

volved.<sup>86</sup> Whatever the merits of *Perry*'s ultimate due process holding, the Court's justification of its holding through a retroactive revision of its existing eyewitness identification cases exemplifies a form of analysis that risks introducing unconstitutional changes into constitutional doctrine.

In light of the Supreme Court's consistent defense of the state-action requirement, the Court in *Perry* reached the right outcome. Yet the majority's misleading renunciation of reliability as the animating due process concern behind its eyewitness identification cases provides an unsatisfying groundwork for that result. *Perry* has already drawn fire for its refusal to safeguard defendants from an increasingly renounced form of courtroom evidence.<sup>87</sup> The case may stand also as a reminder of the importance of using precedent judiciously — and exactly — when venturing out on novel constitutional terrain.

#### D. Sixth Amendment

1. *Sentencing — Factfinding in Sentencing for Criminal Fines.* — At the dawn of the new millennium, the Supreme Court ushered in a new age of the constitutional law of sentencing with its decision in *Apprendi v. New Jersey*.<sup>1</sup> In that case, the Court established the principle that under the Fifth and Sixth Amendments, “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.”<sup>2</sup> The Court incrementally and consistently expanded the rule's scope over the next decade before refusing to extend it to a judge's determination of whether to impose consecutive or concurrent sentences of confinement in *Oregon v. Ice*.<sup>3</sup> However, the lull in *Apprendi*'s expansion was short lived. Last Term, in *Southern Union Co. v. United States*,<sup>4</sup> the Court extended the *Apprendi* rule to sentences of criminal fines.<sup>5</sup> Dicta in the majority's opinion suggest that *Apprendi*'s limits are coextensive with the Sixth Amendment right

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<sup>86</sup> See, e.g., *Connelly*, 479 U.S. at 166–67 (discussing the several policy interests supporting a state-action requirement in due process claims).

<sup>87</sup> See, e.g., Deborah Davis & Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 NEW ENG. L. REV. 769, 784 (2012) (terming *Perry* “a great disappointment” for failing to consider the dangers of unreliable eyewitness evidence); Garrett, *supra* note 2, at 454 (critiquing *Perry* for failing to reform criminal procedure “to promote greater accuracy and to prevent wrongful convictions”).

<sup>1</sup> 530 U.S. 466 (2000). Justice O'Connor presciently noted that the case would “surely be remembered as a watershed change in constitutional law.” *Id.* at 524 (O'Connor, J., dissenting).

<sup>2</sup> *Id.* at 476 (majority opinion) (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)) (internal quotation marks omitted). *Jones* involved a federal statute, and *Apprendi* extended its rule to the states through the Fourteenth Amendment. See *id.*

<sup>3</sup> 129 S. Ct. 711 (2009).

<sup>4</sup> 132 S. Ct. 2344 (2012).

<sup>5</sup> *Id.* at 2348–49, 2357.

to trial by jury. Such a broad reading of *Apprendi* sweeps too wide, bringing within its scope quasi-civil sanctions such as restitution and forfeiture. The Court should have articulated a meaningful distinction between punitive sentences and quasi-civil sanctions; applying *Apprendi*'s protections to the latter will place unnecessary burdens on the criminal justice system.

Southern Union Company, a natural gas transporter and distributor, performed a mercury reclamation program in Rhode Island in the early 2000s.<sup>6</sup> After a disruption in the program, Southern Union stopped processing the reclaimed mercury, instead storing it at a local facility in plastic bags submerged in a “kiddie” pool and in poorly secured plywood cabinets.<sup>7</sup> In September 2004, three young vandals broke into the facility, discovered the stored mercury and, while playing with it, spilled it around the grounds of the facility and in a nearby residential complex.<sup>8</sup> Southern Union's discovery of the spill three weeks later prompted a full investigation, during which the entire apartment complex was evacuated and its 150 residents were displaced for two months.<sup>9</sup>

