BEYOND A REASONABLE DOUBT: LIMITING THE ABILITY OF STATES TO DEFINE ELEMENTS OF AN OFFENSE IN THE CONTEXT OF HATE CRIME LEGISLATION

The Due Process Clause of the Fourteenth Amendment safeguards the American people against the arbitrary exercise of power by the government.[1] This constitutional provision encompasses both procedural and substantive due process rights.[2] Procedural due process requires that, during the deprivation of life, liberty, or property, persons must be given notice and opportunity to be heard.[3] Essentially, procedural due process ensures fairness during the administration of justice.[4]

Over time, courts have expanded procedural due process to include certain protections for criminal defendants.[5] For instance, in order to find an individual guilty of a criminal offense, the state must establish his guilt beyond a reasonable doubt.[6] This standard

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[1] The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. This provision embodies "a principle basic to our society." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

[2] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 663 (2d ed. 1988). Substantive due process pertains to rights that are not specifically delineated in the United States Constitution, but that the Court nevertheless found fundamental. *See* Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 313-14 (1991).

[3] *See* BLACK'S LAW DICTIONARY 1203 (6th ed. 1990); *see also* Fuentes v. Shevin, 407 U.S. 67, 79-80 (1971) (finding that the central meaning of procedural due process is that individuals whose rights are affected are entitled to notification and hearing). To determine if additional procedural protections are warranted under the Due Process Clause, courts employ a balancing test and examine the specific facts of a case. *See* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

[4] *See* TRIBE, *supra* note 2, § 10-8, at 678. Procedural due process "guarantee[s] those procedures which are required for the 'protection of ultimate decency in a civilized society.'" *Id.* (quoting Adamson v. California, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring)).

[5] *See* TRIBE, *supra* note 2, § 10-8, at 683-84 (noting that, in the criminal context, due process protects the defendant's right to a fair trial); *see also* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (ruling that the right to a jury trial in criminal cases is "fundamental to the American scheme of justice").

[6] *See* Vachon v. New Hampshire, 414 U.S. 478, 480 (1974). In *Vachon*, the Court

demands that the proven facts, by the nature of their probative force, must establish guilt to a moral certainty.[7] Courts have required that, under procedural due process, states must prove every fact necessary to constitute the crime beyond a reasonable doubt.[8]

Recently, the issue of procedural due process has been raised in the context of hate crime legislation.[9] Hate crimes[10] are a steadily increasing problem;[11] they reflect an underlying bigotry and intolerance within society.[12] This wave of bias-motivated violence

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found that the Due Process Clause requires that an individual may not be divested of liberty "'on a record lacking any relevant evidence as to a crucial element of the offense charged.'" *Id.* (quoting Harris v. United States, 404 U.S. 1232, 1233 (1971)).

[7] *See* BLACK'S LAW DICTIONARY 161 (6th ed. 1990). "Reasonable doubt" exists when reasonably prudent persons would hesitate before acting in matters of importance to themselves. *See id.* at 1265. American courts have sustained the "reasonable doubt" concept since at least 1793. *See* Jessica N. Cohen, *The Reasonable Doubt Jury Instruction: Giving Meaning to a Critical Concept*, 22 AM. J. CRIM. L. 677, 677 (1995) (noting that a New Jersey judge, in *State v. Wilson*, 1 N.J.L. 502, 506 (1793), instructed a jury "to follow the 'humane rule' and acquit the defendant if they had 'reasonable doubts' about his guilt"). It was not until 1970, however, that the United States Supreme Court, under principles of due process, formally granted constitutional status to the "reasonable doubt" standard. *See In re* Winship, 397 U.S. 358, 364 (1970); *see also infra* notes 58-63 and accompanying text (providing an in-depth analysis of *Winship*). The "reasonable doubt" standard prohibits all procedural devices that shift the burden of disproving any element of the charged offense to the accused. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.4(b), at 520 (5th ed. 1995). Furthermore, the *Winship* Court delineated specific moral and societal considerations that support the reasonable doubt standard. *See Winship*, 397 U.S. at 363-64. The Court emphasized that communities must have faith in, and respect for, the American system of criminal law. *See id.* at 364. To that end, the Court professed that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.*

[8] *See Winship*, 397 U.S. at 364.

[9] *See generally* State v. Apprendi, 159 N.J. 7 (1999).

[10] A hate crime is "[a] crime motivated by the victim's race, color, ethnicity, religion, or national origin." BLACK'S LAW DICTIONARY 378 (7th ed. 1999).

[11] Brief for the Anti-Defamation League of B'nai B'rith at 4, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675) (reporting a steady increase in anti-Semitic incidents from 377 in 1980 to 1685 in 1990); JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 1-5 (1993) (claiming that, over the past few years, bias crimes have increased at an alarming rate); Jeannine F. Hunter, *Vigil Is Stand Against Racism*, KNOXVILLE NEWS-SENTINEL, Oct. 8, 1999, at A3 (citing rise in FBI hate crime statistics from 4558 incidents in 32 states in 1991 to 8734 in 50 states in 1996); Thomas Zolper, *N.J. Crime Down 9%*, THE RECORD (Hackensack, N.J.), Sept. 1, 1999, at A1 (noting a nine percent increase in hate crimes in New Jersey between 1998 and 1999). *But see* James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366, 387-91 (1996) (arguing that the perceived increase in hate crimes is due to society's intolerance of prejudice).

[12] *See* ANTI-DEFAMATION LEAGUE, HATE CRIME LAWS: A COMPREHENSIVE GUIDE 1 (1994) [hereinafter COMPREHENSIVE GUIDE] (discussing the rise of anti-Semitism and

causes devastating physical and psychological harm to its victims.[13] Accordingly, federal and state legislators have enacted hate crime statutes to combat this growing problem.[14]

Hate crime statutes fall into two general categories.[15] The first category creates a separate substantive offense for bias-motivated conduct.[16] The second category enhances the penalty for existing crimes when the offense is motivated by bias against the victim.[17] Despite their salutary purposes,[18] both categories of hate crime statutes are under constitutional attack.[19]

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other ethnic biases); Carl Rowan, *Racism and Madness in America*, BUFFALO NEWS, Aug. 20, 1999, at 3C (observing the prevalence of white supremacy groups); *60 percent of Hate Crimes Tied to Race*, CHI. TRIB., Jan. 5, 1993, at 6 (noting the alarming rates of racial and ethnic violence); *An Outbreak of Bigotry*, TIME, May 28, 1990, at 35 (reporting the increase of bigotry and racial tension in America and throughout the world).

[13] For an analysis of the physical and unique psychic effects of hate crimes, see Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135-49 (1982) (considering the damaging effects of hate crimes and the need for a tort remedy for such conduct).

[14] This comprehensive legislative response to bias crimes was motivated by the Anti-Defamation League's (ADL) model hate crime statute of 1981. *See* COMPREHENSIVE GUIDE, *supra* note 12, at 1. This model statute creates a separate substantive crime for institutional vandalism, penalty enhancement for crimes motivated by certain biases, and a civil cause of action for bias crime victims. *See id.* As of 1994, 35 states adopted hate crime statutes, over half of which are based on the ADL model. *See id.*

[15] For a discussion of the two categories of hate crime statutes, see Frederick M. Lawrence, *Resolving the Hate Crime/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 682 (1993).

[16] *See, e.g.*, CONN. GEN. STAT. ANN. § 53-37a (West 1991) (prohibiting "[d]eprivation of a person's civil rights by person wearing [a] mask or hood . . . on account of religion, national origin, alienage, color, race, [or] sex"); N.Y. PENAL LAW § 240.31 (Consol. 1984) (identifying bias-motivated conduct causing personal injury or property damage as a first-degree offense).

[17] *See, e.g.*, UTAH CODE ANN. § 76-3-203.3 (1999) (enhancing the penalty when the primary offense is motivated by intent to deprive another of his civil rights through intimidation and terror); WIS. STAT. ANN. § 939.645 (West 1993) (providing enhanced penalties when the underlying crime is motivated by hostility toward a protected group).

[18] Houston Mayor Lee Brown believes that the purpose of hate crime legislation embodies the essence of "the American dream." *See* Julie Mason, *Mayor Details Battle Against Hate Crimes*, HOUSTON CHRON., Apr. 14, 1998, at A1. Mayor Brown stated that

> [p]art of that dream is to live in communities where peace is present. Our city and our nation . . . have made great strides in overcoming past injustices, past acts of hate. We cannot change the past—but we can learn from past mistakes and make sure that they are not repeated again.

Id.

[19] For an example of constitutional attacks on the first category of hate crime statutes, see *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), in which the United States

In *State v. Apprendi*,[20] New Jersey's hate crime sentence-enhancing provision[21] was challenged as violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[22] The New Jersey Supreme Court, however, upheld the constitutionality[23] of the statute, which imposes an enhanced sentence when the trial judge finds by a preponderance of the evidence that the offender acted with a biased purpose.[24] The court reasoned that a biased purpose is not an element of the offense and, therefore, does not require a jury determination beyond a reasonable doubt.[25]

In the early morning of December 22, 1994, Charles Apprendi, Jr., a forty-four-year-old white male,[26] fired a .22-caliber rifle[27] at the home of a black family that moved into his predominately white neighborhood in Vineland, New Jersey.[28] As Apprendi fled from the

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Supreme Court struck down on First Amendment grounds a municipal ordinance prohibiting cross burning and other expressions arousing "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380. The Court held that when a state regulates fighting words, such as threats or harassment, it cannot discriminate on the basis of content or viewpoint. *See id.* at 386. Thus, if a state attempts to prohibit only those fighting words that contain racist hate speech, the regulation will be subject to strict scrutiny and may be found unconstitutional. *See id.* at 395-96.

