

SCALIA, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 99–478

CHARLES C. APPRENDI, JR., PETITIONER v.
NEW JERSEY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
NEW JERSEY

[June 26, 2000]

JUSTICE SCALIA, concurring.

I feel the need to say a few words in response to JUSTICE BREYER’s dissent. It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State— and an increasingly bureaucratic part of it, at that.) The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

As for fairness, which JUSTICE BREYER believes “[i]n modern times,” *post*, at 1, the jury cannot provide: I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years— and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted). Will there be disparities? Of course. But the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which

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he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens.*

In JUSTICE BREYER's bureaucratic realm of perfect equity, by contrast, the facts that determine the length of sentence to which the defendant is exposed will be determined to exist (on a more-likely-than-not basis) by a single employee of the State. It is certainly arguable (JUSTICE BREYER argues it) that this sacrifice of prior protections is worth it. But it is not arguable that, just because one thinks it is a better system, it must be, or is even more likely to be, the system envisioned by a Constitution that guarantees trial by jury. What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee— what it has been assumed to guarantee throughout our history— the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.

JUSTICE BREYER proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says. And the guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury” has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.