

NOTES

GUARDING THE RIGHTS OF THE ACCUSED AND ACCUSER: THE JURY'S ROLE IN AWARDING CRIMINAL RESTITUTION UNDER THE SIXTH AMENDMENT

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Guided by common law practice, the Supreme Court has steadily expanded the Sixth Amendment jury trial right since deciding *Apprendi v. New Jersey*.¹ The Sixth Amendment now guarantees a right to have a jury find any fact affecting the maximum amount of punishment that a judge may impose with respect to imprisonment,² capital punishment,³ and criminal fines.⁴ But courts have been reluctant to extend this rule to criminal restitution.⁵

Federal and state courts regularly require criminal offenders to make restitution to their victims by returning stolen property or making compensatory payments.⁶ The restitution ordered typically depends on the nature and amount of the victim's loss.⁷ Although most courts hold that restitution is a criminal penalty, subject to the

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1. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *see also* *Alleyne v. United States*, 133 S. Ct. 2151, 2168 (2013) (Roberts, C.J., dissenting).

2. *See* U.S. CONST. amend. VI; *Apprendi*, 530 U.S. at 490.

3. *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

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

5. *See, e.g.*, *United States v. Williams*, 445 F.3d 1302, 1310 (11th Cir. 2006), *abrogated on other grounds by* *United States v. Lewis*, 492 F.3d 1219, 1221 (11th Cir. 2007); *United States v. Milkiewicz*, 470 F.3d 390, 391 (1st Cir. 2006); *United States v. Reifler*, 446 F.3d 65, 104 (2d Cir. 2006); *United States v. Leahy*, 438 F.3d 328, 331 (3d Cir. 2006) (en banc); *United States v. Nichols*, 149 F. App'x 149, 153 (4th Cir. 2005); *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005); *United States v. Sosebee*, 419 F.3d 451, 453 (6th Cir. 2005); *United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005); *People v. Smith*, 181 P.3d 324, 327 (Colo. App. 2007); *State v. Clapper*, 732 N.W.2d 657, 661, 663 (Neb. 2007); *People v. Horne*, 767 N.E.2d 132, 139 (N.Y. 2002); *State v. McMillan*, 111 P.3d 1136, 1139 (Or. Ct. App. 2005); *State v. Kinneman*, 119 P.3d 350, 355 (Wash. 2005) (en banc).

6. *See* Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1687–89 (2009); CHARLES DOYLE, CONG. RESEARCH SERV., *RESTITUTION IN FEDERAL CRIMINAL CASES* (2007), available at <http://www.policyarchive.org/handle/10207/bitstreams/19198.pdf> (describing federal restitution laws); OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, *ORDERING RESTITUTION TO THE CRIME VICTIM* (2002) [hereinafter *ORDERING RESTITUTION*], available at https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin6/ncj189189.pdf (describing state restitution laws).

7. *See* DOYLE, *supra* note 6, at 15, 19; *ORDERING RESTITUTION*, *supra* note 6, at 3.

Sixth Amendment,⁸ they have rejected the idea that there is a right to have a jury determine the amount of restitution owed.⁹

That conclusion is ripe for reexamination. Recent Supreme Court cases reiterate that the jury trial right depends on common law practice and have expanded the jury's fact-finding role.¹⁰ Yet few, if any, courts have examined what role the jury played in awarding criminal restitution at common law.¹¹ Therein lies a fatal flaw. Relying on historical evidence of common law practice, this Note argues that the Sixth Amendment guarantees the right to have a jury to find the facts affecting the amount of restitution that a judge may order by law.¹²

The argument proceeds as follows. Part I describes the framework that the Court has erected for understanding and applying the Sixth Amendment jury trial right. Because the scope of the right relies heavily upon common law practice, Part II describes the common law procedures that historically applied to restitution. Based on that account, Part III argues that the Sixth Amendment jury trial right extends to criminal restitution and requires juries to find the facts affecting the amount of restitution owed by law. This section also sketches the boundaries of the right with respect to restitution. Finally, Part IV concludes.