The federal government charged Southern Union with, among other things, three counts of violating the Resource Conservation and Recovery Act of 1978.<sup>10</sup> After a nearly four-week trial in the U.S. District Court for the District of Rhode Island, a jury returned a verdict of guilty on one of those counts: knowingly storing a hazardous waste without a permit from “on or about September 19, 2002 to October 19, 2004.”<sup>11</sup> Because the statutory fine for that offense is “not more than \$50,000 for each day of violation”<sup>12</sup> and the verdict form indicated that the violation spanned as many as 762 days, the presentence report calculated a maximum statutory fine of \$38.1 million.<sup>13</sup>

Southern Union challenged the presentence report for violating *Apprendi*'s requirement that any fact that increases the maximum authorized punishment must be found by a jury, arguing that the verdict form was too ambiguous to establish that the jury found beyond a reasonable doubt that Southern Union had been storing mercury for the full 762 days.<sup>14</sup> Judge Smith agreed with Southern Union that “[b]ecause the maximum statutory penalty is tied to the length of the

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<sup>6</sup> United States v. S. Union Co., 643 F. Supp. 2d 201, 205–06 (D.R.I. 2009).

<sup>7</sup> *Id.* at 206.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; United States v. S. Union Co., 630 F.3d 17, 24 (1st Cir. 2010).

<sup>10</sup> 42 U.S.C. §§ 6901–6992k (2006); see *S. Union*, 643 F. Supp. 2d at 206.

<sup>11</sup> United States v. S. Union Co., Cr. No. 07-134 S., 2009 WL 2032097, at \*1–2 (D.R.I. July 9, 2009).

<sup>12</sup> 42 U.S.C. § 6928(d).

<sup>13</sup> *S. Union*, 2009 WL 2032097, at \*1.

<sup>14</sup> *Id.*

violation, *Apprendi* and its progeny requires [sic] the jury, and not the Court, to find the dates needed to calculate the maximum fine.”<sup>15</sup> However, he found that there was no *Apprendi* violation because the “on or about” language from the verdict indicated that the conduct had begun “reasonably near” September 19, 2002, and that “the Court is free, as the holding of *Ice* makes clear, to find facts that *pinpoint* the maximum fine.”<sup>16</sup> Thus, the judge rejected Southern Union’s objection and set the maximum fine at \$38.1 million.<sup>17</sup> The court ultimately imposed a sentence of \$18 million: a \$6 million “fine” and a \$12 million “community service obligation.”<sup>18</sup> Southern Union appealed to the U.S. Court of Appeals for the First Circuit.

Chief Judge Lynch, writing for a unanimous panel,<sup>19</sup> affirmed the imposition of the fine.<sup>20</sup> She disagreed with the trial court that the jury verdict had established bookends to the criminal behavior, and she conceded that the “[t]he district court could not conclude *from the verdict form* the number of days of violation the jury had necessarily found.”<sup>21</sup> Thus, if *Apprendi* did apply to criminal fines, then the statutory maximum could not be determined from the jury’s verdict, the error was not harmless, and the sentence would have to be vacated.<sup>22</sup> After a lengthy discussion of whether *Apprendi* applies to criminal fines, the court decided that *Oregon v. Ice* had resolved the “close” issue in the negative.<sup>23</sup> In *Ice*, the Supreme Court analyzed the “history at common law” of judges’ determining whether sentences should be concurrent or consecutive.<sup>24</sup> The First Circuit, relying on *Ice*, undertook an analogous historical analysis with respect to criminal fines. Quoting an academic article about criminal punishment in the American colonies, the court found that judges historically had broad discretion to determine the amount of a fine.<sup>25</sup> The First Circuit also gave

<sup>15</sup> *Id.* at \*3.

<sup>16</sup> *Id.* at \*4 (emphasis added). The court’s limited, underdeveloped discussion of *Ice* entailed a single quotation followed by the conclusion “that *Apprendi* does not prevent a Court from engaging in judicial fact finding to determine the amount of a penalty *within* the prescribed statutory maximum range.” *Id.* at \*3 (citing *Oregon v. Ice*, 129 S. Ct. 711, 719 (2009)).

<sup>17</sup> *Id.* at \*4.

<sup>18</sup> *United States v. S. Union Co.*, 630 F.3d 17, 32 (1st Cir. 2010).

<sup>19</sup> Chief Judge Lynch was joined by Judges Selya and Thompson.

<sup>20</sup> *S. Union*, 630 F.3d at 39.

