right to a fair trial, as well as the interest in receiving a punishment based upon a statute.¹⁴ Additionally a defendant has a constitutionally protected interest in a jury verdict where one is required, as opposed to the whim of the judge, who is no more qualified than a jury to accurately and efficiently determine the facts required for conviction.¹⁵ While *Apprendi* certainly shifted this balance of power, this debate has continued in

7. *Id.* at 490.

8. *Id.* at 524–26 (O’Connor, J., dissenting).

9. 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 50 (2d ed. 1872). *See also id.* at 51 (“[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.”). The Court in *Apprendi* cited to several high state courts from the same time period that cited to and approved of this definition. *Apprendi*, 530 U.S. at 511–12.

10. *See, e.g.*, LAURIE L. LEVENSON & ALEX RICCIARDULLI, THE RUTTER GROUP-CALIFORNIA CRIMINAL LAW § 1:4 (2012–2013).

11. The term “*Apprendi*-land” was coined by Justice Scalia. *See Ring v. Arizona*, 536 U.S. 584, 613 (2002) (Scalia, J., concurring) (“Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.”).

12. *Apprendi*, 530 U.S. at 524–26 (O’Connor, J., dissenting) (describing the majority’s rule as encroaching upon accepted powers and practices of judges).

13. *Id.* at 555 (Breyer, J., dissenting) (claiming that the majority’s rule was “impractical” and inconsistent with Supreme Court precedent, as well as potentially leading to unwanted and disparate outcomes in criminal trials).

14. Justice Scalia’s concurrence in *Apprendi* contemplates the legality principle when he says “[under *Apprendi*’s rule,] the criminal will never get *more* punishment than he bargained for when he did the crime.” *Id.* at 498 (Scalia, J., concurring).

15. *Id.*

the discussion of a variety of topics, from the potential imposition of the death penalty, to the imposition of criminal fines and restitution.

This interplay between judge, jury, defendant, and victim is especially complex in the context of criminal restitution. While the current federal restitution statutes are found in the criminal code,¹⁶ there has been debate as to whether restitution is a criminal punishment that furthers the traditional punitive goals of deterrence, retribution, and rehabilitation, or if it is simply a civil remedy intended only to make the victim “whole.”¹⁷ Beyond this threshold question of whether restitution is even a “criminal” remedy is the issue of how restitution orders are authorized and determined under the federal restitution statutes.¹⁸ The mere fact that restitution exists is not what prompts a potential *Apprendi* issue; the problem lies in the way that restitution is determined. Under the current federal restitution framework, certain classes of offenses will require a judge to make a *mandatory* order of restitution upon a guilty verdict or plea.¹⁹ Moreover, these orders need not be supported by any facts from the trial, or guilty plea, or even the elements of the crime in question; the court on its own initiative finds these facts on a simple preponderance of the evidence standard.²⁰ Seeing as restitution orders can be millions of dollars or more,²¹ this is not an insignificant issue.

This Article is divided into three parts. Part I is devoted to background, with respect to both restitution generally and the genesis of the rule of *Apprendi*. Part I.A will provide a short survey of both the history and current state of criminal restitution in the United States, including a discussion of the major federal restitution statutes that are applicable today. Additionally, Part I.A will discuss the mechanics of restitution hearings. Part I.B will introduce the rule of *Apprendi v. New Jersey*, including its function, purpose, and importance. It will also set the stage for the discussion of *Apprendi*'s

16. Both the Victim Witness Protection Act (VWPA) and Mandatory Victim Restitution Act (MVRA) are codified in 18 U.S.C. §§ 3663A–3664.

17. Compare Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2762–63, 2766–67 (2005) (concluding that federal restitution statutes should be uniformly considered as means of criminal punishment, not a solely civil remedy), with Matthew Spohn, *A Statutory Chameleon: The Mandatory Victim Restitution Act's Challenge to the Civil/Criminal Divide*, 86 IOWA L. REV. 1013, 1036–40 (2001). See also *infra* Part III.A.

18. See *infra* Part I.A.

19. See 18 U.S.C. § 3663A (requiring mandatory restitution for certain offenses, including crimes of violence and title 18 property offenses).

20. See *infra* Part I.A.2.

21. See, e.g., *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012) (using the Mandatory Victim Restitution Act to order more than six million dollars in restitution against defendant that was found guilty of wire fraud, conspiracy to commit money laundering, and various other offenses).

subsequent line of cases in Part II. Part II will provide a summary of the Court's holdings in these cases, and isolate and analyze specific language in these decisions that suggest their eventual application to the facts underlying criminal restitution. Specifically, the evolution of several terms of art used by the Court in these decisions will be analyzed with an eye towards their future application to criminal restitution. Finally, Part III will consolidate the holdings in the *Apprendi* line of cases, and argue that the rule of these cases logically and rightfully extends to cover criminal restitution. Part III will also analyze and refute the common arguments put forth by the circuits of the United States Court of Appeals against applying *Apprendi* to criminal restitution.

I. BACKGROUND

A. *Restitution Generally: A Brief Overview*²²

1. History and Contemporary Statutory Basis

The authorization and use of restitution in the United States' federal criminal system was infrequent through most of the twentieth century.²³ This infrequent use can be attributed to the lack of overt authority American courts had before the 1980s, as restitution has no explicit basis in the United States Constitution.²⁴ Courts' authority to order restitution is purely statutory, and until 1982, the only federal statute authorizing restitution was the Federal Probation Act of 1925 (FPA), which left any restitution order to the complete discretion of the court.²⁵ In 1982, Congress passed the Victim Witness Protection Act (VWPA),²⁶ which currently acts as the primary statutory source for restitution as a component of a federal sentence. While the VWPA is the courts' underlying authority for restitution orders, Congress has since passed several mandatory restitution provisions, including the Child Support Recovery Act (CSRA),²⁷ the Violence Against Women Act,²⁸ and, most significantly, the

22. See Kleinhaus, *supra* note 17, at 2717–28 (giving a more detailed overview of the history of restitution, both globally and in the United States).

23. See S. REP. NO. 97-532, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536 (“As simple as the principle of restitution is, it lost its priority status in the sentencing procedures of our federal courts long ago.”).

24. See generally U.S. CONST. (containing no explicit mention or authorization of restitution as a remedy).

25. 18 U.S.C. §§ 3651–3656 (1982) (repealed 1984).

26. Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1512–1515, 3663, 3664 (2006)).

27. 18 U.S.C. § 228 (2006) (mandating restitution of child support payments due in all convictions of willful failure to pay past due child support).

Mandatory Victims Restitution Act of 1996 (MVRA).²⁹ Because the VWPA was discretionary, federal judges ordered restitution in only 20.2% of all cases,³⁰ a proportion that Congress was not satisfied with, leading to the passage of the MVRA.³¹

Under the MVRA, a restitution order *must* be issued to all identifiable victims of certain crimes for the full amount of the victims' physical and/or economic losses, without consideration of the defendant's economic circumstances.³² If the underlying criminal act qualifies under the MVRA for mandatory restitution, the government bears the burden of proving by only a preponderance of the evidence the essential facts for determining a restitution order;³³ moreover, these facts are found solely by the judge at sentencing.³⁴

2. The Mechanics of Restitution at Sentencing³⁵

The MVRA establishes procedures for issuing and enforcing a restitution order. First, the court directs the probation officer to obtain and provide information in the form of a pre-sentence report (PSR), which acts as the primary record of fact during sentencing.³⁶ Any dispute over the factual findings in the PSR is determined at the judge's sole discretion on a preponderance of evidence standard.³⁷ The PSR must also include a complete accounting of each victim's loss, the amount of restitution, if any, owed pursuant to a plea agreement, and information relating to the defendant's economic status.³⁸ After receiving the PSR, a judge may act solely on the basis of the report, request additional documentation from either party, or conduct a

28. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (adding mandatory restitution for sexual abuse, sexual exploitation of children, domestic violence, and telemarketing fraud) (codified at 42 U.S.C. §§ 13925–14045d (2010)).

29. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (requiring mandatory restitution for certain offenses, including crimes of violence and title 18 property offenses) (codified at 18 U.S.C. § 3664 (2002)).

30. *See* S. REP. NO. 104-179, at 13 (1996).

31. *Id.*

32. 18 U.S.C. § 3663A; William Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional. Will Courts Say So After Southern Union v. United States?*, 64 ALA. L. REV. 803, 811 (2013).

33. *Id.* § 3664(e).

34. *Id.*

35. *See generally* Acker, *supra* note 32, at 811–16 (discussing the procedure and requirements of restitution orders made pursuant to the Mandatory Victims Restitution Act).

36. 18 U.S.C. § 3664(a). Acker, *supra* note 32, at 813. *See also* FED. R. CRIM. P. 32(c)(1)(B) (2009) (“If the law permits restitution, the probation officer must conduct an investigation and submit a report [containing] sufficient information for the court to order restitution.”).

37. 18 U.S.C. § 3664(e) (2006).

38. 18 U.S.C. § 3664(a) (2006); Acker, *supra* note 32, at 813.

separate restitution hearing.³⁹ The most important attribute of this procedure is that at no time is a jury involved; it is all handled by the court on a preponderance standard, and often times the PSR contains otherwise inadmissible hearsay,⁴⁰ facts neither presented to nor found by a jury during trial,⁴¹ and facts not admitted to by the defendant in his or her plea agreement.⁴² Further, these orders routinely mandate restitution for harms that, while occurring during or as a result of the defendant's conduct, were not elements of the underlying offense the defendant was either convicted of or pleaded guilty to committing.⁴³

This imposition of restitution based solely on facts not presented to and found by a jury on a preponderance standard is what makes this an issue of constitutional law, as the Supreme Court's jurisprudence in *Apprendi v. New Jersey* and its progeny illustrate.

B. *Apprendi: The "Animating Principle" of the Sixth Amendment is Born*

The Supreme Court's decision in *Apprendi v. New Jersey* was a landmark in the law of criminal procedure. In a 5-4 decision, the Court held for the first time that, other than the fact of a prior conviction, any fact that increases a criminal penalty beyond the prescribed statutory maximum must be submitted to the jury to be proved beyond a reasonable doubt.⁴⁴ The defendant, Charles Apprendi, pleaded guilty to multiple counts of second-degree weapons offenses;⁴⁵ however, the trial judge, using a preponderance of the evidence standard at sentencing, found that Apprendi's actions satisfied New Jersey's hate crime statute,⁴⁶ and used that statute to "enhance" his sentence beyond the

39. 18 U.S.C. § 3664(d)(4); Acker, *supra* note 32, at 814.

40. *See* United States v. Booker, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part) (describing presentence reports as "hearsay-riddled").

41. *See, e.g.*, United States v. Morganfield, 450 Fed. Appx. 400, 401 (5th Cir. 2011) (finding no error where the district court relied upon factual findings in the PSR to determine the amount of restitution, which was supplemented post-trial to include an FBI report and other supporting documentation).

42. *See, e.g.*, United States v. Prochner, 417 F.3d 54, 65–66 (1st Cir. 2005) ("A PSR generally bears 'sufficient indicia of reliability to permit the district court to rely on it at sentencing.' The defendant may object to facts in the PSR, but 'if his objections to the PSR are merely rhetorical and unsupported by countervailing proof, the district court is entitled to rely on the facts in the PSR.'" (internal citations omitted)); United States v. Parker, 133 F.3d 322, 329 (5th Cir. 1998) ("Facts contained in a PSR are considered reliable and may be adopted without further inquiry if the defendant fails to present competent rebuttal evidence. . . . Mere objections do not suffice as competent rebuttal evidence.").

43. *See, e.g.*, United States v. Donaby, 349 F.3d 1046, 1054 (7th Cir. 2003) ("The text of the VWPA [and] the MVRA . . . do[es] not limit restitution to the elements of the offense.").

44. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

45. *Id.* at 469–70.

46. N.J. STAT. ANN. § 2C:43-6(a)(1) (West 1999).

statutory maximum for the second-degree weapons charge alone.⁴⁷ The statute in question provided a defendant the right to a jury trial, with proof beyond a reasonable doubt standard on the firearm charge.⁴⁸ However, it also gave the judge sole discretion in determining the crime's motivation on a preponderance standard, which could enhance the sentence under New Jersey's hate crime statute.⁴⁹ Justice Stevens, writing for the majority, found that the statute in question violated Apprendi's due process rights, as well as his Sixth Amendment right to a trial by jury.⁵⁰

This case was viewed by many as a "revolution" in sentencing,⁵¹ which the Court justified by examining the "jury tradition that is an indispensable part of our justice system."⁵² This justification, referred to in later cases as *Apprendi's* "animating principle,"⁵³ stemmed from the historic role of English trial judges at common law, where the judge had "very little explicit discretion in sentencing The judge was meant simply to impose that sentence [which the criminal law in question specifically prescribed]."⁵⁴ While acknowledging that judges have had, and will continue to have, some discretion in sentencing,⁵⁵ the Court delineated more specifically the limits of judicial discretion in criminal sentencing in American law as follows:

We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case. See, e.g., *Williams v. New York*, 337 U.S. 241, 246 (1949) (“[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which [a judge could exercise wide discretion in determining] the kind and extent of punishment to be imposed within limits fixed by law” (emphasis added)).⁵⁶

Equally important as to what the Court stated explicitly in *Apprendi* is what it did not. The Court did not eliminate all judicial discretion at

47. *Apprendi*, 530 U.S. at 471.

48. *Id.* at 491.

49. *Id.*

50. *Id.* at 497.

51. See, e.g., LEVENSON & RICCIARDULLI, *supra* note 10.

52. *Apprendi*, 530 U.S. at 497.

53. See, e.g., *S. Union Co. v. United States*, 132 S. Ct. 2344, 2351 (2012) (affirming *Apprendi's* “animating principal” as “the preservation of the jury’s historic role as a bulwark between the State and the accused.”).

54. *Apprendi*, 530 U.S. at 479.

55. *Id.* at 481.

56. *Id.*

sentencing.⁵⁷ Nor did it restrict its holding to any one type or class of criminal punishment; the trial court enhanced the defendant's sentence to twelve years (above the statutory maximum of ten years for that specific count of the conviction) of incarceration, but the Court referred only to the increase of "penalties" throughout its opinion.⁵⁸ This reference to "penalties," along with the uncertain nature of what exactly is contemplated by the phrase "statutory maximum,"⁵⁹ opened the door to arguments in favor of expanding *Apprendi*'s rule to explicitly encompass other specific criminal penalties that trial judges before had nearly unfettered discretion at sentencing to determine within the state's existing statutory framework.