I. THE COURT'S UNDERSTANDING OF THE SIXTH AMENDMENT JURY TRIAL RIGHT

Over the last fifteen years, the “Court has sought to identify the historical understanding of the Sixth Amendment jury trial right and determine how that understanding applies to modern sentencing practice.”¹³ Treatises as well as

8. See, e.g., *Clapper*, 732 N.W.2d at 661; *Kinneman*, 119 P.3d at 354–55; cf. *United States v. Wolfe*, 701 F.3d 1206, 1217 (7th Cir. 2012) (“Having examined our sister circuits who have addressed whether restitution is civil or criminal in nature, we find ourselves in the minority. Only the Eighth and Tenth Circuits, like us, have found restitution to be civil in nature.”).

9. See *supra* note 5.

10. See *infra* Part I.

11. See *infra* Part III.B.

12. This argument assumes that restitution falls under the Sixth Amendment. A minority of federal courts disagrees. See *Wolfe*, 701 F.3d at 1217. The minority holds that restitution—even when imposed during criminal proceedings—is a civil remedy that is not subject to the Sixth Amendment. See, e.g., *id.* at 1216–17; *United States v. Millot*, 433 F.3d 1057, 1062 (8th Cir. 2006); *United States v. Nichols*, 169 F.3d 1255, 1279–80 (10th Cir. 1999). The Court has not squarely addressed whether restitution is a civil or criminal remedy, see *United States v. Leahy*, 438 F.3d 328, 333–35 (3d Cir. 2006) (describing the Court as having “touched” on the issue), and the topic is outside the scope of this Note. Other scholarship discusses the topic, however. See, e.g., Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 *FORDHAM L. REV.* 2711 (2005); Heidi M. Grogan, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 *TEMP. L. REV.* 1079 (2005); Irene J. Chase, Comment, *Making the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory Victims Restitution Act of 1996*, 68 *U. CHI. L. REV.* 463 (2001); Bonnie Arnett Von Roeder, Note *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 *TEX. L. REV.* 671 (1984); Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 *HARV. L. REV.* 931 (1984).

13. *Alleyne v. United States*, 133 S. Ct. 2151, 2168 (2013) (Roberts, C.J., dissenting).

common law decisions have guided the Court in this endeavor.¹⁴ Members of the Court have sharply disagreed on how to understand and apply those sources, but recent decisions have brought greater consistency and clarity to the Court's methodology.¹⁵

Broadly speaking, these decisions embody three shifts in the Court's understanding of the jury trial right. First, the Court adopted a methodology that looks to the common law. Second, the Court rejected a proposed distinction between so-called "sentencing factors" and elements of a crime. And third, the Court rejected a similar distinction between "sentencing facts" and elements of a crime. This Note will trace how these movements developed and then examine the lessons they hold for interpreting the Sixth Amendment.

A. *Embracing History and Rejecting the Sentencing-Factors Distinction*

The first two developments—the embrace of a historical methodology and the rejection of the sentencing-factors distinction—occurred in the space of a single case: *Apprendi v. New Jersey*.¹⁶ At issue was the constitutionality of New Jersey's "hate crime" enhancement.¹⁷ The enhancement increased the maximum statutory penalty for certain offenses if during sentencing the judge found that the offender had acted with animus by a preponderance of the evidence.¹⁸ The Court pronounced this sentencing scheme unconstitutional based on its understanding of the role of the jury at common law.¹⁹

Relying on eighteenth- and nineteenth-century treatises, the Court observed that the jury trial right historically had stood for two principles.²⁰ The first was that "the truth of every accusation" should be passed on by a jury of one's peers.²¹ And the second was that "all the essential elements of guilt" should be proven beyond a reasonable doubt.²² In the Court's view, the hate crime enhancement conflicted with both principles because it allowed a judge to find an element of a crime—the fact that the offender had acted with animus—by a preponderance of the evidence.²³

By equating animus with an element of the crime, the Court rejected an attempt by New Jersey and the dissenting justices to categorize animus as a mere

14. *See id.*

15. *See infra* Part I.B.

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

17. *See id.* at 471.

