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INSURING RELIABLE FACT FINDING IN GUIDELINES SENTENCING: WHY NOT REAL EVIDENCE RULES?

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I am honored to comment on Judge Becker's article. My few words of praise about his contributions to evidence law cannot do him justice. He is a preeminent jurist whose opinions have immensely advanced the law in this area.[1] He is a scholar advocating evidence reform, as his recent article with Professor Orenstein in the George Washington Law Review indicates.[2] I certainly do not stand alone in saying that he has helped my thinking and, more important, our law immeasurably. A better choice for the Sullivan Lecturer is hard to imagine.

He continues his march on cutting edge evidentiary issues by examination of the Federal Sentencing Guidelines. The Guidelines, as he explains, are a fact-driven process.[3] Amazingly in a country supposedly committed to procedural justice, little thought was given to how those facts were to be determined, except for the decision that the proceedings would not be bound by trial evidence rules.[4] Decisions have been made based upon hearsay and hearsay upon hearsay and hearsay upon hearsay upon hearsay. Anonymous accusers, often hidden further by a faceless facade of other absent declarants, have caused citizens allegedly protected by our Constitution to spend years in jail.

Judge Becker urges reform in how evidence is presented and developed at the fact-finding hearings under the Federal Sentencing

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1. See such opinions as United States v. Downing, 753 F.2d 1224 (3d Cir. 1985) (scientific evidence); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190 (E.D. Pa. 1980) (hearsay exceptions), *rev'd in part and aff'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

2. 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 (1992).

3. "[S]entencing under the Guidelines is a thoroughly fact-driven process. The judge is required to find the facts demanded by the above described framework, and these facts, for the most part, virtually mandate or at least dominate the sentencing decision." Edward R. Becker, *Insuring Reliable Fact Finding In Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 22 CAP. U. L. REV. 1, 8 (1993).

4. *Id.* at 2-3.

Guidelines. He would create an "unfairness index". The sentencing judge would first determine whether the traditionally inadmissible hearsay is important to the facts to be determined. If so,

> [T]he court, using the flexible concept of due process, would consider alternative procedures to convert hearsay into reliable fact. . . . If the unfairness index remains high after consideration of other devices, then the court should require the government to produce the declarant so that he or she may be subject to cross-examination. If this proves impossible, I recommend that the court increase the burden of proof on the government for aggravating factors to a clear and convincing standard.[5]

Judge Becker's proposal does a service. It does this first by simply focusing attention on fact finding outside of trials. Volumes have been written about the evidentiary procedures at trials, but little has been written about the procedures used at sentencing,[6] even though fact finding at sentencing affects more defendants than fact finding at trial. As Judge Becker notes, eighty-three percent of the people sentenced in federal court have not had a trial.[7]

The Judge's proposal also serves, of course, not just by focusing on fact finding at sentencing, but by offering improvements for that process. Fact finding under the Guidelines is crucial. Wrong sentencing resolutions cause injustice. Surely, the Judge is right; if we enrich the quality of evidence at the sentencing hearing, we will improve the accuracy of determinations based on that evidence.[8]

Judge Becker's reform is important also because, unlike many professorial proposals, it does not advocate the unattainable. Reform based on due process, as is the Judge's suggestion, is more likely to

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5. *Id.* at 23-24. Judge Becker's alternative devices to transform hearsay into reliable fact include the production of documents from government files, procurement of affidavits, stipulations, and depositions, including telephone depositions. *Id.* at 4-5.

6. *Cf.* Randolph N. Jonakait, *Making the Law of Factual Determinations Matter More*, 25 LOY. L.A. L. REV. 673, 688 (1992) ("Evidence law is only a small part of the much larger fact-determination system. In comparison to its limited role, too much time is spent debating evidence law. As a result, evidentiary doctrine seems much more important than it is.").