Even though the 5-4 decision was thought by some to be somewhat of an aberration⁶⁰ due in part to the unusual composition of the majority and dissenting coalitions,⁶¹ it has proven to have staying power, evidenced by the subsequent line of cases in the following years. These cases extended the jury fact-finding requirement to capital cases,⁶² further (and more broadly) defined the phrase "statutory maximum" with regards to its place in the *Apprendi* doctrine,⁶³ ended the mandatory nature of the Federal Sentencing Guidelines,⁶⁴ and extended the jury requirement to more categories of punishments, including criminal fines.⁶⁵ Moreover, while *Apprendi*'s language *alone* does not offer an exceedingly persuasive argument for the expansion of its holding to criminal restitution, the Court's language in its subsequent *Apprendi* jurisprudence does.⁶⁶

57. *Id.*

58. *Id.* at 490.

59. Justice Breyer's dissent discussed this ambiguity, stating that "the majority, in support of its constitutional rule, emphasizes the concept of a statutory 'maximum.' . . . I do not understand its relevance." *Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting).

60. See, e.g., Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 388 (2002) ("Neither of the two limitations set by *Apprendi*, pertaining to criminal history and statutory maxima, respectively, can stand much scrutiny. Each . . . is vulnerable to elimination once an appropriate vehicle for overturning its supporting precedent arrives at the Court . . .").

61. Justices Stevens delivered the majority opinion, joined by Justices Scalia, Souter, Thomas, and Ginsburg, while Justice O'Connor wrote a dissenting opinion joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer. *Apprendi*, 530 U.S. at 468.

62. *Ring*, 536 U.S. at 585 (holding that the trial judge violated defendant's Sixth Amendment rights by relying on a judicial finding of fact to authorize the death penalty).

63. *Blakely v. Washington*, 542 U.S. 296, 301-05 (2004). See also *infra* Part II.A.

64. *United States v. Booker*, 543 U.S. 220, 327 (2005). See also *infra* Part II.B.

65. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2348-49 (2012); See *infra* Part II.D.

66. See *infra* Part II.

II. THE EVOLUTION AND EXPANSION OF *APPRENDI*'S RULEA. *Blakely v. Washington*

Four years after its decision in *Apprendi*, the Court in *Blakely v. Washington* re-affirmed and clarified its previous holding, especially with regard to the definition of “statutory maximum.” Like in *Apprendi*, the defendant in *Blakely* pleaded guilty to an offense that by statute could not be punished with a sentence of more than ten years.⁶⁷ However, the trial judge, acting in accordance with the state of Washington’s statute⁶⁸ allowing the imposition of “a sentence above the standard range if he finds ‘substantial and compelling reasons justifying an exceptional sentence,’”⁶⁹ found that the defendant had acted with “deliberate cruelty,” which was a statutorily permissible ground for enhancement of the sentence beyond the ten-year limit.⁷⁰ Relying on this finding, the trial court sentenced the defendant to more than three years above the fifty-three-month statutory maximum, which the Court overturned on appeal.⁷¹

Justice Scalia, the author of the majority opinion, wrote that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*”⁷² Moreover, the “statutory maximum” is not the maximum sentence allowed after a judicial finding of additional facts; instead, it is the maximum penalty the judge may impose *without* any additional findings.⁷³ Finally, and maybe most relevant to the issue of restitution, the Court stated that “every defendant has the *right* to insist that the prosecutor prove to a jury *all facts legally essential to the punishment.*”⁷⁴

This is the first case in the *Apprendi* line with language strongly relevant to federal restitution law. To preface this, even though the criminal statutes in *Apprendi* and *Blakely* happened to be state statutes in New Jersey and Washington, respectively, these rulings will still apply to cases where the statute in question is federal.⁷⁵ If restitution under the MVRA is a criminal

67. *Blakely*, 542 U.S. at 299.

68. WASH. REV. CODE ANN. § 9.94A.535 (West 1998).

69. *Blakely*, 542 U.S. at 299.

70. *Id.* at 300.

71. *Id.* at 303, 305.

72. *Id.* at 303.

73. *Id.* at 303–04.

74. *Blakely*, 542 U.S. at 313 (emphasis added).

75. This is the case because *Apprendi* and *Blakely* were using the Fourteenth Amendment as a vehicle to incorporate the requirements of the Sixth Amendment against the state statutes in question. Because the Sixth Amendment as written was already applicable against the federal government, it follows that these ruling would also apply to federal statutes.

penalty or punishment,⁷⁶ it is clear that the “facts legally essential to the punishment” have not been proven to a jury beyond a reasonable doubt; the procedural statute for the imposition of restitution orders under the MVRA simply requires the probation officer to compile a post-trial, post-conviction, pre-sentence report that will be used by the court in formulating its restitution order.⁷⁷ Moreover, the MVRA also provides that “[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the *preponderance of the evidence*.”⁷⁸ This is especially relevant because, while the underlying conviction or guilty plea may sometimes be enough to support a restitution order, it is far more common for the order to be based on a “bureaucratically prepared, hearsay-riddled presentence [report].”⁷⁹ Given that restitution is allowed for a variety of harms, most of which, while they may come as a result of the underlying offense, are not essential elements of the offense, the facts surrounding these harms are unlikely to be brought up during trial or admitted to in a guilty plea, let alone proven beyond a reasonable doubt to a jury.⁸⁰

B. *United States v. Booker*

Because the Sixth Amendment is applicable (and has been since its inception) against the federal government on its own,⁸¹ the Court began hearing cases in which a *federal* statute implicated *Apprendi*. In *United States v. Booker*, the Court held that the Federal Sentencing Guidelines, which were mandatory at the time,⁸² violated the jury trial requirements of the Sixth Amendment.⁸³ The defendant’s case was illustrative of the then-mandatory nature of the Federal Sentencing Guidelines; the defendant was convicted of possessing at least fifty grams of crack cocaine, enough to support a sentence of 210 to 262 months of imprisonment.⁸⁴ However, defendant’s actual sentence was 360 months, nearly ten years longer than the Guidelines range supported by the jury verdict alone.⁸⁵ Relying on evidence presented during the sentencing hearing, but after the jury trial, the trial judge found that the

76. *See infra* Part III.A. *See also* Kleinhaus, *supra* note 17, at 2729–33.

77. *See* 18 U.S.C. § 3664(a) (2006).

78. *Id.* § 3664(e) (emphasis added).

79. *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part).

80. In fact, the absence of these facts at trial are often the basis for appeal for defendants claiming that restitution orders violated *Apprendi*. *See infra* Part III.

81. *See supra* note 75.

82. *See* 18 U.S.C. § 3553(b)(1) (2006).

83. *Booker*, 543 U.S. at 233.

84. *Id.* at 235.

85. *Id.*

defendant possessed an additional 556 grams of crack cocaine, and used this finding to support the longer sentence.⁸⁶

Justice Stevens, writing an opinion for the Court with respect to the applicability of *Apprendi*, held that the Sixth Amendment is violated by the imposition of an enhanced sentence under the Federal Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.⁸⁷ Interestingly, Justice Stevens's opinion in *Booker* removed any mention of a "statutory maximum" when it reaffirmed the *Apprendi* holding; in his statement of *Apprendi*'s rule, he wrote simply that "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."⁸⁸ Further, Justice Breyer, who had been a dissenter in *Apprendi* and its progeny to that point,⁸⁹ wrote the opinion of the Court with respect to the mandatory nature of the Federal Sentencing Guidelines.⁹⁰ Justice Breyer (1) held that the provision of the Federal Sentencing Act making the Guidelines mandatory did not comport with the requirements of the Sixth Amendment, and (2) severed the offending provision, making the Guidelines only advisory rather than mandatory.⁹¹ Justice Breyer reasoned that the mandatory nature of the Guidelines would lead to disparate outcomes and evinced Congress's "unintentional" introduction of complexity into the sentencing process.⁹²

Booker is important to restitution for two reasons. First, the removal of the "statutory maximum" language from *Apprendi*'s rule makes it more intuitive to apply to restitution. The "statutory maximum" language has been one of the major roadblocks for the federal Courts of Appeals to apply *Apprendi* to restitution orders.⁹³ If the rule eschews that language, which Justice Stevens's opinion in *Booker* does, it follows that the only thing preventing restitution from coming under *Apprendi*'s influence is its uncertain status as a civil or criminal penalty, which has not been definitively addressed by the Supreme

86. *Id.*

87. *Id.* at 245.

