6-1993

Is Conviction Irrelevant?

Elizabeth T. Lear
University of Florida Levin College of Law, lear@law.ufl.edu

ARTICLES

IS CONVICTION IRRELEVANT?

Elizabeth T. Lear*

The past five years have been witness to a revolution in federal sentencing practice: indeterminate sentencing, dominated by discretion and focused on the rehabilitative prospects of the offender, has been replaced by guidelines infused with offense-based considerations.[1] As sweeping as the change in sentencing procedure has been, the system retains troubling aspects of the former regime. The most controversial among these is the Guidelines' reliance on unadjudicated conduct to determine proper punishment levels.[2]

---

* Associate Professor of Law, University of Florida. B.A. 1981, University of North Carolina at Chapel Hill; J.D. 1987, University of Michigan. I am deeply indebted to Francis Allen, Charles Collier, Daniel Freed, Kenwyn Fuller, Jerold Israel, Andrew Kind, Marc Miller, Robert Moffat, Evan Roth, Kevin Reitz, Sharon Rush, Stephen Schulhofer, Michael Seigel, and Christopher Slobogin for their insightful comments on earlier drafts of this Article and to William Hazzard, Kathryn Love, Michael Dupee, and James Holmes for their excellent and tireless research assistance. I am also grateful to the University of Florida College of Law for supporting this research with summer research appointments.

1. The indeterminate system vested the sentencing court with nearly absolute discretion to sentence within a range of appropriate punishment (for instance, 2 to 20 years) designated by statute. *See infra* Part I. In 1984, Congress passed the Sentencing Reform Act, which officially abandoned the aging indeterminate sentencing model for the federal courts. *See* Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–3586 (1988 & Supp. III 1991); 28 U.S.C. §§ 991–998 (1988 & Supp. II 1990) (referred to throughout this Article as the "Act"). The Act eliminated parole and created the United States Sentencing Commission to design a guidelines system. In November 1987, the United States Sentencing Guidelines became law. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL 1 (1993) [hereinafter U.S.S.G.] (referred to throughout this Article as the "Guidelines").

2. The Guidelines as a whole were greeted with extreme hostility by the federal bench, provoking many district courts and one court of appeals to declare the entire enterprise unconstitutional. *See* U.S. SENTENCING COMM'N, 1989 ANNUAL REPORT 11 (1990) (documenting that 200 judges declared the Guidelines unconstitutional within

the first year of operation). Not until the Supreme Court definitively upheld the Commission's constitutionality in United States v. Mistretta, 488 U.S. 361 (1989), did the lower courts get down to the business of imposing the Guidelines' sentences. *See* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 2, 23-40 (1991) (analyzing the delegation doctrine challenge in *Mistretta*).

Commentary about all aspects of the Guidelines has been extensive. *See* Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1685 n.10 (1992) (listing critical reviews of the Guidelines by "federal judges, scholars and others"). To date, four law review symposium issues have been dedicated, at least in part, to Guidelines issues: Symposium, *Federal Sentencing Guidelines Symposium*, 29 AM. CRIM. L. REV. 771 (1992); Symposium, *Making Sense of the Federal Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 563 (1992); Symposium, *Punishment*, 101 YALE L.J. 1681 (1992); Symposium, *Symposium on Federal Sentencing*, 66 S. CAL. L. REV. 99 (1993).

The Guidelines' extensive reliance on unadjudicated conduct, or "real" factors, permeates the system and has proven particularly controversial. Numerous scholars, judges, and practitioners have explored the rationale and consequences of this decision. *See, e.g.*, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8–12 (1988) (reviewing the Commission's reasons for preferring a real offense system); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 185–225, 228–30 (1991) (contending that the Guidelines have not eliminated disparity because real factors may be manipulated, that the relevant conduct provisions violate due process by requiring judges to sentence for uncharged or unproven criminal acts, and recommending that an "offense-of-conviction model . . . replace the modified real offense system adopted by the Sentencing Commission"); 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, 323–43 (1992) (arguing that real factors significantly influencing the length of a sentence must be moved from the sentencing hearing to trial for proof beyond a reasonable doubt); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 925 n.228 (1990) (describing reasons for relying on modified real offense model); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 544–61 (1992) (adding to their earlier study of the extent of Guidelines compliance); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 848–50 (1992) [hereinafter Schulhofer, *Assessing the Federal Sentencing Process*] (responding to Heaney's criticism and rejecting Heaney's version of an offense-of-conviction model); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 278–86 (1989) (assessing the extent to which prosecutors are manipulating sentences (by withholding evidence of real conduct) through charge bargaining); William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 497–520 (1990) (discussing the decision and describing the key provision incorporating the real offense concept); Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880, 1895–98 (1992) (contending that defendants should enjoy a right to confrontation at sentencing given the impact of real factors on the ultimate sentence); Richard Husseini, Note, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1407–11 (1990) (arguing that the importance of factual determinations of real factors mandates a higher burden of proof at sentencing); *see also* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45

This approach is a variation on "real offense" sentencing,[3] which severs the punishment inquiry from the offense of conviction, focusing instead on an offender's "actual" conduct. Under the Guidelines, the "real offense" often encompasses acts prohibited by criminal statute that have never been the subject of a formal conviction. This Article challenges the constitutionality of treating such unconvicted criminal conduct[4] as an aggravating factor at sentencing.[5]

Punishment for nonconviction offenses, whether the result of an acquittal, a dismissed count, or conduct never charged, forms one of the mainstays of the fledgling federal system.[6] For example, under the Guidelines, a defendant convicted of possession with intent to distribute two kilograms of cocaine, but acquitted of a three-kilogram count, may be sentenced as if the acquittal never oc-

---

STAN. L. REV. 523, 547–65 (1993) (discussing policy reasons for rejecting real offense sentencing, focusing primarily on state systems); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 757–72 (1980) [hereinafter Schulhofer, *Due Process of Sentencing*] (discussing the difficulties in relying on real offense model to control prosecutorial power at sentencing); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550, 1564–85 (1981) (rejecting real offense sentencing on constitutional and policy grounds before the adoption of the Guidelines); Michael Tonry & John C. Coffee, Jr., *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES 142, 152–63 (Andrew von Hirsch et al. eds., 1987) (reviewing the real offense model in the context of guidelines systems in general).

3. Real offense sentencing is discussed in detail *infra* subpart I.B. The Guidelines are often described as a "modified" real offense system. The system is modified in that the judge initially focuses on the offense of conviction, adjusting later for "real" factors, and because the Guidelines exclude from consideration some information (such as employment history) that real offense regimes have historically considered relevant. *See* Breyer, *supra* note 2, at 8-12 (reviewing the Commission's reasons for preferring a version of real offense sentencing); Nagel, *supra* note 2, at 925 n.228 (describing reasons for relying on a "modified" real offense model).

4. The terms "nonconviction offense," "unconvicted criminal conduct," "unadjudicated crime," and "nonconviction crime" are used interchangeably to refer to conduct that has never been the subject of a conviction but is defined as criminal by statute. The terms "acquittal conduct" and "acquittal offense" refer to offense conduct that is the subject of a count for which a defendant has been acquitted. The practice of basing punishment on nonconviction offenses is referred to as "nonconviction offense sentencing," which is a subset of real offense sentencing, and is discussed in detail *infra* Part I.

5. This Article considers only the constitutionality of treating unadjudicated crimes as sentencing factors. It makes no attempt to address the issues surrounding the incorporation of other bad, but not specifically criminal, acts at sentencing.

6. The Chairman of the Sentencing Commission explained in a 1990 article that the relevant conduct provisions, by far the most expansive method of incorporating nonconviction offenses into the sentencing calculus, form the "cornerstone" of the Guidelines system. *See* Wilkins & Steer, *supra* note 2, at 496.

curred.[7] Though the 2-kilogram conviction alone theoretically dictates a sentence between 78 and 97 months, the Guidelines categorize the 3-kilogram acquittal offense as occurring within "the same course of conduct," thus increasing the sentencing range to 121 to 151 months.[8] Similarly, an offender who pleads guilty to one count of theft in exchange for the dismissal of a second theft charge may be sentenced to the identical term he would have received had he pled guilty to both.[9] And a conviction for a single count of

---

7. United States v. Rivera-Lopez, 928 F.2d 372, 372–73 (11th Cir. 1991) (holding that the Government's failure to prove all the elements of the three-kilogram offense, for which the jury acquitted the defendant, did not preclude the sentencing judge from considering the facts underlying the acquittal offense if those facts were established by a preponderance of the evidence); *see also* United States v. Manor, 936 F.2d 1238, 1243 (11th Cir. 1991) (holding that, when the jury convicted the defendant on two cocaine distribution counts and acquitted on a conspiracy charge, the sentencing judge could include the drug quantity involved in the acquittal offense because "an acquittal based on a reasonable doubt standard should not preclude a contrary finding using the preponderance of the evidence" standard at sentencing); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 180–82 (2d Cir.) (allowing the defendant's sentence for various narcotics offenses to be enhanced for carrying a firearm during the crimes despite the jury's not guilty verdict on a charge of using and possessing a firearm), *cert. denied*, 111 S. Ct. 127 (1990); United States v. Dawn, 897 F.2d 1444, 1449–50 (8th Cir.) (holding that a jury acquittal on a charge of using a firearm during a bank robbery "does not undermine the fact that a preponderance of the evidence supported the conclusion that a firearm was used during the robbery" for which the defendants were convicted and allowing the firearm to be considered at sentencing), *cert. denied*, 111 S. Ct. 389 (1990); United States v. Mocciola, 891 F.2d 13, 16–17 (1st Cir. 1989) (allowing the defendant's sentence for cocaine possession to be enhanced for possession of a firearm despite the jury's acquittal of the defendant on the same weapons possession charge); United States v. Juarez-Ortega, 866 F.2d 747, 748–49 (5th Cir. 1989) (allowing handgun possession acquittal to be considered in sentencing on cocaine distribution counts).

Not every sentence under the Guidelines that relies in part on evidence of a nonconviction offense is equivalent to the sentence the defendant would have received had he been convicted of the nonconviction offense. In some cases, the statutory maximum for the offense of conviction acts as a ceiling, thus limiting the impact of the nonconviction offense on the sentence.

8. The Eleventh Circuit's opinion in *Rivera-Lopez* does not specify the exact sentence imposed by the district court. According to the drug tables set forth in U.S.S.G., *supra* note 1, § 2D1.1(c), a finding that 2 kilograms of cocaine were involved in the offense yields a "base offense level" of 28, while a finding of 5 kilograms yields a base level of 32, assuming a Guidelines Criminal History score of Category I.

9. United States v. Scroggins, 880 F.2d 1204, 1211–14 (11th Cir. 1989) (agreement to drop 1 count charging 18 instances of theft in exchange for the defendant's plea of guilty to another count alleging only 1 act of theft requires a Guidelines sentence based upon the entire amount of money allegedly stolen during all thefts originally charged in the indictment, resulting in the identical sentence that the defendant would have received had he been convicted of both counts), *cert. denied*, 494 U.S. 1083 (1990); *see also* United States v. Camuti, 950 F.2d 72, 74 (1st Cir. 1991) (conduct involved in two counts dropped as a result of a plea bargain considered in sentencing for the count under which the defendant pleaded guilty); United States v. Salmon, 948 F.2d 776, 778 (D.C. Cir. 1991) ("Plea agreements . . . calling for the dismissal of counts, will not

money laundering may provoke punishment not only for the conviction offense but for any other episodes of money laundering in which the defendant allegedly engaged, regardless of the government's failure to include these episodes in the indictment.[10]

Constitutional challenges to punishment for nonconviction offenses have met with consistent rebuffs in the federal courts. With the exception of the Ninth Circuit,[11] the courts of appeals have perceived no constitutional impediment to "counting" nonconviction offenses at sentencing.[12] After pointing out that the federal courts

---

necessarily result in a reduced sentence under the Sentencing Guidelines."); United States v. Ruelas-Armenta, 684 F. Supp. 1048, 1050–52 (C.D. Cal. 1988) (consideration of conduct involved in charges dropped as a result of plea bargain does not destroy all incentives to enter plea bargains).

10. *See* United States v. Stevenson, No. 89-50443, 1992 U.S. App. LEXIS 279, at *2 (9th Cir. Jan. 8, 1992) (calculating sentence based on estimate of $139,755 laundered by the defendant where indictment charged $54,794 and the count of conviction was for $16,104); *see also* United States v. Andrews, 948 F.2d 448, 448–50 (8th Cir. 1991) (per curiam) (using the defendant's admitted participation in 5 uncharged bank robberies to increase sentence for aiding and abetting a single armed bank robbery and using a firearm in that crime, which resulted in a 90-month sentence when sentencing range for crime of conviction was 37–46 months).

11. The Ninth Circuit alone excludes from the Guidelines sentencing score real conduct necessarily rejected by the jury in acquittal cases. *See* United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1991) (refusing to allow the sentencing judge to punish the defendant for conduct "that the jury has necessarily rejected by its judgment of acquittal"). The Eighth Circuit flirted briefly with the notion that the Commission lacked statutory authority to require punishment for some nonconviction offenses pursuant to the relevant conduct provisions. United States v. Galloway, 943 F.2d 897, 899–905 (8th Cir.), *vacated and reh'g granted*, 1991 U.S. App. LEXIS 27316 (8th Cir. 1991) (en banc), *rev'd*, 976 F.2d 414 (8th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1420 (1993). The opinion, however, was quickly recalled pursuant to a decision to review the question en banc. The court reversed its position in the later decision, holding that not only were the nonconviction offense provisions statutorily authorized, but also that the provisions did not violate the constitutional rights to indictment, jury trial, and proof beyond a reasonable doubt. *Galloway*, 976 F.2d at 422, 425.

The district courts have been slightly more receptive to constitutional challenges. Judge Eisele's opinion in United States v. Clark, 792 F. Supp. 637, 650 (E.D. Ark. 1992), rejecting the use of uncharged criminal conduct as a sentencing factor on Fifth and Sixth Amendment grounds, is particularly interesting in that he was the author of the district court opinion in *Galloway* in which he also rejected the use of uncharged conduct in that case on constitutional grounds. *See Galloway*, 943 F.2d at 898–99 (quoting Judge Eisele's district court opinion in *Galloway*).

12. *See, e.g.*, United States v. Rivera-Lopez, 928 F.2d 372, 372–73 (11th Cir. 1991) (per curiam) (rejecting a challenge that the use of acquittal conduct at sentencing is contrary to the foundation of our judicial system, is a denial of due process, and usurps the jury's role by noting that the use of acquittal conduct in sentencing had already been approved in prior decisions); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 179–82 (2d Cir.) (allowing the use of acquittal conduct over a double jeopardy challenge because the Guidelines did not change the practice as established in pre-Guidelines cases and over a due process challenge because it is well established "that disputed sentencing factors need only be proved by a preponderance of the evidence to satisfy due

have incorporated nonconviction offenses into punishment decisions for nearly half a century,[13] the cases explain that the defendant operates under a misconception: the defendant is not actually punished for the nonconviction offense conduct; the sentence for the conviction offense is merely "enhanced" as a result of that conduct.[14] Based on this historical distinction between punishment and

---

process"), *cert. denied*, 111 S. Ct. 127 (1990); United States v. Mocciola, 891 F.2d 13, 17 (1st Cir. 1989) (allowing the use of acquittal conduct in sentencing because the jury's not guilty verdict did not mean that the conduct was "clearly improbable" but "simply means that the government did not meet its considerable burden under the reasonable doubt standard"); United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989) (dismissing a due process challenge to the use of acquittal conduct at sentencing because it was based on the "flawed" assumption that the acquittal established the defendant's innocence); United States v. Restrepo, 884 F.2d 1294, 1296 (9th Cir. 1989) (over an argument that the Guidelines impermissibly shift the burden of proof to the defendant to show no connection between the firearm and the offense of conviction, the court allowed enhancement for uncharged firearms possession because the Guidelines do not require that any connection at all be shown, but merely require that the firearm be possessed during the offense of conviction); United States v. McGhee, 882 F.2d 1095, 1098 (6th Cir. 1989) (allowing sentence enhancement for uncharged firearms possession over a due process challenge that the enhancement violated the Sixth Amendment jury trial right because "[n]ot all factors that bear on punishment need to be proven before a jury"); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989) (allowing the use of acquittal conduct at sentencing despite the argument that its use overrode the jury's factual determination because the acquittal conduct was not used to punish for the acquittal offense, "but to justify the heavier penalties for the offenses for which [defendant] was convicted"); United States v. Ryan, 866 F.2d 604, 609 (3d Cir. 1989) (affirming the use of acquittal conduct in sentencing over a challenge suggesting such use was inconsistent with the Guidelines by noting its use in pre-Guidelines cases and interpreting the Guidelines to allow that practice to continue).

13. The Supreme Court officially upheld the use of uncharged criminal conduct to enhance a sentence against a Confrontation Clause challenge in 1949. Williams v. New York, 337 U.S. 241, 252 (1949). Although the Court has never reviewed the use of acquittal conduct at sentencing, many courts of appeals upheld such enhancements well before the advent of the Guidelines. *See* United States v. Lee, 818 F.2d 1052, 1055 (2d Cir.) (noting that any information may be used that gives the sentencing court "a more complete and true picture" of the defendant, specifically including "other crimes for which the defendant was neither tried nor convicted, and crimes charged that resulted in acquittal"), *cert. denied*, 484 U.S. 956 (1987); United States v. Cardi, 519 F.2d 309, 314 n.3 (7th Cir. 1975); United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972) (holding that the sentencing judge "could properly refer to the evidence introduced with respect to crimes of which defendant was acquitted"). Challenges to Guidelines sentences based upon unconvicted criminal conduct have more often than not been greeted with the point that this aspect of the Guidelines is merely a codification of the traditional practice in federal sentencing. *See* United States v. Ryan, 866 F.2d 604, 609 (3d Cir. 1989) ("Before the guidelines were promulgated, a court was permitted to consider evidence on counts of which a defendant was acquitted in sentencing the defendant . . . . [T]he guidelines . . . indicate that the Commission intended to permit sentencing courts to continue to consider such information . . . ."); United States v. Mocciola, 891 F.2d 13, 16 (1st Cir. 1989) (quoting *Ryan* with approval).

14. *See, e.g.*, United States v. Mobley, 956 F.2d 450, 457 (3d Cir. 1992) (noting that the defendant's argument "seeks to blur the distinction among a sentence, sentence

enhancement, the courts have issued a series of astonishing statements, chief among them that "[a] verdict of acquittal demonstrates only a lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant's innocence" for sentencing purposes.[15]

Tradition is no substitute for constitutionality; the steadfastness with which the courts have proclaimed the constitutionality of nonconviction offense sentencing should not deter its re-examination.[16] This Article rejects the idea that a label attached to time spent in jail as a result of specific unconvicted criminal conduct is dispositive of the constitutional question. Rather, this Article is premised on the notion that an incremental increase in a sentence, attributable to an offense for which a defendant has never been convicted, is not a figment of a defendant's imagination. Whether one calls it "enhancement" or "punishment," a longer sentence remains a serious restriction on an offender's actual freedom. It is the constitutionality of this restriction, not its semantic classification, to which this Article is addressed.

The use of nonconviction offenses to increase punishment at sentencing is at odds with the central role of the grand and petit juries in the constitutional plan for the administration of justice. The Constitution places the jury at the heart of the criminal justice system as the "fundamental guarantor of individual liberty."[17] Practice under the Guidelines graphically illustrates the extent to which nonconviction offense sentencing emasculates the jury system's ability to control potential executive and judicial abuse of the criminal sanction. Due to its demonstrable incompatibility with the constitutional role of the jury, nonconviction offense sentencing, and the flawed due process theory on which it is premised, must be rejected.

