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The Tail that Wagged the Dog: Bifurcated Factfinding Under the Federal Sentencing Guidelines and the Limits of Due Process

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THE TAIL THAT WAGGED THE DOG: BIFURCATED FACT-FINDING UNDER THE FEDERAL SENTENCING GUIDELINES AND THE LIMITS OF DUE PROCESS

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If the Due Process Clause were allowed to play its proper role in proceedings under the federal sentencing guidelines,[1] sentencing would often upstage conviction. Federal sentencing hearings now resemble trials in their subject matter, the type of questions they explore, and the significance of their outcome. The resemblance ends only when it comes to process.

Imagine a case in which a defendant has been charged with possession with intent to sell cocaine[2] and possession of a weapon.[3] The defendant, of course, has the right under the Sixth Amendment[4] to trial by jury, to confrontation of adverse witnesses, and to compulsory process. The defendant also has the right under the Due Process Clause to demand that his or her guilt be proven beyond a reasonable doubt,[5] and the right under the Fifth Amendment[6] not to be placed in jeopardy twice for the same offense. Assume that after a trial, a jury convicts this defendant of the cocaine-offense charge, based on evidence that the

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1. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (1992) [hereinafter U.S.S.G.].

2. *See* 21 U.S.C. § 841(a)(1) (1988).

3. *See* 18 U.S.C. § 924(c)(1) (Supp. II 1990) (providing for an additional five-year penalty for possession of a weapon in connection with a violent felony or a drug-trafficking offense).

4. U.S. CONST. amend. VI.

5. *See In re* Winship, 397 U.S. 358 (1970).

6. U.S. CONST. amend. V.

defendant offered to sell three grams of cocaine to an undercover agent, and acquits the defendant of possession of a weapon. At sentencing, the judge will determine the sentence under the deceptively formulaic tables of the federal sentencing guidelines. To select the proper slot on the guidelines grid, the judge must first decide what the "relevant conduct" is: whether the quantity of drugs involved is the three grams the jury heard about, the 1500-kilo shipment from which the government now alleges the defendant got the three grams, or some amount in between.[7] The defendant's sentence will range from a low of 10 to 16 months if the judge decides that only three grams were involved in the offense[8] to a high of 360 months to life if the judge decides that the defendant was involved in a relevant 1500-kilo shipment.[9]

There is no right to trial by jury on this issue[10] and no right to proof beyond a reasonable doubt.[11] The proof offered by the government to support its contention that the defendant was involved in the larger shipment may be hearsay[12] or evidence otherwise inadmissible at trial.[13] It is generally considered to be within the sentencing judge's discretion to decide whether or not to hold an evidentiary hearing on this issue,

7. U.S.S.G., *supra* note 1, § 1B1.3; *see, e.g.*, United States v. Silverman, 889 F.2d 1531 (6th Cir. 1989) (defendant sentenced on the basis of possession of one kilo of cocaine rather than the quarter ounce that was alleged at trial).

8. The Drug Quantity Table of the federal sentencing guidelines, at § 2D1.1(c), provides a base offense level of 12 for possession of less than 25 grams of cocaine. The Sentencing Table at § 5A then provides that for a person with a minimal criminal history category, which I am assuming is the case here, the sentence range at base offense level 12 is 10-16 months. I am also assuming, for the sake of simplicity, that no other sentencing adjustments are relevant.

9. The base offense level for possessing this quantity of cocaine is 42, under which, according to the Sentencing Table, the range of incarceration for someone with a minimal criminal history is 360 months to life imprisonment. Therefore, if the judge finds that the defendant was involved in the larger shipment, the judge must sentence the defendant to at least 360 months or justify a departure from this sentencing range. *See* U.S.S.G., *supra* note 1, § 5K2.0.

10. *See* Spaziano v. Florida, 468 U.S. 447, 459 (1984) (holding that there is no right to jury trial at sentencing).

11. In McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986), the Court upheld a state statute providing for proof of sentencing factors by a preponderance of the evidence. *See infra* part III.B.1 (on standards of proof under the guidelines).

12. *See* 18 U.S.C. § 3661 (1988) (hearsay admissible at sentencing).

13. The Federal Rules of Evidence do not apply at sentencing. *See* FED. R. EVID. 1101(d)(3); U.S.S.G., *supra* note 1, § 6A1.3(a).

Some courts have also permitted evidence seized in violation of the Fourth Amendment to be admitted at sentencing. *See* United States v. McCrory, 930 F.2d 63 (D.C. Cir. 1991) (holding evidence seized in violation of the Fourth Amendment inadmissible, with the possible exception of a seizure made with the purpose of obtaining evidence to enhance the defendant's sentence), *cert. denied*, 112 S.Ct. 885 (1992); United States v. Torres, 926 F.2d 321 (3d Cir. 1991) (holding illegally seized evidence admissible at sentencing); United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y.), *aff'd*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971); Annotation, 22 A.L.R. FED. 852 (1970).

whether or not to allow the defendant to cross-examine the government's witnesses, and whether or not to allow the defendant to call witnesses of his or her own.[14] Some judges exercise this discretion, to the chagrin of the Department of Justice, by conducting full-blown factual hearings that can resemble truncated trials.[15] Others exercise their discretion by finding facts in novel and ingenious ways. One judge, for example, determined the quantity of drugs relevant to a defendant's sentence by referring to the transcript of the testimony of a witness at the earlier trial of the defendant's brother.[16]

Furthermore, the judge may also increase the defendant's sentence by as much as an additional sixty-eight months for possession of a weapon at the time of the offense[17]—even though the jury acquitted the

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14. *See infra* part III.B.4.

15. *See* U.S. DEP'T OF JUSTICE, PROSECUTOR'S HANDBOOK ON SENTENCING GUIDELINES AND OTHER PROVISIONS OF THE SENTENCING REFORM ACT OF 1984 (1987), *in* PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES 444 (Phylis Bamberger ed., 2d ed. 1991) (instructing prosecutors to argue that sentencing hearings should not become minitrials).

16. *See* United States v. Beaulieu, 893 F.2d 1177, 1179-81 (10th Cir.), *cert. denied*, 110 S. Ct. 3302 (1990).

Another interesting example of creative fact-finding occurred in United States v. Turner, 898 F.2d 705, 712 (9th Cir. 1990). In that case, the district court sentenced a defendant who pleaded guilty to conspiring to distribute cocaine base to 41 months, having decided that the applicable base offense level was 20. The court's decision was based on a finding that the defendant had been involved in 20 drug sales, which the judge declared must have involved at least 0.10 grams apiece, for a total of two grams. This precise arithmetic was based on a web of conjecture and mistake. The sentencing judge said in written findings of fact that the number of sales was based on the government informant's trial testimony. However, the appellate court noted that the informant's trial testimony had repeatedly been that the defendant was involved in six to 12 sales. *Id.* at 712. The appellate court speculated that the district judge might have had in mind the preliminary hearing testimony of an agent who testified that the same informant had told him that she had observed 20 sales. The number of sales did not matter at the preliminary hearing or at the trial. The informant, who might have shed some light on the question of which number was correct, does not seem to have been consulted in connection with sentencing. The sentence was vacated and remanded by the appellate court, but with a strong hint to the district court that if the judge were simply to write new findings of fact stating that the number of sales was derived from the preliminary hearing testimony (which was hearsay that conflicted with the trial testimony of the declarant), the same sentence would not be reversed. *Id.* The defendant's position—that if the government was unable to establish that any particular drug quantity was involved, he should have been sentenced at base offense level 12, which does not require any minimum quantity—did not persuade either the district court or the court of appeals. *Id.*

17. U.S.S.G., *supra* note 1, § 2D1.1(b)(1) (firearm possessed during commission of offense increases base offense level by two levels). Under the Sentencing Table, the number of months represented by a two-level increase varies. If the judge were to find that the relevant conduct included only the three grams of cocaine, weapon possession could increase the sentence only by a maximum of five months. *See id.* § 5A (Sentencing Table offense levels 12 to 14). If the judge were to find that the defendant had been involved in a shipment of five to 15 kilos, weapon possession could increase the minimum sentence from 292 to 360 months (offense level 40 to 42); and if the amount involved

defendant on that charge. Because a lower standard of proof is permissible at sentencing,[18] the judge's finding that the defendant in fact had a weapon is not considered inconsistent with the jury's finding that possession of a weapon was not proven beyond a reasonable doubt.[19] Double jeopardy is among the procedural rights that fade away at sentencing.

The system that has evolved in federal court thus accords elaborate procedural protection during first-round decisions on which ten months of an individual's freedom may depend, and few and sporadic protections to similar, final decisions, on which twenty-nine or more years of freedom may depend—simply because one decision has been allocated to a proceeding called a trial and the other to a proceeding called a sentencing. This system also imposes strict procedural obligations on prosecutors who wish to charge a defendant with a particular crime, but then provides them with a shortcut alternative means of having a defendant punished for an additional offense that they might not have been able to prove beyond a reasonable doubt, so long as the defendant has been convicted of a related offense.

Because of our unexamined assumption that sentencing is a distinct and secondary phase of the criminal proceeding, it is generally assumed that these radical differences in procedure are appropriate. In my view, this assumption is unfounded in the brave new world of sentencing under the federal sentencing guidelines and in the current sentencing systems of many states. Our concept of what should happen during the sentencing phase of a criminal proceeding, and the constitutional law that has shaped itself around that concept, derives from a preguidelines world, in which the philosophy underlying sentencing, the nature of the decisions being made at sentencing, and the relative roles of the legislature, sentencing judge, and prosecutor were all different. Sentencing as it is performed under the federal sentencing guidelines demands different

were 1500 kilos, the minimum sentence would increase from 360 months to life imprisonment (offense level 42 to 43).

18. *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986) (holding that the preponderance-of-the-evidence standard satisfied due process in state proceeding in which an enhanced sentence was sought on the basis that defendant had visibly possessed a firearm at the time of the offense).

19. *See, e.g.*, United States v. Rodriguez-Gonzalez, 899 F.2d 177, 179 (2d Cir.), *cert. denied*, 111 S. Ct. 127 (1990) (upholding a sentence enhancement on the basis of possession of a weapon when defendant had been acquitted of possessing that weapon); United States v. Mocciola, 891 F.2d 13, 17 (1st Cir. 1989) (same); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989) (jury acquitted defendant of possession of a weapon charge; defendant's sentence enhancement on basis of possessing weapon upheld on appeal as having met "reliability" standard); United States v. Franco-Torres, 869 F.2d 797, 799 (5th Cir. 1989) (upholding enhancement of defendant's sentence on the basis of possession of a weapon and obstruction of justice, based on agent's testimony). See *infra* text accompanying notes 256-68 for a fuller discussion of these and similar cases.

procedural safeguards and different judicial constraints on the factors that may be considered at sentencing rather than at trial.

A major purpose of this Article is to explore the nature of the relationship between sentencing and conviction under these different philosophies. Part I discusses the choices made by Congress and the Sentencing Commission that resulted in loading the sentencing process with factual decisions, many of which relate to the offense. In my view, no one paid adequate attention to how the changes in sentencing philosophy effected by the guidelines should also have changed the allocation of fact-finding between sentencing and trial. I can find no satisfactory reason, given the philosophy and structure of the guidelines, for leaving so many determinations about the nature of the offense to the sentencing phase. Part II examines the Supreme Court's case law on the constitutional limitations bearing on the sentencing process. In this part, two different aspects of the limitations the Due Process Clause imposes on sentencing are discussed: first, the direct requirement of fair procedure in sentencing; and second, the interrelated issue of what constitutional limitations should be imposed on the ability of any legislature, including Congress, to decide whether an offense-related fact is to be treated as a sentencing factor or as an element of the offense with which the defendant is charged.

I argue that constitutional law in both of these areas is underdeveloped, particularly with regard to federal sentencing. Because the divergence between the procedures provided at trial and at sentencing is so great, too much hinges on the legislature's ability to decide that a factor should be considered as a sentencing factor rather than as an element of the offense, and on the prosecutor's ability to seek an enhanced sentence rather than a conviction based on the defendant's suspected conduct. Constitutional law cannot simultaneously abstain from imposing procedure on sentencing, on the one hand, and from imposing limits on the allocation of sentencing factors, on the other. I argue that the Supreme Court's current law in this area is inadequate and also distinguishable in the context of the federal sentencing guidelines in light of their shift away from judicial discretion and indeterminate sentencing. Part III then discusses procedural due process law as it is being applied by the lower federal courts on such issues as standard of proof, right to confront witnesses, and redundant adjudication of facts. My review of the cases shows that the courts of appeals are stinting on even the meager procedural protection Supreme Court case law should require at federal sentencing proceedings. Finally, I conclude with some recommendations for how the U.S. Sentencing Commission, Congress, and the federal

courts can provide additional guidance to sentencing judges so that the law of sentencing process will not exhibit the same symptoms of disparity and abuse of discretion that led to reformation of the substantive law of sentencing.

I. SENTENCING FACTORS AND PHILOSOPHY UNDER THE GUIDELINES

Most federal courts have been unreceptive to arguments that conducting guidelines sentencing proceedings under preguidelines procedures may violate the Constitution.[20] Recently, however, an increasing (although still relatively small) number of commentators and judges have come to share the perception of the Sentencing Commission that sentencing under the guidelines does demand greater attention to procedure.[21] This conclusion is based on the nature of the factors now routinely considered at sentencing, the mandatory impact[22] of these factors, and the magnitude of their impact on sentences.

While sentencing procedure is a critical issue under the guidelines, to begin analysis with the question of what procedures are appropriate at guidelines hearings would only detract from the more fundamental question of whether the problem is exclusively procedural. Considering the nature of the factors now raised at sentencing proceedings and the magnitude of their impact on sentences leads me to ask why it is necessary, or even appropriate, to address similar and related factual issues in two different proceedings. To put the question another way, why should most

20. *See infra* part III.B.

21. *See* U.S.S.G., *supra* note 1, § 6A1.3 cmt. (concluding that greater formality in sentencing procedure is unavoidable under the guidelines); *see also* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 208-25 (1991) (discussing "serious due process problems" raised by the guidelines); Harvey M. Silets & Susan W. Brenner, *Commentary on the Preliminary Draft of the Sentencing Guidelines Issued by the United States Sentencing Commission in September, 1986*, 77 J. CRIM. L. & CRIMINOLOGY 1069, 1079-86 (1986) (sentencing under the guidelines presents a need for amplified procedural protections, including a heightened burden of proof); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89-92 (1988) (sentencing under the guidelines is likely to require more evidentiary hearings and to pose issues about burden of proof and right of confrontation); Richard Husseini, Comment, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1407 (1990) (sentencing under the guidelines demands a heightened burden of proof).

22. Sentencing under the guidelines is not completely mandatory, of course, because of the judge's power to depart from the guidelines' ranges. *See* U.S.S.G., *supra* note 1, § 5K2.0. But even with this exception, the guidelines are so much closer to mandatory sentencing than to earlier models of discretionary sentencing that I will refer to them, for convenience, as "mandatory." *See generally* Tony Garoppolo, *Downward Departures Under the Federal Sentencing Guidelines*, 26 CRIM. L. BULL. 291 (1990) (discussing the scope of the departure power).

of the factors listed in the *Guidelines Manual* be treated as sentencing factors at all rather than as elements of the relevant offenses?

To the extent that sentencing judges making factual determinations adopt procedures comparable to trial procedures, such as the right of confrontation and the right to call witnesses, the significance of allocating those factual determinations to the sentencing phase is reduced. But no matter how generous a court is with sentencing procedure, the decision to allocate a factual determination to sentencing rather than trial is still highly consequential. Even if courts afford the fullest sentencing hearing imaginable, a defendant confronting a factual charge at the sentencing phase still loses significant procedural protections: He or she will not have a grand or petit jury consider the newly alleged conduct, will not enjoy the standard of proof beyond a reasonable doubt, and will face a range of problems caused by redundant proceedings.[23]

While I advocate that hearings under the guidelines should receive more consistently careful, procedural treatment,[24] I also believe that the expanded sentencing proceedings that the federal sentencing guidelines necessitate is a move in the wrong direction. The assumption that it is appropriate for a judge to consider so many offense-related facts at the sentencing phase, like the assumption that sentencing is a secondary proceeding at which fewer procedural protections are appropriate, is rooted in the sentencing philosophy that the guidelines rejected: judicial discretion to impose indeterminate sentences based upon offender-related characteristics. A sharply bifurcated sentencing scheme, featuring full sentencing hearings, is most necessary when the facts on which punishment will be based differ in type from the facts on which the determination of guilt is based.[25] As the guidelines have conflated the two inquiries, sentencing should have become a less important proceeding, with fewer procedural dilemmas.

Therefore, I begin by discussing why and how factual issues have been allocated between trial and sentencing proceedings under the guidelines.

A. Offense-Related Factors and the Guidelines

The short answer to the question of how some offense-related factors came to be allocated to trial and others to sentencing proceedings under

23. These problems include the danger that the prosecution, having practiced at trial, will be able to prove at sentencing additional factors to enhance the sentence. *See infra* part III.B.3.

24. *See infra* part III.

25. *See infra* part I.A.1.a.

the federal sentencing guidelines is that this allocation is more the product of accident than thought. It seems fair to conclude that neither Congress nor the Sentencing Commission ever actually reviewed substantive criminal statutes to decide which offense-related facts should be found at sentencing and which, given the new emphasis in federal punishment decisions on offense-related facts, would be better decided as part of the conviction phase. Congress' delegation of authority to the Sentencing Commission to devise a new system led to a situation in which Congress lacked the opportunity and the Sentencing Commission lacked the power to do the difficult job of deciding how much bifurcation was desirable.

Many of the decisions of the U.S. Sentencing Commission that determined the current contours of federal sentencing hearings were preordained by Congress. Under the Sentencing Reform Act of 1984,[26] the Commission was instructed to effect a dramatic change in sentencing philosophy. Congress had already decided to abandon rehabilitation as a major goal of sentencing,[27] to abolish parole,[28] and to minimize the use of probation.[29] The only offender-related facts Congress had declared definitely relevant at sentencing were facts pertaining to prior criminal history.[30]

Against this background, the Sentencing Commission chose to focus the guidelines that Congress had commissioned primarily on the offense

26. Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 2017 (1984) (codified as amended at 18 U.S.C. §§ 3551-3586 (1988) and 28 U.S.C. §§ 991-998 (1988)).

27. *See, e.g.*, 28 U.S.C. § 994(k) (1988) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providiug the defendant with needed educational or vocational training, medical care, or other correctional trcatment."); S. REP. No. 225, 98th Cong., 1st Sess. 38-40 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3221-23 (maintaining that the rehabilitative model is an inappropriate basis for sentencing decisions because we know too little about how to rehabilitate and how to determine when an individual has been rehabilitated); *see generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981) (discussing the reasons for the failure of the rehabilitative model of sentencing).

28. *See* Pub. L. No. 98-473, tit. II, §§ 218(a)(5), 235, 98 Stat. 2027, 2031 (1984) (abolishing U.S. Parole Commission).

29. A term of probation may be imposed only for defendants with base offense levels of six or less on the scale of 43, and even then probation may be unavailable if a defendant has a significant prior criminal history. *See* U.S.S.G., *supra* note 1, § 5A (sentencing tables). There is some question as to whether the Commission's restrictions on the availability of probation exceed what Congress authorized. *See* THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE § 10.13, at 460-63 (1989). The Sentencing Commission clearly took a narrow view of the circumstances in which probation is valuable, *see* U.S.S.G., *supra* note 1, § A4(d) cmt.

30. Prior criminal history is considered highly relevant to sentencing, providing one of the two axes on the Commission's sentencing grid. *See* U.S.S.G., *supra* note 1, Sentencing Table.

rather than the offender.[31] The Commission's determination to avoid offender-related sentencing factors, such as educational background and family ties,[32] served the driving goal of the Sentencing Reform Act—to reduce sentencing disparity by making sentences more predictable.[33] One product of this orientation is the complex grid of hundreds of different offense-related factors that may aggravate or mitigate a defendant's sentence.[34] Some of these factors break down the offense with which the defendant was actually charged into finely graded levels, depending on such factors as the quantity of drugs involved in a drug case or the extent of the defendant's participation in the offense.[35] Other factors require the sentencing judge to determine the appropriate sentence based on discrete "relevant conduct" with which the defendant was not charged but which is alleged to constitute the "real offense."[36] It was the Commission's own

31. In this Article, I take no position on the wisdom of Congress' choice of sentencing philosophy or on the wisdom of basing sentences primarily on offense-related factors. Instead, I comment on the procedural problems Congress and the Commission have created by effecting changes in sentencing philosophy without appropriate changes in process. For vigorous critiques of the choice of the Sentencing Commission to limit judicial discretion and focus so heavily on the offense and so little on the offender, see, e.g., Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991) (arguing that the guidelines shift too sharply to harm-based penology and iguore what should be relevant characteristics of individual defendants); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Charles Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1953-54 (1988) (arguing that the guidelines fail to take adequate account of offender characteristics); Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 12 (1987) (arguing that eliminating consideration of personal factors concerning defendants is wrong and contrary to the spirit of the Sentencing Reform Act).

