CRIMINAL ACTS AND SENTENCING FACTS: TWO CONSTITUTIONAL LIMITS ON CRIMINAL SENTENCING

*Benjamin E. Rosenberg**

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* Member of the Bar of the State of New York. The author is an Assistant United States Attorney in the Southern District of New York. The views expressed here are the author's alone, and do not necessarily represent the views of the Office of the United States Attorney of the Southern District of New York or of anyone else in the Department of Justice. The author wishes to thank David Bader, Miguel Estrada and Karen Shaer for their helpful comments on earlier drafts of this Article.

Sentence first — Verdict afterwards[1]

A criminal defendant's rights to be proven guilty beyond a reasonable doubt[2] and to a trial by jury[3] are fundamental axioms of American criminal procedure. The right to have all the essential elements of guilt proven beyond a reasonable doubt " 'safeguard[s] men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.' "[4] Similarly, the right to a jury trial guarantees that laypeoples' common sense and community standards, rather than the potentially arid and unsympathetic culture of the court, will be brought to bear on the defendant's case.[5]

A series of decisions in the United States Supreme Court has seriously weakened both the right to proof of guilt beyond a reasonable doubt and the right to trial by jury in federal criminal trials. As a consequence, federal criminal defendants are subject to a regime that (1) defines crimes narrowly, thereby effectively reducing the number of facts that a jury must find beyond a reasonable doubt to find the defendant guilty; and (2) authorizes punishment for those narrowly-defined crimes based upon factors determined not by the jury beyond a reasonable doubt, but by the presiding judge under a lesser burden of proof. In this regime, a criminal defendant's rights to have the essential elements of guilt proven beyond a reasonable doubt and to have a jury, not a judge, determine guilt or innocence, are significantly weaker than they were even a few years ago.

The thesis of this Article is that current due process and Sixth Amendment doctrines have abandoned the values that

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[1] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 95 (Bantam ed., 1981).

[2] *See, e.g., In re Winship*, 397 U.S. 358 (1970).

[3] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . . "); U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .").

[4] *Winship*, 397 U.S. at 362 (quoting Davis v. United States, 160 U.S. 469, 488 (1895)).

[5] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("Providing the accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."); Witherspoon v. Illinois, 391 U.S. 510, 519 & n.15 (1968) (juries express "the conscience of the community").

those constitutional provisions were supposed to serve. Moreover, the doctrines fail to provide sufficient guidance to the inferior courts, and undermine the liberal political theory underlying the federal penal system. Parts III and IV of this Article develop this thesis, but it is necessary to lay a groundwork first. Thus, Part I provides three illustrations of the diminished importance of "criminal acts" — that is, those acts that a jury must find beyond a reasonable doubt to convict a criminal defendant — relative to "sentencing facts" — those facts that, after conviction, a court may take into consideration in sentencing a defendant. These illustrations involve sentencing practices under the federal statutes relating to the distribution of narcotics and under the federal Sentencing Guidelines (the Guidelines). The narcotics statutes and the Guidelines are particularly good illustrations of the dominance of sentencing facts because of their obvious prevalence and significance to the administration of federal criminal law.

Part II reviews the development and recent decline of the criminal defendant's due process right to proof beyond a reasonable doubt and Sixth Amendment right to a jury trial. It demonstrates how history has culminated into what is here termed the *McMillan-Walton* doctrine, pursuant to which the defendant's rights are, today, virtual nullities.

Part III focuses on four significant problems with the *McMillan-Walton* doctrine: its lack of meaningful guidance to the inferior courts; its erosion of the values inherent in the right to a criminal jury trial; its erroneous abdication of the judicial role in protecting constitutional rights; and its threat to the notion of proportionality in punishment that is a recognized cornerstone of the federal penal system.

Part IV proposes a standard that avoids the shortcomings discussed in Part III. The proposed standard, which is adapted from one set forth by Justice Stevens in his dissenting opinion in *McMillan v. Pennsylvania*,[6] avoids the problems that beset the *McMillan-Walton* doctrine. More importantly, it restores a defendant's rights to have a jury determine guilt beyond a reasonable doubt, and leaves the sentencing judge adequate discretion to sentence convicted defendants.

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[6] 477 U.S. 79 (1986).

I. THREE EXAMPLES OF THE SURPASSING IMPORTANCE OF SENTENCING FACTS

The Guidelines and the federal narcotics laws promote the trend of removing decisions from the guilt-determination component of the criminal process, where the defendant enjoys constitutional safeguards, and transferring them to the sentencing determination, where the defendant does not. Three particular situations demonstrate this trend: quantity determinations in narcotics cases; "relevant conduct" determinations under the Guidelines; and instances in which the Guidelines permit a sentencing judge to punish a defendant based on conduct for which the defendant has been acquitted.

A. Quantity Determinations in Drug Cases

Title 21 U.S.C. § 841(a) makes it a crime to manufacture, distribute, disperse or possess certain controlled substances with intent to distribute.[7] The penalty provisions for violation of § 841(a), set forth in 21 U.S.C. § 841(b), apportion penalties largely in relation to the weight of the controlled substance that the defendant distributed or possessed with the intent to distribute.[8] The penalties vary widely depending upon the weight of the substance. Consider cocaine: depending upon the weight of the cocaine that the defendant distributed or possessed, the defendant might face zero years in jail or a lifetime in jail and might have to pay no fine or a fine of four million dollars.[9]

Although the weight of the controlled substance is a critical factor in determining the severity of the defendant's sentence, and although the length of the sentence may vary widely depending upon the weight of the drugs involved, courts have uniformly held that the quantity of the controlled substance is *not* an element of an offense.[10] Rather, the court considers quantity in sen-

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7 21 U.S.C. § 841(a) (1988).

8 21 U.S.C. § 841(b) (1988 & Supp. 1992).

9 *Compare* 21 U.S.C. § 841(b)(1)(A) (penalty for five kilograms or more of cocaine) *with* 21 U.S.C. § 841(b)(1)(B) (penalty for less than 500 grams (one half a kilogram) of cocaine). The range of potential sentences for other drugs is equally wide, depending principally on the quantity of drugs at issue.

10 *See generally* United States v. Campuzano, 905 F.2d 677, 679 (2d Cir.), *cert. denied*, 111 S. Ct. 363 (1990); United States v. Brown, 887 F.2d 537, 540 (5th Cir. 1989); United States v. Jenkins, 866 F.2d 331, 334 (10th Cir. 1989); United States v. Wood, 834 F.2d 1382, 1388-90 (8th Cir. 1987); United States v. Gibbs, 813 F.2d 596, 599-600 (3d Cir.), *cert. denied*, 484 U.S. 822 (1987); United States v. Normandeau, 800 F.2d 953, 956 (9th Cir. 1986); United States v. McHugh, 769 F.2d 860, 868 (1st Cir. 1985).

tencing the defendant. Indeed, it has been held that where the issue of quantity is presented to the jury — for example, if the indictment alleges that the defendant distributed a specified amount of a drug, or if the jury is presented with a special verdict form that requires it to find that the defendant distributed a specified amount — the sentencing court may disregard the jury's findings, and base its sentence on a greater quantity than the jury found to exist.[11]

The courts interpreting the federal narcotics laws have relied in most instances on two arguments to support their exclusion of quantity from the guilt-determination phase. First, the courts frequently note that possession with intent to distribute any quantity of narcotics is a criminal act, and conclude from this observation that the quantity of narcotics involved must simply be a sentence enhancement.[12] The reasoning appears to be that if a certain action is criminal in and of itself, then any factor that measures the extent of the criminal conduct must not be an element of the crime. But there is nothing in the definition of "crime" that would require such a result. Moreover, this assumption is not true in practice. Larceny, for example, is criminal regardless of the value of the property unlawfully obtained; the degree of the criminality, however, is determined by value, which is an element of the crime and must be determined by a jury.[13] Furthermore, several federal statutes include minimum dollar amounts that must be proven as elements of the crime.[14]

Courts also rely on the legislative history underlying § 841, frequently stating that "Congress clearly intended" § 841(b) to be merely a sentencing enhancement.[15] Nothing in § 841 or its legislative history suggests, however, that Congress intended different burdens of proof to apply to §§ 841(a) and 841(b); indeed, Congress never mentions burden of proof in this context.[16] This silence is telling: the same public law that includes § 841 also

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11 *See* United States v. Madkour, 930 F.2d 234, 237 (2d Cir. 1991).

12 *See, e.g.*, *Campuzano*, 905 F.2d at 679 ("Because the quantity is relevant only to enhancement of the sentence, the government is not required to prove the quantity alleged . . . .").

13 *See* 3 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 357, at 309-10 (14th ed. 1980).

14 *See, e.g.*, 18 U.S.C. § 2314 (1988 & Supp. 1992) (interstate transportation of goods worth over $5000).

15 *See, e.g.*, United States v. Jenkins, 866 F.2d 331, 334 (10th Cir. 1989).

16 *See generally* Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 91-513, 1970 U.S.C.C.A.N. 4566 (codified at 21 U.S.C. §§ 801-966 (1988 & Supp. 1992)).

includes a forfeiture section that contains express provisions concerning burden of proof on other matters.[17]

The consequences of this statutorily dubious approach are clear. First, the burden of proof is lower at the sentencing hearing than at trial. In addition, other constitutional safeguards that protect the defendant at trial are not available at the sentencing hearing. For example, hearsay may be admitted without reservation at a sentencing hearing, because the defendant has no right to confront the witnesses against him;[18] the defendant does not have the right of compulsory process;[19] and evidence suppressed at trial under the the Fourth Amendment may be used at sentencing.[20] The right to proof beyond a reasonable doubt, to confrontation and to compulsory process are all accuracy-enhancing

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[17] *See* 21 U.S.C. § 885 (1988). Both § 841 and § 885 were part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513. That the provisions of §§ 841(a) and 841(b) are set forth in separate sections does not mean that the latter section is simply a sentencing enhancement of the former. Courts have, in other instances, found that elements of a criminal act may be set forth under separate sections. *See, e.g.*, United States v. Collins, 957 F.2d 72 (2d Cir. 1992) (willfulness requirement set forth in 18 U.S.C. § 924(a)(1)(D), which establishes the penalty for violation of 18 U.S.C. § 922 (a)(1), is an element of the crime proscribed by § 922(a)(1)); United States v. Campos-Martinez, 976 F.2d 589 (9th Cir. 1992) (elements of crime are found in both 8 U.S.C. § 1326(a) and § 1326(b)(1)).

[18] *See, e.g.*, United States v. Hershberger, 962 F.2d 1548, 1553-54 (10th Cir. 1992) ("reliable hearsay evidence [may be] used during the sentencing phase without the right of confrontation and cross-examination"); United States v. Kikumura, 918 F.2d 1084, 1102-03 (3d Cir. 1990) (Hearsay statements can be admitted at sentencing if "other evidence indicates that they are reasonably trustworthy."); United States v. Pugliese, 805 F.2d 1117, 1122-23 (2d Cir. 1986) (holding that it is not error for district court judge to consider information developed at sentencing hearing), *cert. denied*, 489 U.S. 1067 (1989). *See generally* Note, *An Argument for Confrontation under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992).

[19] *See* United States v. Prescott, 920 F.2d 139, 143 (2d Cir. 1990) ("A defendant has no absolute right to present witnesses or to receive a full-blown evidentiary hearing.").