For an illustration of constitutional challenges to the second category of hate crime legislation, see *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), in which the Court upheld the constitutionality of a hate crime sentence-enhancing statute. *See id.* at 490. The Court posited that the First Amendment does not prohibit a state from providing an enhanced punishment for a crime based on the actor's biased purpose in committing the offense. *See id.* at 487-88.

[20] 159 N.J. 7, 731 A.2d 485 (1999).

[21] *See* N.J. STAT. ANN. § 2C:44-3(e) (West 1995).

[22] *See Apprendi*, 159 N.J. at 12, 731 A.2d at 487.

[23] *See id.* at 25-29, 731 A.2d at 495-97.

[24] *See* N.J. STAT. ANN. § 2C:44-3(e) (West 1994). The statute provides for an enhanced sentence in any case in which "[t]he defendant in committing the crime acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity." *Id.* For convenience, this purpose will be referred to as a "biased purpose." *See Apprendi*, 159 N.J. at 9, 731 A.2d at 486.

[25] *See Apprendi*, 159 N.J. at 27, 731 A.2d at 496.

[26] *See* Matt Ackermann, *N.J. Anti-Hate Statute Found Constitutional*, N.J. L.J., at 9 (June 28, 1999).

[27] *See Apprendi*, 159 N.J. at 10, 731 A.2d at 486. On the night of the shooting, Apprendi was under the influence of alcohol and drugs. *See* Nancy Ritter, *State Upholds Bias Law; Issue for U.S. Justices?*, N.J. LAW., June 28, 1999, at 3 [hereinafter *State Upholds Bias Law*].

[28] *See Apprendi*, 159 N.J. at 9-10, 731 A.2d at 486. The home belonged to Michael and Mattie Fowlkes and their three children. *See State Upholds Bias Law, supra* note 27, at 3. The residence was fired at three other times. *See Apprendi*, 159 N.J. at 10,

scene of this incident, a neighbor recognized his gray Chevrolet truck and subsequently contacted the police.[29] Approximately twenty minutes later, several police officers arrested Apprendi at his home.[30]

An ensuing search of Apprendi's home revealed an antipersonnel bomb and a .22-caliber rifle.[31] In response to police questioning, Apprendi admitted that he fired four or five bullets into the home.[32] Apprendi gave a subsequent statement acknowledging that "he [did] not know the . . . victims or the family, but because they [were] black in color he [did] not want them in the neighborhood . . . [and that he was] just giving them a message that they were in *his* neighborhood."[33] Accordingly, a grand jury returned a twenty-two count indictment against Apprendi.[34]

On July 24, 1995, Apprendi negotiated a plea agreement in which he pled guilty to several charges, including two counts of possession of a rifle for an unlawful purpose and one count of possession of a prohibited weapon.[35] The State then moved to have Apprendi sentenced to an extended term pursuant to title 2C, section 44-3(e) of the New Jersey Statutes.[36] At the related sentencing

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731 A.2d at 486. On September 24, 1994, a bullet penetrated a window of the house. *See id.* Again, in November 1994, bullets, on two separate occasions, were fired into the exterior of the house. *See id.* During the December 22, 1994 shooting, none of the family members were injured. *See Prison Term for Man Who Shot at Home*, THE RECORD (Hackensack, N.J.), Oct. 1, 1995, at N8 [hereinafter *Prison Term*]. One bullet struck the front door, however, and another bullet pierced a window near the bed of the couple's nine-year-old boy. *See id.*

[29] *See Apprendi*, 159 N.J. at 10, 731 A.2d at 486.

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *Id.* (emphasis added).

[34] *See id.* This indictment included charges of attempted murder, attempted aggravated assault, harassment, possession of a firearm for an unlawful purpose, possession of a prohibited weapon, and possession of a destructive device. *See id.*, 731 A.2d at 486-87.

[35] *See Apprendi*, 159 N.J. at 10, 731 A.2d at 487. The court noted that "[p]ossession of a weapon for an unlawful purpose is a second-degree crime for which the ordinary term is between five and ten years." *Id.* at 11, 731 A.2d at 487. Illegally possessing a prohibited weapon is a third-degree offense in violation of title 2C, section 39-3(a) of the New Jersey Statutes. *See* State v. Apprendi, 304 N.J. Super. 147, 150, 698 A.2d 1265, 1266 (App. Div. 1997) (citing N.J. STAT. ANN. § 2C:39-3(a) (West 1995)).

[36] *See Apprendi*, 304 N.J. Super. at 150, 698 A.2d at 1267. Hate crimes are sentenced one degree higher than the traditional punishment for the substantive offense. *See* N.J. STAT. ANN. §§ 2C:43-7(a)(3), (4) (West 1995); N.J. STAT. ANN. §§ 2C:43-6(a)(2), (3) (West 1995). Thus, the extended sentence for a second-degree offense is approximately between ten and twenty years imprisonment, the common range for a first-degree offense. *See Apprendi*, 304 N.J. Super. at 150, 698 A.2d at

hearing, Apprendi retracted his earlier statement that he shot at the house because he wanted to keep blacks away from the area.[37] Rather, he accused the police of unfairly pressuring him into a false statement via threats and a lengthy interrogation.[38] Apprendi also denied that he was a racist or a member of any racist group.[39] The trial judge, however, rejected his explanations and suspected that Apprendi had changed his story to avoid the enhanced penalty for a bias crime.[40] Thus, satisfied that the preponderance of the evidence showed that the shooting was motivated by racial bias, the judge imposed an enhanced penalty under title 2C, section 44-3(e) of the New Jersey Statutes.[41]

1267. For a third-degree violation, the extended sentence is five to ten years imprisonment, which is the usual range for a second-degree offense. *See id.*

[37] *See* text accompanying note 33 *supra* (providing Apprendi's incriminating statement). Apprendi claimed that he randomly aimed at the glass and purple door that caught his eye. *See* Thomas Martello, *Supreme Court Upholds State's Hate Crime Statute*, THE RECORD (Hackensack, N.J.), June 26, 1999, at A4.

[38] *See* Lydia Barbara Bashwiner, *Extended Term Proper If Judge Is Satisfied by Preponderance of Evidence of Racial Motive*, N.J. LAW., Aug. 25, 1997, at 24. This explanation was supported by a psychologist's testimony that a person of Apprendi's personality type would lie, if necessary, to end an unpleasant police interrogation. *See Apprendi*, 304 N.J. Super. at 151, 698 A.2d at 1267.

The psychologist also evaluated Apprendi's mental state in order to establish the underlying motive for the shooting. *See id.* Apprendi was diagnosed as having a cyclothymic disorder (extreme mood swings), obsessive-compulsive disorder, kleptomania, premature ejaculation, and alcohol and drug dependence. *See id.* Based on this evidence, the psychologist concluded that, although his judgment and impulse control were substantially impaired during the shooting, Apprendi knew that he was discharging his weapon toward the victim's house and that it was improper to do so. *See Apprendi*, 159 N.J. at 11, 731 A.2d at 487.

[39] *See Apprendi*, 304 N.J. Super. at 151, 698 A.2d at 1267. Apprendi apologized to the Fowlkes family by stating that "[he] never meant to hurt or scare anybody. I thank God nobody was hurt. My forty years of life is proof that racism is not a part of my life." *Prison Term*, *supra* note 28, at 8.

[40] *See Apprendi*, 304 N.J. Super. at 151, 698 A.2d at 1267. The trial judge also rejected Apprendi's contention that his earlier statement was the product of an onerous and dictatorial police interrogation. *See id.* Rather, the judge believed that this statement, evincing an obvious racial bias, embodied the true motive for the shooting. *See id.* Moreover, the judge dismissed any psychological defenses, stating that Apprendi's condition did not rise to the level of a diminished capacity or insanity defense under title 2C, section 4-1 of the New Jersey Statutes. *See Apprendi*, 159 N.J. at 11, 731 A.2d at 487.

[41] *See Apprendi*, 304 N.J. Super. at 149, 698 A.2d at 1266. The court sentenced Apprendi, based on one of the unlawful purpose counts, to an extended term of twelve years imprisonment without the possibility of parole for four years. *See id.* at 151, 698 A.2d at 1267. On the remaining two counts, Apprendi was concurrently sentenced to a term of seven years imprisonment without the possibility of parole for three years and a term of three years imprisonment. *See id.* Apprendi was also ordered to give $1980 in restitution to the victim, $100 Violent Crimes Compensation Board penalty on each of the three counts, and a $75 Safe Street Act

Apprendi appealed his extended sentence, asserting that section 44-3(e) was unconstitutionally vague and violated the right to due process by allowing a judge to find a biased purpose using a mere preponderance of the evidence standard.[42] The Superior Court of New Jersey, Appellate Division, however, dismissed both of these challenges and affirmed the extended sentence.[43] Relying on *McMillan v. Pennsylvania*,[44] the court posited that section 44-3(e), the hate crime statute, merely examines a traditional sentencing factor, motive for a crime, and dictates the precise weight to be given to this factor.[45] Additionally, the court noted that due process does not require such sentencing factors to be proved beyond a reasonable doubt.[46] The court also concluded that legislatures are justified in treating bias-motivated offenses with enhanced severity because such crimes are more likely to provoke retaliatory violence, inflict emotional harm on their victims, and incite community unrest.[47]

Apprendi appealed this decision as of right,[48] and the New Jersey Supreme Court granted certification.[49] The court held that a jury is

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fine. *See id.* The remaining counts were dismissed. *See id.*

[42] *See id.* at 152, 698 A.2d at 1267.