Part I of this Article briefly describes the adoption of the Guidelines model, discusses the decision to rely on nonconviction crimes at sentencing, and illustrates the operation of principal pro-

---

enhancement, and definition of an offense"); *Mocciola*, 891 F.2d at 17 (noting that the defendant's argument "misperceives the distinction between a sentence and a sentence enhancement"); *Juarez-Ortega*, 866 F.2d at 749 ("The sentencing court was not relying on facts disclosed at trial to punish the defendant for the extraneous offense, but to justify the heavier penalties for the offenses for which he was convicted.").

15. *Isom*, 886 F.2d at 738.

16. *E.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (reversing at least half a century of educational practices pursuant to the "separate but equal" doctrine upheld in Plessy v. Ferguson, 163 U.S. 537 (1896)).

17. SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW 34 (1990). Unless otherwise specified, references to the jury or jury system encompass both the grand and petit juries in the federal system.

visions by which nonconviction offenses are incorporated into the Guidelines scoring process. Part II examines Supreme Court and courts of appeals cases rejecting constitutional challenges to punishment for unconvicted criminal conduct.

Part III argues that the prevailing due process analysis of nonconviction offense sentencing must be rejected, not as a result of any change in sentencing philosophy, but because it was wrong in the first instance. Using the Guidelines as a paradigm for systems embracing nonconviction offense sentencing, Part III demonstrates the disruptive effect punishment absent conviction has upon the structure and integrity of the criminal justice system through the classic jury trial model. The Article concludes that sentencing factors encompassing conduct separately proscribed by criminal statute must be excised from the Guidelines system as unconstitutional.

I. THE NONCONVICTION OFFENSE AS A SENTENCING FACTOR UNDER THE GUIDELINES

A. *The Creation of the Federal Sentencing Guidelines*

For the better part of this century, the federal system, like that of the states, operated under the rubric of the indeterminate sentence.[18] Premised on the notion that crime was "a moral disease," the diagnosis and cure of which were properly delegated to the "experts" in the criminal justice and correctional fields, this approach elevated reformation to the "supreme aim of prison discipline."[19] To aid officials in their efforts to rehabilitate, legislatures passed criminal statutes with open-ended punishments, vesting judges with broad discretion to assess a criminal's prospects for rehabilitation and to sentence him accordingly.[20] For example, in the federal system, the Controlled Substances Act allows the sentencing judge to

18. Commissioner Nagel traces the origin of indeterminate sentencing in the United States to an 1870 *Declaration of Principles by the National Congress of Prisons* adopting reform as the guiding principle of prison discipline. *See* Nagel, *supra* note 2, at 893–94. By the time Congress officially adopted an indeterminate system in 1910, roughly half of the states had already embraced the rehabilitative approach. *Id.* at 894.

19. Nagel, *supra* note 2, at 893 n.62 (citing AMERICAN CORRECTIONAL ASS'N, TRANSACTIONS OF THE NATIONAL CONGRESS OF PRISONS AND REFORMATORY DISCIPLINE (1870)).

20. Having elevated reform to the overriding aim of imprisonment, the reformers logically "reasoned that the prisoner should be sentenced until he or she had reformed—which was by definition an indeterminate time." *Id.* at 893–94. After embracing the rehabilitative spirit, legislatures delegated sentencing responsibility to courts and prison authorities "with a vengeance." *Id.* at 894.

set punishment anywhere from ten years to life in prison.[21] Other statutes, like the federal law prohibiting bank robbery, merely designate the maximum terms for which an offender might be consigned to prison.[22]

The indeterminate system in the federal courts left the initial punishment choice entirely to the considered judgment of the trial judge. To aid her in this decision, probation officers were called upon to develop presentencing reports detailing:

> any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.[23]

This structure provided an environment in which real offense sentencing flourished with the inquiry extending well beyond the circumstances of the crime of conviction to include contemporaneous acts of alleged criminality as well as those from the distant past.[24]

---

21. 21 U.S.C. § 841(b) (1988 & Supp. III 1991). The statute makes it unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." *Id.* § 841(a). For schedule I and II narcotic drugs, the judge can sentence up to 20 years for the first offense and 30 years for the second offense. *Id.* § 841(b)(1)(C). For schedule III items and nonnarcotic drugs, the sentence can be up to 5 years for the first and 10 years for the second offense. *Id.* § 841(b)(1)(D).

22. 18 U.S.C. § 2113(a) (1988). The statute authorizes a sentence of not more than 20 years or a fine of not more than $5000, or both.

23. FED. R. CRIM. P. 32(c)(2). The Federal Probation Act of 1925 provided for officers to assist judges in obtaining information for sentencing. This legislation made no provision for formal reports. It was not until 1946 that the *Federal Rules of Criminal Procedure* formalized the content of the presentence report. FED. R. CRIM. P. 32. In a separate statute, Congress further provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 3577, 84 Stat. 922, 951 (1970) (codified as 18 U.S.C. § 3577 (1982), later incorporated into the Act as 18 U.S.C. § 3661 (1988)).

Rule 32 was substantially revised in connection with the passage of the Act. For an enlightening discussion of the impact of these revisions and the importance of factual findings in the presentence report under the Guidelines, see generally Keith A. Findley & Meredith J. Ross, Comment, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under* Julian *and the Sentencing Guidelines*, 1989 WIS. L. REV. 837.

24. Williams v. New York, 337 U.S. 241 (1949), discussed *infra* notes 137–53 and accompanying text, provides one of the best illustrations of the breadth of information incorporated into the sentencing decision in the name of rehabilitation. In *Williams*, the Supreme Court upheld a death penalty sentence based on, *inter alia*, accusations in a presentence report that the defendant had committed some 30 uncharged burglaries and had a "morbid sexuality." 337 U.S. at 244. The Court declined to restrict the

Federal sentencing under this system proceeded largely unregulated. Courts of appeals declined to require sentencing opinions[25] and turned their collective backs on challenges to trial courts' choices of sentence length.[26] Once sentenced, the defendant entered yet another realm of discretionary decision making—that of corrections officials responsible for assessing whether the prisoner's reform might warrant an early release.[27]

Given the extreme level of discretion placed in the hands of a single judge, it should have come as no surprise that offenders con-

---

sentencing judge's consideration to information discerned at trial because such a restriction "would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice." *Id.* at 251. For a fascinating and detailed account of the actual information considered by the trial court in the *Williams* case, see Reitz, *supra* note 2, at 528–31.

Under the federal indeterminate system, the impact of allegations contained in the presentence report extended well beyond the sentencing phase. Because the United States Parole Commission relied on the report to categorize defendants for security purposes and determine parole release dates, inaccuracies often had devastating consequences. *See* Findley & Ross, *supra* note 23, at 837–38.

25. *See, e.g.*, United States v. Granados, 962 F.2d 767, 774 (8th Cir. 1992); United States v. Trujillo, 906 F.2d 1456, 1463–65 (10th Cir.), *cert. denied*, 111 S. Ct. 396 (1990); United States v. Castillo-Roman, 774 F.2d 1280, 1283 (5th Cir. 1985) ("[A] sentencing court is not required to enunciate the reasons underlying its decision.").

26. *See, e.g.*, United States v. Johnson, 507 F.2d 826, 829 (7th Cir. 1974) (noting the "accepted principle that a federal trial judge has wide discretion in determining what sentence to impose on a convicted person"), *cert. denied*, 421 U.S. 949 (1975); Gurleski v. United States, 405 F.2d 253, 263 (5th Cir. 1968) ("It is elementary that sentencing is discretionary with the trial judge, and he did not abuse his discretion by fixing punishment within the statutory limits."), *cert. denied*, 395 U.S. 981 (1969).

Sentencing judges took the courts of appeals at their word. *See, e.g.*, United States v. Lowery, 335 F. Supp. 519, 521 (D.D.C. 1971) (claiming that "in matters relating to sentencing the trial court has virtually absolute, if not unfettered discretion" and that "[i]t is clear that absent a manifest abuse of discretion, and provided the trial judge complies with the applicable statute, his discretion in sentencing cannot be infringed upon").

27. Typically, parole authorities retained the discretion to release a "rehabilitated" prisoner at any time after one-third of his sentence had been served or after serving 10 years of a life sentence or of a sentence over 30 years. 18 U.S.C. § 4205(a) (1976) (repealed by Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2027 (1984)).

For many years, parole decisions were considered discretionary and hence not subject to due process restraints. *See* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1234–41 (Sanford H. Kadish ed., 1983). The United States Parole Commission adopted guidelines in 1974 to inject some consistency into the system. *Id.* at 1235. Even then, a prisoner was deemed by the court to have only the most limited procedural due process right to accuracy at the parole release determination stage. Moody v. Daggett, 429 U.S. 78, 88 n.9 (1976); Menechino v. Oswald, 430 F.2d 403, 407–12 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). For a critical review of the Court's due process analysis in the prison context, see generally 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 (1984).

victed of similar crimes received widely disparate sentences.[28] A study of the Second Circuit, for example, disclosed that offenders with identical criminal histories convicted of extortion might receive a sentence of anywhere between three and twenty years, depending upon the sentencing judge.[29] A particularly troubling aspect of the system was the suspicious tendency for minority offenders to receive longer prison terms than their white counterparts.[30] The high rate of recidivism observed by the public also proved problematic.[31] By most accounts, the rehabilitative model had failed.[32]

---

28. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 38–50 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3224–33; MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 12–25 (1972) (offering personal anecdotes to demonstrate sentencing disparities and concluding that the indeterminate system resulted in the loss of vital checks and balances on judicial power); RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 118–23 (Alfred Blumstein et al. eds., 1983). Even early in the life of the indeterminate system, researchers documented startling disparities in sentence length among similar offenders. *See, e.g.*, Frederick J. Gaudet et al., *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM L. & CRIMINOLOGY 811 (1933).

29. S. REP. NO. 225, *supra* note 28, at 41–43, *reprinted in* 1984 U.S.C.C.A.N. at 3224–26 (citing ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES (1974) (reporting the results of a series of hypothetical cases submitted to judges)).

30. *See* Joseph C. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121, 121–25 (1975); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1603–41 (1988).

31. *See* Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 25 (1974) (concluding that prison reform programs to reduce recidivism have failed); James Robison & Gerald Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQ. 67, 80 (1971) (reporting a California study finding "no evidence to support any program's claim of superior rehabilitative efficacy").

32. *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 1–59 (1981). S. REP. NO. 225 sums up as follows:

> At present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of "coercive" rehabilitation—the theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons.
>
> Recent studies suggest that this approach has failed, and most sentencing judges as well as the Parole Commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.

S. REP. NO. 225, *supra* note 28, at 40, *reprinted in* 1984 U.S.C.C.A.N. at 3223 (footnotes omitted).

A series of sentencing reform attempts[33] culminated with the Sentencing Reform Act of 1984,[34] which eliminated parole,[35] created the United States Sentencing Commission to design guidelines for federal courts,[36] and provided for appellate review of sentences.[37] By shifting to this determinate model, Congress hoped to ease public confusion regarding sentence lengths,[38] reduce unwarranted disparity among defendants convicted of similar crimes,[39] and infuse sentences with a sense of proportionality.[40] Although Congress declined to embrace a particular punishment philosophy, the legislation clearly rejects rehabilitation as a legitimate goal of incarceration.[41] The Act specifically excludes reliance

33. *See* Nagel, *supra* note 2, at 899 n.95, 899–900 (discussing the several congressional attempts at reform that led to the Act).

34. 18 U.S.C. §§ 3551–3586 (1988 & Supp. III 1991); 28 U.S.C. §§ 991–998 (1988 & Supp. II 1990). A careful and detailed explanation of the legislation may be found in Nagel, *supra* note 2, at 899–906.

35. *See* Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2008–09 (1984) (codified as amended at 18 U.S.C. § 3624 (1988)); *see also* U.S.S.G., *supra* note 1, ch. 1, pt. A, intro. cmt. at 1.

36. 28 U.S.C. § 991(a) (1988).

37. 18 U.S.C. § 3742 (1988 & Supp. III 1991).

38. U.S.S.G., *supra* note 1, ch. 1, pt. A, intro. cmt. at 2.

39. *See* S. REP. NO. 225, *supra* note 28, at 38, *reprinted in* 1984 U.S.C.C.A.N. at 3221; *see also* 18 U.S.C. § 3553(a)(6) (1988) (explaining the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); Breyer, *supra* note 2, at 4–5.

40. U.S.S.G., *supra* note 1, ch. 1, pt. A, intro. cmt. at 2.

41. *See, e.g.*, 28 U.S.C § 994(k) (1988) (requiring that the Guidelines reflect "the inappropriateness of imposing . . . *imprisonment* for the purpose of rehabilitation.") (emphasis added); *see also* S. REP. NO. 225, *supra* note 28, at 40, *reprinted in* 1984 U.S.C.C.A.N. at 3223.

Though Congress quite clearly rejected the rehabilitative model, it declined to embrace any particular philosophy of punishment. Instead, it charged the Commission with the "establish[ment of] sentencing policies and practices . . . that . . . assure the meeting of the purposes of sentencing" set forth in 18 U.S.C. § 3553(a)(2) (1988), which lists the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. 28 U.S.C. § 991(b)(1)(A) (1988). After encountering substantial disagreement among its members, the Commission also eschewed the adoption of a particular theory of punishment. The Commission rejected the "just deserts" approach advocated by Andrew von Hirsch because, according to Commissioner Breyer, attempting to rank harms in a coherent way was deemed too subjective. Breyer, *supra* note 2, at 15–16. Similarly, the Commission rejected a "crime control" model combining deterrence and incapacitation values because of a lack of evidence demonstrating that small variations in punishment would have any deterrent effect. *Id.* at 16–17. Commissioner Nagel's explanation for the failure to adopt a single theory suggests that the statutory mandate implicitly rejected a pure just deserts theory by using the term "just punishment" in its goals section. *See* Nagel, *supra* note 2, at 915–16. In addition, she explains that the Commission originally attempted to develop two sets of guidelines—one based on a just deserts theory, the other on the crime control model. The crime control draft was eventually abandoned due to external constraints such as data availability com-

on troubling offender characteristics such as race and gender[42] and requires the Guidelines to "reflect the general inappropriateness of considering" a whole host of other offender characteristics uniformly relied on by the rehabilitative model.[43]

After several drafts and extensive comment,[44] the Commission produced a daunting set of sentencing guidelines[45] for the more than 1000 crimes in the federal system.[46] A user must engage in an elaborate scoring process to determine the sentence in a given case. Starting with the "base level" score for the offense of conviction, the

---

bined with the time pressure in the statute (the Commission only had two years to present its guidelines to Congress). Thus only one draft was produced in the spring of 1986—the model based on the just deserts approach. This draft encountered severe and widespread criticism. It was this response that apparently convinced the Commission to abandon that approach. *See id.* at 918–20.

Ultimately, the Commission turned to "typical" past practice to develop a general governing rationale for choices regarding sentence type and length. *Id.* at 922–24 (articulating the agreement reached after experimenting with two other drafts). According to the Commission, this decision "as a practical matter" rendered the choice between competing philosophies "unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results." U.S.S.G., *supra* note 1, ch. 1, pt. A, intro. cmt. at 3.

42. *See* 28 U.S.C. § 994(d) (1988) ("The Commission shall assure that the [G]uidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.").

43. When recommending a term of imprisonment, the Commission was admonished to design guidelines reflecting "the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." *Id.* § 994(e) (1988).

44. Nagel, *supra* note 2, at 914–25.

45. The 1993 edition of the *Federal Sentencing Guidelines Manual* exceeds 800 pages.

46. Nagel, *supra* note 2, at 914. Commissioner Breyer estimates the number of federal criminal statutes at only 688. Breyer, *supra* note 2, at 3. In response to criticism that the Guidelines scoring process is too complex and should have more closely resembled one of the state systems, Commissioner Breyer suggested that the scope of the federal criminal code justifies the difference in approach and complexity of the federal system. *Id.* at 3–4. According to Professor Marc Miller, this difference does not adequately excuse the controversial 43-level grid system. Miller points out that the "number of possible crimes says far less than the number of different kinds of crimes that arise frequently" and notes that "over eighty percent of the federal case load is accounted for by a fairly short list of offenses." He suggests that a simpler, more informative grid would have been possible and preferable. Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 599–600 (1992).

The variety of actions deemed criminal by federal statute is astounding. A review of Title 18 reveals that misappropriation of the "4-H Club emblem" and misappropriation of the character "Smokey [the] Bear" are both federal criminal offenses. 18 U.S.C. §§ 707, 711 (1988). Both of these crimes are currently classified as misdemeanors (and are therefore not covered by the Guidelines), but given the reigning "get tough on crime" mentality, it may only be a matter of time before they are elevated to felony status.

user adds or subtracts levels depending on the presence or absence of aggravating and mitigating factors. Such factors may include, for example, the defendant's "role in the offense,"[47] the total weight of drugs sold or attempted to be sold,[48] the vulnerability of the victim,[49] or the use of a weapon.[50] Once a "base offense level" is established, the user derives a score for the defendant's criminal history.[51] These scores are plotted on a 258-box grid; the point at which they intersect provides the presumptive sentencing range. A limited right to depart exists should a judge determine that factors "not adequately taken into consideration by the Sentencing Commission" exist in a specific case.[52]

B. *Real Offense Sentencing Under the Guidelines*

Perhaps the Commission's most critical, and disturbing, decision when determining the structure and content of the Guidelines sentences was to prefer a "real offense" to a "charge offense" sentencing model.[53] A charge or "conviction-offense" system ties pun-

47. U.S.S.G. *supra* note 1, § 3B1.1(a)–(c).

48. *Id.* § 2D1.1(a)(3), (c).

49. *Id.* § 3A1.1.

50. In several sections, the Guidelines add levels to the base offense score for the use of a firearm during the crime. *See, e.g., id.* § 2A4.1(b)(3) (kidnapping, abduction, unlawful restraint—two levels added); *id.* § 2B2.1(b)(3) (burglary and trespass—two levels added); *id.* § 2B3.1(b)(2)(A)–(C) (robbery—if firearm is "discharged," seven levels added; if "used," six levels added; if "brandished," five levels added).

51. *Id.* §§ 4A1.1–.3.

52. *See* 18 U.S.C. § 3553(b) (1988) (trial court retains right to "depart" in certain situations). See also U.S.S.G., *supra* note 1, § 5K2.0, which sets forth the Commission's views on the appropriateness of using certain information as the basis for departure.

The proper use of the departure power and the Commission's seemingly wholesale rejection of individual factors as legitimate basis for departure, *see id.* § 5H1.1, has generated extensive comment. *See, e.g.*, Freed, *supra* note 2, at 1715, 1738 (criticizing Chapter 5H as inconsistent with the statutory mandate of the Act and recommending that circuit courts entertain challenges to failures to depart); David Yellen, *Appellate Review of Refusals to Depart*, 1 FED. SENTENCING REP. 264, 265 (1988).

53. According to Professor Michael Tonry, the Federal Commission is the only sentencing commission in the United States to reject a charge offense model. *See* Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENTENCING REP. 355, 356-57 (1992); Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission's "Mandatory Guidelines,"* 4 FED. SENTENCING REP. 129, 130 (1991) [hereinafter Tonry, *Mandatory Minimum Penalties*].