32. *See* U.S.S.G., *supra* note 1, § 5H1.1 (age not ordinarily relevant); § 5H1.2 (education and vocational skills not ordinarily relevant); § 5H1.3 (mental and emotional condition not ordinarily relevant); § 5H1.4 (physical condition, including drug dependence or alcohol abuse, not ordinarily relevant); § 5H1.5 (employment record not ordinarily relevant); § 5H1.6 (family and community ties not ordinarily relevant). Congress had left to the Commission the determination of to what extent such factors should be deemed relevant to sentencing. *See* 28 U.S.C. § 994(d) (1988).

33. *See* 28 U.S.C. § 994(f) (1988); *see also* U.S.S.G., *supra* note 1, § A3 cmt.

34. In a drug case, for example, a defendant's sentence is increased (1) if the drug offense resulted in death or serious bodily injury, *see* U.S.S.G., *supra* note 1, § 2D1.1(a)(1)-(2); (2) if the defendant had one or more prior convictions for a similar offense, *id.*; (3) if a specified quantity of a particular controlled substance was involved, § 2D1.1(a)(3), (c) (Drug Quantity Table); (4) if a dangerous weapon was involved, § 2D1.1(b)(1); or (5) if an aircraft was involved in certain types of offenses, § 2D1.1(b)(2).

35. *Id.* § 3B1.1 (base offense increased by two to four levels if defendant was a major participant or organizer); § 3B1.2 (base offense decreased by two or four levels if defendant was minor or minimal participant).

36. *Id.* § 1B1.3(a)(1) (relevant conduct within charged offense); § 1B1.3(a)(2) (discrete acts or omissions); § A4(a) (explaining modified real-offense approach); *see* William J. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 497 (1990).

choice to adopt this version of modified real-offense sentencing.[37] Some critics have questioned whether this decision in fact exceeded the Commission's authority.[38] The Commission provided several general adjustments that permit sentence enhancement for various types of uncharged conduct: for example, a showing that the defendant willfully obstructed justice during the investigation or prosecution of the offense[39] or earned a livelihood by engaging in a pattern of criminal conduct of which the conduct charged was just one part.[40]

The resulting sentencing structure makes inevitable a bifurcated procedure in which sentencing consumes more than its fair share of time but less than its fair share of procedure. The Sentencing Commission had no power and no mandate to rewrite the underlying federal criminal law. The Commission could identify those factors it believed made an offense more or less culpable, but it could use that information only to grade punishments, not offenses. Congress, having delegated the authority to rationalize sentencing to the Sentencing Commission, did not provide itself with any opportunity to consider whether the Sentencing Commission's recommendations could more appropriately have been adapted to rationalize the criminal law itself.[41]

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37. One Commissioner describes this decision as a "key compromise." *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); *see also* Ilene H. Nagel, *Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 925-27 (1990); William J. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181 (1988).

38. Heaney, *supra* note 21, at 208-11 (questioning whether the Sentencing Commission actually had statutory authorization to rely on "relevant conduct" to the extent it did); *see also* United States v. Galloway, 943 F.2d 897 (8th Cir. 1991) (holding that Sentencing Commission was not authorized to make punishment so highly variable on the basis of such conduct as separate property crimes on separate days), *vacated*, 976 F.2d 414 (8th Cir. 1992) (en banc).

39. U.S.S.G., *supra* note 1, § 3C1.1.

40. *Id.* § 4B1.3.

41. Congress did not even actually approve the guidelines; they became effective because Congress had not disapproved them by November 1, 1987, the date on which they were scheduled to take effect. This is a typical pattern for criminal legislation. Capital punishment decisions in many states are made at a separate sentencing proceeding on the basis of decisions about the existence of aggravating factors, and the facts may be found by a judge. *See* Walton v. Arizona, 497 U.S. 639 (1990). These aggravating factors often could have been elements of the underlying offenses and as such would have been tried before a jury. However, most statutes providing lists of aggravating factors were enacted in response to the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), in which the Court held that capital punishment imposed without adequate protections against arbitrary imposition was unconstitutional. State legislatures did not take the occasion to give full consideration to revising their homicide statutes so that the allocation of aggravating factors between the trial and the sentencing phases would be sensible. The attempt to cure a constitutional deficiency resulted in the same sort of patchwork approach that characterizes much new criminal legislation.

While the ultimate responsibility for the resulting pattern of allocation of fact-finding lies with Congress,[42] the Commission's own decisions serve to magnify the extent to which the sentencing phase has become a second exercise in trying facts relating to a defendant's criminal conduct. The Commission's decision to adopt a modified real-offense system created many additional occasions for fact-finding at sentencing hearings. But this decision is really only one facet of a pattern of bifurcated fact-finding which, on examination, seems irrational. Under the former offender-oriented sentencing philosophy, separate sentencing proceedings were obviously appropriate and useful. Within the sentencing philosophy of the guidelines, the only plausible explanation for dispersing facts relating to the offense to two separate proceedings is hostility to the values of due process.

1. *The Relationship of Conviction and Sentencing*

There has been surprisingly little scholarly discussion about which issues should be decided at sentencing instead of at trial.[43] It is not surprising that legislatures are not interested in attempting to derive neutral principles to govern this decision. Legislators have been trained by the exigencies of politics to adhere to a crime-control-oriented model of criminal law[44] and to rely on the courts to provide a counterweight of constitutionally based due process values. A legislature might decide to make a certain offense-related act—whether the defendant was armed at the time of the offense, for example—a sentencing factor rather than an

42. In Mistretta v. United States, 488 U.S. 361 (1989), the Supreme Court rejected claims that Congress had unconstitutionally delegated its power to the Sentencing Commission and that the Commission's creation and composition violated constitutional principles of separation of powers. The Court did not consider that a side effect of this delegation would be procedural disparity.

43. The justifications relied upon in determining the nature of the crime of conviction and the nature of the punishment to be imposed may indeed be different. *See, e.g.*, H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY 3 (1968) (distinguishing between general justifying aims of the criminal law and the particular aims on which individual punishment is based); *see also* NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 179-84 (1982) (distinguishing among "defining," "guiding," and "limiting" principles of criminal law, to account for the use of utilitarian factors as a basis for criminal prohibitions and a "just deserts" theory as a basis for punishment).

The Supreme Court recently confronted this issue in Payne v. Tennessee, 111 S. Ct. 2597 (1991), in which it permitted states to use a harm principle (impact on the victim) rather than only those factors concerning the defendant in deciding whether to impose the death penalty. The dissenters took the position that while harm may be an appropriate consideration in a culpability decision, it is not constitutionally permissible in a capital sentencing decision. *Id.* at 2619 (Marshall, J., dissenting); *id.* at 2625 (Stevens, J., dissenting).

44. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) (describing the "crime control" model); *see also* Alschuler, *supra* note 31, at 929-38 (discussing the "severity revolution" in the recent treatment by legislatures, including Congress, of issues concerning crime).

element of the offense, on the assumption that the courts would then be responsible for supplying whatever limits due process principles might require. The Supreme Court, however, has found few constitutional restraints on a legislature's decisions to assign certain facts to sentencing.[45] The Court's willingness to defer to the legislature's decisions defining crime and punishment leaves the legislature as the only venue where balance between crime control concerns and due process concerns can be achieved.[46] This reality should transform the nature of the legislative debate. Constitutionality should not monopolize or end this discussion.[47]

Therefore, it is important to begin the task of identifying the concerns Congress could and should have weighed had it attempted to achieve a rational interplay between sentencing and conviction. If Congress had considered this issue, what is the likelihood that it would have arrived at the balance that now exists under the guidelines? The answer to this question depends on which factors are considered relevant to this inquiry and how those factors are weighted. In this section I intend to open debate on this issue by trying to identify the factors that should be considered and by explaining my own view that generally speaking, offense-related factors should be decided in one proceeding—the trial.

a. *The need for bifurcation in preguidelines sentencing:* Some observers are not troubled by the prospect of judges determining additional offense-related factors at sentencing under the guidelines because fact-finding at sentencing seems familiar.[48] Before the guidelines, sentencing judges could consider such factors as the quantity of drugs in a drug offense or possession of a weapon. Assuming that the guidelines have not really changed the type of information considered but have only prescribed which of these potentially relevant factors each judge is to

45. *See infra* text accompanying notes 136-49.

46. This is not true, of course, in those states in which the state courts may rely upon the provisions of their own constitutions and so continue to play a role in deciding what due process requires. *See, e.g.*, William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Symposium, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

47. Kevin Reitz, in a forthcoming article, argues that the Constitution does not provide a sufficient check on real-offense sentencing and begins a welcome discussion of policy considerations that should guide legislatures in these decisions. *See* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. (forthcoming 1993).

48. *See, e.g.*, United States v. Silverman, 945 F.2d 1337 (6th Cir.) (Wellford, J., dissenting), *vacated and opinion withdrawn*, 976 F.2d 1502 (6th Cir. 1991) (en banc); United States v. Castellanos, 904 F.2d 1990 (11th Cir. 1990) (holding that real-offense sentencing took place preguidelines, too, and so does not require any enhanced procedural protections).

consider and the relative weights to be accorded those factors,[49] these critics find no need to review whether any of these factors should have been elements of the offense or to reconsider sentencing procedure.

The shift in philosophy under the guidelines effected a greater change than this description reflects and eliminated much of the need for making factual determinations at sentencing. One of the chief goals of the guidelines, as noted above, was to break with tradition by curtailing the judicial discretion that had inspired the recognition of sentencing as a significant independent proceeding. In the preguidelines system, judges could decide for themselves which factors were relevant to sentencing. Some judges, impressed with the rehabilitative goal of the indeterminate sentence, would consider offender-oriented factors, such as a drug defendant's addiction, to be of overriding importance; others would concentrate on the details of the crime, such as the quantity of drugs involved. Congress did not make final decisions about the purposes of punishment or the underlying philosophy of sentencing; individual judges did.[50] The substantive law merely prescribed the minimal number of elements believed to establish basic culpability and then allowed each judge to decide which additional factors to consider. For Congress to have included all offense-related factors (like quantity of drugs) as elements of the underlying offense would have curbed the ability of judges to choose among and consider a variety of factors at sentencing, undermining valued judicial discretion. The resulting sentencing structure, therefore, had to tolerate some additional offense-related fact-finding at sentencing because it was impossible to predict how much of this fact-finding would be necessary for each offender or for each judge.[51]

With the federal sentencing guidelines' predetermination of relevant factors and standardization of prevailing philosophy, we now can predict

49. Under this theory, the Commissioners served not as delegees of the legislature, making decisions about the scope of substantive criminal culpability, but as delegees of judges, performing the accustomed judicial task of choosing and weighing the factors to apply to punishment decisions. In fact, the Sentencing Reform Act lodged the Commission within the judicial branch. *See* 28 U.S.C. § 991 (1988).

50. Under this indeterminate scheme, the sentencing process was, in fact, trifurcated. After judicial discretion was exercised, final decisions about sentencing were made by the Parole Board, which was free to exercise a fair amount of discretion in establishing criteria for decision. The U.S. Department of Justice promulgated a table of parole guidelines setting forth what factors were relevant to the parole release decision, foreshadowing the sentencing guidelines by ranking the severity level of various offenses and curtailing the Parole Board's discretion. *See* 28 C.F.R. § 2.20 (1991). The Parole Commission set release dates on the basis of offense severity as well as various offender-related factors. *Id.* §§ 2.18-.19.

51. Even before the guidelines, critics believed that decisions concerning facts upon which a judge's sentence rested should be subject to due process concerns. *See infra* note 99.

which factual questions about the offense will be relevant at sentencing. It is no longer impossible to provide for the adjudication of all offense-related facts in one proceeding. In addition, given the guidelines' rejection of offender-oriented indeterminate sentencing, there is less need in most cases for any substantial secondary proceeding at all.[52]

Historically, sentencing developed as a truly distinct procedural phase only with the advent of the offender-oriented indeterminate sentence. At early common law, both in England and in the Colonies, sentences were usually mandatory.[53] The facts on which sentencing was based were decided by the jury, so there was little need for a separate proceeding. Sentencing was merely a ministerial act.[54] As the use of the quantifiable sanction of incarceration grew and as rehabilitation became a goal of sentencing,[55] the need for discretion in sentencing increased.

52. If all of the facts related to the offense have been decided at trial and "related" offenses were separately charged, there would still be some need for a second sentencing proceeding but it could usually be quite brief. The court would only have to factor in a defendant's prior criminal history, about which there would rarely be any factual disputes, and the few other individual factors the guidelines consider relevant (such as acceptance of responsibility). The sentencing hearing would therefore resemble an oral argument more than a trial, because the judge's chief concern would be how to apply the guidelines to the facts already determined.

53. Through the 17th century, virtually all felonies were capital offenses. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *94-95, *98; 11 WILLIAM HOLDSWORTH, THE HISTORY OF ENGLISH LAW 557 (6th ed. 1938); 1 JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 463 (London, MacMillan 1883). Parliament established as many as 160 capital offenses. *See* BLACKSTONE, *supra*, at *17. The only variation in punishment that existed lay in the manner in which the sentence of death was to be implemented. *See id.* at *92-93, *97. In the Colonies, at least, magistrates enjoyed some discretion in misdemeanor cases. *See* JULIUS GOEBEL & THOMAS RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 680-94 (1944).

54. As late as 1883, James Stephen could categorically describe sentencing as usually following "at once" upon conviction. 1 STEPHEN, *supra* note 53, at 457. *See also* Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968) (describing sentencing as having been "a ceremonial rather than a decision making process").

55. Beginning in the late-18th century, American jurisdictions relied increasingly on incarceration as a sanction. The Walnut Street Jail, built in Philadelphia in 1773, was designated the first American "penitentiary" in 1789. *See* SOL RUBIN, THE LAW OF CRIMINAL CORRECTION 29 (2d ed. 1973). The Quakers, under the inspiration of William Penn, regarded the penitentiary as a humane advance in penology and as furthering the goal of allowing the convict to repent instead of merely suffering punishment. *See* GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM OF THE UNITED STATES AND ITS APPLICATION IN FRANCE, 80-81 (S. Ill. U. Press. 1964) (1833); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 231-56 (Alan Sheridan trans., Vintage Books 1979) (describing the penitentiary model and its history). Alexis de Tocqueville, whose visit to America was largely inspired by his wish to see the new penitentiary, described the American institution as "the first time the idea of reforming offenders as well as punishing them penetrated into prisons." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 231 (J.P. Mayer & Max Lerner eds. & George Lawrence trans., Harper & Row 1966) (1835).

The use of incarceration as a sanction allowed the development of the concept of the rehabilitation-oriented indeterminate sentence. The first American indeterminate sentencing law was enacted

Sentencing proceedings had their field of vision expanded, looking not only to the past but to the future as well by considering a defendant's prognosis for rehabilitation. Information about the defendant that might well be extraneous and prejudicial at trial became necessary to the future-oriented inquiry.[56] Therefore, most jurisdictions assumed that a separate sentencing proceeding was needed to develop whatever offender-oriented facts the sentencing judge might consider relevant.[57] The power of the judge over sentencing grew as sentencing became less a matter of fact-finding and more a matter of diagnosis.

The guidelines' return to limited judicial discretion combined with a nonrehabilitative, offense-oriented sentencing philosophy[58] precludes many of the situations that inspired bifurcated sentencing. The same purposes are no longer served by a separate fact-finding proceeding.

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in New York in 1877, *see* Note, *supra* note 54, at 822 n.8, and by the end of the 19th century the institution of the parole board had spread rapidly, *see* RUBIN, *supra*, at 33. Probation, which allowed a defendant similar rehabilitative advantages without incarceration, also became popular after being introduced in Massachusetts in 1878. *See id.* at 205-06.

These developments led to the transformation of sentencing into a truly independent proceeding. *See* Alan Dershowitz, *Report to the Twentieth Century Fund Task Force on Criminal Sentencing*, *in* FAIR AND CERTAIN PUNISHMENT 81-82 (1976) (dating the development of the modern indeterminate sentence and the model of administrative sentencing to reformative goals first articulated by the 1870 National Prison Association).

56. In federal court, this information also became available as a practical matter. The Federal Probation Act of 1925 led to the creation of federal probation officers, following the trend in the states to increase the use of probation and parole. Judges sometimes asked these probation officers to investigate a defendant's background to aid in exercising sentencing discretion. *See* RUBIN, *supra* note 55, at 83-84, 207. In 1946, the Federal Rules of Criminal Procedure formalized this formerly ad hoc procedure by requiring probation officers to prepare a probation report in every case unless the sentencing judge stated on the record that sufficient information was already available. FED. R. CRIM. P. 32(c)(1). For the first time, federal judges had regular sources of information on which they could rely in making their sentencing decisions. The sentencing proceeding now involved different sources of information from the trial and took place a considerable amount of time after the trial in order to allow the preparation of the presentence report. All of these developments led to the notion that sentencing is a very different proceeding from trial.

57. The Supreme Court endorsed the view that a separate sentencing proceeding is highly desirable for determining such facts as a defendant's prior criminal history in the context of a habitual criminal offender statute. *See* Spencer v. Texas, 385 U.S. 554, 567-68 (1967); *id.* at 569 (Stewart, J., concurring); *id.* at 570-80 (Warren, C.J., dissenting). Nevertheless, the Court found that it was not unconstitutional for a State to include consideration of this fact at trial. *See* Comment, State v. Green, *Recidivist Statutes—The Procedure for the Introduction of Prior Crime Evidence*, 61 TUL. L. REV. 960 n.32 (1987) (listing states that provide separate hearings on this issue).

58. The guidelines' rejection of rehabilitation-oriented sentencing philosophy was not a true swing of the pendulum back to the days of mandatory sentencing, because the guidelines have retained the form of a separate sentencing proceeding without its historical purpose and because it is the judge, not the jury, who now decides many of the facts that determine the choice of mandatory sentence.

While information about whether a defendant is an addict might be irrelevant and unnecessarily prejudicial at trial, information about the quantity of drugs involved in a drug case is neither.[59] While the rules of evidence might be inappropriate for use in forecasting the defendant's prognosis for controlling his or her addiction, the rules of evidence are most appropriate to the process of deciding the quantity of drugs involved or the extent of the defendant's participation in the offense. Indeed, the nature of a great many of the facts considered under the guidelines would be completely appropriate and susceptible to proof at trial.[60]

b. *The identity of the fact-finder:* It might be argued that one function of the bifurcated sentencing hearing as it exists under the guidelines is to allow the judge to find some of the critical facts on which to base the sentence. This argument might be premised on the idea that juries could become confused by statutes as finely graded as the federal sentencing guidelines and that such a complex scheme should be left to judges.[61] This argument reflects a mistrust of the jury system that is fundamentally inconsistent with the constitutional guarantee of a right to trial by jury. A fully professionalized criminal justice system might have a number of advantages over the jury system, including a better ability on the part of the fact-finder to comprehend the intricacies of the law. But the jury serves other important values of public participation and inclusion of a nonprofessional viewpoint in the criminal justice system. Unless there is some other reason why bifurcating these decisions makes sense, the jury should be allowed to fulfill its role as finder of fact by finding all of the facts relevant to the offense and not just submitting a rough draft of the facts for the judge to complete.

In most guidelines cases there is not a serious risk of undue jury confusion. The number of statutes involved in an average guidelines case

59. There might be cases in which a defendant would prefer that certain aggravating circumstances not be set before the jury determining guilt or innocence. *See infra* text accompanying notes 65-68.

60. Some of the relevant-conduct factors the Commission included pose different problems. The inclusion at a defendant's trial of a charge that he had engaged in similar conduct on a different occasion might indeed be prejudicial. I am limiting my analysis in this Article to what I find to be the easier case of pure offense-related facts, by which I mean facts referring to the same transaction or series of transactions that is the subject of the indictment. Evidence of other crimes presents a gray area between offender-related and offense-related factors. The use of such evidence at trial could be limited either by the charging and proof process, if this conduct is being charged as an offense, or by the evidentiary rules concerning prior related conduct, if it is being used as evidence. *See infra* notes 68-69.

61. *See* United States v. Pena, 930 F.2d 1486, 1492 (10th Cir. 1991).

is not likely to be great. In cases in which the underlying statutes are many or intricate, there are more moderate ways to address the problem of potential jury confusion without taking important factual decisions away from the jury. Special verdicts could be used to assist juries in working through the components of the decisions they must make.[62] In a particularly complex case, the defendant and the government have the option of trying the entire case before a judge.[63]

Another argument for providing the judge with fact-finding power at sentencing might spring from a desire to preserve the checks and balances of the criminal justice system by compensating for the guidelines' reduction of judicial discretion.[64] But this argument does not present any logical reason for giving the judge this procedural power. Judges historically were afforded fact-finding power at sentencing so that they could play their assigned role in an indeterminate, offender-oriented sentencing scheme. Why should that power be preserved or expanded when the role itself has been rewritten? There was no meaningful fact-finding role for the sentencing judge in earlier eras, when sentencing was less discretionary. Why not return to the notion that the jury decides all of the offense-related facts on which sentencing will be based?