[43] *See id.*, 698 A.2d at 1268. The appellate division quickly dismissed the vagueness challenge based upon the New Jersey Supreme Court's decision in *State v. Mortimer*, 135 N.J. 517, 641 A.2d 257 (1994). In *Mortimer*, the court rejected a vagueness challenge to the language in title 2C, section 33-4(d) of the New Jersey Statutes, which provided that harassment, a petty disorderly persons offense, would be raised to a fourth-degree offense if the defendant acted, "at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate . . . because of race, color, religion, sexual orientation, or ethnicity." *Mortimer*, 135 N.J. at 526, 641 A.2d at 261. Moreover, the court excised the words "at least in part, with ill will, hatred or bias toward" to cure the vagueness problem. *Id.* at 534, 641 A.2d at 265.

Because section 44-3(e) contained the same language as that construed in *Mortimer*, the appellate division dismissed Apprendi's vagueness challenge and removed the words "at least in part, with ill will, hatred or bias toward" to conform with the Legislature's amended version of the statute. *Apprendi*, 304 N.J. Super. at 152, 698 A.2d at 1268.

[44] 477 U.S. 79 (1986); *see also infra* notes 77-85 and accompanying text (discussing *McMillan* in depth).

[45] *See Apprendi*, 304 N.J. Super. at 155, 698 A.2d at 1269. In determining that motive was a sentencing factor, and not an essential element of the offense, the court distinguished motive from intent. *See id.* The court announced that "'motive is the inducement for doing an act; the intent is the resolve to commit an act. Stated differently, motive relates to the end; intent relates to the means.'" *Id.* at 157, 698 A.2d at 1270 (quoting BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 458 (2d ed. 1995)).

[46] *See id.* at 155, 698 A.2d at 1269.

[47] *See id.* at 157, 698 A.2d at 1270.

[48] *See* N.J. CT. R. 2:2-1(a)(2) (permitting an appeal to the New Jersey Supreme Court in any case in which there is a dissent in the appellate division).

[49] *See* State v. Apprendi, 159 N.J. 7, 13, 731 A.2d 485, 488 (1999). This appeal was

not required to determine, beyond a reasonable doubt, whether a particular defendant acted with a biased purpose in violation of title 2C, section 44-3(e).[50] Rather, the court declared that it is proper for a judge to utilize the preponderance of the evidence standard to decide the existence of such a biased purpose.[51] Rejecting the notion that it is an element of an offense, the court asserted that, similar to recidivism,[52] a biased purpose is a traditional and objective sentencing factor.[53] The court explained that section 44-3(e) simply dictates the precise weight to be given to this factor.[54] The court also maintained that requiring juries to make the biased-purpose determination would create a risk of prejudice for defendants as it would expose trials to evidence of previous acts of bias.[55] Therefore, claiming that all courts would agree that Apprendi acted with a biased purpose, the court affirmed the decision of the appellate division and upheld the extended sentence.[56]

Pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution, criminal defendants are entitled to certain procedural safeguards.[57] The United States Supreme Court first delineated these protections in *In re Winship*.[58] In *Winship*, a New York Family Court judge found a twelve-year-old boy

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strictly limited to the issue of whether a biased purpose, under section 44-3(e), is an element of the offense that must be determined by a jury beyond a reasonable doubt. *See id.* at 9, 731 A.2d at 486.

[50] *See id.* at 27-28, 731 A.2d at 486-87.

[51] *See id.*

[52] *See* SUE TITUS REID, CRIME AND CRIMINOLOGY 299 (8th ed. 1997) (defining recidivism as "further violations of the law by released suspects or inmates, or noncriminal violations of conditions by probationers and parolees"). Recidivism means the propensity of habitual criminals to relapse into criminal behavior. *See* BLACK'S LAW DICTIONARY 1269 (6th ed. 1990). Recent studies indicate that two-thirds of released prisoners will commit other crimes and thus become recidivists. *See* REID, *supra*, at 608. These studies also show that certain variables are significantly related to recidivism: (1) property offenders have the highest rates of recidivism; (2) the probability of recidivism increases in direct proportion to a person's number of prior juvenile and adult convictions; (3) the presence of an income, regardless of source or amount, leads to lower rates of recidivism; and (4) recidivism rates are lower for those individuals living with a spouse and children. *See id.* at 608-09.

[53] *See Apprendi*, 159 N.J. at 24, 731 A.2d at 494-95. In its analysis, the court relied primarily on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See Apprendi*, 159 N.J. at 24, 731 A.2d at 495; *see also infra* notes 86-92 and accompanying text (discussing *Almendarez-Torres* in detail).

[54] *See Apprendi*, 159 N.J. at 24, 731 A.2d at 494-95.

[55] *See id.* at 26, 731 A.2d at 495.

[56] *See id.* at 28-29, 731 A.2d at 496-97.

[57] *See supra* notes 3-8 (examining the procedural protections of the Due Process Clause).

[58] 397 U.S. 358, 364 (1970).

guilty of theft, while acknowledging that the evidence did not establish such guilt beyond a reasonable doubt.[59] The United States Supreme Court, however, reversed this decision by explicitly holding that the Due Process Clause protects criminal defendants against convictions when the prosecution fails to prove every fact necessary to constitute the crime beyond a reasonable doubt.[60] The Court emphasized that the beyond a reasonable doubt standard is a well-established common-law principle.[61] The Court also noted that, from a practical standpoint, requiring this standard of proof would reduce the likelihood of errors in criminal trials.[62] Therefore, the Court

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[59] *See id.* at 359. The judge, relying on a provision in the New York Family Court Act that authorized use of the preponderance of the evidence standard, rejected the contention that the Fourteenth Amendment requires proof beyond a reasonable doubt. *See id.* Section 744(b) of the New York Family Court Act provided that "[a]ny determination at the conclusion of [an adjudicatory] hearing that a [juvenile] did an act or acts must be based on a preponderance of the evidence standard." *Id.*

[60] *See id.* at 364. The Court explained the moral justifications for requiring this standard of proof:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. . . . The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." . . . "[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."
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> . . . [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 of his guilt.

Id. at 363-64 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

[61] *See id.* at 361. The Court maintained:

> The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. . . . Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does "reflect a profound judgement about the way in which law should be enforced and justice administered."

Id. at 361-62 (quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968)).

[62] *See id.* at 364. The Court reasoned:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Id.

expressly stated for the first time that the Due Process Clause required a standard of proof of beyond a reasonable doubt.[63]

Five years later, in *Mullaney v. Wilbur*,[64] the Supreme Court broadened the application of the *Winship* principle.[65] In *Mullaney*, an individual was convicted of murder when a Maine court permitted malice aforethought[66] to be conclusively implied when the defendant failed to establish by a preponderance of the evidence that he acted in the "heat of passion."[67] The State claimed that, because the relevant statute did not define "heat of passion" as an essential element of the offense, there was no constitutional mandate for the State to prove such "heat of passion" beyond a reasonable doubt.[68] The United States Supreme Court, however, rejected the notion that *Winship* only applied to those elements of a crime as defined by state law.[69] Rather, the Court declared that substantive aspects of a crime, such as "heat of passion," must be disproved by the prosecution beyond a reasonable doubt, irrespective of their labels under state law.[70] To rule otherwise, the Court reasoned, would enable states to undermine the Due Process Clause by characterizing elements of a crime as mere punishment or sentencing factors.[71]

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[63] *See id.*

[64] 421 U.S. 684 (1975).

[65] *See id.* at 698-99.

[66] *See id.* at 686. "Malice aforethought" is defined as a "'premeditated design to kill' thereby manifesting a 'general malignancy and disregard for human life which proceeds from a heart void of social duty and fatally bent on mischief.'" *Id.* at 686 n.4 (citation omitted).

[67] *See id.* at 687. "'Heat of passion . . . means that at the time of the act the [actor's] reason is disturbed or obscured by passion to an extent which might [make] ordinary men of fair, average disposition liable to act irrationally without due deliberation or reflection, and from passion rather than judgment.'" *Id.* at 687 n.5 (citation omitted).

[68] *See id.* at 696-97. Under Maine common law, murder and manslaughter were varying degrees of the single crime of felonious homicide. *See id.* at 688. Criminal defendants may only be convicted of felonious homicide when the prosecution proves, beyond a reasonable doubt, that the killing was unlawful and intentional. *See id.* at 685. Only when these essential elements are established can the existence or absence of "heat of passion" be used as a factor in ascertaining the level of culpability attached to homicide. *See id.* at 696. Simply, the proof of "heat of passion" reduces a felonious homicide charge from murder to manslaughter. *See id.* at 687. Therefore, because the presence or absence of "heat of passion" is considered a punishment factor, and not an essential element, the Maine Supreme Judicial Court asserted that *Winship* was not violated by requiring the defendant to prove this factor by the preponderance of the evidence. *See id.* at 696-97; *see also infra* note 173 and accompanying text (defining *mens rea* and levels of culpability).

[69] *See Mullaney*, 412 U.S. at 698-99.

[70] *See id.* at 703-04.

[71] *See id.* at 698-99. The Court maintained:

The Court, however, qualified this holding in *Patterson v. New York*,[72] which upheld a statute that required second-degree murder defendants to prove, by a preponderance of the evidence, the affirmative defense of extreme emotional disturbance.[73] The Court announced that the Due Process Clause does not require a state to *disprove* beyond a reasonable doubt all facts that serve as exculpatory or mitigating factors affecting the severity of the penalty or the level of culpability.[74] Here, the Court assessed, the prosecution met its

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> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. An extreme example of this approach can be fashioned from the law challenged in this case. Maine divides the single generic offense of felonious homicide into three distinct punishment categories—murder, voluntary manslaughter, and involuntary manslaughter. Only the first two of these categories require that the homicidal act either be intentional or the result of criminally reckless conduct. But under Maine law these facts of intent are not general elements of the crime of felonious homicide. Instead, they bear only on the appropriate punishment category. Thus, if petitioners' argument were accepted, Maine could impose a life sentence for any felonious homicide—even one that traditionally might be considered involuntary manslaughter—unless the defendant was able to prove that his act was neither intentional nor criminally reckless. *Winship* is concerned with substance rather than this kind of formalism.