7. Becker, *supra* note 3, at 8 n.21.

8. *Cf.* Randolph N. Jonakait, *Stories, Forensic Science, and Improved Verdicts*, 13 CARDOZO L. REV. 343, 351-52 (1991) ("More accurate and complete 'facts' will lead to more accurate results no matter how that evidence is assimilated and assessed.").

succeed than one based on confrontation. The Supreme Court has given no indication that it will extend the confrontation right to sentencing.[9] Furthermore, the Court has increasingly used due

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9. *Cf.* Williams v. New York, 337 U.S. 241 (1949), where, in a case preceding the incorporation of the Confrontation Clause into the Fourteenth Amendment, the Court rejected a due process challenge to the use of hearsay at sentencing. See Becker, *supra* note 3, at 6 for a discussion of *Williams*. *See also id.* at 3 ("With respect to confrontation, every court of appeals to deal with the problem has held that confrontation rights do not apply at the sentencing stage.").

Interpreters, however, who rely on the plain meaning of the text of the Constitution might have to conclude differently. The Sixth Amendment states:

> 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 defense.

U.S. CONST. amend. VI.

Part of this language plainly grants the accused protections only for a "trial". Thus, "by an impartial jury" refers to the preceding "trial", as do the qualifiers "speedy and public". As a matter of purely textual analysis, however, the assistance of counsel guarantee does not refer to "trial". Instead, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The right to counsel applies not to the limited notion of "trial", but to the phrase "all criminal prosecutions." And, of course, the right to counsel extends beyond trials to all critical stages of a prosecution, including sentencing. *See* Mempa v. Rhay, 389 U.S. 128 (1967). Similarly, the Sixth Amendment's text does not limit the confrontation right to trials, but to all criminal prosecutions. A purely textual analysis, then, should grant the right to confrontation whenever the right to counsel has been granted.

Cf. Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880, 1888 (1992) [hereinafter Harvard Note]:

> The plain meaning of the [Sixth Amendment's] words, however, suggests that "criminal prosecutions" include sentencing. More significantly, the original meaning of "criminal prosecutions" likely included determination of the appropriate penalty. At the time of the framing of the Sixth Amendment, trial and sentencing were not distinct; conviction for a particular crime almost automatically led to the imposition of a legislatively-prescribed punishment.

Id. at 1888.

process standards to measure possible constitutional violations even when Sixth Amendment protections clearly apply.[10] Judge Becker's analysis, resting on fundamental fairness, is much more likely to be persuasive in today's world than one based on the Sixth Amendment.

While the Judge's proposal could improve the fairness and accuracy of sentencing and possibly be adopted, it is not without drawbacks. For example, the Judge expects that his procedures would not impose an undue burden on our system because it would only apply to a fragment of federal sentencing decisions.

> Most cases are quite straightforward; in these cases the sentence will flow primarily from the facts of conviction . . . . [T]he proposals that I make will apply only to those cases where an adverse resolution of a disputed fact will affect the defendant's sentence. And even then, it will not always be necessary for the court to jump through all the various "hoops."[11]

While the "unfairness index" hearings might impose burdens in a relatively small number of cases, the mere uncertainty caused by such hearings will produce a more significant burden. Without definite evidentiary rules, but with the chance declarants will have to be produced, the prosecutor in each case will have to assess whether witnesses need to be kept on tap for sentencing. While the judicial perspective might be different, attorneys find a system burdensome where they cannot reasonably predict what proof will be allowed.[12]

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10. *See* Randolph N. Jonakait, *Foreword: Notes for a Meaningful and Consistent Sixth Amendment*, 82 J. CRIM. L. & CRIMINOLOGY 713, 713 (1992) ("A strain of Supreme Court reasoning uses a due process analysis to decide Sixth Amendment claims. This approach deprives Sixth Amendment guarantees of independent meaning and makes them superfluous."). *Cf.* Becker, *supra* note 3, at 20. ("In its procedural aspect, the Due Process Clause subsumes confrontation values, and provides more case specific flexibility.").

11. Becker, *supra* note 3, at 21.

12. For example, the present residual hearsay exceptions to the Federal Rules of Evidence, Rules 803(24) and 804(b)(5), were opposed because attorneys could not reasonably predict in advance of trial what hearsay would be allowed. Thus, the House of Representatives eliminated them from the proposed rules, explaining, "The [House Judiciary] Committee deleted these provisions . . . as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial." H.R. Rep. No. 650, 93d Cong., 2d Sess. 6, *reprinted in* 1974 U.S.C.C.A.N. 7075, 7079. The residual exceptions were only enacted after they were amended to include a provision requiring a party to give advance notice of the intention to use the provisions. For the legislative history of the residual hearsay provisions, see Randolph N.