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62. Some courts have expressed concern that special verdicts might catechize the jury toward a conviction, *see* United States v. Spock, 416 F.2d 165, 181 (1st Cir. 1969), and have disallowed their use in cases in which they have been held to be too directive in demanding that a jury explain its verdict or too confusing to the jury, *see id.*; United States v. Wilson, 629 F.2d 439 (6th Cir. 1980); 8A JAMES W. MOORE, FEDERAL PRACTICE & PROCEDURE § 31.02 (2d ed. 1992); *see also* Note, *Bifurcated Jury Deliberations in Criminal RICO Trials*, 57 FORDHAM L. REV. 745 (1989) (advocating use of bifurcated jury procedure to avoid the need for special verdicts in connection with predicate offenses in RICO prosecutions). However, there is no blanket rule against special verdicts in criminal cases, even in federal court, where judges hesitate to utilize them because the Federal Rules of Criminal Procedure do not make any provision for them. *See* Heald v. Mullaney, 505 F.2d 1241, 1244-45 (1st Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

Special verdicts have been permitted in federal court when their use was thought to decrease potential jury confusion in a complex case, *see* United States v. Palmeri, 630 F.2d 192, 202 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981), or when the jury had a role to play with respect to sentencing, *see, e.g.*, United States v. Quicksey, 525 F.2d 337, 341 (4th Cir. 1975) (special verdict for narcotics conspiracy count alleging violation of several narcotics statutes with varying penalties), *cert. denied*, 423 U.S. 1087 (1976); Jalbert v. United States, 375 F.2d 125 (5th Cir.) (holding that when sentence depended on value of property, separate finding on issue of value was proper), *cert. denied*, 389 U.S. 899 (1967); 3 CHARLES A. WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 512 (2d ed. 1982); *see also* Note, *Jury Agreement and the General Verdict in Criminal Cases*, 19 LAND & WATER L. REV. 207, 222 (1984) (endorsing use of special verdicts despite judicial concern that they force jurors to be more logical and less humane).

63. FED. R. CRIM. P. 21.

64. The guidelines have left judges some substantive discretion to decide when to depart and what actually constitutes "relevant conduct."

c. *Defendants, the privilege against self-incrimination, and finality:* In the usual case, a defendant is likely to be disadvantaged by bifurcated fact-finding because the procedures at the second proceeding are likely to be less solicitous of the defendant's freedom and because doubling the number of proceedings creates new options for prosecutors.[65] However, defendants might have reason to prefer bifurcated fact-finding in certain cases. For example, a defendant who does not wish to testify at a drug trial might wish to testify after conviction on the issue of what quantity of drugs should determine the base offense. To have all facts relating to the offense determined at trial might unduly pressure a defendant deciding whether to testify. In a bifurcated system, a defendant might choose to exercise the right to remain silent at trial when his or her involvement in a drug offense is at issue and yet be heard at sentencing on the issue of the quantity of drugs involved. This is not a problem in every case, however, and less cumbersome procedural mechanisms exist for allowing defendants to testify about only one aspect of a charge against them than routinely providing for a substantial ancillary proceeding.[66]

Some defendants might also be pleased to limit the evidence their trial jury hears to the three-gram cocaine transaction rather than the multikilo shipment the government would like to allege at sentencing, on the theory that the jury might be more likely to convict if the stakes seem higher. But if the quantity of drugs were an element of a graded scheme of drug offenses rather than merely a sentencing factor, the prosecution could only allege the defendant's involvement with the greater amount if it expected to prove that allegation beyond a reasonable doubt. If the additional drug transaction were not a charged offense, the prosecutor could introduce evidence concerning the transaction at the defendant's trial only by meeting the conditions for introducing evidence of other crimes.[67] The rules of evidence already set the limits of the defendant's protection against uncharged conduct introduced at trial. If the prejudicial impact of otherwise admissible evidence is unwarranted in an individual case, the trial court can address this problem under the rules of

65. *See infra* text accompanying notes 263-68.

66. Defendants who made an appropriate pretrial motion could be permitted to reserve the right to contest some limited allegation even if they were convicted. This procedure would function as an exception to usual collateral estoppel rules; *cf.* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (holding that state-court litigants may reserve particular federal issue to be decided in a later federal-court action despite the rules of res judicata).

As a practical matter, if a defendant is accused of a larger drug transaction than has actually taken place, the defendant's best protection is probably to offer to plead guilty to the lesser charge.

67. *See* FED. R. EVID. 404(b).

evidence as well.[68] Therefore, defendants should generally not be entitled to have a separate fact-finding proceeding to serve their interest in preventing the jury from being influenced by enhancing evidence. The cases in which defendants would benefit from a second proceeding are few, and they generally do not merit solicitude beyond what the rules of evidence now provide.

d. *The prosecutor and proof beyond a reasonable doubt:* Prosecutors, on the other hand, generally do enjoy an advantage by being allowed to establish offense-related conduct as a sentencing factor. The defendant's punishment at sentencing may be less than the potential punishment had this conduct been charged as a separate offense,[69] but the prosecutor is spared the need to prove the conduct with admissible evidence leaving no reasonable doubt. The alternative of seeking sentence enhancements instead of convictions certainly adds to the prosecutor's arsenal and affects the balance of power in sentencing, not simply by limiting the judge's power but by shifting it to the prosecutors and probation officers who draft the facts on which sentencing will be based.[70]

Allowing sentencing enhancements to rest on conduct that has not been proved beyond a reasonable doubt may be the true reason why legislatures provide for certain facts to be found at sentencing rather than at trial.[71] This rationale assumes that lesser procedural protections are constitutionally adequate at sentencing, an assumption I think is questionable in the context of guidelines sentencing.[72] It also assumes that there is

68. *See* FED. R. EVID. 403 (evidence to be excluded if prejudicial impact outweighs probative value).

69. In at least one exceptional case, it seems that the guidelines would allow a sentence for possession of a weapon in connection with a drug offense to exceed the five years the statute would have allowed if that conduct had been charged under 18 U.S.C. § 924(c)(1) (1988). *See supra* note 17 (possible adjustment of up to 68 months for possession of a weapon).

70. One of the principal chroniclers and critics of this expanded prosecutorial power under guidelines sentencing generally and the federal sentencing guidelines in particular has been Albert Alschuler. *See, e.g.*, Alschuler, *supra* note 31, at 925-28 (noting the shift of sentencing power under the guidelines from judges to prosecutors); Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459 (1988) (advising judges to use their power to limit prosecutorial discretion in guidelines plea bargaining and sentencing practices); Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 563-76 (1978) (noting adverse effect of prosecutors' charging and bargaining power on attempts to formulate fixed or presumptive sentencing schemes); *see also* FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 138 (1990) (guidelines transfer sentencing power from judges to prosecutors).

71. This seems to have been the motivation of the Pennsylvania legislation at issue in *McMillan*. *See infra* note 141 and accompanying text.

72. What burden of proof to require at sentencing is a difficult question and not susceptible to one answer applicable in all cases. *See infra* part III.B.1. It is unlikely that the courts will require

a material difference between conviction, where proof beyond a reasonable doubt should be required, and sentencing, where it should not. This split-screen thinking, once again, reflects assumptions generated when sentencing proceedings addressed different facts from conviction and therefore required separate fact-finders and procedures. It might not make sense to suggest that a prosecutor should prove beyond a reasonable doubt that a defendant has a poor prognosis for rehabilitation, a fact that does not resemble any element of any criminal offense.[73] But there is little reason for sparing the prosecutor the burden of proving beyond a reasonable doubt the quantity of drugs in a drug offense if that fact is what will determine the magnitude of punishment.

The strongest argument I can envision for lessening the prosecutor's burden relies on a positivist view of liberty in the criminal justice system.[74] According to this view, proof of the elements of the offense, as defined by the legislature, is considered sufficient to justify imposition of the maximum sentence provided by that statute. The question of precisely where within that statutory range to place a particular defendant's sentence is considered a second, separate question. The convicted defendant is considered to have lost his or her constitutional right to be free for a period of time measured by the statutory maximum sentence. Therefore, the government is being eleemosynary if it decides to "return" part of this freedom by imposing a sentence below the statutory maximum. Under the Supreme Court due process jurisprudence embracing this analysis, the ancillary nature of the second proceeding and the fact that the defendant no longer has any constitutionally protected "right" to be free become reasons for refusing to require a full measure of procedural protection at the second proceeding.[75] The legislature's power to

proof beyond a reasonable doubt at sentencing, so disparities in procedure used at trial and at sentencing will remain.

73. Some states do require that offender-related aggravating facts be proved beyond a reasonable doubt in capital sentencing proceedings. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 643-44 (1990) (discussing ARIZ. REV. STAT. ANN. § 13.703 (Supp. 1988)).

74. This is the theory the Supreme Court has adopted as the basis for its jurisprudence concerning due process rights of the convicted. *See infra* text accompanying notes 163-73.

75. I provide a fuller critique of this theory in my discussion of the constitutional dimension of this problem. *See infra* section II.B.

The Court's concept of the values due process protects seems to be skewed by its attraction to the notion that the stigma of conviction is a far more important consequence than the amount of time a convicted person will spend incarcerated. *See, e.g.*, United States v. DiFrancesco, 449 U.S. 117, 136 (1980); *infra* notes 259-60. The only exception the Court has created to its positivist due process theory, which allows the State to barter years of freedom of convicted individuals without the constraints of due process, was in Vitek v. Jones, 445 U.S. 480 (1980), in which the issue at stake was not the number of years a convicted individual would spend incarcerated but *where* he would spend that time—in a prison or a state mental hospital. The Court believed that the stigma and

choose among sentencing philosophies and therefore to define the relationship between conviction and sentencing becomes a basis for allowing the legislature to decide what should be an element of an offense and what should be a sentencing factor and therefore to determine which procedures will govern the finding of these facts.[76]

I have always found this positivist view of liberty troubling because of its procedural consequences.[77] I would look at the weight of the interest the defendant has at stake in deciding what process is due rather than at the legislature's decisions about how to structure its criminal statutes. At least as troubling are the implications of this view for the relationship of sentencing and conviction. If we could shake free from the hold of the indeterminate sentencing model, there would be no reason to separate the inquiries regarding conviction and punishment—at least not when offense-related facts are at issue. Instead of a bifurcated inquiry—(1) Does the defendant's conduct deserve a sanction within this range? and (2) What sanction within this range does the conduct deserve?—we could pose one question: What punishment (within the range provided) does the defendant's conduct deserve? If we ask only one question, there seems little basis for parsing out some conduct to be decided by proof beyond a reasonable doubt based on admissible evidence and other conduct to be decided under some indeterminate standard.

The positivist view I have described has led the Supreme Court to defer to many legislative and administrative decisions about defendants' postsentencing freedom. I will discuss whether these cases may in fact be distinguishable with regard to some of the procedural issues presented under the guidelines.[78] Regardless of whether the guidelines' approach meets the Court's minimal constitutional requirements, a significant policy question remains: Is the desire to spare prosecutors the heavy burden of proving certain conduct on which punishment will be based a good enough reason to establish a sharply bifurcated fact-finding system like the one the federal sentencing guidelines create?

I view the decreased procedural protection at sentencing as undesirable because it subjects defendants to years of incarceration on the basis of facts that have not been found in the careful way the Constitution

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adverse social consequences of being treated as mentally ill was, unlike the length of incarceration, a constitutional liberty interest leading to a requirement of procedural protection regardless of whether state law created an interest. *Id.* at 492.

76. *See infra* text accompanying notes 164-77.

77. *See* Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482, 529-43 (1984).

78. *See infra* part II.B.3.

requires in a criminal trial when significant periods of liberty are at stake. Whether an individual will be incarcerated for 360 months as opposed to ten months is a matter deserving as careful consideration as whether that individual may be incarcerated at all. Others, including many legislators and prosecutors who may find the positivist view more attractive than I do, undoubtedly would view the procedural disparities of this bifurcated system as an advantage. Therefore, whether procedural disparites are a good reason to allow the extensive bifurcation provided by the guidelines may depend on irreducible value judgments. In the former federal sentencing system, there may have been neutral reasons for an expansive sentencing phase; these reasons are no longer persuasive, so differences in value judgments become more apparent.

e. *Disadvantages of bifurcation:* If courts were to consolidate fact-finding on issues related to the offense, they would avoid the procedural dilemma that now faces judges in guidelines sentencing. As the Department of Justice frequently points out, the federal courts cannot afford to provide the equivalent of a second trial in every case.[79] If the procedures at sentencing are complete enough to provide even a minimally fair hearing on such issues as the quantity of drugs involved, then the resources of the federal courts, in terms of both time and money, will be drained.[80] Federal judges are therefore torn between amplifying sentencing proceedings in response to defendants' due process claims[81] and streamlining these proceedings to preserve scarce resources, including their own time, at the risk of being not entirely fair.[82]

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79. *See* U.S. DEP'T OF JUSTICE, *supra* note 15.

80. *See* FEDERAL COURTS STUDY COMM., *supra* note 70, at 137 (90% of judges responding to survey believed that the guidelines had made sentencing more time-consuming: More than half estimated that they were spending 25% more time; a third reported an increase of 50% or more). In the Eastern District of New York, where statistics were kept on time spent on sentencing, judges reported spending 1252 hours on sentencing in 1989, 1324 hours in 1990, and 1537 hours in 1991. *Report of Advisory Group, Eastern District of New York*, 138 F.R.D. 167 (1991). The year 1989 was the first year sentencing proceedings under the guidelines began to outnumber preguidelines proceedings. *See* U.S. SENTENCING COMM'N, ANNUAL REPORT app. C (1990) (tbl. C-1) [hereinafter 1990 ANNUAL REPORT]

81. *See infra* part III.B.

82. There is also another disadvantage inherent in allowing offense-related facts to be found at sentencing. One reason why offender-related characteristics—such as the defendant's bad character or prior criminal record—are reserved for consideration at sentencing is fear that the trier of fact will be unduly prejudiced by premature exposure to such information. In proceedings under the federal sentencing guidelines, the finder of fact on many critical offense-related issues (such as whether the defendant was involved in the 1500-kilo shipment of cocaine) will be exposed to complete information about the defendant's prior record. Should the sentencing hearing itself be bifurcated, with the judge first finding offense-related facts and only then moving on to consider the defendant's prior

Many of the procedural issues plaguing sentencing hearings under the guidelines can be traced to Congress' failure to revise the underlying criminal statutes to make most, or even all, offense-related facts elements of substantive criminal offenses rather than sentencing factors. Among the good reasons for having all relevant decisions about a defendant's offense-related conduct made in one proceeding are sparing the courts the need to hold double proceedings and to decide what should happen at the later proceeding. I do not believe that the desire to give prosecutors a shortcut to incremental punishment is a good enough reason for distributing such similar fact-finding responsibilities between two different proceedings.

2. *Real-Offense Sentencing and the Guidelines*

The problem of fact-finding at sentencing hearings under the guidelines was, as noted earlier, exacerbated by the Sentencing Commission's decision to adopt a modified real-offense system.[83] In addition to deciding facts that in a logically constructed system would be decided at trial, the sentencing court must also decide facts that probably could not be decided at trial because they involve discrete conduct.[84] The Commission's choice of a modified real-offense approach has been criticized, properly, in my opinion, by a number of commentators.[85] The choice has certainly had a profound impact on federal sentencing. One recent study concluded that one half of all sentences imposed in the districts

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criminal history? Judges may not be much less susceptible than juries to the effects of such information. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 180 (1966) (examining whether judges and juries are influenced differently by such factors as defendant's decision to testify or prior record); Gregg v. United States, 394 U.S. 489, 490-91 (1969) (submitting presentence report to court prior to conviction or plea is error if judge or jury is influenced).

83. In initial drafts, the Commission had attempted a purer real-offense scheme. *See* U.S.S.G., *supra* note 1, § 1A4. The Department of Justice has criticized the Commission for not adhering to that model, *see* U.S. DEP'T OF JUSTICE, *supra* note 15, at 448, on the ground that the modified system unduly excludes some relevant evidence.

84. *Compare* U.S.S.G., *supra* note 1, § 1B1.3(a)(1) (conduct within the scope of offense of conviction) *with id.* § 1B1.3(a)(2) (discrete acts and omissions deemed to be part of the same course of conduct or common scheme or plan as the offense of conviction).

85. One excellent early commentary critiquing the modified real-offense aspects of the guidelines can be found in Silets & Brenner, *supra* note 21, at 1086-92 (proposing that sentencing be predicated on a charge-of-conviction offense system, based on the view that "the legislature's definition of an offense and specification of penalties includes a consideration of all of the 'harms' associated therewith," *id.* at 1091). *See also* Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 756-72 (1980) (arguing against the use of real-offense sentencing in a guidelines system on policy grounds).

studied had been increased, sometimes doubled or tripled, by uncharged conduct.[86]

The Commission's ostensible reason for adopting modified real-offense sentencing rather than a charge-based system was to curb the prosecutor's power to select the sentence by selecting the charge.[87] However, a prosecutor's selection of charges must, at the defendant's option, be put to the test of a jury trial, with the full panoply of constitutional rights. Allowing a defendant to receive a sentence for what is in effect a crime with which he has not been charged[88] is an odd way to curb prosecutorial power. Far from redressing the balance of power in sentencing, it enhances the prosecutor's power by expanding the range of prosecutorial options.[89]

One instructive example of how a prosecutor can use this power is the case of Yu Kikumura.[90] Kikumura was charged with various passport and weapons offenses, the most serious of which was interstate transportation of explosives under 18 U.S.C. § 844(d).[91] Under the guidelines, Kikumura's sentence for this offense would have been between twenty-seven and thirty-three months.[92] Kikumura was sentenced, however, to 360 months,[93] based on the government's contention at sentencing that he was a member of a notorious international terrorist organization (the Japanese Red Army) and that his real offense entailed

86. *See* Heaney, *supra* note 21, at 209-10 n.138.

87. *See* Breyer, *supra* note 37; *cf.* Frank H. Easterbrook, *Symposium Introduction: Equality Versus Discretion in Sentencing*, 26 AM. CRIM. L. REV. 1813, 1814 (1989) (positing that prosecutorial discretion is to guidelines sentencing as black market is to price control).

88. Obstruction of justice, for example, could be charged as a separate offense under 18 U.S.C. § 1510 (1988) or treated as a sentence enhancement under the guidelines.

89. My colleague Margaret Berger has recently compared the prosecutor's choice of whether to use conduct as the basis for a charge or a sentencing enhancement to the fielder's choice that baseball rules limit with the infield fly rule. *See* Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED. SENTENCING REP. 96 (1992) (advocating preventing the prosecution from avoiding the rules of evidence at sentencing by prohibiting the proof of facts as relevant conduct if they could have been the subject of a separate count).

90. United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990).

91. *Id.* at 1094. This section prohibits transporting any explosive in interstate commerce "with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully damage or destroy any building, vehicle, or real or personal property." 18 U.S.C. § 844(d) (1988).

92. The base offense level was calculated to be 18, and Kikumura had no prior convictions. 918 F.2d at 1094.

93. The court used its power to depart upward from the guidelines range, under 18 U.S.C. § 3553(b) (1988), for aggravating circumstances not adequately taken into consideration by the guidelines. This is another way the guidelines permit some real-offense sentencing. The guidelines declare most offender-related characteristics not to be relevant for purposes of sentencing, *see supra* note 32, so these factors usually may not become the basis for a departure from the guidelines'

intent to use his explosives to commit multiple murder. Unless the government had undisclosed sources of evidence, it seems unlikely that the prosecution could have proved these allegations at trial, because it would have been denied resort to the inadmissible evidence on which it relied at the sentencing hearing.[94] The court of appeals, while concerned that this may have been a case where the tail of conviction wagged the dog of sentence,[95] contented itself with remanding the case for resentencing in accordance with somewhat more rigorous procedural requirements than would have been applied in the usual federal sentencing proceedings.[96] These intermediate procedures brought this sentencing procedure closer to the trial model, but still not as close as Kikumura wished or as close as he would have been had he been sentenced only on the basis of the conduct with which he was charged and for which he was convicted.

As long as the sentence given Kikumura was within the statutory maximum, he could have received the same sentence, on the same reasoning, in a preguidelines sentencing proceeding. Discretionary sentences may include real-offense components among the range of factors considered. Some would argue that a defendant is no worse off having such determinations made at sentencing under the guidelines than under a discretionary sentencing regime. But the defendant is worse off than he or she would have been had these offense-related factors been subject to the requirement of being charged[97] and then proved beyond a reasonable doubt.

I do not contend that sentencing should be based on no conduct other than that related to the offense. Other factors in addition to the defendant's prior criminal history may fit the guidelines' orientation toward a predictable, nonoffender-oriented sentencing regime. On the whole, however, real-offense elements undermine predictability by aggrandizing the sentencing phase.[98] If Congress' goals were to eliminate

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sentence ranges. However, offense-related factors are almost always circumstances on which departures may be based, unless these factors were adequately considered by the Commission in formulating the guidelines. *See* U.S.S.G., *supra* note 1, § 1A4(b) (introduction); Breyer, *supra* note 37, at 14; 1990 ANNUAL REPORT, *supra* note 80, at 71-72 (tbls. Q & R).

94. This was established in part by hearsay evidence (an affidavit quoting a confidential informant who purported to describe activities inside a terrorist training camp in Lebanon) that clearly would have been inadmissible at a trial. *See Kikumura*, 918 F.2d at 1102-04.

95. *See id.* at 1103 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)); *see also infra* text accompanying notes 146, 186-95.

96. *See infra* text accompanying notes 241, 253-54.

97. Had the offense been charged, Kikumura would have had the right to indictment by grand jury, among other rights.

98. *See* Heaney, *supra* note 21, at 202-08 (maintaining that sentencing disparity continues under guidelines, including racial disparity).

disparity and to have the punishment fit the crime, the modified real-offense system does not serve them well.