[20] *See, e.g.*, United States v. Tejada, 956 F.2d 1256 (2d Cir. 1992) (sentencing court can use illegally obtained evidence if it was not seized for the purpose of sentencing); United States v. McCrory, 930 F.2d 63, 68, 69 (D.C. Cir. 1991) (leaving open the question of whether the Fourth Amendment right to privacy has any force in the sentencing stage, but noting that "evidence inadmissible at trial may be admissible at sentencing. . . . Where there is no showing of a violation of the Fourth Amendment purposefully designed to obtain evidence to increase a defendant's base offense level at sentencing," there is no ground to suppress evidence from an illegal search); United States v. Torres, 926 F.2d 321, 325 (3d Cir. 1991) ("[E]vidence suppressed as in violation of the Fourth Amendment may be considered in determining appropriate guideline ranges."); United States v. Graves, 785 F.2d 870, 876 (10th Cir. 1986) ("[T]he additional deterrent effect of extending application of the exclusionary rule to sentencing procedures . . . would be so minimal as to be insignificant."); United States v. Butler, 680 F.2d 1055, 1056 (5th Cir.

rights — rights that tend to make the result of the proceeding more certain than it would otherwise be.[21] Their absence in the sentencing phase means that determinations made there, including decisions about the quantity of drugs that the defendant distributed or conspired to distribute, tend to be less accurate than those made at trial.

B. Relevant Conduct under the Guidelines

The Guidelines fix a defendant's sentence within the statutorily prescribed maximum and minimum ranges.[22] They assign a "base offense level" to the crime of conviction. Once the base offense level is determined, the court considers a series of potential specific offense "characteristics" and "adjustments" that move the base offense level up or down, resulting in an "adjusted base offense level." Following the determination of the defendant's adjusted base offense level, the court consults the defendant's criminal record and converts it, according to a prescribed method, into a quantity of criminal history "points" — the more serious the prior record, the greater the number of points. The court then consults a matrix provided by the Guidelines, one axis of which is the adjusted base offense level and the other axis of which is the criminal history points. The intersection of the defendant's adjusted base offense level and criminal history points yields the defendant's sentencing range.

In determining a defendant's base offense level, the Court

1982) (evidence inadmissible at trial is admissible for sentencing purposes because deterrent value during sentencing phase is minimal).

[21] *See, e.g., In re* Winship, 397 U.S. 358, 361-64 (1970) (explaining that right to proof beyond a reasonable doubt is an accuracy-enhancing right) (discussed *infra* at notes 45-50 and accompanying text); Ohio v. Roberts, 448 U.S. 56, 65 (1980) ("[The Confrontation Clause's] underlying purpose [is] to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence . . . ."). The obvious purpose of the Compulsory Process Clause is to assist defendants in procuring witnesses favorable to their version of events. By contrast, criminal defendants' rights to privacy and against self-incrimination are not accuracy-enhancing rights, but serve other ulterior goals, namely, the preservation of a person's privacy and dignity. *See generally* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989).

[22] What follows is a rough description of the workings of the Guidelines that is adequate for purposes of this Article. It assumes that there is only a one count indictment, and thus does not refer to the practice of grouping counts. *See* FEDERAL SENTENCING GUIDELINES MANUAL § 3D (West 1992) [hereinafter GUIDELINES]. In relatively unusual cases, the Guidelines mandate a sentence above the statutory maximum or below the statutory minimum. In such cases, the Guidelines provide that the sentence should be the statutory maximum or minimum, accordingly.

considers not simply the offense of conviction, but also considers a defendant's wrongful activity *in connection with* the offense of conviction. More specifically, the Guidelines instruct the sentencing judge to sentence the defendant on the basis of "relevant conduct" surrounding the offense of conviction.[23] For most crimes, the Guidelines define relevant conduct as follows:

> [A]ll acts or omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, 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, or that otherwise were in furtherance of that offense.[24]

For crimes in which the total amount of harm or loss is important in determining the sentence, most typically drug and money crimes, the Guidelines define relevant conduct to include "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction."[25]

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[23] *See* GUIDELINES *supra* note 22, § 1B1.3.

[24] *See id.* § 1B1.3(a)(1).

[25] *Id.* § 1B1.3(a)(2); *see also id.* § 3D1.2 (discussing groups of closely related counts).

On November 1, 1992, approximately two months before this Article was sent to the printer, the Sentencing Commission promulgated an amendment to the definition of relevant conduct. The definition currently reads as follows:

> [Relevant conduct is] . . .
> (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or wilfully 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 in 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, or that otherwise were in furtherance of that offense.

Id. § 1B1.3(a)(4).

Section 1B1.3(a)(2) now provides that relevant conduct includes "acts and omissions described in subdivisions 1(A) and 1(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction." *See* 57 FED. REG. 20148 (May 11, 1992).

It is too early to include in this Article any cases interpreting the new relevant-conduct guidelines. The plain intent of the amendments is to limit the scope of relevant conduct. *See id.* at 20148-50. The amendments, however, may not lead to a substantial difference in the interpretation of relevant conduct. First, the Sentencing Commission stated that it views the amendments as merely "clarif[ying]" rather than changing the concept of relevant conduct. Thus, a court may determine that its conception of relevant conduct remains the same after the amendments as before. Moreover, the definition of relevant conduct, as amended, is still

In practice, these definitions permit courts to base their sentences on a tremendous amount of activity *other than* the offense of conviction. Consequently, the sentences that the courts impose often bear a greater relation to what the court determines to be the defendant's relevant conduct than to the crimes for which the defendant has actually been convicted. The examples are legion; consideration of a few, chosen almost at random, demonstrates the point.

** In *United States v. Sklar*,[26] the defendant pled guilty to possessing approximately seventy-five grams of cocaine, which he had received in an Express Mail package. The defendant had been arrested holding the package. At the defendant's sentencing, the government argued that in the six months preceding his receipt of the package with which he was arrested, the defendant had received eleven other Express Mail packages, and that each of the previous eleven had been filled with similar amounts of cocaine. Although the eleven prior packages "were never produced in court, inspected by government agents, or chemically tested,"[27] the government argued that the receipt of those packages constituted "relevant conduct" that should be taken into account at sentencing. The court accepted this argument and, relying on postal records that purportedly demonstrated the similarity of the packages, found by a preponderance of the evidence that the contents of the eleven packages were indeed cocaine, and that the approximate weight of the cocaine was 300 grams.[28] The court placed the defendant in the 37-46 month range for sentencing.[29] Had the defendant been sentenced based upon only what he had been convicted of, he would have been placed in the 18-24 month range.

** In *United States v. Ignancio Munio*,[30] the defendant pled guilty to transferring $10,840 in counterfeit currency. Had he been sentenced upon this conduct alone, his sentence would have been in the range of 10-16 months. Using a

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quite broad; the amended definition of relevant conduct would still permit most, if not all, of the sentencing practices that are described and criticized below.

26 920 F.2d 107 (1st Cir. 1990).

27 *Id.* at 109.

28 *Id.* at 112.

29 *Id.* at 109, 111-12.

30 909 F.2d 436 (11th Cir. 1990).

preponderance of the evidence standard,[31] the court found that, although the indictment had not charged any more than $10,840 worth of counterfeit currency, the defendant had in fact been part of a conspiracy to distribute *$1.1 million* in counterfeit currency.[32] The Court then placed the defendant, pursuant to the Guidelines, in the 27-33 month category.

** In *United States v. Lanese*,[33] the defendant was convicted of using extortionate means to collect an extension of credit. The sentencing judge increased the defendant's sentence based on his involvement in an illegal gambling operation for which he had never been convicted.

** In *United States v. Joyner*,[34] a defendant who was convicted for the purchase for resale of two vials of crack-cocaine from a co-defendant was sentenced as if he had purchased 586 vials of crack-cocaine for resale because that was the number of vials found on the person of the co-defendant.

** In *United States v. Copeland*,[35] the defendant, a crack addicted "steerer" who directed potential buyers to sellers of crack-cocaine, "steered" an undercover officer to sellers who sold the undercover officer three vials of crack-cocaine. The defendant was subsequently charged with, and pled guilty to, possessing three vials of crack with intent to distribute them. The Second Circuit affirmed the sentencing judge's finding that, because the crack sellers had sixty-three vials of crack on their person when they were arrested, those vials should be attributed to the defendant — they were part of his "relevant conduct" — because the court believed that the defendant *would have* steered sellers to buy the sixty-three vials if he had not been arrested.[36]

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31 *Id.* at 439.

32 *Id.* at 438.

33 937 F.2d 54 (2d Cir. 1991).

34 924 F.2d 454 (2d Cir. 1991).

35 902 F.2d 1046 (2d Cir. 1990).

36 *Id.* at 1047-48; *see also* United States v. Ebbole, 917 F.2d 1495 (7th Cir. 1990) (uncharged conduct resulted in tripling of sentence); United States v. Miller, 910 F.2d 1321 (6th Cir. 1990) (tripling sentence); United States v. Cohoon, 886 F.2d 1036 (8th Cir. 1989) (doubling sentencing range).

C. *Sentencing Facts and Second-Guessing the Jury*

Frequently a fact may be both an element of a crime and a specific offense characteristic. For example, 21 U.S.C. § 848 makes it a crime to be a "leader or organizer" of certain criminal organizations;[37] § 3B1.1 of the Guidelines likewise mandates an upward adjustment in the base offense level for a person that the sentencing court determines to be an "organizer/leader" or a "manager/supervisor" in a criminal activity.[38] Similarly, 18 U.S.C. § 924(c) makes it a crime to use or carry a weapon in connection with certain enumerated crimes;[39] the Guidelines provide that if a person uses, brandishes, or displays a weapon in connection with relevant conduct, that person's base offense level will, in most instances, receive an upward adjustment.[40]

Because a fact can be both a criminal act and a sentencing fact, a sentencing court can consider and punish conduct for which a defendant has been acquitted. For example, even if a defendant is acquitted of a charge of being a "leader or organizer," a judge at the sentencing phase might still conclude that the defendant was a leader or organizer and impose punishment for conduct for which the jury had just acquitted the defendant. Similarly, a fact may be both an element of a crime and an aggravating factor that could justify an "upward departure" at sentencing.[41] The courts have almost unanimously determined that a sentencing court may depart upwardly based upon conduct for which the defendant has been acquitted.[42]

The courts that have reconsidered, in the sentencing phase,

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37 21 U.S.C. § 848 (1988 & Supp. 1992).

38 GUIDELINES, *supra* note 22, § 3B1.1.

39 18 U.S.C. § 924(c) (1988 & Supp. 1992).

40 *See* GUIDELINES, *supra* note 22, §§ 2D1.1, 2E2.1; United States v. Carter, 953 F.2d 1449 (5th Cir. 1992); United States v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir. 1990).

41 An upward departure is an increase beyond the prescribed Guidelines level. It is supposed to be done only in extraordinary circumstances, where the sentencing judge deems the Guidelines to have inadequately taken into account certain factors present in a particular case. *See generally* GUIDELINES, *supra* note 22, § 5K.

