NORTH CAROLINA LAW REVIEW

Volume 81 | Number 5 Article 2

6-1-2003

Trial Rights at Sentencing

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TRIAL RIGHTS AT SENTENCING

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While the landscape of constitutional rights of procedure at a criminal trial is well developed, the picture of which of these rights apply at sentencing proceedings is much murkier. The scope of protection provided at sentencing and the principles governing which trial rights apply at sentencing and which rights do not apply have not been well understood. The advent of sentencing guidelines systems has increased the importance of these issues. In this Article, Professor Michaels systematically canvasses trial rights at sentencing, identifying the rights that apply, the rights that do not apply, and the rights whose application remains in doubt. Professor Michaels also explores possible rationales for the results that emerge and identifies a previously unarticulated principle that appears to govern them. Briefly put, under this principle, rights that are directed primarily at determining the correct result apply at sentencing, whereas those rights designed to offer special protection to a defendant's liberty or autonomy interests do not apply. Professor Michaels then addresses how such a principle may have come to guide court decisions and explores its implications for future decisions regarding the constitutional law of sentencing.

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INTRODUCTION

Do constitutional trial rights apply at sentencing? *Williams v. New York*[1] is often seen as the seminal case.[2] In *Williams*, the Supreme Court affirmed a death sentence that a state trial judge had imposed based in part on assertions in a probation report that Williams had committed some thirty burglaries (for which he had not been charged) and on "certain activities of [Williams] as shown by the probation report that indicated [Williams] possessed a 'morbid

1. 337 U.S. 241 (1949).

2. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.4(a), at 1216 (3d ed. 2000); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 28 (1998); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 316 (1992).

sexuality' and classified him as a 'menace to society.' "[3] The Court concluded that Williams's sentence of death—concededly based on hearsay allegations that he was not given the opportunity to challenge prior to sentencing—did not violate the Due Process Clause of the Fourteenth Amendment. The Court justified its conclusion on the ground that looser evidentiary rules were necessary at sentencing to achieve the progressive goals of achieving rehabilitation and reformation through a process of individualized sentencing.[4]

The half-century since *Williams* has seen a revolution in the constitutional rights governing criminal trials. The Supreme Court has recognized or established many new constitutional rules for criminal trials,[5] and application of these rights to state criminal trial proceedings has become the rule, rather than the exception.[6] Do these rights apply at sentencing? Judging by the Supreme Court's steady citation to *Williams* for the relative absence of constitutional procedural restrictions at sentencing,[7] the drumbeat of commentators criticizing that same absence,[8] and the calls for additional procedural

3. *Williams*, 337 U.S. at 244. The probation report was not even disclosed to Williams prior to his sentence. *See id.* at 253 (Murphy, J., dissenting).

4. *See id.* at 247–51.

5. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 684–85 (1984) (establishing the right to effective assistance of counsel); *In re* Winship, 397 U.S. 358, 368 (1970) (establishing the right to proof beyond a reasonable doubt); Brady v. Maryland, 373 U.S. 83, 86–87 (1963) (establishing the right to receive exculpatory evidence); *see also* Douglas A. Berman, *Appreciating* Apprendi*: Developing Sentencing Procedures in the Shadow of the Constitution*, 37 CRIM. L. BULL. 627, 630–31 n.15 (2001) (collecting sources that assess the " 'criminal procedure revolution' " of the Warren and Burger Courts).

6. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.3.3, at 482–83 (2d ed. 2002) (detailing that the incorporation of the Fifth, Sixth, and Eighth Amendments occurred almost exclusively after 1947).

7. *See* United States v. Watts, 519 U.S. 148, 151–52 (1997); Witte v. United States, 515 U.S. 389, 397–98 (1995); Schlup v. Delo, 513 U.S. 298, 326 (1995); Nichols v. United States, 511 U.S. 738, 747 (1994); Payne v. Tennessee, 501 U.S. 808, 820–21 (1991); McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986); United States v. Grayson, 438 U.S. 41, 49 (1978); McGautha v. California, 402 U.S. 183, 218–19 (1971).

8. STITH & CABRANES, *supra* note 2, at 29 (stating that "the criminal procedure revolution extended only marginally into the area of criminal sentencing"); Herman, *supra* note 2, at 316 (noting that *Williams* has served as a "roadblock" to lower courts' consideration of due process issues at sentencing); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 542–47 (1993) (remarking critically that the "Constitution, as currently interpreted, imposes virtually no restrictions on the practices of real-offense sentencing"); Steven A. Saltzburg, *Sentencing Procedures: Where Does Responsibility Lie?*, 4 FED. SENTENCING REP. 247, 248 (1992) (noting critically that the *Williams* decision "was read by many to mean that a defendant had little right to procedural protections in sentencing"); Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 362–72 (1994) (arguing that the Federal Rules of Evidence should apply at sentencing).

rights at sentencing,[9] one might conclude that the answer is a nearly uniform no. That conclusion would be wrong. More trial rights apply at sentencing than many have supposed.

Confusion about the extent of trial rights at sentencing undoubtedly traces from the Court's utter failure to articulate a consistent explanation for whether and when constitutional adjudication rights apply to sentencing proceedings. In deciding whether a particular right applies, the Court regularly decides individual cases without reference either to the larger procedural picture or to earlier decisions regarding the applicability of trial rights at sentencing.[10] Moreover, the Court's proffered methodology in

9. *See* Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence,"* 35 WM. & MARY L. REV. 147, 160 (1993) (contending that, under a due process analysis, rights of confrontation, proof beyond a reasonable doubt, and compulsory process should apply at sentencing); Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 22 CAP. U. L. REV. 1, 20 (1993) (arguing that the due process right of confrontation should apply at sentencing); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1177–78 (2001) (arguing that the rights of compulsory process, confrontation, and cross-examination should apply at sentencing); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 220 (1991) (arguing that the constitutional requirements of notice, trial by jury, and proof beyond a reasonable doubt should apply to "relevant conduct" offered at sentencing); Herman, *supra* note 2, at 316 (urging a rigorous due process inquiry that would enhance procedural protections at Federal Sentencing Guidelines proceedings); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 915–19 (1962) (contending that the broad procedural and substantive discretion given to sentencing judges threatens basic values of due process of law); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 773–77 (1993) (arguing for a right to jury determination of sentence-controlling facts); David A. Hoffman, Note, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 DUKE L.J. 382, 404–18 (1992) (urging the application of rights of confrontation derived from the Confrontation Clause and due process to proceedings under the Federal Sentencing Guidelines). *See generally* Richard Husseini, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387 (1990) (advocating a constitutionally based "clear and convincing" standard); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179 (1993) (arguing for a constitutional bar on consideration of unconvicted offenses at sentencing); Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992) [hereinafter Note, *An Argument for Confrontation*] (urging application of due process and Confrontation Clause rights of confrontation at sentencing); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968) [hereinafter Note, *Procedural Due Process*] (calling for the rights of discovery and presentation of evidence for a defendant at sentencing).

10. *See, e.g.*, Mitchell v. United States, 526 U.S. 314, 321–30 (1999) (establishing the right to remain silent at sentencing without reference to other sentencing rights); Monge v. California, 524 U.S. 721, 727–34 (1998) (examining the applicability of the Double Jeopardy Clause at sentencing without reference to other sentencing rights); *McMillan*, 477 U.S. at 91–93 (examining burden of proof and trial by jury rights at sentencing without

these cases is ad hoc. For example, depending on the case, the Court has justified its conclusions on the basis of the constitutional text,[11] historical practice,[12] considerations of due process,[13] and the purposes of sentencing.[14] The Court frequently fails to offer these justifications, however, when they do not support the Court's result. Commentators have similarly failed to establish a comprehensive picture of the trial rights that apply at sentencing, much less develop a sound principle of sentencing rights that could explain the judicial outcomes.

This Article assumes that task. First, the Article systematically examines judicial decisions regarding the applicability of constitutional trial rights to sentencing proceedings. The result is a comprehensive taxonomy of sentencing rights. The Article examines twenty-five rights—from employing an attorney to not having inferences drawn from one's silence, from bail and *Brady* to presence and proceeding pro se—and establishes that the Court has found roughly one quarter apply at sentencing and one quarter do not. The rights in the remaining half, still undecided at the Supreme Court level, have been resolved with similar percentages by lower courts—some apply, some do not, and about half remain unresolved.

Second, the Article establishes that, although the Court's proffered rationales are only camouflage, a consistent principle can explain the sentencing rights decisions. The Court's decisions are consistent with a conception of sentencing as constitutionally

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reference to other sentencing rights); Mempa v. Rhay, 389 U.S. 128, 133–37 (1967) (establishing the right to counsel at sentencing without reference to other sentencing rights); *see also* Glover v. United States, 531 U.S. 198, 203–05 (2001) (extending the right of effective assistance of counsel to noncapital sentencing without mentioning that it was doing so).

11. *See Mitchell*, 526 U.S. at 327–29.

12. *See McMillan*, 477 U.S. at 91 (relying on what sentencing courts have "traditionally" done); United States v. DiFrancesco, 449 U.S. 117, 133–34 (1980) (examining practice at common law).

13. *See* Gardner v. Florida, 430 U.S. 349, 357–62 (1977); *Mempa*, 389 U.S. at 137.

14. *Mitchell*, 526 U.S. at 329 (concluding that because the "stakes are high," the right to remain silent should apply in the same way at sentencing as at trial); *Monge*, 524 U.S. at 734 (declining to apply the right against double jeopardy because the sentencing interest is of a lesser magnitude); Spaziano v. Florida, 468 U.S. 447, 460 (1984) (holding that nothing about capital sentencing requires a jury); Estelle v. Smith, 451 U.S. 454, 463 (1981) (holding that Fifth Amendment rights apply in a capital case "[g]iven the gravity of the decision to be made"); *DiFrancesco*, 449 U.S. at 143 (noting that allowing the government to appeal sentencing decisions will serve as a check on the " 'unbridled power of the sentencers to be arbitrary and discriminatory' " and will provide greater consistency (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1973))); Williams v. New York, 337 U.S. 241, 248 (1949) (citing the rehabilitative purpose of sentencing).

mandating a balanced and thorough effort to determine the "right" sentence, within the range of prescribed penalties. In making that determination, however, there is no mandated presumption of "sentencing innocence"—in other words, no requirement that the defendant be given the benefit of the doubt. Within the range of allowable sentences, "too low" is not intrinsically better than "too high." The mandate is to make a best estimate of the "right" sentence, but without the built-in presumption towards resolving errors in the defendant's favor that is present at the trial level. Thus, for example, the protections of the Double Jeopardy clause,[15] the Jury Trial clause,[16] and the heavier burden of proof[17]—which all provide extra protection to the defendant at trial—do not apply at sentencing. On the other hand, given the mandate of the right to a fair (i.e., not biased and not arbitrary) estimate of the correct sentence within the prescribed range, rights relevant to a level playing field, such as the right to counsel and the right to notice of exculpatory evidence, do apply.

Third, the Article explores the means by which this unarticulated principle may have guided judicial decisionmaking and examines the principle's implications for the burgeoning constitutional law of sentencing, including discussion of two much anticipated cases from the Court's most recent term, *Ring v. Arizona*[18] and *United States v. Harris*,[19] that fleshed out the meaning of the Court's landmark decision in *Apprendi v. New Jersey*.[20]

Part I provides an overview of the Article's exploration of trial rights at sentencing. This Part begins by setting out several possible descriptive explanations for the Court's sentencing rights decisions. In addition to the best-estimate principle described above, these explanations include whether the language of the Constitution suggests its application, whether historical practice supports application of the right at sentencing, and whether the Court has primarily considered the trial right to be a matter of due process or derived from a particular constitutional provision. Although each of these latter principles is sometimes articulated in the Court's decisions, none fits with the Court's results as a whole (unlike the best-estimate principle).

15. *See* U.S. CONST. amend. V.
16. *See* U.S. CONST. amend. VI.
17. *See In re* Winship, 397 U.S. 358, 368 (1970).
18. 122 S. Ct. 2428 (2002).
19. 122 S. Ct. 2406 (2002).
20. 530 U.S. 466 (2000).

With this background, Part I then provides (in the form of a Table) a taxonomy of the trial rights that could apply at sentencing. The Table collects in one place the Court's answers to questions it has resolved and lower court answers to the ones the Court has not, and demonstrates that the best-estimate principle articulated here provides a powerful explanation for the inclusion and exclusion of rights at sentencing. The Table also shows how most of the remaining dozen open questions about trial rights at sentencing will be resolved if the law continues to follow the best-estimate principle—thereby also suggesting the resolution of splits in the lower courts and suggesting where lower courts may be heading in the wrong direction.

Part II of the Article establishes the foundation for the conclusions summarized in Part I. Part II considers each of the twenty-five rights and establishes whether the Supreme Court has resolved each right's applicability at sentencing. Where the Court has not done so definitively, Part II sets out the views of the lower courts. For some rights, such as the right to appointed counsel for indigents, the answer is clearly yes.[21] For others, such as the right to trial by jury, the answer is clearly no.[22] For many others, the answer is either less obvious or not yet established. In examining each right, Part II also examines how each of the questions would be resolved under each of the descriptive explanations discussed in Part I, with particular attention to the best-estimate rationale, thereby demonstrating both its descriptive supremacy for current law and how much of the remaining landscape will be filled in if the Court continues on the path of the last fifty years.

Part III of the Article examines explanations for, and some broader implications of, Part II's descriptive conclusions. First, it explores how the Court's decisions might have come to match the best-estimate principle so well through an unarticulated due process balancing test. In this view, the defendant's residual liberty interest—an interest in a sentence that is not "too high"—is balanced against the state's interest in an appropriate and reasonably expedient outcome. The result is a system that eliminates the special protections a criminal defendant is afforded before a conviction to safeguard her liberty, but that nonetheless guarantees process directed at ensuring that the sentence is "accurate." Second, Part III explains that courts may be expected to defend this balance. When faced with changes in the nature of the remaining liberty interest at

21. *See* Mempa v. Rhay, 389 U.S. 128, 134 (1967).
22. *See* Spaziano v. Florida, 468 U.S. 447, 459 (1984).

stake in sentencing, courts will maintain the balance by either imposing substantive limitations on what can be decided at sentencing or by adding more procedures. As will be seen, the Court's recent decisions in *Apprendi v. New Jersey*, *Ring v. Arizona*, and *Harris v. United States* are best understood (indeed, perhaps can only be understood) in this light. These decisions impose the substantive limitations on what can be decided at sentencing that are necessary (but *only* those that are necessary) for preserving the Court's conception of a defendant's liberty interest at sentencing that underlies its procedural decisions. Finally, Part III briefly considers the possible effect of guidelines sentencing systems on the model the Court has created.

I. TRIAL RIGHTS AT SENTENCING: AN OVERVIEW

A. Possible Descriptive Explanations

1. Best Estimate v. Special Protection

There is an explanatory principle that fits the law of trial rights at sentencing. According to this principle, the Constitution requires a balanced and thorough process for determining sentences following a criminal conviction. The vision is of a reasonably thorough process directed at getting the best estimate of the appropriate sentence with both prosecution and defense advancing their positions on equal terms. There is, however, no constitutionally mandated presumption of "sentencing innocence"; within the range of legislatively prescribed sentences for the crime, "too high" is neither better nor worse than "too low." In this vision, the defendant, by virtue of his conviction, has lost the constitutional entitlement to have errors resolved in his favor that protected him at trial. The defendant has also lost some autonomy interests that he had at trial. So long as a balanced approach is preserved, some tradeoffs of procedure for efficiency are acceptable.

Under this explanatory principle, called the "best-estimate" principle here for short, trial rights directed at ensuring a fair and balanced determination of the appropriate sentence do apply at sentencing. On the other hand, "special-protection" rights, those rights that are designed to give the defendant extra protections—particularly by insuring that errors will tend to be resolved in the defendant's favor, but also rights that provide extra protection against

state oppression or otherwise champion the defendant's autonomy—do not apply.

Admittedly, the line between best-estimate rights and special-protection rights can occasionally be fuzzy. Some cases may fall in a gray zone, and some rights are certainly justified by both best-estimate and special-protection concerns.[23] Yet, as will be seen by analysis of the best-estimate principle on a right-by-right basis in Part II, most rights can confidently be placed in one category or the other.

The best-estimate principle is offered here as a descriptive explanation of which rights apply at sentencing, *not* as a normative justification. The suggestion here is not that this is how the constitutional mandates for sentencing procedures ought to have been conceived, but rather that this is the system that has been conceived. Having a firm idea of where we are should help courts and commentators figure out where we should go.

2. Other Descriptive Explanations

In considering the constitutional landscape at sentencing, a number of other methodologies, sometimes cited by the Court in deciding cases, deserve examination, although these alternative methodologies ultimately fail as comprehensive explanatory principles. Three of them are considered systematically in the survey discussed in Part II. Two others, for reasons explained below, are not.

One very formal possibility worthy of mention—a narrow form of textualism—would be to consider certain specific terms of the Constitution. The Bill of Rights relates many of its protections to specific circumstances: "criminal prosecutions,"[24] a "trial,"[25] an "offence,"[26] and a "criminal case."[27] One might ask whether the Court's decisions can be explained through a uniform understanding

23. The right to a public trial, discussed *infra* notes 277–90 and accompanying text, for example, presents one of the closer questions. On one hand, the right is an "extra protection" for the defendant—an added bulwark against state venality or incompetence. On the other hand, exposing criminal proceedings to public scrutiny will, for these very reasons, promote accuracy. On balance, the right is best considered as a special protection because it tends to prevent errors in the defendant's favor more than errors in the state's favor. *See infra* note 289 and accompanying text. Nonetheless, the distinction is less sharp than in many other cases, such as proof beyond a reasonable doubt (plainly a special-protection right), *see infra* notes 300–01 and accompanying text, and the right to appointment of counsel (plainly a best-estimate right), *see infra* p. 1791.

24. U.S. CONST. amend. VI.

25. *Id.*

26. U.S. CONST. amend. V.

27. *Id.*

of each of these terms—for example, that sentencing is part of a "criminal case" and relates to an "offence," but is not part of a "criminal prosecution" or a "trial." No such explanation of the decided cases is possible, however, because the Court simply has not applied these terms uniformly. Indeed, even outside the sentencing context, the Court has held that what constitutes a "criminal prosecution" for some rights under the Sixth Amendment is not the same as what constitutes a "criminal prosecution" for other Sixth Amendment rights,[28] and what constitutes punishment for certain Eighth Amendment purposes is not the same as what constitutes punishment for certain Fifth Amendment purposes.[29]

The case law has been particularly inconsistent and the Justices particularly fractured on questions of whether these terms encompass sentencing.[30] For example, the Sixth Amendment's Confrontation Clause and Assistance of Counsel Clause both apply to "all criminal prosecutions." But, as will be seen, although sentencing is apparently *not* a "criminal prosecution" for Confrontation Clause purposes, it *is*

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28. Two examples: a "criminal prosecution" for appointment of counsel purposes is any case in which the defendant is imprisoned, but for jury trial purposes covers only those cases punishable by more than six months imprisonment. *Compare* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (requiring appointment of counsel for any crime for which a defendant is imprisoned), *with* Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (guaranteeing the right of a jury trial for crimes punishable by imprisonment for more than six months). A "criminal prosecution" commences for speedy trial purposes at the time of arrest but does not commence for appointment of counsel purposes until the commencement of adversary judicial proceedings. *Compare* Barker v. Wingo, 407 U.S. 514, 530–33 (1972) (adopting a balancing test for determining whether a defendant received a speedy trial and beginning the determination at arrest), *with* United States v. Gouveia, 467 U.S. 180, 187 (1984) (noting the right to counsel attaches at initiation of adversarial judicial proceedings).

29. *See* Hudson v. United States, 522 U.S. 93, 101–05 (1997) (finding civil forfeiture not "punitive" for double jeopardy purposes, although it is "punitive" for Eighth Amendment purposes); *see also* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 777–82, 799 (1997) (discussing the Court's "muddled" understanding of punishment and noting the Court's reliance on a "generalized idea about what constitutes punishment" as opposed to distinctive historical or doctrinal methodologies).

30. For example, in *Mitchell v. United States*, 526 U.S. 314 (1999), Justice Kennedy, writing for a 5-4 majority, claimed that "[i]n accordance with the text of the Fifth Amendment, we must accord the privilege the same protection in the sentencing phase of 'any criminal case' as that which is due in the trial phase of the same case." *Id.* at 328–29. Justice Kennedy further stated, "To maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." *Id.* at 327.

Representing four Justices in dissent, Justice Scalia responded that the argument that the text of the Constitution made procedural guarantees applicable at sentencing was "demonstrably not so." *Id.* at 336–37 (Scalia, J., dissenting) (citing cases in which the Court had found Sixth Amendment rights of trial by jury and confrontation and the Fifth Amendment right to proof beyond a reasonable doubt inapplicable at sentencing).

a "criminal prosecution" for (at least some) Assistance of Counsel Clause purposes.[31] Similarly, the Sixth Amendment's speedy trial and jury trial provisions both hinge on the term "trial," but, as will be seen, sentencing is apparently *not* a part of the "trial" for right to jury purposes, but may well be a part of the trial for speedy trial purposes.[32]

A second possibility, the Court's articulated due process tests, must be rejected not because they get too many of the decided cases wrong, but rather because they can be used to get any case "right." To be sure, one could ask whether a particular procedural right would apply at sentencing under either the three-factor balancing test of *Mathews v. Eldridge*[33] that the Court uses to resolve procedural due process claims outside of the criminal context,[34] or the "far less intrusive"[35] approach that the Court recently has stated governs procedural due process claims in criminal cases. Without more, however, neither test can provide a useful descriptive explanation. In the first place, the Court has never expressly used either test to determine whether a trial right applies at sentencing, as opposed to whether it exists at all. More importantly, neither test provides a useful explanatory metric. They are not, by themselves, capable of telling us whether particular objective aspects of a right determine whether it applies at sentencing or of predicting how unresolved questions in this area will be answered.[36]

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31. *See infra* notes 56, 313–15 and accompanying text.

32. Thus, the Court has not uniformly followed Professor Beale's logical suggestion that the words "trial" and "criminal prosecution" in the Sixth Amendment indicate that "trial" does not include sentencing but that "criminal prosecution" does. *See* Beale, *supra* note 9, at 160–61.

33. 424 U.S. 319 (1976).

34. Under *Mathews*, a court must consider:

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

Id. at 335.

35. Medina v. California, 505 U.S. 437, 445 (1992). Under this latter test, a state's decision regarding criminal procedure "is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.* at 445 (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977)).

36. The *Medina* test relies heavily on the historical basis for the right in question (already included as a possible descriptive explanation) and beyond that focuses on "whether the rule transgresses any recognized principle of 'fundamental fairness' in operation." *Id.* at 448. Without questioning whether judging if fundamental fairness

Three other possible explanations for the Court's decisions merit more extensive examination. The first is a slightly broader textual approach. Perhaps rights that seem mandated by the text of the Constitution, such as the right to employ counsel, are more likely to apply at sentencing than rights, such as the right to appointment of counsel for indigents, that stand on weaker textual footing.[37] To be sure, in the sentencing context this method of analysis suffers the handicap of considerable added uncertainty regarding whether particular "specific terms" of the Constitution apply to sentencing.[38] Nonetheless, this textual or "plain meaning" approach can occasionally be applied to the right at sentencing and can otherwise

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requires a particular right at sentencing is an appropriate means for resolving cases, one can observe that such a method relies particularly on the judgment of the jurist and is less susceptible to objective third-party analysis. Put simply, if the question were whether "fundamental fairness" required a particular right at sentencing, there would be no way to know how to answer that question for any particular right—other than parroting the Court's answer had it given one. Any answer would be highly conclusory at best. The *Mathews* test is similarly not objectively predictable. Different judges could apply different weights to the various factors and reach different results.

Indeed, this aspect of the tests was highlighted in *Medina*, in which the Court adopted the "narrower" test by a slim 5-4 majority. The Court had previously used the *Mathews* test twice in deciding criminal procedure questions. *See* Ake v. Oklahoma, 470 U.S. 68, 77–80 (1985); United States v. Raddatz, 447 U.S. 667, 677–84 (1980). The *Medina* majority concluded that both of those cases would have come out the same way under the *Medina* test as they did under *Mathews*. *See Medina*, 505 U.S. at 444–45. At the same time, the Justices in *Medina* who would have resolved the case under the *Mathews* test, nonetheless reached the same result. *See id.* at 453–56 (O'Connor, J., concurring).

To reiterate, the claim that these due process tests are not useful descriptive metrics for analyzing what procedural rights apply at sentencing because the result they "require" can only be determined after the Court has said so is not to make any normative claim about whether or not they are appropriate standards for judges to use or to challenge the good faith of judges who claim to use them. Indeed, it could be that just such an inquiry does govern what rights apply. *See infra* notes 403–10 and accompanying text; *see also* Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1638 (1996) (stating that the Due Process Clause, as currently limited by the Court, would provide much less protection to defendants than the provisions of the Bill of Rights, but arguing that, properly understood, it would often provide more). *But see* Herman, *supra* note 2, at 347–55 (arguing that application of the *Mathews* test would produce more procedural protections at sentencing); Note, *An Argument for Confrontation*, *supra* note 9, at 1892–98 (same). The search here, however, is for a more objectively verifiable descriptive principle that matches the decided cases.

37. *See* Scott v. Illinois, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal proceeding in a federal court to employ a lawyer to assist in his defense.").

38. *See supra* note 30 and accompanying text.

be applied to the trial version of the right. The constitutional text is a factor the Court has sometimes cited in deciding cases.[39]

Second, it could be that the descriptive explanation for whether a right applies at sentencing depends on whether the procedure generally governed sentencing proceedings at the time of the enactment of the Bill of Rights or, perhaps in the case of rights that are purely a matter of due process, at the time of the enactment of the Fourteenth Amendment. The Court has sometimes used such an analysis to answer these questions.[40]

Third, it could be that the key distinction is whether the right is derived from the Due Process Clause on the one hand, or from the specifically enumerated rights of the Fifth, Sixth, and Eighth Amendments on the other. The Court has sometimes used this method of classification in discussing constitutional criminal procedural restrictions in general[41] and sentencing rights in particular.[42] As to the states, all constitutional criminal procedure rights—including those specifically enumerated in the Bill of Rights—are "due process" rights in the sense that they are applicable only through their incorporation by the Due Process Clause of the Fourteenth Amendment. But this fact has not prevented the Court from emphasizing the distinction. Sometimes the notion behind this distinction is that the Court can use different methods of

39. *See, e.g.*, Mitchell v. United States, 526 U.S. 314, 327–29 (1999) (relying on the textual applicability of a right to "any criminal case" to find it applicable at sentencing); United States v. Marion, 404 U.S. 307, 313–15 (1971) (relying on the textual applicability of the speedy trial right to "criminal prosecutions" and to an "accused" to conclude that the right does not apply before indictment).

40. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (relying on what sentencing courts have "traditionally" done); United States v. DiFrancesco, 449 U.S. 117, 133–34 (1980) (examining the practice at common law); Williams v. New York, 337 U.S. 241, 246 (1949) (noting the historical basis underlying the policy of allowing the sentencing judge to exercise wide discretion).

41. *See, e.g.*, *Medina*, 505 U.S. at 443 (stating that the use of the Due Process Clause to expand the constitutional guarantees explicitly listed in the Bill of Rights "invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order"); Dowling v. United States, 493 U.S. 342, 352 (1990) ("[B]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.").

42. *See* Gardner v. Florida, 430 U.S. 349, 357–62 (1977) (concluding that the imposition of a death sentence based on information in an investigation report not disclosed to the defendant violated due process); Mempa v. Rhay, 389 U.S. 128, 129 (1967) (holding that counsel must be afforded to a felony defendant at sentencing because sentencing is a "critical stage" of a criminal proceeding).

constitutional interpretation for matters to which the "Bill of Rights speaks in explicit terms"[43] and those for which it does not.

Each of these latter three possibilities is explored systematically in Part II.

B. Summary of the Analysis

The following Table provides a complete taxonomy of trial rights at sentencing. In addition, the Table describes how each of the rights questions would be resolved under the descriptive principles discussed above and how the undecided questions would likely be decided under each principle.

43. *Medina*, 505 U.S. at 443. The Court is less restrictive of state procedures where no enumerated right exists. Of course, even for those matters that the Constitution does cover "in specific terms," the Court has used different methods of constitutional interpretation. Alternatively, one might think that rights founded in the Due Process Clause may be more likely to apply at sentencing, in accordance with the view that it is due process, not the enumerated rights, that establishes the framework for which rights apply at sentencing. *See* LAFAVE ET AL., *supra* note 2, § 26.4 (examining sentencing procedures as a due process framework).