88. *Booker*, 543 U.S. at 244.

89. See *Apprendi v. New Jersey*, 530 U.S. 466, 468 (2000); *Blakely v. Washington*, 542 U.S. 296, 297 (2004).

90. *Booker*, 543 U.S. at 244; Acker, *supra* note 32, at 806.

91. *Id.* at 250.

92. *Id.* at 252–55.

93. See, e.g., *United States v. Carruth*, 418 F.3d 900, 904 (2005) (finding that criminal restitution does not violate *Apprendi* because the MVRA prescribes no "statutory maximum"); *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000) (finding that the MVRA does not include a "statutory maximum" that could be increased by a given finding). See also *infra* Part III.B.

Court.⁹⁴ Further, finding the “mandatory” nature of the Sentencing Guidelines to be severable as unconstitutional has parallels to the mandatory nature of the MVRA, and while the specific constitutionality of the MVRA is outside the scope of this Article, there is an argument to be made using this line of reasoning.⁹⁵ For the same reasons cited by Justice Breyer in severing the mandatory provision in the Federal Sentencing Guidelines,⁹⁶ the fact that the MVRA places the burden solely on the probation officer⁹⁷ and judge, at the exclusion of the jury, to find the facts necessary to order restitution may be a violation of the Sixth Amendment’s jury requirement.

C. Oregon v. Ice

While the majority of cases that followed *Apprendi* expanded the reach of its rule, not all was well in “*Apprendi*-land.”⁹⁸ In *Oregon v. Ice*, the Court held in a 5-4 decision that in light of historical practice and the authority of the states over administration of their criminal justice systems, the Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, finding of facts necessary to impose consecutive, rather than concurrent, sentences for multiple offenses.⁹⁹ This was a deviation for Justice Ginsburg, who wrote the majority opinion in *Ice* despite having joined the majorities in *Apprendi* and its progeny to that point.¹⁰⁰ Justice Ginsburg, while acknowledging the “longstanding common-law” practice in which *Apprendi*’s rule is rooted, found that the “twin considerations”¹⁰¹ of *Apprendi* support the Court’s decision against extending the doctrine to preclude judicial discretion in these circumstances.¹⁰²

Justice Ginsburg pointed to a “historical record” demonstrating that the jury played no role in the decision to impose sentences consecutively or concurrently,¹⁰³ citing to multiple treatises indicating that this was the case both in England before the founding of the United States, as well as in the

94. See generally Kleinhaus, *supra* note 17.

95. See generally Acker, *supra* note 32, at 811–16 (arguing that the MVRA in its current form is unconstitutional due in part to its mandatory nature).

96. Namely, the fact that the Guidelines contemplated only “the judge without the jury,” and not “the judge working together with the jury” when determining the sentence. *United States v. Booker*, 543 U.S. 220, 252–55 (2005).

97. The probation officer prepares the Presentence Report, which is the main resource used by the judge in fashioning a restitution order.

98. See *supra* note 11.

99. *Oregon v. Ice*, 555 U.S. 160, 164 (2009).

100. *Id.* at 162; *Apprendi v. New Jersey*, 530 U.S. 466, 467 (2000); *Blakely v. Washington*, 542 U.S. 296, 297 (2004); *Booker*, 543 U.S. at 225.

101. “Historical practice and respect for state sovereignty.” *Ice*, 555 U.S. at 168.

102. *Id.*

103. *Id.*

early period of American history.¹⁰⁴ Moreover, Justice Ginsburg justified the Court's reluctance to further extend *Apprendi* by admitting that if the judge's discretion in determining concurrent and consecutive sentences was subject to a jury's finding of fact, then determining the details other state initiatives such as supervised release, drug rehabilitation programs, community service, and the imposition of fines and restitution would be jeopardized as well.¹⁰⁵ This language would later be used by lower courts as a reason to decline the extension of *Apprendi* to criminal fines and restitution, but the Court would eventually hold to extend the rule to criminal fines.¹⁰⁶

The dissent, led by Justice Scalia, did not agree.¹⁰⁷ Arguing that *Apprendi* presented a "bright-line" rule, he wrote that "[a]ny fact—other than that of a prior conviction—that increases the maximum punishment to which a defendant may be sentenced must be admitted by the defendant or proved beyond a reasonable doubt to a jury."¹⁰⁸ He went on to write that "Oregon's sentencing scheme allows judges rather than juries to find the fact necessary to commit defendants to longer prison sentences, and thus directly contradicts what we held eight years ago and have reaffirmed several times since."¹⁰⁹ Justice Scalia's dissent provides an excellent template for the argument of applying *Apprendi* to criminal restitution. He lays out a syllogism of sorts, writing that:

The judge in the case could not have imposed a sentence of consecutive prison terms without making the factual finding that the defendant caused "separate harms" to the victim by the acts that produced two convictions There can thus be no doubt that the judge's factual finding was "essential to" the punishment he imposed. That "should be the end of the matter."¹¹⁰

If one applies this to restitution, the result would be as follows:

The judge in this case could not have imposed a sentence [that included a restitution order] without making the factual finding that the defendant caused [the harms that qualified for restitution under the restitution statute in question]. There can be no doubt that the judge's factual finding was

104. *Id.* at 168–69.

105. *Id.* at 171–72.

106. Compare *United States v. S. Union Co.*, 630 F.3d 17, 34 (1st Cir. 2010) (giving "great weight" to this language in *Ice* and characterizing it as "an express statement . . . that it would not be appropriate to extend *Apprendi* to criminal fines"), with *S. Union Co. v. United States*, 132 S. Ct. 2344, 2351 (2012) (explaining that the language in *Ice* was dicta, and the Court had never distinguished one form of penal sanction from another when doing the *Apprendi* analysis, and holding that *Apprendi* applies to the imposition of criminal fines).

107. *Ice*, 555 U.S. at 173 (Scalia, J., dissenting).

108. *Id.*

109. *Id.*

110. *Id.* (citations omitted).

“essential” to the punishment he imposed. That “should be the end of the matter.”

Also, while Justice Scalia’s dissent did address the majority’s fears laid out in its “parade of horrors,”¹¹¹ which would include the potential implication of criminal fines and restitution orders under *Apprendi*, he did not agree with the level of concern expressed by the majority. Justice Scalia dismissed the majority’s concerns, saying simply that “if these [supervised release, community service, or drug rehabilitation] courses reduce rather than augment the punishment that the jury verdict imposes, there is no problem.”¹¹² The minority’s lack of concern about this possibility bodes well for the inclusion of restitution under *Apprendi*, as does the Court’s holding (and the makeup of the majority) in the next case to be discussed, *Southern Union Co. v. United States*.