42 For cases in which a sentencing judge departed upwardly based on conduct for which defendant was acquitted, see United States v. Olderback, 961 F.2d 756 (8th Cir. 1992); United States v. Averi, 922 F.2d 765 (11th Cir. 1991) (*per curiam*); United States v. Fonner, 920 F.2d 1330 (7th Cir. 1990); United States v. Duncan, 918 F.2d 647 (6th Cir. 1990); United States v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir. 1990); United States v. Mocciola, 891 F.2d 13 (1st Cir. 1989); United States v. Dawn, 897 F.2d 1444 (8th Cir. 1990); United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989) (*per curiam*); United States v. Ryan, 866 F.2d 604 (3d Cir. 1989). *But see* United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1991) (sentencing court not permitted to find

facts that the jury had already considered and rejected reason that the acquittal simply means that the state failed to prove the conduct at issue beyond a reasonable doubt, but that it was still permissible for a sentencing court to find, by a preponderance of the evidence, that the conduct existed.[43] The strength of this reasoning is considered below. For now, it is sufficient to point out that, as a consequence of the courts' ability to second-guess the jury, a defendant is tried twice for a given act: once by the jury and once by the judge. Moreover, even if the defendant is acquitted of certain charges at trial, the acquittal may be meaningless because punishment can be exactly what it would have been had the defendant been convicted of the charges.[44]

II. The Decline and Fall of Proof Beyond a Reasonable Doubt and the Right to Trial by Jury

A. Proof Beyond a Reasonable Doubt

1. *In re Winship*'s enunciation of the right to proof beyond a reasonable doubt

"The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation."[45] For most of our history, the beyond a reasonable doubt standard was assumed to be constitutionally required.[46] In 1970, in the case of *In re Winship*,[47] the Supreme Court affirmed the long-standing assumption and "explicitly h[e]ld that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[48]

The *Winship* Court explained that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error."[49] Because criminal convictions both besmirch the defendant's good name and impose considerable hardship, courts could not allow a conviction to befall an inno-

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that defendant knowingly killed victim after jury acquitted defendant of that charge).

43 *See supra* notes 26-36 and accompanying text.

44 *See id.*

45 *In re* Winship, 397 U.S. 358, 361 (1970).

46 *See, e.g.*, Holt v. United States, 218 U.S. 245, 253 (1910); Davis v. United States, 160 U.S. 469 (1895); Miles v. United States, 103 U.S. 304, 312 (1880).

47 397 U.S. 358.

48 *Id.* at 364.

49 *Id.* at 363.

cent person; and thus, to prevent that from happening, the Due Process Clause required the State to surmount a high burden of proof to secure a conviction.[50]

2. *Mullaney* and *Patterson*: development and confusion

The Court reiterated its analysis regarding the beyond a reasonable doubt standard in *Mullaney v. Wilbur*.[51] In *Mullaney*, the Court struck down a Maine statute, providing that once the State had demonstrated beyond a reasonable doubt that the criminal defendant had committed an intentional and unjustified homicide, the criminal defendant could be convicted of murder unless he then demonstrated by a preponderance of the evidence that he acted in the heat of passion on sudden provocation, in which case he would be guilty of the lesser crime of manslaughter.[52] While both murder and manslaughter were criminal acts, the penalties for the two crimes were significantly different.[53] The disparity in the sentences, the Court held, meant that the State could not shift the burden of proof to the defendant.[54] The Court held that the State bore the burden of proving that the defendant did not act in the heat of passion or on sudden provocation if the State sought to have the defendant convicted of murder.[55] Relying on the same calculation that it had employed in *Winship*, the *Mullaney* Court observed:

> [I]t is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.[56]

Two years later, in *Patterson v. New York*,[57] the Court held that, notwithstanding *Mullaney*, a New York law that required a defendant

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[50] *Id.* at 363-64 ("[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."). This point was emphasized by Justice Harlan in his concurring opinion: "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (Harlan, J., concurring).

[51] 421 U.S. 684 (1975).

[52] *Id.* at 703.

[53] *Id.* at 698.

[54] *Id.*

[55] *Id.* at 704.

[56] *Id.* at 703-04 (citation omitted).

[57] 432 U.S. 197 (1977).

charged with murder to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance to reduce the crime to manslaughter did not violate the Due Process Clause.[58] In reaching this decision, the Court used a far different tone than it had in *Mullaney*. Rather than analyzing the societal consequences of the allocation of the burden of proof in criminal trials, the Court deferentially stated that it would invalidate state criminal procedural rules only in exceptional circumstances, because "preventing and dealing with crime is much more the business of the States than it is of the Federal Government."[59] The Court also noted that there was precedent for New York's allocation of the burden of proof — nineteenth century common law, for example, mandated that the burden of proving the defense of heat of passion on sudden provocation rested upon the defendant[60] — and that it therefore did not " 'offend[] some principle of justice so rooted in the traditions of conscience of our people as to be ranked as fundamental.' "[61]

Patterson acknowledged that "*Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt."[62] But, the Court in *Patterson* continued, *Mullaney* did *not* hold that "the State may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt."[63] The *Patterson* Court never explained what appears to be the crucial distinction between those facts that constitute the "ingredient[s] of an offense" (*Mullaney*), and those facts upon which depend "the blameworthiness of an act or the severity of punishment authorized for its commission" (*Patterson*). The "ingredients of an offense" would appear to consist of the precise factors that make a defendant's conduct blameworthy or that sanction punishment, and *Patterson*'s unexplained effort to draw a distinction between them was confusing. As a consequence, following *Patterson*, the state of the law concerning

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58 *Id.* at 201.

59 *Id.* (citing Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion)).

60 *Id.* at 202; *see also id.* at 208-09.

61 *Id.* at 202 (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

62 *Id.* at 215.

63 *Id.* at 214 (footnote omitted); *see also id.* at 214 n.15 ("There is some language in *Mullaney* that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability.' . . . The Court did not intend *Mullaney* to have such far-reaching effect.").

proof beyond a reasonable doubt was in disarray.[64]

3. *McMillan v. Pennsylvania* and the uncertain scope of *In re Winship*

Finally, in *McMillan v. Pennsylvania*,[65] the Court upheld a portion of Pennsylvania's Mandatory Minimum Sentencing Act (MMSA) that provided that anyone convicted of enumerated felonies was subject to a five-year mandatory minimum sentence if the sentencing judge found by a preponderance of the evidence that the defendant "visibly possessed a firearm" during the commission of the offense.[66] As in *Patterson*, the Court emphasized that States have the primary responsibility for defining, regulating and punishing criminal activity;[67] and, while recognizing the possibility that a State's allocation of the burden of proof in a criminal trial might run afoul of due process, the Court declined to provide any illustrations or guidance concerning this theoretical possibility.[68] Instead, the Court held that whatever else it did, a State could not discard the presumption of innocence,[69] and that however onerous the State made sentencing provisions, such provisions could not be "a tail which wags the dog of the substantive offense."[70]

The Court concluded that the MMSA did not exceed either of these limits.[71] It plainly did not contravene the first, and the Court found that it did not violate the second, either. Of course, because of the imprecision of the second standard, it is hard to determine why the MMSA did not "wag the dog" of the substantive offense, or in what circumstances it might have. One hint of

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64 *See, e.g.*, Celia Goldwag, Note, *The Constitutionality of Affirmative Defenses After* Patterson v. New York, 78 COLUM. L. REV. 655, 655 (1978) ("[T]he result in *Patterson* is explicable only if the Court intended to repudiate *Mullaney*.").

65 477 U.S. 79 (1986).

66 *Id.*

67 *Id.* at 86 ("[W]e should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.").

68 *Id.* ("[W]e have never attempted to define precisely the . . . extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases, and do not do so today . . . ."); *see also Patterson*, 432 U.S. at 210 ("[T]here are obviously constitutional limits [on the allocation of the burden of proof] beyond which the States may not go . . . .").

69 *McMillan*, 477 U.S. at 86-87.

70 *Id.* at 88.

71 *Id.* at 91 (acknowledging the Court's inability to set forth any "bright line" test, but concluding that "[w]e have no doubt that Pennsylvania's Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line.").

an answer was contained in the Court's observation that, because several of the felonies to which the five-year mandatory minimum applied subjected the defendant to a maximum of ten or twenty years' imprisonment, the MMSA "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it . . . ."[72] In other words, it may have been important to the Court that the MMSA could not extend any defendant's maximum sentence, but could only increase the defendant's minimum sentence. The Court did not incorporate this observation into its holding, and the import of the observation was therefore unclear. This ambiguity, discussed below, has had important consequences for the interpretation of *McMillan*.

B. Trial by Jury

The right to a criminal jury trial has traditionally served three principal goals. First, the jury expresses "the conscience of the community,"[73] and thus invests the criminal law with a moral force that it would not otherwise have.[74] The Supreme Court has emphasized that an important attribute of juries is "the community participation and shared responsibility that results from that group's determination of guilt or innocence."[75] This is a benefit shared by all of society, not simply the immediate participants in any particular trial.

Second, the jury benefits defendants on trial by protecting the defendant against the State, as represented by the prosecutor and the judge. As Justice White explained in his often-cited opinion for the Court in *Duncan v. Louisiana*:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . [P]roviding an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [The right to a jury trial] reflect[s] a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.[76]

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72 *Id.* at 88.

73 Witherspoon v. Illinois, 391 U.S. 510, 519 & n.15 (1968).

74 *See generally* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1185-86 (1991); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-94 (Phillips Bradley ed., 1984) (1945).

75 Williams v. Florida, 399 U.S. 78, 100 (1970).

76 Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (emphasis added) (footnotes omitted); *see also* Amar, *supra* note 74, at 1186.

Third, the jury benefits the jurors themselves, for each jury serves as a school that trains its members to be good citizens. As Justice Kennedy articulated in *Powers v. Ohio*:

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. . . . [W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.[77]

Notwithstanding the considerable virtues of the constitutional right to a jury, the Supreme Court has consistently held that juries play no role in sentencing defendants.[78] The judge is responsible for sentencing, and juries are instructed before they begin their deliberations that punishment is not their concern, and that they should take no account of the potential punishment that a defendant may receive if found guilty.[79] It is hard to square the jury's nonparticipation in sentencing with its role as a "conscience of the community." Punishment is unquestionably a moral concept, for it is an act of retribution for the defendant's crime. It may thus appear anomalous that the law so clearly demarcates the sentencing phase of the trial as a territory into which the jury has no right to venture.

One explanation for the division of responsibilities is that although sentencing involves retribution, it also serves other ends — principally, the goals of general deterrence and rehabilitation — that may be better served by a judicially-imposed sentence than by a jury-imposed one. In particular, choosing a sentence in any case requires consideration of a wide variety of facts beyond the jury's attention. Juries are instructed to focus narrowly and determine the facts relating to the particular crime charged in the indictment, but the imposition of an appropriate sentence requires a broader focus. Sentencing judges frequently consider, for example, a defendant's criminal history, position in the community, family situation and other "background facts" that are irrelevant to the crime of conviction, but that are relevant to the possible rehabilitative effect of any punishment. As the Supreme Court explained:

In a trial before verdict the issue is whether the defendant is

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77 Powers v. Ohio, 111 S. Ct. 1364, 1368, 1369 (1991) (citing *Duncan*, 391 U.S. at 147-58, 187, 188)). *See generally* Amar, *supra* note 74, at 1186-89.