Table 1. Trial Rights at Sentencing.

Right	At Sentencing?		Source	Principles			
	S. Ct.	L. Ct.		Const. Text	Historical Practice	Due Process Right	**Best Estimate**
Counsel							
Use an attorney	Y	–	6th	Y	Y	N	**Y**
Appt. for indigent	Y	–	6th	N	N	N	**Y**
Effective assistance	y	Y	6th	N	N	N	**Y**
Counsel of choice	?	y/split	6th	n	y	N	**n**
Proceed pro se	?	split	6th	n	y	N	**N**
Bail							
Nonexcessive bail	y	?	8th	Y	y	N	**y**
Bail at all	n	n	5th	N	n	Y	**n**
Notice of Charges	?	y	5th/6th	y	N	?	**Y**
Trial by Jury	N	–	6th	n	n	N	**N**
Discovery (*Brady*)	y	Y	5th	N	N	Y	**Y**
Double Jeopardy							
No post-verdict adverse change	N	–	5th	y	N	N	**N**
Collateral estoppel	?	?	5th	n	N	N	**y**
Speedy Trial	?	split	6th	n	y	N	**y**
Public Trial	?	y	6th	n	y	N	**N**
Proof Beyond a Reasonable Doubt	N	–	5th	N	N	Y	**N**
Confrontation							
Use of hearsay	n	N	6th	Y	N	N	**N**
In court procedures	?	n	6th	Y	N	N	**N**
Right of presence	?	Y	5th/6th	N	?	y	**Y**
Present Evidence							
Speak	?	split	5th/6th	n	Y	?	**Y**
Rebut state's evidence	?	y	5th	n	?	Y	**Y**
Call witnesses	?	N	6th	y	?	Y	**?**
Remain Silent							
Not to testify	Y	–	5th	n/a	n/a	n/a	**n/a**
No use of compelled testimony	?	split	5th	y	y	N	**n**
No inference re: facts	Y	–	5th	N	N	N	**N**
No inference re: other	?	?	5th	N	N	N	**N**
Fit with Supreme Court Decisions				5 – 6	7 – 4	4 – 7	**10 – 1**

The Table and its eight columns are explained in the footnote.[44]

44. In the hope that context will be helpful, the explanation will focus on the "Right to Counsel—Proceed pro se" line of the table as it describes each column.

The left hand column lists the right in question. Many of the rights are divided into subcategories to reflect the different aspects of the particular protection. For example, the right to counsel is divided into five different subcategories—the subcategory "Proceed pro se" being covered here.

The next two columns indicate whether or not the right applies at sentencing under current law. The first of these columns (labeled "S. Ct.") reports whether the United States Supreme Court has said the right does apply ("Y"), does not apply ("N"), or has not yet answered the question ("?"). If the Court has given some strong indication but

As Table 1 reflects, the best-estimate principle has an outstanding fit with the Supreme Court's decisions regarding which rights apply at sentencing. Of course, Table 1 presents its conclusions in summary fashion. The more detailed right-by-right examination of Part II provides both a fuller understanding of the principle and a better sense of its descriptive fit. Even from the summary, however, one can see that the principle corresponds nearly perfectly with the Court's decisions—even though those decisions have been split almost 50–50 between rights applying and not applying. Indeed, the fit was a perfect one until the Supreme Court's 1999 decision in *Mitchell v. United States*[45] held the rule against drawing adverse inferences from a defendant's silence applicable at sentencing. Whether the *Mitchell* decision may portend an expansion of the

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not definitively settled a question, then the result is listed in lower case letters ("y" or "n"). Because the Supreme Court has not considered whether the right to proceed pro se applies at sentencing, the entry on this line is "?". For those rights that the Supreme Court has not definitively settled, the next column (labeled "L. Ct.") reports the view of the lower courts. Capital letters ("Y" or "N") are used where the lower court view is strong, lower case ("y" or "n") where it is more tentative. Significant disagreement among the lower courts is indicated by the designation "split." Because lower courts have expressed divergent views on whether a defendant has a right to proceed pro se at sentencing, "split" appears in this column in the pro se line.

The next column (labeled "Source") indicates the amendment to the Constitution in which the trial right is based. The right to proceed pro se, for example, is grounded in the Sixth Amendment, so "6th" is indicated. For rights that are based on "due process" in general, the column indicates the Fifth Amendment.

The remaining four columns—under the overall heading "Principles"—indicate whether the right would apply at sentencing under the alternative descriptive principles described in Part I.A and examined with regard to each right in Part II of the Article. In other words, they answer the question whether the right would apply at sentencing if the indicated principle served as the sole means for deciding the question. For each of these columns the same conventions regarding "Y," "N," "y," "n," and "?" are followed. The column for the best-estimate principle appears in bold.

In the "Const. Text" column, the right to proceed pro se is marked "n," meaning if the text of the Constitution were the determining principle, that right would probably not apply at sentencing, though the result is not certain. This conclusion is explained *infra* note 102 and accompanying text. In the "Historical Practice" column, the right to proceed pro se is marked with a "y" because the weight of the arguments under this criterion would support the right. *See infra* note 103 and accompanying text. The "Due Process Right" column contains an "N" for the right to proceed pro se because that right is not grounded in due process concerns. *See infra* note 104 and accompanying text. Finally, the "Best Estimate" column contains an N for the right to proceed pro se, because that right is not one that is necessary for a level playing field and a reasonable estimate of the correct result, but rather one that offers special protections (in this case grounded in autonomy concerns) to the defendant. *See infra* p. 1800.

The totals under each of the last four columns, in the bottom row labeled "Fit with Supreme Court Decisions," indicate how many times the principles do and do not yield the result on which the Supreme Court has settled.

45. 526 U.S. 314, 328 (1999).

Court's vision of the kinds of rights that apply at sentencing and the reasons why such expansion may occur are discussed in Part III.

In addition to setting out the answers the Court has provided regarding which rights apply at sentencing, the Table also reveals how the best-estimate model suggests the Court is likely to resolve the many trial-rights-at-sentencing questions it has not yet addressed. The Sixth Amendment rights to proceed pro se, to counsel of choice, to a public trial, and to face-to-face confrontation for in-court testimony will likely be found inapplicable at sentencing, as will the rule against drawing adverse inferences concerning issues other than the facts of the criminal case and the rule against the use of statements from pretrial compelled testimony. On the other hand, the rights to notice of accusation, to a speedy trial, to the protection of collateral estoppel, to be present at the proceeding, to rebut the state's evidence, and to speak at the proceeding likely will apply at sentencing.

II. TRIAL RIGHTS AT SENTENCING: DETAILS

This Part closely analyzes the application at sentencing of each of the rights that the Court has concluded the Constitution guarantees at trial.[46] The analysis proceeds right by right, explaining in each case the results for each right shown in Table 1. For each right, this Part provides a brief description of its meaning at trial, and then examines the Court's conclusions (if any) about its applicability at sentencing. Where the Court has not decided the question, lower court views are reported. After considering the applicability of the right under current case law, this Part examines whether each right would be applicable if the principle driving these decisions were textualism, historical practice, or whether the right derives from express enumeration or the Due Process Clause. Finally, for each right, this Part examines whether it would apply at sentencing under the best-estimate principle.

A. Right to Counsel

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have the

46. In doing so, this Part provides detailed support for the conclusions set out in Part I. Furthermore, an analysis of several rights gives the reader a better understanding of the nature of the best-estimate principle. Some readers may be interested in the entire Part, some may wish to read far enough to get a firm understanding of the best-estimate principle, and some may have a special interest in the applicability of particular rights or be especially interested in particular conclusions summarized in Table 1.

Assistance of Counsel for his defence."[47] Over the years, numerous aspects of this right have developed, including the right to use an attorney to act as defense counsel during the trial,[48] and at all "critical stages" prior to the trial;[49] the right of indigents to the services of state-appointed counsel;[50] the right to the "effective assistance" of counsel;[51] the right to proceed pro se;[52] and the right to counsel of one's choice.[53]

1. Using an Attorney and Appointment for Indigents

The rights to use an attorney to act as defense counsel and to the appointment of counsel for those unable to retain counsel apply at sentencing. Prior to incorporation of the right to counsel, lower federal courts had concluded that the Sixth Amendment required counsel at all sentencing proceedings.[54] In *Mempa v. Rhay*,[55] the Supreme Court simultaneously validated this conclusion and incorporated that provision against the states.[56]

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47. U.S. CONST. amend. VI.

48. *See* Scott v. Illinois, 440 U.S. 367, 370 (1979) (stating that the Sixth Amendment contemplated the "guarantee . . . of an accused in a criminal prosecution . . . to employ a lawyer to assist in his defense").

49. *See* United States v. Ash, 413 U.S. 300, 310–11 (1973).

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

51. *See* Strickland v. Washington, 466 U.S. 668, 669 (1984).

52. *See* Faretta v. California, 422 U.S. 806, 834 (1975).

53. *See* Wheat v. United States, 486 U.S. 153, 164 (1988). All of these rights apply to both state and federal prosecutions, as the rights have been incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *See* Brewer v. Williams, 430 U.S. 387, 397–98 (1977); Mempa v. Rhay, 389 U.S. 128, 134 (1967); *Gideon*, 372 U.S. at 342–43.

54. *See Mempa*, 389 U.S. at 133–34 & n.4.

55. 389 U.S. 128 (1967).

56. *Id.* at 134–37. In *Mempa*, the defendants were sentenced, without representation by counsel, as part of probation revocation proceedings; the defendants had pled guilty, been sentenced to probation and then, months later, were brought up on charges of violating their probation. This process led to their being resentenced on their original offenses. *Id.* at 130–32. One of the defendants had retained counsel at the time of his plea, the other had been represented by appointed counsel. *Id.* Neither was represented at the resentencing, and the Court held that such uncounseled sentencing violated the Sixth Amendment, notwithstanding that the state law *required* the judge to impose the maximum sentence, following a revocation of probation. *Id.* at 129. The Court's holding that conducting the sentencing proceeding without counsel for the defendants violated the Sixth Amendment would thus appear to cover both the right to be allowed to use one's attorney and the right to have an attorney appointed.

Moreover, given *Mempa*'s facts, the holding appears comprehensive. The Court stated that counsel was required at any "stage of a criminal proceeding where substantial rights of a criminal accused may be effected." *Id.* at 134. The Court concluded that the sentencing proceedings before it were such a stage, even though the judge was compelled by statute to sentence the defendants to the maximum term, with the actual length of

In terms of the different hypothetical descriptive principles for the constitutional rights provided at sentencing, the express language of the Constitution includes the right to use an attorney as defense counsel, but not the right of an indigent to have counsel appointed.[57]

Historical practice—looking at the time of the enactment of the Bill of Rights or the Fourteenth Amendment—was certainly *not* to mandate the appointment of counsel for indigents at sentencing (because there was generally no right to appointment of counsel for indigents even at trial).[58] Whether there was a right to use an attorney at sentencing is less obvious, but it appears there would have been. The right to be represented by counsel at trial in felony cases embodied in the Sixth Amendment was a reversal of the common-law rule.[59] By the time the Bill of Rights was enacted, the colonies had

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imprisonment to be determined later by the Board of Parole. *Id.* at 129. According to the Court, "substantial rights" might be affected, notwithstanding the fact that the length of the sentence was necessarily predetermined, because the statute required the judge to make a recommendation to the Board as to the length of time the defendant should serve, *id.*, and because counsel might be necessary to advise defendant of his right to appeal. *Id.* at 135–36. If those reasons suffice to make counsel necessary at sentencing, then counsel is necessary for the decisions that occur at almost all contemporary sentencing proceedings.

Prior to *Mempa*, the Court had, on occasion, held that counsel was required at sentencing in state criminal cases because of special circumstances that made counsel necessary as a matter of due process. *See* Townsend v. Burke, 334 U.S. 736, 736 (1948). Lower courts had held that the Sixth Amendment required appointment of counsel at sentencing in federal cases. *See Mempa*, 389 U.S. at 134 n.4 (collecting cases). *Mempa* confirmed these lower courts' reading of the Sixth Amendment and held that *Gideon*'s incorporation of the Sixth Amendment right to counsel covered this aspect of the right to counsel as well. *Id.* at 129.

57. The relevant portion of the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. While one might also interpret the "plain language" of the provision to mean an indigent must be appointed counsel, the Supreme Court has not read the language in that way. *See* Scott v. Illinois, 440 U.S. 367, 370 (1979) (stating that the Framers of the Bill of Rights most likely intended the Sixth Amendment to guarantee only the right of an accused to *employ* counsel when facing criminal prosecution in a federal court); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 29.02, at 596 (3d ed. 2002) (noting that the Sixth Amendment, at a minimum, provides an accused with the right to employ counsel).

58. *See* Jerold H. Israel, *Free Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 359 (2001); Bruce J. Winick, *Forfeiture of Attorney's Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 789 (1989).

59. *See* Powell v. Alabama, 287 U.S. 45, 60 (1932) (stating that the common law, as it existed in England at the time the U.S. Constitution was adopted, generally denied counsel to felony defendants); WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8–9 (1955) (explaining that counsel was not permitted for felonies at common law and that this prohibition continued for most felonies until 1836); 4 WILLIAM

firmly rejected the common-law rule.[60] Thus, if the relevant historical practice were (as seems appropriate) the practice at the time of the enactment, as opposed to the practice at common law,[61] that practice supports application of the right at trial. Because, at that time, trial and sentencing were largely the same thing,[62] the practice would presumably support the right at sentencing as well.

BLACKSTONE, COMMENTARIES *355 (stating, as the settled rule at common law, that counsel was generally not allowed to one accused of a felony crime); 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 398 (London, MacMillan 1883) (stating no right to counsel existed during the seventeenth century).

60. *See, e.g.*, Betts v. Brady, 316 U.S. 455, 466 (1942) (stating that the colonies' constitutions were intended to override the common-law rule on representation in felony cases), *overruled on other grounds by* Gideon v. Wainwright, 372 U.S. 335 (1963); *Powell*, 287 U.S. at 64 (stating that the English common-law rule "had been definitely rejected and the right to counsel fully recognized" in at least twelve of the thirteen colonies); Winick, *supra* note 58, at 788 (examining history in detail and concluding that the colonies rejected the rule by constitution and practice prior to 1789).

61. In fact, *Powell v. Alabama*, 287 U.S. 45 (1932), in which the Court recognized the right to counsel, marked an important turning point for the Court regarding what point in time it looked to to determine historical practice. *Powell* "marked the demise of the *Hurtado* rule that a process sanctioned by 'settled usage' at common law 'must be taken to be due process of law.' " Israel, *supra* note 58, at 359 (quoting Hurtado v. California, 110 U.S. 516, 528 (1884)). Under *Powell*, "settled usage at common law" was proof that something qualified as due process of law only if American courts adhered to that usage after independence. *See id.* at 360; *see also id.* at 359 n.305 (collecting a variety of views about when this shift in understanding of the controlling historical practice occurred).

62. According to the Court:

> [T]he English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence (unless he thought in the circumstances that the sentence was so inappropriate that he should invoke the pardon process to commute it).

Apprendi v. New Jersey, 530 U.S. 466, 479 (2000) (quoting John Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900, at 13, 36–37 (A. Schioppa ed., 1987)); *see also* Alan Dershowitz, *Background Paper*, *in* FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 67, 84 (1976) (noting that criminal sentencing in colonial America, with few exceptions, followed a "strict legislative model ... characterized by inflexibility"); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892 (1990) (stating that through 1870, judges had little discretionary power in sentencing); Young, *supra* note 8, at 306 (stating that colonial courts had no meaningful discretion once a defendant was convicted of a felony).

But see Bibas, *supra* note 9, at 1124–25 (noting the legislative and jury role in sentencing at common law, but also noting that, at the time of founding, judges did have discretion in penalties for misdemeanors and, in felony cases, "to downgrade ... sentences of transportation to branding and to trigger the pardon and commutation processes"). Moreover, by the time of the enactment of the Bill of Rights, the shift towards indeterminate sentencing was either underway or about to be. *See id.* at 1126; Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506–09 (2001); *see*

Finally, both the right to employ an attorney and the indigent's right to appointed counsel are rooted in the Sixth Amendment, rather than being purely matters of due process.[63]

Considering application of these rights from the perspective of choice between best-estimate rights and special-protection rights, both of these fall into the former category. Representation by counsel in an adversary system is a critical component of arriving at the truth. Moreover, allowing and providing the defendant with counsel does not give the defendant an "advantage" over the prosecution. To the contrary, the right to counsel only evens the playing field because the state, of course, is represented by counsel.

2. Right to Effective Assistance

The right to effective assistance of counsel also applies at sentencing. The Court's seminal recognition in *Strickland v. Washington*[64] that " 'the right to counsel is the right to the effective assistance of counsel' "[65] itself arose in the context of a sentencing proceeding, albeit in a capital case. In holding that the standard for effectiveness at such a proceeding was the same as the standard for effectiveness at trial, the *Strickland* Court expressly reserved judgment on ineffectiveness claims at noncapital sentencing proceedings.[66] Post-*Strickland*, federal courts of appeals agreed that *Strickland* applied to noncapital sentencing proceedings as well.[67]

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also STITH & CABRANES, *supra* note 2, at 9–11 (noting that from 1789 forward, *federal* statutes gave judges sentencing discretion).

63. *See* Scott v. Illinois, 440 U.S. 367, 370 (1979) (noting the Sixth Amendment's guarantee of the right of an accused to employ an attorney when faced with criminal prosecution in a federal court); Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (describing the policy of the Sixth Amendment to furnish counsel to an indigent defendant unable to employ counsel).

64. 466 U.S. 668 (1984).

65. *Id.* at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

66. *See id.* ("We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance.").

67. *See* Jones v. United States, 224 F.3d 1251, 1259 (11th Cir. 2000); United States v. Kissick, 69 F.3d 1048, 1056 (10th Cir. 1995); Auman v. United States, 67 F.3d 157, 162 (8th Cir. 1995); United States v. Springer, 51 F.3d 861, 864 (9th Cir. 1995); Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993); United States v. Stevens, 851 F.2d 140, 145 (6th Cir. 1988); *see also* Durrive v. United States, 4 F.3d 548, 550–51 (7th Cir. 1993) (applying *Strickland* to a noncapital sentencing proceeding, but holding that the prejudice prong requires a "significant" difference in sentence and that a difference of two offense levels is not significant), *overruled on other grounds by* Glover v. United States, 531 U.S. 198 (2001) (holding that a six to twenty-one month increase in prison sentence from counsel error constitutes "prejudice").

Cases in which noncapital sentences have been overturned for ineffective assistance have been infrequent, but far from unheard of.[68]

This lower court consensus was recently implicitly validated by the Supreme Court. A circuit split had developed on the question whether a small amount of increased jail time resulting from attorney error satisfied the "prejudice" prong of *Strickland*.[69] The Supreme Court resolved the conflict by holding that "any amount of actual jail time has constitutional significance."[70] The Court's opinion assumed, without discussing, that the *Strickland* right to effective assistance of

68. *See* United States v. Wilson, No. 98-6535, No. 98-7258, 1999 U.S. App. LEXIS 5125, at *4 (4th Cir. Mar. 22, 1999) (holding that counsel was ineffective for failure to object to evidence relating to volume of PCP, which changed base level offense under sentencing guidelines); United States v. Gallagher, No. 97-35653, 1998 U.S. App. LEXIS 20660, at *3 (9th Cir. Aug. 20, 1998) (finding a Sixth Amendment violation where the defendant's attorney failed to object to the government's breach of the plea agreement); United States v. Martin, 107 F.3d 22 (10th Cir. 1997) (unpublished table decision), *at* 1997 U.S. App. LEXIS 2361, at *6–*7 (10th Cir. Feb. 12, 1997) (recognizing procedural viability of claim of ineffective assistance of counsel at sentencing); Woodall v. United States, 72 F.3d 77, 78 (8th Cir. 1995) (considering double jeopardy implications of a finding of ineffective assistance of counsel at sentencing); Lee v. United States, 939 F.2d 503, 505 (7th Cir. 1991) (finding failure to dispute percentage of income from crime for purposes of calculating the sentencing guidelines constitutes prejudice); Harrison v. Jones, 880 F.2d 1279, 1282 (11th Cir. 1989) (finding ineffective assistance, under the *Strickland* test, for counsel's failure to object to admission of prior conviction at sentencing under a three-strikes-you're-out law); Armstrong v. Dugger, 833 F.2d 1430, 1431 (11th Cir. 1988) (holding that counsel's failure to investigate and present mitigating evidence constituted ineffective assistance); Butler v. Sumner, 783 F. Supp. 519, 521–22 (D. Nev. 1991) (holding that counsel's complete failure to present any argument or evidence at sentencing constituted ineffective assistance); Gardiner v. United States, 679 F. Supp. 1143, 1147 (D. Me. 1988) (finding ineffective assistance for counsel's failure to speak on defendant's behalf or aid defendant in any way at sentencing); United States v. Boone, 49 M.J. 187, 194–96 (C.A.A.F. 1998) (discussing appropriate procedural steps following a finding of ineffective assistance at sentencing). In other cases, courts have recognized the viability of such claims and have remanded for lower courts to consider the claims. *See* Nichols v. United States, 75 F.3d 1137, 1145–46 (7th Cir. 1995) (holding that counsel's failure to object to the amount of drugs attributed to the defendant at sentencing was grounds for an ineffective assistance claim); United States v. Bennett, 70 F.3d 1280 (9th Cir. 1995) (unpublished table decision), *at* 1995 U.S. App. LEXIS 35300, at *5–*7 (9th Cir. Dec. 1, 1995) (remanding for consideration of whether the defendant's attorney rendered ineffective assistance by stipulating at sentencing that the substance at issue was crack cocaine); Jackson v. United States, 2 F.3d 1154 (8th Cir. 1993) (unpublished table decision), *at* 1993 U.S. App. LEXIS 20134, at *6–*7 (8th Cir. Aug. 6, 1993) (finding possible ineffective assistance in misapplication of sentencing guidelines); United States v. Ford, 918 F.2d 1343, 1350 (8th Cir. 1990) (finding possible ineffective assistance because counsel did not object to the parole officer's failure to reduce the defendant's base offense level under the sentencing guidelines for acceptance of responsibility).

69. To win an ineffective assistance claim a defendant must show not only that his attorney erred, but also that the poor representation harmed him. *See Strickland*, 466 U.S. at 691–92.

70. *See* Glover v. United States, 531 U.S. 198, 203 (2001).

counsel applied at noncapital sentencing proceedings, so the opinion provides no explanation of why *Strickland* applies at sentencing. Because the defendant's sentence was reversed and remanded by the Court, however, it is fair to describe the applicability of *Strickland* to noncapital sentencing proceedings as the holding of the case.

The application of the potential descriptive principles to the right to effective assistance is fairly straightforward. Plainly, the right to an *effective* attorney is not expressly mentioned in the Constitution.[71] Historically, there was no right to *effective* assistance of counsel at sentencing.[72] As with the counsel rights discussed above, the effective assistance right is also rooted in the Sixth Amendment rather than being purely a matter of due process.

If the test for deciding whether a right applied at sentencing were whether the right is a best-estimate right rather than a special-protection right, then the right to effective assistance of counsel would apply at sentencing. To make the contrary argument one would note that outside the criminal context distinctions are not drawn between good attorneys and bad attorneys in this way and "ineffective assistance" is not itself a basis for changing outcomes. Moreover, one might add, the state does not have a comparable guarantee; an ineffective prosecutor cannot lead to a new prosecution. This view would conclude that both the state and the defendant are guaranteed counsel and that anything more is a special protection for the defendant.

For two reasons, however, the ineffective assistance claim is better understood as relating to a balanced and fair estimate, rather than to tilting the playing field towards the defendant. First, if representation by counsel is necessary for a fair and best estimate, it follows that *effective* counsel must be necessary as well. The minimal requirements of performance necessary to qualify assistance as

71. Indeed, this is a necessary corollary to the view that the right to appointed counsel is not expressly included in the Constitution. *See supra* note 57 and accompanying text (noting that the Supreme Court has not read the "plain language" of the Constitution to mean an indigent must be appointed counsel). If the Constitution does not expressly say you must have an attorney, it is hard to see how it can expressly say that you must have an effective one.

72. Such a right would have been highly anomalous because there was no historical right to effective assistance of counsel at *trial*. The decisions the Court in *Strickland* cites as recognizing the right to effective assistance of counsel date only from 1970. *See Strickland*, 466 U.S. at 686. Even Justice Marshall's opinion, which argued for a broader right to effective assistance and looked to state decisions, pointed to state cases recognizing the right to effective assistance of counsel only from 1978 and later. *See id.* at 714 (Marshall, J., dissenting).

effective underscore the point.[73] Without representation at this most basic level of competence, the balanced, best estimate is less likely to be achieved.

Second, in setting out the test, the Court expressly emphasized the right's relation to getting a balanced attempt at the right result, as opposed to a special protection for the defendant.[74] The defendant must show not only that counsel's performance was poor, but also that the poor performance changed the result.[75] Moreover, to meet this burden the defendant must show that there is a "reasonable probability" that the result would have been different;[76] the right does not carry forward the "beyond a reasonable doubt" formula that provides the defendant extra protection in front of the jury. This places the right firmly in the best-estimate group.[77]

3. Counsel of Choice and Proceeding Pro Se

The Supreme Court has not decided whether the other Sixth Amendment counsel rights—the right to counsel of choice and the right to proceed pro se—apply at sentencing. In both cases, lower courts have sometimes, but not uniformly, held that the rights do apply at sentencing.[78] Under the Sixth Amendment, a defendant's choice of retained counsel that she is able to afford is constitutionally protected.[79] Trial courts "must recognize a presumption in favor of [defendant's] counsel of choice,"[80] but that "presumption" can be overcome by competing concerns.[81] The issue tends to arise in a different context post-trial than pretrial. Before trial, in many cases,

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73. To qualify as ineffective, counsel must make "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Counsel's performance should be given a "highly deferential" review and "must indulge a strong presumption" that counsel's performance is adequate. *Id.* at 689. Proving this requisite level of ineffectiveness is extremely difficult. *See* DRESSLER, *supra* note 57, § 29.07, at 621–25.

74. *See Strickland*, 466 U.S. at 686 (holding that to establish a violation of the right to effective assistance, the defendant must show that his counsel's error deprived him of a trial that produced a reliable result).

75. *See id.* at 687.

76. *See id.* at 694.

77. Indeed, in this way the right is even more plainly a best-estimate right than the right to counsel itself, because complete denial of counsel will require a new trial, regardless of whether prejudice resulted.

78. *See infra* notes 85–95 and accompanying text.

79. *See* Wheat v. United States, 486 U.S. 153, 159 (1988) ("[T]he right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment . . . .").

80. *Id.* at 164.

81. *Id.*

including *Wheat v. United States*,[82] the leading Supreme Court case regarding the right to counsel of choice,[83] the defendant wants a particular attorney, and the government objects on the grounds of a conflict or potential conflict of interest. Post-trial, the issue usually arises in the context of a defendant who wants to change from his guilt phase attorney. Rather than a potential conflict, the typical concern of the government and the trial court is that the presentencing substitution is for the purpose of delay[84]—though, to be sure, delay is also often a concern in pretrial motions to substitute.

Lower federal courts have assumed that this constitutionally mandated "presumption" in favor of defendant's counsel of choice applies at sentencing as well as at trial.[85] A majority of state courts have reached the same conclusion though they sometimes describe the right, in both circumstances, with more crabbed language.[86] Other

82. 486 U.S. 153 (1988).

83. *Id.*

84. *See* United States v. Gonzalez, 113 F.3d 1026, 1028 (9th Cir. 1997); United States v. Attar, 38 F.3d 727, 735 (4th Cir. 1994); United States v. Hall, 35 F.3d 310, 313–14 (7th Cir. 1994).

85. *See* United States v. Calderon, 127 F.3d 1314, 1343 (11th Cir. 1997) (applying the *Wheat* standard for counsel of choice to review of a denial of a motion to substitute counsel at sentencing), *cert. denied*, 534 U.S. 1167 (2002); *Gonzalez*, 113 F.3d at 1028 (applying a balancing test to weigh the defendant's Sixth Amendment right to counsel against the Government's interest in efficient administration of justice to a motion to substitute counsel at sentencing hearing); Bae v. Peters, 950 F.2d 469, 477 (7th Cir. 1991) (recognizing that the same "narrowly limited" right to trial counsel of choice applies at sentencing); *see also* United States v. Gibbs, 190 F.3d 188, 207 n.10 (3d Cir. 1999) (applying the same standard for substitution of counsel motion at sentencing as the court applies during trial); *Attar*, 38 F.3d at 735 (same); *Hall*, 35 F.3d at 314 (same).