D. *Southern Union Co. v. United States: Extending Apprendi to Criminal Fines*

After the Court’s decision in *Ice*, many commentators speculated that *Apprendi*’s reign was at an end and its reach would begin to recede.¹¹³ However, in *Southern Union Co. v. United States*, Justice Sotomayor authored an opinion for a 6-3 majority that extended *Apprendi* to the imposition of criminal fines.¹¹⁴ In *Southern Union*, the defendant-appellant had been convicted by a jury of a single count of violating 42 U.S.C. § 6928(d)(2)(A) by storing hazardous waste without a permit “[f]rom on or about September 19, 2002 until on or about October 19, 2004,” a period of 762 days.¹¹⁵ However, the jury did not find the specific number of days of the defendant’s violation, nor the duration of any particular violation; while the statute provided a penalty of “not more than \$50,000 for each day of violation,” the jury needed only to find one day’s violation to return a guilty verdict.¹¹⁶ At sentencing, the PSR set a maximum fine of \$38.1 million, on the basis that the defendant

111. *Id.* at 177.

112. *Ice*, 555 U.S. at 177.

113. See, e.g., Benjamin J. Priester, *Apprendi Land Becomes Bizarro World: “Policy Nullification” and Other Surreal Doctrines in the New Constitutional Law of Sentencing*, 51 SANTA CLARA L. REV. 1, 78 (2011) (“The decision in *Ice* in 2009 may have signaled the end of any reliable voting bloc in [the *Apprendi*] line of cases.”); Mark Chenoweth, *Using Its Sixth Sense: The Roberts Court Revamps the Rights of the Accused*, 2009 CATO SUP. CT. REV. 223, 225–28 (2008–2009) (noting the weakness that Ginsburg defected from the *Apprendi* majority put in the further application of the doctrine); Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. REV. 2223, 2246–47 (2010) (“*Ice* . . . suggests a waning enthusiasm among the Justices to push *Apprendi* beyond its current boundaries.”).

114. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2348–49 (2012).

115. *Id.* at 2349; Acker, *supra* note 32, at 807.

116. *Id.*

violated the statute for each of the 762 days from September 19, 2002, through October 19, 2004.¹¹⁷ Defendant appealed, and the First Circuit affirmed the trial court's order, though using different reasoning to do so.¹¹⁸

Justice Sotomayor's opinion relied on three main premises: (1) not all criminal fines are so "petty" as to not trigger the Sixth Amendment's right to a jury trial,¹¹⁹ (2) unlike *Ice*, where the historical record showed that the imposition of consecutive or concurrent sentences for substantially similar counts of a conviction or guilty plea was at the trial judge's discretion,¹²⁰ here the record supports applying *Apprendi* to criminal fines because "the predominant practice was for [facts relating to the amount of criminal fine to levy] to be alleged in the indictment and proved to the jury,"¹²¹ and, perhaps most importantly, (3) the Court has never distinguished one form of punishment from another when applying *Apprendi*'s rule; its decisions "broadly prohibit judicial fact-finding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]'"—terms that each undeniably embrace fines."¹²²

Further, the majority, which included Justice Ginsburg,¹²³ dismissed the trepidation shown by the Court in *Ice* to extend *Apprendi*'s rule to potentially cover a litany of sentencing programs, including an explicit reference to the imposition of criminal fines.¹²⁴ Any fear of the dicta in *Ice* was quickly mollified when the Court dropped just one footnote to its *Southern Union* opinion, which stated simply:

Ice also stated in dicta that applying *Apprendi* to consecutive-versus-concurrent sentencing determinations might imperil a variety of sentencing decisions judges commonly make, including "the imposition of statutorily prescribed fines." The Court of Appeals read this statement to mean that *Apprendi* does not apply to criminal fines. We think the statement is at most ambiguous, and more likely refers to the routine practice of judges imposing fines from within a range *authorized by jury-found facts*. Such a practice poses no problem under *Apprendi* because the penalty does not exceed what the

117. *Id.*

118. *See* *United States v. S. Union Co.*, 630 F.3d 17, 33–36 (1st Cir. 2010) (affirming trial court's sentence and holding that *Apprendi* does not apply to criminal fines).

119. *S. Union*, 132 S. Ct. at 2351–52.

120. *See supra* text accompanying notes 98–112.

121. *S. Union*, 132 S. Ct. at 2353–54.

122. *Id.* at 2351.

123. *Id.* at 2348. Recall that Justice Ginsburg had declined to extend *Apprendi* just three years before in *Ice*, and the majority opinion authored by her included the fear of eventually extending *Apprendi* to embrace criminal fines as a justification for her holding.

124. *Oregon v. Ice*, 555 U.S. 160, 171 (2009).

jury's verdict permits. In any event, our statement in *Ice* was unnecessary to the judgment and is not binding.¹²⁵

This is an extremely strong disclaimer and a vehicle to distance the *Southern Union* holding from the passage in *Ice* just three years prior. This bodes very well for the eventual recognition that *Apprendi* is applicable to restitution orders for two reasons: (1) it indicates that *Southern Union*'s majority may be open to extending *Apprendi* further, and (2) it calms any fear of the stability of the coalition of justices still willing to extend *Apprendi* to other punishments.

First, this summary dismissal of a significant portion of the Court's justification of its holding in *Ice* means that the justices making up the six-person majority in *Southern Union* are likely willing to extend *Apprendi* to other items on that list, which included restitution orders.¹²⁶ This footnote did not only disclaim the Court's previous statement regarding criminal fines; it referred to the "variety of sentencing decisions" commonly made by judges, "including 'the imposition of statutorily prescribed fines.'"¹²⁷ This shows the *Southern Union* majority's acknowledgement of the entire list from *Ice* (which included restitution), as well as its willingness to disregard fear that any on the list would be seriously imperiled if *Apprendi* were to be extended to it.

Second, and vital for the potential inclusion of restitution under *Apprendi*'s umbrella, the makeup of *Southern Union*'s majority does not seem precarious or vulnerable to a significant change by the time the next *Apprendi* challenge reaches the Supreme Court.¹²⁸ Justices Scalia and Thomas have consistently voted to extend and/or reinforce *Apprendi* when given the opportunity.¹²⁹ Justice Ginsburg had done the same until her opinion in *Ice*;¹³⁰ however, it appears that she has abandoned at least a portion of her reservation with regard to extending the rule to cover the activities listed in that opinion. Finally, Justice Sotomayor, Justice Kagan, and Chief Justice Roberts, while only being on the Court a relatively short time,¹³¹ have all shown their willingness to extend *Apprendi* further while on the bench.¹³²

125. *S. Union*, 132 S. Ct. at 2352 n.5 (citations omitted).

126. Compare *Ice*, 555 U.S. at 171, with *S. Union*, 132 S. Ct. at 2352 n.5.

127. *S. Union*, 132 S. Ct. at 2352 n.5 (emphasis added).

128. The majority in *Southern Union* was made up of Sotomayor, Scalia, Thomas, Kagan, Ginsburg, and Roberts. *Id.* at 2348.

129. See *supra* cases discussed in Part II.

130. See *supra* note 100 and accompanying text.

131. Chief Justice Roberts has served on the Court since 2005; Justice Sotomayor has served on the Court since 2009; Justice Kagan has served on the Court since 2010.

132. Justices Sotomayor and Kagan both voted to extend *Apprendi*'s rule in the one case they have had the opportunity to do so, while Justice Roberts has now twice voted in favor of extending *Apprendi*. See *S. Union*, 132 S. Ct. at 2348; *Oregon v. Ice*, 555 U.S. 160, 162 (2009).