78 *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986) ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact . . . .").

79 *See, e.g.*, HON. LEONARD B. SAND ET AL., 1 MODERN FEDERAL JURY INSTRUCTIONS ¶ 9.01 at 9-3 (1991).

> guilty of having engaged in certain criminal conduct of which he has been specifically accused. . . . A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant — if not essential — to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendants's life and characteristics.[80]

The only disputes in recent years concerning the role of juries in sentencing defendants have arisen in capital cases. Because many states provide a statutory basis for jury participation in sentencing in capital cases, some people had argued that a defendant had a constitutional right to a jury determination in the sentencing phase of a capital trial. These arguments were silenced by *Walton v. Arizona*,[81] in which the Court upheld an Arizona statute pursuant to which a defendant who had been found guilty of first-degree murder underwent a "sentencing hearing" in which the court, sitting without a jury, found certain statutorily-identified "aggravating factors" were present, and thus imposed the death penalty.[82] Without these aggravating factors — specifically, that the murder had been committed "in an especially heinous, cruel or depraved manner," and that it had been committed for pecuniary gain — the defendant would have been subject to a maximum penalty of twenty-five years in prison.[83] The defendant challenged the statute on the ground that it violated his Sixth Amendment right to a jury trial.[84] The Court, however, brushed aside any suggestion or possibility left open from previous cases that there was a right to a jury determination in the sentencing phase of capital cases. Relying on the line of decisions holding that the jury determines guilt, not punishment,[85] the Court found no reason to distinguish capital cases from others, and ruled that " 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' "[86] *Walton* thus makes clear that there is no

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80 Williams v. New York, 337 U.S. 241, 246-47 (1949) (footnote omitted).

81 110 S. Ct. 3047 (1990).

82 *Id.* at 3051-54.

83 *Id.* at 3052-53; *see also id.* at 3087 & n.1 (Stevens, J., dissenting).

84 *Id.* at 3054. The defendant also challenged the statute on Eighth Amendment grounds, but the Court found that the statute did not violate the defendant's Eighth Amendment right to be free of cruel and unusual punishment. *Id.* at 3055.

85 *Id.* at 3054 (citing Clemons v. Mississippi, 494 U.S. 738 (1990)); Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984)).

86 *Id.* (quoting *Hildwin*, 490 U.S. at 640-41).

Sixth Amendment limit on the distinction between, on the one hand, elements of the crime and, on the other, factors relevant only for sentencing purposes.[87]

III. A CRITIQUE OF THE *McMILLAN-WALTON* DOCTRINE

McMillan and *Walton* represent the highwater mark of the trend toward removing decisions that strongly affect criminal defendants from the jury and resolving them by a standard of less than proof beyond a reasonable doubt. *McMillan* establishes the due process limits on the definition of criminal activity and the scope of sentencing facts. *Walton* demonstrates that there is no Sixth Amendment limitation between criminal acts and sentencing facts. In light of *McMillan* and *Walton*, the current state of the law with regard to criminal acts and sentencing facts may be stated thus:

> Congress or a state legislature has a free hand to determine what constitutes both elements of a crime and "aggravating factors" that affect sentencing *except that* (1) all defendants must be presumed to be innocent, and (2) the "tail" of sentencing must not be allowed to "wag the dog" of the guilt-determination phase of the trial.[88]

There are four problems with this approach, which I will call the *McMillan-Walton* doctrine. First, the doctrine's imprecision has led to an almost complete obliteration of the distinction between criminal acts and sentencing facts. Second, this obliteration has led to a devaluation of the role of the jury, which compromises the right to a jury trial. Third, the *McMillan-Walton* doctrine relies unaccountably on a brand of literalism that is, in effect, an abdication of the judicial role in constitutional interpretation. Finally, the *McMillan-Walton* doctrine threatens the classical liberal notion of proportionality in punishment.

A. Vagueness and the Slippery Slope

The first and most obvious problem with the *McMillan-Walton* doctrine is that it provides no meaningful guidance to the lower courts. No state or federal law has ever abolished the presumption of innocence — the requirement that the state bear the burden of proof in a criminal trial. Consequently, the first pro-

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87 Although *Walton* deals specifically with the right to a jury determination in death penalty cases, the breadth of its reasoning confirms that the jury has no role in the sentencing phase of *any* cases.

88 *See supra* notes 65-72 and accompanying text.

viso of the *McMillan* test has virtually no practical import. The second proviso of *McMillan* is so broadly stated and imprecise that it is a nullity. It is impossible to define with any precision when a statutory "dog" is wagged by its "tail"; the words simply do not make sense.

Any legal standard is imprecise to some degree, and indeed, sometimes ambiguity may serve a legitimate purpose. For example, ambiguity is useful when a court employs it to defer an issue to allow events or parties' ideas to develop.[89] But the *McMillan-Walton* doctrine's total lack of guidance to the lower courts serves no such purpose. To the contrary, the imprecision of the *McMillan-Walton* doctrine does not affect all parties to the criminal process equally, but instead plainly works to the disadvantage of the criminal defendant. As shown above, lower federal courts have attached increasing importance to sentencing facts and less to criminal acts.[90] Given the freedom that *McMillan-Walton* gave the lower courts, it was to be expected that they would interpret the scope of sentencing facts broadly. The broader the scope of sentencing facts — and, the resultant narrower scope of criminal acts — the broader is the sentencing judge's power. One need not be overly cynical to believe that courts, like most other people, prefer situations over which they have comparatively greater control.[91]

Given *McMillan*'s vagueness, courts can accommodate *McMillan* to virtually any case before them to the disadvantage of the criminal defendant. *United States v. Young*[92] provides a perfect example. In *Young*, the defendant was accused of violating the then-effective version of 18 U.S.C. § 111, which provided:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with [certain specified federal officials in the course of their official duties] shall be fined not more than $5,000, or imprisoned not more than three years, or both.
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> Whoever, in the commission of such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or im-

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89 The Supreme Court's famous directive that certain school districts were to desegregate "with all deliberate speed," Brown v. Board of Educ., 349 U.S. 294, 301 (1955), may have been such an instance.

90 *See supra* notes 26-36 and accompanying text.

91 It may be significant that numerous judges have expressed displeasure with the constraints on their power imposed by the Guidelines. In light of this perceived restriction on judges' powers, it is understandable that judges would tend to oppose other restraints, such as a narrower definition of sentencing facts.

92 936 F.2d 1050 (9th Cir. 1991).

prisoned not more than ten years, or both.[93]

The indictment referred only to the statute's first sentence — it did not mention that the defendant used a deadly or dangerous weapon — and the jury was not instructed regarding the use of a deadly or dangerous weapon.[94] After the jury found the defendant guilty of violating § 111, however, the court found, in the sentencing phase of the trial, that the defendant had used a deadly or dangerous weapon in connection with his criminal acts, and thus sentenced him under the second, more harsh portion of the statute.[95]

Relying solely on *McMillan*, the circuit court upheld the sentence against a due process challenge. The court, observing that *McMillan* had not established any hard and fast rules governing the distinction between criminal acts and sentencing facts,[96] was unconstrained in conducting its brief analysis: the weapons provision of § 111, the court asserted, "is not imbued with the constitutional accoutrements of an offense,"[97] and thus was properly regarded as a sentencing fact. The *Young* court recognized that § 111 went beyond the MMSA at issue in *McMillan* because § 111 (unlike the MMSA) increased the defendant's sentence beyond the otherwise applicable sentence range.[98] Again, the *Young* court took advantage of the ambiguity of *McMillan* to slough off the difference: "Since *McMillan* did not establish a 'bright line' rule, it is not particularly relevant that the sentence for using a dangerous or deadly weapon could exceed the 'normal' statutory maximum by up to seven

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93 18 U.S.C. § 111 (1988 & Supp. 1992). The statute was amended on November 18, 1988 — after the date of the acts involved in *Young* — as follows:

> (a) In general. — Whoever —
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates or interferes with [certain specified people in the course of their official duties]; or
>
> (2) forcibly assaults or intimidates [certain other specified people in the course of their official duties] shall be fined under this title or imprisoned not more than three years, or both.
>
> (b) Enhanced penalty. — Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon, shall be fined under this title or imprisoned not more than ten years, or both.

Id. The amendment thus resolves the question of statutory interpretation confronted by the *Young* court. It could not, of course, affect the constitutional analysis of *Young*.

94 *Young*, 936 F.2d at 1053 n.4.

95 *Id.*

96 *Id.* at 1053-54.

97 *Id.* at 1055.

98 *Id.* at 1054-55.

years."[99]

The *Young* court's analysis is unpersuasive. The bald assertion that the weapons provision of the statute "is not imbued with constitutional accoutrements of an offense," is not a coherent rationale for the court's holding; it is simply impossible to say what a "constitutional accoutrement" of an offense is. Moreover, the distinction between § 111 in *Young* and the MMSA in *McMillan* should not have been ignored with the observation that it is "not particularly relevant." Yet, *Young*'s cursory treatment of the problem is almost understandable. Given the vagueness of the *McMillan-Walton* doctrine, it is virtually impossible to assert cogent reasons for categorizing something as a criminal act or a sentencing fact.

The danger of the slippery slope that the *McMillan-Walton* doctrine creates is that its consistent application would permit many statutes that have hitherto been unquestionably interpreted as dealing with criminal acts as if they were merely sentencing-enhancement statutes. For example, the federal bank robbery law has always treated armed bank robbery as a crime separate and distinct from "regular" bank robbery, and provides a heavier penalty for armed bank robbery.[100] Under *McMillan* and its progeny, however, there is no reason why armed bank robbery could not cease to be considered separately and become a variant of bank robbery. Similarly, 18 U.S.C. § 924(c), which makes it a crime to "use or carry" a firearm in connection with certain specified felonies, and which carries a punishment of at least five years' imprisonment in addition to whatever other punishment the defendant receives for the underlying, specified felonies,[101] has always been considered a separate crime, required to be presented to the jury and found beyond a reasonable doubt.[102] Yet, under *McMillan* and its progeny, it is not at all clear why § 924(c) could not be considered simply a sentencing fact to be contemplated by a court following a trial.

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99 *Id.* at 1055.

100 *Compare* 18 U.S.C. § 2113(a) (1988 & Supp. 1992) (not more than $5000 fine or twenty year prison term, or both, for bank robbery) *with* 18 U.S.C. § 2113(d) (1988) (not more than $10,000 fine or twenty-five year prison term, or both, for armed bank robbery).

101 18 U.S.C. § 924(c) (1988 & Supp. 1992).

102 *See, e.g.*, United States v. Morehead, 959 F.2d 1489, 1501 n.4 (10th Cir. 1992) (quoting United States v. Hunter, 887 F.2d 1001, 1003 (9th Cir. 1989) (per curiam), *cert. denied*, 110 S. Ct. 1159 (1990)) ("It is well settled that 'Section 924(c)(1) defines a separate crime rather than merely enhancing the punishment for other crimes.' ").

B. The Discredited Role of the Jury

As demonstrated above, the right to a jury promotes three goals for three separate beneficiaries: it protects the criminal defendant from the oppression of the State as embodied by the prosecutor and the judge; it benefits the jurors themselves by serving as a "school" for citizenship; and, it increases confidence in the criminal justice system, which is a general benefit to society.[103] The *McMillan-Walton* doctrine hinders the promotion of each of these goals.