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The diligent prosecutor will always have to assume the worst case scenario and make sure that possible witnesses are available until after the hearing. This would lead to more work than Judge Becker acknowledges. Even if they ultimately are not produced, the prosecutor will have to keep track of numerous people whose appearances might be ordered. The Supreme Court, as its confrontation reasoning indicates, at least would see that as a "significant practical burden on the prosecution."[13]

More troubling dangers, however, lurk in the case by case system proposed by the Judge. Its ad hoc nature would inevitably lead to disparate treatment as different judges would decide in different ways what evidence was necessary. Federal judges already evince a wide range of views over the wisdom of the present trial hearsay rules.[14] Judge Becker's system, which really says, "Do what you think is best, trial judge", would, in effect, give free reign to each judge's opinion about the present hearsay rule without a guarantee that this individualistic opinion stay consistent among the cases that each judge decides. Perhaps this is the road to better justice, but it is one paved more with the rule of men and women than the rule of law.

Judge Becker's proposal would not meaningfully cabin judicial discretion although his reform, I am willing to bet, would be opposed by many federal judges as an unnecessary restriction on their

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Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 437-41 (1986).

13. United States v. Inadi, 475 U.S. 387, 399 (1986). The Supreme Court, in rejecting that the Confrontation Clause requires that the declarant must be unavailable in order for coconspirator statements from absent, declarants to be used against an accused, stressed the burden that such a requirement would place on the prosecution:

> In every case involving coconspirator statements, the prosecution would be required to identify with specificity each declarant, locate those declarants, and then endeavor to ensure their continuing availability for trial. . . . For unincarcerated declarants the unavailability rule would require that during the sometimes lengthy period before trial the Government must endeavor to be aware of the whereabouts of the declarant or run the risk of a court determination that its efforts to produce the declarant did not satisfy the test of "good faith".

Id.

14. See Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473 (1992), for a study of how judges actually apply the hearsay exceptions.

discretion. How much freedom should judges have in devising the procedures for determining facts at Guidelines sentencing? The Guidelines themselves are schizophrenic over the wisdom of wide judicial discretion.[15] On the one hand, the chief motivation behind the Guidelines was to reduce sentencing disparities by restricting judicial discretion to set a sentence. On the other hand, trial judges were basically granted unfettered discretion in deciding how the disputed facts were to be determined in this newly created, fact-driven process.[16]

I am saying nothing subversive in stating that we ought to be concerned about discretionary powers ceded to judges. That concern helped animate our Bill of Rights; certainly it was at heart of the Sixth Amendment. At least when it came to trials, the framers wanted juries to find facts, not judges, and so the right to jury trials was constitutionalized. The framers wanted to make sure that defense advocates, not judges, could develop the information upon which juries would act, and so they constitutionalized the rights to counsel, confrontation, and compulsory process.

Times change, of course, but modern attorneys are not being disrespectful to the judiciary when they resist judicial control of the process by which facts are developed. Many would take the wise counsel of Senator Sam Ervin, who after recognizing that "some judges do not have the discretion that others do," concluded, during hearings on the then proposed Federal Rules of Evidence, that he "would rather have the rules say what is admissible rather than discretionary."[17]

Judge Becker's proposal, in a slightly different form, just continues to allow the trial judge to determine what procedures should be used to determine facts at Guidelines sentencing. His reform would not meaningfully restrict judicial discretion. It, however, would require judges to be more self-reflective about the fairness of

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15. *See* Becker, *supra* note 3, at 1 ("The United States Sentencing Guidelines . . . were designed primarily to eliminate the serious and longstanding problem of similarly situated offenders receiving widely disparate punishments. . . . [T]hey have been attacked for unacceptably limiting the discretion of sentencing judges.").