Id.

[72] 432 U.S. 197 (1977).

[73] *See id.* at 198. This New York law provides, in relevant part:

> "A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that: (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believes them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

Id. at 198 n.2 (quoting N.Y. PENAL LAW § 125.25 (McKinney 1975)). Thus, proof of this affirmative defense typically reduced a second-degree murder charge to that of first-degree manslaughter. *See id.* at 199.

In *Patterson*, the defendant fatally shot a partially unclothed man in the presence of the defendant's estranged wife. *See id.* at 198. The defendant was subsequently convicted of second-degree murder under the above statute when he failed to mitigate this charge by proving, by a preponderance of the evidence, that he acted under extreme emotional disturbance. *See id.* at 200.

[74] *See id.* at 207 (emphasis added). The Court reasoned:

constitutional mandate by proving all essential elements of the crime beyond a reasonable doubt.[75] Therefore, the Court concluded that due process was not offended by requiring the defendant to prove the existence of an affirmative defense.[76]

> Here, in revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance . . . but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty. The State was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state. It has been said that the new criminal code of New York contains some 25 affirmative defenses which exculpate or mitigate but which must be established by the defendant to be operative . . . The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment.

Id. at 207-08 (footnote omitted); *see also* Anthony J. Dennis, *Fifth Amendment—Due Process Rights at Sentencing*, 77 J. CRIM. L. & CRIMINOLOGY 646, 651-52 (1986) (stating that, in *Patterson*, "the applicability of the reasonable doubt standard was a function of how the state defined the offense").

[75] *See Patterson*, 432 U.S. at 206. Stressing that the State satisfied its burden under the Due Process Clause, the Court explained:

> The crime of murder is defined by the statute . . . as causing the death of another person with the intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder . . . [T]he guilty verdict confirms that the State successfully carried its burden of proving the facts of the crime beyond a reasonable doubt . . . It seems to us that the State satisfied the mandate of *Winship* that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged."

Id. at 205-06 (alteration in original) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)); *see also supra* notes 58-63 and accompanying text (discussing *Winship* in detail).

The Court also distinguished this New York statute from the invalidated Maine law at issue in *Mullaney*. *See Patterson*, 432 U.S. at 216. The Court noted that, in *Patterson*, no elements of the crime were either presumed or inferred against the defendant. *See id.* Rather, because the State established each element of the offense, the Court affirmed the constitutionality of the statute and the defendant's conviction. *See id.*

[76] *See id.* at 210. The Court summated:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance

Nine years later, the Court revisited this due process issue in *McMillan v. Pennsylvania*.[77] In *McMillan*, the Court sustained a statute that imposed a minimum five-year sentence if the judge determined, based on the preponderance of evidence, that the defendant visibly possessed a weapon during the perpetration of the crime.[78] While acknowledging that due process limits a state's authority to define the elements of a crime, the Court held that this statute did not surpass these limits.[79] The Court based this conclusion upon five critical findings:[80] (1) the statute did not presume the existence of any essential element of the offense;[81] (2) the defendant did not face a disparity in sentencing;[82] (3) the law did not alter the maximum punishment for the crime, but rather, divested the judge's discretion in selecting a penalty;[83] (4) the statute did not create a separate offense calling for a separate penalty;[84] and (5) the Pennsylvania Legislature made no attempt to evade due process by labeling visible possession of a firearm as a sentencing factor, as opposed to an element of the offense.[85]

The *McMillan* factors were applied more than a decade later in

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> struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

Id.

[77] 477 U.S. 79 (1986).

[78] *See id.* at 81-82. The statute, known as Pennsylvania's Mandatory Minimum Sentencing Act of 1982, imposed mandatory minimum sentences on anyone convicted of certain enumerated felonies when the judge determined that the person visibly possessed a weapon while committing a crime. *See id.* The Act did not, however, authorize a sentence exceeding the penalty for the underlying crime. *See id.* Rather, it simply divested the judge of any discretion to impose a lesser sentence. *See id.*

[79] *See id.* at 86.

[80] *See id.* at 86-91. For convenience purposes, these five critical determinations will be referred to as the "*McMillan* factors."

[81] *See id.* at 86. Because there was no reallocation of burdens of proof, the Court found that, unlike *Patterson*, this statute fell on the permissible side of the Constitution. *See id.*

[82] *See id.* at 87 (noting that a differential in sentencing exists when the sentence imposed for a crime ranges from a nominal fee to a mandatory life sentence). In making this determination, the Court noted that the range of penalties under this statute was much less severe than those considered in *Mullaney*. *See id.*

[83] *See McMillan*, 477 U.S. at 87-88.

[84] *See id.*

[85] *See id.* at 88.

Almendarez-Torres v. United States.[86] The statute upheld in *Almendarez-Torres* authorized an enhanced prison term for deported aliens returning to the United States when their initial deportation was pursuant to a conviction for an aggravated felony.[87] The Court held that this statute did not create a separate substantive offense such that the element of recidivism needed to be included in an indictment and proved beyond a reasonable doubt.[88] Rather, the Court found that the existence of a prior aggravated felony was a mere sentencing factor that the sentencing judge could independently establish.[89] The Court reasoned that Congress designed this statute to set forth a sentencing factor[90] and that such legislative intent is usually dispositive.[91] Moreover, the Court rejected the claim that recidivism must be treated as an element of the offense because this statute fulfilled most of the *McMillan* factors.[92]

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[86] 523 U.S. 224 (1998).

[87] *See id.* at 226. Title 8, § 1326 of the United States Code provides, in pertinent part:

> "Subject to subsection (b) of this section, any alien who – (1) has been . . . deported . . . and thereafter (2) enters . . . or is at any time found in, the United States [without the Attorney General's consent or the legal equivalent], shall be fined under title 18, or imprisoned not more than 2 years, or both. (b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection – (1) whose deportation was subsequent to a conviction for commission of [certain misdemeanors], or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisonment not more than 10 years, or both; or (2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both."

Id. at 229 (alteration in original) (quoting 8 U.S.C. § 1326 (1994)). The defendant, in this case, was an alien who returned to the United States after an earlier deportation pursuant to three convictions for aggravated felonies. *See id.* at 227.

[88] *See id.* at 247; *see also* Todd Meadow, Note, Almendarez-Torres v. United States*: Constitutional Limits on Government's Power to Define Crimes*, 31 CONN. L. REV. 1583, 1591-92 (1999) (articulating congressional intent not to create a separate substantive offense when enacting the statute at hand).

[89] *See Almendarez-Torres*, 523 U.S. at 247.

[90] *See id.* at 235.

[91] *See id.* at 242 (citing *McMillan*, 477 U.S. at 85).

[92] *See id.* at 242-43. The Court explained that the statute satisfied the following *McMillan* factors: (1) the law did not presume the existence of any essential element of the offense; (2) the statute did not create a separate offense requiring a separate penalty; and (3) Congress made no attempt to evade the Constitution by labeling recidivism as a sentencing factor. *See id.* at 243 (citing *McMillan*, 477 U.S. at 87-88).

The Court, however, recognized that the statute at issue increased the maximum permissible sentence, while the law examined in *McMillan* invoked a mandatory minimum sentence. *See id.* at 244. Yet that difference, the Court held, created no unfairness for the criminal defendant because, unlike *McMillan*, the sentencing judge retained discretion to impose a lesser sentence. *See id.* at 244-45 (citing

Only one year later, in *Jones v. United States*,[93] the Court retreated from *Almendarez-Torres* by holding that, under the Due Process Clause, any fact other than recidivism that increases the maximum penalty for a crime must be included in an indictment and proved to a jury beyond a reasonable doubt.[94] In *Jones*, the Court construed a federal carjacking statute[95] that imposed an enhanced penalty when the offender caused serious bodily injury to another during the taking of a motor vehicle.[96] The Court determined that Congress intended for serious bodily injury to be an element defining an aggravated form of the crime.[97] The Court also recognized that states may not evade the mandates of due process by insulating juries from a fact that increases the severity of the penalty.[98] Lastly, the Court acknowledged recidivism, with its well-established tradition as a sentencing factor, as

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McMillan, 477 U.S. at 95). In addition, while the statute created a wide range of punishments, the Court ruled that such a broad sentencing range does not itself create significantly greater unfairness. *See id.* at 245. Lastly, in declaring that the *McMillan* factors were satisfied, the Court emphasized that recidivism was a tradition and perhaps the most traditional factor for increasing an offender's punishment. *See id.* at 243.

[93] 526 U.S. 227 (1999).

[94] *See id.* at 243 n.6. This holding was based upon the safeguards in the Due Process Clause and the notice and jury trial guarantees of the Sixth Amendment. *See id.*

[95] *See id.* at 230. At the time of this case, the federal carjacking statute read as follows:

> "Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—(1) be fined under this title or imprisoned not more than 15 years, or both, (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years or both, and (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both."

Id. (quoting 18 U.S.C. § 2119 (1994)).

[96] *See id.* The defendant in this case, along with two accomplices, held up two victims and stole their car. *See id.* at 229. During the commission of this carjacking, the defendant stuck his gun in the left ear of one victim and then hit him on the head. *See id.* at 229. As a result of this attack, the victim sustained a perforated eardrum and permanent hearing loss. *See id.* at 231. After crashing the stolen vehicle into a telephone pole, the defendant was arrested. *See id.* at 230.

While neither the indictment nor jury instructions mentioned a serious bodily injury, the district court judge, contending that a serious bodily injury was established by the preponderance of the evidence, sentenced the defendant to a twenty-five-year prison term. *See id.* at 231. The Ninth Circuit Court of Appeals affirmed this decision, but remanded for resentencing on other grounds. *See id.* at 231 n.2.