<sup>21</sup> *Id.* at 36 (emphasis added).

<sup>22</sup> *Id.* at 36–37.

<sup>23</sup> *Id.* at 22, 33–36.

<sup>24</sup> *Id.* at 33–34.

<sup>25</sup> See *id.* at 35 (“[T]he range was apparently without limit except insofar as it was within the expectation on the part of the court that it would be paid.” (quoting Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 350 (1982)) (internal quotation marks omitted)). The prosecution “present[ed] strong evidence of historic practice,” *id.*, which consisted of that and other citations to academic articles and books, see Brief for the Appellee at 42 & n.23, *S. Union*, 630 F.3d 17 (No. 09-2403).

“great weight” to *Ice*’s dictum that “[t]rial judges often find facts about the nature of the offense or the character of the defendant in determining . . . the imposition of statutorily prescribed fines.”<sup>26</sup> The Supreme Court granted certiorari in order to resolve a circuit split.<sup>27</sup>

The Supreme Court reversed and remanded.<sup>28</sup> Writing for the Court, Justice Sotomayor<sup>29</sup> held that the Sixth Amendment requires that any fact that increases the maximum sentence of a criminal fine must be submitted to the jury.<sup>30</sup> After reiterating the basic premise of *Apprendi*, the Court decided that it could find “no principled basis . . . for treating criminal fines differently” from terms of imprisonment or the death penalty, which were already well within the scope of *Apprendi*’s rule.<sup>31</sup> Justice Sotomayor emphasized that in the *Apprendi* line of cases, the Court “ha[d] never distinguished one form of punishment from another.”<sup>32</sup>

The Court agreed with the First Circuit that the reasoning of *Ice* controlled and that it was “correct to examine the historical record.”<sup>33</sup> However, the Court disagreed with the lower court’s analysis and held that “the record supports applying *Apprendi* to criminal fines.”<sup>34</sup> In so holding, Justice Sotomayor reviewed eighteenth-century treatises and case law. Conceding that judges often had wide discretion in setting fines, she instead homed in on the more technical issue of “what role the jury played in prosecutions for offenses that did peg the amount of a fine to the determination of specified facts.”<sup>35</sup> In reviewing nineteenth-century cases for larceny, arson, malicious mischief, and embezzlement, as well as some treatises, she concluded that juries historically determined the facts that established a maximum fine.<sup>36</sup> The Court criticized the dissent’s substantial reliance on two obscure Supreme Court cases from the 1800s, arguing that the cases’ ambiguous impli-

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<sup>26</sup> *S. Union*, 630 F.3d at 34 (quoting *Oregon v. Ice*, 129 S. Ct. 711, 719 (2009) (emphasis added)) (internal quotation mark omitted).

<sup>27</sup> *S. Union*, 132 S. Ct. at 2349. The Second and Seventh Circuits had held that the *Apprendi* rule applies to criminal fines. *United States v. Pfaff*, 619 F.3d 172 (2d Cir. 2010) (per curiam); *United States v. LaGrou Distribution Sys., Inc.*, 466 F.3d 585 (7th Cir. 2006). The First Circuit noted these cases, but said that they were unpersuasive because one was decided before *Ice* and the other failed to address its reasoning. See *S. Union*, 630 F.3d at 36 n.17.

<sup>28</sup> *S. Union*, 132 S. Ct. at 2357.

<sup>29</sup> Justice Sotomayor was joined by Chief Justice Roberts and Justices Scalia, Thomas, Ginsburg, and Kagan.

<sup>30</sup> *S. Union*, 132 S. Ct. at 2348–49.

<sup>31</sup> *Id.* at 2350.

<sup>32</sup> *Id.* at 2351.