86. *See, e.g.*, People v. Smith, 863 P.2d 192, 200 (Cal. 1994) (holding that in ruling on a motion to substitute counsel, whether made pre- or post-conviction, courts must determine whether a failure to allow the substitution would substantially impair the right to counsel); People v. Hernandez, 829 P.2d 394, 398 (Colo. Ct. App. 1991) (holding that the defendant's presentencing motion to substitute counsel must be granted upon a showing of "good cause" based on the state's pretrial standard for substitution of counsel); Lockwood v. State, 608 So. 2d 133, 134 (Fla. Dist. Ct. App. 1992) (per curiam) (remanding for resentencing where the court had failed to properly resolve a motion to substitute counsel for sentencing); State v. Jaroma, 630 A.2d 1173, 1179 (N.H. 1993) (holding that the defendant could not prevail on his ineffective assistance at sentencing claim because he could not meet the *Strickland* standard); People v. Murray, 666 N.Y.S.2d 716, 717 (N.Y. App. Div. 1997) (holding as a proper exercise of discretion the denial of a motion for new counsel at sentencing where the defendant's statement of dissatisfaction was "perfunctory" and never explained); People v. Rodriguez, 510 N.Y.S.2d 700, 701 (N.Y. App. Div. 1987) (applying the pretrial standard of substitution—"good cause"—to a presentencing motion to substitute counsel).

states, however, do not seem to give the right at sentencing a constitutional status.[87]

The application of the right to proceed pro se at sentencing is also uncertain. Lower courts have generally discussed the *Faretta v. California*[88] right to proceed pro se[89] as though it applies at sentencing.[90] The difficult question arises in cases in which represented defendants assert the right to proceed pro se for the first time at sentencing. In this situation, courts have taken two different approaches. The clear majority of courts have held that at sentencing

87. *See, e.g.*, Blake v. State, No. S00A1857, 2001 Ga. LEXIS 145, at *6 (Ga. Feb. 16, 2001) (holding that the decision regarding substitution of counsel lies in the sound discretion of the trial court); People v. Walker, 627 N.E.2d 193, 201–02 (Ill. 1993) (finding that the decision to review the adequacy of counsel is within the "sound discretion" of the trial court).

88. 422 U.S. 806 (1975).

89. *Id.* at 836 (holding that a criminal defendant has a constitutional right to refuse counsel and proceed pro se).

90. Once again, this issue tends to arise differently at sentencing. Prior to conviction, the *Faretta* right is a sword that can cut both ways: a defendant has the constitutional right to proceed pro se, so convictions can be reversed when a defendant was "forced" to have counsel. *Id.*; *see* McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984) (explaining that the right of self-representation is not properly viewed under a "harmless error" analysis because a deprivation of the right will never be harmless). On the other hand, the defendant cannot proceed pro se without a knowing and voluntary waiver of the right to representation, so that, in the absence of such a waiver, a conviction can be reversed when a defendant is not represented. At sentencing, the issue arises overwhelmingly in the second context rather than the first—pro se defendants claiming an inadequate waiver of the right to counsel are the ones who appeal, rather than represented defendants who claim they were denied a chance to represent themselves at sentencing. *See, e.g.*, United States v. Salemo, 61 F.3d 214, 218 (3d Cir. 1995) (describing a criminal defendant's claim that his waiver of counsel at sentencing was not knowing, intelligent, and voluntary); United States v. Mateo, 950 F.2d 44, 50 (1st Cir. 1991) (remanding the case for resentencing and instructing the trial court to appoint competent counsel or ensure that the defendant knowingly waives that right). In deciding appeals raising that latter issue, lower courts look to the *Faretta* standard for determining the adequacy of a waiver. *See, e.g.*, Havrilenko v. Duckworth, 661 F. Supp. 454, 461–62 (N.D. Ind. 1987) (concluding that defendant had a right under *Faretta* to proceed pro se and, having made that choice knowingly and voluntarily, must abide by the consequences). Frequently, the issue turns on whether a defendant's waiver of the right to counsel at an earlier stage of the proceedings remains valid at sentencing without further action by the court, or whether the defendant must make a separate "knowing and voluntary" waiver for sentencing. The clear weight of authority lies with the former position: a defendant's decision to proceed pro se, and the accompanying knowing and voluntary waiver of the right to counsel, carry over, assuming there has been no major time lapse or change in posture of the case. *See* People v. Baker, 440 N.E.2d 856, 860–61 (Ill. 1982); John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483, 583–84 (1996) (stating that precedent establishes "that a pro se defendant is not entitled to a renewed determination of his waiver of the right to counsel prior to a sentencing hearing"). This result follows logically from the conclusion that the trial pro se right simply continues into sentencing.

the Sixth Amendment still protects the right of a defendant to proceed pro se.[91] At least two courts, however, have held that the right does not apply at sentencing.[92]

Most courts applying the right to proceed pro se at sentencing do so without much analysis, simply assuming that the *Faretta* right applies.[93] Perhaps courts make this assumption because of the Court's language in *Faretta*: "[a state cannot] constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense,"[94] and "[the defendant] has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so."[95] By their broad language and their lack of express reference to the trial stage, these dicta suggest a right to proceed pro se at sentencing.

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91. *See* Lopez v. Thompson, 202 F.3d 1110, 1117 (9th Cir. 2000) (en banc); United States v. Marks, 38 F.3d 1009, 1015 (8th Cir. 1994); *Havrilenko*, 661 F. Supp. at 461–62; State v. Braswell, 78 N.C. App. 498, 499–500, 337 S.E.2d 637, 638 (1985); *cf.* Silagy v. Peters, 905 F.2d 986, 1007 (7th Cir. 1990) (holding that the right to proceed pro se applies at capital sentencing).

92. *See* United States v. Davis, 150 F. Supp. 2d 918, 923 (E.D. La. 2001); People v. Rivers, 25 Cal. Rptr. 2d 602, 608 (Cal. Dist. Ct. App. 1993).

At least one court has reached this result on the ground that assertion of the right after a finding of guilt prior to sentencing is "mid-trial" and that there is no longer a constitutional right to proceed pro se, though such a motion may nonetheless be granted in appropriate circumstances. *See Rivers*, 25 Cal. Rptr. 2d at 608. Whether or not they reach the right result, courts denying the right to proceed pro se at sentencing on the ground that the Sixth Amendment right to proceed pro se is permanently waived if not exercised prior to the commencement of trial are almost certainly wrong. Regardless of whether there is a right to proceed pro se at sentencing, the fact that sentencing occurs after a trial has commenced cannot settle the matter. Most courts agree that when a substitution of counsel would delay the proceedings, the court must balance the Sixth Amendment interest against the reasons for not allowing the substitution. *See, e.g.*, United States v. D'Amore, 56 F.3d 1202, 1204 (9th Cir. 1995) (denying defendant's substitution of counsel request because of the government's compelling interest in prompt and efficient administration), *overruled on other grounds by* United States v. Garrett, 179 F.3d 1143, 1145 (9th Cir. 1999); United States v. Machor, 879 F.2d 945, 952 (1st Cir. 1989) (holding that the right to counsel is not absolute and must be weighed against the need for effective administration). For this reason, the Sixth Amendment right may be particularly diminished by competing concerns once the trial has commenced. However, the right is not extinguished. If this is correct, it is hard to see how the Sixth Amendment interest would be extinguished at sentencing merely because sentencing occurs after the trial has commenced. The rationale would have to be a post-trial one.

93. *See, e.g.*, *Lopez*, 202 F.3d at 1117 (holding that the defendant had a right to remove counsel and proceed pro se under *Faretta*); *Marks*, 38 F.3d at 1015 (holding that a defendant has a right under *Faretta* to represent himself if he has made a valid waiver of counsel).

94. *Faretta*, 422 U.S. at 807.

95. *Id.*

In its 1999 term, however, the Supreme Court supplied reasons to doubt this view. In *Martinez v. Court of Appeal of California, Fourth Appellate District*,[96] the Court held unanimously that there is no constitutional right to proceed pro se on appeal (the opposite conclusion from that of most of the lower courts that had addressed the issue).[97] In so doing, the Court stated that while the *Faretta* language could be broadly construed, "our specific holding was confined to the right to defend oneself at trial."[98] The Court's conclusion that the defendant did not have the right to proceed pro se on appeal was explained in part by the fact that:

> The status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict. . . . [On appeal], the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*. Yet the overriding state interest in the fair and efficient administration of justice remains as strong as at the trial level.[99]

In light of the Court's reasoning, there is a new and significant reason for uncertainty about a right to proceed pro se at sentencing.

To be sure, the sentencing context can be distinguished from the appellate context on the ground that the Sixth Amendment right to counsel applies at sentencing, whereas the constitutional right to an attorney on an appeal is grounded only in due process because there is no constitutional right to an appeal in the first place. If the right *not* to have counsel is an implicit adjunct of the former but not of the latter, then *Martinez* might have little bearing on the sentencing context. Only Justice Scalia in *Martinez*, however, relied on this distinction[100] for the (unanimous) outcome in that case, nor is there any obvious reason why the rights to counsel should differ in this respect. Instead, the majority opinions in both *Faretta* and *Martinez* looked to historical practice and the nature of the procedural setting to determine whether there was a right to proceed pro se.[101]

Because the Supreme Court has not settled whether the rights to counsel of choice and to proceed pro se apply at sentencing, their

96. 528 U.S. 152 (2000).
97. *See id.* at 163.
98. *Id.* at 154.
99. *Id.* at 162–63.
100. *See id.* at 165–66 (Scalia, J., concurring).
101. A final permutation on this issue would be a case in which the defendant was allowed to proceed pro se at trial, after which a court tried to force counsel at sentencing. Research has not revealed any such case.

analysis under the alternative descriptive explanations will not shed light on those explanations' fit with Supreme Court precedent. Accordingly, only brief discussion is included, mostly in the footnotes. If the method for determining whether a right applied at sentencing was whether the right was expressly guaranteed by the Constitution, the rights to counsel of choice and to proceed pro se probably would not apply.[102] The historical record, such as it is, might support these rights at sentencing, but the questions are close.[103] Both rights are

102. The language provides that the accused shall have the right "to have the Assistance of Counsel" but does not say anything about who that counsel will be. *See* U.S. CONST. amend VI. Plainly one could "have" counsel that is not the counsel of one's choice. To be sure, the "plain meaning" of a provision is often in the eye of the beholder, and one could see the Constitution's language as expressly covering this right. The Court's language in *Wheat*, however, the seminal case on right to counsel of choice, supports the view offered in the text. *See* Wheat v. United States, 486 U.S. 153, 159 (1988) (explaining that the "essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers").

Similarly, while one could imply from the right to have counsel the right not to have counsel, that hardly can be called the plain language of the provision. Indeed, if provision of the right to something in the Sixth Amendment constituted a clear statement of the right not to have that something, then under the Sixth Amendment a defendant would also have a right to a delayed and private bench trial.

103. The Court's recognition of the right to counsel of choice was not based on historical practice. *See Wheat*, 486 U.S. at 159. The right to be represented by counsel at all was an abrogation of the common-law rule. *See supra* note 59 and accompanying text. Thus, any historical practice argument would have to rely on the new practices of the colonies rather than the approach of the common law. *See supra* note 61 (discussing the relevance of colonial practice to history-based due process inquiry). Apparently, the "counsel of choice" issue as we know it did not generally arise. Thus, one might say—by default—that a practice of getting to choose your counsel was not recognized. On the other hand, a practice of denying such choice was not recognized either. If the question is put in the form of "would the framers have approved of such a right had it come up," the answer may be yes. For further exploration of this question (concluding with a positive answer), see Winick, *supra* note 58, at 788–800.

The historical support for the right to proceed pro se at sentencing is probably stronger. The Court relied heavily on historical practice in establishing the pro se right in *Faretta*, noting the existence of the practice in England and early America and the inclusion of express rights to self-representation in many colonial charters and state constitutions. *See* Faretta v. California, 422 U.S. 806, 821–32 (1975). The Court found this history significant notwithstanding that during much of this period defendants were not allowed to have counsel or counsel were not easily available. Probably a similar historical argument could be made for the right to self-representation at sentencing, given that sentence historically was so closely linked to the trial outcome. In *Martinez*, the Court, in the context of denying a right to proceed pro se on appeal, found the negative historical argument—"[n]o State or Colony ever forced counsel upon a convicted appellant"—unpersuasive as to appeals because there was no historic right to appeal at all. *Martinez*, 528 U.S. at 159. That reasoning would presumably not prevent the historical inference in support of the right from being drawn about sentencing.

plainly ones that are attached to the Sixth Amendment itself rather than purely being a matter of due process.[104]

If the descriptive explanation for whether a right applied at sentencing were whether the right is a best-estimate right, then the right to proceed pro se would not apply at sentencing, and the right to counsel of choice probably would not either. Both rights are, at bottom, concerned with individual autonomy—in this case, complete autonomy to direct one's own criminal defense (something in which individuals have a very substantial interest). The rights are not particularly concerned with achieving a balanced or accurate result; indeed, they often work in the opposite direction. Of the two, the right to counsel of choice is the closer question. The right is, after all, premised on the right to counsel, which attempts to achieve an equal balance. One could argue that the right to counsel of choice supports achieving the best estimate on the ground that each side (defense and prosecution) choosing its own attorneys will lead both sides to get the best counsel for their circumstances and thus, through the adversary process, the most accurate result. Even if that would be true in a world of unlimited resources and perfect information, however, it is probably not true in our world. For this reason, both rights would likely go the way of other special protections at sentencing and be found inapplicable.

B. Rights Relating to Bail

The Eighth Amendment provides that "excessive bail shall not be required."[105] The Supreme Court has held that this provision "says nothing about whether bail should be available at all,"[106] but does

104. The *Wheat* decision, which firmly established the right to counsel of choice, was a federal case in which the majority and dissenting opinions described the right to counsel entirely as a Sixth Amendment matter. *Wheat*, 486 U.S. at 159 (describing the case as determining the scope of "a criminal defendant's right under the Sixth Amendment to his chosen attorney"); *id.* at 165 (Marshall, J., dissenting) ("The Court acknowledges, as it must, that the Sixth Amendment's guarantee of assistance of counsel comprehends the right to select one's own attorney.").

As for the right to proceed pro se, the *Faretta* Court relied heavily in establishing the right on its support by "the structure of the Sixth Amendment," and did not rely on due process for its holding. *See Faretta*, 422 U.S. at 818–21.

105. U.S. CONST. amend. VIII.

106. United States v. Salerno, 481 U.S. 739, 752 (1987). It should be noted that the Court did, nonetheless, leave the door to a right to bail slightly ajar, stating that "we need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail." *Id.* at 754. Commentators have taken a variety of positions on whether the Eighth Amendment provides a right to bail in general. *See* Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 355–57 & nn.138 & 146 (1990)

require that if pretrial conditions of release or detention are imposed, they must "not be 'excessive' in light of the perceived evil."[107]

In addition to the Eighth Amendment, pretrial detention is restricted by principles of substantive due process. For the Constitution to permit a defendant to be deprived of his liberty prior to conviction, the deprivation must be a "regulation" rather than a "punishment"[108] and must not be "excessive" in regard to the regulatory purpose.[109]

Do the "trial rights" to bail apply at sentencing? Specifically, does the Fifth Amendment due process liberty interest survive conviction and require that detention pending sentencing be "regulatory" rather than punitive, and must bail, if authorized, satisfy the Eighth Amendment limitation that it not be excessive?[110] Although the Supreme Court as a whole has not settled either question, the decided cases[111] point to an answer of "no" regarding due process and "yes" regarding the Eighth Amendment.

The Supreme Court has held that there is no due process right to bail pending appeal.[112] Beginning with the proposition that a "review by an appellate court of the final judgment in a criminal case . . . is not

(collecting a "variety of positions" but concluding that "[t]he argument that the Eighth Amendment prohibits a court from detaining an individual without bail is unsatisfactory").

107. *Salerno*, 481 U.S. at 754. It has been suggested that denying bail to a class of defendants for trivial reasons—for example, holding jaywalkers without bail to protect the community—would be a condition of pretrial detention excessive in relation to its purpose that would violate the Eighth Amendment. *See* LAFAVE ET AL., *supra* note 2, § 12.3(c), at 652–53. Any detention that ran afoul of such a limit in the pretrial context, however, would also violate liberty interests protected by substantive due process. *See infra* notes 108–09 and accompanying text. The Eighth Amendment's protection against excessive bail "has been assumed to have application to the States through the Fourteenth Amendment." Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

108. *Salerno*, 481 U.S. at 747; *see* Bell v. Wolfish, 441 U.S. 520, 537 (1979).

109. *See Salerno*, 481 U.S. at 747; *Wolfish*, 441 U.S. at 538.

110. Because the Eighth Amendment has not been held to provide an independent right to bail in the first place, *see supra* note 106 and accompanying text, the question is not whether the Eighth Amendment requires that there be a possibility for bail pending sentence. The assumption for the present must be that it does not.

111. Not surprisingly, given the short time that usually elapses between conviction and sentence, particularly in state courts, the case law is sparse. A significant number of the federal cases arise when a defendant has pled guilty and agreed to cooperate with the government and the sentencing has been postponed until completion of the defendant's "cooperation." *See* United States v. Gregory, 245 F.3d 160, 161 (2d Cir. 2001); United States v. Bryant, 895 F. Supp. 218, 220 (N.D. Ind. 1995); United States v. Douglas, 824 F. Supp. 98, 99 (N.D. Tex. 1993).

112. *See* McKane v. Durston, 153 U.S. 684, 688 (1894).

. . . a necessary element of due process of law,"[113] the Court concluded that the conditions under which an appeal may be allowed—meaning with or without bail—were therefore also to "be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper."[114] The Court's position on bail pending appeal, while perhaps debatable, has a certain logic under its more contemporary bail/substantive due process jurisprudence. If there is no constitutional right to an appeal after a conviction, then it stands to reason that the state may constitutionally punish following a conviction. If the state may punish, then bail (and liberty) may be denied for punitive, as opposed to regulatory, reasons and substantive due process would not be implicated.

This no-bail-pending-appeal result, however, does not necessarily resolve the sentencing question. Arguably, while an appeal is not a necessary adjunct to punishment, a sentence is. In other words, one might argue that punishment cannot take place prior to a lawful sentence. At least in a case where, absent presentence release, sentencing might not take place until after the statutory minimum prison sentence is served (in many cases, prison is not actually required), one could argue that punishment is not yet allowed and bail can only be denied for "regulatory" reasons—that the substantive due process protection retains force.

Lower court decisions, at least, suggest the contrary—that the prohibition on punishment does not survive conviction. The Bail Reform Act of 1984[115] changed the federal law governing bail pending sentencing. Prior to that Act, there was a presumption in favor of bail, even after conviction; after that Act, the presumption shifted to one against bail.[116] In many cases, the defendant *must* be denied bail

113. *Id.* at 687. The Court has reiterated this proposition over the ensuing one hundred years, most recently in *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 161 (2000).

114. *McKane*, 153 U.S. at 687–88.

115. Pub. L. No. 98-473, Title II, ch. 1, § 203(a), 98 Stat. 1976, 1981–82 (codified as amended at 18 U.S.C. § 3143 (2000)) (discussing the "[r]elease or detention of a defendant pending sentence or appeal").

116. *Compare* Bail Reform Act of 1966, Pub. L. No. 89-465, § 3(a), 80 Stat. 214, 215–16 (repealed 1984) (presuming the court should grant bail unless the court reasonably believes the defendant will be a flight risk or will pose a danger to another person or to society), *with* Bail Reform Act of 1984, § 203(a), 98 Stat. at 1981–82 (codified as amended at 18 U.S.C. § 3143(a) (2000)) (presuming the court should order detention of the defendant pending sentencing unless the court "finds by clear and convincing evidence" that the defendant will neither be a flight risk nor pose a threat to the safety of another person or to the community). *See generally* Miller & Guggenheim, *supra* note 106, at 343–49 (discussing changes in the law of bail wrought by the Bail Reform Act of 1984).

pending sentencing even if he can show by clear and convincing evidence that he poses neither a risk of flight nor a danger to the community.[117] If the substantive due process right still had force after conviction, such a provision would be constitutionally problematic because risk of flight and danger to the community are, essentially, the only approved "regulatory" interests that justify nonpunitive restrictions in this context on an individual's fundamental interest in liberty.[118] Yet none of the courts applying these provisions of the Bail Reform Act have found them constitutionally troubling.[119]

Supreme Court dicta also support the view that the substantive due process protection against deprivation of liberty effectively ends at trial, even before sentence.[120] The Court has recognized a "general rule" that substantive due process bars confinement "prior to a judgment of *guilt* in a criminal trial"[121] and that "special

117. If the defendant is convicted of a violent crime, a crime for which the death penalty or life imprisonment is the maximum sentence, or an offense for which the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act prescribe a maximum term of ten years imprisonment, then the statute insists that a higher standard be met in order for bail pending sentencing to be granted. 18 U.S.C. § 1342(f)(1) (2000). The defendant not only must show by clear and convincing evidence that he will neither flee nor endanger society, but also the court must find either a "substantial likelihood" that an acquittal or new trial is forthcoming or a government attorney must recommend that the imposition of a sentence of imprisonment be withheld. *See id.* § 3143(a)(2).

118. *See supra* notes 108–09 and accompanying text.

119. *See, e.g.*, United States v. Salome, 870 F. Supp. 648, 645 (W.D. Pa. 1994) (finding that the defendant did not present any "exceptional reasons" warranting release); United States v. Mahabir, 858 F. Supp. 504, 507 (D. Md. 1994) (denying continuation of bail based on the defendant's inability to prove the likelihood of prevailing at trial or exceptional circumstances warranting continuation of bail). While these cases do uphold bail denials in the absence of danger or flight risk, most do not expressly address the constitutional issue. In the one exception, the Court expressly held in the context of a presentence bail application that "no constitutional right to bail after conviction exists." United States v. Ross, 730 F. Supp. 355, 356 (D. Kan. 1990).

120. The substantive due process liberty interest that can create an effective right to bail ends for all practical purposes with conviction if, as seems to be the case, the state is free to incarcerate for punitive reasons at this stage. This is so because any incarceration would, no doubt, be justified and justifiable on punitive grounds. The constitutionally protected liberty interest does technically survive, however, and could be proffered to challenge a deprivation of liberty *apart* from punitive incarceration. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 78 (1992) (stating "that a convicted felon serving his sentence has a liberty interest, not extinguished by his confinement as a criminal, in not being transferred to a mental institution"); *see also* 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, 504–55 (1984) (discussing the liberty interests of prisoners and those on probation and parole). Such examples, however, are not relevant in the bail pending sentencing context.

121. United States v. Salerno, 481 U.S. 739, 749 (1987) (emphasis added); *see also* Bell v. Wolfish, 441 U.S. 520, 534 (1979) (recognizing the traditional right to freedom before *conviction*).

circumstances" are necessary to justify such confinement *without* "criminal trial and conviction."[122] Lower courts have made similar pronouncements.[123]

In the Eighth Amendment context, several Supreme Court Justices have stated, in deciding applications for bail pending appeal, that—so long as bail is available pending appeal—the constitutional guarantee that it not be excessive is applicable.[124] If the prohibition applies pending appeal, it would certainly seem to apply pending sentencing. On the other hand, it must be noted that each of these decisions came under the pre-1984 version of the Bail Reform Act—under which there was a presumption in favor of bail pending sentencing[125]—and each Justice found that bail was required as a statutory matter,[126] rendering their constitutional statements dicta. Moreover, if this doctrine does have continuing force, it has not found applicability in any lower court cases since the enactment of the Bail Reform Act of 1984.[127]

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122. *Salerno*, 481 U.S. at 749.

123. *See* United States v. Majors, 932 F. Supp. 853, 854 (E.D. Tex. 1996) (stating that " '[o]nce guilt of a crime has been established in a court of law, there is no reason to favor release pending imposition of sentence' " (quoting S. REP. NO. 98-225, at 26 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3209)); State *ex rel.* Brown v. Newell, 391 S.W.2d 667, 669 (Tenn. 1965) (stating that the constitutional guarantee of bail is lost after conviction).

124. *See* Hung v. United States, 439 U.S. 1326, 1329 (1978) (Brennan, Circuit Justice); Harris v. United States, 404 U.S. 1232, 1232 (1971) (Douglas, Circuit Justice); Sellers v. United States, 89 S. Ct. 36, 38 (1968) (Black, Circuit Justice).

125. *See supra* note 116 and accompanying text.

126. *See Hung*, 439 U.S. at 1326–27 (Brennan, Circuit Justice); *Harris*, 404 U.S. at 1232–33 (Douglas, Circuit Justice); *Sellers*, 89 S. Ct. at 37–38 (Black, Circuit Justice).

127. These cases were decided under a regime in which the statute provided that bail would be available pending appeal unless the defendant presented a risk of flight, a danger to an individual or the community, or the appeal was frivolous. So, after finding that the appeal was not frivolous, the Justices could find the refusal to grant bail constitutionally "excessive" in relation to the purposes of preventing flight or danger as well as erroneous under the statute. Because the new Bail Reform Act indicates that bail should be denied pending sentencing and appeal, even in the absence of these risks, notwithstanding that nonfrivolous appellate issues remain, if the defendant was convicted of a crime of violence or of a crime with a maximum penalty of greater than ten years, it is not clear what "excessive" would mean. Excessive in relation to what purpose? There are two possible answers. The first answer would be excessive in relation to a legitimate purpose articulated by the state. Unless some new purpose were proffered, this contention would mean that presentence and preappeal detention would violate the Constitution if the defendant established that he posed no danger to the community or risk of flight. The second answer would be that the Eighth Amendment does not apply to those crimes because bail is not permitted after conviction for them. The contention would be that the Eighth Amendment imposes no substantive limitations on the power of legislatures to prohibit bail, but only comes into play when bail is made available. In *Salerno*, 481 U.S. at

Turning to the possible descriptive explanations, if the method for determining whether a right applied at sentencing were whether the right was expressly guaranteed by the Constitution, the right against excessive bail would apply and the right against detention would not. As to the former, excessive bail is expressly prohibited in the Eighth Amendment, without any limitation of the prohibition to "criminal prosecutions" (as in the Sixth Amendment) or to "criminal cases" (as in the Fifth Amendment).[128] As to the latter, the right not to be detained is not mentioned at all but comes instead as a matter of substantive due process.[129]

Historical practice regarding bail pending sentencing is extremely murky. Indeed, the question whether "the scanty historical evidence from the colonial and early national periods"[130] supports a *pretrial* right to bail is uncertain.[131] The sentencing question is further complicated by the fact that the mandatory or summary nature of most eighteenth century sentences[132] meant that sentence could be ordered immediately at the time of the guilty verdict, so that bail pending sentencing for the *post-verdict* time period relevant here would not be an issue at all.[133] Statutes of the time do not make the issue any clearer.[134] Thus, while the historical basis for a "right to

524, the Court expressly reserved judgement on this question. *See supra* note 106 and accompanying text.

128. *See* U.S. CONST. amend. VIII.

129. *See supra* notes 108–09 and accompanying text.

130. Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 334–35 (1982).

131. *Compare* Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1139, 1140 (1972) (examining the historical record and finding no basis for a right to bail), *and* Verilli, *supra* note 130, at 334–35 (examining the historical record and finding it too inconclusive to support a general right to bail at the time of adoption of the Eighth Amendment but finding post-1789 developments strongly supportive of a right to bail), *with* Caleb Foote, *The Coming Constitutional Crisis in Bail* (pt. 1), 113 U. PA. L. REV. 959, 966–89 (examining the historical record and concluding it provides a basis for a right to bail).

132. *See* Dershowitz, *supra* note 62, at 83–84; *see also supra* note 62 (discussing the history of judicial discretion in sentencing).

133. *See* Herman, *supra* note 2, at 302 n.54 ("As late as 1883, James Stephen could categorically describe sentencing as usually following 'at once' upon conviction." (quoting 1 STEPHEN, *supra* note 59, at 457)); Note, *An Argument for Confrontation*, *supra* note 9, at 1888 (noting that prior to the eighteenth century, trial and sentence were combined in a single proceeding).

134. In 1641, the first expression of the right to bail in the colonies did expressly extend the limited right there granted up until the time of sentence. *See* THE BODY OF LIBERTIES OF 1641, *reprinted in* WILLIAM H. WHITMORE, A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686, at 29, § 18, at 37 (Boston, Rockwell and Churchill 1890) ("No mans person shall be restrained or imprisoned by any Authority whatsoever, before the law hath sentenced him thereto, If he

bail" in general may be inadequate,[135] the basis for a general right to bail pending sentencing is virtually absent.