First, because the *McMillan-Walton* doctrine does not demarcate any constitutional core of decisions that a jury *must* determine, the jury's role can be reduced to a minimum by a legislature's definition of a crime. Therefore, the jury's determination is simply the first of several decisions that affect the defendant, rather than the authoritative voice of the community's moral conscience; it is neither the decision most deeply imbued with moral significance, nor necessarily the decision that has the most practical importance for the defendant. Obviously, as the jury's role lessens, the jury can no longer protect the defendant as it was intended to do.

Second, the value of jury service for the jurors themselves lies in the requirements that the jurors think analytically about problems, discard prejudice and reflexive reactions and consider carefully what has been proven as distinct from what has been assumed. To the extent that the *McMillan-Walton* doctrine provides juries with fewer opportunities to engage in this exercise, the doctrine makes jury service less of a "school for citizenship" than it would otherwise be.

Walton itself aptly illustrates these two points. The question that the sentencing judge was required to answer was whether the acts for which Walton was convicted had been undertaken in a "heinous, cruel or depraved manner."[104] Such a question is preeminently a matter of community standards, morals and norms. It is, in short, precisely the type of question on which the voice of the community's moral authority would be most valuable. Yet, because of the standardless *McMillan-Walton* doctrine, the jury was prevented from speaking on the matter.

Third, in addition to limiting the scope and importance of the jury's verdict, and thus depriving both the defendant and the

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[103] *See supra* notes 73-77 and accompanying text.

[104] Walton v. Arizona, 110 S. Ct. 3047, 3052 (1990).

jurors themselves of the benefits of a jury trial, the *McMillan-Walton* doctrine undermines both the integrity of the verdict and, consequently, public confidence in the criminal justice system. Just as the *McMillan-Walton* doctrine permits the legislature to reduce almost without limits the factual disputes that the jury must determine, it also permits the sentencing judge to reconsider factual determinations reached by the jury. In the most extreme case, a judge who hears no evidence other than that presented to the jury may make a finding contrary to what the jury found — as, for example, cases in which a jury returns special verdicts concerning the amount of drugs and the sentencing judge makes a contrary finding.[105] Indeed, an observer might well conclude that the jury's deliberations were pointless.

One might acknowledge that the *McMillan-Walton* doctrine affects the role of the jury in the ways that I have identified, but argue that the diminished role of the jury is not something that need worry us. After all, juries are often criticized for being inefficient and inaccurate — therefore, anything that limits their roles is a positive good, not a reason for concern. The problem with this view is that it is completely at odds with the jury system and the important role that the jury plays in assuring society of the appearance, as well as the fact, of justice. The Supreme Court recently relied upon precisely these values in *Powers v. Ohio*.[106] In *Powers*, the Court held that a white defendant had standing to object to the race-based exclusion of black prospective jurors. The *Powers* Court stated:

> The jury acts as a vital check against wrongful exercise of power by the State and its prosecutors. . . . The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.[107]

Sentences that are based upon acts or factors for which the jury has acquitted the defendant undermine the appearance of fairness. It appears as if, by its sentence, the court is repudiating the jury's judgment.

A further response might be that, because the court applies a lesser standard of proof in the sentencing phase than the jury does in the guilt-determination phase of the trial, there is no *logical* contradiction between the jury's verdict and the judge's decision. But

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105 *See supra* note 11 and accompanying text.
106 111 S. Ct. 1364 (1991).
107 *Id.* at 1371, 1372.

the absence of a logical contradiction does not erase the strong appearance of repudiation. Most people recognize that the distinction between the burdens of proof is not mathematically precise, and thus would inevitably feel that the court, by finding facts differently than the jurors, was "second guessing" the jury. The Ninth Circuit noted this point in *United States v. Brady*.[108] In *Brady*, the court held — contrary to several other circuits — that a sentencing court could not upwardly depart on the basis of factual findings that contradicted what the jury had found and that had led the jury to acquit the defendant of certain charges.[109] In support of its holding, the *Brady* court relied on the strong appearance of injustice that would result from an upward departure in these circumstances:

> We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted. . . . A sentencing court should not be allowed to . . . mak[e] a finding of fact — under any standard of proof — that the jury has necessarily rejected by its judgment of acquittal.[110]

The observations of Professor Charles Nesson in his article, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*,[111] are apposite. Professor Nesson argued that an important function of a trial is to make jury verdicts acceptable to the society at large by safeguarding their reliability. In other words, jury verdicts are statements to the public of what actually happened at a particular time and place. The criminal process takes great pains to make these statements conservative and difficult to undermine.[112] The acceptability of jury verdicts will be undermined and diminished precisely to the extent that judge's sentencing determinations override a jury's findings. If a sentencing court made a finding opposite to what the jury found, explaining simply that it was using a different burden of proof, it would hardly make jury verdicts widely accepted as a statement regarding what happened at a particular time and place.

The absence of the jury from sentencing decisions is particularly disturbing under the Guidelines, for the Guidelines make retribution rather than rehabilitation the predominant federal

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108 928 F.2d 844 (9th Cir. 1991).

109 *Id.* at 851.

110 *Id.* (footnote omitted).

111 Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

112 *See id.* at 1360-68.

penological goal.[113] Retribution, as discussed above, is an expression of the society's anger and moral outrage. It is thus more appropriately the province of the jury rather than of the judge.

C. *The Failure of Literalism*

Rather than draw a reasoned distinction between criminal acts and sentencing facts, the *McMillan-Walton* doctrine relies upon a brand of literalism that undermines the distinction and precludes, as a practical matter, judicial review of critical legislative decisions.

The *McMillan-Walton* doctrine's most important factor in determining whether a fact is an element of an offense or a sentencing fact is how the state statute defines the offense. In *Patterson*, for example, the Court observed that "[t]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case[.]"[114] In *McMillan* itself, the Court stated that, "in determining what facts must be proved beyond a reasonable doubt[,] the state legislature's definition of the elements of the offense is usually dispositive[.]"[115] In *Walton*, the Court accepted without question the statutory distinction between elements of the offense and "aggravating factors."[116]

Allowing a state legislature to define an element of a crime without any meaningful or clear judicial limitation is an abandonment of the Court's role as the authority on constitutional rights. *Marbury v. Madison* firmly established that "[i]t is emphatically the province and duty of the judicial department to [s]ay what the law is."[117] The literalism of the *McMillan-Walton* doctrine cedes that duty to the state legislature.

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[113] *See* 28 U.S.C. § 994(k) (1988 & Supp. 1992). *Compare* Mistretta v. United States, 488 U.S. 361, 363-66 (1989) (retribution is the predominant penological goal underlying the Guidelines) *with* Williams v. New York, 337 U.S. 241, 248 (1949) (identifying rehabilitation as the predominant contemporary penological goal).

[114] Patterson v. New York, 432 U.S. 197, 211 n.12 (1977).

[115] McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986).

[116] Walton v. Arizona, 110 S. Ct. 3047, 3057-58 (1990).

[117] 1 U.S. (1 Cranch) 137, 177 (1803); *see also* Harmelin v. Michigan, 111 S. Ct. 2680, 2713 (1991) (White, J., dissenting) ("[T]he suggestion that a legislatively mandated punishment is necessarily 'legal' is the antithesis of the principles established by Marbury v. Madison, . . . for '[i]t is emphatically the province and duty of the judicial department to say what the law is,' . . . ., and to determine whether a legislative enactment is consistent with the Constitution."). In *Harmelin*, the Court considered whether a Michigan statutory scheme of punishment violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Id.* at 2684.

The Court's reliance on the legislature's definitions and labels for its determination of the extent of constitutional protections is contrary to the Supreme Court's refusal, expressed elsewhere, to rely on legislative labels. In *United States v. Halper*,[118] for example, the Supreme Court held that the Double Jeopardy Clause may bar a civil action seeking punitive damages if there has already been a criminal prosecution against the defendant.[119] The Court declined the Government's invitation to hold that civil proceedings do not implicate the Double Jeopardy Clause simply because they are, by definition, civil:

> The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.[120]

Similarly, the fact that a state does not label an act or circumstance an element of the crime ought not be controlling for constitutional analysis.[121]

The Court has justified its reluctance to overturn the states' allocations between criminal acts and sentencing facts by reference to its concern for federalism.[122] But such forbearance is ill-advised. Although it is correct that substantive criminal law is principally the province of the states, not of the federal government, this principle arises from a concern that the federal government would be too oppressive if it took a leading role in sanctioning criminal conduct.[123]

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118 490 U.S. 435 (1989).

119 *Id.* at 446-51.

120 *Id.* at 447-48 (quoting Hicks v. Feiock, 485 U.S. 624, 631 (1988) ("[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law.")).

121 Somewhat incongruously, the Court has seemed less attentive to the problem of literalism than has Congress. In the debate concerning what became 18 U.S.C. § 3579(a) — the federal criminal restitution statute — the House Report observed that there were constitutional limits on restitution that could be ordered by a court: "To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law." H.R. REP. No. 99-334, 99th Cong., 1st Sess. 7 (1985) (citing to H.R. REP. No. 98-1017, 98th Cong., 2d Sess. 83 n.43 (1984)) (quoted in Hughey v. United States, 110 S. Ct. 1979, 1985 n. 5 (1990)). Unlike the Court, Congress, at least in this instance, appeared to appreciate that there are constitutional limits on the definitions of crimes and attributions of punishments.

122 *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986) (quoting Patterson v. New York, 432 U.S. 197, 201-02 (1977)) ("preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . .").

123 *See, e.g.*, Garcia v. United States, 469 U.S. 70, 89 (1984) (Stevens, J., dissenting) ("Law enforcement remains, and should remain, the primary responsibility of

Such a concern for federalism does not mean, however, — indeed, cannot mean — that the federal judiciary cannot prescribe constitutional boundaries within which state legislatures may act. While the concern for federalism operates as a restraint on Congress, and may influence the federal judiciary's interpretation of federal criminal statutes,[124] it in no way implies that federal courts must tread lightly in applying constitutional principles that protect individual rights under state criminal statutes.

Moreover, the Supreme Court's "tail wags the dog" rule hardly seems the best way to avoid federal judicial intervention in state criminal procedures. The ambiguity of that rule invites federal constitutional challenges to state practices. A clearer rule, even if more restrictive of state practices, might reduce federal intervention overall — and thus better serve the goals of federalism.[125]

Finally, the concern for federalism ought not affect the judiciary's consideration of *federal* statutes or the Guidelines. Thus, to the extent that the concern for federalism led the *Patterson*, *McMillan* and *Walton* Courts to defer entirely to the legislative definition of criminal acts, that concern is not present where federal statutes or the Guidelines are at issue. Significantly, though, the lower federal courts have applied *McMillan* to their analyses of federal criminal statutes and the Guidelines.[126] Their willingness to do so demonstrates that they are unpersuaded by the Supreme Court's federalism rationale.

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the several States. Every increase in the power of the federal prosecutor moves us a step closer to a national police force with its attendant threats to individual liberty.").