<sup>33</sup> *Id.* at 2353.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2354–55.

cations for the Sixth Amendment “d[id] not outweigh the ample historical evidence” the Court found to be in favor of its decision.<sup>37</sup>

Justice Breyer dissented,<sup>38</sup> disagreeing with the Court’s interpretation of the historical record and its failure to weigh the interest of the states in “devising solutions to difficult legal problems.”<sup>39</sup> First, he cited eighteenth-century treatises to establish that, under English common law, judges generally had unlimited discretion in setting a fine, and that cases in which Parliament declared that a fine would be tied to a jury determination were deviations from the general rule.<sup>40</sup> He disagreed vigorously about early American practice, finding that “the range of the fine was ‘apparently without limit except insofar as it was within the expectation of the court that it would be paid,’”<sup>41</sup> and that the Supreme Court case of *United States v. Tyler*<sup>42</sup> disposed of the issue by holding that “the jury’s finding as to valuation was not *relevant*” to the imposition of a fine.<sup>43</sup> Justice Breyer argued that the Court erred by only considering cases in which a statute “peg[ged] the amount of a fine to the determination of specified facts,”<sup>44</sup> and that the mid-nineteenth-century practices of states in which juries determined sentences were irrelevant because those courts “did not believe that the constitutional right to jury trial compelled [those practices].”<sup>45</sup>

Justice Breyer argued that the Court’s decision intruded upon states’ sovereign right to efficiently and judiciously administer public policy, the result being that states would either increase judges’ discretion in setting fines or grossly limit discretion in order to avoid forcing the jury to make too many finely pointed factual findings.<sup>46</sup> Finally, Justice Breyer questioned the benefit of jury protections in a system in which plea bargaining resolves most criminal cases. He concluded by suggesting that “by unnecessarily complicating the trial process,” the present decision counterproductively “nudges” the criminal justice system toward one in which the judge and jury play a minimal role and the prosecutor wields immense discretionary power.<sup>47</sup>

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<sup>37</sup> *Id.* at 2355–56.

<sup>38</sup> Justice Breyer was joined by Justices Kennedy and Alito.

<sup>39</sup> *S. Union*, 132 S. Ct. at 2369 (Breyer, J., dissenting) (quoting *Oregon v. Ice*, 129 S. Ct. 711, 719 (2009)) (internal quotation mark omitted).

<sup>40</sup> *Id.* at 2361–64.

<sup>41</sup> *Id.* at 2364 (quoting Preyer, *supra* note 25, at 350).

<sup>42</sup> 11 U.S. (7 Cranch) 285 (1812).

<sup>43</sup> *S. Union*, 132 S. Ct. at 2365 (Breyer, J., dissenting). Justice Breyer buttressed his reliance on this case by pointing to Justice Story’s reaffirmation of *Tyler*’s holding in *United States v. Mann*, 26 F. Cas. 1153 (C.C.D.N.H. 1812) (No. 15,717). *S. Union*, 132 S. Ct. at 2366.

<sup>44</sup> *S. Union*, 132 S. Ct. at 2366 (Breyer, J. dissenting) (quoting *id.* at 2353 (majority opinion)) (internal quotation marks omitted).

<sup>45</sup> *Id.* at 2367.

<sup>46</sup> *Id.* at 2370.

<sup>47</sup> *Id.* at 2371–72.

*Southern Union* is a plausible expansion of the *Apprendi* rule,<sup>48</sup> the plain language of which conceivably covers fines. However, the historical analysis employed in *Ice*, and now *Southern Union*, may be ineffective at addressing many contemporary sentencing issues. Because there is no limiting principle to *Southern Union*'s formalistic interpretation of *Apprendi*, its logic may compel lower courts to extend it to characteristically civil sanctions that rely on an underlying criminal conviction. The Court should have used some of the core purposes of the criminal law — punishment and retribution — to articulate a substantive limiting principle to *Apprendi*'s rule.

Despite the *Southern Union* majority's purported reliance on the historical record à la *Ice*, the Court espoused a formalistic view of *Apprendi*, suggesting that any "penalt[y] inflicted by the sovereign for the commission of offenses" following a jury trial should be covered within the scope of *Apprendi*.<sup>49</sup> There is a reasonable likelihood that this expansive and formalistic language will take precedence in future decisions as the historical record fails to provide satisfactory resolution of future cases,<sup>50</sup> particularly since the jury right need only "be informed" — and therefore not necessarily be controlled — by "the historical role of the jury at common law."<sup>51</sup> Indeed, the dispute over the historical record between the majority and the dissent in *Southern Union* demonstrates the record's malleability and its failure to conclu-