The historical picture regarding "excessive" bail, however, is somewhat different. Two aspects of sentencing in colonial times suggest that the Eighth Amendment's protection against "excessive bail" would probably have been understood to extend to the time of sentencing had the issue ever arisen. First, the historical practice of sentence upon verdict would offer historical support for protection against "excessive" bail pending sentencing. The "excessive bail" clause indisputably applies pending the trial. If the practice was that the issuance of sentence came at the same time as the conclusion of the trial, then the effect of the provision would have been to prohibit excessive bail pending sentencing as well. Second, the fact that, until the end of the eighteenth century, incarceration was rarely used as a punishment for crime,[136] but instead was used only *prior* to adjudication, suggests the same result. Because incarceration served the same limited function both pre- and post-verdict (ensuring the defendant's presence), it is reasonable to understand the Eighth Amendment's Bail Clause as applying in the same way both pre- and post-verdict. It would have been odd to change the rules governing incarceration upon the entry of a verdict when, unlike current practice, the verdict did not lead to incarceration as a punishment.

In summary, the historical question is extremely difficult to answer not only because of uncertainty about actual practice, but even more so because the question of bail pending sentencing makes little sense in the historical context. For the reasons described above, however, the best answers would probably be "no" to the right to bail

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can put in sufficient securitie, bayle or mainprise, for his appearance . . . ."). Subsequent expressions of the right, however, from the Pennsylvania Frame of Government of 1682 through the Judiciary Act of 1789, tended to use slightly different language that eliminated the reference to sentencing. *See* Verrilli, *supra* note 130, at 337–38 (detailing history and quoting the Pennsylvania version as "all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption great").

135. *See supra* notes 130–31 and accompanying text.

136. *See* ARTHUR W. CAMPBELL, LAW OF SENTENCING 4–5 (2d ed. 1991) (noting that in the eighteenth century, incarceration was usually reserved for debtors and political prisoners rather than criminals); WILLIAM FRANCIS KUNTZ II, CRIMINAL SENTENCING IN THREE NINETEENTH CENTURY CITIES: SOCIAL HISTORY OF PUNISHMENTS IN NEW YORK, BOSTON, AND PHILADELPHIA, 1830–1880, at 49 (Harvard Dissertations in American History and Political Science Series, 1988) (explaining summary and nonincarcerative penalties in Massachusetts counties, including that less than one percent of punishments involved jail in the decade of the 1760s); Nagel, *supra* note 62, at 892 (describing how prerevolutionary American colonists used jails primarily to detain the accused awaiting trial).

in general pending sentence and "yes" to the right to protection against excessive bail pending sentence.

If the descriptive explanation for whether rights applied at sentencing were whether the rights were primarily a result of due process, then, for reasons evident from the preceding discussion,[137] the answer for excessive bail would clearly be no and for bail at all would be yes.

The best-estimate/special-protection distinction would probably lead to the result that the right against excessive bail does apply at sentencing while the right to bail in the first place does not. The substantive due process right to bail at all—the right to liberty, to freedom—falls plainly in the category of special right rather than best estimate. Rather than simply being designed to ensure that an adjudication leads to a balanced and accurate result, the right is more fundamentally a part of the reason a trial is required at all. The right to bail is not only a fundamental right,[138] it also underlies the presumption of innocence[139] and, indeed, has broader applications beyond the criminal context.[140] If the trial rights that survive until sentencing are only those that are directed towards achieving a balanced, best estimate of the issue in question, and not those provided to defendants as extra assurance of the protection of liberty, this right, in effect a right not to be punished,[141] would not apply. This right is a core privilege of living under the United States Constitution, *not* a right designed to lead to accurate trial results.

In contrast, the Eighth Amendment's protection against "excessive bail," by applying only in the context in which bail is available, relates directly to the defendant's interest in freedom pending adjudication, rather than simply to liberty in general. The protection thus includes practical ramifications to a criminal defendant of not being incarcerated. For example, a defendant in jail pending trial or pending sentence will be less able to develop a

137. *See supra* notes 105–09 and accompanying text.

138. United States v. Salerno, 481 U.S. 739, 750 (1987).

139. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951).

140. Even where a deprivation of liberty by confinement is civil in nature rather than punitive, the due process liberty interest mandates adequate justification for the confinement. *See, e.g.*, Seling v. Young, 531 U.S. 250, 265 (2001) (holding that even though a challenge to a state's sentencing scheme is a civil claim, "due process requires that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons are committed"); Foucha v. Louisiana, 504 U.S. 71, 79 (1992) (determining that due process requires that a decision to perpetuate a prisoner's confinement because of bad behavior "bear some reasonable relation to the purpose for which the individual is committed").

141. *See supra* note 108 and accompanying text.

helpful record of rehabilitation, repentance, or non-dangerousness, less able to assist her attorney and to help him with investigation, and less able to earn money to pay for her defense.[142] The Court has specifically held that these sorts of interests are among those encompassed by the Eighth Amendment's bail protection.[143] These are best-estimate interests rather than special protections. The defendant's ability to assist in his case—at trial or at sentencing—by paying for his defense, by consulting with counsel or by developing a more complete record (through investigation or through demonstration by his own actions) all serve to advance the cause of accurately deciding what the sentence should be, without any hint of a bias against the state. The interests are part of a balanced playing field because the state has unfettered use of the equivalent advantages.[144]

C. *Notice of Conduct*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation."[145] According to the Court, this notice right serves a similar function to one of the functions of the indictment requirement: to "apprise[] the defendant of what he must be prepared to meet."[146] In addition, the Court has held that, as a matter of due process, "notice of the specific charge . . . [is] among the constitutional rights of every accused in a criminal proceeding."[147]

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142. *See, e.g.*, DANIEL FREED & PATRICIA WALD, BAIL IN THE UNITED STATES: 1964, at 43–46 (1964) (explaining studies in New York City indicating that inability to make bail leads to higher conviction rates and harsher sentences in some cases); Hans Zeisel, *Bail Revisited*, 1979 AM. B. FOUND. RES. J. 769, 779–87 (describing similar studies in detail); *see also* Verrilli, *supra* note 130, at 358 (noting that because of the disadvantages of pretrial incarceration, federal courts have "discerned in a bail clause a constitutional intent to assure a fair trial"). *See generally* DRESSLER, *supra* note 57, § 30.02, at 637 (discussing reasons why confinement may hamper presentation of a defendant's case).

143. *See Boyle*, 342 U.S. at 4.

144. To be sure, only the defendant can show his reformed character by not committing crimes pending sentencing, but even this possibility is balanced by the fact that the defendant out on bail may equally well demonstrate the opposite by committing further crimes.

145. U.S. CONST. amend. VI. Although the Supreme Court has not frequently discussed this provision, it has held that this right applies to state criminal prosecutions through the Fourteenth Amendment. *See* Herring v. New York, 422 U.S. 853, 857 & n.7 (1975); Cole v. Arkansas, 333 U.S. 196, 201 (1948).

146. Russell v. United States, 369 U.S. 749, 763 (1962) (internal quotation omitted).

147. *Cole*, 333 U.S. at 201; *see also In re* Oliver, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him . . . [is] basic in our system of jurisprudence . . . .").

Because this protection is sometimes characterized as one of due process, it might well be required even without the Sixth Amendment provision.[148]

Does the Sixth Amendment right to notice of the "nature and cause of the accusation" and/or any related due process right apply to accusations at sentencing? In other words, does the Constitution require that the defendant be informed of allegations to be considered against him at sentencing? Both the Supreme Court and lower courts have struggled with this issue, almost always under the rubric of due process. The Court has never discussed the application of the Sixth Amendment provision as such at a sentencing proceeding.

When first presented with a right to notice at sentencing case, the Court seemed to find such trial rights inapplicable. In *Williams v. New York*, a state trial court imposed a sentence of death despite a jury's recommendation of life imprisonment.[149] The sentencing judge relied in part on a presentence investigation report that showed the defendant had committed thirty other burglaries, had engaged in activities that demonstrated "a morbid sexuality," and was a "menace to society."[150] The defendant's appeal to the United States Supreme Court claimed that the use of this evidence violated the Due Process Clause because the defendant had not had the opportunity to cross-examine the witnesses.[151] The Court characterized the issue as "the manner in which a judge may obtain information to guide him in the imposition of sentence upon an already convicted defendant."[152]

In a broadly worded opinion, the Court found no constitutional objection to the judge's use of this information. The Court specifically noted that a defendant at trial has a due process right to know of the charges against him,[153] but stated that both historical practice[154] and practical concerns of sentencing (specifically, individualization of punishment and rehabilitation)[155] justify, from a due process perspective, "different evidentiary rules governing trial

148. *See In re* Gault, 387 U.S. 1, 33 & n.53 (1967) (applying the notice of charges requirement in a juvenile proceeding and collecting applications in other civil and criminal proceedings).

149. Williams v. New York, 337 U.S. 241, 242 (1949).

150. *Id.* at 244.

151. *Id.* at 243.

152. *Id.* at 244.

153. *Id.* at 245 (citing *In re* Oliver, 333 U.S. at 257, 273 (1948)).

154. *See id.* at 245–46.

155. *See id.* at 246–50.

and sentencing procedures."[156] While more directly a Confrontation Clause case than a notice case, *Williams* appeared to stand for the proposition that a defendant may lawfully not receive notice of conduct that will be counted against him prior to imposition of sentence.

Subsequent cases, however, have suggested that there are "notice of charges" rights that survive at sentencing. In *Gardner v. Florida*,[157] a fractured Court overturned a death sentence on the ground that the judge imposing the sentence relied on a presentence report, parts of which were never disclosed to the defense, either before or after sentencing. The Court[158] distinguished *Williams* on two grounds. First, the Court noted that the material in *Williams* was at least disclosed in detail in open court at the time of sentencing, giving counsel the opportunity "to challenge the accuracy or materiality of any such information."[159] This distinction suggests a requirement of notice regarding conduct relied on for sentencing. Second, however, the Court noted that constitutional interpretation had evolved to impose greater due process requirements for capital sentences than for noncapital sentences.[160] This suggested that any notice requirements at sentencing might be limited to capital cases.

The Court returned to the notice question, this time in the noncapital context, in *Burns v. United States*.[161] In *Burns* the Court held that before a district court can depart upward in sentencing under the Federal Sentencing Guidelines, the defendant must have reasonable advance notice that the Court is contemplating an upward departure on the ground in question.[162] *Burns* was decided on statutory interpretation grounds,[163] but has significance because the

156. *Id.* at 246.

157. 430 U.S. 349 (1977).

158. Though only a plurality opinion, five Justices adopted the decision's reasoning on this point. Justice Stevens's plurality opinion was joined by Justices Stewart and Powell. Because the plurality left open the possibility of a death sentence on resentencing, Justices Brennan and Marshall dissented. They expressed agreement, however, with regard to the plurality's conclusions about the nondisclosure of the report. *See id.* at 364 (Brennan, J., dissenting); *see also id.* at 365 (Marshall, J., dissenting) (noting further that the trial judge's reliance on disclosed portions of the presentence report is enough to deny due process).

159. *Id.* at 356.

160. *Id.* at 357–59.

161. 501 U.S. 129 (1991).

162. *Id.* at 138–39.

163. The specific provision relied on by the *Burns* Court was Federal Rule of Criminal Procedure 32(a)(1), which provides, in relevant part, that the parties be given "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." *Id.* at 135. Reasoning that a sua sponte upward departure would constitute such a "matter," the Court concluded that because Congress

Court found that the opposite conclusion would raise a "serious" due process question.[164]

The Supreme Court has yet to revisit the issue, but lower courts now seem to concur that the defendant must have notice of facts relied upon by the court in noncapital sentencing cases,[165] although prior to *Gardner* and *Burns* they sometimes reached the opposite conclusion.[166] The full extent of the constitutional requirement the lower courts have developed is difficult to judge because of the degree of disclosure now required by statute.[167]

Because the Supreme Court has left uncertain whether constitutional notice requirements apply at noncapital sentencing,

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intended by this rule to give the defendant the right to comment on such action, "it makes no sense to impute to Congress an intent that a defendant . . . not [have] the right *to be notified* that the court is contemplating such a ruling." *Id.* at 135–36.

164. *Id.* at 138. *See generally* LAFAVE ET AL., *supra* note 2, § 26.4 (analyzing the significance of *Williams*, *Gardner*, and *Burns*).

165. *See, e.g.*, Hili v. Sciarrotta, 140 F.3d 210, 215 (2d Cir. 1998) (stating that due process requires notice to the defendant of information to be used against him at sentencing to protect the accuracy of the sentencing); United States v. Pelliere, 57 F.3d 936, 940 (10th Cir. 1995) (finding that because of due process concerns, " 'the defendant must be given adequate notice of and an opportunity to rebut or explain information that is used against him' " (quoting United States v. Beaulieu, 893 F.2d 1177, 1181 (10th Cir. 1990)) (internal alterations omitted)); United States v. Berzon, 941 F.2d 8, 17 (1st Cir. 1991) (stating that notice is required when a court relies on testimony at a hearing in a separate case to enhance a sentence); United States v. Sands, 908 F.2d 304, 307 (8th Cir. 1990) (holding that the court's reliance on information not contained in the presentence report and not raised at the sentencing hearing was an error because the defendant must have notice of information to be used); United States v. Landry, 903 F.2d 334, 340 (5th Cir. 1990) (determining that when a court bases a sentence on matters outside the presentence report, it must allow defense counsel to address that issue before the court); *see also* People v. Eason, 458 N.W.2d 17, 28 (Mich. 1990) (observing that "due process requires notice of the information in the presentence report sufficiently in advance of sentence to provide a meaningful opportunity to contest its accuracy"); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 763–64 (1980) (concluding that the Constitution would require notice of "real-offense" information to be considered at sentencing as a matter of due process). *But see* State v. Pearson, 704 P.2d 1056, 1060 (Mont. 1985) (stating that there is no due process right of advance notice of facts to be relied on at sentencing).

166. *See, e.g.*, United States v. Jackson, 649 F.2d 967, 979 n.15 (3d Cir. 1981) (stating that "there is no constitutional right to disclosure of the presentence report at any time, much less in advance of the hearing" (citing FED. R. CRIM. P. 32 advisory committee's note (1966 Amendment to Subdivision (c)(2))); United States v. Stidham, 459 F.2d 297, 299 (10th Cir. 1972) (holding that due process was not violated by a denial to a defendant of an opportunity to examine a presentence report and collecting cases from six different circuits reaching the same conclusion).

167. Under Federal Rule of Criminal Procedure 32(b)(6)(A), the defendant is now entitled to a copy of the presentence report thirty-five days in advance of the sentencing hearing. *See generally* Gary D. Spivey, Annotation, *Defendant's Right to Disclosure of Presentence Report*, 40 A.L.R.3d 681 (1971) (collecting and analyzing federal and state cases that address a defendant's right to advance disclosure of a presentence report).

resolution under the possible descriptive explanations will say little about their fit with the law. Discussion of the details of the textual conclusions, therefore, takes place in the footnotes. If the explanation for whether a right applied at sentencing depended on whether the express terms of the Constitution provided for the right, then the right to notice of allegations might well apply at sentencing.[168] If the determinative factor were historical practice, no right of notice would apply at sentencing, even if the relevant historical period was considered to be the time of enactment of the Fourteenth Amendment.[169] If the explanation for whether a right applied at sentencing were whether the trial right was a matter of due

168. The Sixth Amendment expressly provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. CONST. amend. VI. Admittedly, the text refers only to "accusation," singular. That fact ought to be given little weight, however, because "accusation" plainly would encompass multiple accusations at trial. It would be reasonable to argue, then, that as a matter of ordinary language, the word "accusation" includes a negative fact the state will demonstrate about the defendant to affect his punishment, such as the amount of drugs involved or a prior conviction. Of course the phrase is specifically qualified; the defendant need only be informed of the "nature" of the accusation (not necessarily the details), but this qualification would go with the right wherever the right applies—at trial or sentencing. On the other hand, if one took "accusation" to mean only the criminal charge, narrowly considered, then the Constitution might not provide a right to notice of additional facts to be considered.

169. By 1868, when the Fourteenth Amendment was ratified, sentencing practice had evolved considerably from colonial times. Incarceration was the usual penalty for noncapital felonies. Under the prevailing approach, statutes provided a sentencing range for offenses, within which the judge would choose a figure. *See* Dershowitz, *supra* note 62, at 87–91 (describing the judicial model of this period). Although the judge had some discretion in determining the length of prison terms, the sentence once given by the judge was determinant. It was a precise number, not a range, and not subject to revision other than by pardon. The shift to indeterminate sentencing began shortly after the enactment of the Fourteenth Amendment. *See id.*; *see also* David J. Rothman, *Sentencing Reforms in Historical Perspective*, 29 CRIME & DELINQ. 631, 637 (1983) (describing the problems with determinate sentencing at the end of the nineteenth century). According to the Supreme Court, however, that shift from offense-based mandatory sentences did not require increased procedural protections—for example, the shift did not preclude judges from using even their personal out-of-court knowledge of defendants in considering sentences. *See* Williams v. New York, 337 U.S. 241, 246 (1949). As another example, there was a presumption *against* disclosure of presentence reports well into the twentieth century. *See* LAFAVE ET AL., *supra* note 2, § 26.5(c), at 1237. In short, there was not a historical practice of providing the defendant with the information to be used against him at sentencing. Sanford Kadish suggested that perhaps this historical procedural laxity derived from a view that a sentence below the maximum was, at that time, considered a potential act of leniency that created no procedural entitlements. *See* Kadish, *supra* note 9, at 919–20. The current federal rule mandating disclosure of presentence reports can be traced to changes in the nature of federal sentencing proceedings brought about by the Sentencing Guidelines. *See* STITH & CABRANES, *supra* note 2, at 158.

process, rather than a specific constitutional provision, the right might or might not apply at sentencing.[170]

The best-estimate analysis would predict that a convicted defendant has a right to notice of facts on which the prosecution will rely at sentencing. Accuracy is at the very core of why such notice has been required by lower courts. Indeed, courts sometimes recite explicitly that "a defendant has a due process right not to be sentenced on the basis of information that is materially false, and that that right is protected by affording the defendant notice of ... information on which the court intends to rely in imposing sentence."[171] Adequate notice of the other side's factual contentions is a necessary adjunct to an adversarial proceeding—which a sentencing proceeding certainly is. A fundamental feature of such a proceeding is that contentions will be tested by both sides; this cannot occur unless both sides have notice of the contentions.

Notice is not a protection that tips the playing field towards one side rather than the other. Instead of providing defendants with an advantage over prosecutors, notice requirements, particularly notice of allegations, instead put the parties on a more equal footing.

D. Trial by Jury

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a ... trial, by ... jury."[172] This right applies only to "non-petty" offenses, which the Court has held usually means any offenses punishable by more than six months of incarceration.[173]

The right to a trial by jury, however, does not apply at sentencing. The Court has held explicitly that, even in the context of a capital case, in which factual issues must be resolved to determine whether the penalty of death can and should be imposed, the

170. As noted above, *see supra* notes 145–48 and accompanying text, while there is a specific constitutional provision, even trial right notice questions are often decided on due process grounds.

171. Hili v. Sciarrotta, 140 F.3d 210, 215 (2d Cir. 1998); *see also* United States v. Sands, 908 F.2d 304, 307 (8th Cir. 1990) (noting that disclosure to the defendant of the information to be relied on in sentencing ensures that such information is accurate); People v. Eason, 458 N.W.2d 17, 28 (Mich. 1990) (observing that due process mandates notice to the defendant of the information contained in the presentence report sufficiently in advance of sentencing so that the defendant maintains a "meaningful opportunity" to contest the accuracy of the information).

172. U.S. CONST. amend. VI.

173. *See* United States v. Nachtigal, 507 U.S. 1, 4 (1993). This right has been incorporated against the states. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

Constitution provides no right to a trial by jury.[174] In the Court's words:

> [D]espite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.[175]

Turning to the descriptive explanations, if the descriptive explanation for whether a right applies at sentencing were reliance on the Constitution's text, then there would be some basis for arguing for the right's application, because the right to a jury does receive express mention in the Sixth Amendment. Were this the descriptive explanation, however, the case would be relatively weak because the requirement of an "impartial jury" modifies the right to a "trial."[176] Thus, even by the Constitution's express terms, the right to a jury is limited to narrower circumstances—the trial—than many other Sixth Amendment rights, which apply in "all criminal prosecutions." The question whether sentencing is part of the trial would remain, and might well be answered "no."[177]

Historical practice probably would not support the application of the right to a jury at sentencing. At common law, sentencing was the province of the judge, not the jury.[178] Although some states adopted jury sentencing early in United States history, the federal system and most state systems left sentencing authority with judges.[179] Moreover, by now only a handful of states still allow jury sentencing.[180] Thus, outside of the capital context, judicial sentencing has been the rule and jury sentencing the "aberration."[181]

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174. *See* Spaziano v. Florida, 468 U.S. 447, 459 (1984).

175. *Id.* (citations omitted). The Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the Court held that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . submitted to a jury," *id.* at 476, does not change this rule. *Apprendi* is properly understood as forbidding certain determinations from being left to sentencing, rather than as requiring a jury at sentencing. Indeed, *Spaziano* was not even mentioned, much less questioned, in *Apprendi.*

176. U.S. CONST. amend. VI.

177. *See supra* note 174 and accompanying text.

178. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 40 (1986).

179. *See* STITH & CABRANES *supra* note 2, at 9; Dershowitz, *supra* note 62, at 87–88.

180. *See* Craig Reese, Note, *Jury Sentencing in Texas: Time for a Change?*, 31 S. TEX. L. REV. 323, 328 (1990) (identifying the eight states still allowing jury sentencing).

181. *Id.* at 327. To be sure, at that time, in many jurisdictions, the judge's sentencing role usually did not depend on factual conclusions other than those reached by a jury because many crimes carried specific mandatory penalties upon conviction. *See* Dershowitz, *supra* note 62, at 83. Indeed, the argument has been made that such practices

If the descriptive explanation for whether a right applies at sentencing were whether the trial right is characterized as a "due process" right rather than deriving from some other provision, then the jury right would not apply at sentencing. The trial right, even as to the states, is grounded firmly in the Sixth Amendment's Jury Clause.[182]

If the descriptive explanation for whether a right applied at sentencing were whether the right was based on best-estimate concerns as opposed to special-protection concerns, the right to trial by jury would not apply at sentencing. The right to a trial by jury is plainly a protection against excessive and abusive official power rather than a conclusion that juries are the most accurate or efficient fact-finders. In the Court's words: "A right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government."[183] Whether, in contrast, juries are the best available decision-makers about what actually happened was recognized as controversial at the time of incorporation,[184] and remains so today.[185]

E. Discovery

The Court has expressly held that "there is no general constitutional right to discovery in a criminal case."[186] Nonetheless, under the Due Process Clause, the Court held in *Brady v. Maryland*[187] that the prosecution has an affirmative duty to disclose to the

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gave juries de facto sentencing power. *See* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 782–84 (1993). That fact, however, falls well short of establishing an affirmative basis for claiming there was a practice of using juries to determine sentences.

182. "[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

183. *Id.* at 155. In finding the Sixth Amendment incorporated against the states, the Court continued:

> [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt and innocence.

Id. at 156.

184. *See id.* at 156–57 (calling attention to the "long debate" concerning the allocation of decisionmaking power to a jury).

185. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780–81 nn.12–16 (2001) (collecting sources critiquing juries on accuracy grounds).

186. Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

187. 373 U.S. 83 (1963).

defendant evidence that is favorable to the accused and "material either to guilt or to punishment."[188] Moreover, the Court has subsequently made clear that evidence "favorable" to the defendant includes not only directly exculpatory evidence, but impeachment material as well.[189] The Court has also established that the prosecution has a duty to disclose such evidence even if the defendant does not request it,[190] and that the duty extends to evidence within the prosecution's control, whether or not the prosecutor's office is actually aware of the evidence.[191]

The Court's reference in *Brady* to evidence related "to guilt or to *punishment*"[192] obviously implies that the right applies at sentencing. Indeed, *Brady* was a capital sentencing case; the Court affirmed the defendant's conviction but set aside his death sentence.[193] Thus, at least in capital cases, it has been clear from the beginning that the obligation to turn over exculpatory material applies to sentencing proceedings as well as to trial proceedings. *Brady*'s dictum notwithstanding, however, until the Court applies the rule to a noncapital sentencing, the possibility remains at least technically open that the Court could find that the prosecution's affirmative duty to disclose material helpful to the defense does not apply to such proceedings or that it applies in a more limited fashion.

Although the Supreme Court has not faced this issue in a noncapital sentencing context, lower courts facing the issue have squarely held that the *Brady* duty to disclose exculpatory information applies to noncapital sentencing as well.[194] This application includes the rules that count impeachment material as exculpatory material[195] and the rules that hold the prosecution vicariously responsible for

188. *Id.* at 87.

189. Strickler v. Greene, 527 U.S. 263, 280 (1999) (citing United States v. Bagley, 473 U.S. 667, 676 (1985)).

190. *Id.* (citing United States v. Agurs, 427 U.S. 97, 107 (1976)).

191. *See* Kyles v. Whitley, 514 U.S. 419, 437–38 (1995) (holding the prosecutor responsible for failure to disclose favorable evidence to the defense, even though the evidence was known only to the police investigators).

192. *Brady*, 373 U.S. at 87.

193. *Id.* at 86–90.

194. *See* United States v. Severson 3 F.3d 1005, 1012–13 (7th Cir. 1993) (vacating a noncapital sentence after a *Brady* violation); United States v. Weintraub, 871 F.2d 1257, 1265 (5th Cir. 1989) (same); United States v. Feeney, 501 F. Supp. 1324, 1335 (D. Colo. 1980) (requiring the government to turn over material that could potentially mitigate the defendant's sentence).

195. *See* United States v. Nash, 29 F.3d 1195, 1202 (7th Cir. 1994) (analyzing a *Brady*-impeachment-at-sentencing claim).

material in the possession of the police, even if unknown to the prosecution.[196]

With regard to the descriptive explanations, if the descriptive explanation for whether a right applies at sentencing were the Constitution's text, then the right to *Brady* discovery would not apply at sentencing. The *Brady* right is not expressly mentioned in the Constitution, and from *Brady* forward the Court has relied solely on the Due Process Clauses of the Fifth and Fourteenth Amendments in developing this right.[197]

If the descriptive explanation for whether a right applies at sentencing were whether historical practice supported the application of the right to sentencing, then the right to receive exculpatory evidence would certainly not apply. The right to receive exculpatory evidence is another right, like the right to appointment of counsel for indigents, that was unknown at common law and at the time of the enactment of the Bill of Rights and the Fourteenth Amendment.[198] Thus, from an historical perspective, the right to receive exculpatory evidence did not exist at all, much less apply at sentencing.

If the descriptive explanation for whether a right applies at sentencing were whether the trial right is characterized as a "due process" right rather than deriving from some other provision, then the right would apply at sentencing. The right is purely a matter of due process.[199]

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196. *See Severson*, 3 F.3d at 1012–13.

197. *See* LAFAVE ET AL., *supra* note 2, § 24.3(b), at 1098–1107 (tracing the development of *Brady*). While some commentators have argued that the Confrontation Clause also provides a basis for requiring disclosure of exculpatory and impeaching evidence—on the ground that not providing material that could assist cross-examination amounts to not allowing the cross-examination—a majority of the Court has resisted this approach. *See id.* § 24.3(a), at 1097–98 (setting out the argument and tracing its consistent rejection by the Supreme Court).

198. According to LaFave et al.:

> American courts, relying on the English precedent, adopted a common law rule holding that the judiciary lacked any inherent authority to order pretrial discovery in criminal cases. . . . Well into the early 1900s, in all but the few states that had legislatively authorized pretrial discovery, the only pretrial discovery available to the parties was that which was obtained informally through the mutual exchange of information or incidentally in the course of . . . pretrial proceedings.

Id. § 20.1(a), at 910.

The *Brady* right itself was not established until that case was decided in 1963, and even the so-called "*Mooney* principle" that *Brady* grew out of only dated from 1935. *See id.* § 24.3(b), at 1098–99 (explaining the Court's use of *Mooney v. Holohan*, 294 U.S. 103 (1945), to establish the *Brady* rule).

199. *See supra* notes 187–91 and accompanying text.