124 *Id.* (Stevens, J., dissenting) (because law enforcement is principally the job of the States, "we have a special obligation to make sure that Congress intended to authorize a novel assertion of federal criminal jurisdiction"); *see also* United States v. Capano, 786 F.2d 122, 128 (3d Cir. 1986) (it is Congress's duty to define the scope of criminal conduct).

125 Similar considerations influenced the Supreme Court to adopt a relatively bright-line test regarding under what circumstances a criminal defendant had a right to counsel. Prior to Gideon v. Wainwright, 372 U.S. 335 (1963), which established that defendants had a right to appointed counsel in all criminal prosecutions, the rule was that defendants had a right to appointed counsel only if such appointment was required to avoid "a denial of fundamental fairness." Betts v. Brady, 316 U.S. 455, 462 (1942). Although the earlier standard was intended, in part, to provide room for the states to develop their own practices, the *Gideon* Court noted that the vagueness of the old rule had led to numerous, intrusive federal appeals to state proceedings, and expressed the hope that the bright-line rule it announced would reduce the number of such appeals. *See Gideon*, 372 U.S. at 337-38 & n.2.

126 *See, e.g.*, United States v. Young, 936 F.2d 1050, 1053-55 (9th Cir. 1991) (applying *McMillan* to analysis of 18 U.S.C. § 111); United States v. Underwood, 932 F.2d 1049, 1053-55 (2d Cir. 1991) (applying *McMillan* to analysis of Sentencing Guidelines).

D. The Decline of the Liberal Ideal of Punishment

Our legal system is predicated on the assumption that, in most instances, individuals can make free and rational choices, and are responsible for the foreseeable consequences of those choices. The assumption of individual autonomy is a predicate underlying the liberal political tradition from which the American common and constitutional law developed. The predominance of sentencing facts undermines the legal system's respect for individual autonomy in two ways.

First, defendants may not know what sentence they will receive if they plead guilty or are convicted at trial; they thus cannot make intelligent decisions about whether to go to trial. For example, the predominance of relevant conduct under the Guidelines allows the Government "to indict for less serious offenses which are easy to prove and then expand them in the probation office."[127] Thus, prior to pleading to or being found guilty of the charges in an indictment, a defendant cannot know whether he will be sentenced upon only the acts specified in the indictment, or on some additional relevant conduct about which he has not been put on notice. For example, a defendant charged with conspiracy to distribute heroin may not know — because the indictment need not specify — whether it will be alleged that the conspired distribution involved a gram of heroin or a kilogram. Obviously such information would make a tremendous difference concerning the penalty that the defendant may face, and to the defendant's decision to plead or go to trial. Indeed, even when the defendant pleads, he is not required to be informed how the Guidelines may apply to his case; therefore, he may still be in the dark regarding the sentence that he will receive.[128] Because the defendant cannot know the consequences of his actions, he cannot exercise his autonomy effectively.

The predominance of sentencing facts further undermines the legal system's respect for individual autonomy because it changes the character of the sentence that criminal defendants

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[127] United States v. Ebbole, 917 F.2d 1495, 1501 (7th Cir. 1990) (quoting United States v. Miller, 910 F.2d 1321, 1332 (Merritt, C.J., dissenting)); *see also* United States v. Kikumura, 918 F.2d 1084, 1121 (3d Cir. 1990) (Rosenn, J., concurring) (suggesting that prosecution deliberately saved proof of the defendant's intent for the sentencing hearing).

[128] *See* United States v. Pimentel, 932 F.2d 1029, 1032 (2d Cir. 1991) (holding that defendants have no due process right to know how the Guidelines may apply in their case, but acknowledging that defendants have been unfairly surprised by the application of the Guidelines in many cases).

receive. A corollary of the traditional liberal account of sentencing is that the punishment must "fit" the crime, that is, be proportional to it.[129] The danger posed by the *McMillan-Walton* doctrine in this context is that, to the extent that the sentence is determined on the basis of sentencing facts rather than criminal acts, the sentence is no longer specifically a punishment for the defendant's criminal behavior. Instead, the sentence is a response to a set of circumstances or a pattern of behavior — relevant conduct — that may never have been presented to the jury,[130] that the defendant may not have had an adequate opportunity to rebut[131] or that may not even be criminal.[132] Additionally, as noted above, a sentence may depend far more on the defendant's relevant conduct than on the crime for which the defendant has been found guilty. The crime thus becomes simply the *occasion* for the sentence rather than the *reason* for it, and the punishment may no longer fit the crime because it is no longer delineated by the crime.

One response is that, so long as a defendant cannot be punished in an amount greater than the statutory maximum, the punishment always fits the crime, and the crime is always the reason for the punishment. But this response is unconvincing: it is well-established that a defendant's punishment may be greater because of relevant conduct than it would otherwise be. It is simply absurd to state that defendants are punished solely for their crime, without regard for relevant conduct.

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129 *See* Solem v. Helm, 463 U.S. 277, 284 (1983) (upholding proportionality review as an inherent part of Eighth Amendment analysis, and noting that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence"). The principle of proportionality was recently reaffirmed by the Supreme Court over the vigorous protest of Justice Scalia. *See* Harmelin v. Michigan, 111 S. Ct. 2680 (1991); *see also* Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (plurality opinion) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) ("punishment should be directly related to the personal culpability of the criminal defendant"); Tison v. Arizona, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); Enmund v. Florida, 458 U.S. 782, 825 (1982)(O'Connor, J., dissenting) ("proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness").

130 *See supra* text accompanying notes 26-36.

131 *See id.*

132 *See* United States v. Newbert, 952 F.2d 281, 284 (9th Cir. 1991) (conduct that does not violate federal law may be "relevant conduct"); United States v. Uccio, 940 F.2d 753, 759 (2d Cir. 1991) (conduct that does not violate federal criminal law may be the basis for an upward departure); United States v. Kikumura, 918 F.2d 1084, 1105 n.26 (3d Cir. 1990) (intent to commit murder, while not a federal offense, may nonetheless be taken into account for sentencing purposes).

Another response is that, in the federal penal system, punishment has never been a response solely to the crime of which a defendant has been convicted. Punishment has always served several purposes — retribution, deterrence and rehabilitation — and has therefore depended upon the defendant's "life and characteristics."[133] Consequently, the objections raised to the *McMillan-Walton* doctrine may be levelled against any system of sentencing in which the defendant's background is taken into account.

While this response has some force, the "other" factors considered by judges in meting out punishment have historically been relatively unimportant compared to the crime itself, and often uncontested. For example, while a criminal's family situation and prior criminal record were always relevant to sentencing, they were usually conceded because they could be easily established through conventional means. In such circumstances, it would be fair to assume that a substantial portion of the defendant's punishment was based on the crime for which the defendant had been found guilty. By contrast, relevant conduct may, as seen above, dwarf the crime of conviction in importance, and it is often sharply contested. In precisely such a circumstance, it is inaccurate to maintain that the substantial portion of the defendant's punishment was due to her crime.

IV. THREE PROPOSALS FOR DRAWING A DISTINCTION BETWEEN CRIMINAL ACTS AND SENTENCING FACTS

A. Clear and Convincing Evidence: The Middle Ground

One commentator, addressing the due process problems discussed in this Article, has argued that a sentencing court should be required to find sentencing facts that tend to enhance a defendant's sentence by "clear and convincing evidence."[134] The clear and convincing standard is an intermediate ground between the beyond a reasonable doubt standard, used in the guilt phase of the trial, and the preponderance of the evidence standard currently employed to determine sentencing facts.[135] According to this commentator, the clear and convincing standard "is the appropriate burden of proof . . . because it effectively bal-

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133 *See* Williams v. New York, 337 U.S. 241, 247 (1949).

134 Richard Husseini, Comment, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387 (1990).

135 *Id.* at 1406; *see also* Addington v. Texas, 441 U.S. 418, 431 (1979) (referring to clear and convincing evidence as the "middle level of burden of proof").

ances the interests of the defendant against the relevant governmental concerns."[136]

The clear and convincing standard is not, however, the solution, for it fails to address many of the problems identified above. Most important, it does nothing to prevent the "slippage" between the categories of criminal acts and sentencing facts. As the commentator recognizes, "at sentencing [under the Guidelines], the judge must resolve factual issues that expose the defendant to greater punishment, *which essentially become elements of the crime*, and which may in effect evade *Winship*."[137] This is precisely correct, yet the imposition of the clear and convincing standard for sentencing facts does nothing to stop this evasion. What is needed is a clear definition of what facts can be sentencing facts and what facts must be elements of the offense, i.e., found by a jury beyond a reasonable doubt.

Moreover, the clear and convincing evidence standard relies upon the false premise that "the concern about erroneous deprivation [of liberty] at sentencing is not as great as it is at trial, because the defendant has already been found guilty."[138] This premise is false because the range of sentences that a defendant may receive after being found guilty is so great. As discussed above, a defendant found guilty of a drug-related offense may face no time in jail or life imprisonment, depending upon the quantity of drugs involved.[139] Obviously the determination of the quantity of drugs for which a defendant will be held responsible matters every bit as much as the question of guilt. Moreover, that a person has been found guilty of a crime does not rob that person of all vestiges of a constitutionally protected liberty interest. Indeed, "[u]nder our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar,"[140] and no convicted person should be punished for more criminal activity than has been proven.[141]

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136 Husseini, *supra* note 134, at 1410-11.

137 *Id.* at 1410 (emphasis added) (citation omitted).

138 *Id.* at 1408 (footnote omitted).

139 *See supra* note 9 and accompanying text.

140 Jackson v. Virginia, 443 U.S. 307, 323-24 (1979).

141 At least two courts of appeals have considered whether the clear and convincing standard should be applied in sentencing hearings. In United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990), the Third Circuit articulated:

> We recognize that there is overwhelming authority in our sister circuits for the proposition that guideline sentencing factors need only be proven by a preponderance of evidence, . . . but we note that in

B. The Greater Includes the Lesser

A more sophisticated alternative to the Supreme Court's approach begins with the observation that a criminal statute that imposes a fixed term of punishment, such as the current statutory maximum, for any violators of the statute, would not be unconstitutional.[142] Given that a legislature could pass such a fixed-term statute, the argument proceeds, flexible statutes, which provide a sentencing range rather than a single mandatory sentence, could only benefit defendants, and if a fixed-term statute would be constitutional, then a flexible one must also be. In other words, the constitutionality of the greater punishment assures the constitutionality of the lesser one. Thus, because a flexible-term statute provides the defendant with a benefit not required by the Constitution, there is no due process right to have the benefit provided in any particular way.[143]

This argument — which I will call the "greater-includes-the-lesser argument" — supports *McMillan*'s observation that the MMSA "operates solely to limit the sentencing court's discretion

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> none of these cases did the operative facts involve anything remotely resembling a twelve-fold, 330-month departure from the median of an applicable guideline range. We hold that the clear and convincing standard is, under these circumstances, implicit in the statutory requirement that a sentencing court "find" certain considerations in order to justify a departure . . . and we reserve judgment on the question whether it is also implicit in the [D]ue [P]rocess [C]lause itself.