[97] *See id.* at 235.

[98] *See id.* at 240-41.

an exception to the general rule that every fact expanding the penalty range must be included in an indictment and determined by a jury beyond a reasonable doubt.[99]

Upon this framework of precedent, the New Jersey Supreme Court decided *State v. Apprendi* in June of 1999.[100] Justice O'Hern, writing for the majority,[101] initially discussed the nationwide development of hate crime laws,[102] commenting that New Jersey, in 1981, was one of the first states to adopt such a statute.[103] The court recognized that the breadth of New Jersey hate crime law was expanded in 1990 with the enactment of the Ethnic Intimidation Act.[104] The court acknowledged that this act closely resembled the Anti-Defamation League's model hate crime statute.[105]

Justice O'Hern then examined two United States Supreme Court

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[99] *See Jones*, 526 U.S. at 248-49. The Court noted that *Almendarez-Torres* was not dispositive of the present matter because it failed to consider the Sixth Amendment right to a jury trial and because its holding was extremely limited to unique facts, like recidivism, that have traditions as well-established sentencing factors. *See id.*; *see also* Benjamin J. Priester, *Further Developments on Previous Symposia: Sentenced for a "Crime" the Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 L. & CONTEMP. PROBS. 249, 294-95 (1998) (discussing the tension between sentencing factors and elements of the offense and criticizing the Court's inability to resolve this conflict in *Jones v. United States*).

[100] 159 N.J. 7, 731 A.2d 485 (1999).

[101] *See id.* at 9, 731 A.2d at 486. Chief Justice Poritz and Justices Pollock, Garibaldi, and Coleman joined the majority opinion. *See id.* at 54, 731 A.2d at 513.

[102] *See id.* at 14, 731 A.2d at 488.

[103] *See id.*, 731 A.2d at 489. New Jersey's 1981 hate crime law prohibited burning crosses or placing swastikas on any property for the purpose of terrorizing others. *See id.* Specifically, the statute explicitly outlawed placing such graffiti on places of worship or cemeteries. *See id.*

[104] *See id.* The Ethnic Intimidation Act of 1990 increased a disorderly persons offense of simple assault to a fourth-degree crime if the actor had a biased purpose in selecting the victim. *See* N.J. STAT. ANN. § 2C:12-1(e) (West 1995). This Act also raised a petty disorderly persons offense of harassment to a fourth-degree crime if the offender had a biased purpose in selecting the victim. *See id.* § 2C:33-4(d). Furthermore, the statute permitted sentence enhancement of other first-, second-, or third-degree crimes. *See id.* § 2C:44-3(e).

The court noted the impressions of Governor Florio upon signing this legislation. Governor Florio stated:

> "From now on, the law in New Jersey will be intolerant of ethnic intimidation. Those who commit these crimes of hate are going to face additional charges. From now on, hate crimes will be serious crimes, whether it's a phone call in the middle of the night or vandalism that leaves hateful symbols in its wake or racial slurs."

Apprendi, 159 N.J. at 14, 731 A.2d at 489 (citations omitted).

[105] *See Apprendi*, 159 N.J. at 15, 731 A.2d at 489; *see also supra* note 14 and accompanying text (discussing the provisions of the ADL's model hate crime statute).

decisions that determined the constitutionality of certain types of hate crime laws.[106] The court referred first to *R.A.V. v. City of St. Paul*, in which the United States Supreme Court announced that state laws may not impose content-based restrictions on speech.[107] The New Jersey Supreme Court then acknowledged *Wisconsin v. Mitchell*, in which the Court upheld the constitutionality of penalty enhancements for bias-motivated crimes.[108] Justice O'Hern then recounted the court's own application of these two decisions.[109]

The justice articulated that the court, in *State v. Vawter*,[110] declared that the 1981 hate crime statutory provisions were impermissible content-based restrictions.[111] The court explained that, in *Vawter*, these provisions were found unconstitutional because they punished only those threats and expressions that evinced racial and ethnic biases.[112] The court emphasized the prior conclusion that the New Jersey Legislature attempted to ban the expression of certain messages with which it disagreed.[113] Because *R.A.V.* prohibited such viewpoint restrictions, the court reiterated its earlier holding that these sections had violated the First Amendment.[114]

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[106] *See Apprendi*, 159 N.J. at 15, 731 A.2d at 489-90.

[107] *See id.*, 731 A.2d at 489; *see also supra* note 19 and accompanying text (discussing *R.A.V.* in detail).

[108] *See Apprendi*, 159 N.J. at 15-16, 731 A.2d at 490; *see also supra* note 19 and accompanying text (examining *Mitchell*). The court then criticized these decisions, arguing that it was unclear how the law in *Mitchell* was directed at conduct, while the unconstitutional statute in *R.A.V.* was directed solely at speech. *See Apprendi*, 159 N.J. at 16, 731 A.2d at 490.

[109] *See id.* at 16-17, 731 A.2d at 490-91.

[110] 136 N.J. 56, 642 A.2d 349 (1994). In *Vawter*, the defendant, along with an accomplice, painted Nazi symbols and hateful words on a Jewish synagogue and wrote a satanic legend on the driveway of a Roman Catholic church. *See id.* at 61, 642 A.2d at 352. The two individuals were subsequently arrested and charged with violating sections 10 and 11 of New Jersey's hate crime statute, which forbade intimidation by placing hateful symbols on a place of worship. *See Apprendi*, 159 N.J. at 13, 731 A.2d at 488.

[111] *See Apprendi*, 159 N.J. at 17, 731 A.2d at 490.

[112] *See id.*

[113] *See id.*

[114] *See id.* The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The court also recognized Justice Stein's disagreement with the logic in *R.A.V.* *See Apprendi*, 159 N.J. at 17, 731 A.2d at 490. The court noted that Justice Stein believed that *R.A.V.* was not an exhaustive analysis and that title 2C, section 33-10 to -11 of the New Jersey Statutes represented a legitimate legislative response to bias-motivated crimes. *See id.*

Next, the court turned to *State v. Mortimer*,[115] in which title 2C, section 33-4d of the New Jersey Statutes was challenged as unconstitutional.[116] Distinguishing the sections at issue in *Vawter*, the court explained that this provision only proscribed harassing conduct itself, not hateful expressions.[117] Thus, Justice O'Hern explained that in *Mortimer*, the court found that this provision breached neither the mandates of the First Amendment nor the ruling of *R.A.V.*[118] The court, however, did reiterate the earlier conclusion that the statutory language of section 33-4d was unconstitutionally vague because it failed to clearly state what it prohibited.[119] Consequently, Justice O'Hern recalled that the Court had excised this vague language from the statute and that the New Jersey Legislature amended the language in sections 33-4d and 44-3(e).[120]

Having fully examined New Jersey's application of federal and state hate crime law, the court conceded that the question of whether due process requires a jury, and not a judge, to find a biased purpose beyond a reasonable doubt remains unanswered.[121] Justice O'Hern clarified that neither *Mitchell* nor *Mortimer* indicated that a penalty enhancement may be unconstitutional when it permits a judge to make biased-purpose determinations upon a preponderance of the evidence.[122] The court, therefore, analyzed when due process requires a jury finding beyond a reasonable doubt.[123]

While *Winship* and the Due Process Clause require that all *essential* elements of an offense be established beyond a reasonable

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[115] 135 N.J. 517, 641 A.2d 257 (1994). The defendant, along with two juveniles, painted hateful words on the garage of a Pakistani family. *See Mortimer*, 135 N.J. at 523, 641 A.2d at 260. Police charged the defendant with two counts of ethnic harassment under section 33-4(d), which prohibited harassment by hateful communications and made the crime a fourth-degree offense if the offender acted in part with bias, hatred, or ill will and with an intent to intimidate based on race, color, religion, gender, or sexual orientation. *See id.* at 523-24, 641 A.2d at 257.

[116] *See Apprendi*, 159 N.J. at 17, 731 A.2d at 490.

[117] *See id.*, 731 A.2d at 491.

[118] *See id.*, 731 A.2d at 490.

[119] *See id.*, 731 A.2d at 491. The contested portion of the statute was "'at least in part, with ill will, hatred or bias toward'" the victim. *Id.* (quoting N.J. STAT. ANN. § 2C:33-4(d) (West 1995)). At the time of this case, the same language existed in title 2C, section 44-3(e), New Jersey's hate crime sentence-enhancing provision. *See id.* at 18, 731 A.2d at 491.

[120] *See id.* at 18, 731 A.2d at 491.

[121] *See id.*

[122] *See Apprendi*, 159 N.J. at 18, 731 A.2d at 491. While the jury in *Mitchell* found that the defendant selected his victim based upon race, the United States Supreme Court failed to state whether this was required. *See id.*

[123] *See id.*

doubt,[124] the court assessed that there is no precise test for discerning such essential elements.[125] Moreover, after examining the definition of an element of an offense in title 2C, section 1-14(h) of the New Jersey Statutes, Justice O'Hern determined that further inquiry was warranted because this provision did not explicitly address the sentence-enhancing statute.[126]

The court's focus then shifted to a line of United States Supreme Court decisions that addressed the interplay between due process and the discernment of an element of an offense.[127] The court noted that, in *Mullaney v. Wilbur*, the Supreme Court required a state, under the Due Process Clause, to prove the absence of "heat of passion" beyond a reasonable doubt.[128] The court proceeded to discuss *Martin v. Ohio*,[129] in which the Court upheld a statute that required the defendant, and not the State, to prove the existence of self-defense because such evidence would negate the State's case.[130] The justice

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[124] *See supra* notes 58-63 and accompanying text (discussing *Winship* in detail).