B. THE FEDERAL SENTENCING GUIDELINES AND THEIR PROCEDURAL COMPROMISES

While the guidelines radically changed the substantive law of sentencing, they left the traditional, informal procedures of sentencing virtually intact. In its commentary, the Commission recognized that the nature of decisions under the guidelines was sufficiently different from those made under the former, discretionary scheme that additional procedural protections might well be appropriate or even constitutionally required.[99] There is some doubt as to whether the Commission had authority to develop procedures to accompany the guidelines. The Sentencing Reform Act does not mention procedure. In the few places

99. *See* U.S.S.G., *supra* note 1, § 6A cmt. Even before the guidelines, many noted scholars and judges had advocated amplified procedures to decide offense-related facts or to determine other disputed facts that could have a major impact on sentence. *See* Schulhofer, *supra* note 85, at 764 (discussing sentencing under a guidelines system, and suggesting that the Court's analysis of the process due in parole revocation proceedings in Morrissey v. Brewer, 408 U.S. 471, 487-89 (1972), may be applicable to guidelines sentencing); Note, *supra* note 54, at 835-46 (arguing for greater adversarial rights in sentencing proceedings); *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 26-32, 38 (1972) (advocating greater use of adversary procedures in the form of a "compromise" between trial procedures and current sentencing procedures); GERHARD O.W. MUELLER, SENTENCING: PROCESS AND PURPOSE 11-13 (1977) (criticizing sentencing hearings that lack disclosure of presentence reports or fail to give the defendant the right to confront and cross-examine witnesses); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 21 (1976) (recommending mandatory sentencing hearings to establish aggravating or mitigating circumstances); *id.* at 45 (proposing a requirement that circumstances aggravating a sentence be established by clear and convincing evidence, or even by proof beyond a reasonable doubt, while a preponderance-of-the-evidence standard might suffice for mitigating circumstances; alternatively suggesting that the standard might be the same for both).

Some of the best judicial discussion of the need for enhaneed procedure can be found in United States v. Lee, 818 F.2d 1052, 1058 (2d Cir. 1987) (Oakes, J., concurring) (court may wish to hold that, in some contexts, proof by clear and convincing evidence is required), and United States v. Fatico, 458 F. Supp. 388, 402-12 (E.D.N.Y. 1978) (different standards of proof apply to different determinations made at sentencing, ranging up to proof beyond a reasonable doubt, depending on the significance of a factor and the problems inherent in proving that factor; setting standard of proof in instant case at "clear, unequivocal and convincing" evidence), *aff'd*, 603 F.2d 1053 (2d Cir. 1979) (without endorsing the selection of standard of proof), *and cert. denied*, 444 U.S. 1073 (1980). *See also* Note, *A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 GEO. L.J. 1515, 1539-42 (1978) (advocating clear-and-convincing-evidence standard); Note, *A Proposal to Ensure Accuracy in Presentence Investigation Reports*, 91 YALE L.J. 1225, 1245-46 un.115-18 (1982) (citing precedential use of the preponderance and the clear-and-convincing standards).

The ALI Model Penal Code, formulated under the same indeterminate sentencing philosophy that informed the Supreme Court's decision in Williams v. New York, 337 U.S. 241 (1949), *see infra* text accompanying notes 112-19, did not advocate any particularly adversarial form for sentencing proceedings. *See* MODEL PENAL CODE § 7.07 (Official Draft 1962).

where the Commission discussed procedural matters, the point of view reflected had been dictated by Congress. For example, the Commission provided that the Federal Rules of Evidence would not apply at sentencing proceedings and that hearsay may be used.[100] But in light of preexisting statutory law, which already provided exactly that,[101] this may not have been a real choice on the part of the Commissioners. According to reports, the Commission did consider providing a standard of proof for evidence at sentencing hearings, although it ultimately did not do so.[102] In the end, whether because of doubts about its own powers or optimism about the ability of the courts to develop procedures appropriate to the new mode of sentencing, the Commission contented itself with simply commenting that more formal proceedings should be required at sentencing under the guidelines and leaving it to the courts to implement this suggestion.

With several years of experience under the guidelines to review, it has now become clear that optimism was not warranted. Because so much is happening at sentencing and because procedure is expensive and time-consuming, the decisions required by the guidelines are likely to be unfair to defendants unless the courts are scrupulous in their attention to defendants' procedural claims.[103] District judges, who bear most of the weight of the crush of business in the federal courts and who can see most clearly how the sentencing proceeding duplicates what they have done or could have done at trial, have little inducement to use their discretion to be generous with procedure. District judges are accustomed to the lax modes of procedure that prevailed during the preguidelines era, when judges had as much discretion over the procedures they used to decide sentences as they did over the sentences themselves.[104] The

100. *See* U.S.S.G., *supra* note 1, § 6A1.3 ("provided that the information has sufficient indicia of reliability to support its probable accuracy").

101. *See* 18 U.S.C. § 3661 (1988).

102. Commentary in the preliminary draft of the guidelines promulgated in 1986 specified that a preponderance-of-the-evidence standard should apply, *see* 51 Fed. Reg. 35,079, 35,085 (1986) (preliminary draft of the sentencing guidelines). However, perhaps in response to criticism, *see, e.g.*, Silets & Brenner, *supra* note 21, at 1079-82, the Commission apparently decided to omit this prescription from its final draft. *See* U.S.S.G., *supra* note 1, § 6A1.3 cmt.; HUTCHISON & YELLEN, *supra* note 29, at 406 (noting that questions on burden of proof are left open by the Sentencing Reform Act, the guidelines, and Federal Rule of Criminal Procedure 32).

103. *See infra* part III.B.

104. Our picture of how sentencing operates, derived from long experience with indeterminate sentencing proceedings, has proved tenacious.

amount of time spent on sentencing has already increased dramatically,[105] although the courts of appeals, as will be seen,[106] are doing little to encourage the district courts to provide full sentencing hearings.

Once it is more generally recognized that the guidelines demand a different approach to sentencing procedure, it will be possible for the courts to do what neither Congress nor the Sentencing Commission has done—provide for sentencing hearings that comport with due process. The Sentencing Commission could assist this effort by promulgating procedural guidelines.[107] But ultimately, the district courts will play the most important role in making procedural decisions, because due process is an individualized inquiry and not, as too many courts assume, a subject for generalization and treatiselike rules. Courts have had little guidance from the Supreme Court, because, as the next section shows, the Court's case law in this area is not entirely consistent and is based on outmoded assumptions regarding the nature of sentencing.

II. DUE PROCESS IN SENTENCING AND THE SUPREME COURT

There are two distinct due process issues concerning sentencing. First, what procedural limitations does the Due Process Clause impose on sentencing proceedings? Second, what limitations does the Due Process Clause impose on the decision to allocate issues to the sentencing rather than the conviction phase? In each of these areas the Supreme Court has decided one key case that is hostile to due process values and that is frequently cited as foreclosing further due process inquiry. Both of these Supreme Court cases are questionable in their reasoning and, fortunately, in their applicability to federal sentencing today. Because these cases have loomed as roadblocks to full consideration of due process issues by the lower federal courts, it is worth examining in some detail how the Supreme Court's law on due process in sentencing has evolved, where it has gone wrong, and where it is distinguishable.

A. PROCEDURAL DUE PROCESS AT SENTENCING

The most frequently cited case on procedural due process at sentencing, *Williams v. New York*,[108] is cited more for its attitude than its

105. *See supra* note 80.

106. *See infra* part III.B.

107. *See infra* text accompanying notes 271-73. Although the Commission was not given explicit power to promulgate procedures, Congress did provide a residuary power for the Commission to do whatever is necessary and proper to fulfill its mandate. *See* 28 U.S.C. § 995(b) (1988).

108. 337 U.S. 241 (1949).

law. On the whole, the Supreme Court case law in this area is neither as monolithic nor as tolerant as most lower courts and commentators seem to think. *Williams* is not the Court's only pronouncement on procedural rights at sentencing, and its holding, even to the extent that it has not been overruled, is limited by the context in which the case was decided—a discretion-oriented, indeterminate sentencing system in state court. Viewing *Williams* together with the Court's other relevant decisions reveals a due process law suffering from multiple personalities, with some cases pleading to be cited by the government and others favoring defendants.

1. *The Right to Be Sentenced on the Basis of Accurate Information*

The Court's first major opinion on sentencing procedure, *Townsend v. Burke*,[109] was a simple and straightforward declaration of the due process rights of defendants. Confronted with a petitioner who had not been represented by counsel at sentencing and who alleged that his sentence was based on inaccurate information, the Court had no trouble concluding that the Due Process Clause does guarantee the right to be sentenced on the basis of accurate information.[110] The Court also strongly urged that counsel be provided for sentencing hearings. Given that the year was 1948 and that the Court would not require the routine assignment of counsel even in felony cases for another fifteen years,[111] the Court stopped short of holding that counsel was constitutionally required at sentencing.

2. Williams v. New York: *Anachronism or Classic?*

The Court's next sentencing case took a different tone. In *Williams* the Court initiated its divergent treatment of the conviction and sentencing processes and ignored the very due process values just recognized in *Townsend v. Burke*.

Williams was a capital case in which the jury[112] had recommended life imprisonment but the judge, relying on presentence-report statements that Williams had committed thirty other burglaries (although he had not been convicted of any of them) and had a "morbid sexuality" that

109. 334 U.S. 736 (1948).

110. *Id.* at 741.

111. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

112. The jury had convicted Williams of murder during the course of a burglary. *See* 337 U.S. at 242.

made him a "menace to society,"[113] sentenced the defendant to death. On appeal, Williams argued that he had been denied due process because he had not been given reasonable notice of these new charges against him or afforded an opportunity to examine adverse witnesses.[114] The Court agreed that due process requires such safeguards when guilt is decided, but declared sentencing to be a different matter.[115] Sentencing was found not to require such procedural niceties for two reasons: "practical" and federalism concerns. First, the Court found "sound practical reasons" for not relying on the rules of evidence at sentencing.[116] Rules of evidence, fashioned to address the narrowly confined question of a defendant's factual guilt, would unduly restrict the judicial inquiry into whether the punishment "fit the offender and not merely the crime."[117] Justice Black's opinion is filled with praise for individualized, indeterminate sentencing and the enhanced judicial discretion this modern mode of sentencing entails. To curb judicial discretion by restricting the ability to receive all types of information that presentence reports might contain "would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation."[118] The Court declared its reluctance to treat the Due Process Clause as "a device for freezing the evidential procedure of sentencing in the mold of trial procedure" because this would "hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice."[119] In other words, the Court's chief aim in *Williams* was to allow sentencing procedures to take whatever shape the states might think appropriate to serve the new goals of indeterminate sentencing.

The reasoning of *Williams* is almost wholly inapplicable to guidelines sentencing in federal court. The *Williams* Court believed that the limiting concept of "evidence" was incoherent and overly restrictive at an administrative sentencing hearing, where psychiatrists and other nonlegal experts seek to predict the future. In contrast, under the guidelines, the future is not particularly relevant.[120] What is at issue is the past—usually those parts of the past pertaining to the offense with which the

113. *Id.* at 244.
114. *Id.* at 245.
115. *Id.* at 246.
116. *Id.*
117. *Id.* at 247 (quoting People v. Johnson, 169 N.E. 619, 621 (N.Y. 1930)).
118. 337 U.S. at 250.
119. *Id.* at 251.
120. Kevin Reitz has pointed out to me that insofar as the guidelines' concern with prior history is based on a goal of incapacitation, the guidelines could be said to show some orientation to the

defendant has been charged. Trial-type procedures obviously are not inappropriate to determine offense-related facts. No promising experimentation with new modes of sentencing would be squelched if guidelines sentencing hearings were conducted with more procedural rigor when offense-related facts are being found.

The second major theme of *Williams* is federalism. The Court was unwilling to demand that the states conform to a procedural model of sentencing that might force them to make certain choices about the substance of their sentencing schemes. If the *Williams* Court had prohibited the use of hearsay at sentencing, for example, a state might conclude that the sources of information available as a basis for indeterminate sentencing were not sufficient and therefore feel constrained to choose a different mode of sentencing. Or if the State retained its indeterminate sentencing scheme, the scheme's success might be compromised because the State had been prevented from using relevant information that did not happen to fit the mold of law.

Under the guidelines, there is no issue of federalism. Supervisory procedural rules, whether issued by the Supreme Court, the lower courts, or the Sentencing Commission, could be fashioned to apply only in federal court without impinging on the states' choices. There is also no danger of a rigid procedural mold stifling experimentation with sentencing philosophy. A court-ordered imposition of procedure in federal sentencing proceedings would not undermine the choice of sentencing philosophy reflected in the guidelines. Using trial-type procedures at sentencing might, as the Court feared in *Williams*, preclude some nonoffense-related issues from being introduced at sentencing, but most of these issues are irrelevant under the guidelines in any event. Specifying procedural guarantees would not limit the offense-related issues that could be raised at sentencing hearings under the guidelines, only the care with which those issues would be determined.

Williams is not often distinguished on these bases, however, for several reasons. First, the actual holding of *Williams* has been undercut by the Court's subsequent decision, in *Gardner v. Florida*,[121] that due process is indeed denied when a defendant is sentenced on the basis of

future. However, the factual basis for sentencing is simply whether the defendant has a prior criminal history meeting certain objective criteria and not general questions about prognosis that, like the defendant's sexuality in *Williams*, would require extralegal evidence.

121. 430 U.S. 349 (1977).

undisclosed information in a presentence report.[122] *Williams*, therefore, is no longer cited for its precise holding, but it has continued to be widely cited as a statement of the Supreme Court's lackadaisical attitude toward due process in sentencing. The *Williams* majority, impressed with the idea that leaving sentencing procedures to the discretion of the states would serve values of federalism and perhaps lead to progressive experimentation in criminal justice, had nothing whatsoever to say about the values of due process.[123] The Court did not discuss what form a defendant's due process rights might take at sentencing because it had concluded that protecting those rights would impede the State's interest. This is an unusually one-sided form of constitutional analysis. The concern that acknowledging due process rights at sentencing might impede progressive thought could have been treated as a factor to be weighed in the balance against a defendant's right to fair proceedings.[124] But the Court did not engage in any balancing; it did not even acknowledge the existence of any countervailing constitutional interest in the fair determination of facts on which an individual's liberty or even life might depend. It is certainly not self-evident that "progressive thought" must automatically trump a defendant's procedural rights, had the Court been willing to look at both sides of the story. Interestingly, the Court did not refer to its due-process-oriented decision in *Townsend v. Burke*, except in a footnote to the last word of its opinion in which the Court cited *Burke* to

122. Although *Gardner* was a capital case, the plurality's decision to base its holding on the Due Process Clause rather than on the Eighth Amendment's ban on cruel and unusual punishment would make the reasoning applicable to all sentencing proceedings.

When the State raised the argument, accepted in *Williams*, that the Court should not limit the sentencing body's access to information necessary to make a properly individualized decision conducive to the defendant's rehabilitation, Justice Stevens, writing for the Court, grimly pointed out that rehabilitation is an unlikely goal in a capital case. 430 U.S. at 360. The theory of *Gardner*, like *Williams*, is not necessarily tied to rehabilitation-oriented sentencing, as these capital cases show. The Court's concern for what can happen at sentencing, however, is fostered by the State's desire to have rehabilitative sentencing as an option.

123. Even Justice Murphy's taciturn dissent did not have very much to say about the value of due process. His conclusions were heavily qualified:

> Due process of law includes at least the idea that a person accused of crime shall be accorded a fair hearing through all the stages of the proceedings against him. I agree with the Court as to the value and humaneness of liberal use of probation reports as developed by modern penologists, but, in a capital case, against the unanimous recommendation of a jury, where the report would concededly not have been admissible at the trial, and was not subject to examination by the defendant, I am forced to conclude that the high commands of due process were not obeyed.

337 U.S. at 253 (Murphy, J., dissenting).

This dissent does not offer any competing philosophy but simply a disagreement with the result derived from the combination of facts present in this case. Had Murphy's position prevailed, *Williams* might not have been a broadly cited precedent.

124. Mathews v. Eldridge, 424 U.S. 319 (1976), in which the Court set out the balancing test now governing such analysis, had not yet been decided. *See infra* text accompanying notes 235-36.

support a disclaimer that sentencing is not wholly immune from due process scrutiny.[125] The *Williams* Court was more interested in the ancient history of sentencing procedure than in due process considerations. The Court observed that throughout English and American history, little attention had been paid to procedural regularity at sentencing.[126] The same, of course, might have been said in *Burke*, since the rights declared in that case had little historical pedigree. In *Williams*, however, the Court seemed to assume that the failure of past generations to provide procedural protections during the sentencing phase was a good enough reason to continue to deny those procedures.

3. *Right to Counsel at Sentencing*

The due process values recognized in *Burke* and wholly ignored in *Williams* reemerged two decades later in *Mempa v. Rhay*,[127] where the Court held that defendants do have a constitutional right to counsel at sentencing hearings.[128] Having decided subsequent to *Burke* that the Sixth and Fourteenth amendments guarantee a right to counsel at critical stages of a criminal proceeding,[129] the Court had no difficulty in identifying sentencing as such a critical stage.[130] Later cases concerning the right to counsel at sentencing share the perception of *Burke* and *Mempa*

125. 337 U.S. at 252 n.18. The Court did not need to snub the *Burke* decision, which it might have distinguished on the ground that Williams, unlike Burke, was represented by counsel. Further, according to the Court, Williams' counsel did not challenge any of the information in the presentence report or request an opportunity to confront witnesses. *Id.* at 244.

126. [B]oth before and since the American colonies became a nation, courts in this country and England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed.

Id. at 246.

As the previous section explained, however, sentencing procedure depends on the underlying goals of sentencing in vogue at any particular time. *See supra* text accompanying notes 20-107. The Court's version of history in *Williams* allows judges discretion in setting sentencing procedure in a context where they were afforded wide discretion in sentencing. The opinion made no attempt to limit its rationale or to identify which theories of sentencing prevailed during the eras when judges had discretion in access to information.

It should also be noted that the Court's examination of history in *Williams* concerned only access to sources of information, because *Williams* involved the use of undisclosed hearsay in presentence reports. Even if the Court's sketchy and lightly documented history is accepted on this issue, it provides little basis for determining what other procedures judges may have employed at sentencing. Because sentencing has been viewed as an ancillary and informal procedure, little history of sentencing procedure has ever been recorded.

127. 389 U.S. 128 (1967).

128. *Mempa* involved a probation revocation hearing at which the defendant was also being sentenced. *Id.*

129. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

130. 389 U.S. at 134.

that sentencing is indeed a critical phase of a criminal proceeding to which the right to counsel guaranteed by the Sixth and Fourteenth amendments applies,[131] not just a laboratory for state experimentation with different ideas about criminal justice reform.

Following these Supreme Court decisions on the procedures required at sentencing, a court may heed the declarations of *Burke* and *Mempa*—that sentencing is a critical stage of a criminal proceeding and that defendants have the right to be sentenced on the basis of accurate information. These cases would lead courts to be unstinting in offering whatever procedures are necessary to arrive at a fair and accurate sentencing determination, no matter how cumbersome.[132] Alternatively, a court could attend to *Williams*, which is generally cited in treatises, secondary sources, and cases for the proposition that sentencing is different from trial and that trial-type procedures are therefore simply not applicable at sentencing. This generalization would lead courts to deny due process claims without analyzing whether the context of *Williams* is distinguishable. It is the attitude of *Williams* rather than the holdings of the due-process-oriented cases that has prevailed in the lower courts.[133]

If the lower courts were to look more closely at what *Williams* actually says rather than the reified versions of its dicta, they would see that it is not necessary to make this choice. The two lines of due process cases are not actually inconsistent; they can be read together to forge a consistent law of procedural due process at sentencing under the federal sentencing guidelines. Once it is recognized that due process must be an individualized determination, *Williams* may be distinguished as a case premised on a theory of the nature and purposes of the sentencing hearing not readily applicable to guidelines sentencing. What the courts should be applying is *Mathews v. Eldridge*,[134] in which the Court provided a balancing test to determine when various procedures might be required at any particular proceeding where life, liberty, or property is at issue. The courts would also be required to analyze whether other specific constitutional guarantees, such as the right of confrontation and the principle of collateral estoppel embodied in the Double Jeopardy Clause,

131. *See* Ake v. Oklahoma, 470 U.S. 68 (1985) (holding that indigent defendants have right to appointment of expert psychiatric witness at sentencing hearing); Strickland v. Washington, 466 U.S. 668 (1984) (Sixth and Fourteenth amendments guarantee right to effective assistance of counsel at sentencing).

132. This would occur, presumably, under the *Mathews v. Eldridge* balancing test. *See infra* text accompanying notes 235-36.

133. *See infra* text accompanying notes 222-23.

134. 424 U.S. 319 (1976). *See infra* text accompanying notes 235-36.

should, like the right to counsel, apply directly to sentencing hearings. If the Supreme Court does not address these issues, the Judicial Conference of the United States or the Sentencing Commission could do so, as could the lower federal courts, by decision or by rule.[135] *Williams* does not block the road.

B. The Allocation of Sentencing Factors and Due Process

If procedure at sentencing diverges markedly from procedure at trial, decisions about which issues are to be decided at sentencing rather than trial become highly significant. In addition to allowing the legislature a fair amount of discretion to select the procedure applicable at sentencing hearings, the received law of sentencing allows the legislature almost complete discretion to designate which issues may be treated as sentencing factors. As was the case with *Williams*, the principal Supreme Court decision on this issue—*McMillan v. Pennsylvania*[136]—reached a questionable conclusion by undervaluing due process considerations. As in *Williams*, the context of the case was a state indeterminate sentencing scheme distinguishable from federal guidelines sentencing today.