Various members of the Sentencing Commission have offered explanations for preferring a modified real offense model to an offense-of-conviction system. Commissioner Breyer suggests that the Commission focused on the limitations of a charge offense system. Such systems may overlook that crimes may be committed in many different ways and that society has thus far thought that differences in conduct during the crime should have an impact on punishment. Breyer, *supra* note 2, at 9. He also points out the potential procedural difficulties attendant to a pure real offense system and empha-

ishment directly to the offense of conviction. A number of successful state guidelines systems have adopted this approach, generally prohibiting reference to nonconviction offenses and prescribing very narrow ranges in which judges may distinguish between cases.[54] Conversely, a "real offense" system is theoretically unconstrained by the crime of conviction and may justify punishment decisions by reference to the "actual" offense. The majority of the states and the federal system operate under some version of a real offense model.[55] At its most expansive, a real offense model might base punishment decisions on the following factors: the current conviction and attendant circumstances; nonconviction offenses committed contemporaneously with the conviction offense; nonconviction offenses committed after the conviction offense;[56] prior convictions and nonconviction offenses; and, perhaps, even a host of biographic components from good works to employment history.[57] Under such an approach, a judge sentencing an offender

---

sizes that the system ultimately adopted was the result of a compromise between the two extremes. *Id.* at 8–12. Though Commissioner Nagel does not detail the Commission's reasons for preferring a modified real offense approach, she does refer to one of the early Guidelines drafts setting forth the relative merits of the two systems. The draft noted that the principal merit of the real offense approach is to allow the "judge to differentiate between seemingly alike offenders whose offense behavior is actually quite different." Nagel, *supra* note 2, at 925 n.228. A conviction offense model was thought to be hindered by the "vague statutory language" of the federal criminal code, which made it inevitable that some real conduct would be taken into account. *Id.* at 926 n.228.

54. Minnesota and Washington are examples of state guidelines systems that rely on a "conviction offense" model. *See generally* Reitz, *supra* note 2, at 535–41 (discussing the states' rejection of real offense sentencing, the practice under the conviction offense model, and advocating the abandonment of real offense sentencing on policy grounds). The Commission was urged to follow the Minnesota approach, which is generally acknowledged to be the most respected among the state systems. *See* DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 219–35 (Daniel J. Freed ed., 1988). For a description of the differences in approach between the federal and Minnesota guidelines and a critique of the Federal Commission's choices, see Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L.J. 1773, 1773–93 (1992).

55. *See* Reitz, *supra* note 2, at 528 & n.22 (listing jurisdictions that allow real offense sentencing).

56. Obstruction of justice, perjury, and prison escape are examples of offenses committed after the offense of conviction that are often considered during sentencing.

57. Reitz, *supra* note 2, at 527–28. As Professor Reitz points out, this definition may "stretch[] the natural connotations of the term 'real offense.' The words alone suggest an inquiry into what 'really' happened in connection with the *instant* crime." *Id.* at 527.

The term "real offense sentencing" has not enjoyed a consistent definition. For instance, the Guidelines' introductory comment describes a "real offense" system as one in which sentences are based on "the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted" noting that "[a] pure

indicted and convicted of aggravated assault may legitimately premise punishment on attempted murder if the facts brought to the court's attention at sentencing so suggest.

The Commission adopted a "modified" real offense system.[58] It is modified in the sense that the conviction offense is used as a starting point to determine the base offense level.[59] In addition, the Guidelines narrow considerably the breadth of nonconviction offense and biographic information previously deemed relevant in the federal system.[60] Many sections of the Guidelines, however, continue to hinge punishment on nonconviction offenses. Some of the more visible of these provisions are examined below.

1. Relevant Conduct

The relevant conduct provision,[61] crowned the "cornerstone" of the Guidelines system by the Chairman of the Sentencing Commission,[62] is the most far-reaching method by which unconvicted criminal conduct is integrated into the sentencing decision.[63] In determining an offender's base offense level, the sentencing judge re-

---

real offense system would sentence on the basis of all identifiable conduct." U.S.S.G., *supra* note 1, pt. A, intro. cmt. Commissioner Nagel describes real offense sentencing as based on "alleged real conduct . . . [like that] . . . charged in the indictment, or in the government's version, or the pre-sentence report" prepared by the probation officer. Nagel, *supra* note 2, at 925. Similarly, Commissioner Breyer describes the real offense model as linking punishment to "the elements of the specific circumstances of the case." Breyer, *supra* note 2, at 10.

58. *See* Nagel, *supra* note 2, at 926–27; Wilkins & Steer, *supra* note 2, at 497.

59. Nagel, *supra* note 2, at 926–27.

60. Under the indeterminate model, the sentencing judge could include information about nonconviction offenses completely unrelated to the offense of conviction. *See, e.g.*, Williams v. New York, 337 U.S. 241, 244 (1949) (allowing consideration of "certain activities of appellant as shown by the probation report that indicated appellant possessed 'a morbid sexuality' " in determining sentence for a murder charge). The Guidelines arguably limit consideration of uncharged conduct to activities more closely related to the crime of conviction. *See* Wilkins & Steer, *supra* note 2, at 502 (noting that the Guidelines "do not mirror the constitutional outer limits of information that a court may consider for sentencing purposes"); *see, e.g.*, U.S.S.G., *supra* note 1, § 1B1.3(a)(1), (2) (discussed in detail *infra* subpart I.B.1.). In addition, much of the biographic information previously deemed relevant has been discounted by U.S.S.G., *supra* note 1, §§ 5H1.1–.6, which specifically finds that a defendant's age, education, mental and emotional condition, physical condition, employment record, family and community ties, and prior good works in the community are not "ordinarily relevant." Reference to race, sex, and national origin is prohibited. *Id.* § 5H1.10.

61. U.S.S.G., *supra* note 1, § 1B1.3.

62. Wilkins & Steer, *supra* note 2, at 495.

63. The relevant conduct provisions have drawn intense scrutiny and criticism. *See, e.g.*, Freed, *supra* note 2, at 1712–15; Heaney, *supra* note 2, at 208–25; Symposium, *The Issue of Relevant Conduct*, 2 FED. SENTENCING REP. 129 (1989); Symposium, *Turmoil over Relevant Conduct in the Ninth Circuit*, 4 FED. SENTENCING REP. 189 (1992).

fers both to the crime of conviction and to any other conduct deemed relevant under Section 1B1.3 of the Guidelines. Relevant conduct encompassing nonconviction offenses may be roughly divided into two categories.[64] The first, which contains two subparts, includes:

> (A) all acts and omissions committed or aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.[65]

This section incorporates both an accomplice liability concept and a temporal element, requiring the court to view the offense of conviction as a continuing action.[66]

The second category of relevant conduct applies exclusively to cases in which the offense of conviction is subject to the multiple count rules of Chapter Three of the Guidelines.[67] Such offenses,

---

64. A third category of relevant conduct, described in § 1B1.3(a)(3), is also cited occasionally in support for sentence enhancements based on unconvicted criminal conduct. This provision requires consideration of "all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions." One of the most factually interesting cases applying this provision is United States v. Kramer, 943 F.2d 1543 (11th Cir. 1991) (approving district court's sentence enhancement based on § 1B1.3(a)(1) and (3) for the property damage resulting from the crash of a helicopter during an aborted prison escape attempt), *cert. denied*, 113 S. Ct. 63 (1992).

65. U.S.S.G., *supra* note 1, § 1B1.3(a)(1).

66. *See* Wilkins & Steer, *supra* note 2, at 503–13.

67. U.S.S.G., *supra* note 1, § 1B1.3(a)(2) provides: "[S]olely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction."

§ 3D1.2(d) requires grouping of counts if the counts involve substantially the same harm and the offense level is determined largely on the basis of the total aggregate harm. For example, if the defendant is convicted of two counts of theft of social security checks and three counts of mail fraud, with five different victims, the counts are grouped together. *Id.* § 3D1.2 cmt. 6, example 2. Also included in this subsection are, for example, larceny, embezzlement, and other forms of theft, *id.* § 2B1.1; receiving, transporting, transferring, transmitting, or possessing stolen property, *id.* § 2B1.2; and damaging or destroying property, *id.* § 2B1.3. The subsection explicitly excludes, for example, burglary of a residence, *id.* § 2B2.1; trespass, *id.* § 2B2.3; and robbery, *id.* § 2B3.1.

which include drug and theft crimes, generally involve sentence lengths based upon the quantity possessed or stolen. In these cases, any acts and omissions that were part of the "same course of conduct or common scheme or plan as the offense of conviction" must be included when computing the base offense level.[68] Subsection two also reaches well beyond the criminal act for which the defendant is convicted to include contemporaneous and past acts of unconvicted criminal conduct.

The clearest examples of the application of the relevant conduct provisions with respect to nonconviction offenses involve charges of drug dealing. Under the Guidelines, sentence lengths for drug crimes are determined by consulting the Drug Quantity Table set forth in Chapter Two.[69] The table relies on the quantity and type of drug allegedly involved to establish the base offense level.[70] For example, in *United States v. Manor*,[71] a jury convicted the defendant on 2 counts of intent to distribute 19 grams of cocaine, but acquitted him of conspiracy to distribute 250 grams of cocaine charged in the same indictment.[72] Note that under the first cate-

---

68. *Id.* § 1B1.3(a)(2).

69. The Drug Quantity Table is set forth in *id.* § 2D1.1(c).

70. In a recent article, Professor Alschuler blasts the Guidelines for, *inter alia*, relying on the weight of the "mixture or substance" to determine sentence severity. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 919 (1991). As Alschuler explains, the Supreme Court recently held in Chapman v. United States, 111 S. Ct. 1919 (1991), that this language includes the weight of the "carrier medium" as well as the drug. Thus, because LSD may be sold in sugar cube or blotter form:

> a dealer is likely to pay an awesome price for the crime of using sugar rather than paper. . . . [T]he guidelines sentence for a first offender who sold 100 doses of LSD in sugar cubes would be 188 to 235 months. The dealer's sentence would have dropped by two-thirds (63 to 78 months) had he or she sold the same quantity of LSD in blotter paper. The sentence would have been cut more than in half again (to 27 to 33 months) if the dealer had chosen gelatin capsules. And the sentence would have been cut in more than half again (to 10 to 16 months) if the dealer had sold the LSD in pure form.

Alschuler, *supra*, at 919 (citing *Chapman*, 111 S. Ct. at 1924 n.2). The mechanistic, "equal nonsense for all" approach to sentencing embodied by the Guidelines led Alschuler to declare: "Some things are worse than sentencing disparity, and we have found them." *Id.* at 902.

In December 1992, the Commission published a set of "proposed amendments" for public comment, one of which addresses the proper interpretation of "mixture or substance." The proposal suggests that the following language be added to the commentary following U.S.S.G., *supra* note 1, § 2D1.1: "Mixture or substance does not include uningestible, unmarketable portions of drug mixtures . . . ." *Proposed Amendments To the Federal Sentencing Guidelines*, 52 Crim. L. Rep. (BNA) 2158 (Feb. 3, 1993).

71. 936 F.2d 1238 (11th Cir. 1991).

72. *Id.* at 1242.

gory of relevant conduct, drugs that are allegedly the subject of a consiracy may be attributed to a defendant regardless of whether he is charged with conspiracy.[73] Consequently, the court added the 250 grams alleged in the conspiracy count to the 19 grams from the conviction counts to raise the base offense level from 12 to 20, effectively tripling the defendant's sentence exposure.[74]

In *United States v. Rivera-Lopez*,[75] the defendant was indicted on three counts: conspiracy to distribute cocaine and two separate counts of possession.[76] At trial, the jury convicted the defendant of conspiracy and one count of possession, but found her not guilty of the possession of three kilograms of cocaine alleged in count two.[77] At sentencing, the trial judge calculated the weight of the drugs with which the defendant was "connected" in order to determine the proper base offense level. Concluding, pursuant to subsection two of the relevant conduct provision, that the possession of the three kilograms of which the defendant had been acquitted formed "part of the same course of conduct or common scheme or plan as the offense[s] of conviction,"[78] the court included the three kilograms in the calculation.[79] This decision moved the defendant's base offense level from level 28, yielding a sentencing range of 78 to 97 months, to level 32 and a sentencing range of 121 to 151 months.

In both *Manor* and *Rivera-Lopez*, the addition of the relevant conduct resulted in the identical punishment ranges which the defendants would have encountered had they been convicted on all counts. This is not always the case. In some instances, the dismissal of a count pursuant to a plea bargain or an acquittal after jury trial acts to limit the defendant's potential exposure. The crime of conviction determines the maximum term to which a defendant

---

73. U.S.S.G., *supra* note 1, § 1B1.3(a)(1)(B).

74. *Manor*, 936 F.2d at 1242. The defendant's sentencing range for a base level of 12 yielded a sentencing range of 10–16 months, while a base level of 20 required a sentence of 33–41 months. U.S.S.G., *supra* note 1, at 288. On appeal, the Eleventh Circuit affirmed, explaining that the jury's acquittal may have simply meant that the 250 gram transaction was not associated with the conspiracy charged, not that the transaction never occurred. The court further noted that, even if the jury acquittal did mean that the prosecutor had not met the reasonable doubt standard on the conspiracy charge, the sentencing judge could still consider the 250 grams because the preponderance of the evidence standard applied at sentencing and "an acquittal based on a reasonable doubt standard should not preclude a contrary finding using the preponderance of the evidence." *Manor*, 936 F.2d at 1243.

75. 928 F.2d 372 (11th Cir. 1991).

76. *Id.* at 372.

77. *Id.*

78. U.S.S.G., *supra* note 1, § 1B1.3(a)(2).

79. *Rivera-Lopez*, 928 F.2d at 372.

may be sentenced. Consequently, conviction of a crime having a lower maximum term than the sum of potential Guidelines sentences for all counts may dilute the impact of relevant conduct.

Conduct need not ever have been charged to be deemed "relevant." In fact, according to a four-district study conducted by Eighth Circuit Judge Gerald Heaney, evidence of uncharged conduct was responsible for sentence increases in fifty percent of the Guidelines cases.[80] *United States v. Andrews*[81] clearly demonstrates the influence uncharged criminal conduct may exercise over the defendant's ultimate term of imprisonment. In *Andrews*, the defendant was charged with two counts of aiding and abetting bank robbery and two counts of using a firearm in connection with a violent crime.[82] He pleaded guilty to one aiding and abetting count and one firearm count, which, under the Guidelines, would have yielded a sentencing range of thirty-seven to forty-six months.[83] The sentencing judge, however, increased the defendant's sentence based on the defendant's admitted participation in five uncharged bank robberies.[84] The increase resulted in a sentence of ninety months, almost double the maximum specified by the Guidelines for the crimes of conviction.[85]

2. Specific Offense Characteristics

Each offense category outlined in Chapter Two of the Guidelines lists a series of "specific offense characteristics" to be determined in assessing the base offense level.[86] The most visible

80. Heaney, *supra* note 2, at 210. This figure, derived from data in four districts in the Eighth Circuit for the calendar year 1989, does not purport to include only cases involving relevant conduct adjustments. *Id.* at 167. Given, however, that the relevant conduct provision provides the most extensive means by which unconvicted criminal conduct may be counted at sentencing, it seems safe to assume that Heaney's findings would not have yielded a substantially lower percentage by restricting the survey to instances in which relevant conduct was referenced.

Judge Heaney's research regarding the disparity attributable to the Guidelines provoked responses from both Commission Chairman Wilkins, *see* William W. Wilkins, Jr., *Response to Judge Heaney*, 29 AM. CRIM. L. REV. 795 (1992), and Professor Stephen Schulhofer, *see* Schulhofer, *Assessing the Federal Sentencing Process*, *supra* note 2. While these articles take issue with Heaney's statistical data and conclusions regarding disparity, they do not question the validity of Heaney's survey regarding sentence enhancements for uncharged conduct.

81. 948 F.2d 448 (8th Cir. 1991).

82. *Id.* at 448.

83. *Id.* at 448–49.

84. *Id.* at 449.

85. *Id.*

86. These are listed with particularity for each Guidelines offense category. For example, kidnapping, abduction, and unlawful restraint, U.S.S.G., *supra* note 1,

instance in which a specific offense characteristic encompasses a nonconviction offense occurs in connection with the possession of a gun during a drug offense.[87] For example, *United States v. Rodriguez-Gonzalez*[88] involved a jury trial for various narcotics offenses and one count of carrying a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c).[89] Although DEA agents testified that they found a loaded .357 magnum revolver in the defendant's apartment,[90] the jury declined to find the defendant guilty on the firearm charge, convicting him only of the narcotics crimes.[91] At sentencing, the judge enhanced the defendant's base offense score by two levels because he found that a "firearm was possessed during the commission of the offense."[92] The inclusion of the acquittal offense changed the defendant's sentencing range from 78 to 97 months to 97 to 121 months.[93] The defendant received a sentence of 110 months—at least a year and a month longer than he could have received absent consideration of the acquittal conduct.[94]

3. Obstruction of Justice

A recent rash of cases have upheld sentence enhancements for uncharged perjury under the "Obstruction of Justice" provision.[95]

---

§ 2A4.1, provide for base offense level adjustments for various specific offense characteristics: if a ransom demand was made, increase the base by 6 levels; if the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; and if the victim was released before 24 hours had elapsed, decrease by 1 level.

87. The specific offense characteristic identified in *id.* § 2D1.1(b)(1) requires a two-level increase in the base offense score "[i]f a dangerous weapon (including a firearm) was possessed" during a drug crime.

88. 899 F.2d 177 (2d Cir.), *cert. denied*, 111 S. Ct. 127 (1990).

89. *Id.* at 178.

90. *See id.* at 179.

91. *See id.* at 178–79.

92. *Id.* at 179 (citing U.S.S.G., *supra* note 1, § 2D1.1(b)(1)).

93. *See id.* at 179, 181.

94. *Id.* It should be noted that had the defendant been convicted of violating 18 U.S.C. § 924(c) (1976) (recodified at 18 U.S.C. § 924(d) (1988)), his sentence would have been substantially longer. Section 924(c) requires a five year mandatory sentence consecutive to the sentence for the other offenses of which the defendant is convicted. Thus, this case provides a good illustration of a situation in which an acquittal limits a defendant's sentence exposure even though the Guidelines require consideration of the acquittal conduct.

95. U.S.S.G., *supra* note 1, § 3C1.1 requires a two-level enhancement in the base offense score if a defendant is found to have "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." The application notes provide a par-

For instance, in *United States v. Akitoye*,[96] a defendant accused of conspiracy and drug trafficking testified at trial that he knew nothing about the heroin or marked money found in his apartment and tried to place responsibility for the entire affair on his front man.[97] The sentencing judge characterized the testimony as "a self-serving cock and bull story" and increased the base offense level by two for the alleged perjury.[98] Absent the two-level perjury enhancement, the maximum sentence that the defendant could have received was ninety-seven months.[99] Instead he was sentenced to 114 months,[100] nearly a year and one half of which is directly attributable to his uncharged crime of "perjury."

4. Departure

Unconvicted criminal conduct has been used as the basis for departure in a number of cases; however, the Guidelines specifically contemplate departure for nonconviction offenses in section 4A1.3(e). This section allows a discretionary departure if "prior similar adult criminal conduct not resulting in a criminal conviction"[101] indicates that the defendant's criminal history category does not "adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit

---

tial list of the types of conduct encompassed by this description including "committing, suborning, or attempting to suborn perjury." *Id.* § 3C1.1 cmt. 3(b).