III. APPRENDI AND ITS PROGENY SUPPORT AN EXTENSION OF ITS RULE TO CRIMINAL RESTITUTION

A. *Restitution is a Criminal Penalty*

The first hurdle in the quest to have restitution recognized as a penalty that requires Sixth Amendment protection under *Apprendi* is to determine that it is indeed a criminal penalty, rather than a civil remedy. While the Supreme Court has not reviewed this specific issue, it has categorized restitution as a criminal penalty, albeit in a slightly different context. In *Kelly v. Robinson*, the Court held that a restitution order made under the VWPA is a criminal penalty, and not compensation.¹³³ In support of its conclusion, the Court said:

Although restitution does resemble a judgment “for the benefit of” the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim’s injury, but on the penal goals of the State’s interests in rehabilitation and punishment, rather than the victim’s desire for compensation Because criminal proceedings focus on the State’s interests in rehabilitation and punishment, rather than the victim’s desire for compensation, we conclude that restitution orders imposed in such proceedings operate “for the benefit of” the State The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State.¹³⁴

Not only has the Supreme Court spoken on restitution under the VWPA, but it has also addressed this general subject after the enactment of the MVRA. In *Pasquantino v. United States*, the Court held that “[t]he purpose of awarding restitution in this action is not to [collect a tax], but to mete out appropriate criminal punishment for that conduct.¹³⁵ When *Pasquantino* is read together with *Kelly*, it seems likely that the Supreme Court will join the majority of the federal Courts of Appeals that have found restitution to be a criminal, rather than civil penalty.¹³⁶

133. *Kelly v. Robinson*, 479 U.S. 36, 52–53 (1986); Acker, *supra* note 32, at 822.

134. *Id.* at 52.

135. *Pasquantino v. United States*, 544 U.S. 349, 365 (2005).

136. Compare *United States v. Wolfe*, 701 F.3d 1206, 1217–18 (7th Cir. 2012) (holding that restitution is a civil, not criminal, remedy), *United States v. Bonner*, 522 F.3d 804, 807 (7th Cir. 2008), *United States v. Millot*, 433 F.3d 1057, 1062 (8th Cir. 2006) (stating that restitution orders “are not in the nature of a criminal penalty”), and *United States v. Nichols*, 169 F.3d 1255, 1279–80 (10th Cir. 1999) (stating that purpose of restitution under VWPA “is not to punish . . . but rather to ensure that victims, to the greatest extent possible, are made whole for their losses”), with *United States v. Serawop*, 505 F.3d 1112, 1122–23 & n.4 (10th Cir. 2007) (discussing then-current state of circuit split and recognizing that the majority of circuits classify restitution as a criminal penalty), and *United States v. Leahy*, 438 F.3d 328, 334–35 & n.9 (3d Cir. 2006) (en

In the years prior to the Court's decision in *Southern Union*, the federal Courts of Appeals have uniformly held that judges may order restitution based on judge-found facts using a preponderance of the evidence standard at the sentencing hearing;¹³⁷ these courts have given a variety of reasons for declining to apply *Apprendi*'s requirement of these facts to be found by a jury beyond a reasonable doubt.¹³⁸ One such justification given is that restitution, unlike the sentences of fines, incarcerations, or death, is a civil remedy rather than a criminal one, and therefore does not even invoke the Sixth Amendment.¹³⁹

In *United States v. Newman*, the Seventh Circuit was the first federal appellate court to adopt the view that restitution is a civil remedy with a purely compensatory purpose, as opposed to a criminal remedy with punitive, retributive, and deterrent goals and effects.¹⁴⁰ In a subsequent case, *United States v. Bach*, Judge Richard Posner affirmed this view, describing restitution under the MVRA as a means of "enabl[ing] the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution," and describing the MVRA as "[f]unctionally . . . a tort statute."¹⁴¹ However, this

banc) (agreeing with the majority of federal Courts of Appeals that hold "restitution ordered as part of a criminal sentence [to be] criminal rather than civil in nature"). See also Acker, *supra* note 32, at 823.

137. See, e.g., *United States v. Milkiewicz*, 470 F.3d 390, 404 (1st Cir. 2006); *United States v. Reifler*, 446 F.3d 65, 120 (2d Cir. 2006); *United States v. Williams*, 445 F.3d 1302, 1311–12 (11th Cir. 2006); *Leahy*, 438 F.3d at 338–39; *United States v. Nichols*, 149 Fed. Appx. 149, 153 (4th Cir. 2005); *United States v. Garza*, 429 F.3d 165, 168 (5th Cir. 2005); *United States v. Sosebee*, 419 F.3d 451, 461–62 (6th Cir. 2005); *United States v. Swanson*, 394 F.3d 520, 526 (7th Cir. 2005); *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) (rehearing en banc denied); *United States v. Visinaiz*, 428 F.3d 1300, 1316–17 (10th Cir. 2005). All federal restitution as we currently know it is ordered on judge-found facts on a preponderance standard. Therefore, each circuit that affirms restitution orders is necessarily endorsing restitution orders based on judge-found facts on a preponderance standard.

138. The two prevailing justifications for declining to extend *Apprendi* to restitution are that (1) restitution is a civil, rather than criminal, remedy, and therefore the Sixth Amendment is not implicated by restitution orders, and (2) because the federal restitution statutes provide for restitution for the "full amount of the victim's losses," there is no "statutory maximum" that would implicate *Apprendi* and the Sixth Amendment's jury guarantee. A discussion of (1) immediately follows this footnote; see *infra* Part III.B for a discussion of (2).

139. See, e.g., *Wolfe*, 701 F.3d at 1217–18 (holding that restitution is a civil, not criminal, remedy); *Bonner*, 522 F.3d at 807; *Millot*, 433 F.3d at 1062 (stating that restitution orders "are not in the nature of a criminal penalty"); *Nichols*, 169 F.3d at 1279–80 (stating that purpose of restitution under VWPA "is not to punish . . . but rather to ensure that victims, to the greatest extent possible, are made whole for their losses").

140. *United States v. Newman*, 144 F.3d 531, 537–42 (7th Cir. 1998). However, since the Seventh Circuit's holding in *Newman*, only two other circuits have held restitution to be a civil, rather than criminal, remedy. See *Nichols*, 169 F.3d at 1279–80; *Millot*, 433 F.3d at 1062.

141. *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999).

was inconsistent not only with Supreme Court jurisprudence,¹⁴² but with precedent from the Seventh Circuit itself: Judge Posner's *Bach* opinion did not reference or attempt to distinguish an earlier case from the Seventh Circuit, *United States v. Fountain*, in which Posner (also the author of the *Fountain* opinion) described "'restitution' in criminal law" as "the earliest criminal remedy . . . sanctioned not only by history but also by its close relationship to the retributive and deterrent purposes of criminal punishment."¹⁴³ Moreover, these two cases concerned two different federal restitution statutes,¹⁴⁴ a potentially plausible basis for holding them to a different standard but for the Seventh Circuit's own words in *Newman* in which it stated "restitution cannot be punishment under only one statute but not the other."¹⁴⁵

Additionally, the Supreme Court's decision in *Southern Union* did not alter the Seventh Circuit's analysis in the recent case *United States v. Wolfe*.¹⁴⁶ In *Wolfe*, the Seventh Circuit affirmed its prior decisions in *Newman* and *Bach* and explicitly declined to extend *Apprendi* to restitution, maintaining that it is a civil remedy that does not invoke the Sixth Amendment.¹⁴⁷ However, this case should not be considered instructive for two reasons. First, while the opinion states that *Apprendi* questions are generally decided de novo in the Seventh Circuit,¹⁴⁸ the defendant did not make an *Apprendi* argument at trial, and therefore his appeal was reviewed for plain error, a standard of review much more deferential to the trial judge than de novo.¹⁴⁹ Second, Seventh Circuit case law establishes the requirement of a "compelling reason" to overrule its precedent,¹⁵⁰ and while acknowledging that its view that restitution is a civil remedy rather than criminal is a minority view among the federal Courts of Appeals, "[b]eing in the minority is not enough" to change its established precedent.¹⁵¹ Because the few circuits that have ruled similarly to the Seventh Circuit have similar standards of review,¹⁵² it is unlikely that they will change

142. See *supra* Parts II.B, II.D.

143. *United States v. Fountain*, 768 F.2d 790, 800 (7th Cir. 1985). See also Kleinhaus, *supra* note 17, at 2750–53.