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<sup>48</sup> *Southern Union* is just the latest in a lengthy series of such extensions. *Apprendi* itself held unconstitutional a statute that permitted a judge to enhance a sentence for unlawful possession of a firearm from a second-degree offense to a first-degree offense by finding by a preponderance of the evidence that the crime was committed with a racial motive. *Apprendi v. New Jersey*, 530 U.S. 466, 491–92 (2000). That holding has since been extended to require jury factfinding beyond a reasonable doubt for numerous elements of sentencing. See *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002) (aggravating factors required to authorize death penalty); *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (facts used to increase imprisonment beyond "standard range"); *United States v. Booker*, 543 U.S. 220, 226–27 (2005) (facts used to increase range of imprisonment in the then-mandatory Federal Sentencing Guidelines). In 2009, this expansion paused when the Court held that the Constitution permits a judge to find the facts necessary to impose consecutive, rather than concurrent, sentences. *Oregon v. Ice*, 129 S. Ct. 711, 717 (2009). In *Ice*, the Court announced that the "twin considerations" of "historical practice and respect for state sovereignty . . . counsel[ed] against extending *Apprendi*'s rule." *Id.* A strong four-member dissent bristled against this limitation of *Apprendi* and argued for the straightforward application of a formalistic any-fact-that-increases-punishment interpretation. See *id.* at 723 (Scalia, J., dissenting).

<sup>49</sup> *S. Union*, 132 S. Ct. at 2350.

<sup>50</sup> For example, the historical record is ambiguous regarding the role of a jury in forfeiture proceedings, since at common law such proceedings were brought against the *rem* and there was no criminal defendant that could assert a constitutional right. See, e.g., *The Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."). See also cases cited *infra* note 85.

<sup>51</sup> *S. Union*, 132 S. Ct. at 2353 (emphasis added) (quoting *Ice*, 129 S. Ct. at 718) (internal quotation mark omitted).

sively resolve the historical understanding of when jury factfinding is required.<sup>52</sup>

Rather than *Apprendi*'s being limited by historical practice, the dicta of *Southern Union* indicate that *Apprendi* has no internal limits: its scope is coextensive with the jury trial right generally.<sup>53</sup> However, such a logical relationship is unjustified. Although it is true that every offense a legislature defines in its criminal code is "criminal," not every sanction that accompanies a criminal conviction necessarily partakes of the "special stigma and [the] special punishment" of criminality.<sup>54</sup> The legislature's "broad power to define crimes and their punishments"<sup>55</sup> arguably includes the power to impose alongside a criminal conviction quasi-civil sanctions not requiring a jury finding beyond a reasonable doubt.<sup>56</sup>

A criminal conviction can yield many postconviction proceedings that are not properly called "criminal punishment." For example, then-Chief Judge Richard Posner once asserted that criminal restitution is not criminal, but rather civil, because its purpose is compensatory — to allow a person who would otherwise be entitled to recover damages in tort "to recover his damages in a summary proceeding ancillary to a criminal prosecution."<sup>57</sup> Other examples include civil forfeiture,<sup>58</sup> deportation,<sup>59</sup> and even an order to execute mortgage satisfactions following a fraud conviction.<sup>60</sup>

To align better with the core purposes of criminal law, *Apprendi* should only extend to those penalties that are inherently punitive, rather than predominantly deterrent or compensatory.<sup>61</sup> Criminal punish-

<sup>52</sup> See Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 915 (1993) ("[T]he Court's presentation of history as an objective basis for decisions really has subjective choices masquerading as objective constraints.").

<sup>53</sup> See *S. Union*, 132 S. Ct. at 2351 ("Where a fine is so insubstantial that the underlying offense is considered 'petty,' the Sixth Amendment right of jury trial is not triggered, and no *Apprendi* issue arises.").

<sup>54</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 98 n.2 (1986) (Stevens, J., dissenting).

<sup>55</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 524 (2000) (O'Connor, J., dissenting).

<sup>56</sup> Cf. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

<sup>57</sup> *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999).

<sup>58</sup> *United States v. Ursery*, 518 U.S. 267, 287–88 (1996).

<sup>59</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

<sup>60</sup> *United States v. Agboola*, 417 F.3d 860, 870 (8th Cir. 2005).