The Supreme Court recently upheld § 3C1.1 against constitutional attack. In United States v. Dunnigan, 113 S. Ct. 1111 (1993), the Court unanimously rejected the defendant's claim that allowing enhancement for alleged perjury chilled the exercise of his Sixth Amendment right to testify on his own behalf. *Id.* at 1117–19. A better approach to sentence enhancements for obstruction of justice is advanced in William J. Hazzard, Note, *Oh What a Tangled Web We Weave When First We Practice to Deceive Under the Federal Sentencing Guidelines: Enhancing Sentences for Defendant Perjury*, 44 U. FLA. L. REV. (forthcoming June 1993) (arguing that only perjury that actually obstructs justice in a significant enough manner to warrant resort to the district court's contempt powers should result in an enhancement at sentencing). *See generally* Peter J. Henning, *Balancing the Need for Enhanced Sentences for Perjury at Trial Under Section 3C1.1 of the Sentencing Guidelines and the Defendant's Right to Testify*, 29 AM. CRIM. L. REV. 933 (1992) (analyzing recent decisions concerning sentence adjustments based on the defendant's perjury at trial).

96. 923 F.2d 221 (1st Cir. 1991).

97. *Id.* at 229.

98. *Id.* at 228.

99. The *Akitoye* opinion does not indicate the maximum term the defendant faced absent the perjury enhancement. However, it does note that the range after the enhancement was 97–121 months. *Akitoye*, 923 F.2d at 223. This range appears 3 times in the sentencing table and in each instance the maximum of the range 2 levels below is 97 months. U.S.S.G., *supra* note 1, at 228.

100. *Akitoye*, 923 F.2d at 223.

101. U.S.S.G., *supra* note 1, § 4A1.3(e).

other crimes."[102] For example, in *United States v. Miller*,[103] the sentencing court justified an upward departure based on several state charges involving similar, though unrelated, criminal conduct dismissed prior to sentencing in the federal action. The defendant pleaded guilty to the robbery of several savings and loan associations.[104] After adjustments for relevant conduct and acceptance of responsibility, the crime of conviction yielded a Guidelines sentencing range of thirty to thirty-seven months.[105] The court, however, sentenced the defendant to forty-five months, adding at least eight months for the several state charges dismissed after his plea of guilty to the federal charges.[106] According to the presentence report, the state had charged Miller with gasoline theft of less than three hundred dollars, on two separate occasions Miller had failed to appear in court to face misdemeanor charges, and Miller had been indicted for burglary of a hardware store two years prior to the federal indictment.[107] After examining the presentence report upon which the district court relied for departure, the Seventh Circuit responded to Miller's complaint that the departure was based upon "unreliable" information:

> The report contains information from the state court records that detailed the local burglary arrest circumstances. Miller, with no right to be in the hardware store after it had closed, was arrested inside. That account is adequate and factually not contested by Miller. The misdemeanor gasoline theft charge, however, is less enlightening. What the factual circumstances were of that charge are not set out. The bench warrants for failure to appear were related to the misdemeanor charge. Defense counsel argues that Miller may not have received the court appearance notices, or had some other innocent explanation in defense of the bench warrants. There is no explanation in the presentence report. Government counsel denied, based on his personal knowledge as a former local assistant prosecutor, that there could be an innocent explanation for the bench warrants. Judge Mills commented on the bench warrants and specifically adversely considered them in imposing sentence.
>
> The presentence report information on the misdemeanor charge, and the related bench warrants, is not as complete as it

102. *Id.* § 4A1.3.
103. 874 F.2d 466 (7th Cir. 1989).
104. *Id.* at 468.
105. *Id.*
106. *Id.*
107. *Id.* at 468–69.

> . . . could be . . . . To permit a departure, however, [it is sufficient under the Guidelines].[108]

Not all the courts of appeals have authorized departures on such scanty records; however, the right of the trial court to depart on the basis of a nonconviction offense is well supported by Guidelines decisions.[109]

C. *Procedure at the Sentencing Hearing*

As the cases demonstrate, the impact of factual findings at sentencing and at trial may be indistinguishable. Although the government must present some evidence of criminal behavior to secure additional punishment for a nonconviction offense,[110] the quantum and quality required at sentencing is well below that required at trial.[111] Sentencing factors need only be proven by a preponderance of the evidence in most federal courts,[112] and some circuits have

---

108. *Id.* at 469.

109. *E.g.*, United States v. Kikumura, 706 F. Supp. 331, 334–35 (D.N.J. 1989) (departing upward from a maximum term of 33 months to a 30-year sentence based on the defendant's alleged terrorist activities), *vacated*, 918 F.2d 1084 (3d Cir. 1990). The Third Circuit remanded the case after a reasonableness analysis of the extent of the departure, but did not question the right to depart for unconvicted criminal conduct. *Kikumura*, 918 F.2d at 1119. The court did insist that the facts supporting such a large enhancement be proven by clear and convincing evidence, *id.* at 1101, and limited the maximum departure to a sentence of 262 months. *Id.* at 1119.

110. The district court is required by 18 U.S.C. § 3553(c) (1988) to "state in open court the reasons for its imposition of the particular sentence." *See* United States v. Franco-Torres, 869 F.2d 797, 800 (5th Cir. 1989) (deferring to "the sentencing judge's credibility determinations" because "[t]he issues were well-developed at the sentencing hearing, and the judge had a full opportunity to consider the competing accounts").

The sheer amount of time judges must devote to sentencing hearings has generated substantial criticism. *See* FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 137 (1990) (reporting the results of a post-Guidelines survey that more than 50% of federal judges who responded estimated a 25% increase in time devoted to sentencing, while one-third estimated an increase of 50%); Alschuler, *supra* note 70, at 906 ("[S]entencing guidelines are unlike many other prophylactic rules; they do not save work or money.").

111. A number of commentators have argued persuasively that the Due Process Clause requires much greater procedural protection at the sentencing hearing than currently granted. *See* Heaney, *supra* note 2, at 208–25 (arguing that due process requires a higher burden of proof at sentencing and raising concerns about a host of other constitutional rights); Herman, *supra* note 2, at 346–55 (subjecting sentencing procedures to analysis under *Mathews v. Eldridge* and finding them deficient); Husseini, *supra* note 2, at 1404–11 (contending that due process requires use of the clear and convincing standard of proof).

112. *See, e.g.*, United States v. Manor, 936 F.2d 1238 (11th Cir. 1991); United States v. Salmon, 948 F.2d 776 (D.C. Cir. 1991); United States v. Macklin, 927 F.2d 1272 (2d Cir.), *cert. denied*, 112 S. Ct. 146 (1991); United States v. Smith, 918 F.2d 664 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1088 (1991); United States v. Dyer, 910 F.2d 530 (8th Cir.), *cert. denied*, 111 S. Ct. 276 (1990); United States v. Restrepo, 903 F.2d 648 (9th

enunciated standards that appear even less stringent.[113] Neither the Confrontation Clause[114] nor the Federal Rules of Evidence apply at the sentencing stage.[115] And although in most circuits the defendant must be given an opportunity to contest allegations,[116] he has no right to a full evidentiary hearing to resolve such disputes.[117] Thus, hearsay statements contained in the presentence report often provide the sole justification for a substantially greater term of imprisonment under the Guidelines.[118]

Cir. 1990); United States v. Reid, 911 F.2d 1456 (10th Cir.), *cert. denied*, 111 S. Ct. 990 (1990); United States v. Wright, 873 F.2d 437 (1st Cir. 1989); United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989). *But see Kikumura*, 918 F.2d at 1101 (recommending a clear and convincing standard of proof in some cases).

113. *See, e.g.*, United States v. Hendricks, No. 91-5796, 1992 U.S. App. LEXIS 4662, at *6 (6th Cir. Mar. 10, 1992) ("[D]ue process requires that some evidentiary basis beyond mere allegation in an indictment be presented to support consideration of such conduct as relevant to sentencing."), *cert. denied*, 113 S. Ct. 139 (1992); United States v. West, 948 F.2d 1042, 1045 (6th Cir. 1991) ("The evidence of other quantities of drugs involved must have a minimal level of reliability beyond mere allegation."), *cert. denied*, 112 S. Ct. 1209 (1992); United States v. Coleman, 947 F.2d 1424, 1428 (10th Cir. 1991) (allowing the trial court to generally use "estimates based on information with a minimum indicia of reliability in calculating drug quantities for sentencing purposes"), *cert. denied*, 112 S. Ct. 1592 (1992).

114. *See Kikumura*, 918 F.2d at 1102–03. For a thoughtful argument in favor of applying the Confrontation Clause at sentencing, see generally Note, *supra* note 2, at 1888–90.

115. United States v. Prescott, 920 F.2d 139, 144 (2d Cir. 1990) (allowing use of hearsay statements at sentencing); United States v. Jarrett, 705 F.2d 198, 208 (7th Cir. 1983) (allowing suspension of best evidence rule at sentencing), *cert. denied*, 465 U.S. 1004 (1984); *see* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—the Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 885–91 (1992).

116. *See* United States v. Evans, 891 F.2d 686, 688 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 2170 (1990); United States v. Berrios, 869 F.2d 25, 32 (2d Cir. 1989); United States v. Holland, 850 F.2d 1048, 1050–51 (5th Cir. 1988); *see also* FED. R. CRIM. P. 32(a)(1)(A), 32(c)(3)(A)–(B), (D) (giving the defendant an opportunity to contest presentence investigation).

117. The Guidelines require only that parties be "given an adequate opportunity to present evidence to the court regarding" disputed sentencing factors. U.S.S.G., *supra* note 1, § 6A1.3(a). In the commentary, the Commission notes that "[w]ritten statements of counsel or affidavits of witnesses may be adequate under many circumstances." *Id.* § 6A1.3 cmt. And although the Commission points out that "[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues," the appropriate hearing is left to the discretion of the trial judge. *Id.*

118. *See, e.g.*, United States v. Easterling, 921 F.2d 1073 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2066 (1991). The *Easterling* court allowed the sentencing judge to include 1815.2 grams of methamphetamine in sentencing on a charge of distributing 0.8 grams. *Id.* at 1076, 1078. The probation officer testified at the sentencing hearing that, in arriving at the drug quantity figure, she relied on information provided to her by a Bureau of Alcohol, Tobacco, and Firearms agent. *Id.* at 1077. The agent had been told

D. *Rationale for Including Nonconviction Offenses as Sentencing Factors*

A real offense approach theoretically provides a way to differentiate between offenders who are convicted of identical crimes, but who engaged in meaningfully different behavior during the offense of conviction.[119] For example, assume Robbers *A* and *B* are both convicted of bank robbery. Robber *A*, a convicted felon, spent months planning and executing an extremely violent robbery grossing millions of dollars; Robber *B* was desperate to feed a sick child, had no weapon, and engaged in the crime on impulse. Arguably, Robber *A* deserves more punishment than Robber *B*. The Guidelines' real offense regime accommodates this goal by treating "real" factors, such as planning, violence during the crime, and amount stolen, as sentencing characteristics.[120] Had the Commission stopped here, that is, confined the Guidelines to the "real" circumstances of the crime of conviction and prior conviction offenses, substantial differentiation among offenders could likely have been achieved.

Instead, the Commission chose to sweep unconvicted criminal conduct into the Guidelines. This choice reflects the Commission's concern that prosecutorial charging decisions would undermine the new sentencing system.[121] Without a mechanism for dampening prosecutorial power, disparities would, of course, develop between offenders charged and convicted of a crime and those who "really" committed the same crime, but were never charged with it. To

---

about the defendant's methamphetamine involvement by two unidentified adult informants, who estimated that they purchased "approximately two pounds each" from the defendant. *Id.* The 1815.2 gram figure was determined by adding four pounds to the 0.8 grams seized from the defendant when he was arrested, which established the drug quantity by a preponderance of the evidence. *Id.* at 1077–78.

119. *See* Breyer, *supra* note 2, at 10–11.

120. Reflecting the pervasive concern that the plea bargaining practices would undermine the Guidelines, Chapter Six prohibits prosecutors from bargaining away such "facts" in plea agreements, thus allowing the court to assess an offender's blameworthiness on the basis of actual offense conduct. *See* U.S.S.G., *supra* note 1, § 6B1.1.

121. The Commission was particularly concerned that charge bargaining would undermine the guidelines effort by creating disparity between similar defendants who pleaded guilty to different crimes. *See* Nagel & Schulhofer, *supra* note 2, at 505; Freed, *supra* note 2, at 1713–14; Schulhofer & Nagel, *supra* note 2, at 232–52; Wilkins & Steer, *supra* note 2, at 500–01. Well before the adoption of the Guidelines, scholars warned that charge bargaining could undermine the success of the Guidelines' efforts. *See generally* Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978); Schulhofer, *Due Process of Sentencing*, *supra* note 2, at 757–72.

eradicate such "unwarranted sentencing disparity"[122] from the system, the Commission added mechanisms by which the judge must count certain nonconviction offenses at sentencing.[123] Because criminal conduct may be included at sentencing whether or not charged or convicted, the disparity-producing effects of the original charging decision and of the conviction are theoretically neutralized.

The Commission's approach treats equally offenders convicted of a crime and those merely accused of that crime. Viewed in this light, it becomes clear that hinging punishment on nonconviction offenses ensures much more than an appropriate sentence for a given crime; it provides a method by which the court may correct any errors committed by either the prosecutor or the jury, thereby ensuring an "accurate" sentence. But notice that this adjustment for "accuracy" never results in a lower sentence. It is a one-way adjustment—up. In reality, incorporating nonconviction offenses as sentencing factors does not avoid disparity, it only guarantees that offenders are not less severely punished than their "true" conduct allegedly warrants.[124] Thus, it is to guarantee proper severity that the Guidelines authorize punishment for offenses excised from (or never included in) an indictment pursuant to a charge bargain. And although this system was originally conceived with charge bargaining in mind,[125] the Commission has exhibited no qualms about using nonconviction offenses to revise convictions secured by jury trial.[126]

---

122. S. REP. No. 225, *supra* note 28, at 52, *reprinted in* 1984 U.S.C.C.A.N. at 3235 (calling the elimination of "unwarranted sentencing disparity" a primary goal of sentencing reform).

123. The Guidelines require that a sentencing court "count" nonconviction offense conduct that has been proven by a preponderance of the evidence at the sentencing hearing in many, but not all, Guidelines sentence scores. Instances in which evidence of nonconviction offense conduct results in a mandatory sentence enhancement are discussed in detail *supra* text accompanying notes 60-100. The Guidelines do not authorize enhancements for nonconviction offense conduct in every situation. In this respect, the Guidelines' real offense system is narrower than that employed in the pre-Guidelines era.

124. The court is assisted by the presentence report in assessing what really happened. FED. R. CRIM. P. 32(c)(2). If the prosecution is truly committed to manipulating the process, it is unlikely that the probation officer will uncover the requisite information because it is from the prosecutor's office and the defendant that the probation officer typically obtains most of her information. *See* Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 777 (1992).

125. *See supra* note 121.

126. The Commission appears to be reconsidering this position. One of the proposed amendments released by the Commission for public comment in December 1992 seeks to amend the relevant conduct provision to exclude "conduct of which the defend-

Although some aspects of a real offense model contribute to the overall fairness of a sentencing system, the incorporation of nonconviction offenses as sentencing factors produces the opposite result. The Commission's preoccupation with unwarranted leniency led it to dismiss difficulties potentially generated by prosecutors' natural ambition to obtain the severest possible sentence for the least amount of work. As demonstrated earlier, in many Guidelines cases, the presence or absence of a conviction for a given offense is irrelevant to the punishment level. The nature of the sentencing hearing, with its lower burden of proof and relaxed fact-finding procedure, makes it much easier to secure punishment for a given offense at sentencing than to obtain a conviction at trial or even via guilty plea.[127] Even when the Guidelines authorize a less severe punishment for the offense in the absence of a conviction, a prosecutor still has a substantial incentive to withhold proof until sentencing. The oppressive caseloads of the United States Attorneys offices are as well known as the desire of recent administrations to appear "tough on crime."[128] Even absent these pressures, counting nonconviction offenses at sentencing would be an open invitation to "undercharge" and beef up the punishment level at the sentencing hearing. In the current environment, undercharging risks becoming the norm.[129]

The potential for such abuse did not evade the Commission. The Guidelines introduction blithely suggests that the statutory maximum "imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence."[130] But the maximum terms designated by federal statutes are substantially higher than the average

---

ant has been acquitted after trial" from consideration under that section. *Proposed Amendments To the Federal Sentencing Guidelines*, *supra* note 70, at 2158. In March 1993, the Department of Justice issued a statement strongly opposing the Commission's proposed amendment. *See* Roger A. Pauley, Remarks Before the United States Sentencing Commission Concerning Proposed Sentencing Guidelines Amendments (Mar. 22, 1993) (transcript on file with author). Given this development, it is unclear whether the Commission's proposal will make the final list of proposed amendments to be submitted to Congress by May 1, 1993.

127. Many commentators have pointed out that the Guidelines actually enhance, rather than control, the power of the prosecutor. *See* Freed, *supra* note 2, at 1714 ("[Relevant conduct] allows a prosecutor to increase an offender's sentence more easily by *dropping* charges than by bringing them!"); Heaney, *supra* note 124, at 774. *But see* Wilkins, *supra* note 80, at 801–05.

128. *See* Alschuler, *supra* note 70, at 929–38 (describing the recent "severity revolution" in government's approach to crime).

129. *See* Tonry & Coffee, *supra* note 2, at 154–56 (citing examples of undercharging).

130. U.S.S.G., *supra* note 1, at 1.

sentence prescribed by the Guidelines (as well as those meted out in the pre-Guidelines era), providing many years within which the prosecution might maneuver at sentencing.[131] The Commission's clear indifference to the potential for prosecutorial abuse demonstrates an unquestioning faith in a single judge's ability to accurately assess whether a defendant "really" committed additional crimes. The Guidelines approach treats trial procedures designed to avoid incorrect assessments of guilt as mere surplusage, having no bearing on the truth of the accusation.[132] Quite obviously, the Commission was a great deal more troubled by undeserved leniency than by undeserved severity. The remainder of this Article explores whether such postconviction revisions to the quality of the conviction are constitutionally permissible.[133]

---

131. The Act mandates that career offenders receive sentences at or near the maximum, thus reserving much lower sentences for "typical" offenders. 28 U.S.C. § 994(h) (1988).

132. As Professor Stephen Schulhofer pointed out in 1980:

> A declared policy placing greater weight upon the judge's conception of offense behavior than upon the formal offense of conviction seems likely to reinforce rather than dispel [cynicism about the criminal justice system]. Indeed, it is hard to imagine a more striking way for the legal system to proclaim mistrust of its own processes.

Schulhofer, *Due Process of Sentencing*, *supra* note 2, at 765; *see also* Tonry & Coffee, *supra* note 2, at 153 (noting that real offense sentencing "downgrades the significance of the trial stage"). It may well be, as Professor Kevin Reitz has suggested, that the implicit ability to "shortcut" the trial process supplies a justification for embracing the real offense model. According to Professor Reitz, the shortcut justification derives from the view that:

> [I]n the aggregate, convictions underrepresent the total number of crimes committed by a healthy margin. There are many contributing causes of this undisputed fact. Only some crimes are reported, still fewer result in arrest, and not all arrests result in convictions. Some of the shortfall, certainly, is attributable to the fact that trial process is time-consuming, expensive, and includes many procedural hurdles. To the extent this is so, real-offense sentencing can be defended as a cheaper, more efficient method of responding to criminal behaviors.