144. In *Fountain*, the statute in question was the VWPA, compared to *Bach* where the MVRA was being analyzed.

145. *Newman*, 144 F.3d at 539.

146. *United States v. Wolfe*, 701 F.3d 1206, 1206 (7th Cir. 2012).

147. *Id.* at 1215–18.

148. *Id.* at 1216.

149. *Id.* However, the opinion goes on to state that the result would have likely been the same using either standard. *Id.*

150. *Wolfe*, 701 F.3d at 1217.

151. *Id.* at 1217.

152. See, e.g., *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012) (declining to extend *Apprendi* to restitution on a plain error standard of review because defendant did not raise issue at trial).

positions without some action on the issue by the Supreme Court, which has more than one precedent describing restitution as a criminal penalty.¹⁵³

Despite this minority view in the Seventh, Eighth, and Tenth Circuits, all other federal Courts of Appeals that have ruled on this issue have held that restitution is indeed a criminal remedy that serves a punitive and deterrent purpose.¹⁵⁴ These circuits have justified this conclusion using slightly different analyses, but the common threads between them are (1) reliance on Supreme Court precedent that has discussed the status of restitution as a criminal punishment,¹⁵⁵ and (2) analyzing the history and purpose of restitution, both generally and in the context of the federal statutes at issue on appeal.¹⁵⁶

The Third Circuit in *United States v. Leahy* illustrates these analyses.¹⁵⁷ In *Leahy*, both the majority and a substantial dissent agreed that the Supreme Court's language in *Kelly v. Robinson* and *Pasquantino v. United States* supported the conclusion that restitution should be considered a criminal penalty for Sixth Amendment purposes.¹⁵⁸ Quoting *Pasquantino*, the dissent recognized that “[t]he purpose of awarding restitution in this action [was] . . . to mete out appropriate criminal *punishment* for that conduct,”¹⁵⁹ and cited the primary objectives of the defendants' prosecution as “‘deterrence and punishment’ of criminal conduct, not ensuring compensation for the victims.”¹⁶⁰ Further, the *Leahy* court affirmed and cited to a previous case holding that the VWPA and MVRA “specifically [indicate] that restitution orders are penalties that a district court may impose when sentencing a defendant,”¹⁶¹ and that “[r]estitution orders have long been treated as part of

153. *See supra* text accompanying notes 133–36.

154. A large majority of federal Courts of Appeals characterize various restitution statutes as criminal sanctions. *See United States v. Serawop*, 505 F.3d 1112, 1122–23 & n.4 (10th Cir. 2007) (discussing then-current state of circuit split and recognizing that the majority of circuits classify restitution as a criminal penalty); *United States v. Leahy*, 438 F.3d 328, 334–35 & n.9 (3d Cir. 2006) (en banc).

155. *See supra* text accompanying notes 133–36.

156. In federal courts, these are almost universally the VWPA and the MVRA.

157. *Leahy*, 438 F.3d at 328 (declining to extend *Apprendi* to restitution because the restitution statute contained no “statutory maximum”). The majority in *Leahy* held federal restitution to be a criminal, rather than civil, penalty. *Id.* at 335 (majority opinion). A five-judge dissent agreed with the majority's analysis on this point, but would have ruled that *Apprendi* required the facts supporting restitution orders to be found beyond a reasonable doubt by a jury. *Id.* at 347–48 (McKee, J., dissenting in part).

158. *Id.* at 341–43 (McKee, J., dissenting in part) (recognizing that classifying restitution as a criminal penalty was “required by the Supreme Court's earlier decision[s]” in *Kelly* and *Pasquantino*).

159. *Id.* at 341 (quoting *Pasquantino v. United States*, 544 U.S. 349, 350 (2005)) (emphasis added).

160. *Id.* at 341–42.

161. *Id.* (affirming *United States v. Syme*, 276 F.3d 131, 159 (3d Cir. 2002)).

the sentence for the offense of conviction.”¹⁶² These holdings make a compelling case for classifying restitution as a criminal penalty.

Additionally, there are several pieces of legislative history for both the VWPA and MVRA that evince Congress’s intent that restitution orders arising from these statutes be considered for their punitive and deterrent effects.¹⁶³ The VWPA’s Senate report discusses restitution as “an integral part of virtually every formal system of criminal justice,”¹⁶⁴ and cites the “provi[sion of] *maximum rehabilitative incentives* to the offender” as the reason for the VWPA’s flexibility in ordering restitution.¹⁶⁵ Similarly, the purpose section of the MVRA’s Senate report cites both the debt a defendant must pay to his or her victim *alongside* the debt the defendant pays to society at large as components of an order of restitution.¹⁶⁶ Finally, the Congressional Record contains statements from multiple United States senators that highlight the “important penalogical [sic] function”¹⁶⁷ of restitution, as well as acknowledging the MVRA as a “formidable deterrent to crime.”¹⁶⁸

In the face of both Supreme Court precedent and the substantial legislative history of the VWPA and MVRA that indicate Congress’s intent that restitution orders have a substantial punitive, deterrent, rehabilitative, and retributive effect, it seems clear that restitution is indeed a criminal remedy that should be classified as such when applying the *Apprendi* rule.

The circuits holding that restitution is a criminal remedy have still declined to extend *Apprendi* to restitution, however, by determining that the federal restitution statutes have no “statutory maximum” to exceed, therefore making them ineligible for Sixth Amendment protection under *Apprendi* and its progeny.

B. Blakely, Booker, and Southern Union Have Eliminated the “Statutory Maximum” Justification for Excluding Restitution from Apprendi’s Rule

Most of the federal Courts of Appeals have found restitution to be a criminal penalty; however, they decline to extend *Apprendi* to restitution for another reason. In *United States v. Day*, the Fourth Circuit summarized this reason as follows: restitution, being mandatory for “the full extent of the victim’s harm” in the MVRA,¹⁶⁹ has no “statutory maximum” as defined by

162. *Leahy*, 438 F.3d at 341 (affirming *Syme*, 276 F.3d at 159).

163. *See Kleinhaus*, *supra* note 17, at 2762 n.378 (summarizing the legislative history of the VWPA and MVRA that indicates Congress’s intent for restitution to be a criminal punishment).

164. S. REP. NO. 97-532, at 10 (1982).

165. *Id.* at 32 (emphasis added).

166. S. REP. NO. 104-179, at 12 (1995).

167. 141 CONG. REC. S38,451 (daily ed. Dec. 22, 1995) (statement of Sen. Hatch).

168. *Id.* at S38,460 (statement of Sen. McCain).