If the descriptive explanation for whether the right applied at sentencing were whether the right was based on best-estimate concerns as opposed to special-protection concerns, the *Brady* right would apply at sentencing. At bottom, *Brady* is a rule of discovery—it requires the prosecution to give information to the defense—and the Court established this constitutional discovery rule in the same era as it was noting a "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of *criminal* justice."[200] Put simply, discovery rules in general are justified on the grounds that the required sharing of information will lead to more accurate results.[201]

One might argue in response that, while discovery in general is directed towards achieving a balanced and accurate result, *Brady* discovery is a special, defendant-protective right in that there is no reciprocal constitutional obligation for the defendant to turn over (even nonprivileged) inculpatory information to the prosecution. This contention must be balanced, however, against two countervailing considerations.

First, as a general matter, the prosecution, through its investigatory resources, including "control" over law enforcement agencies, its broad subpoena power (through the grand jury or other means), and its de facto superior ability to interview witnesses, frequently has access to a great deal of evidence—including exculpatory evidence—that the defense cannot realistically acquire. The two sides in a criminal case are simply far less balanced in their legal access to evidence than the parties in a civil case, a difference that is often exacerbated by a difference in available financial resources. Second, the *Brady* discovery right is narrowly limited to evidence favorable to the defendant—a far cry from the statutory discovery available in civil cases, or even from the narrow (relative to

200. Dennis v. United States, 384 U.S. 855, 870–71 (1966) (emphasis added) (also citing cases and commentary supporting expanded discovery in criminal cases).

201. *See* FED. R. CIV. P. 26–37 (advisory committee's explanatory statement concerning 1970 amendments to discovery rules) (endorsing discovery on the grounds that it "frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial"); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.02, at 26.3 (3d ed. 2001) (stating that "[b]y requiring disclosure of all relevant information, the discovery rules allow ultimate resolution of disputed issues to be based on full and accurate understanding of true facts").

many state provisions) discovery authorized by the Federal Rules of Criminal Procedure.[202]

Taking these two points together, the prosecution's *Brady* obligation serves far more to balance the playing field between the prosecution and the defense than it does to tip the balance of information to the defendant as part of a special protection. Thus, while *Brady* does lessen the adversarial nature of the criminal justice system by requiring the prosecution to provide some assistance to the defendant, it does so only by eliminating an advantage that the prosecution otherwise would have had. Like the right to counsel, but unlike, say, the requirement of proof beyond a reasonable doubt, the *Brady* rule does not give the defendant anything the prosecution does not have. The modification from the pure adversarial model is directed at promoting accuracy, so "that justice shall be done."[203]

Brady's proper place as a best-estimate right also is strongly supported by its materiality requirement. Under *Brady*, only *material* exculpatory information must be disclosed.[204] According to the Court's materiality standard, "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."[205] In other words, the *Brady* right exists only when there is a reasonable probability that its absence would change the outcome of the proceeding. In this sense, the *Brady* right is only concerned about accuracy and is limited by definition to cases in which the best estimate depends upon it.[206] Moreover, as with the right to effective assistance of counsel,[207] the requirement that the defendant bear the burden of establishing a "reasonable probability" that the result would have differed, rather than simply raising a reasonable doubt, confirms the right's placement in the best-estimate group.

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202. *See* FED. R. CRIM. P. 16(c). *See generally* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION 402–08 (1999) (discussing and comparing criminal discovery rules of different U.S. jurisdictions).

203. Strickler v. Greene, 527 U.S. 263, 281 (1999) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

204. Brady v. Maryland, 373 U.S. 83, 87 (1963).

205. *Strickler*, 527 U.S. at 281.

206. The materiality requirement likely will play a particularly important role at sentencing, where a large range of information can conceivably be relevant even in a system where judicial discretion is as tightly constrained as it is under the Federal Sentencing Guidelines.

207. *See supra* notes 73–77 and accompanying text.

F. *Double Jeopardy*

The Constitution's Double Jeopardy Clause is found in the Fifth Amendment and provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[208] The complex doctrine of double jeopardy has many different aspects;[209] fortunately, the present inquiry does not require their complete exposition here.

Several of the Double Jeopardy Clause's trial rules in particular, however, are potentially relevant to sentencing and, as discussed in the next subsection, have sometimes been addressed by the Court in the sentencing context. To begin with, there are rules that, for present purposes, may collectively be labeled "the double jeopardy bar on post-decision changes adverse to the defendant." Three such rules are relevant here. They start with what "has been the unequivocal rule since *United States v. Ball*,[210] that a defendant who is acquitted of an offense may not be prosecuted again for the same offense."[211] Next, under the so-called "implied acquittal" rule, if a defendant charged with an offense is convicted only of a lesser included offense, the verdict counts as an "acquittal" of the greater offense for double jeopardy purposes.[212] Therefore, even if the defendant's conviction for the lesser offense is reversed and a new trial follows, the defendant cannot be retried for the greater offense.[213] Finally, "where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial."[214]

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208. U.S. CONST. amend. V. This prohibition on double jeopardy has been incorporated against the states through the Due Process Clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969).

209. In the words of then Justice Rehnquist, speaking for the Court, the doctrine "is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Albernaz v. United States, 450 U.S. 333, 343 (1981). *See generally* DRESSLER, *supra* note 57, §§ 32.01–32.09, at 687–730 (setting out principles of double jeopardy and collecting leading commentaries).

210. 163 U.S. 662 (1896).

211. DRESSLER, *supra* note 57, § 32.03, at 705.

212. *Id.* § 32.05, at 713–14.

213. *See* Price v. Georgia, 398 U.S. 323, 329 (1970) (stating that "this Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge" (footnote omitted)).

214. Monge v. California, 524 U.S. 721, 729 (1998) (citing Burks v. United States, 437 U.S. 1, 16 (1978)).

The principle of collateral estoppel forms a distinct category of double jeopardy rules potentially relevant at sentencing. The Court has held that the Double Jeopardy Clause encompasses the principle of collateral estoppel: "[W]hen an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the same parties in any future lawsuit."[215] For example, in *Ashe v. Swenson*,[216] Ashe had been tried and acquitted of robbery in a case arising from a robbery of a group of poker players. Although that first trial was only on the charge relating to one of the poker players, Ashe's sole defense had been that he was not one of the robbers.[217] The Court concluded that under the Double Jeopardy Clause this issue could not be relitigated and Ashe's subsequent trial for robbing the other poker players was prohibited.[218]

The double jeopardy bar on post-decision changes adverse to the defendant does not apply at sentencing.[219] The Supreme Court has established "the general rule that double jeopardy principles have no application in the sentencing context."[220] For example, there is no "implied acquittal" of a greater sentence. Thus, there is no double jeopardy bar to the government appealing a sentence to seek a greater sentence.[221] Furthermore, a defendant who is retried after successfully appealing his conviction may be sentenced to a greater term of imprisonment than he received the first time if he is subsequently convicted of the same offense.[222]

Similarly, sentencing reversal-for-failure-of-proof "acquittals" do not implicate double jeopardy issues. Thus, if a sentence is raised on the express basis of a factual finding by the sentencer (such as a finding that the defendant had a prior conviction) and the appellate

215. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

216. 397 U.S. 436 (1970).

217. *Id.* at 438.

218. *Id.* at 446.

219. That is not to say that the Double Jeopardy Clause has no relevance to sentencing at all (even putting collateral estoppel to one side). There are sentencing-specific aspects of the Double Jeopardy Clause that do have force. The clause requires that punishment for an offense that has already been exacted be fully credited if there is a new conviction for the same offense. *See* North Carolina v. Pearce, 395 U.S. 711, 718–19 (1969). The clause also bars imposition of a sentence greater than that authorized by the legislature. *See* Jones v. Thomas, 491 U.S. 376, 383 (1989).

220. Monge v. California, 524 U.S. 721, 730 (1998). In discussing the "general rule," the exception the Court had in mind was capital-sentencing cases. *See id.* at 730–31.

221. *See* United States v. DiFrancesco, 449 U.S. 117, 133 (1980).

222. *See Pearce*, 395 U.S. at 723. While there is no double jeopardy bar to this increase in sentence, due process forbids such resentence if the circumstances indicate the increased sentence was vindictive, i.e., as payback for the successful appeal. *See id.* at 725.

court reverses on the ground that the evidence was insufficient to support the factual finding, the Double Jeopardy Clause does not bar the state from holding another sentencing proceeding and giving the prosecution the opportunity to offer additional evidence.[223]

In addition to the inapplicability of the double jeopardy bar on post-decision changes adverse to the defendant, the Court has held that the fact that a defendant was acquitted of an offense does not create a double jeopardy bar to considering whether the defendant committed that offense at a sentencing proceeding for a different offense and using a conclusion that he did so to enhance a sentence for that second offense.[224] This is not a rejection of a trial double jeopardy right, however, because the Double Jeopardy Clause creates no such bar at trial either. Acquitted conduct may similarly be used at a subsequent *trial* of a separate offense to help prove guilt because "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof."[225]

This last point, however, leads to the question whether the collateral estoppel principle of double jeopardy applies at sentencing. The Court has not directly addressed this issue,[226] and indeed has reserved the question.[227] The issue rarely arises because of the different burdens of proof between trial and sentencing.[228] It is not

223. *See Monge*, 524 U.S. at 728.

224. United States v. Watts, 519 U.S. 148, 157 (1997) (holding that the Double Jeopardy Clause did not bar the trial court from finding that the defendant possessed firearms in connection with his drug conviction and increasing his base offense level under the Sentencing Guidelines accordingly, even though the jury had acquitted the defendant of use of a firearm in relation to the drug offense).

225. Dowling v. United States, 493 U.S. 342, 349 (1990). Although their view was rejected in *Watts*, a number of scholars urged that the use of prior unconvicted conduct should be barred as a matter of due process on the grounds that it constitutes punishment for conduct not proven beyond a reasonable doubt. *See* MILLER & WRIGHT, *supra* note 202, at 852–53 (listing such sources).

226. The Court's discussion in *Watts*, 519 U.S. at 155–57, which established that the application of collateral estoppel principles would not bar the use of acquitted conduct at sentencing, might be taken as evidence that such principles are relevant at sentencing, though the Court did not expressly mention collateral estoppel anywhere in its opinion.

227. *See* Schiro v. Farley, 510 U.S. 222, 232 (1994) (declining to decide whether constitutional collateral estoppel applies to capital sentencing proceeding); *see also id.* at 243 n.4 (Stevens, J., dissenting) (concluding that collateral estoppel did apply to capital sentencing because an aggravating factor had to be found beyond a reasonable doubt).

228. Research reveals two cases in which lower courts have stated that the collateral estoppel principle of double jeopardy does not apply at sentencing. *See* People v. Scott, 102 Cal. Rptr. 2d 622, 635–36 (2d Dist. 2000); Twyman v. Carr, No. 96-365-SLR, 1997 U.S. Dist. LEXIS 8032, at *13–*14 (D. Del. Apr. 7, 1997). Neither of these cases, however, actually involved a collateral estoppel situation. Instead, the question in both was whether

difficult, however, to imagine ways in which the issue may arise in the future.[229]

Turning to the descriptive explanations, if the descriptive explanation for whether a right applies at sentencing were in the Constitution's text, then the double jeopardy protections against post-decision adverse changes might well apply at sentencing. The protections are grounded in express constitutional language, and that language makes no apparent distinction between trial and sentence. Indeed by its express reference to punishments (albeit only "life or limb"), the language of the Double Jeopardy Clause arguably provides a firmer basis for application to sentencing than that of most

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the rule barring retrial after a finding was reversed on appeal for insufficiency of the evidence applied at sentencing. The Supreme Court resolved this question in the negative in *Monge v. California*, 524 U.S. 721, 734 (1998). Even if the Double Jeopardy Clause did mandate the application of collateral estoppel in noncapital sentencing proceedings, the doctrine would not apply in such a case because there would be no final judgment on which to rely.

Research reveals one case in which a lower court refused to apply collateral estoppel where it would seem to have been mandated if that aspect of double jeopardy applied at sentencing. In *State v. Palma*, No. 40057-6-I, 1998 Wash. App. LEXIS 734 (Wash. App. Div. 1 May 18, 1998), the court refused to apply collateral estoppel to bar consideration at sentencing of alleged prior convictions at a 1996 sentencing hearing, even though a court had concluded at a 1992 sentencing hearing on a separate crime that those same convictions did *not* belong to the defendant. *Id.* at *3. In refusing to find a collateral estoppel bar, however, the court did not mention that the Constitution might be implicated. Furthermore, it based its decision on the (highly questionable) ground that collateral estoppel should not apply to this case because, in denying the convictions in the 1992 case, the defendant had "affirmatively misled the first sentencing court[, so that] he had no legitimate expectation that the convictions would not be used in a subsequent sentenc[ing]." *Id.*; *see also* Delap v. Dugget, 890 F.2d 285, 314–17 (11th Cir. 1989) (applying collateral estoppel under the Double Jeopardy Clause to bar the charging at a capital sentencing proceeding of the aggravating circumstance that the killing was committed in the course of a felony where the defendant had been acquitted of the felony and state law required the aggravating circumstance to be proven beyond a reasonable doubt); *cf.* SEC vs. Monarch Funding Corp., 192 F.3d 295, 305–06 (2d Cir. 1999) (holding that a sentencing determination had no collateral estoppel effect in a subsequent civil proceeding).

229. One way would be if a sentencing factor, such as a particular prior conviction, is adjudicated in the defendant's favor at a sentencing for Crime A, and the state then tried to prove the same sentencing factor against the same defendant at a sentencing for a separate Crime B. *See Palma*, 1998 Wash. App. LEXIS 734, at *2–*3. Another way would be if the burden of proof on some question at sentencing were raised to the level of the burden of proof at trial, as sometimes happens in the capital sentencing context. *See Delap*, 890 F.2d at 314–17. A third way would be if the jury's verdict demonstrated that the jury had accepted a partial defense on which the defendant has the burden of proof by a preponderance of the evidence. Collateral estoppel, if mandated, would prevent the judge from rejecting the jury's conclusion about the partial defense in considering the proper sentence for the offense of conviction or any subsequent offense.

of the other express procedural protections.[230] On the other hand, the degree to which the express language of the Double Jeopardy Clause mandates the various prohibitions on post-decision changes adverse to the defendant, even at trial, is highly controversial.[231]

If the descriptive explanation for whether a right applies at sentencing were whether historical practice supported the application of the right at sentencing, then the double jeopardy bar on post-decision changes adverse to the defendant[232] would not apply at sentencing. As noted by the Court, "history demonstrates that the common law never ascribed such finality to a sentence as would prevent a legislative body from authorizing its appeal by the prosecution."[233] By the same token, Supreme Court decisions authorizing greater sentences following an appeal date back at least to 1919.[234] In short, for double jeopardy purposes, "the pronouncement of sentence has never carried the finality that attaches to an acquittal."[235] The result for the collateral estoppel aspect of double jeopardy would probably be the same.[236]

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230. *See generally* GEORGE C. THOMAS III, DOUBLE JEOPARDY, THE HISTORY, THE LAW 120–22 (1998) (tracing the history of the "life or limb" language and concluding that the framers did not intend the words "or limb" to be taken literally).

231. *See* DRESSLER, *supra* note 57, § 32.01, at 687 n.1 (collecting recent scholarship on the proper meaning of double jeopardy).

232. The category of "post-decision changes adverse to the defendant" includes the protection against reprosecution after an acquittal, the "implied acquittal rule," and the rule treating an appellate reversal on grounds of insufficient evidence as an acquittal for double jeopardy purposes.

233. United States v. DiFrancesco, 449 U.S. 117, 134 (1980).

234. *See* Stroud v. United States, 251 U.S. 15, 18 (1919) (permitting harsher sentence on retrial following defendant's appeal). Indeed, late into the nineteenth century there was still "much diversity of opinion in the various state courts" as to whether the "implied acquittal" rule was required by the Double Jeopardy Clause when a defendant appealed the verdict, much less the sentence. Trono v. United States, 199 U.S. 521, 530 (1905); *cf.* THOMAS, *supra* note 230, at 30–31 (setting out and explaining Blackstone's description of the common-law plea of *autrefoits attaint* (former attainder) and clarifying that if the attainder were reversed on appeal the plea was not available and the case would be considered as if no previous penalty had been imposed).

235. *DiFrancesco*, 449 U.S. at 133. The *DiFrancesco* Court explained:

> The common law writs of *autre fois acquit* and *autre fois convict* were protections against retrial. Although the distinction was not of great importance early in the English common law because nearly all felonies, to which double jeopardy principles originally were limited, were punishable by the critical sentences of death or deportation, it gained importance when sentences of imprisonment became common. The trial court's increase of a sentence, so long as it took place during the same term of court, was permitted. This practice was not thought to violate any double jeopardy principle. The common law is important in the present context, for our Double Jeopardy Clause was drafted with the common-law protections in mind.... [C]ountries that trace their legal systems to the English common law permit such appeals.

If the descriptive explanation for whether a right applied at sentencing were whether the trial right was characterized as a "due process" right rather than deriving from some other provision, the double jeopardy protections discussed here, including the collateral estoppel protection, would not apply at sentencing. These "trial" double jeopardy rights are firmly placed in the Double Jeopardy Clause of the Fifth Amendment, not in the Due Process Clause.[237]

If the descriptive explanation for whether the right applied at sentencing were whether the right was based on best-estimate concerns as opposed to special-protection concerns, then the double jeopardy bar on post-decision changes adverse to the defendant would not apply to sentencing.

The Supreme Court has advanced various justifications for the Double Jeopardy Clause protections, and the issue is certainly a controversial one.[238] The articulated reasons relevant to the double jeopardy bar on post-decision changes adverse to the defendant include:

(1) the risk of convicting an innocent by depleting the defendant's resources;[239]

(2) the risk that an innocent defendant will be convicted because of "subtle changes" in the government's evidence;[240]

(3) the protection of the finality of criminal judgments;[241]

(4) protection against "embarrassment, expense and ordeal" and a "continuing state of anxiety and insecurity;[242]

(5) protection against "government oppression;"[243] and

Id. at 133–34 (internal citations omitted).

236. As the Court noted in examining the history of collateral estoppel and double jeopardy in *Ashe v. Swenson*, 397 U.S. 436 (1970), the Court had never previously held that collateral estoppel was part of the double jeopardy clause at all. *Id.* at 445 n.10. Even as a subconstitutional practice in federal courts, collateral estoppel was not mandated in criminal cases until 1916. United States v. Oppenheimer, 242 U.S. 85, 88 (1916). Given the relatively recent application of the doctrine to criminal cases at all, it seems unlikely that a historical record of wide application of the doctrine to criminal cases could be developed.

237. *See, e.g.*, Price v. Georgia, 398 U.S. 323, 326 (1970) (distinguishing treatment of identical facts under due process and double jeopardy analyses, and using the latter approach); *Ashe*, 397 U.S. at 442–43 (same).

238. *See* DRESSLER, *supra* note 57, § 32.01, at 694–95 (collecting and describing five proffered justifications).

239. United States v. Scott, 437 U.S. 82, 91 (1978).

240. Arizona v. Washington, 434 U.S. 497, 504 n.14 (1978).

241. *Id.* at 503.

242. Green v. United States, 355 U.S. 184, 187 (1957).

243. Lockhart v. Nelson, 488 U.S. 33, 42 (1988).

(6) "protecting a jury's prerogative to acquit against the evidence."[244]

These interests are predominantly directed at providing special protections to criminal defendants rather than getting the best estimate of what happened.

Interests four through six are most obviously special protections not addressed to getting a best estimate or a balanced playing field. Indeed, protecting a jury's nullification "prerogative" is hostile to an interest in maximizing accuracy, and when the Court first articulated the avoiding "embarrassment, expense and ordeal" concern, that interest was expressly stated as separate and apart from the interest in getting the correct result.[245]

Interests one and two are somewhat more related to accuracy, because they relate only to the risk of *wrongful* conviction. Like the burden of proof beyond a reasonable doubt, however, it is an accuracy favoring the defendant that is being protected—a special protection in the sense of a preference for wrongful acquittals over wrongful convictions.[246] The view of these interests (as well as the interest in finality—whatever its content beyond the other articulated interests) as special protections for the defendant is further corroborated by the fact that they only apply without exception after an acquittal, not after a mistrial or a conviction.[247]

As far as the collateral estoppel principle of double jeopardy is concerned, a best-estimate regime might well apply it at sentencing. As a general matter, rules of collateral estoppel serve a number of efficiency concerns. They " 'relieve parties of the cost and vexation

244. United States v. DiFrancesco, 449 U.S. 117, 130 n.11 (1980) (quoting Peter Westen, *The Three Faces of Double Jeopardy: Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1012, 1063 (1980)).

245. *See Green*, 355 U.S. at 187–88.

246. Because we are talking about the Double Jeopardy Clause's application in the context of the bar on post-decision changes adverse to the defendant, virtually every application of the right necessarily supposes that there has been a prodefendant error. Only when there is such an error would there be potential grounds for arguing that the "acquittal" should not stand.

247. *See* DRESSLER, *supra* note 57, § 32.03, at 707–09; Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 124–29. These authors question whether, given this treatment, interests one through three can actually be justifications for the rule. Even accepting that the interests have some force, however, the fact that they apply with much greater force after an acquittal than after conviction or mistrial confirm that the "accuracy" they are protecting is a tilted playing field accuracy—an extra assurance that these concerns will not erroneously turn an *acquittal* into a conviction.

of multiple lawsuits [and] conserve[] judicial resources.' "[248] Collateral estoppel rules also serve the interest of providing the parties with finality and repose.[249] In some circumstances collateral estoppel may also further accuracy by encouraging the parties to make their strongest cases in the initial litigation, though, at the same time, collateral estoppel may discourage accuracy by giving preclusive effect to an erroneous decision in the initial proceeding.

The defendant's "repose" interest is, of course, a "special right," but the other interests are the sort that might well be part of an efficient best-estimate regime. Given their great force in civil proceedings and the possibility that, unlike other Double Jeopardy rules, collateral estoppel rules at sentencing possibly could and would be applied to the defendant's detriment as well as to the defendant's benefit,[250] the collateral estoppel principle would probably apply at sentencing under a "reasonable-best-estimate" regime.

G. *Speedy Trial*

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial."[251] If the period between accusation[252] and trial is too long, the Court has stated that dismissal with prejudice is " 'the only possible remedy.' "[253]

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248. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 467 (1982) (quoting Allen v. McCarry, 449 U.S. 90, 94 (1980)).

249. 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4403, at 25–27 (1981).

250. For example, the Court has generally held that, outside of a *Gideon* violation, "due process does not mandate the opportunity during sentencing to challenge prior convictions for most sorts of constitutional invalidity." 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.4(f), at 772 (2d ed. 1999). A fortiori, the same rule would apply to challenges to the factual bases of prior convictions. *See id.* at 772 n.88 (citing state cases rejecting constitutional challenges to the irrebuttable presumption of regularity of prior convictions at subsequent sentencing).

251. U.S. CONST. amend. VI. This provision applies to the states through incorporation by the Fourteenth Amendment. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

252. The Sixth Amendment speedy trial right applies only after a formal accusation, such as an indictment or information, has been made or the "actual restraints" of an arrest have been imposed. United States v. Marion, 404 U.S. 307, 320 (1971). Delay *prior* to the accusation can create a separate due process concern. *See* United States v. Lovasco, 431 U.S. 783, 786–87 (1977). Because that pre-accusation right has no application in the sentencing context, which is necessarily post-accusation, it will not receive further treatment here.

253. Strunk v. United States, 412 U.S. 434, 440 (1973) (quoting Barker v. Wingo, 407 U.S. 514, 522 (1971)). Professor Anthony Amsterdam's suggestion that this rule should be limited to the *post-trial* context in which it arose has not been followed by courts to date. Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV.

The difficult question, of course, is how long is too long. In *Barker v. Wingo*,[254] the Supreme Court established a four-factor balancing test for courts to use to answer this question on a case-by-case basis.[255] The four factors are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) *any* prejudice to the defendant.[256] While the Court has considered post-accusation delay cases under the Sixth Amendment, the Court has also observed in dicta that "a defendant may invoke due process to challenge delay both before and *after* official accusation."[257]

The Supreme Court has not decided whether the Sixth Amendment's speedy trial guarantee applies at sentencing. In *Pollard v. United States*,[258] however, the Court assumed arguendo that the clause did apply and analyzed the defendant's claim on that basis, concluding that there was no speedy trial violation.[259] The Supreme Court has yet to revisit the issue.

Since *Pollard*, four of the federal circuit courts of appeals have concluded that the Sixth Amendment's speedy trial provision does apply at sentencing.[260] Eight others have followed the Supreme Court's example and decided cases against the defendant, assuming arguendo that the right applies.[261] State courts have been far more

525, 535–36 (1975). Nonetheless, his argument that some speedy trial violations could be remedied with less severe sanctions than dismissal with prejudice may yet find judicial adherents, particularly when the right is applied to sentencing. *See also* Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1049–51 (2001) (proposing a variety of alternative remedies for speedy trial violations).

254. 407 U.S. 514 (1972).

255. *See id.* at 530.

256. *Id.*

257. Doggett v. United States, 505 U.S. 647, 655 n.2 (1992); *see also* Burkett v. Cunningham, 826 F.2d 1208, 1221 (3d Cir. 1987) (stating that due process protects against delays in sentencing).

258. 352 U.S. 354 (1957).

259. *Id.* at 361–62. The four dissenting Justices also did not decide the constitutional question. The dissent observed that "[i]t has never been held that the sentence is not part of the trial" described in the Sixth Amendment, but would have decided the case for the defendant on subconstitutional grounds. *Id.* at 368 (Warren, C.J., dissenting).

260. *See* Moore v. Zant, 972 F.2d 318, 320 (11th Cir. 1992) (stating that petitioner has speedy trial rights that would cover a death penalty proceeding); *Burkett*, 826 F.2d at 1220 (holding that the Speedy Trial Clause applies at the sentencing phase); United States v. Howard, 577 F.2d 269, 270 (5th Cir. 1978) (holding that the "constitutionally guaranteed right to speedy trial applies to sentencing"); United States v. Reese, 568 F.2d 1246, 1253 (6th Cir. 1977) (applying the *Barker* balancing test to determine whether the delay between the verdict and sentencing was unreasonable).

261. *See* United States v. Yelverton, 197 F.3d 531, 535–36 (D.C. Cir. 1999); United States v. Rothrock, 20 F.3d 709, 711 (7th Cir. 1994); Perez v. Sullivan, 793 F.2d 249, 253–54 (10th Cir. 1986); Tinghitella v. California, 718 F.2d 308, 312–13 (9th Cir. 1983); Katz v.

divided after *Pollard*. Although a majority seem to conclude that the right applies, a number of states have concluded that it does not.[262]

Those courts that conclude that the Sixth Amendment's speedy trial protection does apply to sentencing (as well as those that assume it applies) use the *Barker* four-part balancing test to decide whether the delay prior to sentencing was unconstitutional.[263] Courts finding a violation have also applied the pretrial rule that the appropriate remedy is discharge.[264]

Because the Supreme Court has not decided whether the speedy trial right applies at noncapital sentencing proceedings, the issue's resolution under the descriptive principles is discussed mostly in the margin. The textual approach would predict that the speedy trial

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King, 627 F.2d 568, 576 (1st Cir. 1980); Brady v. Superintendent, 443 F.2d 1307, 1310 (4th Cir. 1971); Brooks v. United States, 423 F.2d 1149, 1151 (8th Cir. 1970); United States v. Tortorello, 391 F.2d 587, 589 (2d Cir. 1968).

262. At least eleven states have held that the Sixth Amendment's speedy trial provision does apply at sentencing. *See* Gonzales v. State, 582 P.2d 630, 632 (Alaska 1978); State v. Wall, 673 A.2d 530, 540 (Conn. App. Ct. 1996); People v. Garvin, 406 N.W.2d 469, 472 (Mich. Ct. App. 1987); Trotter v. State, 554 So. 2d 313, 318 (Miss. 1989); McLellan v. Cavanaugh, 498 A.2d 735, 740 (N.H. 1985); People v. Harper, 520 N.Y.S.2d 892, 896–97, 902 (N.Y. Crim. Ct. 1987); State v. Avery, 95 N.C. App. 572, 576, 383 S.E.2d 224, 225 (1989); City of Euclid v. Brackis, 735 N.E.2d 511, 512 (Ohio Ct. App. 1999); State v. Dean, 536 A.2d 909, 912 (Vt. 1987); State v. Ellis, 884 P.2d 1360, 1362 (Wash. Ct. App. 1994); State v. Allen, 505 N.W.2d 801, 802 (Wis. Ct. App. 1993).