1. McMillan

In *McMillan*, the Supreme Court examined a state legislature's decision to make a sentencing factor out of what easily might have been an element of the underlying offense. Concerned about the use of weapons in the commission of various crimes, the Peunsylvania state legislature passed a mandatory minimum sentencing act that required a sentencing judge to impose a mandatory minimum sentence of five years on any defendant whom the judge found, by a preponderance of the evidence, to have "visibly possessed a firearm" during the commission of any one of a list of enumerated felonies.[137] The legislature might, of course, have made visible possession of a weapon an element of those enumerated offenses and provided for the same mandatory penalty.[138] But the

135. See *infra* text accompanying notes 271-73 for a discussion of what procedural rules the Sentencing Commission or lower federal courts should be developing.

136. 477 U.S. 79 (1986).

137. *See id.* at 81-82 n.1.

138. Not only have other jurisdictions taken this approach, *see, e.g.*, N.Y. Penal Law § 140.25(1)(a) (McKinney 1988) (second-degree burglary, with deadly weapon as element); *id.* § 160.10(2)(b) (second-degree robbery), Pennsylvania itself had some statutes that made possession of a deadly weapon an element of substantive offenses. *See* 18 Pa. Cons. Stat. Ann. §§ 2701, 2702(a)(4) (1991) (assault).

mandatory sentencing act followed by ten years the most recent revision of relevant provisions of the penal law,[139] and the Pennsylvania legislature apparently was as reluctant to revisit its criminal code as Congress was to revisit substantive federal criminal law when it created the Sentencing Commission. Alternatively, the legislature might have made visible possession of a weapon during the commission of a felony a separate offense with its own cumulative mandatory penalty.[140] The legislature's decision to make this a sentencing factor rather than a separate offense or an element of the predicate offenses looks like the result of political expediency (not wanting to reopen issues related to the underlying criminal statutes) combined with a desire to avoid the requirement of proof beyond a reasonable doubt.[141] It is difficult to imagine any other reason why the legislature would have insisted on making such possession relevant only at sentencing.

Regarding the legislature's decision to allocate this piece of fact-finding to the sentencing phase, the Supreme Court declared that "the state legislature's definition of the elements of the offense is usually dispositive,"[142] although there are "constitutional limits to the State's power in this regard."[143] This legislative decision was found not to exceed those (undefined) constitutional limits, because the Act did not increase the maximum sentence for the crime committed or create a separate offense bearing a separate, cumulative punishment.[144] The legislature, according to Justice Rehnquist, merely took a fact traditionally considered by sentencing courts and specified what weight it was to be given.[145] Therefore, the Due Process Clause did not require that the issue of visible possession

139. *See* 477 U.S. at 86 n.3.

140. Under Missouri v. Hunter, 459 U.S. 359 (1983), the legislature may define what constitutes a separate offense for double jeopardy purposes.

141. The fact that the legislature specified that decisions under the statute were to be made under a preponderance-of-the-evidence standard, *see* 477 U.S. at 81-82 n.1, is some evidence that this may have been the motivation.

142. *Id.* at 85.

143. *Id.* The constitutional limiting principles mentioned by the Court were the requirement of proof beyond a reasonable doubt from *In re* Winship, 397 U.S. 358 (1970), and the Due Process Clause, which is interpreted to preclude the states from discarding the presumption of innocence, *see* 477 U.S. at 87.

144. Under *Hunter*, 459 U.S. at 359, the separate offense, while it could be created by the legislature, would at least have to be proved separately.

145. 477 U.S. at 89. With respect to McMillan himself, it might be said that all the legislature did was to require the judge to make a decision the parole board would otherwise have made. The sentence the judge wished to give McMillan was an indeterminate sentence of three to 10 years. *See id.* at 82 n.2. With a sentence of three to 10, McMillan might have served a five-year minimum anyway, if the parole authorities had decided that he should. The legislature could have prescribed a minimum period of imprisonment to the parole board, or provided parole guidelines with restrictive

of a weapon be tried before a jury or proved beyond a reasonable doubt. Rather than trying to define the manner in which the Constitution limits a legislature's power to allocate decisions to sentencing rather than trial, the Court simply expressed its certainty that whatever the nature of that limit, this statute did not surpass it. This was not a case, Justice Rehnquist picturesquely observed, of the "tail" of sentencing wagging the "dog" of conviction.[146]

The Court then went on to hold that the statutory provision allowing findings at the sentencing phase to be made by a preponderance of the evidence was also constitutionally acceptable. Although *In re Winship*[147] held that the proof-beyond-a-reasonable-doubt standard is constitutionally required in a criminal trial, this principle was declared inapplicable to the wholly separate sentencing proceeding.[148] "Sentencing courts," according to the Court, "have traditionally heard evidence and found facts without any prescribed burden of proof at all."[149]

In my opinion, *McMillan* arrived at the wrong conclusion by distorting or ignoring relevant precedent and by begging the very questions it purported to answer. The state courts can best deal with *McMillan* by looking to their own constitutions to override the decision and provide the judiciary with an appropriate means of checking legislative decisions. In federal court, *McMillan* can and should be distinguished, because it is as inapposite to the context of sentencing under the federal sentencing guidelines as is *Williams*.

2. *Why* McMillan *Is Wrong*

a. *Distinguishing* Patterson: One of the Court's principal authorities for its decision in *McMillan* was *Patterson v. New York*,[150] in which the Court upheld the power of a state legislature to declare a specific factor—whether a defendant had acted under the influence of extreme

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factors. Therefore, the Act did not necessarily have an impact on the amount of time McMillan was to serve.

The same, however, cannot be said for copetitioner Dennison, to whom the judge wished to give a sentence of 11 and a half to 23 months, *see id.*, a maximum sentence below any permitted by the Act.

146. *See id.* at 88.

147. 397 U.S. 358 (1970).

148. *McMillan*, 477 U.S. at 91.

149. *Id.* (citing Williams v. New York, 337 U.S. 241 (1949)). As noted earlier, sentencing courts through most of history did not find facts at all, *see supra* text accompanying notes 53-57, so the relevant "tradition" does not really extend much further back than *Williams* and its context of indeterminate sentencing.

150. 432 U.S. 197 (1977).

emotional disturbance—to be an affirmative defense rather than an element of the offense of homicide.[151] The Court in *Patterson* found that allowing the legislature to allocate this factor in such a way did not deny due process, even though the prosecution thereby was spared its burden of proving the factor beyond a reasonable doubt. The Court's opinion in *McMillan* did not discuss possible ways to distinguish *Patterson* but rather simply posited that *Patterson* was not distinguishable. Had the Court discussed *Patterson*, a number of distinctions might have appeared.

First, as Justice Stevens pointed out in his dissent,[152] *Patterson* involved a mitigating fact while *McMillan* involved an aggravating fact. The opinion in *Patterson* relied heavily on the notion that the legislature need not have provided for that mitigating defense at all, and so the legislature's power to do the greater (eliminate the defense) should include the power to do the lesser (provide the defense but require the defendant to prove it).[153] The theory of *Patterson* seems to be that to disallow the legislature's attempt to provide the defendant with a defense hedged by procedural conditions might backfire by leading the legislature to abandon the defense, in which case the defendant would be deprived of the opportunity to raise it at all. According to the *Patterson* Court, for the Court to try to protect defendants by guaranteeing them greater procedural rights than the legislature wished to attach to this gift might only result in greater harm to the defendants' interests.

The same argument cannot be made with respect to the legislature's power to render a fact—the quantity of drugs, for example—a sentencing factor rather than an element of the offense. Unlike the defendant in

151. The New York statute in question read, in pertinent 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 . . . .

N.Y. PENAL LAW § 125.25 (McKinney 1975).

See also Martin v. Ohio, 480 U.S. 228 (1987) (holding that defendant may constitutionally be required to bear burden of proof on self-defense); Leland v. Oregon, 343 U.S. 790 (1952) (holding that defendant may be required to bear burden of proof on insanity defense).

152. 477 U.S. at 98-101.

153. 432 U.S. at 207-08; *see* Ronald J. Allen, *The Restoration of* In re Winship: *A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 43-49 (1977) (discussing whether permitting the State to shift the burden of proof will encourage the creation of affirmative defenses); Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977) (arguing that proof-beyond-a-reasonable-doubt standard should apply even to "gratuitous defenses").

Patterson, a defendant in the *McMillan* situation is not likely to be disadvantaged if the legislature decided not to make quantity of drugs an issue at sentencing.[154] If McMillan had won his case, for example, the Pennsylvania legislature might have decided to make visible possession of a weapon an element of the offense with which McMillan was charged, or even a separate offense. In that event, McMillan would have gained the advantage of having this fact determined according to trial procedures.[155] There is little reason to believe that defendants would prefer the legislature's package, complete with dual fact-finding and minimal sentencing procedures, to gambling on what the legislature's reaction might be if the package were ruled unconstitutional.[156] Allowing the legislature to compromise by eliminating all of defendants' trial rights is a much more radical form of deference than *Patterson*'s decision to allow compromise on the issue of burden of proof.

Another rationale central to the *Patterson* decision is that there was an inherent political check on the legislature's determination of when a factor should be an element of the offense and when it should be an affirmative defense.[157] The dissenters in *Patterson* hypothesized that

154. If the judge retains sentencing discretion, it could be argued that the defendant might be disadvantaged because the sentencing judge might increase the defendant's sentence on the basis of this factor to a greater extent than the legislature would have allowed. It is for this reason that *McMillan* makes more sense in an indeterminate sentencing scheme than in a guidelines scheme. *See infra* text accompanying notes 204-05.

Defendants might also be disadvantaged if, rather than making the quantity of drugs a sentencing factor, a legislature were simply to provide harsh mandatory sentences for an independent offense of selling or possessing with intent to sell any quantity of drugs at all. The Supreme Court has already shown its disinclination to find that a harsh sentence, such as a sentence of life imprisonment, violates the Eighth Amendment on the ground that it is disproportionate to the offense involved. *See* Harmelin v. Michigan, 111 S. Ct. 2680 (1991). That the Michigan legislature enacted a statute like the one involved in *Harmelin* is, to me, evidence of the fact that the premise of *McMillan*—that legislatures should be trusted to make relatively final decisions about mandatory punishments and that the courts should play a modest role—is an undue abdication of judicial responsibility to protect the politically powerless.

155. In the context of indeterminate sentencing, the legislature could also commit this decision to the parole board. *See supra* note 48; *infra* notes 204-05.

156. It is possible, even likely, that were the legislature to create a separate offense, the potential penalty to which a defendant might be exposed would be greater. But, subject to the meager limitations of the Eighth Amendment, the legislature always has the power to choose the range of punishment. That the defendant is getting the benefit of a lower range of punishment should not provide an excuse for eliminating the defendant's procedural rights, at least if the amount of additional incarceration the defendant faces exceeds the length of incarceration that would have led to a right to a jury trial. *See* Baldwin v. New York, 399 U.S. 66 (1970) (six months).

Harmelin shows the Court's view that the judiciary is responsible for protecting criminal defendants from unfair procedures, not from retributive legislatures. That a legislature might retaliate by imposing a greater punishment is, so long as the sentence is not disproportionate, not a good reason for the courts to refuse to take seriously a claim that sentencing procedure is unfair.

157. *See* 432 U.S. 197 (1977).

because the majority imposed no comprehensible limit on the legislature's power in this area, a legislature could go so far as to declare, for example, that to kill is a crime and that any factor mitigating, justifying, or excusing that killing is an affirmative defense—to be proved by the defendant.[158] Even the dissenters acknowledged that this was an unlikely scenario, for we would not expect either legislators or their constituents to tolerate the prospect that they might be prosecuted for a fatal accident and be left to prove their innocence.[159] There is little need for a judicial check on actions the legislature is unlikely to take. The need for a political check in the *McMillan* situation, on the other hand, is real.[160] We know that criminal laws might allow a defendant found guilty of selling a small or unspecified amount of drugs to be sentenced for involvement in a major drug shipment, or a defendant found guilty of interstate transportation of explosives to be sentenced for involvement in a massive terrorist conspiracy. Legislators and their constituents are less likely to identify with convicted drug dealers or to care whether decisions about the precise seriousness of their offenses are made carefully. *Patterson* showed the Court's desire to allow the legislature ample scope for its decisions in a context in which the Court thought due process constraints were unnecessary. *McMillan* lies in an area where judicial attention to due process is most necessary because the political process is least likely to be sensitive to those whose freedom is at stake.

If *Patterson* is not distinguished from *McMillan*, the cumulative legislative power granted by these cases could lead to scenarios as frightening as the dissenters' hypothetical in *Patterson* but more plausible. If the legislature can make extreme emotional disturbance an affirmative defense, why not go one step further and make it a sentencing factor? Why not make other affirmative defenses, such as whether the defendant was insane at the time of the offense or whether a homicide was committed under duress, into sentencing factors?[161] Under *Patterson*, if a factor

158. *Id.* at 224 n.8.

159. *See id.* at 224-25 n.8. Similarly, Justice Stevens remarked in *McMillan* that if a legislature were to provide that those present in a bank had the burden of proving that they did not rob the bank, an example drawn from Fernand N. Dutile, *The Burden of Proof in Criminal Cases: A Comment on the* Mullaney-Patterson *Doctrine*, 55 NOTRE DAME L. REV. 380, 383 (1980), "a broad-based coalition of bankers and bank customers would soon see the legislation repealed." 477 U.S. 79, 101 (1986) (Stevens, J., dissenting).

160. *See id.* at 102 (Stevens, J., dissenting).

161. This prospect is not at all unrealistic. The insanity defense has been legislatively abolished in Idaho, Montana, and Utah. *See* IDAHO CODE § 18-207 (1982); MONT. CODE ANN. §§ 46-14-102 to -03, 46-14-201(2), 46-14-221 (1979); UTAH CODE ANN. § 76-2-305 (1983). In these jurisdictions, the defendant's insanity at the time of the offense is treated as a sentencing factor. *See* Susan N. Herman, *The Insanity Defense in Fact and Fiction: On Norval Morris's Madness and the Criminal*

is treated as an affirmative defense, a defendant must bear the burden of proof but at least retains trial rights, including a jury, confrontation of adverse witnesses, and compulsory process. If *McMillan* could so easily dispense with the defendant's right to proof beyond a reasonable doubt, what is to stop a legislature from avoiding other procedural rights afforded at trial by leaving what are now affirmative defenses to be decided at a sentencing hearing? Perhaps the influence of extreme emotional disturbance or the defendant's sanity at the time of the offense could, like the issue of the quantity of drugs involved in a drug case, be decided on the basis of hearsay in a presentence report. *McMillan* does not provide any basis for arguing that this would be a denial of due process.

b. *Positivism*, Meachum, *and* Specht: The Court was able to dispense with proof beyond a reasonable doubt in *McMillan*, distinguishing *In re Winship*, because of its conclusion that the legislature was permitted to relegate the proof of whether the defendant visibly possessed a weapon to the sentencing phase. However, this decision did not settle the question of what procedural rights the defendant should have at the sentencing proceeding. What process is due in a particular proceeding is traditionally a question for the courts rather than the legislature.[162] The Court in *McMillan* did not explain why the legislature could select the preponderance-of-the-evidence standard to govern the decision being made. In fact, the Court's casual treatment of this issue rested on *Williams*' laissez-faire attitude toward sentencing proceedings and on the positivist due process line of cases.[163] But *Williams*, as discussed earlier, did not answer this question, and the positivist due process cases are only partially supportive of the Court's conclusion. The Court was reticent in discussing how necessary the positivist theory was to its analysis in *McMillan*, perhaps because it went on in the same decision to repudiate the positivist cases when they appeared to point to an undesired result.

Law, 1985 AM. B. FOUND. RES. J. 385 (disagreeing with Norval Morris' position that the insanity defense is better treated as a sentencing factor).

162. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); see also Arnett v. Kennedy, 416 U.S. 134 (1974), in which Justice Rehnquist's proposal that individuals who are granted rights by statute must take the bitter with the sweet and abide by whatever procedural limitations the legislature has imposed was rejected by a majority of the Court. Justice Powell's position, that the legislature may create substantive rights or entitlements but that it is then up to the courts to decide, as a matter of federal constitutional law, what procedural rights surround such entitlements, prevailed there and in *Loudermill*.

163. *See supra* text accompanying note 75.

This line of cases, best exemplified by *Meachum v. Fano*,[164] provides some rationale for distinguishing *In re Winship* and excusing the lesser burden of proof permitted in *McMillan*. Under *Meachum*, once a defendant has been convicted of an offense and thereby deprived of his constitutional right to liberty for any amount of time not exceeding the maximum sentence prescribed for that offense,[165] it is no longer a matter of constitutional import if the State decides to release the defendant before that amount of time has expired, as it might by granting parole[166] or awarding good-time credit.[167] The defendant has no right to be free during that time and therefore no right to "liberty" for the due process clause to protect. Therefore, the State may choose the procedures it will use in deciding whether to give back to the convicted offender some portion of his or her liberty. The constitutional protection that guards liberty is, according to this view, extinguished by conviction.

There is an exception to this principle, when the State creates a "liberty interest"[168] by conferring a "right or justifiable expectation rooted in state law."[169] A right or justifiable expectation exists if state law, usually a statutory provision, provides that what would otherwise have been a discretionary decision concerning a defendant's release is structured in such a way that a particular finding of fact becomes critical.[170] If such a liberty interest is found, the Court then engages in its usual balancing test

164. 427 U.S. 215 (1976).

165. *Id.* at 224, *cited in McMillan*, 477 U.S. at 92 n.8.

166. *See* Board of Pardons v. Allen, 482 U.S. 369 (1989); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1 (1979).

167. *See* Wolff v. McDonnell, 418 U.S. 539 (1974).

168. This liberty interest is comparable to the property interests protected in cases like Board of Regents v. Roth, 408 U.S. 564 (1972).

169. *Greenholtz*, 442 U.S. at 11-12; *see also* Montanye v. Haymes, 427 U.S. 236, 242 (1976) (companion case to *Meachum*).

170. For example, *Meachum* dealt with an inmate who was transferred from one prison to a more secure prison. The Court found that he had no liberty interest because the governing statute made this decision discretionary. He would have had a liberty interest if state law had conditioned such transfers on specified conduct, such as inmate misconduct, for example. *See Meachum*, 427 U.S. at 228; *see also Wolff*, 418 U.S. at 558 ("Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.")

Another example is *Greenholtz*, in which the Court found that Nebraska inmates did have a liberty interest in parole release decisions because relevant statutes limited the parole authorities' discretion by creating a presumption in favor of parole. 442 U.S. at 11-12.

to determine what procedural protection is appropriate in those circumstances.[171]

I have elsewhere expressed my disagreement with both aspects of *Meachum*'s holding.[172] But the Court in *McMillan* implicitly relied on the authority of *Meachum* in assuming that the defendant's liberty interest was "substantially diminished by a guilty verdict."[173] Therefore, the State has the power to decide whether to incarcerate a defendant for all or part of the maximum sentence, because the defendant no longer has a constitutional right to be free for any part of that time. Under the *Meachum* theory, however, the defendant would nevertheless have a liberty interest worthy of some procedural due process protection if state law limited the discretionary nature of any decision about the defendant's freedom. The Pennsylvania statute at issue in *McMillan* clearly did just that by providing that upon finding a specified fact (such as visible possession of a weapon), the court must impose a five-year minimum sentence. McMillan, under the theory of the earlier cases, had an entitlement, even if not a "right," to his freedom. Therefore, the Court should have discussed what process was due to protect this State-created liberty interest under its usual balancing test, which considers the importance to the defendant of the interest at stake, the risk of erroneous deprivation of that interest through the procedures used, and the government's interests, including the function involved and the fiscal and administrative burdens the additional or substitute procedures would entail.[174] This inquiry would include deciding what standard of proof was required.[175] Instead of engaging in this analysis the Court invoked history, observing

171. *See* Mathews v. Eldridge, 424 U.S. 319 (1976). In *Wolff*, for example, the Court required hearings to be held, with specified procedures, before an inmate could be deprived of good-time credits. 418 U.S. at 539.

172. *See* Herman, *supra* note 77. My critique of the positivist view of liberty in these cases is based in part on the Court's failure to consider the grievousness of a loss of years of freedom through incarceration to the individuals concerned. *See id.* at 529-43. My critique of the "triggering condition" exception faults this theory's implicit hostility to many of the values of procedure. *Id.* at 545-55.

173. *McMillan*, 477 U.S. at 84. This is the language of the Pennsylvania Supreme Court. Justice Rehnquist's opinion cites *Meachum* only in a footnote, *see id.* at 92 n.8, and does not reveal the significance of the theory of that line of cases to the *McMillan* opinion.

174. *Mathews*, 424 U.S. at 335; *see, e.g.*, United States v. Romano, 825 F.2d 725, 729 (2d Cir. 1987) (applying *Mathews* balancing test).

175. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982) (holding that due process requires a clear-and-convincing standard of proof in termination-of-parental-rights proceeding); Addington v. Texas, 441 U.S. 418 (1979) (requiring clear and convincing evidence in civil commitment proceeding).

that no particular standard of proof had been required at sentencing decisions in the past.[176] The Court opined that this case was no different from one in which a judge with sentencing discretion imposes a five-year minimum sentence because of a defendant's possession of a weapon. Once again, history is used as a trump. I do not think the two situations differ with respect to the need for procedural protection simply because the judge in one case has unlimited discretion and the judge in the other does not,[177] but the theory of the *Meachum* line of cases is that there is a critical difference between these two situations. Having implicitly relied on the first aspect of *Meachum*, endorsing the positivist theory, the *McMillan* Court then mocked *Meachum*'s moderating entitlements theory: "We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance."[178]

While this attitude toward *Meachum* is disingenuous and inconsistent, the first aspect of the Court's treatment of *Meachum*—the assumption that its analysis of a defendant's liberty interest was applicable to *McMillan* at all—is what is most troubling. As the Court explicitly acknowledged, the *Meachum* theory applies only when a defendant has been convicted of a crime beyond a reasonable doubt.[179] The precise issue in *McMillan* was whether possession of a weapon was one of the elements as to which *Winship* requires proof beyond a reasonable doubt. Neither *Meachum* nor anything else in the Court's opinion truly answered that question—turning to *Meachum* merely assumed an answer and continued the tradition of treating sentencing as a matter completely separate from conviction. If conviction and sentencing were regarded as two significant aspects of the same event, the theories of *Meachum* would not apply to the sentencing proceeding and the evaluation of what process is due at sentencing would be completely different.

This is shown by the pre-*Meachum* case *Specht v. Patterson*,[180] in which the Court did require substantial procedural protections to be afforded a state defendant at sentencing. In the Colorado statutory

176. The Supreme Court had never addressed this issue. Justice Rehnquist referred to an absence of Supreme Court law and to the procedures reflected in the legislatively or judicially created sentencing model familiar from federal court and many other jurisdictions.

177. *See* Herman, *supra* note 77, at 545-55. My conclusion, however, is that procedural protection is needed in both instances and that the governing factor should be the nature and weight of the loss of liberty at stake. The *McMillan* Court agreed to treat both instances in the same fashion, but by denying any need for procedural protections in either case.

178. 477 U.S. at 92.

179. *Id.* at 92 n.8.

180. 386 U.S. 605 (1967).

scheme considered in *Specht*, a defendant convicted of a sexual offense otherwise carrying a maximum penalty of ten years could be subjected to a sentence as lengthy as life imprisonment if the sentencing judge found, in a posttrial determination, that the defendant posed "a threat of bodily harm to members of the public, or is an habitual offender and mentally ill."[181] The Court held that making such findings on the basis of a written presentence report, with no notice or hearing, constituted a denial of due process. The defendant was, therefore, entitled to be present with counsel, to be heard, to confront and cross-examine witnesses, and to offer his own evidence.[182]

Specht did not involve offense-related circumstances, so the argument in that case for procedures comparable to those at trial might actually be viewed as weaker than in *McMillan*.[183] But the *McMillan* Court distinguished *Specht* as a " 'radically different situation' from the usual sentencing procedure."[184] The Court did not explain what was radically different about *Specht*, but presumably the difference was that the maximum sentence for the offense was actually raised in the posttrial proceeding. Therefore, the theory of *Meachum*, which had not been devised at the time *Specht* was decided, would not apply because the defendant's liberty interest had not yet been diminished to such a great extent.

This distinction rests on quicksand. The Colorado statute in *Specht* might easily have been structured to make life imprisonment the maximum sentence for a sex offense and then allow the judge to set such a sentence.[185] The legislature's power to create both sentencing ranges and sentencing enhancements makes *McMillan*'s distinctions empty. Under *McMillan*, the geography of criminal statutes is what governs whether a factor is placed in a statute defining the crime or one defining the punishment and whether the maximum penalty for an offense can be found by looking at one statute or must be derived by adding numbers from two

181. *Id.* at 607 (quoting COLO. REV. STAT. § 1 (1963)).

182. *Id.* at 608. Counsel for petitioner in *McMillan* suggested that had *Winship* been decided before *Specht*, the Court would have required proof beyond a reasonable doubt. The Court assumed *arguendo* that this was true. *McMillan*, 477 U.S. at 89.

183. *Cf.* Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 26-29 (1989) (suggesting procedural distinction based on whether facts are crime related).

184. *McMillan*, 477 U.S. at 89. See also Vitek v. Jones, 445 U.S. 480 (1980), in which an inmate was transferred to a mental hospital, a rare case in which the Court declared the *Meachum* theory inapplicable because of the stigma attached to being designated as mentally ill.

185. In all likelihood, the Colorado legislature's decisions about how to structure these offenses and sentencing laws were a product of fortuity rather than comprehensive planning. *See supra* note 41.

different statutes. On such ephemeral trivia are constitutional protections made to depend.

After *McMillan*, the constitutional protection provided by *Specht* can easily be eliminated by any legislature that cares to reorganize its criminal statutes. *McMillan* provides little promise of any more meaningful limitation. Given legislatures' power to define offenses and sentences, the Supreme Court seemed to assume that it was impossible or futile to try to fashion constitutional limits. However, recognizing that the legislatures' power could be abused by loading too many decisions into the sentencing phase, the Court allowed for a possible exception—due process is denied if the tail of sentence wags the dog of conviction.[186] This exception is as amorphous as it is colorful. The Court made no attempt to specify what factors should be considered in deciding how large the tail can be or how small the dog.

What is clear from *McMillan* is that the exception to the legislatures' power depends on the relative weight of the increment to the defendants' sentence. By permitting the allocation of an offense-related factor to sentencing, *McMillan* appears to reject the line that I might have proposed—that due process should be deemed to prevent the legislature from allocating consideration of offense-related factors to sentencing because of the procedural ramifications of that allocation.[187] Mine would have been a relatively clear rule, one that would have the advantage of avoiding many of the problems of bifurcation discussed earlier.

There are not many other factors that could be brought to bear in defining the constitutional limits of the legislatures' power. One factor suggested in Justice Powell's opinion in *Patterson*[188] is history. But the

186. *McMillan*, 477 U.S. at 88.

187. Welsh White has proposed a similar line as a limitation on legislative power over the creation of elements, in addressing the analogous question of when a defendant in a capital sentencing proceeding should have the right to a jury determination of the aggravating circumstances on which the death penalty may be based. Focusing on the historical role of the jury as trier of facts relating to the offense (rather than the offender), White proposes either (1) requiring that all offense-related facts be found by a jury (even though this would mean mandating a jury for the bifurcated capital sentencing proceeding) or (2) requiring offeuse-related facts to be tried by a jury when proof of those facts would lead to a significantly enhanced sentence. *See* White, *supra* note 183, at 25-27.

188. 432 U.S. 197, 226 (1977) (Powell, J., dissenting) ("The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. . . . It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance." (footnotes omitted)).

answers one gleans from history are unreliable—they might be too simple,[189] too complex,[190] or simply have their roots in an earlier era's different philosophies and goals.[191] Legislative history is not helpful in

189. If one asks, as the Court did in both *Williams* and *McMillan*, whether historically certain procedural guarantees have been provided at sentencing, the answer is simple but not necessarily relevant.

History is generally a less appropriate basis for decision in the context of sentencing than it is on the issue considered in *Patterson* (when a legislature may declare a factor an affirmative defense) because of the shifting nature of sentencing theory. Compare Justice Powell's account of the consistent treatment of the factor at issue in *Patterson*, a heat-of-passion element, throughout English and American history with the dramatic differences in sentencing law. *Patterson*, 432 U.S. at 216-27 (Powell, J., dissenting). At early common law, for example, any rape or robbery led automatically to a capital sentence. *See* BLACKSTONE, *supra* note 53, at *212, *242-44. There was no need to prove to a jury the aggravating factor that the defendant possessed a weapon during the offeuse, because that fact would not have made a bit of difference. As judicial discretion in sentencing grew, many legislatures allowed maximum discretion to a judge to select sentencing factors, while others limited judicial discretion to predetermined ranges by specifying that possession of a weapon during a robbery was an aggravating factor increasing the sentencing range. Some legislatures adopted both techniques, making possession of a weapon an aggravating element in some offenses but not in others (where it might become a sentencing factor). Should it matter which technique was employed first? At what point in history should the court look to decide whether this factor must be an element of the crime? Early common law seems irrelevant, because the mandatory nature of felony sentencing made jury determination pointless. If a jurisdiction is currently in the process of shifting its theory, moving from a rehabilitative scheme to a guidelines system, for example, perhaps the history appropriate to guide the court remains in the future.

190. One might inquire whether an issue, such as possession of a weapon at the time of the crime or quantity of drugs, historically was submitted to a jury for determination at trial. *See* White, *supra* note 183, at 21 (urging that history be cousulted on role of jury as fact-finder in capital cases). This inquiry is less promising than it originally appears to be, however, because history is likely to be ambiguous. Justice Rehnquist, according to his opinion in *McMillan*, would tell us that sentencing judges have often considered such matters as bearing on sentencing without involving a jury. *McMillan*, 477 U.S. at 86-87. On the other hand, many state and federal statutes include possession of a weapon as an element of many different crimes.

A court might rely on the history ouly of the particular jurisdiction in question. Therefore, if Pennsylvania had a consistent tradition of giving the issue of weapon possession to juries, a court might prohibit the legislature from diverging from that tradition by making possession of a weapon a sentencing factor. History might still be unreliable even for this narrower inquiry, however, because Pennsylvania law, like that in other states, might contain some statutes that include possession of a weapon as an element of the offense and some in which possession of a weapon is a sentencing factor. The current offense of aggravated assault, for example, includes use of a deadly weapon as an element, *see* PA. CODE § 2702(a)(4) (1991), while the statute considered in *McMillan* did not.

191. Another possible factor that might limit the legislature's ability to declare certain factors relevant ouly at sentencing might be a proportionality principle. If a legislature sets a maximum penalty of 360 months to life for drug possession, for example, and then provides that it is to be determined at sentencing what quantity of drugs the defendant actually possessed, as under the guidelines, it might be considered cruel and unusual to allow that maximum sentence to be imposed upon a defendant whose conviction was for a transaction involving ouly the minimum quantity of drugs. A court might conclude that *Specht* had not rcally been distinguished and that the legislature was allowing the tail to wag the dog because it could not realistically have intended the maximum sentence to apply to possession of a small quantity of drugs. *See* Husseini, *supra* note 21, at 1400-03, (arguing that the statutory maximum in a guidelines case is a highly theoretical reference point and

addressing the problems created by an overly bifurcated procedure.[192] The Pennsylvania legislature clearly wanted possession of a weapon to be a sentencing factor rather than an element of an offense. That does not mean its decision was constitutional.

The limitation *McMillan* seems to adopt—requiring a court to find that the legislature breaches the constitutional limits on its power only if the increment to sentencing seems disproportionately large compared with the sentence—could still be meaningful, depending on how it is interpreted. The Court's metaphor seems to suggest that the test should focus on the size of the dog—the offense of conviction—as much as on the size of the tail—the additional factors on which the sentence is based. I think that this is another manifestation of the positivist approach to liberty. Does it matter if the defendant loses two years of freedom when the sentence that has been enhanced by a carelessly found offense-related fact would otherwise have been thirty years, ten years, or one year? I would like to see the *McMillan* exception interpreted as focusing more narrowly on the period of freedom the defendant has at stake at sentencing. I also would advocate that in the future this exception be refined by establishing a particular period of time as being the enhancement a legislature may allow without providing for complete trial procedures. The tail-wags-the-dog idea is too amorphous and too subject to inconsistent application. It is also a misleading metaphor. Small tails are incongruous only on large dogs; the value of two years of freedom is of more than relative importance. As in cases providing that the right to trial by jury attaches if more than six months of liberty are at stake[193] or that the right to counsel attaches if the defendant faces possible imprisonment,[194] the right to the full benefit of criminal trial procedure before being

therefore not a sensible benchmark for due process). Even before the guidelines, the statutory maximum was a purely theoretical punishment, because in an indeterminate sentencing system few defendants served the maximum amount of time and the actual decision about how much time was to be served was given to the parole board rather than the legislature. Given the Supreme Court's recent decision in Harmelin v. Michigan, 111 S. Ct. 2680 (1991), however, in which a state statute imposing a sentence of life imprisoument for an offense involving 672 grams of cocaine was found not to violate the Eighth and Fourteenth amendments, proportionality principles do not seem promising as a way to define the scope of the legislature's power to assign critical offense-related issues to sentencing.

192. *But see* White, *supra* note 183, at 20 n.160 (reading *McMillan* to suggest that a statute's legislative history may determine its constitutionality).

193. Baldwin v. New York, 399 U.S. 66 (1970).

194. Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in felony case); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in nonpetty offense case punishable by more than six months imprisonment); Scott v. Illinois, 440 U.S. 367 (1979) (right to counsel only when sentence of unprisoument is actually imposed).

deprived of liberty could be tied to a specific period of additional sentence time.[195] Why not require that if an offense-related factor subjects a defendant to a sentencing enhancement of six months (or perhaps a year), the decision must be made according to trial procedures?[196] An identifiable time period, as in the cases defining when a defendant has a right to trial by jury, would be predictable, would provide defendants with some tangible protection, and would avoid inappropriate attention to the size of the dog.

3. *Distinguishing* McMillan *Under the Guidelines*

Few federal courts have considered or even recognized the tail-wags-dog exception in *McMillan*, which might render some proceedings under the guidelines unconstitutional even without my proposed modification of this standard.[197] No federal decision I have seen has considered whether *McMillan* is limited in its application because it was decided in the context of a state indeterminate sentencing system.

The context of the federal sentencing guidelines is in fact distinguishable in a number of ways. First, as pointed out earlier, the guidelines do not represent a legislative decision about what should be a sentencing factor and what should be an element of an offense.[198] Unlike the Pennsylvania legislature, which very clearly stated, first, that it

195. Justice Powell suggested that one fact to be gleaned from history and used as a basis for limiting legislative power was the extent to which the fact to be determined involved additional stigma. *Patterson*, 432 U.S. at 226. This factor seems more appropriate to deciding whether an affirmative defense (like insanity) should be subject to proof beyond a reasonable doubt. Sentencing enhancements are so finely graded that it would be difficult to determine at what point stigma increased enough to implicate the Due Process Clause. Judging degrees of stigma is so subjective an inquiry that I think courts should not view this factor directly. Instead, courts should take the length of sentence enhancement permitted as a reliable gauge of the additional stigma reflected. Once stigma is judged in this objective way, this inquiry is no different from the inquiry about the amount of time the defendant has at stake.

196. This does not necessarily require that the legislature consolidate all offense-related factors in the same proceeding. If the legislature is sufficiently attracted by the notion of bifurcation, two proceedings may be provided, as happens in capital punishment decisions and, in some jurisdictions, recidivist decisions, as long as they share key procedural features, like availability of a jury and proof beyond a reasonable doubt.

I recognize that the period of time I propose would require revisiting *McMillan*, in which a longer period of time was at stake, at least in the case of Dennison, *see supra* note 145. But selecting a longer time period as a trigger to accommodate *McMillan* would mean abandoning the analogy of the jury trial cases and gutting due process protection again.

197. See United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990), in which the Third Circuit mentioned such a claim but then declined to decide it because the defendant had not explicitly cast his claim in this form; Heaney, *supra* note 21, at 217-19 (distinguishing *McMillan* and finding greater likelihood of viable due process claims under guidelines).

198. *See supra* part I.A.

wished visible possession of a weapon to be a sentencing factor rather than an element of the offense, and second, that it wished this factor to be determined by a preponderance of the evidence,[199] Congress has not made any such assertions. Are the decisions of the hybrid Sentencing Commission, an administrative agency within the judicial branch, entitled to the same degree of deference as legislative decisions?[200] To the extent that the power exercised by the Sentencing Commission is judicial power to make decisions about how to determine sentences within a legislatively set range, I see no reason for the courts to defer to those decisions. This would be tantamount to the judicial branch making a decision and then deferring to itself. Judges should not defer to the Attorney General,[201] one of the adversaries in an adversarial process, on the question of how sentencing should be conducted.[202] Unlike the Pennsylvania legislature, the Sentencing Commission had no power to decide to make particular factors offense elements rather than sentencing factors. The Commission did not even decide that it wanted a preponderance-of-the-evidence standard used.[203] Neither of these issues warrants the degree of deference the Supreme Court afforded the legislative decision at issue in *McMillan*.

In addition, the *McMillan* statute was created in the context of an indeterminate sentencing scheme. The legislature, which told judges to set a minimum sentence at five years in cases involving visible possession of a weapon, could have accomplished exactly the same result by creating parole guidelines stating that anyone found to have visibly possessed a weapon should not be paroled before five years had passed.[204] The legislature's decision, when viewed in this light, provided for less procedure

199. *See supra* note 141.

200. Some courts reviewing claims that the Sentencing Commission did not abide by its enabling act have followed the approach of Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844-45 (1984) (giving deference to statutory interpretation by affected administrative agency). *See, e.g.*, United States v. Doe, 934 F.2d 353, 359 (D.C. Cir.), *cert. denied*, 112 S. Ct. 268 (1991); United States v. Harper, 932 F.2d 1073, 1079 (5th Cir. 1991); United States v. Martinez-Cortez, 924 F.2d 921, 923 (9th Cir.), *cert. denied*, 112 S. Ct. 443 (1991); United States v. Lewis, 896 F.2d 246, 247 (7th Cir. 1990). Whether this approach is correct is an open question. *See, e.g.*, United States v. Hopper, 941 F.2d 419, 421-22 (6th Cir. 1991). Procedural questions involving constitutional issues are a less appropriate subject for defense.

201. The Attorney General is an *ex officio* nonvoting member of the Sentencing Commission. *See* 28 U.S.C. § 991 (1988).

202. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990) (discussing whether rationales for judicial deference to legislation apply to other types of decision making, such as referenda).

203. *See supra* note 102.

204. *Compare* N.Y. COMP. CODES R. & REGS. tit. 9, § 8001.3(b)(3) (1991) (parole release guidelines depending on grid ranking offense severity).

than if that fact had been found at trial but probably considerably more procedure than if the same fact had been found by a parole board.[205] In this context, the Court's declaration that *McMillan* is not distinguishable from *Patterson v. New York* is more persuasive than it would be in a definite sentencing scheme. As in *Patterson*, the legislature had the option of doing a greater harm to the defendant's interests—leaving the decision to the lesser procedures of the parole hearing. But instead of doing the greater harm to the defendant's interests, it did the lesser—leaving the decision to the sentencing judge. Under a determinate sentencing scheme like the guidelines, in which parole has been abolished, possession of a firearm can be considered only at trial or at sentencing. There is no greater harm with which the legislature can threaten a defendant concerning an accusation of possession of a weapon. It is not possible for the legislature to allow this decision to be made in a less demanding way than it would be at sentencing, so the *Patterson* notion of allowing the legislature some leeway so that it will not eliminate greater procedural opportunities for defendants is not relevant.

Finally, *McMillan* was a state case decided in an era when federalism was a preeminent value in constitutional adjudication. The Supreme Court, the lower federal courts, and the Sentencing Commission itself do have supervisory responsibilities over what happens in federal criminal prosecutions. It would not be unseemly to allow the states to make their own decisions on these issues while providing meaningful due process protections in federal-court sentencing hearings, either by judicial decisions or by rules.[206]

McMillan's holding on the procedural issue involved—the constitutionality of the burden of proof—does not foreclose careful analysis of any due process claims, not even those regarding burden of proof in individual cases. *McMillan* did not explicitly discuss the due process balance of *Mathews v. Eldridge*,[207] but neither did the Court find that approach inapplicable. If the courts use that balancing test to decide procedural issues, defendants will still enjoy the right the Supreme Court recognized in *Townsend v. Burke*: to be sentenced on the basis of accurate information.

205. *See* King v. Pennsylvania Bd. of Probation & Parole, 111 Pa. Commw. 392, 534 A.2d 150 (1987) (holding that Pennsylvania statute does not create liberty interest in parole, so no due process rights attach to parole denial).

206. *See infra* text accompanying notes 271-72.

207. *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986).

4. Medina v. California *and the* Mathews *Balancing Test*

After this paper was presented at the Symposium on Federal Sentencing, the Supreme Court, in *Medina v. California*,[208] refused to apply the balancing test of *Mathews v. Eldridge* in deciding whether due process allows a State to impose on a criminal defendant the burden of proving that he is incompetent to stand trial. The Court declared that the proper analytical approach, derived from *Patterson v. New York*,[209] is to ask only whether a challenged procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[210] If this history-oriented inquiry were the only question asked about due process and sentencing procedure, *Williams* and *McMillan* show that courts would be unlikely to recognize any due process rights whatever at sentencing. However, for several reasons, I still believe that courts should assume the *Mathews* balancing test does apply in federal sentencing proceedings under the guidelines.

First, even the dicta in *Medina* did not cover *federal* criminal proceedings. Justice Kennedy's majority opinion was based heavily on federalism concerns and concluded only that *Mathews* is not the appropriate test for "state procedural rules which, like the one at bar, are part of the criminal process."[211]

In an earlier case, three members of the Court, Justices White, O'Connor, and Souter, had explicitly decided that *Mathews* should apply to analyze a due process claim regarding federal sentencing under the guidelines.[212] In *Medina*, Justices O'Connor and Souter wrote a separate opinion, concurring in the judgment, in order to disassociate themselves from the majority's broad dicta about whether state criminal procedures are ever to be measured against any test other than that of history.[213] Justice White evidently regarded his earlier decision in the guidelines case as consistent with the majority's opinion in *Medina*, involving a state criminal proceeding.