16. *See* Jonakait, *supra* note 10, at 742-43. ("Whether they are labeled adversary rights or the rights of the advocate; whether they were seen as a counter balance to the prosecutor or a restraint on judicial authority; the Sixth Amendment granted the accused rights so that the accused could inform the jury from the accused's perspective of the facts and arguments concerning the charges.").

17. *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 285 (1973).

the procedures that they employ. Self-reflection can lead to a better process,[18] but it has limits, as the Guidelines regime indicates.

Trial judges now have every power that Judge Becker's proposal would give them. They can, and they must, now reject any hearsay that is unreliable.[19] They can now insist that evidence take a more reliable form. Will they exercise these existing powers more if they contemplate an unfairness index? Perhaps, but also remember that judges have not just allowed hearsay of four and five levels to be considered at the sentencing hearings, they have been convinced by these pick-up-sticks-like edifices. Judges who now accept that facts are proven on such evidence obviously do not consider such proceedings unfair. Why should a more formal unfairness hearing change this situation?

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18. At least this seems to be a dominant theory behind "lawyering" theory. Instructors have faith that if students are taught to be more reflective about their performances as simulated attorneys, they will eventually be better attorneys and the legal system will improve as a result. Some common sense, but little empirical data, supports these suppositions.

19. The Guidelines, in prescribing how disputed facts are to be determined, state, "In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court *may* consider relevant information without regard to its admissibility under the Rules of Evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 6A1.3(a) (1992) (emphasis added). The grant of authority here is discretionary, not mandatory. The judge does not have to consider all hearsay of the sort not admissible at trial even if that hearsay has indicia of reliability. The judge merely may consider such information.

On the other hand, the judge may consider such data only if it "has sufficient indicia of reliability to support its probable accuracy." Using the plain meaning of the chosen words, this means something much different from the definition of relevance in the Federal Rules of Evidence. Information is relevant under the Rules if the information makes a material issue more probable or less probable. FED. R. EVID. 401. No matter how slight the shift in the probabilities, the information is relevant as long as there is some movement in the odds. The Guidelines do not authorize a court to consider information otherwise inadmissible at trial as long as it is relevant in this evidentiary sense, that is, as long as it shifts, even though only slightly, the probabilities on an issue material to sentencing. Instead, there has to be indicia of reliability to assure that the information is probably accurate. In ordinary English, saying that something is probably accurate means that it is more likely than not that it is true or correct. Merely concluding that information has minimal indicia of reliability may be enough to satisfy due process, but it is not sufficient to satisfy the clear language of the Guidelines. *Cf.* Becker, *supra* note 3, at 10 ("The caselaw generally holds that the minimal reliability standard is sufficient to satisfy due process.").

Even if, however, Judge Becker's proposal would reform judicial behavior, a more basic question should be confronted. Should the limit of our concern be due process? Due process only prevents fundamental unfairness. As the Judge states, "Undergirding my approach is the view that due process is a flexible concept, the purpose of which is to assess and remediate fundamentally unfair procedures."[20] Should our goal be only to displace elemental injustices when we are devising procedures that determine the most basic, cherished liberty of freedom? Should not we strive instead for the procedures that will bring us the most accuracy in the factual resolutions?

This leads to another question. Why not apply real law to the Guidelines sentencing hearings determining issues about the defendant's criminal involvement; why not apply the Federal Rules of Evidence?

This question does have an answer. Federal Rule of Evidence 1101(d)(3) expressly states that the Rules do not apply in sentencing proceedings.[21] In looking at the wisdom of this prohibition, however, we should focus on Rule 102, entitled Purpose and Construction: "These Rules shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined."[22]

We have the rules of evidence because we believe that they are the best devices in our system for the divination of truth and for just determinations. If these rules serve their goals for trials, how can they be ignored at sentencing? If these rules do not work for trials, why do we have them?[23]

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20. Becker, *supra* note 3, at 24.

21. "The [Federal Rules of Evidence] (other than with respect to privileges) do not apply in the following situations: . . . sentencing . . . ." FED. R. EVID. 1101(d)(3).

22. FED R. EVID. 102.

23. Surely, however, the rules of evidence do aid the accurate determination of truth or the work of many intelligent people has been in vain.