A few states have applied the *Barker* test and found no violation of the right without clearly indicating whether or not the right applies. *See* Scaloni v. State, 383 So. 2d 586, 589 (Ala. Crim. App. 1980); Key v. State, 463 A.2d 633, 636 (Del. 1983); Erbe v. State, 350 A.2d 640, 642 (Md. 1976); Commonwealth v. Bianco, 454 N.E.2d 901, 904 (Mass. 1983); State v. LeFurge, 535 A.2d 1015, 1019 (N.J. Super. Ct. App. Div. 1988); Commonwealth v. Andrews, 571 A.2d 410, 412–13 (Pa. Super. Ct. 1990); Despain v. State, 774 P.2d 77, 81 (Wyo. 1989).

At least five states have held that the right does not apply at sentencing. *See* State v. Drake, 259 N.W.2d 862, 866 (Iowa 1977), *overruled on other grounds by* State v. Kaster, 469 N.W.2d 671, 673 (Iowa 1991); State v. Freeman, 689 P.2d 885, 891 (Kan. 1984); State v. Johnson, 363 So. 2d 458, 460 (La. 1978); State v. Jameson, 395 N.W.2d 744, 747 (Neb. 1986); Easley v. State, 564 S.W.2d 742, 745 (Tex. Crim. App. 1978).

See generally Susan L. Thomas, Annotation, *When Does Delay in Imposing Sentence Violate Speedy Trial Provision*, 86 A.L.R.4th 340 (1991) (collecting and analyzing federal and state cases that address speedy trial claims in the context of post-conviction sentencing delay).

263. For cases that applied the *Barker* test to determine the constitutionality of delay, see, e.g., *Burkett*, 826 F.2d at 1220, *United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976), and *Moore*, 972 F.2d at 320 n.5.

264. *See Burkett*, 826 F.2d at 1220; *Trotter*, 554 So. 2d at 319; *Harper*, 520 N.Y.S.2d at 902; *Brackis*, 735 N.E.2d at 512; *Ellis*, 884 P.2d at 1362–63. *But see* Amsterdam, *supra* note 253, at 535–39 (arguing that less severe remedies should be considered and can be in certain contexts even after *Strunk*).

right would probably not apply at sentencing.[265] If the determinative factor were historical practice, the right might well apply at sentencing.[266] Finally, if the determinative factor were whether the right is primarily a matter of due process, it would probably *not* apply at sentencing.[267]

Whether the speedy trial right would apply to sentencing if the descriptive explanation were whether the right is based on best-estimate concerns as opposed to special-protection concerns is a close question. The conclusion here is that under such a test the right would apply.

The Supreme Court regularly identifies three interests protected by the speedy trial right. According to the Court, the right protects against: "[1] 'oppressive pretrial incarceration,' [2] 'anxiety and concern of the accused,' and [3] 'the possibility that the accused's defense will be impaired' by dimming memories and loss of exculpatory evidence."[268] The first two of these are plainly special rights, heightened protections for a criminally accused not directed at getting the best estimate of what happened or at maintaining a balanced playing field. The third is directed at getting an accurate result. Indeed, the Court "has made clear that the 'major evils' of *pretrial* restraints on liberty [(1) above] and loss of reputation [(2) above] '*exist quite apart* from actual or possible prejudice to an accused's defense [(3) above].' "[269] Of course, limitations on pretrial restraints can be directed towards accuracy and best-estimate concerns, as well as the special concern of protecting against unjust deprivations of liberty. Certainly pretrial restraints can affect the result of a criminal prosecution.[270] The Court's use of the word

265. The issue would be the same as that presented by the right to a jury, *see supra* text accompanying notes 176–77, because the right is clearly mentioned in the Sixth Amendment, but limited to the "trial."

266. Because at the time of the enactment of the Bill of Rights sentencing usually occurred simultaneously or almost simultaneously with the verdict, to the extent provision of a "speedy trial" was a de facto reality, speedy sentencing would also have been, and there is strong historical support for the trial right. *See* Klopfer v. North Carolina, 386 U.S. 213, 223–26 (1967) (tracing the history of the right from the Magna Carta forward and concluding that "[t]he history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution").

267. As noted above, *see supra* text accompanying note 257, the Court has noted the possibility of a due process grounding of the right, but has relied instead on the Sixth Amendment.

268. Doggett v. United States, 505 U.S. 647, 654 (1992) (quoting Barker v. Wingo, 407 U.S. 514, 532 (1972)).

269. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 96 (1997) (quoting United States v. Marion, 404 U.S. 307, 320 (1971)) (emphasis added).

270. *See supra* notes 142–43.

"oppressive" to modify "incarceration," however, suggests that the liberty concern is at the front of the Court's thinking.

Thus, if the first two interests were the paramount concern, the right would be less likely to be found to apply at sentencing. If the third interest were substantial regardless of the other two, the right would be more likely to apply at sentencing. Indeed, speedy trial is an issue in which the Court's eventual resolution of the question whether the right applies at sentencing may tell us something about the Court's view of the nature of the right more generally.

There is sharp disagreement within the current Court about the relative importance of these interests. Justice Thomas, in a dissenting opinion joined by Chief Justice Rehnquist and Justice Scalia, argued that the speedy trial right does not protect against prejudice to an accused's defense resulting from the passage of time at all.[271] In his view, the speedy trial right protects the first two interests,[272] while protections against the effects of delay on trial accuracy come only from statutes of limitation and the Due Process Clause.[273] In the same case, however, Justice Souter, (writing for Justices White, Blackmun, Stevens, and Kennedy) reiterated the Court's view that all three interests were protected.[274] Indeed, Justice Souter's opinion for the Court repeated the Court's assertion from *Barker v. Wingo* that, of the three protected interests, the third was the " '*most* serious,' "[275] and he expressly rejected the contention "that the effect of delay on adjudicative accuracy is exclusively a matter for consideration under the Due Process Clause."[276]

Thus, the majority of the Court found the prejudice concern of particular importance, and, so long as Justices Ginsburg and Breyer are not stingier in their view of this right than Justices White and Blackmun (probably unlikely on a criminal procedure question), a majority of the Court would continue to do so. This view leads to the conclusion that the speedy trial right is a best-estimate right.

H. Public Trial

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial."[277]

271. *Doggett*, 505 U.S. at 659–67 (Thomas, J., dissenting).
272. *Id.* at 659 (Thomas, J., dissenting).
273. *Id.* at 665–66 (Thomas, J., dissenting).
274. *Id.* at 654.
275. *Id.* (quoting Barker v. Wingo, 407 U.S. 514, 532 (1972)).
276. *Id.* at 655 n.2.
277. U.S. CONST. amend. VI.

This right gives the defendant a constitutionally protected interest in an open trial.[278]

The Supreme Court has never held whether the public trial right applies to sentencing. Piecing together Supreme Court and courts of appeals decisions, however, does allow one to argue that some lower courts have effectively concluded that the Sixth Amendment right to a public trial applies at sentencing.

Though the Supreme Court has not decided many Sixth Amendment public trial cases, the Court has a more extensive jurisprudence under the First Amendment, which provides the press and public with a qualified First Amendment right to attend a criminal trial.[279] In *Waller v. Georgia*,[280] the Court faced a Sixth Amendment objection to a closed pretrial suppression hearing. In the Sixth Amendment context, the Court had never before "considered the extent to which [the public trial] right extends beyond the actual proof at trial."[281] The Court concluded that the Sixth Amendment right could be "no less protective of a public trial"[282] than the First Amendment right and applied First Amendment precedent requiring pretrial suppression hearings to be open in order to uphold the defendant's Sixth Amendment claim.

In the First Amendment context, at least one federal court has held that the public right to an open trial extends to cover sentencing proceedings.[283] If *Waller*'s statement that the Sixth Amendment right goes at least as far as the First Amendment right is generally applicable,[284] then this decision amounts to a finding that the public trial right applies at sentencing.[285]

Because the Supreme Court has not expressly decided whether the public trial right applies to sentencing, its resolution under the

278. This right has been applied against the states. *See, e.g.*, *In re* Oliver, 333 U.S. 257, 271–72 (1948) (stating that the Constitution commands that a defendant be given a public trial).

279. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604–05 (1982) (holding that the First Amendment protects the right of access to criminal trials).

280. 467 U.S. 39 (1984).

281. *Id.* at 44.

282. *Id.* at 46.

283. *In re* Wash. Post Co., 807 F.2d 383, 389 (4th Cir. 1986).

284. Several federal courts have endorsed this view of *Waller*. *See* Ayala v. Speckard, 131 F.3d 62, 72–73 (2d Cir. 1997) (en banc) (following *Waller* by applying First Amendment standards to a Sixth Amendment claim); Hunt v. Tucker, 875 F. Supp. 1487, 1528–30 (N.D. Ala. 1995) (same); House v. Belford, No. 85-C9983, 1987 U.S. Dist. LEXIS 7656, at *12 (N.D. Ill. Aug. 12, 1987) (same).

285. *See* Note, *Procedural Due Process*, *supra* note 9, at 830 n.44 (asserting that the right to be sentenced in open court "almost certainly is included" in the Constitution).

descriptive explanations is treated only briefly in the footnotes. Most probably, if the controlling principle were the language of the Constitution's text, the right would not apply,[286] if it were historical practice the right would apply,[287] and if it were the right being primarily grounded in due process the right would not apply.[288]

Although the public trial right may well apply to sentencing on the grounds that the Sixth Amendment incorporates the First Amendment—and the right likely would apply under First Amendment principles—from a strictly Sixth Amendment perspective, if the test were whether the right is directed at an efficient best estimate as opposed to a special protection, the public trial right would not apply at sentencing. The public trial right is a special-protection right that gives the accused an extra bulwark against state venality or incompetence by exposing the state's representatives and their actions to public scrutiny.[289] While these values no doubt sometimes promote accuracy, they sometimes may have the opposite effect (as when a witness is too scared of the defendant's friends to testify in public) and, in any event, the Court has clearly explained the right on special-protection grounds.[290]

I. Burden of Proof Beyond a Reasonable Doubt

Under the Due Process Clauses of the Fifth and Fourteenth Amendments, the prosecution has the burden of proving beyond a reasonable doubt "every fact necessary to constitute the crime . . . charged."[291] As the Court most recently put it, at trial the state must prove the defendant " 'guilty of every element of the crime with

286. The analysis here would be precisely the same as for the speedy trial right. *See supra* notes 176–77, 265 and accompanying text.

287. In concluding that the public trial right applied to the states through the Due Process Clause of the Fourteenth Amendment, the Court relied heavily on the historical protection of the right. *See In re* Oliver, 333 U.S. 257, 266–71 (1948). Presumably public trials historically meant public sentencing proceedings because trial and sentencing were essentially unitary at the time of the enactment of the Bill of Rights. *See supra* note 266.

288. The right comes from the First and Sixth Amendments, not from due process.

289. As the Court explained:

> " 'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . .' " In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Waller v. Georgia, 467 U.S. 39, 46 (1984) (quoting *Oliver*, 333 U.S. at 270 (quoting 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927))).

290. *See id.*

291. *In re* Winship, 397 U.S. 358, 364 (1970).

which he is charged, beyond a reasonable doubt' " in order to prevail.[292]

The burden of proof beyond a reasonable doubt does not apply at sentencing. According to the Supreme Court, "Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."[293] In approving a sentencing statute that had a judge make findings like those "sentencing judges typically make on the way to passing sentence,"[294] the Court concluded that forcing the state to prove a fact at sentencing by a preponderance of the evidence satisfied due process.[295] The Court rejected a constitutionalized clear and convincing standard for sentencing, much less a standard of burden of proof beyond a reasonable doubt.[296] The Court has left open the possibility that in "extraordinary circumstances," where a fact found at sentencing would dramatically increase the defendant's sentence, due process could require proof by clear and convincing evidence.[297] To date, however, the Court has found no such case.[298]

With regard to the descriptive explanations, if the descriptive explanation for whether a right applies at sentencing were whether

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292. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)). What facts this right applies to at trial is a complicated question, but that the burden applies at trial is not.

293. McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (citing Williams v. New York, 337 U.S. 241 (1949)).

294. *Id.* at 92 n.8.

295. *Id.* at 91.

296. *Id.* at 91–92. Susan Herman has argued that *McMillan*'s holding should not be understood to cover cases decided under the Federal Sentencing Guidelines, and that using the holding to endorse the preponderance of the evidence standard in the guidelines context is an "overreading of *McMillan*." Herman, *supra* note 2, at 347. As Professor Herman notes, however, all the federal courts of appeals have read it this way. *See id.* at 347 & n.237 (collecting cases).

297. *See* United States v. Watts, 519 U.S. 148, 156 (1997).

298. In *Apprendi v. New Jersey*, the Court did find unconstitutional a state sentencing scheme in part because the burden of proof at sentencing was less than beyond a reasonable doubt. 530 U.S. 466, 477 (2000). The Court's conclusion was not, however, that the burden of proof beyond a reasonable doubt applies at sentencing—raising the burden of proof would not have saved the statute—but rather that the fact in question was an element of the offense that had to be proven at trial. *Id.*

At least one lower court has come close to finding such a case. In *United States v. Kikamura*, 918 F.2d 1084 (3d Cir. 1990), the factual findings at sentencing would have, under the operative Federal Sentencing Guidelines, increased the defendant's sentence from thirty months to thirty years. *See id.* at 1100. In these circumstances, the court found a "clear and convincing standard . . . implicit in the statutory requirement that a sentencing court 'find' certain considerations" to justify the greater sentence, while "reserv[ing] judgment on the question whether it is also implicit in the due process clause itself." *Id.* at 1102.

the right is expressly mentioned in the Constitution, then the burden of proof beyond a reasonable doubt would not apply at sentencing because there is no mention of it in the Constitution. If the descriptive explanation for whether a right applies at sentencing were historical practice, then the right would also not apply.[299] If the descriptive explanation for whether a right applied at sentencing were whether the trial right was characterized as a "due process" right rather than deriving from some other provision, plainly the right to proof beyond a reasonable doubt would apply at sentencing.

If the descriptive explanation for whether a right applied at sentencing were whether the right was based on best-estimate concerns as opposed to special-protection concerns, then the right to proof beyond a reasonable doubt would not apply at sentencing. Proof beyond a reasonable doubt is a paradigmatic "special protection." That heightened standard of proof is the "concrete substance for the presumption of innocence."[300] It seeks to tilt the field toward the defendant, so that in cases of uncertainty, the defendant will win. The burden of proof beyond a reasonable doubt directs the fact finder *not* to make its best estimate regarding the fact in issue, but rather to resolve it for the defendant unless the answer is very clear.[301]

J. Confrontation Clause

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[302] The Court's jurisprudence in this area is complex, but three types of rights protected by the Confrontation Clause potentially relevant to sentencing are readily identifiable. First, the Clause places some limits on the use of hearsay evidence at trial. Under the Confrontation Clause, hearsay evidence

299. *See McMillan*, 447 U.S. at 91 (stating that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all" (citing Williams v. New York, 337 U.S. 241 (1949))); Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pennsylvania, 22 SEATTLE U. L. REV. 1057, 1068 n.54 (1999) (noting that based on common-law practice, one could reasonably argue that the standard of proof during sentencing was less than beyond a reasonable doubt (citing JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW §§ 601–606, at 439–43 (9th ed. 1923))).

300. *In re* Winship, 397 U.S. 358, 363 (1970).

301. *See* Young, *supra* note 8, at 352–53 (demonstrating how raising the burden of proof at sentencing might result in fewer accurate outcomes).

302. U.S. CONST. amend. VI. This right has been incorporated against the states. *See* Pointer v. Texas, 380 U.S. 400, 401 (1965).

may not be admitted unless it " 'falls within a firmly rooted hearsay exception,' or ... is supported by 'a showing of particularized guarantees of trustworthiness.' "[303] In addition to protection under the Confrontation Clause of the Sixth Amendment, this aspect of the right also receives some protection under the Due Process Clauses of the Fifth and Fourteenth Amendments.[304] Second, the Confrontation Clause affects "what *in-court* procedures are constitutionally required ... once a witness is testifying."[305] Protected interests in this context include the witness being physically present, under oath, subject to cross-examination, and visible to the defendant and the finder of fact.[306] Third, confrontation protections provide the defendant with a right to be present in court.[307]

The question could be asked as to each of these protected interests whether each applies at sentencing. The answers are discussed separately. The alternative descriptive explanations are then considered together.

303. Idaho v. Wright, 497 U.S. 805, 816 (1990) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)); *see also* White v. Illinois, 502 U.S. 346, 355–56 (1992) (noting that "firmly rooted" hearsay exceptions satisfy the reliability requirement of the Confrontation Clause); Lee v. Illinois, 476 U.S. 530, 543 (1986) ("[E]ven if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.' " (quoting Ohio v. Roberts, 488 U.S. 56, 66 (1980)) (footnote omitted)).

304. The Court has thus indicated that the ability to introduce hearsay at trial is also limited by due process. *See* California v. Green, 399 U.S. 149, 163–64 n.15 (1970) (stating that "considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking"); *In re* Oliver, 333 U.S. 257, 273 (1948) (finding a denial of due process in part because the defendant was not provided with the opportunity to cross-examine other witnesses); *see also* Becker, *supra* note 9, at 20 (collecting sources calling for additional procedural rights at sentencing). The presence of the Confrontation Clause, however, has meant that the Court has not needed to rely on this restriction in limiting hearsay at criminal trials. Individual Justices have suggested that these inquiries should largely be redirected from the Confrontation Clause to the Due Process Clause, *see* Illinois v. White, 502 U.S. 346, 364 (1992) (Thomas, J., concurring); *Green*, 399 U.S. at 184–86 (Harlan, J., concurring), but a majority of the Court has firmly refused to shift reliance from the Confrontation Clause. *See White*, 502 U.S. at 352.

305. *White*, 502 U.S. at 358.

306. Maryland v. Craig, 497 U.S. 836, 846 (1990).

307. *See* Illinois v. Allen, 397 U.S. 337, 338 (1970) (stating that "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial").

1. Protection Against Use of Hearsay

Technically speaking, the Supreme Court has never decided whether the Confrontation Clause applies at sentencing.[308] In *Williams v. New York*, of course, the Court held that a "sentencing judge may consider . . . information even though obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine."[309] That case was decided on due process grounds alone, however, and was decided sixteen years before the Confrontation Clause was incorporated against the states.[310]

Nonetheless, as the *Williams* Court noted, "both before and since the American colonies became a nation, courts in this country" allowed judges to consider a broad range of evidence, including out-of-court statements, in determining sentences.[311] Furthermore, if the Confrontation Clause's restriction on the use of hearsay at trial applied to sentencing without modification, then many current sentencing proceedings would be unconstitutional.[312] For this reason, all the federal courts of appeals to consider the issue have ultimately concluded that the hearsay restriction aspect of the Confrontation Clause does not apply at sentencing[313] and that due process permits the use of hearsay at sentencing,[314] although some commentators and judges have dissented from this view.[315]

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308. *See, e.g.*, United States v. Kikumura, 918 F.2d 1084, 1103 n.19 (3d Cir. 1990) (urging the Supreme Court to decide "in the near future . . . whether confrontation clause principles are applicable at sentencing"); Note, *An Argument for Confrontation*, *supra* note 9, at 1888 ("The Supreme Court has never decided whether sentencing proceedings are 'criminal prosecutions' under the Sixth Amendment.").

309. Williams v. New York, 337 U.S. 241, 245 (1949).

310. *See supra* notes 149–56 and accompanying text.

311. *Williams*, 337 U.S. at 246.

312. *See, e.g.*, United States v. Silverman, 976 F.2d 1502, 1508 (6th Cir. 1992) (citing Williams, 337 U.S. at 250 (recognizing that most of the information relied upon by courts at sentencing would be unavailable if subject to cross-examination)); THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 6A1.3, at 905 (1997) (discussing the lower standard of reliability applied to sentencing).

313. *See* United States v. Petty, 982 F.2d 1365, 1367 (9th Cir. 1993); *Silverman*, 976 F.2d at 1510; United States v. Wise, 976 F.2d 393, 402 (8th Cir. 1992) (en banc); United States v. Tardiff, 969 F.2d 1283, 1287 (1st Cir. 1992); United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991); United States v. Beaulieu, 893 F.2d 1177, 1180–81 (10th Cir. 1990); United States v. Kikumura, 918 F.2d 1084, 1102 (3d Cir. 1990); United States v. Marshall, 910 F.2d 1241, 1244 (5th Cir. 1990).

314. *See* United States v. Giltner, 889 F.2d 1004, 1007–08 (11th Cir. 1989) (per curiam); United States v. Agyemang, 876 F.2d 1264, 1271–72 (7th Cir. 1989); United States v. Carmona, 873 F.2d 569, 574 (2d Cir. 1989).

315. *See, e.g.*, *Petty*, 982 F.2d at 1370–71 (Noonan, J., dissenting) ("If sentencing is part of a criminal proceeding in determining the right to counsel, it follows that sentencing is also a criminal prosecution in determining the right to confront witnesses."); *Silverman*,

As to the due process restriction on the use of hearsay, the Court in *Williams* indicated that it did not apply at sentencing (and a capital sentencing proceeding at that). Commentators have persuasively argued that much of *Williams*'s reasoning no longer has force,[316] that the specific holding regarding the use of hearsay in capital sentencing is arguably no longer good law,[317] and that the decision could be narrowly limited to its facts (where the defendant did not contest the truth of any of the out-of-court assertions).[318] But the Court's continued positive citation to the case for the proposition that procedural rights are reduced at sentencing[319] and the plain intended breadth of the opinion[320] require the judgment that, for the time being, the Due Process Clause does not bar the use of hearsay at sentencing to anywhere near the same degree as the Confrontation Clause does at trial.

This view has certainly been adopted by the lower courts.[321] The lower courts have subjected hearsay at sentencing to due process review, but under deferential standards such as that "the statements are sufficiently corroborated,"[322] that the hearsay has some "minimal indicia of reliability,"[323] or that it has " 'some minimal indicium of reliability beyond mere allegation.' "[324] Indeed, the due process

976 F.2d at 1524 (Merritt, C.J., dissenting) (agreeing with Chief Judge Arnold's dissenting opinion in *Wise*); *Wise*, 976 F.2d at 410–12 (Arnold, C.J., concurring in part and dissenting in part) (arguing that confrontation at sentencing is mandated by both the Confrontation Clause and the Due Process Clause); *see also* Young, *supra* note 8, at 350–51 (collecting scholarship urging higher burdens of proof or standards of admissibility at sentencing); *supra* note 9 (collecting sources calling for additional procedural rights at sentencing).

316. *See* Herman, *supra* note 2, at 317–21; Note, *An Argument for Confrontation*, *supra* note 9, at 1885–86; *see also Wise*, 976 F.2d at 408–09 (Arnold, C.J., concurring in part and dissenting in part) (arguing against *Williams*'s precedential value).

317. *See* Herman, *supra* note 2, at 319–20 (stating that *Williams*'s holding is no longer followed but is cited to show the Court's relaxed view of due process at sentencing); Schulhofer, *supra* note 165, at 762 n.125 (explaining how *Gardner v. Florida*, 430 U.S. 349 (1977), on facts "virtually identical to those in *Williams* . . . reached the opposite result").

318. *See Wise*, 976 F.2d at 409 (Arnold, C.J., concurring in part and dissenting in part); Saltzburg, *supra* note 8, at 248.

319. *See supra* note 7 and accompanying text.

320. *See* Williams v. New York, 337 U.S. 241, 250–51 (1949); *see also* United States v. Fatico, 579 F.2d 707, 712 n.11 (2d Cir. 1978) (relying on the fact that *Williams* rests "on the broad ground that due process does not preclude reliance on out-of-court information in imposing sentence").

321. *See supra* note 314 and accompanying text.

322. *Fatico*, 579 F.2d at 713.

323. United States v. Silverman, 976 F.2d 1502, 1511 (6th Cir. 1992); *see also* Young, *supra* note 8, at 317 (stating that "minimal indicia of reliability" is the standard for assessing hearsay at sentencing).

324. United States v. Beaulieu, 893 F.2d 1177, 1181 (10th Cir. 1990) (quoting United States v. Sunrhodes, 831 F.2d 1537, 1542 (10th Cir. 1987)); United States v. Kikumura, 918

standard adopted by many courts of appeals seems to be more lenient than the statutory requirement of reliability for hearsay at sentencing imposed by the United States Sentencing Guidelines, which require that the information have "sufficient indicia of reliability to support its probable accuracy."[325]

2. In Court Procedures When Witness Is Testifying

The Court has not discussed whether the confrontation protections of *Maryland v. Craig*[326] apply at sentencing. Lower courts have not frequently addressed the question either, but research revealed one case in which the question was answered in the negative.[327] This is not surprising. Given the more lenient rules regarding hearsay at sentencing, if a testimonial procedure at sentencing were found to violate the *Craig* principles, the government might have the simple expedient of taking the statement out of court entirely and then offering it at sentencing via hearsay.

3. Presence

The Supreme Court has not stated whether the Sixth Amendment right to presence includes presence at sentencing. Lower courts have concluded that defendants have a constitutional right to be present at sentencing[328] (video conferencing may

F.2d 1084, 1100 (3d Cir. 1990) (quoting United States v. Baylin, 696 F.2d 1030, 1040 (3d Cir. 1982)); *see also* United States v. Sciarrino, 884 F.2d 95, 97 (3d Cir. 1989) (finding hearsay broadly admissible at sentencing in response to a constitutional challenge).

325. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) (2000); *see also* The Law of Evidence in Federal Sentencing Proceedings, 177 F.R.D. 513, 522 (April 1977) (noting that the "minimum indicia of reliability" standard is weaker than the "sufficient indicia of reliability to support its probable accuracy" standard stated in the Sentencing Commission's Policy Statement); Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years*, 60 GEO. WASH. L. REV. 857, 889 (1992) (noting that sentencing courts presume hearsay to be reliable, in contrast to traditional evidentiary rules and the general approach under the Federal Rules, which presume hearsay to be unreliable unless it falls into certain exceptions); Note, *An Argument for Confrontation*, *supra* note 9, at 1884 (criticizing courts for imposing a standard weaker than that of the Guidelines).

326. 497 U.S. 836 (1990); *see supra* note 308 and accompanying text.

327. *See* United States v. Edmondson, 10 F. Supp. 2d 651, 655 (E.D. Tex. 1998), *vacated on other grounds sub nom.* United States v. Navarro, 169 F.3d 228 (5th Cir. 1999).

328. *See* United States v. Townsend, 33 F.3d 1230, 1231 (10th Cir. 1994) (holding that "the Sixth Amendment . . . requires that a defendant be physically present at sentencing"); United States v. Taylor, 11 F.3d 149, 151 (11th Cir. 1994) (per curiam) (holding that a defendant has a "constitutional right" to be present at sentencing); Hays v. Arave, 977 F.2d 475, 476 (9th Cir. 1992) (stating that a defendant has both a state and a federal right to be present at sentencing) (citing Brewer v. Raines, 670 F.2d 117, 118–19 (9th Cir. 1982)), *overruled on other grounds by* Rice v. Wood, 77 F.3d 1138, 1144 (9th Cir. 1998) (en

increasingly bring this issue to the forefront),[329] though the attributed source of the right varies between the Sixth Amendment, due process, and a generic "constitutional" attribution.[330]

4. Alternative Descriptive Explanations

If the descriptive explanation for whether a right applies at sentencing were the constitutional text, then the confrontation protection against the use of hearsay and for in court procedures would likely apply at sentencing. The Court has based application of the right at trial very firmly on the Sixth Amendment's Confrontation Clause, and (at least to a majority of the Court)[331] the language of that clause does directly suggest that it could present this issue.[332] The textual basis for a right of presence, beyond seeing witnesses, however, is weak.[333]

If the descriptive explanation for whether a right applies at sentencing were whether the protection was historically granted at sentencing, the answer would be no. The Court has expressed a strong view that historically almost anything could be considered at sentencing, particularly the use of ex parte affidavits, a kind of hearsay sometimes thought to be at the core of the Confrontation

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banc) (finding that precedent grants that a defendant has a due process right to presence at sentencing); Paul v. United States, 734 F.2d 1064, 1067 (5th Cir. 1984) (stating that the Constitution guarantees the defendant the right to be present at her sentencing); Rakes v. United States, 309 F.2d 686, 687 (4th Cir. 1962) (stating that "[i]t has long been established that the defendant in a criminal case must be personally present" at sentencing); State v. Ditmars, 567 P.2d 17, 19 (Idaho 1977) (stating in dicta that under the Sixth Amendment, a defendant has a right to presence at sentencing); State v. Braun, 853 P.2d 686, 690 (Kan. 1993) (describing the right to presence at sentencing as " 'a common law right, separate and apart from the constitutional or statutory right to be present at the trial' " (quoting State v. Fennell, 542 P.2d 686, 686 (Kan. 1975))); *see also* Note, *Procedural Due Process*, *supra* note 9, at 830–31 (finding "meticulous judicial insistence" on a defendant's right of presence at sentencing).