[125] *See Apprendi*, 159 N.J. at 18, 731 A.2d at 491.

[126] *See id.* Title 2C, section 1-14(h) of the New Jersey Statutes defines an element of a crime as:

> "(1) such conduct or (2) such attendant circumstances or (3) such a result of conduct as (a) is included in the description of the forbidden conduct in the definition of the offense; (b) establishes the required kind of culpability; (c) negatives an excuse or justification for such conduct; (d) negatives a defense under the statute of limitations; (e) establishes jurisdiction or venue."

Id. (quoting N.J. STAT. ANN. § 2C:1-14(h) (West 1995)).

[127] *See id.*

[128] *See id.* at 18-19, 731 A.2d at 491; *see also supra* notes 64-71 and accompanying text (discussing *Mullaney*).

[129] 480 U.S. 228 (1987).

[130] *See Apprendi*, 159 N.J. at 19, 731 A.2d at 491. In *Martin*, the defendant and her husband argued over grocery money. *See Martin*, 480 U.S. at 230-31. The defendant claimed that, during the confrontation, her husband hit her on the head. *See id.* at 231. The defendant asserted that she then retreated upstairs, put on a robe, retrieved her husband's gun, and returned downstairs for the purpose of disposing the weapon. *See id.* Viewing something in his wife's hand, the husband approached the defendant and inquired about the weapon. *See id.* The defendant then fired five or six shots, three of which struck and killed her husband. *See id.* The defendant was subsequently arrested for aggravated murder. *See id.*

Under Ohio law, "aggravated murder" is defined as "purposely, and with prior calculation and design, [causing] the death of another." *Id.* Moreover, the State had to prove each of these elements beyond a reasonable doubt. *See id.* Nevertheless, the affirmative defense of self-defense was afforded to criminal defendants when they proved, by a preponderance of the evidence, that they (1) did not give rise to the argument; (2) honestly believed that they were in imminent danger, and (3) did not breach any duty to retreat or avoid danger. *See id.* at 230 (citation omitted).

At trial, a jury convicted the defendant of aggravated murder, indicating that she did not meet her burden of proving self-defense. *See id.* at 231. The defendant then

then noted that, in *Patterson v. New York*, a defendant's burden to prove the mitigating factor of extreme emotional disturbance was also sustained.[131]

The court then considered *McMillan*,[132] which affirmed a statute that required the judge to impose a minimum sentence when the defendant committed an offense in visible possession of a firearm.[133] The court emphasized that *McMillan* held that the Due Process Clause did not require the State to treat such a sentencing factor as an element of the offense.[134] Moreover, the court agreed with *McMillan* that connecting the severity of a punishment to the presence or absence of a fact does not necessarily make that fact an element of the offense.[135] The court also observed, quoting the *McMillan* Court, that "'the state legislature's definition of the elements of the offense is usually dispositive.'"[136] The court, however, ended its review of *McMillan* by noting that there are constitutional limits on the legislative authority to define elements of an offense, even though such limits were not explicitly defined in *McMillan*.[137] Because the United States Supreme Court refused to do so, the New Jersey Supreme Court attempted to define these constitutional limits and apply them to New Jersey's hate crime sentence-enhancing provision.[138]

The court began by stating that biased purpose could be an element of the offense, even though the hate crime sentence-enhancing provision is located within the sentencing sections of the Code of Criminal Justice.[139] The court also dismissed the

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brought an appeal, claiming that it violated due process to require the defendant, and not the State, to prove the elements of an affirmative defense. *See id.*

[131] *See Apprendi*, 159 N.J. at 19; 731 A.2d at 491; *see also supra* notes 72-76 and accompanying text (discussing *Patterson*).

[132] *See supra* notes 77-85 and accompanying text (examining the *McMillan* holding).

[133] *See Apprendi*, 159 N.J. at 19, 731 A.2d at 491.

[134] *See id.*

[135] *See id.*, 731 A.2d at 491-92 (citing Patterson v. New York, 432 U.S. 197, 214 (1977)).

[136] *Id.*, 731 A.2d at 492 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986)).

[137] *See id.* (citing *McMillan*, 477 U.S. at 86).

[138] *See id.* at 19-20, 731 A.2d at 492. These constitutional limits prevent states from circumventing due process by redefining essential elements of an offense as mere sentencing factors. *See id.* at 19, 731 A.2d at 492 (citing *McMillan*, 477 U.S. at 86).

[139] *See Apprendi*, 159 N.J. at 20, 731 A.2d at 492. To prove the validity of this statement, the court used the example of first-degree kidnapping. *See id.* To be convicted of this crime, the court explained, the State must prove beyond a reasonable doubt that the victim was not returned unscathed. *See id.* Therefore, the

characterization of biased purpose as a motive because, unlike the statute at issue, proof of traditional motives does not increase the severity of punishment.[140] Therefore, the court admitted that a search for additional controlling precedent was necessary.[141]

Justice O'Hern conceded that New Jersey law did not control the case at issue because neither *Mortimer*[142] nor *State v. Camacho*[143] addressed the sentence-enhancing provision or the constitutional limits on allocating sentencing factors.[144] Thus, Justice O'Hern noted that the court's findings would only be temporary until the United States Supreme Court definitively ruled on this due process issue.[145] Imploring the Supreme Court to take action, the court compared the similarities between federal hate crime laws and New Jersey's bias crime statutes.[146] Nevertheless, in the absence of such guidance from

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court elaborated, if the Legislature's placement of the statute was dispositive, the State could easily allow judges, and not juries, to assess the harm caused to kidnapping victims. *See id.*

[140] *See id.* The court clarified that whether one steals to feed his family or to satisfy a drug habit does not increase the sentence for theft. *See id.* Thus, the court found that labeling biased purpose as a motive is misleading because, in the context of a criminal proceeding, it has vastly different consequences than do traditional motives. *See id.* at 20-21, 731 A.2d at 492.

[141] *See id.* at 21, 731 A.2d at 492.

[142] *See supra* notes 115-20 and accompanying text (discussing *Mortimer*).

[143] 153 N.J. 54, 707 A.2d 455 (1998). In *Camacho*, the defendant attended a party at an apartment during which he turned on the stereo. *See id.* at 57, 707 A.2d at 456. When the apartment tenant turned off the stereo, the defendant pulled out a handgun and fired shots at the stereo and walls. *See id.* Subsequently, the defendant was indicted on several counts of aggravated assault and weapons offenses, including possession of a firearm with the intent to use it against the person or property of another under title 2C, section 39-4(a) of the New Jersey Statutes. *See id.*

Under the Graves Act, persons convicted of the above offense must be sentenced to a minimum parole-ineligibility term. *See id.* at 56, 707 A.2d at 456 (citing N.J. STAT. ANN. § 2C:43-6(c) (West 1995)). The issue in *Camacho* was whether a jury or the sentencing judge must determine whether a defendant intended to use a firearm against a person, as opposed to the property of another. *See id.* at 56-57, 707 A.2d at 456. The court held that the sentencing court, and not the jury, should make such a determination. *See id.* at 72, 707 A.2d at 464. As the *Apprendi* court acknowledged, however, this decision did not explore the constitutional limits on allocating sentencing factors to a judge or jury. *See Apprendi*, 159 N.J. at 21, 731 A.2d at 493.

[144] *See Apprendi*, 159 N.J. at 21, 731 A.2d at 492-93.

[145] *See id.* at 22, 731 A.2d at 493.

[146] *See id.* at 21-22, 731 A.2d at 493. The court noted that the amendments to the federal sentencing guidelines include a hate crime penalty-enhancing provision that applies to all federal crimes. *See id.* at 21, 731 A.2d at 493. The provision increases the defendant's offense by three levels if

> the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any

the Supreme Court, the court resolved to examine existing precedent to discern the proper disposition.[147]

The court commenced by exploring *Jones*,[148] the most recent United States Supreme Court decision on the due process issue.[149] While *Jones* declared that "'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,'"[150] the court found that this language was not essential to the holding.[151] Moreover, because *Jones* did not explicitly overrule *Almendarez-Torres*,[152] the court submitted that it was proper to follow the latter decision.[153]

The court remarked that *Almendarez-Torres* sustained a statute that treated the existence of prior convictions as a sentencing factor due to the longstanding tradition of recidivism as such.[154] Furthermore, the court pointed out that the *Almendarez-Torres* analysis centered upon an examination of the *McMillan* factors.[155] The court then applied this *Almendarez-Torres* analysis to section 44-3(e) of the New Jersey Statutes.[156]

The court found that, while New Jersey's hate crime sentence-enhancing provision does alter the maximum penalty for the offense, it satisfies all of the other *McMillan* factors: (1) the statute does not presume an element of the offense in violation of *Patterson*; (2) there is no great differential in sentencing; (3) the provision does not

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property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.

Id. at 21, 731 A.2d at 493 (citation omitted).

While this federal hate crime statute requires the jury to make the biased-purpose determination as part of the trial, it does permit the judge to establish beyond a reasonable doubt that the defendant selected the victim because of race, creed, or other characteristics. *See id.* at 21-22, 731 A.2d at 493.

147 *See id.* at 22, 731 A.2d at 493.

148 *See supra* notes 93-99 and accompanying text (analyzing *Jones* in detail).

149 *See Apprendi*, 159 N.J. at 22, 731 A.2d at 493.

150 *Id.* (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)).

151 *See id.*

152 *See supra* notes 86-92 and accompanying text (discussing *Almendarez-Torres*).

153 *See Apprendi*, 159 N.J. at 22-23, 731 A.2d at 493. The court did acknowledge, however, that the *Jones* Court specifically excepted recidivism from its ruling and, therefore, had no need to explicitly overrule *Almendarez-Torres*. *See id.* at 23 n.2, 731 A.2d at 494.