> Although evidence law may have subsidiary purposes, its prime goal is to advance the accuracy of the courts' fact finding function. . . . Our present evidence law is the product of common law generations, study by legal giants, many reform efforts, and much recent codification guided by scholars, judges, attorneys, and legislators. These efforts have been undertaken to strengthen the truth-determining process of trials. While disputes about certain provisions may occur, any rule that has survived all this evidentiary analysis can be thought to serve the purpose of making verdicts more accurate.

Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 577-78 (1988).

One answer, and perhaps the correct one, is that we simply do not care as much about accurate and fair fact determinations at sentencing as we do at trials. If there really is value in self-reflection, perhaps we ought to admit this when we discuss the desirable procedures for sentencing.

Another answer, however, might state that we use different evidentiary procedures under the Guidelines because factual determinations at sentencing are fundamentally different from trial decisions. That may have once been true. As Judge Becker describes, a "medical model" previously dominated sentencing.[24] This was a forward looking system. A trial court was trying to predict the future in determining what was the best sentence to reform or rehabilitate the accused. This determination was different from the ones made at normal trials. Criminal trial verdicts do not look forward. They look backward to try to determine what happened at some time in the past.

But, of course, as Judge Becker has explained, the Guidelines factual determinations do not follow the medical model.[25] The Guidelines decisions are backward looking. They attempt to punish a defendant for the full extent of his past criminal behavior relating to the convicted charge. When the sentencing judge assesses the "real offense", the judge is making the same sort of factual determinations

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24. The philosophy underpinning this system of indeterminate punishment was the so-called "medical model," which posited that convicted defendants could (and should) be rehabilitated, and that rehabilitation should be taken into account in fixing the sentence, along with the other generally accepted purposes of sentencing–deterrence, protection of society, and retribution.

Becker, *supra* note 3, at 5.

25. See Becker, *supra* note 3, for a summary of the Guidelines sentencing scheme. *See also* Becker & Orenstein, *supra* note 2, at 887-88:

> Under the new regime [of the Guidelines], the sentence is shaped and, in many respects, driven by the trial court's factual findings, particularly the findings that relate to relevant offense conduct not included in the conviction itself. The finding of other nonconviction but related conduct can raise the base offense level. . . . In contrast with the pre-Guidelines regime . . . the judge is not free to compromise by reducing the sentence in proportion to the degree of persuasiveness of the evidence bearing on the sentencing factors.

Id.

that have been traditionally made at criminal trials—whether certain historical events occurred. Was the defendant the leader of the criminal activity? Did the defendant sell other drugs besides the ones he was convicted of? And so on. If we ask such questions in a criminal trial, which we do every day, we use the rules of evidence to answer them because those rules are the best ones, we believe, to reach the truth. What makes placing those same questions into the sentencing framework so much different that those rules no longer do the job for assessing truth? Perhaps most directly to the point, how can we recoil from such information as multi-level hearsay at trial and embrace it at sentencing?[26] Why should there be any difference in the evidentiary procedures when the same sorts of facts are at stake?[27]

The reply might simply be costs. It would take too much in time and money and effort to use real evidence rules at sentencing.[28] As

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26. The recent en banc decision by the Sixth Circuit illustrates these questions. The trial court had determined that the accused had been involved in a quarter gram drug sale. At sentencing, the issue was whether the defendant had taken part in earlier sales and, if so, how big they were. The dissent summarized how the crucial information got to the sentencing court:

> [A]n unnamed informant tells a police officer, who tells the police chief, who tells a DEA agent, who tells a probation officer, who tells the court, that Silverman was a major dealer in drugs. . . . The amount of drugs in prior unconvicted transactions is then estimated by the probation officer and Silverman's sentence is automatically increased more than five years based on the quintuple hearsay of witnesses who no one suggests were unavailable.

United States v. Silverman, 976 F.2d 1502, 1520 (6th Cir. 1992) (Merrit, J., dissenting).