329. *See* United States v. Lawrence, 248 F.3d 300, 302–03 (4th Cir. 2001). In *Lawrence*, the court held that sentencing via videoconferencing violated the defendant's statutory right under Federal Rule of Criminal Procedure 43(a) to be present at sentencing. *Id.* Because the court decided the case on statutory grounds, it expressly reserved judgment on the constitutional question. *See id.* at 303 n.1.

330. *See supra* notes 302–07 and accompanying text.

331. *See supra* notes 302–07 and accompanying text.

332. For an examination of textual arguments regarding application of the Confrontation Clause to sentencing (and finding the right applicable), see generally Hoffman, *supra* note 9, at 412–15, and Note, *An Argument for Confrontation*, *supra* note 9, at 1888.

333. There is no express reference to "presence," and the Sixth Amendment's phrase, "to be confronted with the witnesses against him," does not appear to mandate a broader right to presence.

Clause protection.[334] Moreover, to the extent that the broader protections against hearsay now encompassed by the Sixth Amendment were arguably not originally a part of the Sixth Amendment's protection at trial,[335] they certainly were not a part of a confrontation protection at sentencing.[336]

Finally, if the descriptive explanation for whether a right applied at sentencing were whether the trial right was based on due process, as opposed to the Confrontation Clause, the answer probably would be no. As noted above, while there is Supreme Court dicta suggesting that use of hearsay at trial might be a due process violation, the cases barring such hearsay have relied on the Sixth Amendment.[337]

5. Best Estimate v. Special Protection

If the descriptive explanation for whether a right applied at sentencing were whether the right was based on best-estimate concerns as opposed to special-protection concerns, then the trial level protection against the use of hearsay evidence would not apply at sentencing. To be sure, as the Court has often said, "the Confrontation Clause has as a basic purpose the promotion of the 'integrity of the factfinding process.' "[338] The degree of "integrity" constitutionally mandated at trial, however, is closely tied to the special protection afforded the defendant by the burden of proof beyond a reasonable doubt. If the goal at sentencing, in contrast, is to get the best estimate of the defendant's appropriate punishment, without a significant preference between errors that help the defendant and errors that hurt the defendant, then—if some hearsay evidence is both relevant and of at least some weight (i.e., has minimum indicia of reliability)—then the confrontation restriction on

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334. The Court explained:

> [B]oth before and since the American colonies became a nation, courts in this country and in 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 .... *Out-of-court affidavits have been used frequently* ....

Williams v. New York, 337 U.S. 241, 246 (1949) (emphasis added).

335. *See supra* note 304 and accompanying text.

336. The resolution of the right to presence at sentencing under this approach is not certain.

337. The answer for presence is probably yes, because the right of presence has a firm due process pedigree as well as a Confrontation Clause grounding.

338. *See* White v. Illinois, 502 U.S. 346, 356–57 (1992) (quoting Coy v. Iowa, 487 U.S. 1012, 1020 (1988) (quoting Kentucky v. Stincer, 482 U.S. 730, 736 (1987))).

hearsay would go too far. Such a system would want the sentencing court to have all potentially useful information before it.[339]

Whether one likes it or not, this best-estimate vision of sentencing explains the Court's continued adherence to *Williams*, even as the *Williams* justification of hearsay as necessary for a process of individualized and broadly discretionary sentencing[340] became inapplicable with changing sentencing philosophies. Whether the judgment is discretionary and concerned with rehabilitation, or tightly guided and concerned with offense characteristics, allowing consideration of more relevant evidence increases the average accuracy of judgments at a cost of more errors harmful to the defendant. Thus, hearsay is admitted in a model concerned with best estimates rather than special protections.

As to the other trial confrontation rights, regulation of in-court procedures and the defendant's right of presence, if the descriptive explanation for whether a right applied at sentencing were whether the right was based on best-estimate concerns as opposed to special protections, the restriction on in-court procedures probably would not apply at sentencing, but the right of presence probably would. With regard to in-court procedures, as noted above, without a rule against hearsay, the restrictions on in-court procedures seem unlikely because the restrictions could be easily circumvented by choosing out-of-court hearsay. Because in-court testimony would likely have greater weight, however, these rights could have continuing relevance. Even still, they might well not apply at sentencing under a best-estimate approach. Restrictions on in-court testimony confrontation are sometimes justified, even at trial, as leading to fuller and more accurate testimony.[341] With regard to presence, both the Supreme Court in establishing the right to presence at trial, and lower courts in extending the right to sentencing, have relied on accuracy best-estimate concerns—the defendant's ability to consult with his attorney and the decisionmaker's ability to see and hear the defendant before passing judgment.[342]

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339. *See* Young, *supra* note 8, at 302 (arguing that the use of hearsay at sentencing "may increase accuracy while also increasing the number of errors ... borne by defendants").

340. Williams v. New York, 337 U.S. 241, 247–50 (1949).

341. *See* Maryland v. Craig, 497 U.S. 836, 857 (1990) (noting that if confrontation causes a child witness to experience significant emotional distress, then the truth-seeking goal of the Confrontation Clause would actually be disserved).

342. *See, e.g.*, Illinois v. Allen, 397 U.S. 337, 344 (1970) (explaining that one of the primary advantages of presence at trial is the defendant's ability to speak with his counsel); Hays v. Arave, 977 F.2d 475, 476 (9th Cir. 1992) (stating that a defendant's

K. Present Evidence

At trial, a criminal defendant can use a number of constitutionally protected avenues to make his case. Three of these in particular are potentially relevant at sentencing: (1) a right to testify; (2) a right to rebut the state's evidence; and (3) a right to call witnesses and present other affirmative evidence.

Although the Court had never held to the contrary, it was not until 1987, in *Arkansas v. Rock*,[343] that the Supreme Court firmly established the right of "a defendant in a criminal case . . . to take the witness stand and to testify in his or her own defense."[344] The right is effective against the states.[345] Although the right may "bow to accommodate other legitimate interests in the criminal trial process," such restrictions "may not be arbitrary or disproportionate to the purposes they are designed to serve."[346] In establishing the right, the Court identified four distinct (and apparently sufficient) bases for it: due process,[347] the Compulsory Process Clause of the Sixth Amendment,[348] the accused's Sixth Amendment right to "a personal defense,"[349] and the Fifth Amendment privilege against self-incrimination.[350]

In addition to protecting a defendant's right to testify at trial, the Constitution, through the Due Process Clause and the Compulsory Process Clause of the Sixth Amendment, gives a criminal defendant

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absence from sentencing is critical because he cannot testify on his behalf, communicate with counsel, or affect participants), *overruled on other grounds by* Rice v. Wood, 77 F.3d 1138 (9th Cir. 1998) (en banc); *see also* United States v. Jackson, 923 F.2d 1494, 1496–97 (11th Cir. 1991) (describing the right to presence at sentencing as based on best-estimate concerns). *But see* Note, *Procedural Due Process*, *supra* note 9, at 831 (conceding important accuracy values to the right of presence at sentencing, but describing respect for the "dignity of the individual" as "perhaps [a] more fundamental justification for the right").

343. 483 U.S. 44 (1987).

344. *Id.* at 49.

345. *Rock* itself was a state prosecution. *Id.* at 44.

346. *Id.* at 55–56 (citations omitted). In *Rock*, the Court found a per se rule barring all hypnotically refreshed testimony unconstitutional when applied to a criminal defendant. The Court concluded that application of this balancing test required states to consider whether such refreshed testimony would be unreliable on a case-by-case basis. *Id.* at 61.

347. *Id.* at 51 (stating that the right is essential to due process of law in a fair adversary proceeding necessary under the Fourteenth Amendment's guarantee).

348. *Id.* at 52 (explaining that "[l]ogically included in the accused's right to call witnesses . . . is a right to testify himself").

349. *Id.* (explaining that a "defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness").

350. *Id.* at 52–53 (explaining that the privilege *not* to testify encompasses the right to make the opposite choice).

some additional rights regarding presentation of evidence.[351] At present, the relative role of the two clauses in the defendant's right to present evidence at trial, and the strength of the right under each of the clauses, is muddled at best.[352] States may not restrict a defendant's right to present a defense by rules that are "arbitrary or disproportionate to the purposes they are designed to serve,"[353] but what this means in practice is far from clear.[354] It is safe to say, however, that a defendant has a constitutionally protected interest in both calling witnesses[355] and in rebutting the state's evidence at trial.[356]

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351. Regarding compulsory process, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. Prior to 1967, the Supreme Court only discussed the Compulsory Process Clause five times: declining to construe it on three occasions and referring to it in dictum twice. *See* Peter Westen, *The Compulsory Process Clause*, 30 MICH. L. REV. 71, 108 (1974). In *Washington v. Texas*, 388 U.S. 14 (1967), the Supreme Court incorporated the Compulsory Process Clause against the states and held that it not only gave the defendant a constitutional interest in subpoenaing witnesses, but in having them testify as well. The Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law.

Id. at 19.

352. For an enlightening guide through the Court's jurisprudence on these issues, see Peter Westen, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203, 1259–76 (1999).

353. *Rock*, 483 U.S. at 56.

354. For example, under this standard a per se rule excluding testimony based on hypnosis-based recollection is unconstitutional, *see id.* at 53–57, but a per se rule excluding polygraph evidence is permissible. *See* United States v. Scheffer, 523 U.S. 303, 309–11 (1998). For an excellent examination of the cases arguing that application of this standard is necessarily ad hoc and must amount to a less exacting review than the words might suggest, see Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063 (1999).

355. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 410 (1988) (describing the defendant's right to present witnesses as a sword in the defendant's arsenal); *Washington*, 388 U.S. at 23 (stating that the defendant has a right to put a codefendant on the stand); *see also supra* note 351 (noting that prior to 1967 the Supreme Court clearly held that the Compulsory Process Clause gives defendants a constitutional interest in calling witnesses).

356. This right is protected both by the Compulsory Process Clause, as discussed *supra* notes 354–55 and accompanying text, and by the Due Process Clause. The current Court is sharply divided on the *scope* of the protection due process provides a defendant to rebut the state's evidence, but is arguably unanimous that it provides some such protection. In *Montana v. Egelhoff*, 518 U.S. 37 (1996), the Court split 4-4 on the due process standard to be applied when a state prohibits a defendant from putting on evidence that was logically relevant to an element of the offense (i.e., to counter proof of an element). Four Justices concluded that the due process test primarily depended on the historical question of whether the right to present such evidence was "deeply rooted" at the time of the Fourteenth Amendment. *Id.* at 48. Four Justices concluded that the due process test

Although the Court has not squarely decided whether, once convicted, a defendant has a constitutionally protected interest in testifying—either under oath or by unsworn allocution[357]—the *Rock* Court did state in dicta that the "right reaches beyond the criminal trial: the procedural due process constitutionally required in some extrajudicial proceedings includes the right of the affected person to testify."[358] Given that the Court found that the right "extends" to probation revocation, parole revocation and termination of welfare benefits,[359] the right seems likely to "extend" to sentencing as well.[360]

Lower courts have divided on whether the defendant has a constitutional right to be heard at sentencing—either through sworn testimony or unsworn allocution.[361] Notably, the allocution cases are decided on due process grounds—neither the Supreme Court nor the lower courts have directly expressed a view as to whether the Compulsory Process Clause applies at sentencing.[362]

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turned on whether the defendant had "a fair opportunity to put forward his defense." *Id.* at 71 (O'Connor, J., dissenting). *See generally* Westen, *supra* note 352, at 1264–67 (detailing the two views). Justice Ginsburg took no view on the question. All the Justices that discussed the issue, however, agreed that the Due Process Clause provided *some* protection in this context.

357. *See* McGautha v. California, 402 U.S. 183, 218 (1971) (stating that the "Court has not directly determined whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so"); Hill v. United States, 368 U.S. 424, 429 (1961) (declining expressly to decide whether the denial of an affirmative request to allocute violates the Constitution).

358. *Rock*, 483 U.S. at 51 n.9.

359. *Id.*

360. *See* LAFAVE ET AL., *supra* note 2, § 26.4(g), at 1229–30 (arguing that the Court's recognition of the right to present evidence at parole and probation revocation hearings supports a comparable right to present evidence at sentencing); *see also* Schulhofer, *supra* note 165, at 764 (making the same argument regarding the right to present witnesses).

361. *Compare* Boardman v. Estelle, 957 F.2d 1523, 1525 (9th Cir. 1992) (finding a constitutional right to allocute at sentencing), United States v. Moree, 928 F.2d 654, 656 (5th Cir. 1991) (same), United States v. Jackson, 923 F.2d 1494, 1496 (11th Cir. 1991) (same), *and* Ashe v. North Carolina, 586 F.2d 334, 336 (4th Cir. 1978) (same), *with* United States v. Li, 115 F.3d 125, 132–33 (2d Cir. 1997) (describing a defendant's right of allocution at sentencing as a criminal procedure matter and not a constitutional right), United States v. Coffey, 871 F.2d 39, 40 (6th Cir. 1989) (stating that the right of allocution is "not of constitutional dimension"), *and* United States v. Fleming, 849 F.2d 568, 569 (11th Cir. 1988) (same). *See also* LAFAVE ET AL., *supra* note 2, § 26.4(g) (collecting state and federal cases discussing the right to allocution at sentencing).

362. *Cf.* White v. Wyrick, 727 F.2d 757, 758 (8th Cir. 1984) (finding no right to compulsory process in a prison disciplinary proceeding). The applicability of the Compulsory Process Clause at sentencing would take on greater significance if, as Richard Nagareda has urged, it were reconceived as an anti-discrimination principle—requiring equal treatment of the state and the defendant. *See* Nagareda, *supra* note 354, at 1069–70.

The Supreme Court has similarly left unclear whether the defendant's due process and/or compulsory process rights provide any constitutionally protected interest in rebutting the state's evidence or calling witnesses in a noncapital sentencing proceeding.[363]

Lower courts seem to have concluded that the due process right to rebut the state's evidence applies at sentencing, though the precise parameters of the right are unclear and the process required is clearly considered to be less than at trial. On the other hand, the lower courts also conclude that due process does not provide a general right to call witnesses at sentencing. Lower courts examining such claims start from the Supreme Court's pronouncement that a defendant has the right not to be sentenced on the basis of allegations that are "materially untrue."[364] From this premise, almost every federal circuit court has concluded that the defendant has a right to rebut the evidence to be used against him.[365] The courts agree, however, that this right of rebuttal may follow procedures that are largely within the discretion of the trial court,[366] and specifically does *not* include a right to call witnesses.[367]

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363. *See* McGautha v. California, 402 U.S. 183, 218 (1971) (stating that the "Court has not directly determined whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so"); *see also* LAFAVE ET AL., *supra* note 2, § 26.4(g), at 1229–30 (analyzing the Court's "conflicting signals"). The Court has established such a right in the capital context. *See* Gardner v. Florida, 430 U.S. 349, 361–62 (1977).

364. *See, e.g.*, United States v. Prescott, 920 F.2d 139, 143 (2d Cir. 1990) (beginning its due process analysis for a challenge to a sentencing hearing by stating that a defendant has a right not to be sentenced based on materially false allegations) (quoting Townsend v. Burke, 334 U.S. 736, 741 (1948)).

365. *See* United States v. Nappi, 243 F.3d 758, 763 (3d Cir. 2001) (citing United States v. Jackson, 32 F.3d 1101, 1105 (7th Cir. 1994)); United States v. Wilfred Am. Educ. Corp., 953 F.2d 717, 722 (1st Cir. 1992) (citing United States v. Diaz-Villafane, 874 F.2d 43, 47 (1st Cir. 1989)); United States v. Bowman, 926 F.2d 380, 382 (4th Cir. 1991) (citing United States v. Beaulieu, 893 F.2d 1177, 1181 (10th Cir. 1990)); United States v. Beaulieu, 893 F.2d 1177, 1181 (10th Cir. 1990); United States v. Agyemang, 876 F.2d 1264, 1272 (7th Cir. 1989); United States v. Giltner, 889 F.2d 1004, 1007 (11th Cir. 1989) (per curiam) (citing United States v. Saintil, 753 F.2d 984, 990 (11th Cir. 1985)); United States v. Fogel, 829 F.2d 77, 90 (D.C. Cir. 1987) (citing United States v. Collins Spencer Catch the Bear, 727 F.2d 759, 761 (8th Cir. 1984)); United States v. Pugliese, 805 F.2d 1117, 1123–24 (2d Cir. 1986); Kohley v. United States, 784 F.2d 332, 334 (8th Cir. 1986) (citing Barton v. Lockhart, 762 F.2d 712, 713 (8th Cir. 1985) (per curiam)); United States v. Petitto, 767 F.2d 607, 611 (9th Cir. 1985), *overruled on other grounds by* United States v. Fernandez-Angulo, 897 F.2d 1514, 1517 (9th Cir. 1990); United States v. Ashley, 555 F.2d 462, 466 (5th Cir. 1977). State courts appear to have reached the same conclusion. *See* Ruffin v. State, 683 So. 2d 565, 566 (Fla. Dist. Ct. App. 1996); State v. Cannon, 922 P.2d 1293, 1302 (Wash. 1996); State v. Mosley, 547 N.W.2d 806, 809 (Wis. Ct. App. 1996).

366. *See* United States v. Berzon, 941 F.2d 8, 21 (1st Cir. 1991) (citing United States v. Curran, 926 F.2d 59, 62 (1st Cir. 1991)); *Giltner*, 889 F.2d at 1008–09; United States v.

Because the Supreme Court has not resolved the question of whether these constitutional rights apply at sentencing, analysis of their outcome under the various descriptive explanations cannot assist in drawing conclusions about their fit with the decided cases, and therefore that analysis is discussed in the footnotes.[368]

In a system that conceived sentencing as a process designed to achieve a balanced, best estimate of the appropriate penalty, the right to speak and to rebut the state's evidence would apply at sentencing. Whether there would be protection of a right to call witnesses is a close question.

Stevens, 851 F.2d 140, 144 n.8 (6th Cir. 1988) (citing United States v. Papajohn, 701 F.2d 760, 763 (8th Cir. 1978)); *Pugliese*, 805 F.2d at 1123; *Petitto*, 767 F.2d at 611 (citing United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976)); *Ruffin*, 683 So. 2d at 566; State v. Kempf, No. 90-2632-CR, 1991 Wisc. App. LEXIS 1068, at *9 (Wis. Ct. App. July 3, 1991) (citing *Pugliese*, 805 F.2d at 1123).

367. *See Giltner*, 889 F.2d at 1008 (citing United States v. Satterfield, 743 F.2d 827, 840 (11th Cir. 1984)); Fogel, 829 F.2d at 90 (citing United States v. Heller, 797 F.2d 41, 43 (1st Cir. 1986)); *Pugliese*, 805 F.2d at 1123; United States v. Heller, 797 F.2d 41, 43 (1st Cir. 1986) (citing United States v. Jackson, 700 F.2d 181, 191 (5th Cir. 1983)); United States v. Jackson, 700 F.2d 181, 191 (5th Cir. 1983); Davis v. State, No. 157, 1992 Del. LEXIS 428, at *4 (Del. Dec. 7, 1992); *Ruffin*, 683 So. 2d at 566; *Kempf*, 1991 Wisc. App. LEXIS 1068, at *9 (citing *Pugliese*, 805 F.2d at 1123).

368. If the descriptive explanation for whether a right applied at sentencing were the Constitution's text, the rights to speak and to rebut the state's evidence would probably not apply—because neither is expressly mentioned—but the right to call witnesses well might, because the Sixth Amendment gives a right to "compulsory process for obtaining witnesses" in all criminal prosecutions. *See* U.S. CONST. amend VI. If the descriptive explanation were whether the right was a matter of due process, as opposed to a particular provision of the Constitution, then the right to speak might or might not apply (because it is expressly derived from both due process and express provisions, *see supra* notes 347–50 and accompanying text) but the rights to rebut evidence and call witnesses probably would, because the Court has relied on the Due Process Clause in developing these rights. *See supra* note 363. If the descriptive explanation were historical practice, the right to speak would likely apply because defendants de facto enjoyed this right, much as they effectively had the right to proceed pro se, because of frequently having to represent themselves. *See* Faretta v. California, 422 U.S. 806, 823–28 (1975). Indeed, in the words of Professor John Langbein:

> [U]ntil late in the eighteenth century, the fundamental safeguard for the defendant in common law criminal procedure was not the right to remain silent, but rather the opportunity to speak. *The essential purpose of the criminal trial was to afford the accused an opportunity to reply in person to the charges against him.*

John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994) (emphasis added).

As to the rights to call witnesses and rebut the state's evidence, lower courts denying the former and providing the latter do not rely on historical practice. *See, e.g.*, *Giltner*, 889 F.2d at 1007–08 (stating, without mentioning historical practice, that due process requires that a defendant be given the opportunity to rebut the state's evidence at sentencing, but does not require that a defendant be given the opportunity to call and cross-examine witnesses); *Pugliese*, 805 F.2d at 1123 (same).

The trial right to speak is predicated on both best-estimate and special-protection sorts of concerns.[369] Giving each party the right to be heard is an essential aspect of achieving a best estimate in an adversarial process. Moreover, at sentencing, at least to the same extent as at trial, hearing from the defendant may be the sole method to assess certain issues (such as the presence of remorse) and may be the best method, or at least an important method, of assessing many other issues. On the other hand, the right to be heard provides the defendant an autonomy benefit of helping make his defense his own, and a liberty interest in allowing him to be heard while his fate is being decided. These latter two interests are special-protection concerns. Most likely, the best-estimate interests are sufficiently significant to sustain the right in a best-estimate environment, even if the special protections were discounted.[370]

The right to rebut the state's evidence is plainly a best-estimate right. Indeed, it is such an essential component of the adversarial model that lower courts applying this right at sentencing have tied it explicitly to the accuracy right not to be sentenced on the basis of "materially untrue" information.[371]

Allowing the calling of witnesses, of course, promotes an accuracy interest. In the reasonable best-estimate sentencing environment the Court has mandated, however, even accuracy enhancing rights may not apply if the resulting economies are sufficient. Thus, for example, if the evidence can be proffered in other ways (i.e., by hearsay submission), the increased accuracy afforded by calling witnesses might or might not be worth the coin. The absence of the special protections of the burden of proof beyond a reasonable doubt and the presumption of innocence make consideration of such tradeoffs possible. Whether the Court would recognize a constitutionally protected interest in calling witnesses, but allow a balancing of interests under a test that allowed the right to be easily overcome, or would decide that there is no constitutionally protected interest at all, is difficult to predict.

369. *See supra* note 368 and accompanying text (explaining the Court's placement of the right in a number of constitutional sources).

370. *But see* Note, *Procedural Due Process*, *supra* note 9, at 833 (concluding that, given presence of counsel, "little would be lost if the ceremonial allocation were no longer required").

371. *See supra* notes 364–65 and accompanying text.

L. Remain Silent

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."[372] The right to remain silent offers a number of protections potentially relevant to sentencing. First, the right protects a defendant at a criminal trial from being forced to testify.[373] Indeed, much of this aspect of the right extends beyond criminal trials; a defendant need not answer incriminating questions in any proceeding, "civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[374] Second, the privilege protects a defendant from having pretrial statements taken by compulsion[375] or in violation of the privilege[376] used directly against him at trial. Third, if the defendant chooses not to testify, no adverse inferences may be drawn (or suggested) and the defendant has a constitutional entitlement to a jury instruction against such inferences.[377]

The Supreme Court recently considered the application of the Fifth Amendment's privilege against self-incrimination to sentencing in *Mitchell v. United States*. The first and third of the protected interests were directly at issue in *Mitchell*. Mitchell had pleaded guilty to conspiracy to distribute and to distributing cocaine.[378] At Mitchell's sentencing, she did not testify and the trial court, in deciding whether Mitchell was responsible for more than five kilograms of cocaine sales, "held it against [her] that [she] didn't come forward today and tell [the court] that [she] really only did this a couple of times."[379] The lower court had held that Mitchell's guilty plea had waived the privilege in the sentencing phase of the case.[380] The government added the argument that, even if Mitchell retained her privilege, the rule against drawing adverse inferences did not apply at sentencing.[381]

372. U.S. CONST. amend. V. This provision has been incorporated against the states. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964).

373. *See* DRESSLER, *supra* note 57, § 26.05, at 554 n.86.

374. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

375. *See, e.g.*, New Jersey v. Portash, 440 U.S. 450, 456–57 (1979) (holding that compelled grand jury testimony cannot be used at trial against a defendant even for impeachment purposes).

376. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

377. *See* Carter v. Kentucky, 450 U.S. 288, 299–300 (1981); Griffin v. California, 380 U.S. 609, 612 (1965).

378. Mitchell v. United States, 526 U.S. 314, 317 (1999).

379. *Id.* at 319.

380. *Id.* at 319–20.

381. *Id.* at 327.

The Supreme Court rejected both of these contentions. First, the Court held that the privilege against being compelled to testify as a witness extends to sentencing, reasoning that "[w]here the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony."[382] Second, the Court held that the rule against adverse inferences being drawn from the defendant's silence applied to questions about the facts of the defendant's case that were relevant to sentencing (here, the quantity of drugs for which Mitchell was responsible).[383]

Once the *Mitchell* Court concluded that the guilty plea did not constitute a waiver of the privilege,[384] the conclusion that Mitchell could not be compelled to testify was inevitable. Absent waiver, the risk of *trial* incrimination continued at sentencing and thus would have protected Mitchell from testifying at her sentencing proceeding even if the privilege did not apply to sentencing as such.[385]

The *Mitchell* Court, however, did not limit itself to this ground in reaching its decision. Instead, the Court stated that sentencing was part of the "criminal case" referred to in the Fifth Amendment and that the "essence of this basic constitutional principle is 'the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.' "[386]

Thus, while the difference between the first and second protections of the privilege against self-incrimination described above was not presented in *Mitchell*,[387] the language of much of the Court's decision indicates that the trial prohibition against the use at trial of

382. *Id.* at 326. The Court stated that once the sentence has been fixed and the judgment of conviction has become final, the right no longer applies. *Id.*

383. *Id.* at 328.

384. *Id.* at 316.

385. The risk of incrimination continues until a judgment becomes final, which necessarily occurs after sentencing. *See id.* at 326 (citing Reina v. United States, 364 U.S. 507, 513 (1960)). Thus, a defendant could not be forced to testify about the facts of an offense at sentencing unless the defendant had actually waived the privilege.

386. *Id.* (quoting Estelle v. Smith, 451 U.S. 454, 462 (1981) (quoting Culombe v. Connecticut, 367 U.S. 568, 581–82 (1961))). *Estelle v. Smith*, 451 U.S. 454 (1981), held that the privilege against self-incrimination applied at capital sentencing proceedings. *Id.* at 462. Indeed, application of the second protection of the privilege against self-incrimination to capital sentencing was the precise issue in *Estelle*, and the *Mitchell* Court stated, "[W]e find no reason not to apply [*Estelle*] to noncapital sentencing hearings as well." *Mitchell*, 526 U.S. at 326.

387. *But see infra* note 389 (discussing cases that examined the admissibility at sentencing of statements taken in violation of the Fifth Amendment privilege or *Miranda*).

pretrial statements taken in violation of the privilege might also apply at sentencing, at least as to statements about the nature of the offense.[388] This result would be in accord with the previously expressed views of some, but certainly not all, lower courts.[389]

Finally, as noted, the Court also held that in determining facts about the crime at sentencing, a trial court may not use a defendant's silence against her.[390] In so doing, however, the Court expressly did

388. It is possible, of course, that the Court ultimately might treat statements obtained by some violations of the Fifth Amendment (i.e., *Miranda* violations) differently than others at sentencing. *Compare* Harris v. New York, 401 U.S. 222, 226 (1971) (holding that a statement taken in violation of *Miranda* can be used for impeachment), *with* New Jersey v. Portash, 440 U.S. 450, 457–58 (1979) (holding that a statement taken by compulsion of threatened contempt could not be used for impeachment).

389. A number of courts have held generally that statements taken in violation of the Fifth Amendment privilege cannot be used at sentencing. *See* United States v. Abanatha, 999 F.2d 1246, 1249 (8th Cir. 1993) (holding that the use of immunized testimony at sentencing would violate the Fifth Amendment); United States v. Harrington, 923 F.2d 1371, 1377 (9th Cir. 1991) (holding that a sentencing court "may not consider information obtained in violation of the privilege against self-incrimination"); United States v. Jackson, 886 F.2d 838, 841 n.4 (7th Cir. 1989) (indicating in dicta that the use of information taken in violation of the Fifth Amendment would not be admissible at sentencing); United States v. Underwood, 880 F.2d 612, 616 (1st Cir. 1989) (indicating it would be improper for a sentencing judge to consider immunized statements of the defendant); United States v. Chitty, 760 F.2d 425, 431–32 (2d Cir. 1985) (overturning sentence on grounds that the judge relied on evidence taken in violation of the privilege against self-incrimination); State v. Conn, 669 P.2d 581, 584 (Ariz. 1983) (same); *cf.* Pens v. Bail, 902 F.2d 1464, 1466 (9th Cir. 1989) (holding that post-trial, presentence statements regarding other crimes taken in violation of the Fifth Amendment cannot be used at sentencing).