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208. 112 S. Ct. 2572 (1992).

209. *See* 432 U.S. at 197.

210. 112 S. Ct. at 2577 (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958), as quoted in *Patterson*, 432 U.S. at 201-02).

211. Id. at 2575; *see id.* at 2577 (quoting *Patterson*, 432 U.S. at 201-02 ("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.")).

212. *See* Burns v. United States, 111 S. Ct. 2182, 2188 (1991) (concurring opinion). It also seems likely that Justices Blackmun and Stevens, who did not find it necessary to reach the constitutional issue in *Burns* and who later dissented in *Medina*, would share this view.

213. 112 S. Ct. at 2581.

Furthermore, the Court's positivist approach in *McMillan* suggests that the Court does not regard sentencing as an integral part of the criminal proceeding. *McMillan* assimilated sentencing to cases involving the freedom of prisoners, not to criminal trials. In fact, in *Medina*, when discussing whether *Mathews* had ever been applied in the context of criminal proceedings, the Court completely ignored many prisoners' rights cases in which *Mathews* has been applied.[214] Either federal sentencing is, as I have been arguing, so similar to criminal trials that standard trial procedures should apply, or, as the Court seems to believe, sentencing is comparable to the prisoners' liberty cases, in which case there is no good reason not to apply *Mathews* to derive appropriate proeedures. *Williams* and *McMillan* refused to choose between these two possible models, treating defendants being sentenced as caught between two worlds and unentitled to the protections of either one. But the Court did not discuss the applicability of *Mathews* in either of these cases. If the Court were to confront this issue directly, it would have to decide whether to view sentencing as more similar to trial or to parole decisions, or whether to create an intermediate level providing more protection, not less, than the prison cases. In any event, some decision would have to be made about what procedures to require, and that decision should, as the *Mathews* calculus suggests, look to more than just history.

Finally, the Court in *Medina* attached great significance to the fact that it was deferring to the decision of a state legislature. The allocation of the burden of proof in *Medina* had been explicitly announced by statute.[215] One central point of this Article is that under the federal sentencing guidelines, no one other than individual courts has made procedural decisions: not Congress, not the Sentencing Commission, not courts through local rules. It is certainly the job of the courts to decide what due process requires at guidelines hearings, not least because no one else has made decisions to which the courts can defer. As the cases discussed in the next part show, the federal courts acknowledge this responsibility, even if they exercise their power grudgingly. To rule in this context that the balancing test of *Mathews* does not apply would only deprive the courts of a useful and familiar structure for making the decisions that cases like *Townsend v. Burke* require. I am unwilling to assume that the Supreme Court will declare that federal defendants today are ipso facto being sentenced on the basis of accurate information as long as they are

214. *See id.* at 2575-77.

215. *See* CAL. PENAL CODE § 1369(f) (West 1982), *quoted in* 112 S. Ct. at 2574. This specific legislative decision is reminiscent of the legislature's decision in *McMillan* to specify a standard of proof.

receiving no less procedural attention than recipients of automatic sentences did in the Middle Ages.

III. PROCEDURAL DUE PROCESS AND THE GUIDELINES IN THE LOWER COURTS

Reading the cases decided under the guidelines leaves me with a distinct sense that too much is happening at proceedings conducted with too few safeguards. Because of the tremendous number of factual determinations to be made before an appropriate sentence can be selected, federal sentencing under the guidelines is not, despite predictions to the contrary, a job for a computer.[216] In addition to the examples given earlier concerning quantity of drugs and possession of a weapon,[217] sentences may also be increased, *inter alia*, on the basis of the defendant's obstruction of justice,[218] additional fraudulent transactions, acts committed by coconspirators, or conduct resulting in the death of the crime victim.[219] The quantity of drugs in a drug case can be established,

216. *See, e.g.*, Weigel, *supra* note 21, at 100-01 (quipping that computers using software developed by the Sentencing Commission should pass approval as "constitutional due processors"); *but see* Richard Gruner, *Sentencing Advisor: An Expert Computer System for Federal Sentencing Analyses*, 5 SANTA CLARA COMPUTER & HIGH TECH. L.J. 51 (1989) (praising guidelines as being compatible with software).

217. *See supra* text accompanying notes 1-9.

218. United States v. Ruiz-Garcia, 886 F.2d 474, 476 (1st Cir. 1989) (defendant gave false name at arraignment and attempted to maintain fictitious identity); United States v. Shoulberg, 895 F.2d 882, 884 (2d Cir. 1990) (defendant sent a note to his codefendant that the court held to be threatening); United States v. McDowell, 888 F.2d 285, 292 (3d Cir. 1989) (defendant's son perjured himself in grand jury testimony, and, because the court "believed" that his only motive was to protect his father at his father's urging, the Court enhanced defendant's sentence for obstruction of justice); United States v. Garcia, 902 F.2d 324, 326 (5th Cir. 1990) (defendant lied to court officer about prior criminal conduct); United States v. Acosta-Cazares, 878 F.2d 945, 953 (6th Cir.) (defendant perjured himself during trial), *cert. denied*, 493 U.S. 499 (1989); United States v. Jordan, 890 F.2d 968, 973 (7th Cir. 1989) (defendant continued to use cocaine while on bail for a drug-related offense and then lied about this to his probation officer; the court considered this a "material falsehood" permitting sentence enhancement); United States v. Patterson, 890 F.2d 69 (8th Cir. 1989) (defendant gave an alias at arrest; court held that obstruction of justice is not limited to "post-offense" conduct and defendant's sentence was enhanced); United States v. Baker, 894 F.2d 1083 (9th Cir. 1990) (defendant's misstatements to probation officer about the number of his convictions constituted obstruction of justice; defendant was not entitled to an evidentiary hearing on this matter); United States v. Beaulieu, 900 F.2d 1537 (10th Cir.) (defendant testified untruthfully at trial), *cert. denied*, 497 U.S. 1009 (1990); United States v. Cain, 881 F.2d 980 (11th Cir. 1989) (defendant's attempt to hide treasury checks from a postal inspector warranted a two-point enhancement for obstruction of justice).

219. This is a departure factor, *see* United States v. Rivalta, 892 F.2d 223, 230 (2d Cir. 1989) (departure was two to 20 years), *cert. denied*, 112 S. Ct. 215 (1991). *Compare* U.S.S.G., *supra* note 1, §§ 3A1.1-.3 (other victim-related factors treated as adjustments).

according to the courts, by counting drugs not mentioned in the indictment, drugs which were never seized,[220] and drugs which the defendants never had any realistic prospect of actually obtaining.[221] Yet drug quantity can increase a sentence from base offense level twelve to level forty-two, the difference between ten months in prison and a life sentence.

Defendants who claim on appeal that they have a right to procedures beyond those that federal judges were accustomed to providing in discretionary sentencing decisions under *Williams* have been brushed aside in most cases with citations to *Williams* or *McMillan*.[222] There is no satisfactory way to know at the present time how most district courts are responding to such claims, because most procedural issues raised at sentencing seem to be resolved without reported opinions. The courts of appeals have shown a remarkable unanimity in deciding many of the issues raised,[223] and on those occasions when panels of one circuit have disagreed with the consensus of the other circuits, a rehearing or rehearing en banc quickly brings that circuit into line with the others.[224] There

220. *See* United States v. Pierce, 893 F.2d 669, 677 (5th Cir. 1990). The finding was made on the basis of the testimony of one witness at the sentencing hearing, who said that before the shipment of drugs for which defendant had been convicted there had been other shipments, which, in her opinion, were "larger."

221. United States v. Thomas, 870 F.2d 174, 176 (5th Cir. 1989). In a commentary to amendments to the guidelines, the Commission provided that the sentencing court should exclude from the guideline calculation amounts of drugs the defendant did not intend to produce or was not reasonably capable of producing. *See* U.S.S.G., *supra* note 1, § 2D1.4 cmt n.1.

222. *See, e.g.*, United States v. Restrepo, 946 F.2d 654, 657 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1564 (1992); United States v. Frierson, 945 F.2d 650 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1515 (1992); United States v. Duncan, 918 F.2d 647, 652 (6th Cir.), *cert. denied*, 111 S. Ct. 2055 (1990); United States v. Engleman, 916 F.2d 182, 184 (4th Cir. 1990); United States v. Wilson, 900 F.2d 1350, 1353 (9th Cir. 1990); United States v. Fuentes-Moreno, 895 F.2d 24, 26 (1st Cir. 1990); United States v. Burke, 888 F.2d 862, 869 (D.C. Cir. 1989); United States v. Guerra, 888 F.2d 247, 249-50 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1833 (1990).

223. In most cases, the courts of appeals have decided that due process requires precisely what the Department of Justice has advocated, *see* Memorandum from Roger M. Adelman, Former U.S. Attorney, to Federal Prosecutors, *in* PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES, *supra* note 15, at 440-42 (standard of proof should be a preponderance of the evidence); *id.* at 442-43 (burden of proof depends on whether factor proffered is aggravating or mitigating); *id.* at 443-47 (nature of hearings).

224. *See, e.g.*, United States v. Restrepo, 883 F.2d 781 (9th Cir. 1989), *rev'd on reh'g*, 946 F.2d 654 (9th Cir. 1991) (en banc) (original panel had held that only drugs within a count on which defendant was actually convicted could be considered relevant conduct), *cert. denied*, 112 S. Ct. 1564 (1992); United States v. Silverman, 945 F.2d 1337 (6th Cir.) (right of confrontation applies at sentencing if fact at issue may materially increase sentence), *vacated on reh'g*, 976 F.2d 1502 (6th Cir. 1991) (en banc); United States v. Wise, 923 F.2d 86, 87 (8th Cir. 1991) (same), *rev'd on reh'g*, 976 F.2d 393 (8th Cir. 1992) (en banc); *see also* United States v. Castellanos, 882 F.2d 474 (11th Cir. 1989) (evidence derived from codefendant's trial may not be used to determine relevant quantity of drugs at sentencing), *rev'd on reh'g*, 904 F.2d 1490 (11th Cir. 1990).

are few areas where there is serious disagreement among the circuits. There should be more.

A. *McMILLAN* AND THE ALLOCATION OF SENTENCING FACTORS

Few defendants have challenged sentencing under the guidelines on the theory that certain sentencing factors listed in the guidelines should have been treated as elements of the offense. Therefore, the lower courts have had few opportunities to consider whether *McMillan* is distinguishable in this context, as argued earlier,[225] or when to apply the tail-wags-dog exception. Defendants who claim a right to certain procedures because the factors on which their sentences are being enhanced could have led to an independent criminal charge are generally told that whether their sentence is enhanced is simply a different matter from whether they are convicted, and besides, the actual period of incarceration generated by the sentence enhancement is shorter than the potential period of incarceration upon conviction of a separate offense.[226] The Third Circuit, recognizing that in the *Kikumura* case[227] the dog of the defendant's conviction for interstate transportation of explosives might well have been wagged by the 360-month-sentence tail imposed on him for intent to commit mass murder, nevertheless declined to address the *McMillan* issue because the defendant had not raised a claim in that particular form.[228]

McMillan remains an underused theory in litigation over the guidelines. After *Mistretta v. United States* rejected the claim that Congress had unconstitutionally delegated its power to the Sentencing Commission,[229] courts and litigants may have assumed that all of the Sentencing Commission's work is beyond constitutional reproach. The question posed in *McMillan* about legislative power to allocate sentencing factors presents a claim that is both unresolved and difficult. Although the Court found in *Mistretta* that Congress' delegation of authority to the Sentencing Commission did not violate separation of powers principles, a

225. *See supra* part II.B.3.

226. *See, e.g.*, United States v. Mocciola, 891 F.2d 13, 17 (1st Cir. 1989). The fact remains that if the defendant had been charged with a crime the maximum sentence of which was the same 15 months by which his sentence was enhanced here, he would have been entitled to a jury trial with all the trimmings. *See* Baldwin v. New York, 399 U.S. 66 (1970) (right to a jury trial applies to all offenses with possible punishment of incarceration of more than six months). Sentencing enhancements may be substantial and, on occasion, might even exceed the punishment available under a separate statute. *See supra* note 69.

227. *See supra* text accompanying notes 90-97.

228. *See supra* note 197.

229. 488 U.S. 361 (1989).

challenge under *McMillan* to particular aspects of the Commission's work reveals a different constitutional cost of this delegation—the procedural consequences of arraying aggravating and mitigating circumstances as sentencing factors rather than as legislatively prescribed elements of the underlying offenses.

Future claims raised under *McMillan* will provide the courts with the opportunity to distinguish *McMillan*, or at least to define the scope of the tail-wags-dog exception *McMillan* declared. As I have discussed,[230] I would define this exception as depending on the extent to which determination of the fact at issue is likely to enhance the defendant's sentence, even though this definition is not entirely consistent with the opinion in *McMillan*.

B. Procedural Due Process in Guidelines Proceedings

As I have described in discussing the Supreme Court's due process in sentencing cases, the question of what procedures to apply at sentencing is an individualized inquiry. This was true before the guidelines, as Judge Weinstein recognized in *United States v. Fatico*,[231] because the touchstone of due process in this area has always been the declaration in *Townsend v. Burke* that sentencing must be based upon accurate information.[232] It is even more manifestly true under the guidelines, which create exactly the type of liberty interest the Court has required as a predicate for due process protections in areas where the government must decide whether to "give back" some amount of the liberty forfeited by a criminal conviction. In the parole release cases, for example, the Court has held that the State must provide a prospective parolee with an appropriate opportunity to be heard if the State's parole regulations specify substantive predicates for parole release decisions and if those regulations use language of a mandatory character to limit the discretion of the

230. *See supra* text accompanying notes 186-94.

231. 458 F. Supp. 388, 396-412 (E.D.N.Y. 1978), *aff'd on other grounds*, 603 F.2d 1053 (2d Cir. 1979), *and cert. denied*, 444 U.S. 1073 (1980). The disputed issue on sentencing concerned the government's allegation that the defendant was a member of an organized crime family, a fact not established at trial. Judge Weinstein, after careful analysis, concluded that the standard of proof at sentencing hearings should vary according to the particular circumstances of the case and that for this allegation, given its seriousness and potential impact on the sentence, the standard should be set at clear, unequivocal, and convincing evidence.

Fatico remains one of the most thorough and incisive analyses of this issue, even in light of subsequent cases and the advent of the guidelines.

232. *See supra* text accompanying notes 109-10.

parole authorities.[233] For example, providing that a prisoner "shall be paroled if . . ." creates a liberty interest entitling the prospective parolee to procedural protection. The federal sentencing guidelines clearly limit discretion through language of a mandatory nature and thereby do create a liberty interest.[234]

Therefore, courts considering whether procedures at a sentencing hearing are adequate must go on to the second step of the Court's two-step due process analysis: They must consider what process is due under the test of *Mathews v. Eldridge*,[235] which requires a court to balance

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[236]

It is still rare to see an explicit application of this balancing test in opinions about procedure at sentencing proceedings under the guidelines. Yet this is what each court should be doing whenever an issue arises as to whether a defendant is entitled to a heightened standard of proof on any particular issue, to confront and cross-examine the government's witnesses, or to compulsory process to call his or her own witnesses. This complex inquiry is not satisfied by observations about the history of procedure at sentencing hearings in earlier eras or by reflexive citation to *Williams* or *McMillan*.

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233. *See* Board of Pardons v. Allen, 482 U.S. 369 (1987); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 11-12 (1979). The same criteria apply to determine whether prisoners, who no longer have a right to certain forms of liberty, are entitled to due process protections before they may be transferred to a segregated housing unit for disciplinary reasons, *see* Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974), or for administrative reasons, *see* Hewitt v. Helms, 459 U.S. 460 (1983), to a different facility, *see* Meachum v. Fano, 427 U.S. 215, 224-27 (1976), or denied visiting privileges, *see* Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989) (in which the Court declared, for the first time, that *both* substantive limits on discretion *and* mandatory language are necessary to create a liberty interest).

For a critique of this postivist approach to liberty, see Herman, *supra* note 77.

234. The limited departure power does not provide enough discretion to warrant finding no liberty interest. Three members of the Supreme Court have already applied *Mathews* to a due process issue in a guidelines case. *See supra* text accompanying note 212.

235. 424 U.S. 319, 335 (1976). For a critique of this balancing test, see Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

236. 424 U.S. at 335.

1. *Burdens and Standards of Proof*

All twelve courts of appeals have held that defendants in guidelines sentencing proceedings are entitled to have relevant facts proved at sentencing by a preponderance of the evidence,[237] generally without recognizing that any exceptions to this standard might be necessary. These courts have usually invoked *McMillan* for the proposition that the preponderance-of-the-evidence standard is what due process requires at sentencing.[238] This is an overreading of *McMillan*, which provided only that in the context of that case due process did not require more. As discussed earlier, the context of guidelines sentencing in federal court is different.[239] This generalized law on standards of proof also fails to take account of *Townsend v. Burke*[240] and the right of each individual to be sentenced on the basis of accurate information.

A few thoughtful judges have recognized that even after *McMillan* and these general court of appeals decisions, due process may still require a higher standard of proof than a preponderance of the evidence—usually a clear-and-convincing-evidence standard—in cases in which the findings of fact in question may lead to a substantial sentence enhancement.[241] As these courts have recognized, an appellate ruling that using the preponderance standard in guidelines sentencing generally satisfies due process does not answer the question of whether this standard might deny due process in a particular case. A Ninth Circuit panel created an intermediate approach by defining the preponderance standard in the context of guidelines sentencing to require a "sufficient weight of evidence to convince a reasonable person of the probable existence of the

237. United States v. Blanco, 888 F.2d 907, 909 (1st Cir. 1989); United States v. Guerra, 888 F.2d 247, 250 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990); United States v. McDowell, 888 F.2d 285 (3d Cir. 1989); United States v. Powell, 886 F.2d 81, 85 (4th Cir. 1989), *cert. denied*, 493 U.S. 1004 (1990); United States v. Reynolds, 900 F.2d 1000, 1003 (5th Cir. 1990); United States v. Duncan, 918 F.2d 647, 652 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2055 (1991); United States v. Fonner, 920 F.2d 1330, 1333 (7th Cir. 1990); United States v. Malbrough, 922 F.2d 458, 464 & n.6 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2907 (1991); United States v. Restrepo, 903 F.2d 648, 654 (9th Cir. 1990), *modified by* 946 F.2d 654 (9th Cir. 1991) (en banc), *and cert. denied*, 112 S. Ct. 1564 (1992); United States v. St. Julian, 922 F.2d 563, 569 n.1 (10th Cir. 1990); United States v. Castellanos, 904 F.2d 1490, 1494-95 (11th Cir. 1990); United States v. Burke, 888 F.2d 862, 869 (D.C. Cir. 1989).

238. *See* cases cited *supra* note 222.

239. *See supra* text accompanying notes 197-206.

240. *See supra* text accompanying notes 109-11.

241. The best discussion in a postguidelines case is in *Kikumura*, 918 F.2d at 1099-1102; *see also St. Julian*, 922 F.2d at 569 n.1 (dictum); *Restrepo*, 903 F.2d at 657-58 (1990) (Pregerson, J., dissenting); Husseini, *supra* note 21, at 1405-11 (an excellent example of how to apply the *Mathews v. Eldridge* balancing test to burden-of-proof questions).

enhancing factor," not merely that the fact offered to enhance the defendant's sentence was more likely than not to be true.[242] These few thoughtful opinions, along with *Fatico*, suggest how this issue should be approached—by a due process analysis of the interests at stake in a particular case and the purposes of enhanced standards of proof.[243]

On the issue of burden of proof, the courts are in general agreement that the burden of proof should be on the government to establish aggravating factors and on the defendant to establish mitigating factors.[244] Here, too, courts should be aware that this general rule may need to yield if the burden imposed on a particular defendant seems too great.

2. *Adversary Hearings, Confrontation, and Hearsay*

The district courts are recognized as having discretion to decide when an adversary hearing is necessary prior to sentencing and how extensive such a hearing needs to be.[245] It is clear from the increase in the amount of time consumed by sentencing hearings under the guidelines that some judges are exercising this discretion to afford fuller hearings. Cases in which judges hold generous sentencing hearings are generally not appealed or reported on procedural grounds. It may be, therefore, that reading reported opinions on defendants' procedural claims provides a misleading picture of what most district courts actually do at sentencing.[246] The appellate cases that consider whether particular district court judges have abused their discretion by failing to hold adequate hearings tend to be forgiving of district court decisions. Unfortunately, some district court judges could take this invulnerability on appeal as license.

One of the principal questions concerning the adequacy of such hearings is when a defendant should be afforded a right to confront

242. *Restrepo*, 903 F.2d at 654-55. The Ninth Circuit en banc replaced the panel opinion on this point with a new discussion of burden of proof, in which the panel's fortified definition of the preponderance standard is not mentioned.

243. *See, e.g.*, *In re* Winship, 397 U.S. 358, 370-72 (1970) (Harlan, J., concurring) (maintaining that the standard of proof should be determined by the consequences, such as loss of liberty, stigma, and costs of an erroneous determination); Husseini, *supra* note 21.

244. *See, e.g.*, United States v. Havens, 910 F.2d 703, 706 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 687 (1991); United States v. Khang, 904 F.2d 1219, 1222 (8th Cir. 1990); United States v. Rodriguez, 896 F.2d 1031, 1032 (6th Cir. 1990); United States v. McDowell, 888 F.2d 285, 290 (3d Cir. 1989); United States v. Urrego-Linares, 879 F.2d 1234, 1239 (4th Cir.), *cert. denied*, 493 U.S. 943 (1989).