27. We might also ask, why not apply confrontation principles to these factual decisions? The Supreme Court has stated that "the Confrontation Clause's very mission [is] to advance 'the accuracy of the truth-determining process in criminal trials.'" Tennessee v. Street, 471 U.S. 409, 415 (1985) (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)). The right to confrontation, in other words, furthers truth when we want to determine whether a person committed a crime. How, then, can we not use the same procedures when we determine whether a person committed a crime for purposes of sentencing?

28. *Cf.* Becker, *supra* note 3, at 20:

> I believe, however, that it will not be wise to mandate the full application of the Confrontation Clause . . . to Guidelines Sentencing. My concerns are primarily administrative. There are many thousands of Sentencing Guidelines cases decided every year and probably many hundreds of opinions addressing the sufficiency of procedures. Given

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Judge Becker states, however, the number of instances where the sentence depends upon the disputed determination of the defendant's other criminal activities is small.[29] Indeed, it may be more efficient to just apply the evidence rules, which allow attorneys to predict reasonably what witnesses will be necessary, to this modest segment of sentencing decisions than to go through the separate unfairness hearings that the Judge proposes. In any event, if the rules of evidence are our best device for resolving disputed questions about possible criminal events, then those who wish to abandon them at least ought to show, and not just assert, that the costs associated with them are too burdensome to be borne.[30]

Perhaps there are principled as well as simply historical answers (that is the way it has always been done) as to why we do not use real evidence rules at sentencing, but in searching for them, I suggest that we face other questions, ones based on even less formed ideas than my previous questions.

Criminal procedure, I believe, is set off from the rest of the law. For example, the standards measuring the constitutionality of

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> the current linkage between the confrontation and evidence jurisprudence, I believe that application of confrontation law to these myriad cases would lead to a hodgepodge that would ill serve the development of the jurisprudence of both confrontation and evidence.

Id.

29. *See supra* text accompanying note 11. *See also* Becker, *supra* note 3, at 28-29 n.120:

> While I recognize that there is much concern that the additional time consumed by Guidelines Sentencing has imposed a burden on already overburdened district and magistrate judges, preliminary data available from the Federal Judicial Center, based on pre- and post-Guidelines district court time studies, suggests that the amount of time spent on Guideline Sentencing hearings is only 25% greater than was spent on pre-Guidelines hearings.

Id.

30. An honest assessment of burdens and costs might show that the evidence rules would not exact an exorbitant amount of time and money. The truly important costs might be the abandonment of the use of information from informers who would not be allowed to remain anonymous. *Cf.* Harvard Note, *supra* note 9, at 1896 ("Part of this burden relates to the use of confidential informants for sentencing information. Giving the defendant the right to confront confidential witnesses would enable him to learn their identities: the government would thus be forced either not to use such witnesses or to expose them to potential retaliation.").

criminal procedures are often different from those used in interpreting other constitutional provisions.[31] Why is a "strict scrutiny", a "compelling state interest", or a "least restrictive alternative" test used to decide some constitutional disputes, but not those concerning the rights of those facing criminal charges?[32] The law's web may be seamless, but it has a rent which isolates criminal procedure.

If the insularity of criminal procedure were stripped away and we examined it through the devices by which we review other areas of the law, we might see that, while our rhetoric proclaims great rights for the criminal defendant, the criminal defendant is often treated more shabbily and afforded fewer protections in many ways than any other party who comes into court. We do grant the accused proof beyond a reasonable doubt, a right against self-incrimination, and a valuable double jeopardy protection, but we then set up rules and procedures weighted against the accused in ways that would not be tolerated elsewhere. Discovery fits this description, as Professor Gianelli's article in this symposium illustrates.[33] And so, of course, does sentencing.[34]

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31. Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1056 (1987) ("For reasons that are not apparent, the field of constitutional criminal procedure has not always incorporated the modes of analysis generally employed in constitutional cases.").

32. *Cf.* Jonakait, *supra* note 10, at 729:

> If this [Sixth Amendment impartial juror] right is fundamental, should it be measured by standards different from those by which other essential guarantees are measured? The crucial issue might be whether a "strict scrutiny," or "compelling state interest," or a "least restrictive alternative" test should be used to decide Sixth Amendment disputes just as such formulations are used to assess other constitutional claims.

Id.