United States v. Kikumura, 918 F.2d 1084, 1102 (3d Cir. 1990). The Circuit Court for the District of Columbia has recently refused to require application of the clear and convincing standard, but held open the possibility that it might do so in the future. United States v. Lam Kwong-Wah, 966 F.2d 682 (D.C. Cir. 1992); *see also* United States v. Townley, 929 F.2d 365, 369-70 (8th Cir. 1991) ("We do not foreclose the possibility that in an exceptional case . . . the clear and convincing standard adopted by [the Third Circuit] might apply.") The Supreme Court denied certiorari in a case that might have presented the issue, Kinder v. United States, 112 S. Ct. 2290 (1992), over a dissent by Justice White. Justice White stated:

> The burden of proof at sentencing proceedings is an issue of daily importance to the district courts, with implications for all sentencing findings, whether they be the base offense level, specific offense characteristics, or any adjustments thereto. . . . I would grant *certiorari* to clarify the applicable standards under the new sentencing regime.

Kinder v. United States, 112 S.Ct. 2290, 2292 (1992)(White, J. dissenting).

[142] Of course, it might be so high a penalty that a court would find it to be cruel and unusual and thus a violation of the Eighth Amendment. Given the current state of the law in that area, however, *see* Harmelin v. Michigan, 111 S. Ct. 2680 (1991), such a finding would be most unlikely.

[143] *See* Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases after* Patterson v. New York, 76 MICH. L. REV. 30 (1977).

in selecting a penalty within the range already available to it."[144] According to this argument, so long as sentencing facts do not subject the defendant to punishment greater than the maximum that the defendant could *theoretically* have received without regard to sentencing facts, there is no constitutional problem.

This greater-includes-the-lesser argument is an improvement over the clear and convincing standard approach just discussed for, unlike that approach, it in fact does draw a line between criminal acts and sentencing facts, namely, criminal acts are those acts necessary to justify a maximum sentence as defined by statute, whereas sentencing facts are any facts that serve to fix the sentence below the maximum. The greater-includes-the-lesser argument cannot, however, justify cases like *Walton v. Arizona* and *United States v. Young*, in which the enhanced penalty *exceeded* that which could have been imposed in the "normal" case without the enhancement. Thus, the argument does not support the existing state of the law, and would actually require some limitation of it.

Notwithstanding its superiority over the clear and convincing standard approach, the greater-includes-the-lesser argument is not satisfactory for two reasons. First, although it attempts to respond to the due process problems considered here, it says nothing about the Court's evisceration of the defendant's Sixth Amendment right to a jury trial. Under the greater-includes-the-lesser approach, a court could still "second guess" the jury's resolution of any factual determination that was both a criminal act and a sentencing fact, and thus undermine public confidence in the jury's deliberations. Moreover, this approach would still permit legislatures to define crimes narrowly, thereby limiting severely the facts that will be determined by the jury, with high maximum penalties. Thus, it would continue to move the onus of the trial to the sentencing stage, where the sentencing judge would evaluate evidence about a great many sentencing facts to determine where within the statutory range to sentence the defendant. Because there would be so much more at stake in the sentencing stage than in the criminal prosecution itself, the benefits received by both the defendant and the jurors in any jury trial would be severely limited.

Second, the greater-includes-the-lesser argument is simply a reiteration of the now-discredited distinction between rights and

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144 McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986).

privileges.[145] According to the argument, the defendant has a *right* to be sentenced at no greater than the maximum imposed by the statute and, although the defendant may have a *privilege* created by the Guidelines or other statutory terms to be sentenced at something below the maximum, that privilege can be conditioned in any way that the Government wishes, including the presence *vel non* of specified sentencing facts that are determined during the sentencing phase of the trial.

The application of right-privilege analysis to criminal sentencing, however, is inappropriate. Crucial to the development of the right-privilege distinction was that it related not to rights traditionally protected by the government, but to the conferral of non-traditional benefits — including welfare benefits and other elements of the "new property"[146] — by the Government.[147] Criminal sentencing, however, deals not with property rights, but with liberty interests, which were never part of the "new property," and have not traditionally been, nor should they be, subject to right-privilege analysis.

The Guidelines and other statutory terms confer something more than a privilege on the criminal defendant. More accurately, they confer a liberty interest that is entitled to due process protection.[148] Whether a defendant has a constitutionally protected liberty interest depends upon the degree to which the government's discretion to take away that liberty is constrained. In *Board of Pardons v. Allen*,[149] for example, the Court held that a Montana parole release statute created a liberty interest because it *required* that the inmates to whom it applied be released on parole so long as certain designated findings were made.[150] Similarly, in *Wolff v. McDonnell*,[151] the Court found that inmates had a liberty interest, entitled to due process protection, in "good time" calculations where prison regulations created a right to good time that could be forfeited only for specified "serious

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145 For a good discussion of the right-privilege distinction, see Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982).

146 Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

147 *See* Smolla, *supra* note 145, at 78.

148 Much of the reasoning in this and the following paragraphs is derived from Judge Norris's opinion in United States v. Restrepo, 946 F.2d 654 (9th Cir. 1991) (*en banc*) (Norris, J., dissenting).

149 482 U.S. 369 (1987).

150 *Id.* at 375, 377-78.

151 418 U.S. 539 (1974).

misbehavior."[152]

The Guidelines and sentencing statutes under consideration here work the same way, for they set forth the precise extent to which defendants *shall* lose their liberty if certain facts are found. On account of the lack of governmental discretion, defendants have constitutionally protected liberty interests in that factual finding.

Although no case has held that the Guidelines create a liberty interest protected by due process constraints, the opinion of Justice Souter in *Burns v. United States*[153] provides persuasive authority for that view. *Burns* raised the question of whether the sentencing court was required to give the defendant notice of its intention to depart upwardly from the presumptively applicable Guideline range. The majority of the Court held that Rule 32 of the Federal Rules of Criminal Procedure required such notice.[154] Justice Souter, however, found that there was no such requirement in Rule 32[155] and therefore considered whether it would violate the defendant's constitutional rights for the sentencing court to depart upwardly from the presumptively applicable Guideline range without giving the defendant prior notice. In the course of his opinion, Justice Souter, analyzing the relevant precedents regarding the creation of liberty interests, observed that because the Guidelines spoke in mandatory terms — they provided that the defendant *shall* receive a certain sentence if certain conditions were met, at least in most circumstances — and concluded that the defendant had a liberty interest subject to due process protection in receiving the presumptively applicable sentence:

> The [Guidelines] . . . provid[e] that "[t]he court *shall* impose a sentence of the kind, and within the range [set forth by the Guidelines,] *unless* the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." . . . I therefore conclude that a defendant enjoys an expectation subject to due process protection that he will receive a sentence within the presumptively applicable range in the absence of grounds defined by the [Guidelines] as justifying departure.[156]

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152 *Id.* at 557.

153 111 S. Ct. 2182 (1991).

154 *Id.* at 2187.

155 *Id.* at 2188 (Souter, J., dissenting).

156 *Id.* at 2192 (Souter, J., dissenting) (citation omitted). Justice Souter went on

Although Justice Souter's observations came in the context of upward departures, their import is broader. Given that a defendant has a liberty interest, protectible by the Due Process Clause, in a sentence "within the presumptively applicable range," it follows that the defendant has a right to have that range calculated by procedures that meet due process scrutiny.[157]

Advocates of the greater-includes-the-lesser argument might concede that a criminal defendant has a liberty interest in a sentence within the presumptively applicable range, but ask the question: even if a defendant is entitled to due process, what process is due? More particularly, does the use by the sentencing court of the preponderance of the evidence standard adequately protect the defendant's liberty interest, or is the more exacting, beyond a reasonable doubt standard required?

The answer is that the beyond a reasonable doubt standard is necessary to adequately protect the defendant's liberty interests. To demonstrate that this is so, one must balance the defendant's liberty interests against society's interests, and the dangers of erroneous factual determinations.[158] Considering first the defendant's interest

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to find that there were adequate protections of a defendant's sentence so that the lack of notice did not violate the defendant's right to due process. *Id.* at 2195-96 (Souter, J., dissenting). Justice Souter was joined in his opinion by Justices White and O'Connor. Chief Justice Rehnquist joined in part, but did not join in Justice Souter's due process analysis. The majority of the Court, although it did not reach the constitutional question addressed by Justice Souter, indicated that had it interpreted Rule 32 differently, it would probably have agreed that there was a liberty interest entitled to due process protection in the sentencing phase of the trial. *Id.* at 2187. The Court suggested that if it had interpreted Rule 32 as not requiring notice of a sentencing court's intention to depart upwardly, it would have raised the "serious question whether notice in this setting is mandated by the Due Process Clause." *Id.*

157 As noted above, no court has held that there is a due process right to a sentence within the presumptively applicable range. Two powerful dissents, however, have made the argument. *See* United States v. Restrepo, 946 F.2d 654, 669-72 (9th Cir. 1991) (Norris, J., dissenting) (*en banc*) (arguing along the lines discussed here); United States v. Lawrence, 918 F.2d 68 (8th Cir. 1990) (Bright, J., dissenting) (concluding that the Guideline "give convicted defendants a protected liberty interest to a sentence within the Guidelines range appropriate for their conduct and circumstances.").

158 Mathews v. Eldridge, 424 U.S. 319 (1976). In Medina v. California, 112 S. Ct. 2572 (1992), the Supreme Court held that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process." *Id.* at 2576. *Medina* involved the constitutionality of requiring the defendant in a state criminal proceeding to bear the burden of proving, by a preponderance of the evidence, his incompetence to stand trial. The proper question, the Court stated, was not whether such an allocation of the burden of proof satisfied the *Mathews* standard, but, following *Patterson v. New York*, whether it "'offend[ed] some principle of justice

in liberty:

> The importance of the liberty interest at stake need not be labored. As Justice Souter put it in *Burns*, "The defendant's interest in receiving a sentence not unlawfully higher than the upper limit of the guideline range is . . . clearly substantial." . . . Under the Guidelines, then, a defendant's stake in accurate factfinding at sentencing may be as great as his stake in accurate factfinding at trial.[159]

Of course, the importance of the defendant's liberty interest at stake in sentencing is a direct consequence of the wide range of sentences that the defendant might typically receive. If the range were more constrained — if more of the factual determinations relevant to sentencing were determined at trial — then the defendant would have a substantially smaller liberty interest in the sentencing proceeding, simply because the range of error could not be as great.

Society's interest in the sentencing procedure is not entirely opposed to the defendant's interest. On the one hand, society has no interest in sentencing a defendant to a longer term than deserved on the basis of incorrect information; thus society would prefer a beyond a reasonable doubt standard to pertain even at a sentencing hearing to avoid erroneous deprivations of liberty.[160] On the other hand, society also has an interest in making an efficient sentencing process[161] and, arguably, a higher standard of proof impairs the efficiency of the process. Thus, on the basis of efficiency, one might

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so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 2577 (quoting Patterson v. New York, 423 U.S. 197, 202 (1977)).

By its terms, *Medina* is limited to the analysis of state procedural rules; it has no application to analysis of federal sentencing procedures. Thus, the *Mathews* analysis in the text is still relevant to federal proceedings. Moreover, the twin premises of *Medina* were that (i) the only constitutional right arguably infringed by the challenged procedure was the defendant's right to due process, and (ii) " '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.' " *Id.* at 2576 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)). In the sentencing context, however, I have argued that the defendant's due process right *and his Sixth Amendment right to a jury trial* may be infringed by certain sentencing procedures. Thus, the premises in *Medina* that led the Court to abandon *Mathews* and adopt a less stringent constitutional test for state criminal procedures are absent here. Finally, *Medina* criticized, but did not overturn, previous decisions in which the Court had plainly used the *Mathews* test in analyzing challenged state criminal procedures. *See* Ake v. Oklahoma, 470 U.S. 68 (1985); United States v. Raddatz, 447 U.S. 667 (1980). The extent of the *Medina* holding is thus open to question.