<sup>61</sup> This comment takes its foundational tenets from expressive and retributive theories of criminal law. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597–601 (1996). Opposed to this view of criminal law, some scholars have argued that the criminal justice system primarily serves other ends, less morally charged and more unabashedly utilitarian. See, e.g., Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985) (proposing that criminal sanctions are deterrents used when tort damages do not provide sufficient deterrence); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 165–66 (2005) (arguing for a forward-looking "preventive model" of criminal punishment).

ment cannot be, as the *Apprendi* line's increasing scope suggests, all "penalties inflicted by the sovereign for the commission of offenses."<sup>62</sup> This broad language would logically cover civil enforcement pursued by state regulators, which is clearly not criminal and not covered by *Apprendi*. This *reductio ad absurdum* highlights an important point: many secondary purposes of criminal penalties, such as deterrence and restitution, could also be satisfied by civil sanctions.<sup>63</sup> Rather, the dual purposes of moral condemnation and punishment distinguish the criminal system from the civil<sup>64</sup> and should therefore guide the application of its protections. It follows that courts must affirmatively enforce constitutional criminal protections for sanctions that are clearly intended to be stigmatic or punitive. However, since the legislature is the governmental organ most competent to assess the purposes of particular sanctions and *Ice* instructs the courts to show "respect for state sovereignty,"<sup>65</sup> the courts should only extend *Apprendi* protection to those sanctions that the courts can confidently say are specially stigmatic or predominantly punitive.<sup>66</sup>

The Court's reluctance to perform a purposive inquiry — to investigate the substance of the sanction for punitive purposes — is not for lack of precedent. Courts, including the Supreme Court, have not been afraid to use the concept of punitiveness to police the line between "criminal" and "civil" in other contexts.<sup>67</sup> For example, in *Kennedy v. Mendoza-Martinez*,<sup>68</sup> the Court held that a statute that imposed a sanction of forfeiture of citizenship against draft dodgers was so punitive that defendants could not suffer the sanction without being

<sup>62</sup> *S. Union*, 132 S. Ct. at 2350.

<sup>63</sup> Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 403–05 (1958).

<sup>64</sup> See *In re Winship*, 397 U.S. 358, 363–64 (1970) (stating that the requirement of proof beyond a reasonable doubt protects a defendant's potential loss of liberty and "the certainty that he would be stigmatized by the conviction," *id.* at 363); see also Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 804 (1997) (discussing "punishment as blaming" in criminal law); Douglas Husak, *Why Criminal Law: A Question of Content?*, 2 CRIM. L. & PHIL. 99, 100 (2008) ("[T]he most important difference between the criminal law and other bodies of law . . . is that the former subjects offenders to *state punishment*.").

<sup>65</sup> *Oregon v. Ice*, 129 S. Ct. 711, 717 (2009).

<sup>66</sup> Cf. *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (holding that a proceeding to enforce a punitive tax "was the functional equivalent of a successive criminal prosecution" barred by the Double Jeopardy Clause).

<sup>67</sup> There is a large literature on the civil-criminal divide and the courts' role in defining it. See, e.g., Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999). But see Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1797–98 (1992) (suggesting that the criminal and civil systems overlap).

<sup>68</sup> 372 U.S. 144 (1963).



provided with the full set of procedural protections afforded to criminal defendants.<sup>69</sup> Similarly, in *United States v. Bach*,<sup>70</sup> the court held that the Ex Post Facto Clause does not apply to criminal restitution because the sanction is functionally a compensatory tort remedy.<sup>71</sup> Furthermore, in determining whether a contempt order — regardless of whether it results in a fine or in imprisonment — qualifies as civil or criminal, the Court’s analysis hinges on whether the order is coercive or punitive.<sup>72</sup> Such a rich case law that untangles the underlying purposes of sanctions provides the kind of guidance that could allow the Court to perform a more substantive analysis in the *Apprendi* context.