Reitz, *supra* note 2, at 559 (footnotes omitted). Perhaps this view explains the Commission's preoccupation with ensuring the "accuracy" of the sentence even in the absence of a conviction. It also explains why, in the face of years of documented overcharging, *see* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85–105 (1968), the Commission is apparently convinced that charge bargains create sentence differentials among "like" offenders. Such a position assumes an indictment is as indicative of guilt as conviction (and in the case of trial by jury, that it is trial procedure that saves the defendant from conviction). This is especially problematic when one considers that in practice the preponderance of the evidence standard at sentencing appears roughly equivalent to the probable cause standard for indictment.

133. The wisdom, as opposed to the constitutionality, of statutorily mandating such obvious contempt for the trial process is questionable. Professor Kevin Reitz has recently and eloquently argued that real offense systems should be abandoned as a matter

II. THE FEDERAL COURTS AND THE CONSTITUTIONALITY OF NONCONVICTION OFFENSE SENTENCING

The array of constitutional challenges raised to the Guidelines' real offense scheme is rivaled only by the monotony of response from the federal courts.[134] With one exception,[135] the courts of appeals have consistently answered such claims with a description of the current system, rather than a discussion of the constitutional propriety of punishment for nonconviction offenses.[136] These cases accept without analysis the historical distinction between trial and sentencing, which has formed the linchpin of constitutional review of sentencing practices during this century.

The Supreme Court officially endorsed real offense sentencing in 1949. In *Williams v. New York*,[137] Justice Black found nothing in the Due Process Clause that inherently limits a judge's discretion to consider uncharged and unproven conduct in determining a sentence.[138] Williams had been convicted of first degree murder after a jury trial.[139] Choosing between the available penalties of death and life imprisonment, the jury recommended the latter.[140] The judge disagreed. After considering information contained in the presentence report indicating that the defendant had committed a string of uncharged burglaries,[141] had "a morbid sexuality," and was a "menace to society," the trial judge sentenced the defendant to death.[142]

---

of policy, even assuming the constitutionality of the practice. Reitz, *supra* note 2, at 547–73; *see also* Tonry & Coffee, *supra* note 2, at 152–67.

134. *See, e.g.*, United States v. Tejada, 956 F.2d 1256 (2d Cir.) (rejecting Fourth Amendment challenge), *cert. denied*, 113 S. Ct. 124, *and cert. denied*, 113 S. Ct. 334 (1992); United States v. Mobley, 956 F.2d 450 (3d Cir. 1992) (rejecting due process challenge); United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990) (rejecting Confrontation Clause challenge); United States v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir.) (rejecting double jeopardy challenge), *cert. denied*, 111 S. Ct. 127 (1990); United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989) (rejecting right to jury trial challenge).

135. *See* United States v. Brady, 928 F.2d 844 (9th Cir. 1991) (finding the use of certain information necessarily rejected by the jury to be unconstitutional).

136. *See, e.g.*, *Mobley*, 956 F.2d at 455 (noting that the "bifurcated criminal justice process" embraces "the full panoply of constitutional rights" at the trial stage, but not at sentencing); *Rodriguez-Gonzalez*, 899 F.2d at 180–81 (reinforcing *Mobley*'s view).

137. 337 U.S. 241 (1949).

138. *Id.* at 250–52.

139. *Id.* at 242.

140. *See id.* at 243–44.

141. The sentencing judge referred to the defendant's alleged participation in some 30 burglaries in the same vicinity as the murder. *Id.* at 244.

142. *Id.*

Williams challenged his sentence on the grounds that he had not been given "reasonable notice of the charges against him" in the presentence report or "an opportunity to examine adverse witnesses."[143] The Supreme Court rejected his claim, suggesting that sentencing is unique and, thus, operates outside the strictures of such constitutional limitations. According to the Court, sentencing courts have historically operated under different evidentiary rules.[144] In addition, "sound practical reasons"[145] supported the distinction between constitutional protections at trial and sentencing. Because a "sentencing judge . . . is not confined to the narrow issue of guilt,"[146] the Court concluded that any restrictions upon a trial judge's ability to obtain "pertinent" information would undermine the modern penological goals of reformation and rehabilitation.[147] Almost as an afterthought, the Court added that "no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all."[148] Consequently, reasoned the Court, no due process issue was created "merely because a judge gets additional out-of-court information to assist him in the exercise" of his discretion.[149]

Expansive assumptions about the power of government undergird the Court's decision. The first assumption is that the inferred right to conceal from the public the true reasons for a sentence insulates such reasons from constitutional scrutiny. The second is that history and legislative policy choices trump constitutional rights. In making these assumptions, the Court undertook no search for constitutional authorization to treat sentencing as an extra-constitutional proceeding. To support the legitimacy of subjecting sentencing practices to less scrutiny than other government activities, the opinion offered only two sentences suggesting that, even before the adoption of the Constitution, courts exercised "wide discretion" at sentencing.[150] Given that the bulk of criminal punishments in early

143. *Id.* at 245.

144. *Id.* at 246 & n.4.

145. *Id.* at 246.

146. *Id.* at 247.

147. *Id.*

148. *Id.* at 252. Interestingly, Justice Black cites nothing in support of this proposition. *Williams*, as it applies to death penalty cases, has been overruled. Gardner v. Florida, 430 U.S. 349 (1977).

149. *Williams*, 337 U.S. at 252.

150. According to *Williams*:

America were legislatively fixed, leaving the trial court only minimal flexibility in the imposition of a sentence,[151] history offers unconvincing authority for the actions complained of in *Williams*. The Court devoted the remainder of the opinion to admiring the penological policy choices of the state legislature. The Constitution was presumed to take a back seat to the "progressive" judgments of an elected government.[152] At base, *Williams* concluded that sentencing decisions reside outside of the constitutional framework.[153] This concept, whether applied in the arena of judicial or legislative sentencing, comprises the core of twentieth century sentencing jurisprudence.

In 1978, the Supreme Court again turned to the constitutionality of using unconvicted criminal conduct at sentencing. In *United States v. Grayson*,[154] the defendant was convicted of a crime after a jury trial at which he testified in his own defense. In a rare sentencing opinion, the trial judge disclosed his reasons for imposing a two-year term, among them his belief that the defendant's testimony was a "complete fabrication."[155] On appeal, the defendant claimed that punishment for uncharged perjury infringed on "his right to have

---

> [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 within limits fixed by law. Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders.

Id. at 246 (footnotes omitted). In support of this information, the Court referred to several collections of cases suggesting in many instances that affidavits about the defendant's character were accepted. *Id.* at 246 nn.5–6 (citing cases collected at 14 Am. & Eng. Ann. Cas. 968; 77 A.L.R. 1211; 86 A.L.R. 832; Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. CHI. L. REV. 715 (1942); ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 178 (1930)). It is somewhat of a leap, however, to conclude from the Court's meager authorities regarding affidavits that the discretion of the sentencing judge in early America was "wide" enough to encompass accusations of 30 uncharged burglaries and extensive biographic information in support of a death sentence.

151. *See infra* note 226.

152. *Williams*, 337 U.S. at 251.

153. Professor Sanford Kadish, writing in 1962, charged that "[the rehabilitative system] has resulted in vesting in judges and parole and probation agencies the greatest degree of uncontrolled power over the liberty of human beings that one can find in the legal system." Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 916 (1962), *reprinted in* SANFORD H. KADISH, BLAME AND PUNISHMENT 250 (1987) (footnotes omitted).

154. 438 U.S. 41 (1978).

155. *Id.* at 44.

criminal charges . . . formally adjudicated pursuant to procedures required by due process."[156]

Before addressing the merits of this claim, the Court delivered an exhaustive account of the history of the indeterminate sentencing system in the United States.[157] *Grayson* recognized the inherent potential for arbitrary sentences created by the rehabilitative model and concluded that only by providing "the judge with as much information as reasonably practical concerning the defendant's 'character and propensities' " could this dilemma be avoided.[158] This revelation was followed by a discussion of *Williams v. New York*, *United States v. Tucker*,[159] and a congressional statute[160]—all of which supported the idea that the sentencing court is "largely unlimited either as to the kind of information it may consider, or the source from which it may come."[161]

Following in the *Williams* tradition, the Court balanced the defendant's constitutional objections against historical practice and the importance of outside offense information to the prevailing penological goals. Though recognizing that the practice of "incarcerating for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution" would be "impermissible," the Court was loath to restrict the right to consider such information for the "permissible" purpose of evaluating

---

156. *Id.* at 45. The defendant also contended that allowing the sentencing court to enhance for uncharged perjury would inhibit the exercise of a defendant's right to testify on his own behalf. *Id.* at 44–45. The majority dismissed this argument as "frivolous." *Id.* at 55. Justice Stewart, joined by Justices Brennan and Marshall, dissented on this ground. According to the dissent:

> It does not change matters to say that the enhanced sentence merely reflects the defendant's prospects for rehabilitation rather than an additional punishment for testifying falsely. The fact remains that all defendants who choose to testify, and only those who do so, face the very real prospect of a greater sentence based upon the trial judge's unreviewable perception that the testimony was untruthful.

Id. at 56–57 (Stewart, J., dissenting).

157. *Id.* at 45–52.

158. *Id.* at 48 (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937)).

159. 404 U.S. 443, 446 (1972) (requiring that the information in the presentence report be reliable but placing no limit on the type of information that may be included).

160. See 18 U.S.C. § 3577 (1985), which provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Section 3577 has been recodified in the Act as 18 U.S.C. § 3661 (1988).

161. *Grayson*, 438 U.S. at 50 (quoting *Tucker*, 404 U.S. at 446).

the defendant's prospects for rehabilitation.[162] Three justifications for this conclusion were offered: (1) the necessity of access to the information to facilitate the rational exercise of discretion at sentencing,[163] (2) the *Williams* decision itself,[164] and (3) that "[n]o rule of law, even one garbed in constitutional terms, can prevent improper use of firsthand observations of perjury."[165]

Both *Williams* and *Grayson* treat constitutional rights as equivalent to legislative policy choices in the sentencing realm. The result is uncontrolled discretion lodged with the trial court to impose any sentence within the statutory range no matter how offensive the judge's reasoning. Considered logically, such discretion can exist pursuant to legislative delegation only if the legislature possesses, in the first instance, the same unchecked power to include any potentially relevant information in the punishment inquiry. Eight years later, in *McMillan v. Pennsylvania*,[166] the Court embraced this logic.

McMillan addressed the propriety of a state sentencing scheme that prescribed a mandatory minimum sentence if visible possession of a firearm during the crime of conviction was proven by a preponderance of the evidence at sentencing.[167] The defendants offered two due process challenges to the Pennsylvania plan. First, they contended that the statute was inconsistent with *In re Winship*[168] and *Mullaney v. Wilbur*[169] because possession of a firearm should actually be considered an element of the crime of conviction.[170] By relegating proof of the firearm to sentencing, and by requiring only proof by a preponderance of the evidence, the defendants claimed that the state had impermissibly circumvented its burden to establish criminal conduct by proof beyond a reasonable doubt.[171] The Court rejected this argument, finding that a legislature's discretion to allocate conduct between elements of a crime and factors for sen-

162. *Id.* at 53.

163. *Id.*

164. *Id.* at 53–54.

165. *Id.* at 54. Instead of attempting regulation, the Court looked to "[t]he integrity of the judges" to assure that sentence enhancements are not made simply to save the Government the time and money attendant to a separate prosecution for perjury. *Id.*

166. 477 U.S. 79 (1986).

167. *Id.* at 83.

168. 397 U.S. 358 (1970).

169. 421 U.S. 684 (1975).

170. *McMillan*, 477 U.S. at 83.

171. *Id.*

tencing is essentially absolute.[172] The Court's agreement that possession of a firearm could properly be classified as a sentencing factor was pivotal to the subsequent due process analysis. According to the Court, the statute did not relieve the prosecution of the burden of establishing guilt because the firearm enhancement "only [became] applicable after defendant has been duly convicted of the crime for which he is to be punished."[173] In addition, the Pennsylvania scheme "neither alter[ed] the statutory maximum . . . nor create[d] a separate offense calling for a separate penalty; it operate[d] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm."[174] Absent the presence of one of these factors, the Court found no fault with the legislative plan, even though an affirmative finding at sentencing could potentially increase a defendant's prison term by five years.

Defendants' second constitutional challenge—that due process is offended by the use of the preponderance of the evidence standard at sentencing—provoked a much terser, but equally important, reply. Citing *Williams*, the Court responded that sentencing courts have traditionally made such decisions without any due process limitations on burdens of proof, and admitted "some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance."[175] Yet, by 1986, the philosophical and practical premises so influential to the *Williams* decision had been discredited.[176] Perhaps in an effort to explain the continued dichotomy in constitutional scrutiny between trial and sentencing procedures, *McMillan* looked to the reasoning in *Meachum v. Fano*,[177] a case involving an inmate's procedural due process challenge to an alleged retaliatory prison transfer. Although *Meachum* appears only in a footnote, the

172. *See id.* at 85–86. The Court declined to define the constitutional limits of a state's power to define criminal offenses, only noting that the Pennsylvania statutory scheme "gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88. Professor Herman attacks the *McMillan* decision on several fronts. She takes issue with the *McMillan* outcome, arguing that the Court flagrantly misinterpreted *Patterson v. New York* and also suggests a formula by which the tail and dog limitation might be given substantive meaning in the Guidelines era. *See* Herman, *supra* note 2, at 323–39.

173. 477 U.S. at 87.

174. *Id.* at 87–88.

175. *Id.* at 92.

176. By 1986, Congress had already abandoned the rehabilitative model in favor of the Guidelines, as had many of the states.

177. 427 U.S. 215 (1976).

majority cited *Meachum* for the proposition that "[o]nce the reasonable-doubt standard has been applied to obtain a valid conviction, 'the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him.' "[178] By linking the lack of constitutional standards at sentencing to the absence of a liberty interest, the *McMillan* due process formula divorced itself from the system's interest in obtaining relevant information considered so crucial in *Williams* and *Grayson*.[179]

Combining the *Meachum-McMillan* theory—that a conviction magically strips a defendant of his liberty interest in an as yet undetermined term of imprisonment to the full extent of the statutory maximum—with the premises underlying *Williams* and *Grayson*—that a legislature may delegate to a court absolute discretion to impose any sentence below or equal to the statutory maximum using any available information to arrive at a proper sentence—yields a *legislative* power to operate outside due process constraints in setting punishment for any crime for which the legislature has statutorily designated a maximum punishment. In other words, by its very act of naming a statutory maximum, a government erases that amount of a potential defendant's liberty interest in his freedom, thereby escaping the scrutiny of the Due Process Clause. Post-Guidelines cases have seized upon this analysis, and in so doing

178. *McMillan*, 477 U.S. at 92 n.8 (quoting *Meachum*, 427 U.S. at 224). *Meachum* responded to an inmate's procedural due process challenge to a prison transfer, that is, to a claim by a person who had already been sentenced to a specific term. The words "to the extent the State may confine him" quite obviously refer to the *term* given at sentencing, not to the maximum term delineated by statute. This point is easily discerned by reviewing the entire quote from *Meachum*, as opposed to the sliver culled out by Justice Rehnquist: "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the state may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." 427 U.S. at 224. Note that the *Meachum* Court felt no need to provide any citation for this proposition.

As Professor Kadish has explained, the importation of reasoning from the parole-prison arena to the sentencing stage is inappropriate:

> Daily housekeeping decisions in the conduct of an institution are not of the same order as sentencing-type decisions governing release and term, either in their impact on the individual or the significance to him, in the closeness of the relationship to the original processes of guilt determination, or in their potential for contaminating the mainstream of tradition with regard to notions of the rule of law.

KADISH, *supra* note 153, at 256; *see also* Herman, *supra* note 2, at 331–32.

179. Professor Herman points out that by "turning to *Meachum* [the *McMillan* Court] merely assumed an answer and continued the tradition of treating sentencing as a matter completely separate from conviction." Herman, *supra* note 2, at 332.

have removed any impediment to a government's decision to relegate unadjudicated crimes to the status of sentencing factor.

Consider, for example, the Third Circuit's response in *United States v. Mobley*[180] to an argument challenging a "sentence enhancement" for possession of a stolen gun, a crime admittedly not charged because the government lacked proof of scienter:

> [Defendant] confuses the fundamental distinction between conviction and sentencing. Moreover he confuses the distinction among a sentence, a sentence enhancement and the definition of a crime. In our bifurcated criminal justice process, at the trial stage the accused receives the full panoply of constitutional rights. . . . At the sentencing stage, however, a convicted criminal is entitled to less process than a presumptively innocent accused.[181]

Mobley received the same punishment pursuant to the "possession of stolen firearm" sentencing factor[182] that he would have received had he been convicted of "possession of a stolen firearm pursuant to 18 U.S.C. §§ 922(i) or (j)."[183] The conduct prohibited by the two provisions was identical; however, the sentencing factor eliminated the scienter requirement. In response to the defendant's insistence that he was in fact being punished for statutorily prohibited criminal conduct in the absence of a conviction, the court explained:

> This argument misses the point. [Defendant] was not charged under §§ 922(i) or (j); he was charged under § 922(g). He was not sentenced for violating §§ 922(i) or (j); he was sentenced for violating § 922(g). The [Guidelines] did not sentence or enhance his sentence for violating §§ 922(i) or (j); it enhanced his sentence for violating § 922(g). The argument misperceives the distinction between a sentence and sentence enhancement.[184]

---

180. 956 F.2d 450 (3d Cir. 1992).

181. *Id.* at 455 (citation omitted).

182. U.S.S.G., *supra* note 1, § 2K2.1(b)(4). The *Mobley* court incorrectly cited to U.S.S.G., *supra* note 1, § 2K2.1(b)(2), which allows sentence reduction if a firearm was owned for sporting reasons. Subsection (b)(4) allows for increase if the gun is stolen.

183. "Together § 922(i) and § 922(j) provide that *any person* who 'transport[s]' or 'receive[s] . . . any stolen firearm or stolen ammunition, *knowing or having reasonable cause to believe*' it stolen is culpable." *Mobley*, 956 F.2d at 454 (second emphasis added).

184. *Id.* at 456–57 (quoting United States v. Mocciola, 891 F.2d 13, 17 (1st Cir. 1989)). The court continued, pointing out that:

> [Defendant] seeks to blur the distinction among a sentence, sentence enhancement, and definition of an offense. If he was correct, anytime specific offense characteristics of a sentence enhancement satisfy some element of a separate offense, many applications of the guidelines would be constitutionally in doubt. [The Court then referenced relevant conduct provisions]. These acts or omissions could in many cases satisfy elements of other offenses and constitute grounds for more charges.

After uttering this ipse dixit, the opinion pointed out that the sentence-sentence enhancement distinction "may be academic to the defendant who must serve the sentence, but it is analytically crucial for the due process scrutiny."[185]

According to *Mobley*'s reading of *McMillan*, due process is implicated only if a sentencing regime alters the statutory maximum, negates the presumption of innocence, or creates a separate offense calling for a separate penalty.[186] *Mobley* pointed out that the stolen gun enhancement did not offend the statutory maximum for the crime of conviction; that the presumption of innocence was not impugned because the prosecutor's burden of proof at the conviction stage suffered no modification; and, as explained above, that no new offense had been created, notwithstanding the existence of a statutory offense encompassing the same conduct. The Third Circuit's approach, like that of the majority of the other courts of appeals, excludes from due process scrutiny the Guidelines' *choice* of sentencing factors, leaving only the accuracy of the sentencing proceeding open to review. According to *Mobley*, "once convicted, a defendant has a liberty interest in the correct application of the Guidelines within statutory limits, nothing more and nothing less."[187]

The same analysis accounts for the perverse reasoning in cases upholding punishment for acquittal conduct. The most well known among these is undoubtedly the Fifth Circuit's opinion in *United States v. Juarez-Ortega*.[188] The defendant was convicted by jury of two counts of intent to distribute, and acquitted of carrying a firearm "during and in relation to" a drug trafficking offense.[189] At sentencing, the district judge voiced obvious dissatisfaction with the jury's acquittal,[190] and instead of imposing the twelve to eighteen month term called for by the Guidelines in the absence of a gun, sentenced the defendant to seventy-six months—the same term received by the defendant's codefendant who had been convicted on

---

Id. at 457–58 (footnote omitted). The court then notes that other courts have rejected this idea. *Id.* at 458.