18. *See id.*

19. *Id.* at 497; *see also id.* at 482–83 ("The *historic link* between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.") (first emphasis added).

20. *See id.* at 477–78.

21. *Id.* at 477 (citations omitted) (internal quotation marks omitted).

22. *Id.* at 478 (citations omitted) (internal quotation marks omitted).

23. *See id.* at 479–80.

“sentencing factor.”²⁴ The majority responded that this distinction was “unknown . . . during the years surrounding our Nation’s founding.”²⁵ The criminal law historically had affixed a particular punishment to a given crime and specified the circumstances surrounding the offense that would result in greater or lesser punishment.²⁶ This structure not only cabined judicial discretion, but it also meant that the jury found the facts supporting any given punishment.²⁷ The procedural rules of the time required the prosecutor to charge in the indictment and prove to the jury that a crime had “‘been committed under th[e] circumstances’” described in the statute.²⁸ And the prosecutor was required to “‘state th[ose] circumstances with certainty and precision,’” thereby allowing a defendant to predict the punishments that could be imposed upon him from the face of the indictment.²⁹

Based on this tight “historic link between verdict and judgment,” the Court rejected the sentencing factors distinction.³⁰ And the Court announced the general rule that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”³¹

The Court, however, stopped short of embracing the broader view of the jury trial right defended by Justice Clarence Thomas. Whereas the majority defined “crime” by reference to the facts affecting the *maximum* sentence available by law,³² Justice Thomas argued that a “‘crime’ includes every fact that is by law a basis for *imposing or increasing* punishment.”³³ He thus concluded that a jury must find any fact affecting the “kind, degree, or range of punishment” to which the prosecution is entitled.³⁴ This formulation left judges the discretion to fashion sentences within legislatively prescribed boundaries, but not to find the facts affecting the boundaries themselves.³⁵

Justice Thomas argued that his rule was more consistent with common law practice than the majority’s, due to the particularity with which aggravating facts had to be alleged in an indictment.³⁶ A larceny case from Massachusetts furnished

24. *Id.* at 478.

25. *Id.*

26. *See id.* at 478–80.

27. *See id.* at 479–81.

28. *Id.* at 480–81 (quoting J. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 51 (15th ed. 1862)).

29. *Id.* (quoting J. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 51 (15th ed. 1862)).

30. *See id.* at 482–83 (“The historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.”).

31. *Id.* at 490.

32. *See id.*

33. *Id.* at 501 (Thomas, J., concurring) (emphasis added).

34. *Id.*

35. *Id.* at 519–20.

36. *See id.* at 501.

one of his examples. In *Commonwealth v. Smith*,³⁷ the defendant was prosecuted for larceny under a statute that fixed the punishment at three times the value of the goods stolen.³⁸ Although convicted of stealing multiple items, the court refused to sentence Smith for the items whose value was not set forth in the indictment.³⁹ The reason for this was that the punishment for the crime varied with the amount stolen.⁴⁰ Thus, according to Justice Thomas, the Massachusetts court treated the value of the stolen goods as an element of the crime.⁴¹

B. *Rejecting the Sentencing-Facts Distinction*

Although the *Apprendi* majority did not adopt Justice Thomas's proposed rule, his concurrence laid the foundation for expanding *Apprendi* beyond the context of maximum sentences. The Court's rejection of the sentencing-facts distinction builds on the logic of Justice Thomas's concurrence. As evidence, consider the Court's initial attempts to limit *Apprendi* and its recent rejection of those limits.

1. *Attempts to Limit Apprendi*

Just two years after *Apprendi*, the Court adopted a rule in direct conflict with the Thomas concurrence in *Harris v. United States*.⁴² The *Harris* Court declined to require juries to find the facts triggering mandatory minimum sentences.⁴³ To reach this result, the Court read *Apprendi* narrowly. Although *Apprendi* had noted that the jury trial right both served to prevent governmental overreaching and to promote sentencing predictability,⁴⁴ little mention of predictability appeared in *Harris*. Instead, the Court characterized its ruling in *Apprendi* as concerned with placing an upper limit on judicial power.⁴⁵ *Harris* thus cabined *Apprendi*'s rejection of the sentencing factors distinction to statutory maximums, thereby implicitly rejecting Justice Thomas's position that a jury must find any fact that affects the "range of punishment" authorized by law.⁴⁶

Even so, the Court did not repudiate *Apprendi*'s emphasis on common law practice. A plurality of the Court instead distinguished *Apprendi* on historical grounds, observing that judges had long exercised discretion in sentencing.⁴⁷

37. *Commonwealth v. Smith*, 1 Mass. 245 (1 Will.) (1804).