169. *See* 18 U.S.C. § 3664 (2006).

the *Apprendi* line of cases, and therefore no finding by a judge can go beyond any maximum.¹⁷⁰ This still occurs in spite of the evolution of the Supreme Court's recitation of its *Apprendi* rule,¹⁷¹ which has removed most vestiges of the "statutory maximum" requirement, instead making clear that "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."¹⁷² However, federal Courts of Appeals have largely ignored this shift in the Supreme Court's rule language, and have declined applying *Apprendi* to restitution orders on the grounds that the MVRA contains no "prescribed maximum penalty," and therefore escapes *Apprendi*'s reach.¹⁷³

The circuits that have held this way have denied that *Blakely* altered the meaning of the term "statutory maximum" within the rule of *Apprendi*.¹⁷⁴ While the Eighth Circuit joined the Second Circuit in finding that restitution does not violate *Apprendi* because the MVRA prescribes no "statutory maximum,"¹⁷⁵ it did so in spite of the Supreme Court's own change in its definition of the term,¹⁷⁶ and in the face of a dissent by one of the judges hearing the case.¹⁷⁷ The dissent wrote that "after the Supreme Court's landmark decision in *Blakely v. Washington*, [the question of whether restitution is a criminal penalty that can be 'increased . . . beyond the prescribed statutory maximum'] becomes no longer difficult to answer."¹⁷⁸ Despite the general acknowledgement among the federal circuits that *Blakely* had altered the understanding of "statutory maximum," the analysis set forth in *Carruth* is still the preferred choice of courts that do not wish to apply *Apprendi* to the facts underlying restitution orders.

On November 29, 2012, the Fourth Circuit was one of the first Courts of Appeals to speak on the issue after *Southern Union* was decided earlier that year. In *United States v. Day*,¹⁷⁹ the defendant was convicted of wire fraud,

170. See, e.g., *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012) ("[T]here is no prescribed statutory maximum in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense.") (emphasis omitted); *United States v. Sosebee*, 419 F.3d 451, 454 (6th Cir. 2005) ("[R]estitution is not subject to *Apprendi* because the statutes authorizing restitution, unlike ordinary penalty statutes, do not provide a determinate statutory maximum.").

171. See *supra* Part II.B.

172. *United States v. Booker*, 543 U.S. 220, 244 (2005).

173. See, e.g., *United States v. Reifler*, 446 F.3d 65, 118 (2d Cir. 2006); *United States v. Carruth*, 418 F.3d 900, 900 (8th Cir. 2005) (rehearing en banc denied).

174. See, e.g., *Reifler*, 446 F.3d at 118; *Carruth*, 418 F.3d at 900.

175. *Carruth*, 418 F.3d at 902–04.

176. See *supra* text accompanying notes 81–97.

177. *Carruth*, 418 F.3d at 905 (Bye, J., dissenting).

178. *Id.*

179. *United States v. Day*, 700 F.3d 713, 713 (4th Cir. 2012).

conspiracy to commit wire fraud, conspiracy to commit money laundering, and conspiracy to commit smuggling.¹⁸⁰ The defendant appealed his sentence, which consisted of incarceration, fines, forfeitures, and restitution; the fines and restitution orders amounted to more than nine million dollars.¹⁸¹ While the court correctly justified the three million dollar fine under the framework of *Southern Union*,¹⁸² it declined to overturn the defendant's restitution order, stating that:

Critically, however, *there is no prescribed statutory maximum* in the restitution context; the amount of restitution that a court may order is instead indeterminate and *varies based on the amount of damage and injury caused by the offense*. As a consequence, the rule of *Apprendi* is simply not implicated to begin with by a trial court's entry of restitution. As the Sixth Circuit aptly explained in *United States v. Sosebee*, "restitution is not subject to [*Apprendi*] because the statutes authorizing restitution, unlike ordinary penalty statutes, do not provide a determinate statutory maximum." That logic was sound when written before *Southern Union*, and it remains so today.¹⁸³

The *Day* court's reliance on a statute's status as "indeterminate" or "vari[able] based on the amount of damage and injury caused by the offense" is misplaced. This logic is dependent on the Supreme Court's endorsement that *any* form of punishment¹⁸⁴ that is "indeterminate" need not be subject to *Apprendi*'s rule. The Court has explicitly rejected this line of reasoning. In *Southern Union*, the Court made it clear that the rule of *Apprendi* applies to all "'sentence[s], 'penalties,' or 'punishments'" regardless of the type of facts required to support said sentence, penalty, or punishment.¹⁸⁵ Further, it specifically addressed these "indeterminate" types of statutes, stating that even where the amount of a fine is calculated using the "amount of the defendant's gain or the victim's loss,"¹⁸⁶ "[a jury finding these facts beyond a reasonable doubt] is necessary to implement *Apprendi*'s animating principle: the preservation of the jury's historic role as a bulwark between the State and the

180. *Id.* at 716. The defendant, Roger Day Jr., was found to be the "mastermind of a multi-million dollar scheme to defraud the Department of Defense." *Id.*

181. *Id.* at 731–33.

182. The court correctly pointed out that the defendant's own admissions had established that he had received a gain of at least \$2.16 million; the statute in question subjected the defendant to fines up to "twice the gross gain" produced by the offense. *Id.* at 731–32. The defendant's admission to this fact was key, because *Apprendi*'s rule (as stated by the Court in *Southern Union*) precludes only "judicial fact-finding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow." *S. Union Co. v. United States*, 132 S. Ct. 2344, 2352 (2012).

183. *Day*, 700 F.3d at 732 (second emphasis added) (citations omitted).

184. See *S. Union*, 132 S. Ct. at 2351 ("In stating *Apprendi*'s rule, we have never distinguished one form of punishment from another.").

185. *Id.* at 2350–51.

186. *Id.* at 2351.

accused at the trial for an alleged offense.”¹⁸⁷ Thus, it is clear that there is no intelligible distinction between statutes with “determinate” amounts of punishment as opposed to “indeterminate” amounts of punishment; if *any* punishment is inflicted, the facts that support that punishment *must* be found by a jury beyond a reasonable doubt.

CONCLUSION

Since the Court first established the specific form of protection the Sixth Amendment affords criminal defendants under *Apprendi*, it embarked upon a slow, steady march to include *all* forms of criminal sentences under its reach. The Court has generally shown little fear in extending *Apprendi* to cover more forms of “punishments” and “penalties” in the application of its rule. Given the recent choice of language used by the Court in its *Apprendi* jurisprudence, I believe that the inclusion of restitution under the moniker of “punishment” is inevitable. The reasons given by the circuit courts for declining to extend *Apprendi* are tenuous at best, and given the expansive nature of the opinions in the *Apprendi* line of cases (as well as the current Supreme Court language that describes restitution) it seems very likely that restitution will be the newest resident of “*Apprendi*-land” in the not-so-distant future.

What happens next will be an interesting occurrence in itself. If *Apprendi* is indeed applied to restitution, what will become of the current sentencing procedure under the federal statutes? Will the prosecution be compelled to introduce the evidence necessary to support a restitution order at trial, or will the jury be held over to perform its duty at a sentencing hearing? Will an entirely new jury be selected for use at the sentencing hearing? The implications on the sentencing procedure are profound, and will be sure to spark protest from prosecutors and judges nation-wide. In the words of Justice Scalia’s concurrence in *Apprendi*, “[we cannot operate on the] erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says.”¹⁸⁸ If it says that *all* facts that support criminal punishments or penalties must be proven to a jury beyond a reasonable doubt, then the criminal justice system will just have to play along.

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187. *Id.* (citations omitted) (internal quotation marks omitted).

188. *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000) (Scalia, J., concurring).

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