154 *See id.* at 23, 731 A.2d at 494.

155 *See supra* note 92 and accompanying text (reproducing the *Almendarez-Torres* Court's application of the *McMillan* factors).

156 *See Apprendi*, 159 N.J. at 23, 731 A.2d at 494.

create a separate crime with a separate penalty; and (4) the New Jersey Legislature did not enact this provision to evade the mandates of due process.[157] Rather, Justice O'Hern contended that the Legislature merely dictated the precise weight to be given to the traditional biased-purpose sentencing factor.[158]

Moreover, the court argued that altering the maximum penalty by itself is insufficient to declare the statute unconstitutional.[159] Justifying this conclusion, the court referenced *State v. Krantz*,[160] in which a Montana sentencing provision was sustained even though it authorized punishment beyond the maximum for the underlying offense.[161] The court reasoned that because such sentence enhancements are discretionary, their penalties may be even less severe than a mandatory sentence without the possibility of parole.[162]

The court further maintained that section 44-3(e) would not infringe upon any constitutional liberties.[163] Referring to Graves Act[164]

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[157] *See id.* at 23-24, 731 A.2d at 494. In determining that the New Jersey Legislature acted forthright in passing section 44-3(e), the court distinguished *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1998), in which an Arizona sentencing provision was declared void because it maliciously withdrew traditional elements of the crime and reclassified them as sentencing factors. *See id.*

[158] *See id.* at 24, 731 A.2d at 494-95. The court claimed that, like the factor of recidivism in *Almendarez-Torres*, biased purpose is a well-established sentencing factor. *See id.*, 731 A.2d at 495. In fact, the court maintained that section 44-1(2) has long permitted the sentencing judge to consider the severity of the harm imposed on the victim. *See id.*

[159] *See id.*, 731 A.2d at 495.

[160] 788 P.2d 298 (Mont. 1990). In *Krantz*, the defendant engaged in a series of armed robberies and was subsequently convicted of accountability in one holdup and robbery in another. *See id.* at 299. The defendant was sentenced to 30 years in prison for each conviction. *See id.* at 300. In addition, an extended term of 10 years was imposed for each conviction under a Montana sentence-enhancing provision. *See id.* This statute authorized enhanced penalties for the use of a weapon in the commission of a crime. *See id.* at 301. The defendant challenged this sentence-enhancing provision, alleging that the use of a weapon in the commission of a crime is either a distinct offense from the underlying crime or is an element of the underlying crime. *See id.*

[161] *See id.* at 303. The court rejected a narrow interpretation of *McMillan* that would have all factors that alter the maximum penalty for a crime be deemed separate offenses or elements of an offense subject to the requirements of due process. *See id.*

[162] *See Apprendi*, 159 N.J. at 25, 731 A.2d at 495.

[163] *See id.*

[164] *See* N.J. STAT. ANN. § 2C:43-6(c) (West 1995)). The Graves Act states:

> A person who has been convicted under 2C:39-4a of possession of a firearm with intent to use it against the person of another, or of a crime under any of the following sections: 2C:11-3, 2C:11-4, 2C:12-1b., 2C:14-2a, 2C:14-3a, 2C:15-1, 2C:18-2, 2C:29-5, who, while in the course of committing or attempting to commit the crime, including the

decisions, the court insisted that there is rarely any doubt about the factual issues that determine a sentence.[165] The court expounded that *State v. White*[166] solely turned on the legal issue of whether an armed robbery accomplice, who did not possess a firearm, could be sentenced under the Graves Act.[167] Similarly, the justice maintained that *State v. Stewart*[168] hinged on the legal question of whether constructive possession of a firearm triggers a Graves Act sentence.[169] Correspondingly, the court proclaimed that, in cases like *Vawter* and *Mortimer*, the existence of a biased purpose is rarely in question.[170] The court also indicated that constitutional liberties are secured under section 44-3(e) because the statute only applies when there is a compelling state interest to combat hateful discrimination.[171]

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immediate flight therefrom, used or was in possession of a firearm as defined in 2C:39-1f, shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or 3 years, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole.

Id.

[165] *See Apprendi*, 159 N.J. at 25, 731 A.2d at 495.

[166] 98 N.J. 122, 484 A.2d 691 (1984). In *White*, the defendant participated in two separate robberies. *See id.* at 126, 484 A.2d at 693. During the commission of the first robbery, the defendant and three other men drove to an area near a gas station. *See id.* After a gun was exchanged in the presence of the defendant, two of the men robbed the gas station at gunpoint. *See id.* Thereafter, all four men shared the proceeds. *See id.* In the second robbery, the defendant informed one of his accomplices that a particular individual had money concealed in his sock. *See id.* at 126-27, 484 A.2d at 693. Shortly after, that accomplice used a gun to force that individual into a car and rob him. *See id.* at 127, 484 A.2d at 693.

Subsequently, the defendant was convicted of various charges related to the armed robberies and unlawful possession of a weapon. *See id.* At sentencing, the trial court imposed a mandatory minimum sentence under the Graves Act, even though the defendant never physically possessed a gun during the commission of either robbery. *See id.*

[167] *See Apprendi*, 159 N.J. at 25, 731 A.2d at 495.

[168] 96 N.J. 596, 477 A.2d 300 (1984). The defendant in *Stewart* leapt out of a pick-up truck, stuck a flare gun in the side of an individual standing on the corner, and robbed him of $50. *See id.* at 599, 477 A.2d at 301. While the defendant claimed that he merely stole a bag of marijuana that the individual was selling, a jury convicted him of second-degree unarmed robbery. *See id.* at 600, 477 A.2d at 302. Nevertheless, because the jury believed that the defendant was in possession of a firearm, he was sentenced to a mandatory minimum sentence under the Graves Act. *See id.* at 600-01, 477 A.2d at 302. The defendant appealed, maintaining that constructive possession of a firearm does not warrant a minimum term under the Act. *See id.* at 601, 477 A.2d at 302.

[169] *See Apprendi*, 159 N.J. at 25, 731 A.2d at 495.

[170] *See id.*

[171] *See id.* (citing People v. MacKenzie, 40 Cal. Rptr. 2d 793, 800-01 (Cal. Ct. App.

Next, Justice O'Hern dismissed the fear that the court might allow the Legislature to undermine traditional rights to trial by jury and due process of law.[172] The court decided to guard these constitutional rights by prohibiting the Legislature from reallocating traditional *mens rea*[173] or grading factors as mere sentencing factors to be determined by a judge.[174]

While acknowledging that Florida, under a similar hate crime statute, requires the jury to make the biased-purpose determination, the court proceeded to identify the problems with this approach.[175] The court predicted that a defendant would be subject to a great risk of prejudice if his former acts of bias were exposed to the jury.[176] Such evidence of racial or ethnic hatred, the justice forewarned, has the potential to inflame a jury.[177]

1995)).

[172] *See id.* at 25-26, 731 A.2d at 495.

[173] *See* BLACK'S LAW DICTIONARY 985 (6th ed. 1990) (defining *mens rea* "[a]s an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent"). Since the seventeenth century, common-law crimes have required both the commission of an act and the existence of a culpable state of mind. *See* J.W.C. Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31, 35 (1938). Culpability "requires a showing that [the criminal] acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." BLACK'S LAW DICTIONARY 379 (6th ed. 1990). Consequently, the most serious culpable state of mind is one of purpose, followed by knowledge, recklessness, and lastly, negligence. *See* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 463 (1992). These varying culpable states, with their respective degrees of severity, are significant because "deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished." Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 39-40 (1997).

In contrast, strict liability crimes do not require the accused to possess a particular state of mind. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.8, at 340 (1986). Strict liability offenses are defined as "[unlawful acts whose elements do not contain the need for criminal intent or *mens rea*." BLACK'S LAW DICTIONARY 1422 (6th ed. 1990); *see also* Simons, *supra*, at 463 (noting that the concept of strict liability permits the absence of a culpable mental state). Because they are void of any mental culpability requirements, strict liability offenses do not carry harsh punishments, such as imprisonment. *See* LAFAVE & SCOTT, *supra*, at 340-41. Generally, strict liability crimes entail "acts that endanger the public welfare, such as illegal dumping of toxic wastes." BLACK'S LAW DICTIONARY 1422 (6th ed. 1990).

[174] *See Apprendi*, 159 N.J. at 25-26, 731 A.2d at 495.

[175] *See id.* at 26, 731 A.2d at 495.

[176] *See id.*

[177] *See id.*, 731 A.2d at 495-96. In reaching this conclusion, the court referred to *State v. Crumb*, 277 N.J. Super. 311, 649 A.2d 879 (App. Div. 1994), in which the court insulated a bias count from the other counts at trial to reduce the risk of prejudice. *See id.* (citing *Crumb*, 277 N.J. Super. at 321, 649 A.2d at 884). The court also

The court concluded that a biased purpose is not an element of the offense of possession of a firearm for an unlawful purpose.[178] Rather, the court asserted that a biased purpose, like recidivism, is a traditional and objective sentencing factor.[179] Therefore, via the constitutional calculus of *McMillan*, Justice O'Hern upheld section 44-3(e) and ruled that a sentencing judge may determine the presence of a biased purpose by a preponderance of the evidence.[180] The court stressed that New Jersey's hate crime sentence-enhancing provision requires a delicate balance of constitutional rights.[181] The court explained that, while New Jersey's laws do not punish thoughts, they do punish crimes motivated by invidious discrimination more severely.[182] In the present matter, the court articulated, there is no question that Apprendi acted with a biased purpose in shooting at his neighbor's home.[183] Therefore, the court affirmed the extended sentence upheld by the appellate division.[184]

In a dissenting opinion, Justice Stein, joined by Justice Handler, denounced the finding that a biased purpose is not an element of the

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considered *State v. Carter*, 91 N.J. 86, 449 A.2d 1280 (1982), in which the court admitted evidence of racism, holding that it was not so prejudicial as to outweigh its probative value. *See id.* (citing *Carter*, 91 N.J. at 107-08, 449 A.2d at 1291-92).