185. *Id.* at 457.

186. *Id.* at 456 (citing McMillan v. Pennsylvania, 477 U.S. 79, 87–88 (1986)).

187. *Id.* at 455 (citation omitted).

188. 866 F.2d 747 (5th Cir. 1989).

189. *Id.* at 748; *see also* 18 U.S.C. § 924(c)(1) (Supp. III 1991).

190. For a description of this dissatisfaction, *see infra* notes 262–63 and accompanying text.

the firearm count.[191] In response to Juarez-Ortega's argument that the court "in effect overrode the jury's determination of a fact issue with regard to the question of the firearm," the Fifth Circuit replied:

> This argument is without merit. Although the jury may have determined that the government had not proved all of the elements of the weapons offense beyond a reasonable doubt, such a determination does not necessarily preclude consideration of underlying facts of the offense at sentencing so long as those facts meet the reliability standard. The sentencing court was not relying on facts disclosed at trial to punish the defendant for the extraneous offense, but to justify the heavier penalties for the offenses for which he was convicted.[192]

The confidence with which the federal courts embrace an obviously semantic, and concededly "academic," distinction is startling. Relying on *McMillan*, the cases suggest that the simple fact of conviction justifies use at sentencing of any information deemed relevant by the legislature. Because a court is not sentencing for the nonconviction offense, but is in fact engaged in determining the proper level of deprivation for the conviction offense, the legislature's choice to include unadjudicated crimes as sentencing factors is immune from scrutiny. The sentencing court need only concern itself with the reliability of facts on which it chooses to base the sentence.

Such an approach vests enormous unchecked power with the legislature. Theoretically, statutory maximums could be increased to levels high enough to accommodate punishment for any crimes allegedly committed by a convicted offender, obviating the government's burden to prove the bulk of criminal activity by proof beyond a reasonable doubt.[193] The federal courts, however, have

---

191. Although the Fifth Circuit upheld this sentence, the district court actually applied the Guidelines incorrectly. The district court should have enhanced the defendant's base level offense for possessing a dangerous weapon during a drug crime pursuant to § 2D1.1(b). Instead the sentencing court departed under Chapter Five to reach the 76-month sentence. The departure is technically impermissible in that it relies on a factor clearly considered by the Commission in drafting the Guidelines.

192. 866 F.2d at 749. Only the Ninth Circuit has refused to use acquittal information at sentencing. *See* United States v. Brady, 928 F.2d 844, 850–52 (9th Cir. 1991). Other courts of appeals have expressed their agreement with the Fifth Circuit's result on the basis that an "acquittal demonstrates only a lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant's innocence." United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989).

193. This scenario differs from that posed by the dissenters in Patterson v. New York, 432 U.S. 197 (1977), in that it would still require the government to name and prove all the elements of some crime. In *Patterson*, the dissenters worried that the legislature could provide merely a generic crime with no elements and shift the burden

simply declined to question the assumption that conduct prohibited by criminal statute may, at the government's whim, be relegated to the status of sentencing factor.

III. CONVICTION AS PREREQUISITE TO PUNISHMENT

A. *The Flaw in the Supreme Court's Model*

The Supreme Court's due process analysis must be reconsidered, not in response to the change in sentencing structure,[194] but because the approach was wrong in the first instance. Viewed through the prism of the Guidelines, it becomes clear that the prevailing due process formula is deeply flawed. The formula presumes that the very act of designating a maximum punishment presumptively vests the state with that amount of the defendant's liberty upon conviction, rendering the legislature's, or court's, choice of sentencing factors irrelevant to the due process analysis.[195]

---

to the defendant to disprove factors. *Id.* at 227–28 (Powell, J., dissenting). The results of either of these Orwellian hypotheses are strikingly similar.

194. Several commentators have suggested that the due process analysis developed in *Williams*, *Grayson*, and *McMillan* is rendered obsolete by the Act's explicit rejection of the indeterminate sentencing model. Because the Act excludes rehabilitation as a legitimate purpose of incarceration, a sentencing court's need for information regarding the offender's "prospects for rehabilitation" considered so crucial in *Williams* and *Grayson* has vanished. *See* Heaney, *supra* note 2, at 215–20; Herman, *supra* note 2, at 340–42; Harvey M. Silets & Susan W. Brenner, *Commentary on the Preliminary Draft of the Sentencing Guidelines Issued by the United States Sentencing Commission in September, 1986*, 77 J. CRIM. L. & CRIMINOLOGY 1069, 1079–92 (1986). Similarly, commentators have pointed out that the pre-Guidelines cases hinged their analyses on the sentencing judge's ability to sentence the offender to the statutory maximum without disclosing his reasons. The Guidelines have eliminated both the discretionary ability to sentence absent explanation and in most cases the right to sentence to the extent of the statutory maximum. *See* 28 U.S.C. § 994(h) (1988) (mandating that career offenders receive sentences at or near the maximum, thus reserving much lower sentences for "typical" offenders); Husseini, *supra* note 2, at 1399–401; *see also* Heaney, *supra* note 2, at 215–20.

195. This position has historically been defended on two grounds. First, it is argued that because the state could have punished the offender to the extent of the statutory maximum, a lesser sentence represents the dispensation of grace. Thus, the theory goes, no legal claim may be attached to "an act of merciful leniency," because it is a privilege rather than a right. Kadish, *supra* note 153, at 920. At base, this theory must assume that every criminal statute is the result of a legislative consensus that the crime defined therein merits the maximum punishment listed, and that only the mercy of the sentencing court causes a lesser sentence. Such a description is at odds with reality; federal criminal statutes set forth a range of appropriate punishment. There is a minimum and a maximum for each statute. At no point in the federal criminal code is it suggested that a judge must begin his or her inquiry at the top of the range and count down. As *Williams* makes clear, the indeterminate sentence was conceived in an effort to inject humanity into the sentencing process and allowed judges to pick the "appropriate" sentence within a range of possibilities. The "grace" argument is even harder to sustain in

Such unbridled governmental power is flatly at odds with the philosophical underpinnings and structure of the Constitution.

The government of the United States is one of limited powers;[196] its very design assumes the worth of the individual, the danger of government abuse, and the need for restraint of government actors.[197] Yet the *McMillan* approach suggests that Congress may create a space in which it, or the courts, may act outside the bounds of the Constitution to restrain an individual's actual liberty. No authorizing language may be gleaned to support such a position.[198] In fact, the very extremes to which the courts have had to go in order to protect this ideology demonstrate its incompatibility with the constitutional framework. Almost the entire Bill of Rights has had to be defined away:[199] the Double Jeopardy Clause does not

---

the Guidelines environment in which it is absolutely clear that sentencing is based on aggravating as well as mitigating factors. The notion that mercy accounts for the extra-constitutional character of the sentencing inquiry seems even more implausible under a guidelines system, when "grace" is dispensed mandatorily on a system-wide basis pursuant to a mechanical scoring process.

Perhaps inherent in the "grace" approach, but often discussed as a separate rationalization for the system, is the notion that a convicted criminal is an "outlaw"—a " 'naked criminal[], hoping for mercy but entitled only to justice,' neither a 'citizen, nor entitled to invoke the organic safeguards which hedge about the citizen's liberty.' " *Id.* (footnotes omitted). As an outcast, the convicted offender exists beyond the parameters of constitutional protection. Professor Kadish's eloquent response in the context of the indeterminate model remains persuasive today:

> [T]he argument is immoral; and it underrates the danger to the general community. A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual no matter how degenerate. It is a radical departure from that tradition to accept for a defined class of persons, even criminals, a regime in which their right to liberty is determined by officials wholly unaccountable in the exercise of their power . . . .
>
> . . . .
>
> Secondly, attitudes and values are infectious. The way official power is exercised over the criminal is bound to have repercussions on how it is exercised over the accused; and how it is exercised over the accused is bound to affect how it is exercised over the general community.

Id. at 923–24; *see also* Reitz, *supra* note 2, at 557–59.

196. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The original and supreme will organizes the government, and assigns to different departments . . . .").

197. As James Madison elegantly phrased it in explaining the concept of ordered liberty: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

198. On the contrary, the Due Process Clause by its very terms applies to deprivations of liberty; a comparable provision excluding the sentencing stage from Constitutional constraint is strikingly absent. *See* U.S. CONST. amend. V.

199. Not only has the Court been required to manipulate many of the Bill of Rights protections to support its approach to due process at sentencing, but it has also had to

apply at sentencing;[200] the Fourth Amendment prohibition against unreasonable searches does not apply at sentencing;[201] the Confrontation Clause does not apply at sentencing.[202] In addition, cases applying the Court's approach have been forced to adopt absurd positions to support their results: an acquittal is no protection against punishment;[203] a convicted defendant has no liberty interest in his liberty;[204] a citizen whose punishment is increased on the basis of specific conduct is not being punished for that conduct.[205] Such obvious inanities could not fail to astound the general public.[206] Nor should we allow our legal training to dull our intellects to such nonsense.

Admittedly, the Constitution provides little affirmative guidance regarding factors that may be incorporated into the sentenc-

---

do this selectively and inconsistently. *See* Herman, *supra* note 2, at 316–42. Note that the Confrontation Clause is not implicated at sentencing, United States v. Kikumura, 918 F.2d 1084, 1102–03 (3d Cir. 1990), but the right to counsel is constitutionally mandated, Townsend v. Burke, 334 U.S. 736, 738–41 (1948). Similarly, due process forbids the use of prior convictions obtained unconstitutionally, United States v. Tucker, 404 U.S. 443, 444–45, 447–49 (1972), yet condones inclusion of offenses that were never even charged.

200. United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181 (2d Cir.) (use of acquittal conduct at sentencing does not violate Double Jeopardy Clause), *cert. denied*, 111 S. Ct. 127 (1990).

201. *See, e.g.*, United States v. Tejada, 956 F.2d 1256, 1263 (2d Cir.) (holding that the sentencing judge should consider illegally obtained evidence where it was not seized expressly to enhance the sentence), *cert. denied*, 113 S. Ct. 124 (1992); United States v. McCrory, 930 F.2d 63 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992).

202. *See supra* note 114 and accompanying text. In addition, the very scope of the sentencing inquiry historically authorized by the indeterminate system implies that the First Amendment may not apply at sentencing. The rehabilitative model itself has moral and religious underpinnings. Under most indeterminate systems, offenders' religious habits were routinely considered in presentence reports. Logically, under the *Grayson-Williams* approach, any information relevant to a defendant's prospects for rehabilitation could "properly" be considered by the sentencing court. An offender's religious habits undoubtedly may be correlated with prospects for rehabilitation. Also, *Grayson* might suggest that there would be no way to regulate the use of such information for the improper purpose of discriminating against particular religions and the proper purpose of assessing a defendant's prospects for rehabilitation.

203. *See* cases cited *supra* note 7.

204. *Cf.* United States v. Mobley, 956 F.2d 450, 455 (3d Cir. 1992) (suggesting that, once convicted, a defendant "is entitled to less process than a presumptively innocent accused").

205. *See* cases cited *supra* note 14.

206. Professor Freed comments:

> Most lawyers, as well as ordinary citizens unfamiliar with the daily procedures of criminal law administration, are astonished to learn that a person in this society may be sentenced to prison on the basis of conduct of which a jury has acquitted him, or on the basis of charges that did not result in conviction.

Freed, *supra* note 2, at 1714.

ing inquiry.[207] It does, however, delineate specific conduct that lies outside the government's power to punish. In spite of the years of operation under the *Williams* rubric, few scholars or courts would argue that the Sentencing Commission could constitutionally have categorized "failure to attend church" or "membership in the Democratic Party" as aggravating factors under the Guidelines.[208] Just as the Constitution prohibits punishment on the basis of religious or political beliefs, it prescribes a specific procedure that must be honored should the government seek to deprive an individual of his freedom for a transgression of the criminal law. The mandates of the Fifth and Sixth Amendments are not optional.[209] By statutorily classifying specific conduct as criminal, the legislature forfeits its right to punish that behavior in any manner other than by recourse to the criminal justice system established by the Constitution.[210]

---

207. This Article does not attempt to delineate the information that must be considered at sentencing; it seeks to prove only that absent a conviction, criminal offenses are *outside* the scope of the sentencing inquiry. An analysis of the proper allocation of facts between the trial and sentencing hearing appears in Herman, *supra* note 2, at 342–55.

208. Before the Guidelines were adopted, the Fourth Circuit overturned evangelist Jim Bakker's 45-year sentence as violative of the First Amendment because the sentencing court had considered the fact that he was a minister when he committed his fraudulent acts to be an aggravating factor. United States v. Bakker, 925 F.2d 728, 740–41 (4th Cir. 1991).

209. The Fifth and Sixth Amendments very specifically set forth the characteristics considered crucial to a fair criminal justice system. Although the word was known and used in the Constitution, most of the protections at the criminal stage are not confined to a criminal "trial." The language is actually quite broad, referring to being "held to answer," the "criminal case" and "criminal prosecutions." The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

210. As Professor Tonry phrased it: "Real offense sentencing side-steps the substantive law as if its refinements are so much superfluous metaphysic, rather than the exactingly developed fine print of the social contract." Tonry, *supra* note 2, at 1565. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 324-30, 347-49 (Peter Laslett ed., student ed. 1988) (3d. ed. 1698).

This choice is critical even assuming, as *McMillan* posits, that it is within a legislature's discretion to categorize conduct as a sentencing factor, an element of a crime, or a completely separate crime.[211] Once the decision is made to condemn specific conduct as, in and of itself, criminally reprehensible, a conviction must be treated as a prerequisite to punishment based on that conduct.

The Court's analysis begs the crucial question—it presumes the right to punish on proof of factual guilt. But the state's power to punish does not derive from the existence of factual guilt; it originates from the finding of legal guilt symbolized by conviction. At its most elementary level, the criminal justice system exists to legitimize punishment—to authorize the state to deprive an individual of his life, liberty, or property. Conviction supplies this legitimacy. Such legal guilt authorizes punishment even in the face of factual innocence. American society clearly abhors the idea that an innocent should be hanged, but in spite of this institutionalized abhorrence, government is not deemed to have acted lawlessly by punishing a factually innocent citizen after a fair trial and conviction.[212] Considered from this perspective, the fallacy in the reasoning upholding punishment for acquittal conduct becomes obvious. These cases argue that an acquittal does not prove innocence. A citizen, however, does not need to prove his innocence to protect himself from criminal punishment; the government needs authorization through conviction to legitimize his incarceration.[213] In the absence of a conviction, the government lacks constitutional authority to exact punishment for allegedly criminal conduct.[214]

---

211. Professor Herman takes issue with the idea that *McMillan* leaves states completely free to allocate conduct between elements and sentencing factors. Herman, *supra* note 2, at 333–36.

212. *Cf.* Imbler v. Pachtman, 424 U.S. 409, 424–29 (1976) (societal benefit warrants finding prosecutor absolutely immune from 42 U.S.C. § 1983 (1988) claim of having knowingly presented perjured testimony at trial); Pierson v. Ray, 386 U.S 547, 553–54 (1967) (finding judge immune from damages action under 42 U.S.C. § 1983 even though the judge was accused of acting maliciously or corruptly on ground that immunity benefits public interest in having independent judiciary).

213. *Cf.* Herman, *supra* note 27, at 530 (The state "can no more create freedom than [it can] life," thus, "under the Constitution, the role of the sovereign in connection with freedom and liberty is purely negative.") (footnote omitted).

214. In fact, it is arguable that the notions of individual liberty embraced by the Bill of Rights suggest that criminal conduct is the only legitimate action for which the state may exact punishment. Under such a theory, fidelity to the offense of conviction is required because any conduct not specifically proscribed by statute (or common law crime) is deemed free conduct by this society. Other harmful conduct is relegated to the civil system for settlement by damages or to other social means of control. Such an approach would of course be inconsistent with the rehabilitative model as a whole. At

The constitutional necessity of a conviction is most easily grasped by examining the disruptive effects of the opposite presumption on the administration of justice through the classic jury trial model. The prevailing approach emasculates the jury's ability to protect the citizen from government overreaching, thereby undermining the jury's crucial balancing role in the criminal justice system. The judiciary's power to divine facts directly linked to punishment, as well as the United States Attorneys' capacity to secure extreme punishment outside the trial context, is virtually uninhibited.[215] Treating conviction as irrelevant to the right to punish criminal behavior renders the jury powerless to control government recourse to the criminal sanction. Abandoning jury approval undercuts the stability of the criminal justice system by impugning the integrity of the verdict, and by interfering with the jury's unique ability to provide political accountability to the larger democratic society.

B. *The Example of the Jury Trial*

The Constitution strikes a deliberate, yet precarious, balance between the judge, jury,[216] and prosecutor, each providing a counterbalance to the potential abuses of the others. Any one actor alone is empowered to exercise mercy by halting the process toward conviction without the acquiescence of the other two: the prosecution may refuse to indict and neither the judiciary nor the grand jury may override that decision;[217] the judge may dismiss the indict-

---

the very least, when the Constitution goes to the trouble to enumerate certain behaviors and how or whether they may be punished, we should respect those statements.

215. The following argument does not seek to prove that government overreaching is in fact the norm under a real offense model. Rather, it is designed to show that the potential for abuse of power exists under the current system, and that the Guidelines render the grand and petit juries powerless to check such abuse should the need arise.

216. Unless otherwise specified, references to the "jury" or "jury system" are intended to encompass both the grand and petit juries in the federal system.

217. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974) (noting that the decision to prosecute rests exclusively in the Executive Branch); United States v. Cox, 342 F.2d 167, 185–96 (5th Cir.) (Wisdom, J., concurring) (pointing out that neither the grand jury nor the judiciary may contravene the executive's decision not to indict), *cert. denied*, 381 U.S. 935 (1965). The Fifth Amendment theoretically gives the grand jury the right to proceed against a defendant by presentment; however, at the time the Fifth Amendment was adopted, the prosecutor possessed an unreviewable right to abort the case by filing a writ of *nolle prosequi*. ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 12 (1981). FED. R. CRIM. P. 7(a) authorizes prosecution only pursuant to indictment (or information if indictment is waived), thus eliminating the federal grand jury's right to proceed by presentment.

ment or order judgment of acquittal absent agreement of either the jury or the prosecution;[218] and the grand jury may refuse to indict in spite of the government's insistence that the defendant should be prosecuted,[219] while a petit jury may decline to convict regardless of the opinion of the judge or prosecutor.[220] Contrast this with the hurdles the government must overcome to secure criminal punishment: the prosecutor must have both the approval of the grand jury and the judge to pursue the indictment[221] and the approval of both the judge and petit jury for a conviction. Thus, while independent government agents may exercise mercy absent democratic approval, decisions to institute proceedings or authorize punishment require the explicit blessing of the "people" through the jury.[222]

The architects of this plan did not expect that jury approval would be lightly given. The jury was no accident of history or symbolic offering designed to assuage the suspicions of the masses. "[T]he American colonies won their independence at a time when the jury system was being acclaimed as a fundamental guarantor of individual liberty."[223] Colonists firmly believed that layperson ju-

218. If the judge dismisses the indictment, the prosecution is free to try again by securing an indictment for the same offense from a different grand jury. *See* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 15.2 (1984). In the case of a judgment of acquittal, however, the defendant is theoretically immune by virtue of the Double Jeopardy Clause from further criminal sanction for that conduct. United States v. Wilson, 420 U.S. 332, 343 (1975) (noting that "[w]hen a defendant has been acquitted of an offense, the [Double Jeopardy] Clause guarantees that the State shall not be permitted to make repeated attempts to convict him").