245. *See, e.g.*, United States v. Pologruto, 914 F.2d 67, 68 (5th Cir. 1990).

246. This is the heartening conclusion of Judge Jack B. Weinstein's informal survey. *See infra* note 269.

adverse witnesses and when a sentence may be based on hearsay. Congress has provided that hearsay is admissible at sentencing.[247] The Federal Rules of Evidence also declare their own inapplicability to sentencing proceedings.[248] Congress' views on the desirability of hearsay at sentencing proceedings (generated in the context of the indeterminate sentencing model) do not, of course, constitutionalize all use of hearsay in sentencing proceedings. The use of hearsay needs to be examined on a case-by-case basis. The guidelines themselves provide that hearsay introduced must be "reliable."[249] This invites courts to conduct an individualized inquiry into the use of any challenged hearsay evidence.

A related question is whether the Confrontation Clause applies at sentencing hearings. Based on *Williams*' disdain for constitutionally based claims to process in sentencing proceedings, the courts of appeals have held that it does not.[250] Panels of the Sixth and Eighth circuits had held that the Confrontation Clause does apply to sentencing hearings and that hearsay evidence must therefore meet the usual Supreme Court standards for reliability of evidence and unavailability of declarant.[251] Those courts also prohibited reliance on multiple hearsay in presentence reports when it was disputed by the defendant and had required testimony that a defendant could cross-examine.[252] Mechanically citing *Williams* and Congress' declaration that hearsay is admissible, the Sixth and Eighth circuits en banc rejected that approach. The Third Circuit's due process approach still preserves some essence of the values of the Confrontation Clause. Applying the same intermediate standard that it used to escalate the burden of proof in cases in which the impact on a defendant's sentence would be substantial if a certain fact were established,[253] the Third Circuit held that although the Confrontation Clause does not apply

247. 18 U.S.C. § 3661 (1988).

248. FED. R. EVID. 1101(d)(3); *see* U.S.S.G., *supra* note 1, § 6A1.3 cmt.

249. U.S.S.G., *supra* note 1, § 6A1.3 (reliable hearsay permitted).

250. *See, e.g.*, United States v. Beaulieu, 893 F.2d 1177, 1179-81 (10th Cir.), *cert. denied*, 110 S. Ct. 3302 (1990); United States v. Sciarrino, 884 F.2d 95, 97 (3d Cir.), *cert. denied*, 493 U.S. 997 (1989).

251. United States v. Silverman, 945 F.2d 1337 (6th Cir.), *vacated on reh'g*, 976 F.2d 1502 (6th Cir. 1991) (en banc) (right of confrontation applies at sentencing if fact at issue may materially increase sentence); United States v. Wise, 923 F.2d 86, 87 (8th Cir. 1991), *rev'd*, 976 F.2d 393 (8th Cir. 1992) (en banc); United States v. Fortier, 911 F.2d 100, 103-05 (8th Cir. 1990); United States v. Streeter, 907 F.2d 781, 792 (8th Cir. 1990); *see* Heaney, *supra* note 21, at 224-25 (advocating that other courts adopt the Eighth Circuit's rule in *Fortier, supra*); *cf.* FRANKEL, *supra* note 99, at 32 (criticizing courts for operating at sentencing as if they were unaware of the dangers posed by hearsay).

252. *See* cases cited *supra* note 251.

253. *See* United States v. Kikumura, 918 F.2d 1084, 1099-1102 (9th Cir. 1991). In the *Kikumura* case, the sentencing court departed upward from the guidelines range substantially. The

directly at sentencing hearings, the usual requirements of reliability of hearsay are inadequate in such cases. In *Kikumura*, the Court required "reasonably trustworthy" information as the basis for a dramatic sentencing increment.[254]

This intermediate standard provides a good example of application of the *Mathews v. Eldridge* due process test in another context. Even if the Confrontation Clause itself does not apply at sentencing proceedings, the Due Process Clause does. In the future, I urge more courts to consider either the Eighth Circuit's now-repudiated approach of allowing confrontation and cross-examination in sentencing hearings on the basis of the Sixth Amendment or the Third Circuit's due process approach. The Eighth Circuit's former approach is simpler, incorporating all of the Sixth Amendment law derived in the context of trials rather than creating a new standard, but the Third Circuit's approach may be attractive to courts that wish to forge a new, intermediate law of procedure at sentencing. Both approaches share the advantage of evaluating challenges to the use of hearsay by constitutional analysis rather than merely invoking the law of the past or the rules of evidence. The number of cases affected under either approach would probably not be great,[255] but the fairness of sentencing proceedings would be greatly enhanced.

3. *Previously Acquitted Conduct*

Most courts have found that, because of the difference in the applicable burden of proof, it is permissible for a sentencing judge to take account of asserted conduct even if the defendant was acquitted by a jury of what was essentially the same charge. These courts have declared that the Double Jeopardy Clause is not applicable at the sentencing phase.[256]

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same theory should apply, even within the guidelines range, when a substantial amount of time is involved, even if it is much less than the decades at issue in that case.

254. *Id.* at 1102-03.

255. *See Silverman*, 945 F.2d at 1337.

256. United States v. Mocciola, 891 F.2d 13, 16 (1st Cir. 1989) (holding that sentencing court could consider prior related acquittal because verdict demonstrated only lack of proof beyond a reasonable doubt and did not necessarily establish innocence); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 179 (2d Cir.) (denying defendant's double jeopardy claim for enhancement of sentence based on conduct of which he had been acquitted), *cert. denied*, 111 S. Ct. 127 (1990); United States v. Cianscewski, 894 F.2d 74 (3d Cir. 1990); United States v. Talbott, 902 F.2d 1129, 1133 (4th Cir. 1990) (holding that acquittal of manufacturing-firebomb offense did not bar consideration of the acquitted conduct during sentencing); United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989) (defendant's sentence based on possession of a firearm although he had been acquitted of that offense); United States v. Cardi, 519 F.2d 309, 314 n.3 (7th Cir. 1975) (allowing district judges, preguidelines, to augment sentences after personally concluding defendants had committed the offenses of which they had been acquitted); United

The Ninth Circuit, in a rare dissenting voice, has held that a sentencing court may not use facts rejected by a jury in its finding of not guilty to enhance a defendant's sentence, at least not when the defendant actually challenges the existence of the conduct alleged.[257] The Ninth Circuit opinion seems based more on notions of due process than on the Double Jeopardy Clause. It is questionable whether the Double Jeopardy Clause could be found to apply directly in this situation. Although the defendant is not being charged with anything characterized as a new "offense," many of the values of the Double Jeopardy Clause are implicated by repeated litigation of the same issue. The Supreme Court has recognized that a collateral estoppel concept inheres in the Double Jeopardy Clause.[258] This is in part because a defendant will suffer additional anxiety from being made to run the gauntlet a second time. It is also thought that with practice, the prosecution may perfect its techniques and gain an unfair advantage in meeting its burden of proof in the second proceeding. Both of those concerns are just as applicable if the second proceeding is a sentencing rather than a trial. Defining sentencing and conviction as part of the same criminal proceeding, and therefore outside of the prohibition against double jeopardy, defines away the problem without solving it.

The Supreme Court has held that the Double Jeopardy Clause does not bar an upward revision of a defendant's sentence on appeal,[259] on the

States v. Fonner, 920 F.2d 1330, 1332-33 (7th Cir. 1990) (defendant's sentence enhanced for a killing after acquittal by jury on homicide charge); United States v. Manor, 936 F.2d 1238 (11th Cir. 1991) (sentence based on quantity of drugs involved in conspiracy of which defendant was acquitted); United States v. Donelson, 695 F.2d 583, 590 (D.C. Cir. 1982) (holding that a sentencing judge can take into account facts introduced at trial, even those of which the defendant has been acquitted).

In addition to theorizing that the standard of proof is different, some courts note that the increment to a defendant's sentence is less than what a separate conviction would entail. *See Mocciola*, 891 F.2d at 17. See *supra* note 69 for an explanation of why this is not always true.

The U.S. Parole Commission, which had limited authority to consider conduct that had been the subject of an acquittal, has now been given authority to consider such conduct in connection with parole release decisions on the reasoning that the courts are doing so at sentencing. *See* 56 Fed. Reg. 16,269 (1991) (to be codified at 28 C.F.R. § 219(c)).

257. *See* United States v. Brady, 928 F.2d 844, 850-52 (9th Cir. 1991) (jury had acquitted defendant of murder and convicted him of manslaughter; sentencing court enhanced sentence based on defendant's state of mind during the homicide). The court distinguished the *Fonner* case on the basis that the defendant there had admitted the killing—the jury's verdict was considered to have been based on a rejection of defendant's defense of self-defense. 928 F.2d at 851 n.11. *See also* United States v. Lawrence, 934 F.2d 868, 875 (7th Cir. 1991) (expressing admiration for *Brady* holding, but following previous opinions in that and other circuits).

258. *See* Ashe v. Swenson, 397 U.S. 436 (1970).

259. United States v. DiFrancesco, 449 U.S. 117 (1980). The Court found that neither the history of sentencing practices nor the rationales underlying the Double Jeopardy Clause supported a prohibition on increasing sentences on appeal. *Id.* at 132-38.

theory that sentencing is a secondary proceeding, ancillary to the main event of the criminal conviction.[260] But to the extent that sentencing proceedings under the guidelines try and retry offense-related facts, they allow greater opportunity than a resentencing for the evils the Double Jeopardy Clause addresses. In addition, allowing the sentencing judge to reconsider facts already determined by the jury depreciates the role of the jury. Another value the Double Jeopardy Clause is supposed to protect is the defendant's right to the verdict of the jury first selected in his or her case.

Sentencing, as a critical phase of a criminal proceeding, could easily be found to be limited by principles of collateral estoppel that might not apply in other contexts. The difference in burden of proof between sentencing and conviction, which has been described throughout this Article as a product of what may be a misconceived idea of the relationship between sentencing and conviction, need not be dispositive of this issue. The values of the Double Jeopardy Clause itself must be considered.

Even if the Double Jeopardy Clause is found not to apply directly to sentencing proceedings, courts should consider whether allowing the prosecution a second opportunity to prove the same conduct constitutes a denial of due process.[261] Allowing previously acquitted conduct to be used as a sentencing factor gives the prosecution many options and the defendant very few.[262] Suppose a prosecutor decides to charge a defendant with drug trafficking and possession of a weapon in connection with the drug transaction.[263] The defendant admits the drug offense but denies possessing a weapon. The defendant can plead guilty to the drug offense in exchange for the prosecutor's agreement to drop the count in the indictment charging weapon possession. The defendant may then be

260. "The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him." *Id.* at 136.

Justice Brennan, dissenting on behalf of four Justices, accused the majority of fundamentally misunderstanding the importance of sentencing decisions to the defendant. "I suggest that most defendants are more concerned with how much time they must spend in prison than with whether their record shows a conviction .... Clearly, the defendant does not breathe a sigh of relief once he has been found guilty." *Id.* at 149 (Brennan, J., dissenting).

261. *Cf.* North Carolina v. Pearce, 395 U.S. 711 (1969) (holding that upward revision of a sentence after a defendant has been retried, following reversal of initial conviction on appeal, does not violate Double Jeopardy Clause but may deny due process), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989).

262. *See* Weinstein, *supra* note 31, at 5 (chart detailing examples of prosecutors' options under guidelines).

263. *See* 18 U.S.C. § 924(c)(1) (Supp. II 1990); United States v. Foote, 898 F.2d 659 (8th Cir. 1990) (defendant challenged prosecutor's power to decide whether to charge this offense or rely on possession of a weapon as a sentencing factor).

sentenced on the basis of possession of that weapon anyway.[264] Alternatively, the defendant can go to trial. If the jury finds the defendant not guilty of possession of the weapon and guilty on the drug charge, he or she may again nonetheless be sentenced on the basis of possessing the weapon.[265]

Whether to include that charge in the indictment at all was the prosecutor's choice. The prosecutor could simply reserve the charge for use as a sentencing factor, particularly if the evidence is not very strong.[266] The prosecutor, in fact, can probably have two chances to prove that the defendant possessed a firearm even if that charge was not included in the original indictment. At a sentencing hearing, the prosecutor can have the defendant's drug-possession sentence enhanced by convincing the judge by a preponderance of the evidence that the defendant did have a gun. If the proof of possession of a weapon turns out to look better than expected, is there anything to stop the prosecutor from then also seeking an indictment on this additional charge? Unless possession of a weapon were considered to be part of the "same offense" as drug possession,[267] the Double Jeopardy Clause would, according to current law in most courts of appeals, be held not to bar the second prosecution. The defendant was never in "jeopardy" on the weapon charge if this factor was raised ouly at the sentencing phase.[268]

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264. *See, e.g.*, United States v. Fox, 889 F.2d 357 (1st Cir. 1989) (sentencing defendant, who pleaded guilty to one count of fraudulent bank loan, on the basis of other fraudulent loans considered "relevant conduct"); United States v. Blanco, 888 F.2d 907 (1st Cir. 1989) (holding that additional drugs that were not covered by counts to which defendant pleaded guilty could still be considered in setting base offense level under federal sentencing guidelines); United States v. Fernandez, 877 F.2d 1138 (2d Cir. 1989) (sentencing defendant based on 25 kilograms rather than the 500 grams to which he pleaded guilty); United States v. Rivera, 879 F.2d 1247 (5th Cir.) (holding that the government's promise in plea agreement not to pursue any charges against defendant for intimidation of government witnesses did not prohibit government from supplying information for presentence report on this subject), *cert. denied*, 493 U.S. 998 (1989); United States v. Ykema, 887 F.2d 697, 699 (6th Cir. 1989) (holding that base offense level under sentencing guidelines was not required to be based on amount of cocaine specified in plea agreement), *cert. denied*, 493 U.S. 1062 (1990); United States v. Franklin, 902 F.2d 501 (7th Cir.) (sentencing defendant on total quantity of drugs in a 17-count indictment rather than the quantity alleged in the three counts to which he pleaded guilty), *cert. denied*, 111 S. Ct. 274 (1990); United States v. Scroggins, 880 F.2d 1204, 1214 (11th Cir. 1989) (holding that the government's agreement to drop certain theft charges against defendant in exchange for a guilty plea did not preclude district court from considering them in setting offense level), *cert. denied*, 494 U.S. 1083 (1990).

265. *See supra* note 256.

266. This is the same allocation decision that the Pennsylvania legislature reserved to itself in *McMillan*. *See supra* text accompanying note 141.

267. It would not be under current federal double jeopardy law. *See* Grady v. Corbin, 493 U.S. 953, *reh'g denied*, 493 U.S. 1037 (1990).

268. Jeopardy is considered to attach in a jury trial when the first juror is sworn. *See* Crist v. Bretz, 437 U.S. 28 (1978).

Whether characterized as a double jeopardy problem or a due process problem, this claim, like all of the other issues defendants raise about the fairness of procedures under the guidelines, deserves far more careful analysis than it has received so far in most of the reported opinions.

4. *District Court Discretion and Appellate Review*

At the present time, we really do not have enough information about the nature of the hearings the district courts are providing under the guidelines in the many cases that do not generate opinions on procedural issues. It may be that most district courts are providing more adequate sentencing hearings than the reported appellate law would suggest.[269]

The district courts do have the discretion to provide sentencing hearings that are reasonably fair. Decisions to hold hearings and to allow confrontation and compulsory process are not likely to be subject to appeal. Creative district judges may even find other ways to enhance the fairness of sentencing proceedings and reduce the disparity between the sentencing process and the trial process.[270] As long as these judges realize that fact-finding at sentencing under the guidelines resembles fact-finding at trial at least as much as it resembles the now-abandoned practices of indeterminate sentencing, sentencing hearings in most individual cases can be conducted fairly despite the purportedly restrictive statutory and appellate law of sentencing.

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269. In his commentary on this article, Judge Jack B. Weinstein reports the results of his informal survey of sentencing practices among his colleagues in the Eastern and Southern districts of New York. His encouraging news is that, on his court, at least, district judges are more generous with heightened standards of proof than reported decisions reflect. *See A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 359 (1992). I hope that district judges on other courts would report that they are exercising their discretion similarly. Nevertheless, it is still the job of the courts of appeals to create law encouraging the wise use of discretion and refusing to tolerate the unwise, even if the unwise are in the minority.

270. On an anecdotal level, I recently attended a trial in the Eastern District of New York in which an issue existed as to whether the quantity of drugs mentioned at trial was accurate. (The government had not actually opened or tested most of the capsules believed to have contained drugs, but instead relied on random sampling and extrapolation to calculate the amount of drugs.) Defense counsel asked for a jury determination on the quantity of drugs involved. The judge, although noting that he would not be bound by the jury determination because this was a sentencing factor, agreed to submit this issue to the jury. Complex issues about the responsibility of the judge for fact-finding in guidelines hearings might have been raised if the judge had attempted to defer to the jury's findings. Nevertheless, I see no reason for judges not to refer factual issues to the jury in this manner, as long as they use the jury's verdict carefully. This is one means by which a court can reinstate some of the jury's role in fact-finding.

The stingy appellate law of sentencing procedure is nevertheless a problem because it tolerates some hearings that do not seem fair as well as a measure of procedural disparity. It is ironic that Congress and the Sentencing Commission addressed substantive disparity in sentencing by creating a system in which the fairness of treatment that a defendant receives in sentencing still depends on the luck of the draw. This should be an easier problem for the courts to remedy on their own than substantive disparity proved to be. Since many appellate courts have been unwilling to take this problem seriously in individual cases, some attention from the Judicial Conference, or some local rules, might be helpful. As a preliminary step, the Sentencing Commission could undertake to study what is happening procedurally as well as substantively at federal sentencing proceedings.

The Sentencing Commission might even consider playing a more active role in the promulgation of fair procedures. The courts may simply be too embattled by overwhelming demands on their time posed by this new sentencing regime, the rapidly increasing federal criminal docket, and the neglected civil docket to willingly undertake a commitment to enhanced sentencing procedures. The Commission, which was created to act for Congress on substantive issues on which Congress doubted its will to do the right thing, could provide a similar service for the courts. The Commission could undertake to draft procedural guidelines to accompany its substantive guidelines as part of its necessary and proper powers.[271] While these guidelines could not prescribe what is constitutionally required in each individual case, they could set out parameters for decision, specifying, for example, that *Mathews v. Eldridge* does provide the appropriate test for procedural challenges, that hearsay must be measured by something similar to Sixth Amendment standards when a substantial increase in the sentence is at stake, that a burden of proof higher than preponderance of the evidence may be required in particular cases, and that facts implicitly decided in a jury's verdict may not be redecided at sentencing. If there is any doubt as to the Commission's power to promulgate rules, the Commission could draft recommended procedures to refer to the Judicial Conference or for adoption as local rules.[272]

271. *See supra* note 107.

272. Congress could assist this effort by clearing out those rules of procedure that were designed for preguidelines sentencing, such as blanket permission to use hearsay at sentencing proceedings.

IV. CONCLUSION

If I am right in thinking that many of the decisions being made at sentencing proceedings under the guidelines do not belong in those proceedings at all, the courts cannot fully correct this situation. A careful reading of *McMillan* would allow the courts to find, at least in cases in which the sentence enhancement is great, that allocating some of these decisions to the sentencing phase denies some defendants due process. A more comfortable and less adventurous role for the courts is to become more attentive to sentencing procedures under the guidelines, bearing in mind that there is no particularly good reason why many of these factors have been allocated to sentencing hearings rather than trials.

The Third, Eighth, and Ninth circuits have provided several examples of an intermediate, due-process-oriented model more appropriate to sentencing under the federal sentencing guidelines than the laissez-faire attitude of *Williams*. The principal objection to enhanced procedure at sentencing has been that it would be time-consuming and duplicative. If that turns out to be true, it is for the Sentencing Commission and Congress to remove some of the burden at sentencing by redirecting the emphasis of factual determinations to trial.[273] It should not be necessary to hold two proceedings to decide the relevant facts in many of these cases,[274] but if two proceedings continue to be held, both should be fair.

273. In this Article, I have focused on cases in which the facts are decided at trial. The vast majority of criminal cases are disposed of through plea proceedings, which present different issues concerning how facts are determined and to what extent they can be stipulated. For a preliminary account of the impact of the guidelines on plea bargaining procedures, see Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231 (1989).

If, as I suggest, the number of offense-related factors relevant at sentencing were reduced by making these factors elements of the relevant offenses, sentencing after plea bargaining would also be simplified. Most of the facts on which sentencing would be based would then be stipulated, and the surprising scenarios described above, *supra* note 260, would be avoided. The extent to which judges would have authority to review plea bargains to ensure that prosecutors were not using their power to subvert the guidelines could, as Professor Schulhofer has suggested, be addressed directly, STEPHEN J. SCHULHOFER, PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM (1979). Whether the factors at issue relate to the actual charges or only to sentencing decisions would not necessarily affect the amount of control the judges could be given.

274. Judge Weinstein's survey disclosed that most judges in the districts surveyed believe there is rarely a serious enough dispute about the facts on which sentencing is to be based to warrant holding a hearing. *See supra* note 269. If this is true, there is even less reason for the courts or the Sentencing Commission to resist being generous with procedural safeguards in those few cases where important facts are disputed.