[178] *See id.* at 27, 731 A.2d at 496. The court stated that the Legislature's designation of biased purpose as a sentencing factor, and not an element of an offense, supports this conclusion. *See id.* In addition, the court noted that the Legislature's motive for doing so was not constitutionally suspect. *See id.*

[179] *See supra* notes 78-84 and accompanying text (reproducing the *Almendarez-Torres* Court's characterization of recidivism).

[180] *See Apprendi*, 159 N.J. at 27, 731 A.2d at 496.

[181] *See id.* The court asserted that the requirements of title 2C, section 44-3(e) are strict. *See id.* at 27-28, 731 A.2d at 496. To impose an extended sentence under this provision, the defendant must do more than exhibit bias during the commission of an offense. *See id.* at 28, 731 A.2d at 496. Rather, the court assessed, the statute requires that the defendant's purpose in committing the crime was to exhibit bias. *See id.*

The court likened this interpretation to Florida's hate crime sentence-enhancing provision reviewed in *Dobbins v. State*. *See id.*, 731 A.2d at 496-97 (citing *Dobbins*, 605 So. 2d 922 (Fla. Dist. Ct. App. 1992), *aff'd*, 631 So. 2d 303 (Fla. 1994)). That statute stated that the "'penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion or national origin of the victim.'" *Dobbins*, 605 So. 2d at 923 (quoting FLA. STAT. ANN. § 775.085 (West 1989)). The court held that the jury must find that the defendant intentionally selected the victim and committed the crime because of the race of the victim. *See id.* The court rejected the notion that an extended sentence could be imposed simply because the defendant made a racial slur during the commission of the crime. *See id.*

[182] *See Apprendi*, 159 N.J. at 27, 731 A.2d at 496.

[183] *See id.* at 28-29, 731 A.2d at 497.

[184] *See id.* at 29, 731 A.2d at 497.

crime.[185] Rather, Justice Stein argued that a biased purpose necessarily involves an aspect of criminal intent.[186] The dissent insisted that, unlike the factors in *Almendarez-Torres*[187] and *Jones*,[188] a biased purpose relates to the defendant's conduct and his subjective purpose in committing the underlying offense.[189] Thus, Justice Stein declared that such conduct, coupled with a purposeful state of mind, unmistakably embodies the characteristics of an element of an offense and therefore must be proved to a jury beyond a reasonable doubt.[190]

The dissent concluded that, as a matter of statutory interpretation, section 44-3(e) violates the provisions of the Code of Criminal Justice that define conduct, mental states, and elements of an offense.[191] Justice Stein also stated that this statute breached the Due Process Clause, the Sixth Amendment's notice and jury trial guarantees,[192] and Article 1 of the New Jersey Constitution.[193] Moreover, the dissent articulated, because a biased purpose potentially doubles the term of imprisonment for a defendant, this critical determination must be made by a jury beyond a reasonable

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[185] *See id.* at 48, 731 A.2d at 510 (Stein, J., dissenting).

[186] *See id.* at 49, 731 A.2d at 510 (Stein, J., dissenting).

[187] *See supra* notes 86-92 and accompanying text (discussing *Almendarez-Torres*).

[188] *See supra* notes 93-99 and accompanying text (analyzing *Jones*).

[189] *See Apprendi*, 159 N.J. at 49, 731 A.2d at 510 (Stein, J., dissenting).

[190] *See id.* at 50-51, 731 A.2d at 511 (Stein, J., dissenting).

[191] *See id.* at 51, 731 A.2d at 510-11 (Stein, J., dissenting). The Code of Criminal Justice states that "'[c]onduct' means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions.'" *Id.* (quoting N.J. STAT. ANN. § 2C:1-14(d) (West 1995)).

An element of an offense is defined as "(1) such conduct or (2) such attendant circumstances or (3) such a result of conduct as (a) is included in the description of the forbidden conduct in the definition of the offense; (b) establishes the required kind of culpability; (c) negatives an excuse or justification for such conduct; (d) negatives a defense under the statute of limitations; or (e) establishes jurisdiction or venue." N.J. STAT. ANN. § 2C:1-14(h) (West 1995).

General requirements of culpability are established in a provision stating that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense." *Id.* § 2C:2-2(a). Additionally, "purposely," the mental state required by the hate crime sentence-enhancing provision, is defined as a "conscious object to engage in conduct of that nature or to cause such a result." *Id.* § 2C:2-2(b)(1).

[192] The Sixth Amendment requires that a defendant be tried by "an impartial jury" and "be informed of the nature and cause of the accusation." U.S. CONST. amend. VI.

[193] *See Apprendi*, 159 N.J. at 51, 731 A.2d at 511-12 (Stein, J., dissenting). Article 1, paragraph 1 of the New Jersey Constitution embodies the safeguards of due process. *See id.* (citing Greenberg v. Kimmelman, 99 N.J. 552, 568, 494 A.2d 294, 302 (1985)).

doubt.[194]

Finally, Justice Stein chided the court for drawing an analogy between a biased purpose and recidivism.[195] The dissent determined that recidivism, unlike biased purpose, is objectively determined based upon the official court record and involves no inquiry of the mental state of the defendant.[196] While agreeing with the majority that evidence of a biased purpose increases the risk of prejudice for defendants, the dissent suggested a bifurcated trial to reduce such danger.[197] Therefore, reiterating the unconstitutionality of section 44-3(e), Justice Stein announced that Apprendi's conviction and extended sentence should be reversed and the matter remanded for a new trial consistent with the dissenting opinion.[198]

In deciding that a biased purpose is not an element of an offense, *Apprendi* departed from binding authority in *Jones*. In that decision, the United States Supreme Court explicitly held that any fact, other than recidivism, that increases the maximum penalty for a crime must be charged in an indictment and proven to a jury beyond a reasonable doubt.[199] The *Apprendi* court, however, incorrectly found

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[194] *See id.* at 52, 731 A.2d at 512 (Stein, J., dissenting). Justice Stein noted the majority's unwillingness to decide whether such a large expansion of the sentencing range violated due process. *See id.* The dissent then criticized such reluctance as a manifestation of the court's discomfort with having the judge, and not the jury, determine a fact that materially affects the sentence. *See id.*

[195] *See id.*

[196] *See id.* Justice Stein opined:

> The factor of recidivism is readily determined on the basis of the official court record of a prior conviction; it involves no inquiry into the defendant's conduct in perpetrating the current offense; and recidivism, of course, involves no inquiry in connection with the defendant's mental state in committing the current offense. Neither the *Jones* case, in which the sentencing factor was serious bodily injury to a carjacking victim, nor *McMillan*, in which the sentencing factor was visible possession of a firearm in the course of committing various felonies, required the sentencer to make findings of fact, such as are required by N.J.S.A. 2C:44-3(e), about the mental state of a defendant when he committed the subject offense. Because under our Code a finding that a defendant possessed the requisite mental state is indispensable to a conviction, N.J.S.A. 2C:2-2, there simply can be no doubt that the defendant's purpose to intimidate these victims because of their race must be regarded as a material element of the charged offenses.

Id. at 52-53, 731 A.2d at 512 (Stein, J., dissenting).

[197] *See id.* at 53, 731 A.2d at 512-13 (Stein, J., dissenting). The court used this type of bifurcated procedure in *State v. Ragland*. *See id.* (citing State v. Ragland, 101 N.J. 33, 35, 499 A.2d 1366, 1367-68 (1985), *reconsidered*, 105 N.J. 189 (1986)).

[198] *See id.* at 53-54, 731 A.2d at 513 (Stein, J., dissenting).

[199] *See supra* notes 93-99 and accompanying text (discussing *Jones*). The *Jones*

that this language was not essential to the holding and instead followed the *Almendarez-Torres* analysis. In so doing, the majority distorted a clear mandate from our nation's highest court.

The need for a jury to make the biased purpose determination is apparent from the facts of the *Apprendi* case itself. The defendant's purpose in shooting at his neighbor's home remains unclear. While Apprendi initially admitted that he shot at the house because he wanted to keep African-Americans out of his neighborhood,[200] he later retracted this statement, claiming that he merely shot at glass and a purple door that had caught his eye.[201] Thus, because reasonable persons could disagree as to Apprendi's mental state at the time of the shooting, a jury is best suited to make this critical determination.[202]

The fate of section 44-3(e) and all other similar sentence-enhancing provisions is yet to be determined. During the 1999 Term, the United States Supreme Court will review *State v. Apprendi* and definitively resolve this due process dilemma.[203] In so doing, the Court needs to delineate the constitutional limits on legislatures' ability to define the elements of an offense. Until such time, states will have to continue to walk an unidentified path that strikes a balance between state autonomy to define crimes and the safeguards for criminal defendants embodied in the Due Process Clause.

Joshua S. Bratspies

Court declared:

> The dissent repeatedly chides us for failing to state precisely enough the principle animating our view that the carjacking statute, as construed by the Government, may violate the Constitution. The preceding paragraph in the text expresses that principle plainly enough, and we re-state it here: 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.

Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (citations omitted).

[200] *See* text accompanying note 33 *supra* (reproducing the defendant's incriminating statement).

[201] *See supra* notes 37-38 and accompanying text (discussing the circumstances surrounding the defendant's retraction).

[202] *See* THE FEDERALIST NO. 81, at 489 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that common-law courts presented disputed facts to a jury).

[203] *See* Apprendi v. New Jersey, 120 S. Ct. 525 (1999) (granting Apprendi's petition for a writ of certiorari on November 29, 1999).