Under a purposive test, the holding of *Southern Union*, namely that *Apprendi* extends to *all* fines imposed following jury trials, would be too broad.<sup>73</sup> A legislature can fix a fine with the intent that it serve various purposes — compensatory and equitable as well as punitive — such that the rationale for extending the *Apprendi* rule is significantly diluted. Indeed, the district court had ordered Southern Union to pay both a (purportedly punitive) “fine” and a restitutionary “community service obligation.”<sup>74</sup> Also, there is no meaningful, purpose-driven way to distinguish the multiplier-based fines noted by the Court<sup>75</sup> from civil penalties that are also a multiple of damages<sup>76</sup> except for the facile observation that the former are criminal and the latter civil.

Had the *Southern Union* Court adopted a purposive inquiry, it would have been forced to address the question of whether *Apprendi* ought to protect corporate defendants.<sup>77</sup> First, fines against corporations do not satisfy the same goal of *punishment* that animates the pro-

<sup>69</sup> *Id.* at 165–67.

<sup>70</sup> 172 F.3d 520 (7th Cir. 1999).

<sup>71</sup> *Id.* at 522–23; *see also* *United States v. Nichols*, 169 F.3d 1255, 1279–80 (10th Cir. 1999) (holding that the Ex Post Facto Clause does not apply to criminal restitution because it lacks the “punitive” purpose of criminal sanctions).

<sup>72</sup> *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 829 (1994).

<sup>73</sup> Under such a test, *Apprendi*’s previous application to substantially punitive punishments like imprisonment and the death penalty would continue to be justified.

<sup>74</sup> *United States v. S. Union Co.*, 630 F.3d 17, 32, 37 (1st Cir. 2010).

<sup>75</sup> *S. Union*, 132 S. Ct. at 2351 n.4 (pointing to state and federal statutes authorizing fines of up to twice the gain or loss resulting from unlawful activity, or up to three times the value of a bribe).

<sup>76</sup> For example, “the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130–31 (1969).

<sup>77</sup> Rather, the Court only briefly mentioned corporate criminality. *See S. Union*, 132 S. Ct. at 2350 (“[Fines] are frequently imposed today, especially upon organizational defendants who cannot be imprisoned.”). The Court should have given more treatment to this issue: *Ice*’s historical analysis weighs against extending *Apprendi* to corporations because, at the time of the Framing, corporations could not be criminally prosecuted at common law. *See* William F. Jung, Note, *Recognizing a Corporation’s Rights Under the Indictment Clause*, 1983 U. ILL. L. REV. 477, 495–96.

tections that flow from the Sixth Amendment, largely because corporations lack the same moral character as an individual defendant.<sup>78</sup> Indeed, many of the offenses for which corporations are criminally liable, like the environmental violation of which Southern Union was convicted, have a more regulatory than moral flavor.<sup>79</sup> If *Apprendi* provides jury protection for punishments, then its aegis should extend necessarily to corporations only if sanctions can rightfully be said to *punish* them. Indeed, many “criminal” actions against corporations are “regulatory or public welfare offenses, rather than true crimes,”<sup>80</sup> precisely the types of offenses for which the full panoply of criminal protections are unnecessary.<sup>81</sup> Although the law entitles corporations to a jury trial on the question of guilt or innocence of a serious crime,<sup>82</sup> *Apprendi*’s rule does not necessarily extend to facts that increase the effective sanction where there is already a valid conviction. This is the lesson of *Ice*. Indeed, corporations do not enjoy all of the constitutional protections enjoyed by natural persons accused of crimes,<sup>83</sup> so there is no constitutional principle necessitating that, even if fines are generally within *Apprendi*’s rule, these protections should extend to institutional defendants too.<sup>84</sup>

Concededly, simply establishing a purposive test would not conclusively answer all *Apprendi* questions, such as whether the rule extends to civil forfeiture proceedings, whose complicated case law vacillates on whether forfeiture is a punitive sanction.<sup>85</sup> Despite possible ques-

<sup>78</sup> See, e.g., V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1482 n.26 (1996) (“[S]ome nineteenth-century commentators argued that the criminal law required that the convicted defendant be morally blameworthy and have the capacity to suffer from punishment, and corporations could not fulfill either of these requirements.”).

<sup>79</sup> See, e.g., Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 425–26 (1963).

<sup>80</sup> John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 343 (2004).