38. *Apprendi v. New Jersey*, 530 U.S. 466, 502 (2000) (describing *Smith*, 1 Mass. 245).

39. *Id.*

40. *See id.* at 502–03.

41. *See id.* at 503 ("Value was an element because punishment varied with value . . .").

42. *Harris v. United States*, 536 U.S. 545 (2002), *overruled by Alleyne v. United States*, 133 S. Ct. 2151 (2013).

43. *See id.* at 568–69.

44. *Apprendi*, 530 U.S. at 479–81.

45. *See Harris*, 536 U.S. at 557–58.

46. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).

47. *See Harris*, 536 U.S. at 558 (discussing the historical underpinnings of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)).

Although that discretion was not absolute, the plurality found little evidence that courts “submit[ted] facts increasing the mandatory minimum to the jury.”⁴⁸ The plurality, however, did not engage with the evidence Justice Thomas had compiled in *Apprendi*.

The Court also limited the reasoning of *Apprendi* in *Oregon v. Ice*.⁴⁹ In *Ice*, the Court held that a jury need not make the factual findings required by law to impose consecutive terms of imprisonment.⁵⁰ The majority justified the decision on two grounds: “historical practice and respect for state sovereignty.”⁵¹

The Court’s willingness to tie the Sixth Amendment jury trial right to the “historical role of the jury at common law” accorded with *Apprendi*.⁵² Where the Court differed in its approach was in its reading of history. Rather than examine how the jury’s role in situations where the punishment authorized depending upon certain factual findings—as the Court had in *Apprendi*—the majority simply noted that the jury traditionally had played no role in deciding whether sentences would run consecutively or concurrently.⁵³ Although this mode of analysis is arguably inconsistent with *Apprendi*,⁵⁴ that decision had not spoken to how the Sixth Amendment applies to the interaction among sentences for discrete offenses.

More significantly, the Court fashioned its judgment based on concerns for state sovereignty. For example, the majority’s concern for state sovereignty prompted it to warn against limiting the authority of judges to make factual determinations affecting “the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of statutorily prescribed fines and orders of restitution.”⁵⁵ Although the statement was dicta, it was in tension with *Apprendi*, which had not distinguished among various types of punishments in speaking of the jury’s role.⁵⁶ And the dictum was at even greater odds with the Thomas concurrence, in which Justice Thomas stated that his rule would apply to fines.⁵⁷

48. *Id.* at 563 (plurality opinion).

49. 555 U.S. 160 (2009).

50. *Id.* at 163–64.

51. *Id.* at 168.

52. *Id.* at 170.

53. *See id.* at 168–69.

54. *See id.* at 173–77 (Scalia, J., dissenting).

55. *Id.* at 171.

56. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

57. *See id.* at 501 (Thomas, J., concurring) (“[I]f the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact—such as a fine that is proportional to the value of stolen goods—that fact is also an element.”).

2. *The Current View of Apprendi*

The limitations imposed by *Harris* and *Ice* proved short-lived. The Court overruled *Harris*⁵⁸ and disregarded *Ice*'s caution regarding criminal fines.⁵⁹ The Court's newfound refusal to distinguish between "sentencing facts" and elements of a crime was largely responsible for these holdings.