Some courts have reached this result in the *Miranda* context. *See* State v. Valera, 848 P.2d 376, 382 (Haw. 1993) (reaching its decision under Hawaii's constitution but describing the decision as consistent with federal law); *see also* LAFAVE ET AL., *supra* note 2, § 6.10(e), at 372 (concluding that the rule of *Estelle* prohibiting the use of statements taken outside *Miranda* in capital sentencing, applies to noncapital sentencing as well).

On the other hand, some courts have found statements taken in violation of *Miranda* admissible at sentencing. *See* Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1388 (7th Cir. 1994) (stating, in a capital case no less, that statements taken in violation of *Miranda* are admissible at sentencing because "the exclusionary rule is generally inapplicable during sentencing," but citing Fourth Amendment cases in support); State v. Bryant, 776 So. 2d 532, 534 (La. App. 2000) (citing *Del Vecchio*); People v. Mancini, 658 N.Y.S.2d 37, 38 (N.Y. App. Div. 1997) (mem.) (allowing the use at sentencing of a statement taken in violation of *Miranda*); *see also* Susan R. Klein, Miranda *Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 429–30 & n.54 (1994) (stating that lower courts have held that statements taken in violation of *Miranda* can be used at sentencing); *cf.* United States v. Delgado, 56 F.3d 1357, 1372 (11th Cir. 1995) (declining to decide the legal issue that would have been presented by the use of such evidence at sentencing).

390. *See supra* note 383 and accompanying text. This result may further support the view that the Court will eventually bar the use at sentencing of statements taken in violation of the privilege because the rule against the drawing of adverse inferences has generally been restricted to the same circumstances—a criminal trial—as the restriction on use of evidence obtained in violation of the privilege.

not decide whether silence could be used at sentencing to draw inferences about issues other than facts about the crime, such as whether the defendant was remorseful.[391]

As explained above, given that the risk of incrimination continues until a judgment of conviction is final and, therefore, continues through sentencing, the protection against being forced to testify must apply at sentencing as part of the trial right. Use of the descriptive explanation metrics on this point is thus not helpful because the protection exists at sentencing as part of the trial right, without deciding whether it must be extended to sentencing. The other two aspects of the right, however—the protection against use of compelled testimony and the protection against adverse inferences—can be so examined.

If the descriptive explanation for whether a right applies at sentencing were the Constitution's text, then the accused's right not to have compelled testimony used against him probably would apply.[392] The protection against adverse inferences being drawn, however, probably would not apply at sentencing. The text of the Fifth Amendment does not expressly suggest such a right,[393] and the text was not the basis for the Court's establishment of the right.[394]

If the descriptive explanation for whether a right applies at sentencing were whether historical practice supported the application of the right at sentencing, then the right not to have pretrial testimony

391. *See Mitchell*, 526 U.S. at 330. In the wake of *Mitchell*, lower courts appear to be in some disagreement over the boundaries of the appropriate use of defendant's silence at sentencing. *Compare* United States v. Rivera, 201 F.3d 99, 101–02 (2d Cir. 1999) (finding a Fifth Amendment violation where silence was used by the sentencing judge as evidence of the defendant's lack of cooperation), *with* United States v. Martorano, No. 83-314-1, 2001 U.S. Dist. LEXIS 11656, at *12–*13 (E.D. Pa. Aug. 8, 2001) (refusing to set aside a sentence when the sentencing judge relied on silence as evidence of the defendant's lack of contrition).

392. The language of the Self-Incrimination Clause, "be a witness against himself," arguably contemplates courtroom testimony in the course of a criminal case. *See, e.g.*, George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1095 (2001) (presenting the view that the language of the amendment clearly refers to courtroom testimony). The answer might depend, however, on whether the statement obtained in violation of the privilege was taken in court in a criminal proceeding.

393. *Griffin* detractors on the Court rely heavily on this lack of textual support for the protection. *See Mitchell*, 526 U.S. at 331 (Scalia, J., dissenting); *id.* at 341 (Thomas, J., dissenting).

394. *See* Griffin v. California, 380 U.S. 609, 613–14 (1965) (noting that the right of protection against adverse inferences reflects the "spirit" of the Self-Incrimination Clause).

obtained in violation of the privilege might apply,[395] but the right against adverse inferences almost certainly would not. The practice of drawing adverse inferences *at trial* from the silence of those charged with crimes apparently was still common well after the enactment of the Bill of Rights, and disagreement among the states about the propriety of drawing such inferences continued well into the twentieth century.[396]

If the descriptive explanation for deciding whether a right applied at sentencing were whether it was primarily based on the Due Process Clause, then neither the prohibition on the use of pretrial testimony obtained in violation of the privilege nor the rule against adverse inferences would apply at sentencing. These protections would be inapplicable because both are plainly tied to the Self-Incrimination Clause of the Fifth Amendment, rather than an independent due process concern.[397]

If the descriptive explanation for deciding whether a right applied at sentencing were whether it was based on best-estimate concerns as opposed to special-protection concerns, then the use of pretrial compelled testimony might not apply at sentencing and the protection against adverse inferences would certainly not apply at sentencing.

Although the wisdom and purposes of the privilege against self-incrimination are controversial,[398] proffered justifications for the privilege generally rely on some form of heightened protection for criminal defendants—either of the possibility of their innocence, of

395. Of course, what constitutes "pretrial testimony obtained in violation of the privilege" has changed over time. "Americans, like Englishmen, understood the common law to prohibit torture in the search for evidence, and at least some Americans exceeded the English concern with the coercive power of oaths." Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1129 (1994). During the colonial period, American and English criminal procedure "assumed the testimonial availability of the defendant at the crucial pretrial stage of the prosecution and freely made use of the defendant's admissions at trial." *Id.* With *Miranda v. Arizona*, 384 U.S. 436, 467–69 (1966), the category expanded to include statements that were the product of unwarned custodial interrogation.

396. *See Mitchell*, 526 U.S. at 332–35 (Scalia, J., dissenting) and sources cited therein; AMAR, *supra* note 269, at 69 (citing Moglen, *supra* note 395, at 1094–1104).

397. For an argument that this should not be the case regarding *Miranda* violations, see Thomas, *supra* note 392, at 1083, 1104–17 (arguing that the Court should drop the "pretense" that *Miranda* is an extension of the privilege against self-incrimination and give it a new "home" in the Due Process Clause).

398. *See* DRESSLER, *supra* note 57, § 26.03, at 545–51 (collecting and describing scholarly views).

their autonomy, or of their special procedural protections.[399] The right is *not* justified on the grounds that it leads, on balance, to more accurate results or to putting the defendant and the prosecution on an equal footing, which it assuredly does not, because the defendant alone has access to what the defendant knows. This is particularly true of the right against the use of adverse inferences which, unlike the right against the use of compelled testimony,[400] is not even arguably justified on best-estimate grounds.

III. THE BEST-ESTIMATE PRINCIPLE: EXPLANATIONS AND IMPLICATIONS

A. *Explanations*

No one will be surprised to learn that the Supreme Court has not consistently followed a particular formal interpretive methodology—such as textualism or historical practice—to decide which constitutional trial rights apply at sentencing. Even outside of the sentencing context, many commentators have concluded that the Court's constitutional criminal procedure decisions are driven by shifting policy preferences within the Court.[401] What is surprising is

399. *See id.* In outlining the primary proffered justifications for the privilege and the criticisms that have been leveled against those justifications, Professor Dressler groups them into four categories:

> (i) preventing the "cruelty" of forcing someone to choose between accusing themselves and committing perjury or contempt;
> (ii) preventing the morally wrongful affront to personal dignity and autonomy of compelled self-incrimination;
> (iii) ensuring that the state carries its burden in the adversary system [the Court relied on this justification in particular in *Mitchell*, *see* 526 U.S. at 325, 326, 330]; and
> (iv) providing extra-protection to the innocent, at the cost of providing some extra-protection for the guilty.

Id.

Arguably, the restriction on the use of compelled pretrial testimony would apply at sentencing under the best-estimate metric, on the grounds that such evidence is "inherently unreliable" and therefore likely to be less helpful rather than more helpful at sentencing. While reliability may be part of the concern, on balance it is a concern about "special" reliability—related to the requirement of proof beyond a reasonable doubt. Compelled pretrial testimony—at least that which was not obtained by such terrible means as would violate due process—probably is no less reliable than hearsay, which judges are allowed to consider and give appropriate weight to at sentencing. *See supra* notes 309–25 and accompanying text.

400. *See supra* notes 392–94 and accompanying text.

401. *See, e.g.*, Dripps, *supra* note 36, at 1635 (noting that policy is the driving force behind criminal procedure cases rather than any general principle); Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1057–58 (2002) (arguing that a policy and result-oriented focus dominates the Court's criminal

that over a period spanning decades, and including both "revolutions" and "counter-revolutions" in the Court's criminal procedure jurisprudence,[402] decisions about which trial rights apply at sentencing have followed a remarkably consistent, if unarticulated, course: rights designed to provide extra protection to the defendant do not apply at sentencing; rights directed towards assuring an accurate, balanced, but reasonably efficient result do apply.

What can explain this silent consistency? The short answer is due process. The slightly longer answer is a relatively stable conception of the nature of sentencing proceedings, or, put differently, of the residual liberty interest of a criminal defendant at the point between conviction and sentencing.

The short answer first. As already noted, constitutional restrictions imposed on the states in sentencing proceedings are ultimately all founded upon the Due Process Clause of the Fourteenth Amendment.[403] Nonetheless, the Court has not taken the opportunity to make a distinction between the constitutional rights at sentencing in state versus federal prosecutions. Moreover, although the Court could, perhaps, have adopted a formal approach of holding all the specific Bill of Rights provisions *inapplicable* at sentencing and expressly limited its inquiry to the question of whether the particular procedure comported with due process, the Court has not done so. To the contrary, the Court has repeatedly (though far from uniformly) expressed its "sentencing rights" determinations as interpretations of Bill of Rights guarantees.[404]

Notwithstanding this lack of express reliance on the Due Process Clause, the best-estimate principle for sentencing rights could, no doubt, be reached through a due process analysis. Certainly the best-estimate principle would be within the range of what a judge could decide was the mandatory protection that the state must give a defendant at sentencing under a due process balancing test such as

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procedure jurisprudence rather than standard methods of constitutional adjudication); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 3–4 (1997) (asserting that criminal procedure rules exist in a vacuum and that the Court fails to consider that the rules are part of a larger criminal justice system).

402. *See generally* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) (assessing the theory of a "counter-revolution" in criminal procedure).

403. *See supra* text accompanying note 43.

404. *See, e.g.*, Mitchell v. United States, 526 U.S. 314, 326–29 (1999) (concluding that the Fifth Amendment privilege against self-incrimination applies to sentencing hearings); Mempa v. Rhay, 389 U.S. 128, 134–37 (1967) (holding that the Sixth Amendment right to counsel applies in a felony probation revocation or deferred sentencing proceeding).

that of *Mathews v. Eldridge*.[405] A Court could also reach this conclusion using the "fundamental fairness" balancing often seen elsewhere in criminal procedure.[406] In short, attorneys seeking results in accordance with this principle would be well-advised to collect the results of precedents and argue for the principle as a matter of due process.

One may reasonably speculate that judges and justices reaching results in accordance with this principle have done so in accordance with their sense of fair process—of the proper balance between ensuring fairness to a convicted defendant and the state's interest in efficient proceedings and an appropriate sentence.[407] The notion would be that, once convicted of the crime, the defendant is not entitled to special protection from the punishment for which that conviction makes him eligible. The traditional rationale for the special protections provided criminal defendants—Blackstone's statement of the law's view "that it is better that ten guilty persons escape, than one innocent suffer"[408]—is, in this view, no longer applicable.[409] The convicted individual facing sentencing is, by definition, not innocent. Retributive and utilitarian concerns about the high cost of punishing the innocent (or risking doing so) might be

405. The *Mathews* test is set out *supra* note 34. The Court would weigh the private interest to be affected (the amount of "liberty deprivation" between the maximum and minimum sentences), the risk of an erroneous deprivation under the existing procedure, and the probable value of additional safeguards, against the government's interest in not providing additional procedural safeguards (an appropriate sentence and a nonburdensome proceeding). The Court could reach the best-estimate principle by concluding that accuracy rights were worth the protection in terms of these costs, but that special-protection rights were not.

406. The *Medina* test, *see supra* notes 35–36, with its special emphasis on historical practice may be a little less malleable, but it would certainly be malleable enough by its reliance on "fundamental fairness." All of the rights that would apply at sentencing under a best-estimate approach could be considered as necessary to fundamental fairness, in that they are directed at seeking a balanced and accurate estimate of the appropriate sentence. A court could similarly exclude special-protection rights as not necessary to fundamental fairness post-conviction.

407. For a thorough discussion of the ways in which "pro-defendant" criminal procedure rights relate to the cost of proceedings and the risks of errors, see Keith N. Hylton & Vikramaditya S. Khanna, *Toward an Economic Theory of Criminal Procedure* 9, 25–33 (working paper modified Aug. 12, 2002), *at* http://www.bu.edu/law/faculty/papers (on file with the North Carolina Law Review).

408. 4 BLACKSTONE, *supra* note 59, at *359; *see also* DRESSLER, *supra* note 57, § 2.03, at 29–30 (describing justifications for the traditional view).

409. *See, e.g.*, Harris v. United States, 122 S. Ct. 2406, 2418–19 (2002) (plurality opinion) (asserting that the Fifth and Sixth Amendment guarantee that the defendant " 'will never get more punishment than he bargained for when he did the crime' " but do not provide special protections at sentencing based on the possibility of innocence (quoting Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring))).

deemed inapplicable. Nonetheless, courts might reason that the defendant has a residual liberty interest within the range of possible penalties—an interest protected by due process.[410] The sentence—the amount of punishment the state will inflict on the individual—is a serious matter that must be resolved in a reasonably balanced way through a process that, within reasonable bounds, is designed to get the "right" answer.

My point is not that the system of best-estimate rights that we have at sentencing is the right principle from a normative perspective. Many commentators would disagree with such an assessment,[411] and this Article is agnostic on that question. Rather, my points so far are: (1) the best-estimate principle well describes the actual sentencing rights landscape; (2) a court could arrive at these results through a due-process balancing analysis (though courts have usually reached these results in different ways); and (3) the conception of the nature of the balance of interests at sentencing that might lead courts to decisions in accordance with the principle is sufficiently reasonable

410. Professor Susan Herman has suggested that the Court's resolution of the burden of proof at sentencing and perhaps other due process issues rests on the "positivist" due process line of cases exemplified by *Meachum v. Fano*, 427 U.S. 215, 224–25 (1976), in which the Court considered the extent of process constitutionally required for a transfer from one prison to another, more secure prison. This and other cases, Professor Herman contends, stood for the proposition that:

> [O]nce 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, 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 or awarding good-time credit. . . . The constitutional protection that guards liberty is, according to this view, extinguished by conviction.

Herman, *supra* note 2, at 330. Professor Herman, who forcefully rejects this positivist view on normative grounds, *see id.* at 309, argues that even if this view did apply at sentencing, courts would have to engage in a due process balancing test at sentencing to protect a defendant's " 'right or justifiable expectation' " of particular effects for a sentence on particular factual findings. *Id.* at 330–31 (quoting Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 11–12 (1979)); *see also* Note, *An Argument for Confrontation*, *supra* note 9, at 1892–95 (making the same argument). Both of these commentators conclude that the *Mathews* balancing test should therefore govern sentencing procedures, at least under the Federal Sentencing Guidelines. *See Herman*, *supra* note 2, at 330–31; Note, *An Argument for Confrontation*, *supra* note 9, at 1895. The Court has not expressly followed the path these commentators suggest and has mandated considerably less process than these commentators believe a due process test would require. At the same time, the Court has mandated far more process at sentencing than would be required given a completely extinguished liberty interest under the positivist theory.

411. *See supra* note 9.

that one can imagine courts being guided by them; in other words, the principle's consistency with results is no mere coincidence.

This short "due process" answer offers an explanation for how the law has reached its present state, but the longer answer may be more useful for examination of whether the principle will continue to have force. If a "due process" balancing sense is at the core of the results to date, the longer answer describes the nature of the interest being protected by due process. Due process in protecting the residual liberty interest of a criminal defendant at stake after conviction but before sentencing, an interest that has been relatively stable for much of the past fifty years over which the law of sentencing rights developed, and, indeed, was relatively stable before that as well.[412]

B. Implications

The Court's recent flurry of cases concerning the substantive boundaries of what can be decided at sentencing is also consistent with this reasoning. If the scope of procedural protection at sentencing is hinged on a due process concern, but a concern limited to the defendant's residual liberty interest in the difference between the minimum and maximum sentences authorized by the trial verdict, then those procedures could be justified only for sentences that fell within that range. That appears to be precisely the line the Court's most recent decisions have been policing.

In *Apprendi v. New Jersey*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum" must be determined at trial, rather than at sentencing.[413] Although limited in scope, *Apprendi* was remarkable in that it was a rare example of the Court imposing a constitutional limitation on the legislature's ability to define crimes—in this case, by holding that a particular fact must

412. To be sure, the nature of sentencing has changed radically over that fifty-year period, with a shift from indeterminate to determinate sentencing, *see* CAMPBELL, *supra* note 136, § 1:3, at 9–15, and from one of judicial discretion to one of judicial factfinding, *see* STITH & CABRANES, *supra* note 2, at 1. In any of these regimes, however, the defendant has an interest in receiving the lowest sentence possible given his conviction and a cognizable liberty interest in the "right" sentence (however that might be determined as a matter of substantive law) and may be understood by the Supreme Court to have forfeited his right to special protection against a sentence below that his conviction authorized.

413. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

be made an element of the offense.[414] Yet if the amount of process constitutionally mandated at sentencing depends on treating the defendant's liberty interest as limited to the range of punishments authorized by the conviction, the *Apprendi* result was necessary to preserve the procedural structure. The statute at issue in *Apprendi* allowed the state, through the results of sentencing, to deprive the defendant of liberty *beyond* the deprivation already authorized by the conviction. Such an approach might well have led to requiring greater procedural protections at sentencing.

In *Ring v. Arizona*, the Court reaffirmed and extended *Apprendi*'s rule that a fact that increased the maximum sentence could not be determined at sentencing.[415] In overruling *Walton v. Arizona*,[416] *Ring* extended *Apprendi* by closing a loophole that would have allowed legislatures to circumvent *Apprendi* and put the finding that increases the maximum punishment back into sentencing in capital punishment cases.[417] In *Ring*, the Court rejected a legislative scheme that purported to establish the maximum sentence in the statute that contained the elements proven at trial, while simultaneously employing a separate statute that forbade imposition of the maximum sentence without an additional factual finding at sentencing.[418] Without so extending *Apprendi*, the Court concluded that *Apprendi*'s rule "would be reduced to a 'meaningless and formalistic' rule of statutory drafting."[419]

While extending *Apprendi* in *Ring*, the Court also circumscribed *Apprendi*'s impact in *Harris v. United States*. The result in *Harris* is very hard to reconcile with *Apprendi* and *Ring*, unless *Apprendi* and *Ring* are interpreted as policing the understanding of the scope of the defendant's liberty at sentencing, which appears to underlie the Court's best-estimate structure. *Harris* presented a statute that raised the *minimum* penalty for the crime based on a factual finding by the judge at sentencing.[420] The Court had previously approved the

414. For a discussion of the significance of *Apprendi* as a substantive limitation on the legislature's ability to define crimes, and a comparison of it to earlier such limitations prescribed by the Court, see Alan C. Michaels, *Truth in Convicting: Understanding and Evaluating* Apprendi, 12 FED. SENTENCING REP. 320, 323–25 (2000).

415. Ring v. Arizona, 122 S. Ct. 2428, 2443 (2002).

416. 497 U.S. 639 (1990).

417. *Ring*, 122 S. Ct. at 2443.

418. *Id.* at 2440–41.

419. *Id.* at 2441 (quoting Apprendi v. New Jersey, 530 U.S. 466, 541 (2000) (O'Connor, J., dissenting)).

420. Harris v. United States, 122 S. Ct. 2406, 2410–14 (2002).

constitutionality of such statutes in *McMillan v. Pennsylvania*.[421] The question in *Harris* was whether *McMillan*'s rule that determination of facts that would raise the minimum sentence could be left to sentencing in light of *Apprendi*'s holding that facts which raised the maximum sentence could not be.[422]

Viewed from the perspective of how much difference the decision made to the defendant, the two holdings are irreconcilable. Justice Kennedy's opinion, in setting out the defendant's argument, captured this tension between *Apprendi* and *McMillan* succinctly:

> Petitioner argues, however, that the concerns underlying *Apprendi* apply with equal or more force to facts increasing the defendant's minimum sentence. Those factual findings, he contends, often have a greater impact on the defendant than the findings at issue in *Apprendi*. This is so because when a fact increasing the statutory maximum is found, the judge may still impose a sentence far below that maximum; but when a fact increasing the minimum is found, the judge has no choice but to impose that minimum, even if he or she otherwise would have chosen a lower sentence.... Why, petitioner asks, would fairness not also require the latter sort of fact to be [subject to the protections of trial rights]?[423]

The plurality opinion's answer in *Harris* was unambiguous. Because it is well established that factual findings that may have an enormous impact on the defendant's actual sentence can be determined under the procedural regime authorized for sentencing, "a factual finding's practical effect cannot by itself control the constitutional analysis. The Fifth and Sixth Amendments ensure that the defendant 'will not get *more* punishment than he bargained for

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421. 477 U.S. 79, 81–82, 86 (1986).

422. *See Harris*, 122 S. Ct. at 2410.

423. *Id.* at 2418–19; *see also id.* at 2420 (Breyer, J., concurring in part and concurring in the judgment) (suggesting that *Apprendi* and *Harris* are logically indistinguishable); *id.* at 2427–28 (Thomas, J., dissenting) (collecting previous views of Justices who reasoned that the "decision in *McMillan* could [not] coexist with the logical implications of ... *Apprendi*").

The decisions are equally difficult to reconcile if *Apprendi* is understood, as I have argued elsewhere it should be, as providing "truth-in-convicting" values. *Apprendi* could be taken to stand for the principle that individuals are entitled to advance notice regarding the maximum penalties they may suffer for their actions, and the holding is justifiable on these grounds. Michaels, *supra* note 414, at 322; *see also* King & Klein, *supra* note 62, at 1486–87 (justifying the *Apprendi* rule on the ground that it induces legislators to be clear about the maximum punishment they are authorizing for an offense). It is hard to see why individuals would not be equally entitled to a clear, advance statement from the legislature of the minimum penalty the crime entails. *See* Michaels, *supra* note 414, at 329 n.48.

when he did the crime,' but they do not promise that he will receive 'anything less' than that."[424]

The argument, put slightly differently, is that once convicted a defendant has a vastly reduced liberty interest in any sentence up to, and including, the maximum. Constitutionally mandated sentencing procedures are those that are sufficient to protect that residual liberty interest. *Apprendi* was justified in intruding on legislative prerogatives because the statute in question was an attempt to authorize a deprivation of liberty *beyond* the maximum authorized by a conviction without the heightened procedural protections required for doing so. Because mandatory minimum sentences do not raise this concern, *McMillan* did not need to be overruled.

Whatever the normative merits of this approach may be, and one may well question a system that does not more closely connect the extent of the required procedure to the actual extent of the interest at stake,[425] the Court's recent decisions in *Apprendi*, *Ring*, and *Harris*

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424. *Harris*, 122 S. Ct. at 2419 (quoting Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring)).

425. Some commentators have argued that, under the Federal Sentencing Guidelines and similar systems, factual determinations at sentencing are so important that they are functionally part of the substance of the crime. Professor Kate Stith and Judge José Cabranes, leading proponents of this view, make the argument forcefully:

> [T]he federal Sentencing Guidelines effectively function as an adjunct to the substantive criminal statutes enacted by Congress. . . . In essence, the Sentencing Commission has identified a multitude of new "Guidelines crimes" . . . . The sentencing hearing has thus been transformed into an adjudicatory process, in which the sentencing court determines which "Guidelines crimes" the defendant has committed. The defendant may be formally convicted of one crime at trial (or by plea of guilty), only to be sentenced for additional criminal conduct defined in the Sentencing Guidelines.

STITH & CABRANES, *supra* note 2, at 3. Many other commentators share this view. *See, e.g.*, Heaney, *supra* note 9, at 166 (arguing for efficiency and fairness improvements to the guidelines sentencing system to prevent due process violations); Reitz, *supra* note 8, at 573 (advocating a "conviction-offense" sentencing system because "real-offense" sentencing allows sentencing facts to deviate from or override trial factfinding).

Although the Court has, to date, stood by the formal distinction between trial and sentencing that its best-estimate structure would seem to depend on, there are some signs that it may not do so indefinitely. One is the slimness of the majority in *Harris*. If the Court had overruled *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and required that facts that raise the minimum sentence be adjudicated at trial, rather than at sentencing, the holding might have constituted a recognition that changes in sentencing systems mandate more substantive restrictions on sentencing to preserve the procedural structure. A second sign is the Court's single departure from its best-estimate structure—its 1999 decision in *Mitchell*, which extended the rule against adverse inferences based on silence from the trial context to sentencing. Mitchell v. United States, 525 U.S. 314, 328–30 (1999). Perhaps significantly, *Mitchell* arose under the Federal Sentencing Guidelines. *Mitchell* may betray a sense that systems such as the Federal Sentencing Guidelines

suggest that the Court may continue on the procedural path it has charted over the past fifty years. The Court has been willing to put substantive limitations on what can be decided at sentencing to the extent, but only to the extent, necessary to support a view of the defendant's liberty interest at sentencing that supports the best-estimate principle it has consistently followed.

On the other hand, the predictive game is a difficult one, particularly in this circumstance, because *Apprendi* and *Harris* were each decided by the thinnest of majorities. Perhaps the most that can be said is that the procedural structure the Court has created for sentencing would seem to mandate some substantive limits on what can be decided at sentencing. The Court has, in turn, enforced those substantive limits. Only time will tell whether that will suffice to preserve its procedural structure.

CONCLUSION

The Supreme Court has established over two dozen constitutional rights relating to criminal adjudication. At the same time, the Court has not articulated a consistent explanation for whether and when these rights apply to sentencing proceedings. To the contrary, although the Court has resolved the applicability of about half of these rights at sentencing, the Court's opinions have a decidedly ad hoc flavor—articulating different grounds for decisions and frequently ignoring the other parts of its jurisprudence.

Yet, despite the Court's continued citation to *Williams v. New York* (the seminal "rights-do-not-apply-at-sentencing" case)[426] and the chorus of criticism from commentators calling for more procedural rights at sentencing, systematic scrutiny of the decided cases reveals that perhaps as many rights do apply at sentencing as do not. Moreover, at least until very recently, the Court has charted a consistent path through these issues. Rights directed at a balanced and thorough process—in other words, rights that support accuracy concerns or that tend to put the prosecution and defense on a more even playing field—do apply at sentencing. Rights that offer the defendant special protections—such as those that automatically resolve errors in the defendant's favor or primarily protect the defendant's autonomy—do not apply at sentencing.

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change the substantive nature of sentencing to such a degree that the best-estimate level of process no longer suffices.

426. *See supra* note 2 and accompanying text.

If the Court continues on this path, it can be expected eventually to recognize rights of presence, notice, allocution, and rebuttal. On the other hand, the Court also can be expected to maintain its much criticized permissive attitude towards hearsay and burdens of proof and not to establish rights to proceed pro se or to forbid the use of silence to show lack of remorse. Some of these results comport with the view that lower courts have taken and some do not.

The due process principle that seems to underlie the Court's sentencing structure necessarily implies substantive limitations on what can be decided at sentencing. The Court's decision in *Apprendi v. New Jersey* and its decisions in its most recent term in *Ring v. Arizona* and *Harris v. United States* suggest that it is willing to take the relatively extraordinary step of placing substantive restrictions on the legislature's discretion in crime definition in order to police the substantive limitations on sentencing minimally necessary to support its procedural structure. The Court will, in ensuing terms, likely need to wrestle with the question of whether those substantive limitations will ultimately prove sufficient to save its procedural edifice.