33. Paul C. Giannelli, *Expert Testimony and the Confrontation Clause*, 22 CAP. U. L. REV. 45 (1993).

34. Federal Rule of Evidence 1101 also indicates how we often treat criminal cases apart from the rest of the law. This provision states that the Federal Rules of Evidence "apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code." FED. R. EVID. 1101(b). The Rule then goes on, however, to state that the "rules (other than with respect to privileges) do not apply in the following situations . . . ." FED. R. EVID. 1101(d). The first exception is for preliminary questions of fact to be

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These thoughts suggest that we examine the Guidelines from a broadened perspective. We now compare sentencing to a criminal trial, cite the differences, and justify the procedural differences undercutting the accused at the punishment proceeding. But if we see ourselves as having one legal system, we would not examine sentencing procedures by themselves or only compare them to criminal trials.[35] We would also compare and contrast them with

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determined by the trial court under Rule 104. The second exception is for grand jury proceedings, and the final exception excludes "[p]roceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise." *Id.*

These exceptions in essence exclude the application of the Rules of Evidence from all parts of a criminal proceeding except the trial. Criminal proceedings, then, are treated much differently from civil proceedings where the evidentiary rules apply to all parts of a civil case.

35. A comparison of sentencing and criminal trials, however, raises questions for me about one particular part of Judge Becker's proposal. He suggests that if the unfairness index remains high after remedies are explored to make the information more reliable, then the government should be ordered to produce the declarants for cross-examination. If this cannot be done, however, he does not recommend abandonment of the information. Instead, he suggests "that the court increase the burden of proof on the government for aggravating factors to a clear and convincing standard." Becker, *supra* note 3, at 36. Are the problems inherent in the use of unreliable information that is not cross-examined taken care of by increasing the burden of proof? That is not the way we see trials. If it would be, then the prosecutor in a criminal case would have the right to have evidence admitted that would not be admitted in civil trials. Not because of the proof beyond a reasonable doubt standard. (That is not the way the evidence rules operate.) We do not see a heightened burden of proof as a corrective for unreliable evidence in trials. Why should the burden of proof serve such a function for sentencing? *Cf.* Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need For an Infield Fly Rule*, 5 FED. SENTENCING REP. 96 (1992):

> Reliance on a heightened burden of proof, such as a clear and convincing standard, as the sole means of controlling unreliable proof at sentencing invites a good deal of subjectivity and inconsistency, the very characteristics the guidelines were intended to avoid. We know that individual judges vary considerably in their estimate of the probabilities represented by a particular standard of proof. In contrast, a per se evidentiary rule that excludes certain kinds of evidence is more likely to produce uniform results.

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similar civil procedures. Approached this way, the proper point of comparison for sentencing is not criminal trials, but perhaps the remedies phase of civil litigation.[36] Such an examination raises further questions that need exploration (and for which I certainly do not have the answers).

Would we ever use the Guidelines' evidentiary procedures to determine money damages, punitive damages, injunctive relief, or contempt of injunctive relief? If not, is that by a policy choice? Is there something about sentencing that sets it apart from other remedies phases that a less rigorous fact determination process is the best choice for sentencing? Or would we eschew the Guidelines' procedures in the civil arena because they would not be constitutional in non-criminal suits? Are there good reasons why they would not be constitutional in civil cases, but still constitutional in criminal matters?

I am not sure what such explorations would show, but I do suspect that, along the way, it would be revealed that the more a proceeding looks somehow criminal,[37] but is not in fact a criminal trial, the fewer protections we extend to the defendant. Perhaps, in spite of the rights we pride ourselves on, when people are seen as criminals, a deep concern for fairness and truth start heading for the window. Perhaps that is the reason we have our present fact-finding system under the Guidelines.

Id. at 98.

36. *Cf.* Becker, *supra* note 3, at 11-12. "Could one imagine that, after liability was established in a civil case, the determination of damages, which bears a rough similarity to sentencing, could be decided under such lax procedures as are countenanced in the sentencing area? . . . Another useful analogy is to civil contempt proceedings (following injunctive relief)." *Id.*

37. By this I mean such things as certain immigration matters, forfeitures, proceedings to confine people with mental difficulties, and so on.