In *Southern Union Co. v. United States*,⁶⁰ the Court held unconstitutional the imposition of a fine tied to a judicial determination of how many days the defendant corporation had been in violation of the criminal statute.⁶¹ The bulk of the majority opinion focused on defining the jury trial right in relation to "the historical role of the jury at common law."⁶² The majority acknowledged that judges often, but not always, exercised discretion with respect to assessing fines.⁶³ But whether common law judges had some sentencing discretion was not the "salient question."⁶⁴ Instead, the key consideration was "what role the jury [had] played in prosecutions for offenses that *did peg the amount of a fine to the determination of specified facts*."⁶⁵ Examining treatises and cases—several of which Justice Thomas had relied upon in *Apprendi*⁶⁶—the Court found that for fines yoked to particular facts—such as the value of damaged or stolen property—the triggering facts had "to be alleged in the indictment and proved to the jury."⁶⁷

The Court, therefore, rejected a distinction—proposed by the Government⁶⁸ and by dissenting Justice Stephen Breyer⁶⁹—between elements of a crime and "sentencing facts."⁷⁰ The sentencing-facts distinction supposed a difference between facts defining the elements of a crime and facts quantifying the particular harm inflicted.⁷¹ The majority, however, observed that *Apprendi* had rejected a similar distinction and expressed doubts about its coherence.⁷²

Implicit in the Court's rejection of the distinction between sentencing facts and elements was an increasing openness to the rule advanced by the Thomas

58. *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013).

59. See *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012).

60. *Id.* at 2344.

61. *Id.* at 2348–49.

62. *Id.* at 2353 (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009)).

63. *Id.*

64. *Id.*

65. *Id.* (emphasis added).

66. Compare *id.* at 2253–55, with *Apprendi v. New Jersey*, 530 U.S. 466, 501–18 (2002) (Thomas, J., concurring). Both opinions discuss *Ritchey v. State*, 7 Blackf. 168 (Ind. 1844), *United States v. Woodruff*, 68 F. 536 (D. Kan. 1895), *Hope v. Commonwealth*, 50 Mass. 134 (1845), *Commonwealth v. Smith*, 1 Mass. 245 (1 Will.) (1804), and JOEL PRENTISS BISHOP, 1 COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE (2d ed. 1872).

67. *Southern Union Co.*, 132 S. Ct. at 2253–54.

68. *Id.* at 2356.

69. *Id.* at 2357 (Breyer, J., dissenting).

70. *Id.* at 2357 (majority opinion).

71. See *id.* at 2359–60 (Breyer, J., dissenting).

72. See *id.* at 2356 (majority opinion).

concurrence in *Apprendi*. The Court made this shift explicit its next term in *Alleyne v. United States*.⁷³

Overruling *Harris*, the Court held in *Alleyne* that juries must find the facts triggering mandatory minimums.⁷⁴ Justice Thomas wrote for the majority. Reiterating sentiments that he expressed in *Apprendi*, Justice Thomas observed that the logic of *Apprendi* applies with equal force to facts triggering a mandatory minimum sentence.⁷⁵ For regardless of whether a factual finding affects the statutory maximum or statutory minimum, he explained, it alters the “prescribed range of sentences to which a criminal defendant is exposed.”⁷⁶

Only a plurality of the Court joined the portion of the opinion summarizing the historical analysis in Justice Thomas’s *Apprendi* concurrence,⁷⁷ but the rule adopted by the majority unmistakably rests on the same historical foundation. The majority opinion cites repeatedly to the Thomas concurrence in *Apprendi*.⁷⁸ And the majority ultimately reaches the same conclusion that a jury must find the facts affecting ““what punishment is available by law,”” although a judge may still find the facts affecting the imposition of ““a specific punishment within the bounds that the law has prescribed.””⁷⁹ *Alleyne* thus squarely rejects the idea that sentencing facts are distinct from elements of the underlying offense.⁸⁰

C. The Court’s Methodology

From *Apprendi* and its progeny, several features emerge that characterize the Court’s approach to the Sixth Amendment jury trial right. The most uncontroversial is that the right turns on historical practice. Even the dissenters in *Southern Union* and *Alleyne* argued against the Court’s judgment on historical grounds.⁸¹

More controversially, the Court has linked the right to common law practice in the eighteenth and nineteenth centuries. *Apprendi*, *Southern Union*, and *Alleyne* all rest on historical sources that predate and postdate the writing of the Sixth Amendment. The Court thus has not pursued the Founders’ view of the jury trial

73. See *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

74. *Id.* at 2155.