219. The grand jury may not be compelled by either the prosecution or the judiciary to return an indictment. *See* 2 LAFAVE & ISRAEL, *supra* note 218, § 15.2. The prosecution is free, however, to submit the evidence to the next grand jury in the hope of obtaining an indictment. Professors LaFave and Israel point out that the "longstanding federal rule" permits resubmission even though the prosecutor presents no additional evidence to the second grand jury. *See id.*; *see also*, 1 SARA S. BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 6:41 (1986) (noting that "double jeopardy imposes no bar to resubmission because the grand jury has determined only that the evidence presented did not establish probable cause to indict the accused").

220. The petit jury's power to refuse to convict is absolute. *See* Strickland v. Washington, 466 U.S. 668, 695 (1984) (even decision of "lawless" decisionmaker cannot be reviewed). Although the trial court may direct a judgment of acquittal, it may never direct a judgment of conviction. *See*, WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.1 (student ed. 1985).

221. The judge may review the indictment to ensure that a crime has been alleged and for pleading inconsistencies, which if found may warrant dismissal. *See* LAFAVE & ISRAEL, *supra* note 220, § 8.4(c). The review at common law was extremely strict. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 30-31 (1968).

222. *See* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1184–85 (1991).

223. STIMSON, *supra* note 17, at 34.

ries were the major impediment to the tyranny of arbitrary government.[224] As Justice Story's oft-quoted description explains:

> It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. . . . When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as part of that admirable common law, which had fenced round and interposed barriers on every side against the approaches of arbitrary power.[225]

The drafters of the Constitution, steeped in this tradition, placed the jury at the heart of the criminal justice system with the expectation that it would play an active and important role in safeguarding American liberty.[226]

---

224. *See* FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 21–29 (1951). As evidence of early America's regard for the jury system, Heller notes that the denial of jury trial was one of the grievances specifically set forth in the Declaration of Independence, that every state boasted a constitutional right to trial by jury before the adoption of the federal constitution, and that the rhetoric used by constitutional critics during the ratification debates to praise the institution of the jury was extremely expansive. *Id.*

225. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779, at 652–53 (Leonard W. Levy ed., Da Capo Press 1970) (1833).

226. *See* Amar, *supra* note 222, at 1183 ("The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury.").

To adequately understand the significance of the jury in the constitutional framework, one must first recognize that, unlike the modern judiciary, the drafters of the Constitution were not engaged in a metaphysical debate about the meaning of a criminal conviction and its relationship to punishment. Conviction and punishment were synonymous. "[W]ith few exceptions, criminal sentencing in the colonial period followed a strict legislative model. Statutes dictated relatively fixed sentences—the whip, the stocks, fines, death. Although magistrates sometimes had a modicum of discretion concerning the duration of corporal punishments, for the most part, the system was characterized by inflexibility." ALAN M. DERSHOWITZ, TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 84 (1976) (footnote omitted). Although imprisonment gained steady popularity shortly after the Constitutional Convention, *id.* at 85–87, it was against this backdrop of clear, legislatively determined punishments that the drafters constitutionalized the criminal justice system. The Constitution addressed the need to control government recourse to the criminal sanction, not simply recourse to the criminal trial. *See* David Rothman, *Lawful Sentences: How Much, in* JUSTICE IN SENTENCING 46–52 (Leonard Orland & Harold R. Tyler eds., 1974); Herbert Wechsler, *The Model Penal Code and the Codification of American Criminal Law, in* CRIME, CRIMINOLOGY AND PUBLIC POLICY 419 (Roger Hood ed., 1975); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 821–22 (1968). *But see* Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 555 (1978) (taking issue with Dershowitz's (and others') conclusion that judicial discretion in sentencing is the result of the optimism of the Progressive Era). According to Professor Alschuler, the number of state statutes vesting judges with the authority to choose punishment levels (branding, whipping, and

Concerned that the meager provision for criminal trial by jury in Article III might be insufficient to hold the government in check,[227] the first Congress designed more explicit methods in the Bill of Rights by which the jury might control both the executive and the independent judiciary of the national government.[228] The right to indictment by grand jury was added both as a means of controlling prosecutorial charging discretion and ensuring citizen

---

in some cases incarceration) during the eighteenth and early nineteenth centuries proves that rehabilitation "has been neither the exclusive nor the primary impetus for the grant of judicial sentencing discretion in America." *Id.* at 556. Alschuler suggests that "[t]he principal function of judicial sentencing discretion has probably been to permit a detailed consideration of differences of this sort in culpability—a consideration that legislatures have historically recognized their own inability to provide." *Id.* at 557. This conclusion does not, however, support the notion that the framers understood separate crimes for which a defendant had never been convicted to be within the realm of the judge's sentencing discretion.

227. Article III provides only that "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § 2, cl. 3. This provision provided the source of passionate attacks on the Constitution during the ratification debates. *See* HELLER, *supra* note 224, at 25–29. These concerns were not limited to the petit jury. As Richard D. Younger points out, "[t]he necessity of an express guarantee of the right to indictment by a grand jury in all criminal cases became a disputed issue before several of the state ratifying conventions." RICHARD D. YOUNGER, THE PEOPLE'S PANEL 45 (1963). In Massachusetts, Abraham Holmes warned that officers of the federal government would be at liberty to proceed by information and "bring any man to jeopardy of his life without indictment by a grand jury." *Id.* Supporters of the Constitution noted that the possibility of such behavior existed under the current draft, but that just because officials could so abuse their power did not mean they necessarily would. "Refusing to rely solely upon the integrity of future federal officials, the Massachusetts [and New York and New Hampshire ratifying] convention[s] recommended that the Constitution be amended" to include a grand jury provision. *Id.*

228. Early Americans were only too aware of the awesome power of the criminal sanction as a tool for political oppression. The most grisly punishments in England had typically been inspired by antigovernment activity. Amar, *supra* note 222, at 1182. For example, "[f]or the crime of 'writing books and pamphlets,' the English lawyer William Prynne's 'ears were first cut off by court order and . . . subsequently, by another court order, . . . his remaining ear stumps [were] gouged out while he was on a pillory.' " *Id.* (citing Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 870 (1960)). In addition, the American colonial period, like the English practice of that time, had been characterized by punishments of extreme severity. As Professor Jay Sigler explains: " '[I]f one were to mark out the period of greatest severity in modern English law, the sixteenth and seventeenth centuries would undoubtedly form the central area.' With this condition extant on both sides of the Atlantic, the need of a countervailing protection must have been evident." Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 303 (1963) (quoting JEROME HALL, THEFT, LAW AND SOCIETY 117 (2d ed. 1952)). Only after the Revolution did the states succumb to the influence of Cesare Beccaria's 1764 treatise, *On Crimes and Punishment*, and begin to reject the harsh criminal laws characterizing the earlier era. *See* DERSHOWITZ, *supra* note 226, at 85–86.

review of government wrongdoing.[229] To further control government recourse to the criminal sanction, the Bill of Rights included the Double Jeopardy Clause.[230] Although it makes "no explicit mention of juries," Professor Akhil Amar argues that the Double Jeopardy Clause "should be understood to safeguard not simply the individual defendant's interest in avoiding vexation, but also the integrity of the initial petit jury's judgment (much like the Seventh Amendment's rule against 're-examin[ation]'[231] of the civil jury's verdict)."[232] Also, in response to the widespread suspicion generated by the failure of Article III to require jurors from the neighbor-

229. The grand jury, hailed as a "bulwark against oppression," played an active role in the Revolution by refusing to indict colonists for "political crimes" and in issuing reports critical of England's colonial practices. YOUNGER, *supra* note 227, at 45-48.

230. Professor Jay Sigler credits Madison with the idea of including the Double Jeopardy Clause, which when proposed in the House of Representatives on June 8, 1789, read as follows: "[N]o person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." Sigler, *supra* note 228, at 304, 306. Although some members of the House thought the language might be interpreted to deny the defendant a second trial after a successful appeal, *id.* at 305, the amendment was presented to the Senate in the same form. The proposal was adopted by the Senate with the substitution "be twice put in jeopardy of life or limb by any public prosecution." *Id.* at 306.

231. The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

232. Amar, *supra* note 222, at 1190 (alteration in original). The Article III jury provision provoked intense criticism during ratification for offering no protection against *judicial* disregard of the jury's verdict. *See* HELLER, *supra* note 224, at 25. These critics "pointed to the appellate jurisdiction of the federal courts and predicted that it would, 'in its operation, destroy the trial by jury. The verdict of an impartial jury will be reversed by judges unacquainted with the circumstances.' " *Id.* (quoting Patrick Henry, Speech at the Virginia Ratifying Convention (June 20, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540 (Jonathan Elliot ed., 2d ed., Phila., J.B. Lippincott 1888)). What protection could the jury really offer if its verdict could be upset by the independent federal judiciary? Quite clearly, the Seventh Amendment prohibition against reconsidering facts responds to this concern in the context of the civil jury. It seems odd to assume that a nation obsessed with controlling the power of the central government and its recourse to the criminal law would have been content to allow factual reconsideration in the context of the criminal trial, but not the civil. The Double Jeopardy Clause, however, has never been interpreted to prohibit use of nonconviction offenses at sentencing, nor has it been extended to prohibit an enhanced punishment when the defendant has been convicted of other offenses prior to the instant offense. *See infra* note 253 and accompanying text.

hood of the accused,[233] the Sixth Amendment guaranteed the local character of the jury.[234]

These fortifications to the jury system take on special significance when one considers that jury nullification was a popular tool by which English and colonial juries shielded their citizens from government tyranny.[235] Requiring local jurors and ensuring the inviolacy of "not guilty" verdicts[236] increased the likelihood that a jury would resort to nullification to resist abusive prosecutions. Also recall that the right of jury review—the power to refuse to enforce unconstitutional laws (as opposed to the right to disregard a law altogether)—was widely advocated by early constitutional theorists.[237] The impeachment of Justice Chase for his refusal to instruct the jury regarding its power to review for unconstitutionality supplies a graphic illustration of the strength of this belief.[238] Considered against this backdrop, the drafters doubtless expected the jury to provide a powerful defense against the overzealous prosecutor and the corrupt judge[239] and perhaps against abuses by the national lawmaking power as well. The Court's approach to sentencing, however, demonstrates that this confidence was misplaced. The failure to treat conviction as a prerequisite to punishment obviates the government's need to secure democratic approval through jury review, thus eviscerating the jury's ability to control executive and judicial abuse.

---

233. HELLER, *supra* note 224, at 25. During debate at the Virginia ratifying convention, Patrick Henry declared: "[T]his great privilege . . . is prostrated by this paper. Juries from the vicinage being not secured, this right is in reality sacrificed." *Id.*; *see also* Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 508 (1986).

234. The Sixth Amendment mandates that jurors be drawn from the "State and district wherein the crime shall have been committed." U.S. CONST. amend. VI.

235. Regarding the English practice of nullification, see generally THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE 26–27, 62–63 (1985); TWELVE GOOD MEN AND TRUE: THE CRIMINAL JURY IN ENGLAND 1200–1800 (J.S. Cockburn & Thomas A. Green eds., 1988). Regarding both the history of the American experience with jury nullification and whether the petit jury has the right or merely the power to nullify, see generally Gary J. Stimson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976); Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825 (1990).

236. See *infra* text accompanying notes 257–58.

237. Amar, *supra* note 222, at 1191; *see* Massaro, *supra* note 233, at 508–09.

238. Amar, *supra* note 222, at 1191–92.

239. The Supreme Court has long praised the jury as a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

1. Grand Jury Control

The tenuous control historically exercised over the United States Attorneys' offices by the grand jury system is weakened even further by the current real offense scheme. The grand jury is often likened to a "shield" between the government and the accused by virtue of its right to refuse to indict should it find the government's evidence insufficient or unjust.[240] Under the Guidelines, however, the prosecution need not subject all criminal conduct to grand jury review; in many cases, the prosecutor retains the option of obtaining an equivalent criminal sanction by withholding evidence until after trial and offering it at the much more relaxed sentencing hearing. Not only does the possibility exist that a grand jury might not have been willing to indict the defendant for criminal conduct introduced at sentencing, but more disturbing, it might have already so declined. The current system does not technically prevent a federal prosecutor from presenting evidence of a "crime" at sentencing that has already been offered to, and rejected by, the indicting grand jury.[241] Severing punishment from conviction not only frees the federal prosecutor from the task of marshalling credible evidence to obtain an indictment for additional criminal conduct, but potentially authorizes her to ignore grand jury findings that such evidence was insufficient, or even politically motivated.[242]

240. The "grand jury is often said to operate as 'the shield and the sword' of the criminal justice system." The grand jury acts as a "sword" by virtue of its ability to operate as an investigatory body. LAFAVE & ISRAEL, *supra* note 220, at 346. The efficacy of grand jury review has long been the subject of debate. Critics allege that the grand jury is little more than the rubber stamp of the prosecutor. LaFave and Israel quote former prosecutors as stating that "a prosecutor, if he so desires, 'can indict anybody, at any time, for almost anything before a grand jury.'" *Id.* at 618. Because the "no-bills" or refusals to indict have been few and far between in the federal system, *id.* at 618–19, critics claim that the grand jury provides little affirmative control on the prosecution. Given, however, that the real offense system has obviated the need to submit a large number of criminal offenses to the grand jury for screening, it is impossible to judge the true effectiveness of the grand jury as a "shield."

241. Although FED. R. CRIM. P. 6(f) requires that the grand jury file a "no true bill" with the federal magistrate presiding over the grand jury if it rejects the entire prosecution proposed by the Assistant U.S. Attorney, *see* FED. R. CRIM. P. 6(f), neither the grand jury nor the prosecutor are required to disclose that proposed *counts* of an indictment have been rejected. Anecdotal information suggests that the federal prosecutor confronted with grand jury recalcitrance on a count could simply redraft the indictment, deleting that count, and resubmit it to the grand jury.

242. I am not suggesting that redrafting and resubmitting the indictment is common practice among federal prosecutors. In fact, I feel relatively certain it is not. The focus of this entire section is on unchecked power—I am suggesting that the *power* to redraft and resubmit and still obtain punishment at sentencing exists in the current system.

The ability to secure punishment absent grand jury review undermines the traditional notice function of the indictment.[243] Theoretically, an indictment ensures proper notice of a "capital, or otherwise infamous crime" for which a defendant might be "held to answer."[244] Supreme Court lore suggests that the indictment should "sufficiently apprise the defendant 'of what he must be prepared to meet.' "[245] Practically speaking, permitting punishment in the absence of charge and conviction produces indictments that provide little actual notice of the extent of criminal activity for which a defendant may ultimately be held accountable. Because federal indictments only detail the offense to be proven at trial, a defendant may be "held to answer" for substantial additional criminal conduct at sentencing.[246]

---

243. *See generally* LAFAVE & ISRAEL, *supra* note 220, at 711. A complicated set of rules designed to ensure notice exists, limiting the government's right to amend the indictment in the absence of grand jury approval, regulating the level of variance between the evidence introduced at trial and the allegations of the indictment, and reaffirming the necessity of pleading certain facts in support of the elements of the crime. *See generally id.* at 615–46. Quite clearly, the incentive to secure an amendment to the indictment is minimal in cases in which sentence enhancements for uncharged offenses will roughly equal punishments prescribed for such offenses upon conviction. It seems odd that we are so concerned that the government be prevented from introducing information of unindicted crimes or securing convictions for unindicted crimes at trial, yet completely unconcerned that proof of these same crimes is offered at sentencing under conditions designed to ensure that the government prevails and the defendant is punished for these crimes.

244. U.S. CONST. amend. V.

245. Russell v. United States, 369 U.S. 749, 763–64 (1962) (citations omitted).

246. The current approach confines the requisite notice to information to which one might be expected to respond at trial, thus excluding accusations raised at sentencing from the indictment requirement. The words "at trial" do not, however, follow the words "held to answer" in the Fifth Amendment. U.S. CONST. amend. V. Moreover, the drafters of the Fifth and Sixth Amendments were specific at other points, restricting the privilege against self-incrimination to "criminal case[s]" and extending trial by jury to situations involving "criminal prosecutions." *Id.* amend. VI. History is similarly unavailing in confirming that the indictment requirement was inextricably linked to crimes the prosecutor hoped to prove at trial, rather than crimes for which the government sought punishment. In the late eighteenth century, the words "held to answer" may have referred to answers given to questions from the magistrate (which predated police interrogations) or perhaps to the formal plea to criminal charges at an arraignment-like proceeding. Either historical hypothesis supports the view that a defendant is being "held to answer" at the sentencing hearing when the government introduces factual information in support of accusations of extraneous criminal behavior in an effort to secure additional punishment for that behavior. A failure to object on the defendant's part is treated as agreement; if a defendant hopes to avoid jail time for such conduct, he must object and cast enough doubt on government evidence to bring it below the preponderance of the evidence level.

Consider the case of *United States v. Kikumura*,[247] in which the government indicted and obtained conviction for twelve passport and weapons violations.[248] The unindicted and unconvicted conduct introduced at sentencing increased the defendant's sentence ten-fold.[249] Yet the federal prosecutor was under no obligation to include that information in the indictment. For the most part, the federal courts have responded to the notice claim like other constitutional challenges—noting that the defendant received notice of criminal conduct proven at trial; because he is not being punished for other criminal conduct, the notice function is not implicated. One federal court has even suggested that the Guidelines themselves provide the requisite notice.[250] The same could be said of the entire federal criminal code, but to date no one has suggested that the conduct sought to be proven at trial need not be described by the indictment.[251]

Another key role traditionally ascribed to indictment by grand jury is to provide a record by which double jeopardy claims might

---

247. 918 F.2d 1084 (3d Cir. 1990).

248. *Id.* at 1093–94. The court of appeals noted that the most serious violation was of 18 U.S.C. § 844(d) (Supp. II 1990), which prohibits transportation of explosives in interstate commerce "with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or real or personal property." *Kikumura*, 918 F.2d at 1094.

249. *Kikumura*, 918 F.2d at 1100. Although the Guidelines provided a sentencing range of 27 to 33 months for the offense of conviction, Kikumura was sentenced to 360 months. *Id.* at 1089. The sentencing judge departed from the Guidelines because he found that Kikumura was a member of the Japanese Red Army international terrorist organization, that he "meticulously planned, schemed and attempted" to carry out a terrorist mission in the United States, and that he intended to kill scores of people with his bombs "for no reason other than they are Americans." *Id.* at 1097. The judge equated this activity to attempted murder in calculating the sentence. *Id.* at 1115. Although the Third Circuit recognized a difference between an intent to commit murder and an attempt to commit murder, it found the analogy to attempted murder reasonable. *Id.* The Third Circuit reviewed each factor listed by the sentencing judge as a reason for departure and concluded that, while 360 months was an unreasonable sentence, 262 months would not be unreasonable. *Id.* at 1089.