<sup>81</sup> See RICHARD S. GRUNER, CORPORATE CRIMINAL LIABILITY AND PREVENTION § 2.02, at 2-8 to -9 (2012) (“Except where policies underlying protections afforded to individuals are also served by applying equivalent protections to corporations, providing similar protections to corporations and individuals is unwarranted and may unduly frustrate the attainment of public policy goals.”).

<sup>82</sup> See, e.g., *United States v. Yang*, 144 F. App’x 521, 523 (6th Cir. 2005); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 663 (2d Cir. 1989).

<sup>83</sup> See *Bellis v. United States*, 417 U.S. 85, 89–90 (1974) (collective entities cannot assert Fifth Amendment right against self-incrimination); *United States v. Yellow Freight Sys., Inc.*, 637 F.2d 1248, 1253–55 (9th Cir. 1980) (corporation subject to criminal fine not entitled to grand jury indictment); see also Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1643–45 (1982) (documenting patchy decisions regarding constitutional rights for corporations).

<sup>84</sup> Of course, the canard “corporations are people too” has been given new life in the age of *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>85</sup> Compare *United States v. Ursery*, 518 U.S. 267, 274 (1996) (holding that the Double Jeopardy Clause did not forbid a civil forfeiture proceeding, in part because “such actions . . . do not im-

tions about whether a sanction is predominantly punitive, the resolution of such a case would depend upon a simple determination by a court, with a healthy amount of deference to legislative purpose. So far, many of the courts that have decided whether a defendant is entitled to a jury during restitution or forfeiture proceedings have responded in the negative.<sup>86</sup> However, by extending *Apprendi* to a characteristically regulatory sanction imposed against an institutional defendant, *Southern Union* suggests that if the defendant is entitled to a jury for the underlying conviction, then he should be entitled to a jury on facts that determine all accompanying penalties. In *In re Winship*,<sup>87</sup> which canonized the reasonable-doubt standard, Justice Brennan asserted that that high barrier was interposed between a defendant and the state in order to protect him from loss of liberty and the stigma of conviction.<sup>88</sup> By opting for mathematical rigor and simplicity, *Southern Union* strays from the core concerns of criminal procedure articulated in *Winship*.

2. *Confrontation Clause — Forensic Evidence.* — In 2004, the Supreme Court gave the Sixth Amendment's Confrontation Clause new life, independent of the rules of evidence, in *Crawford v. Washington*.<sup>1</sup> *Crawford's* interpretation of the Confrontation Clause bars admission of out-of-court testimonial statements unless the out-of-court witness is unavailable to testify and the defendant had a previous opportunity to cross-examine the witness.<sup>2</sup> In 2009, in *Melendez-Diaz v. Massachusetts*,<sup>3</sup> the Supreme Court held that forensic lab reports are testimonial statements subject to the Confrontation Clause. And more recently, in *Bullcoming v. New Mexico*,<sup>4</sup> the Court held that cross-examination of a surrogate witness — in lieu of cross-examination of the analyst who signed the lab report or conducted the forensic testing — is insufficient to satisfy the Confrontation Clause.

Last Term, in *Williams v. Illinois*,<sup>5</sup> the Supreme Court ruled that, in certain circumstances, the Confrontation Clause does not bar an expert witness from testifying on the basis of a forensic lab report prepared by another analyst, even when the defendant was never given

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pose punishment"), *with* *Austin v. United States*, 509 U.S. 602, 622 (1993) (holding that a civil forfeiture procedure was "punishment" within the context of the Excessive Fines Clause).

<sup>86</sup> *E.g.*, *United States v. Alamoudi*, 452 F.3d 310, 315 (4th Cir. 2006) (refusing to extend the Sixth Amendment to forfeiture orders); *Dohrmann v. United States*, 442 F.3d 1279, 1281 (11th Cir. 2006) (refusing to extend the Sixth Amendment to restitution orders).

<sup>87</sup> 397 U.S. 358 (1970).

<sup>88</sup> *Id.* at 363–64. *See also* sources cited *supra* note 64.

<sup>1</sup> 541 U.S. 36 (2004).

<sup>2</sup> *See id.* at 68.

<sup>3</sup> 129 S. Ct. 2527 (2009).

<sup>4</sup> 131 S. Ct. 2705 (2011).

<sup>5</sup> 132 S. Ct. 2221 (2012).