75. *Id.* at 2160.

76. *Id.*

77. *Id.* at 2158–60 (plurality opinion).

78. *Id.* at 2160–63 (majority opinion).

79. *Id.* at 2163 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 519 (2000) (Thomas, J., concurring)).

80. See *id.* at 2166–67 (Breyer, J., concurring) (acknowledging that the distinction between sentencing facts and elements of a crime is inconsistent with *Apprendi* and should be rejected).

81. See *id.* at 2168 (Roberts, C.J., dissenting) (stating that the Court has distorted the Framers’ understanding of the Sixth Amendment); see also *id.* at 2172–73 (Alito, J., dissenting) (stating that there are “strong reasons” to question the accuracy of *Apprendi*’s account of the “original understanding” of the jury trial right); *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2357 (2012) (Breyer, J., dissenting) (arguing the Court’s conclusion is “ahistorical”).

right, but rather an expansive, if not ill-defined, notion of common law practice.⁸²

The Court also reads that history in much the same way as Justice Thomas proposed in *Apprendi*, focusing on the relationship between the indictment and verdict. In fact, the Court's wholesale rejection of sentencing facts leans heavily on the sources and language of the Thomas concurrence.⁸³ In the end, the Court may not have fully reconciled its rejection of sentencing facts with its holding in *Ice*.⁸⁴ But setting aside the question of how sentences for discrete offenses should interact,⁸⁵ *Southern Union* and *Alleyne* make clear that any fact affecting the amount of punishment authorized by law must be found by a jury.⁸⁶

Finally, the Court's focus on the range of punishment authorized by law ties into a particular understanding of the principles vindicated by the jury right. Although even the dissenters in *Apprendi* and *Alleyne* agree that the jury right prevents judicial overreaching and interposes citizens between the criminal defendant and the state,⁸⁷ the majority in *Apprendi* and the plurality in *Alleyne* ascribe to it yet another purpose: "enabl[ing] [a] defendant to predict the legally applicable penalty from the face of [an] indictment."⁸⁸

II. CRIMINAL RESTITUTION AT COMMON LAW

Applying the *Apprendi* framework to criminal restitution requires examining how the criminal law provided for restitution and what role the jury had in awarding it. Historically, there was no single means of obtaining restitution. The type of award varied with the jurisdiction and nature of the prosecution. Yet nearly the same procedural rules applied across the board. These rules tightly bound awards of restitution to the facts alleged in the indictment and proven to the jury. This Note will focus on four areas of interest: restitution awarded under the appeal of felony, restitution awarded under the indictment of felony, restitution awarded as damages, and restitution awarded under early American statutes.

82. See *Alleyne*, 133 S. Ct. at 2172–73 (Alito, J., dissenting) (stating that there are "strong reasons" to question the accuracy of *Apprendi*'s account of the "original understanding" of the jury trial right); see also Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1123–24 (2001) (noting that the Court has remarked on the absence of direct historical evidence for how courts dealt with *Apprendi*-like questions during the Founding era); Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1236 (2012) ("Whatever the merit of the Court's concern for erosion of the jury right, it is not originalist.").

83. See *supra* Part I.B.

84. If a legislature requires a judge to impose sentences concurrently unless she first finds certain facts, the judge who does so arguably increases the penalty to which the defendant is exposed. See *Oregon v. Ice*, 555 U.S. 160, 173 (2009) (Scalia, J., dissenting).

85. The Court has read *Ice* as being limited to this situation. See *Southern Union Co.*, 132 S. Ct. at 2352 (majority opinion).

86. See *supra* Part I.B.

87. See *Apprendi v. New Jersey*, 530 U.S. 466, 547–48 (O'Connor, J., dissenting); *Alleyne*, 133 S. Ct. at 2169 (Roberts, C.J., dissenting).

88. *Alleyne*, 133 S. Ct. at 2161 (plurality opinion) (quoting *Apprendi*, 530 U.S. at 478).