250. United States v. Canada, 960 F.2d 263, 266–67 (1st Cir. 1992) (noting that, by defining "specific and finite factors" used to adjust the sentence, "the [G]uidelines themselves provide notice to the defendant" about what factors he should be prepared to comment on at the sentencing hearing).

251. Most notice claims arise in the context of FED. R. CRIM. P. 32. Yet, notice of criminal accusations via presentence reports are at base unsatisfactory. The opportunity to defend criminal charges first introduced at sentencing is substantially diminished from the trial context. *See supra* text accompanying notes 110–18. Timing and possibility of success (in that it is essentially an affirmative defense situation) conspire to undermine the ability to marshal a defense. In addition, the lower procedural due process requirements do not even mandate a full evidentiary hearing in which to respond to every accusation withheld until sentencing.

be judged.[252] Again, the Guidelines' real offense scheme permits a prosecutor to avoid the constraints of the double jeopardy prohibition by the simple expedient of not bothering to charge the crime. Under the Guidelines, a prosecutor may secure punishment for an uncharged offense at sentencing, only to turn around the following day and present that offense to a new grand jury. The Double Jeopardy Clause will find fault neither with the subsequent indictment and trial nor, as recent cases demonstrate, with a second punishment for that offense.[253] Although the Supreme Court recently reaffirmed that the Double Jeopardy Clause protects "against multiple punishments for the same offense,"[254] the federal courts do not interpret this language to preclude prosecution for conduct that has been the basis of an enhancement under the Guidelines. As the Eleventh Circuit recently explained:

> Enhancement of a sentence based on criminal conduct other than that underlying the instant conviction has the practical effect of penalizing the defendant for that conduct. However, it is not considered "punishment" for that conduct in the double jeopardy context because the court is sentencing the defendant only for the instant offense, which is considered more serious because of the defendant's other criminal conduct.[255]

---

252. LAFAVE & ISRAEL, *supra* note 220, at 711.

253. *See, e.g.*, United States v. Mack, 938 F.2d 678, 679–80 (6th Cir. 1991) (agreeing with the Fifth, Seventh, and Tenth Circuits that "the prohibition against double jeopardy is not implicated when a defendant is indicted for an incident of conduct previously used to increase the length of his sentence for a separate offense"); United States v. Garcia, 919 F.2d 881, 886 (3d Cir. 1990) ("[C]onsideration of a prior bad act at sentencing will not ordinarily create a double jeopardy bar to a later prosecution for that bad act."). *But see* United States v. McCormick, 798 F. Supp. 203, 206-07 (D. Vt. 1992) (relying on the Double Jepardy Clause to dismiss several counts of an indictment for criminal conduct that had been used to support a 13-level sentence enhancement in a previous prosecution).

254. Grady v. Corbin, 495 U.S. 508, 516 (1990) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

255. United States v. Carey, 943 F.2d 44, 46 n.4 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1676 (1992). The *Carey* court noted that this explanation is the same as that used to explain the constitutionality of the use of prior convictions to enhance a sentence. The question of whether criminal conduct for which a conviction has been secured may be used to mandate a higher sentence for a subsequent crime is beyond the scope of this Article. It may be, however, that a better explanation for the acceptability of heavier sentences for previously convicted defendants lies with the language of the Double Jeopardy Clause itself. "Life or limb" refers to the English practice of sentencing an offender to death or mutilation upon proof of a second crime. The double jeopardy concept developed in England to ensure that such punishment was only meted out upon proof of a different crime than that for which the first punishment was given. *See generally* Sigler, *supra* note 228. Arguably, the Constitution presumes that sentences for second offenders will be more severe for a given crime.

It is the failure to require democratic review in the first instance that gives rise to the ease with which the prosecution may avoid the strictures of the Double Jeopardy Clause.[256]

2. Petit Jury Control

Punishment absent conviction also skews the power relationship between the federal prosecutor and the petit jury. By insisting on proof beyond a reasonable doubt and through the implicit threat of nullification, the federal petit jury was expected to provide a strong check to potential prosecutorial abuse. But under the Guidelines, the prosecutor will often see no need to take up the challenge of proving guilt beyond a reasonable doubt at trial because information introduced informally at sentencing may yield an identical or satisfactory punishment for the criminal conduct at issue. In addition, to the extent that the jury, through the Sixth Amendment "district" requirement, was intended to provide community oversight of the United States Attorney, such oversight is lost.[257] A jury's refusal to convict should send a strong message to the executive regarding community tolerance for certain types of crime and even of certain classes of offenders. Yet, the Guidelines insulate the United States Attorney from this risk of rebellion, thereby interfering with the community's ability to influence the direction of her law enforcement decisions. Even in cases where the jury is given the opportunity to consider evidence of the defendant's criminality, it is stripped of absolute authority to exercise mercy. If acquittal conduct falls within a Guidelines category rendering it relevant to the offense of conviction, a prosecutor will likely encounter no impediment to having that conduct "counted" at sentencing.[258] Thus, the theoretical checks provided by the burden of proof and the risk of jury rebellion are simply that—theoretical.

The sheer amount of fact-finding power potentially residing with the federal judiciary also suggests that the current system is at odds with the jury's central role in the constitutional plan for the administration of criminal justice. Colonists possessed a deep distrust of the judiciary due to their harsh treatment at the hands of

256. Professor Herman argues in the context of acquittal offenses that the double jeopardy values of protecting defendants from the anxiety of a second trial and of prohibiting the prosecutor from perfecting her case through practice are both implicated by the relitigation of facts at sentencing. Herman, *supra* note 2, at 351.

257. *See supra* text accompanying notes 233–34.

258. *See* cases cited *supra* note 253.

the British judges,[259] and it was through the jury that they expected to control the power of the independent federal judiciary.[260] Because the power of the American judiciary has in no way diminished since 1791, there is little reason to suspect that the need to control that power has become obsolete.

The current system creates just the sort of opportunities for judges to abuse power that the Constitution sought to avoid. The power of the trial court to find facts crucial to the amount of punishment is, for all intents and purposes, unchecked—appellate review of findings of fact continues to be extremely circumscribed (or nonexistent).[261] Consider, for example, the colloquy following a district court's decision to enhance a defendant's sentence for possession of a firearm even though the jury had acquitted on that count:

THE COURT: The jury could not have made—the jury could not have listened to the instructions.

COUNSEL: Your Honor,—

THE COURT: The testimony was so strong. The gun was even in the apartment. That's all they needed. There was no dispute of that fact. The mere fact that that gun was in the apartment, being used in association with—he didn't have to have it on his person.

COUNSEL: They perhaps didn't believe it was being used in association with drug-related activity, your Honor.

---

259. *See* Amar, *supra* note 222, at 1185; *see also Essays by a Farmer (IV) in* 5 THE COMPLETE ANTI FEDERALIST 39 (1981) ("Whenever therefore the trial by juries has been abolished . . . [t]he judiciary power is immediately absorbed or placed under the direction of the executive . . . .") (cited in Amar, *supra* note 222, at 1185 n.238). The views of Cesare Beccaria were extremely influential at this time. His treatise, *On Crimes and Punishments*, also advocates more control of abusive judges. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 10–12 (David Young trans., Hackett 1986) (6th ed. 1766).

Distrust of the judiciary did not prove unwarranted when considered in light of the extremely partisan actions of some federalist judges during the Sedition Act era. *See* JAMES M. SMITH, FREEDOM'S FETTERS 139–417 (1956); Amar, *supra* note 222, at 1185 n.239 (citing 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATION OF POWER: JOHN MARSHALL 1801–1805, at 140, 159 (1981)).

260. *See* Amar, *supra* note 222, at 1185 (noting that "in those aspects of a criminal case that might involve a judge acting without a jury, [such as] issuing arrest warrants, setting bail, and sentencing," the Bill of Rights provides additional restrictions on the power of the judge).

261. Appellate review provides protection in only the most extreme cases because review of facts found by the sentencing judge is based on a clearly erroneous standard. 18 U.S.C § 3742(d) (1988).

THE COURT: Well, I'll tell you something; I have been disappointed in jury verdicts before, but that's one of the most important ones, because what it did, it set up a disparity in result between the two defendants. Your client was consistently selling cocaine from his apartment and using a firearm. The fact is that the officers came in and testified that it was in your client's waistband and described, had an officer on the stand, a man who is an ATF agent, who is capable and knows what a firearm looks like, telling them, "This is what I saw."

There is no reason for him not to have seen that, since its undisputed that the firearm was in the apartment and it's undisputed that the firearm was used in connection with drug sales and used [for] the purpose of protecting drug sales. And then here in number twelve, there is no doubt at all that the firearm was brought for him. It's all a pattern. This firearm was used. They had to absolutely disregard the testimony of a government agent for no reason—no reason.

COUNSEL: Perhaps they considered the testimony of the other agent who testified that he couldn't be sure, your Honor.

THE COURT: Well, you can take it up with an appellate court, because I've made my findings on the record.[262]

As noted earlier, the Fifth Circuit found nothing objectionable about the judge's behavior.[263] Given that the current system renders the jury powerless to shield a defendant from even the simple disagreement of the trial judge, the salutary promise of jury protection from the "biased or unscrupulous" judge appears empty in the extreme.[264]

The Constitution entrusts to the jury, not to an independent federal judge, the task of determining the "truth" of criminal accusations.[265] That choice reflects both a distrust of judges and a recognition of the importance to the integrity of the system of avoiding

262. United States v. Juarez-Ortega, 866 F.2d 747, 748–49 (5th Cir. 1989).

263. *Id.* at 749.

264. In addition to being able to nullify jury verdicts, the real offense model gives the judge the power to nullify the prosecutor's right to exercise mercy. Under the Guidelines, a prosecutor's decision not to charge a criminal act that falls within "relevant conduct" or the like may be muted in its entirety should the probation report disclose the uncharged, but relevant, conduct.

265. Professor Massaro suggests that:

> The preference for laypersons' judgments may also stem from a distrust of, or disinclination to rely exclusively on, lawyers' and judges' judgments. As one of George Eliot's characters in *Middlemarch* observes,

punishment based on inaccurate factual assessments. Twelve people, each placing different emphasis on various bits of testimony, remembering statements in different ways, and drawing different conclusions from the demeanor of witnesses, can challenge and refine each other's views.[266] If they are able to arrive at a unanimous decision about "what happened," we feel more confident about their conclusion than we do about the conclusion of one individual who has seen many criminal trials, knows the prosecutor personally, and has the inevitable biases that come with power and experience. Punishing a defendant for criminal conduct determined by a single judge flies in the face of this reasoning.[267]

3. Safeguarding the Jury Role

Absent some method of forcing the government to submit to jury oversight, the criminal system collapses in on itself. Under the current regime of nonconviction offense sentencing, only the judge and prosecutor need approve the bulk of punishment decisions—the inherent balance provided by democratic input through the jury is all but lost. Sanctioning jury evasion undermines more than merely democratic ability to check potential executive and judicial abuses, it endangers the crucial link provided by the jury between the criminal justice system and the larger democratic society. The jury represents the collective conscience of the community.[268] A finding of guilt by the community gives validity to the sanction; it adds a special and irreplaceable dimension of fairness to the deprivation of an

---

> "In my opinion . . . , legal training only makes a man more incompetent in questions that require knowledge of another kind."

Massaro, *supra* note 233, at 511 n.70 (quoting GEORGE ELIOT, MIDDLEMARCH 168 (The Folio Society 1972)).

266. The Supreme Court has observed that such group fact-finding produces "diffused impartiality." Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). As Professor Massarro explains, "[t]he need for diffused impartiality stems from the heterogeneity of society, and hence of perceptions, and from the realization that no person is really 'impartial.' " Massaro, *supra* note 233, at 511.

267. The present sentencing system suggests that we do not really believe that the fact-finding abilities of the jury are superior to those of the court in the criminal context. If that is so, we should rethink the use of the criminal jury in its entirety rather than employ it arbitrarily. *See* JEROME FRANK, LAW AND THE MODERN MIND 180–81 (1930) ("The jury makes the orderly administration of justice impossible."). *But see* Massaro, *supra* note 233, at 510–11 (juries serve interests beyond efficient fact-finding).

268. *See* PAULA DIPERNA, JURIES ON TRIAL 21 (1984) ("In a sense, the jury achieves symbolically what cannot be achieved practically—the presence of the entire populace at every trial."); Massaro, *supra* note 233, at 512 ("The jury interjects community conscience into the process, if only symbolically.").

individual's liberty.[269] By codifying the use of nonconviction offenses, the Guidelines' real offense scheme exudes contempt for the necessity of democratic approval, thus frustrating, rather than reinforcing, public confidence in the system.[270]

The American system of criminal justice can ill afford a further diminution in prestige. In recent decades, it has been denounced as arbitrary by all sides, too lenient, and too harsh, not to mention racist, classist, and sexist. Even assuming the unimpeachable integrity of the vast majority of prosecutors and judges, the stability of the criminal justice system demands that we honor the structure designed to counteract the potential abuse of the unscrupulous government official.

CONCLUSION

As the foregoing analysis demonstrates, the Guidelines' nonconviction offense regime dislodges the jury from its crucial oversight role in the criminal justice system. This is no trivial disruption requiring only a minor adjustment in our approach to sentencing. The jury system lies at the heart of the Bill of Rights. The demonstrable incongruity between the prevailing due process analysis and the crucial role of the jury requires the wholesale rejection of nonconviction offense sentencing. Conviction must be treated as a prerequisite to punishment regardless of the method used to dispose of the criminal case—thus, even in the plea bargain context,[271] the

269. *See* Massaro, *supra* note 233, at 513–14; Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1364 (1985).

270. *See* Freed, *supra* note 2, at 1714 ("Ironically, the relevant conduct guideline *reduces* visibility and candor in sentencing.").

271. The fact that nearly 90% of federal convictions are obtained by guilty plea, *see* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909 n.1 (1992), in no way undermines the importance of abandoning nonconviction offense sentencing. A guilty plea is only a waiver of one's right to have legal guilt assessed by a petit jury. It does not affect the Fifth Amendment right to accusation by indictment, nor can it be interpreted as a wholesale surrender of other constitutional restraints on the government's recourse to the criminal sanction. Treating a guilty plea as conferring anything beyond the right to punish a defendant for the crime admitted lodges with the government just the sort of hidden, unchecked power that the Constitution steadfastly sought to avoid.

In addition, other factors weigh in favor of treating the jury model as the norm when gauging the constitutionality of sentencing practices. First, the framers of the Constitution unquestionably assumed that the jury trial would be the primary method by which guilt and conviction were secured. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 1–24 (1979) (explaining that guilty pleas were not typical 200 years ago, but were rather viewed with hostility). Demonstrable incompatibility with this system does not lose its constitutional significance simply because we

government must charge all criminal offenses for which it seeks to obtain punishment.[272] Absent formal accusation and conviction entered after trial, or a formal plea of guilty, the government lacks the constitutional authority to exact punishment for that offense.

This conclusion requires only that the nonconviction offense be excluded from the sentencing inquiry;[273] it says nothing about the power of the legislature to repeal criminal statutes and relegate that conduct to the sentencing context,[274] nor about the applicability of the Due Process Clause to factors properly considered at the sentencing hearing.[275] Yet, even by taking the limited step of excising the nonconviction offense from the medley of legitimate sentencing factors, a modicum of harmony is injected into modern sentencing practice.[276] We discard the punishment-enhancement fiction and restore an acquittal to its commonly understood status. The plea

---

have chosen to treat the waiver of jury trial rights as a desirable and necessary evil. Second, plea bargaining is the stepchild of the jury system—the Constitution does not enshrine plea bargaining in the Bill of Rights. In fact, a substantial debate continues to rage about both the right to waive jury trial in the first instance, *see* Amar, *supra* note 222, at 1196–99, and the legitimacy of plea bargaining. *See, e.g.*, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932–36 (1983).

272. As explained earlier, *see supra* text accompanying notes 121–26, nonconviction offenses were incorporated as sentencing factors in an effort to dampen the effects of prosecutorial charging decisions. Though a conviction offense system may give prosecutors more control over sentence length, concerns about disparities created by prosecutorial discretion are better confronted directly than surreptitiously through a real offense sentencing model. *See generally* Alschuler, *supra* note 121 (calling for the elimination of plea bargaining in presumptive systems coupled with a legislatively specified reward for entering a guilty plea); Schulhofer, *Due Process at Sentencing*, *supra* note 2, at 757–60, 820–21 (rejecting real offense model to control prosecutorial power and suggesting judicial control of charge-reduction agreements); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562–65 (1981) (advocating, *inter alia*, guidelines for prosecutorial decision making).

273. Logically, "legally recognized" facts, that is, facts that form "elements of substantive offense definitions and constitute the basis for hierarchical distinctions between offenses," Tonry & Coffee, *supra* note 2, at 155, must also be excluded from the sentencing inquiry under my analysis. Thus, a prosecutor could not charge robbery (instead of the more serious offense of armed robbery) and introduce evidence of use of a firearm at sentencing. Doing so would allow the government to avoid jury scrutiny of the armed robbery offense.

274. *See generally* Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665 (1987).

275. *See generally* Herman, *supra* note 2, at 342–55.

276. Other commentators have persuasively advanced the policy reasons for rejecting real offense sentencing. *See generally* Reitz, supra note 2, at 547–73; Schulhofer, *Due Process of Sentencing*, *supra* note 2, at 765–72; Tonry, *Mandatory Minimum Penalties*, *supra* note 53, at 130-32 (rejecting real offense model on both policy and constitutional grounds); Tonry & Coffee, *supra* note 2, at 152–63.

bargain becomes less of a gamble and more of a bargain.[277] Also the sentencing hearing itself becomes less factually complex, perhaps allowing the judiciary to devote precious resources to other proceedings.

Decades of sentencing reform have sought to re-establish respect for a system veiled in secrecy and plagued with accusations of arbitrariness. The Guidelines provide us with the opportunity to complete this task; they provide a structure by which the validity of long-held assumptions about the sentencing process may be re-evaluated. Scrutiny reveals that the expansive assumption about the power to punish absent conviction, undergirding the *Williams*, *Grayson*, and *McMillan* decisions, is flawed. A conviction is not irrelevant to the right to punish a criminal offense; it is a prerequisite.

277. Plea bargaining under the Guidelines has provoked dismay among judges, scholars, and defendants. Defendants often receive no "bargain" if dropped counts are considered relevant conduct yielding a sentence equivalent to that which they would have received had they been convicted of both. *E.g.*, United States v. Scroggins, 880 F.2d 1204, 1213 (11th Cir. 1989), *cert. denied*, 494 U.S. 1083 (1990). Professors Daniel Freed and Marc Miller note that the "[relevant conduct] guideline system has a powerful capacity to undermine a defendant's reasonable expectations if the defense attorney does not fully comprehend the extent to which non-binding charge and sentence bargains may be trumped by relevant conduct at sentencing." Dan Freed & Marc Miller, *Plea Bargained Sentences, Disparity and "Guideline Justice,"* 3 FED. SENTENCING REP. 175, 177–78 (1991). Professors Freed and Miller recommend that a defense lawyer never advise a client to plead guilty without control over relevant conduct information. *Id.* In response, Professor Stephen Schulhofer attributes sentencing surprises in the plea context to the judiciary's failure to comply with a policy statement "indicating that the judge 'shall defer' the decision whether to accept a plea until *after* reading the PSI." Stephen J. Schulhofer, *Implementing the Plea Agreement Provisions of the Federal Sentencing Guidelines*, 3 FED. SENTENCING REP. 179, 179–81 (1991); *see also* Wilkins, *supra* note 80, at 804.