159 *Restrepo*, 946 F.2d at 674 (citations omitted) (Norris, J., dissenting).

160 *See id.*

161 *See* United States v. Guerra, 888 F.2d 247, 251 (2d Cir. 1989) (expressing concern about turning the sentencing hearing into a "second trial"), *cert. denied*, 110 S. Ct. 1833 (1990).

argue that the preponderance of the evidence standard provides sufficient protection of the defendant's right to due process in the sentencing stage of the criminal process.

The efficiency argument against the beyond a reasonable doubt standard is ultimately unpersuasive. The dangers of error at sentencing are substantial. As noted above, many constitutional rights that defendants have at trial and that are intended to assure the accuracy of the fact-finding trial process — including the rights to confrontation and compulsory process — are not available at sentencing hearings.[162] Sentencing courts proceed on the basis of affidavits, hearsay, estimates and "anything other than 'misinformation of constitutional magnitude.' "[163] Moreover, it has been reported that most of the inaccuracies tend to work to the defendant's detriment, principally because of the disparity of resources typically available to the government and the defendant.[164] According to a federal judge:

> The probation officer ordinarily undertakes no independent investigation of the facts and interviews no witnesses. Instead, the probation officer relies almost exclusively on the government-provided information, a dependency reflecting the resource limitations of the probation office. Clearly, in practice, the prosecutors control the ultimate judicial finding of facts. . . . As one probation officer summarized, "we basically rely on what the prosecutors and investigators give us."[165]

Whether or not the probation office relies exclusively on the government's files in all cases, errors obviously benefit neither society at large nor the defendant, and the high rate of errors suggests the need for a higher standard of proof.

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162 *See supra* notes 18-21 and accompanying text.

163 Jones v. Thieret, 846 F.2d 457, 461 (7th Cir. 1988) (quoting United States v. Tucker, 404 U.S. 443, 447 (1972)). *See also* United States v. Jacobs, 955 F.2d 7, 9-10 (2d Cir. 1992) (*per curiam*) ("reliable new evidence" may be used by sentencing judge to support sentence); United States v. Pirre, 927 F.2d 694, 695-96 (2d Cir. 1991) (sentencing judge's use of chemist's findings made after conviction did not constitute error).

164 *See* Note, *An Argument for Confrontation under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880, 1886 (1992); Peter B. Pope, Note, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 YALE L.J. 1258, 1275-77 (1986).

165 Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 173 (1991) (quoting an Interview with a United States Probation Officer on October 22, 1990); *see also* United States v. Harrington, 947 F.2d 956, 966 n.9 (D.C. Cir. 1991) (Edwards, J., concurring) ("It appears there may be situations, for instance, where a Probation Officer will contact a [federal prosecutor] in advance of writing a Presentence Report and ask 'how much of a [downward] departure do you want in this case?' The Report is then written accordingly.").

Finally, there is probably not a great difference in the cost to society of adjudication under the two standards of proof. Although a preponderance of the evidence standard currently prevails at sentencing hearings, protracted and adversarial hearings are already common. Insisting upon a higher burden of proof would not, therefore, effect any exceedingly costly change in procedure; it would simply insist that the existing procedure be more accurate.

C. Justice Stevens's Solution: Aggravating and Mitigating Factors

Justice Stevens, in his dissenting opinions in *McMillan* and *Walton,* set forth a superior method of distinguishing criminal acts from sentencing facts.

In *McMillan*, Justice Stevens reasoned that the foundation underlying the beyond a reasonable doubt rule was the judgment that a person should not suffer the stigma and loss of liberty that a criminal conviction and sentence entail unless culpability is clearly demonstrated, or in other words, proven beyond a reasonable doubt.[166] According to Justice Stevens, "*In re Winship* . . . took a purposive approach to the constitutional standard of proof: when the State threatens to stigmatize or incarcerate an individual for engaging in prohibited conduct, it may do so only if it proves the elements of the prohibited transaction beyond a reasonable doubt."[167] The appropriate rule for determining what facts must be proven beyond a reasonable doubt, and what facts need not be, could be derived from the purpose of the beyond a reasonable doubt rule:

> [I]f a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a "fact necessary to constitute the crime," within the meaning of our holding in *In re Winship* [*i.e.*, must be proven beyond a reasonable doubt].[168]

Justice Stevens elaborated on this approach in his dissenting opinion in *Walton*. There, he reviewed briefly the importance that the Court had attributed to the jury's role in the criminal process. Most importantly, the Justice focused on the jury's historic role as a protector against arbitrary and oppressive action by the State, acting

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166 McMillan v. Pennsylvania, 477 U.S. 79, 97 (1986) (Stevens, J., dissenting) (quoting *In re* Winship, 397 U.S. 358, 363-64 (1970)).

167 *Id.* at 98 (footnote omitted) (Stevens, J., dissenting).

168 *Id.* at 103 (Stevens, J., dissenting).

through the judge.[169] The Justice decried how the Court, in recent decisions (including *McMillan*),[170] had eviscerated the jury's role: "By stretching the limits of sentencing determinations that are made by judges . . . these decisions have encroached upon the factfinding function that has so long been entrusted to the jury."[171] The *Walton* decision, Justice Stevens argued, "[f]urther distort[s] the sentencing function,"[172] and contributes to " 'the utter disuse of juries in questions of the most momentous concern.' "[173]

Justice Stevens's proposed test would require the government to prove to the jury beyond a reasonable doubt any fact relating to a "prohibited transaction" that "give[s] rise both to a special stigma and to a special punishment."[174] Before evaluating this proposed test, it is necessary to elaborate on it and explicate certain of its parts.

The first point that requires elaboration is the definition of a "prohibited transaction." This is important because, under any sentencing system that seeks to accomplish the various goals that the federal system does (retribution, deterrence and rehabilitation), sentencing judges must be permitted to take into account some facts other than those directly related to a defendant's criminal acts — for example, the defendant's criminal history,[175] and whether the defendant has expressed contrition for the crime.[176] Thus, we could not permit a standard that tied a sentencing judge's hands by requiring a jury to find all facts relevant to a defendant's sentence. Alternatively, "prohibited transaction" must be given a meaning independent of any statutory definitions; otherwise, Justice Stevens's standard would fall into the literalism trap of the *McMillan-Walton* doctrine. In other words, if the "prohibited transaction" was coterminous with the crime that the legislature proscribed, then the

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169 Walton v. Arizona, 110 S. Ct. 3047, 3088-89 (1990) (Stevens, J., dissenting). Much of this portion of Justice Stevens's opinion was devoted to quotations from Justice White's opinion for the Court in Duncan v. Louisiana, 391 U.S. 145 (1968). Justice Stevens's choice of quotations was sharply pointed: Justice White authored the majority opinion in *Walton*.

170 Justice Stevens also cited Spaziano v. Florida, 468 U.S. 447 (1984), which held that a death sentence may be imposed by a judge rather than a jury.

171 *Walton*, 110 S. Ct. at 3089 (Stevens, J., dissenting) (footnote omitted).

172 *Id.*

173 *Id.* at 3089 n.5 (Stevens, J., dissenting) (quoting 4 W. BLACKSTONE COMMENTARIES 343-44 (1769)).

174 McMillan v. Pennsylvania, 477 U.S. 79, 103 (1986) (Stevens, J., dissenting).

175 The Guidelines, as well as virtually every other sentencing scheme, take criminal history into account.

176 Once again, the Guidelines expressly take into consideration whether a defendant accepts responsibility for committing a crime.

legislature could easily avoid Justice Stevens's standard by defining the crime very narrowly. Thus, a defendant whom the Government suspects of engaging in numerous, large, difficult to prove narcotics transactions in a short period of time could be charged with a single, easy to prove small sale. After the defendant was convicted of that simple crime, the sentencing court could increase the defendant's sentence on the grounds of the other transactions, which would, by definition, not be part of the "prohibited transaction."

The Guidelines themselves suggest a possible definition of the concept of "prohibited transaction." As seen above, the Guidelines provide that a sentencing court must take into account a defendant's "relevant conduct," which is defined as the "same course of conduct" of the offense of conviction, or as part of a "common scheme or plan" as the offense of conviction.[177] Judge Wilkins, the Chairman of the Sentencing Commission, has written that the phrase "same course of conduct" contemplates "that there be sufficient similarity and temporal proximity to reasonably suggest that repeated instances of criminal behavior constitute a pattern of criminal conduct."[178] This would appear to be an appropriate definition of "prohibited transaction" in Justice Stevens's standard: the "prohibited transaction" to be presented to the jury must include all acts by the defendant that are part of the same course of conduct or common scheme or plan; the prosecution cannot prove a small number of the acts to the jury, and then present the remainder only to the judge.

As to the federal narcotics laws, it will be recalled that as those laws are currently interpreted, the jury need only find that a defendant distributed *an* amount of narcotics; the sentencing judge then determines the quantity.[179] Justice Stevens's standard would obviously require a change in this procedure. Any determination of quantity by the sentencing judge would, by definition, be part of the transaction for which the defendant is to be punished, and also part of the "prohibited transaction" of Justice Stevens's standard. Consequently, the jury, not the judge, would determine the amount of narcotics that the defendant was responsible for distributing.

A second part of Justice Stevens's proposed standard that requires elaboration is the nature and relevance of the "stigma" to

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177 GUIDELINES, *supra* note 22, § 1B1.3(a)(2); *see also supra* notes 22-25 (discussing Guidelines).

178 William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 515-16 (1990).

179 *See supra* notes 7-14 and accompanying text.

which it refers. Although the Court has frequently referred to the stigma associated with criminal convictions and to the moral force of the criminal law, and although the criminal law does, in many instances, implicate society's moral imperatives,[180] it is not clear what stigma Justice Stevens has in mind here. Surely there are cases in which one might argue that an incrementally greater punishment does not carry with it additional stigma. For example, does a narcotics sentence of twelve years' imprisonment carry with it a greater stigma than one of ten years? Perhaps the answer is "yes," but if it is, then it would appear that any greater sentence carries with it a greater stigma than a lighter sentence. If this is true, then the reference to "stigma" in Justice Stevens's proposed formulation is redundant with the reference to "punishment." On the other hand, if the answer is "no" — if, that is, a twelve year narcotics sentence does not carry a greater stigma than a ten year one — then it is hard to see why the notion of stigma is relevant. *Winship* held that the relevant facts against a person must be proven beyond a reasonable doubt before that person may suffer punishment. The punishment itself, and the hardship that it imposes on a person, should be sufficient to require the heightened standard of proof. Thus, it should be sufficient to take Justice Stevens's approach in any case involving "special punishment," and to dispense altogether with the requirement of "stigma."[181]

Finally, there is the question of what "special punishment" means. It cannot mean punishment that is beyond the range available without a finding about a particular fact; such an interpretation would be a reaffirmation of the greater-includes-the-lesser argument against which Justice Stevens argued in his *McMillan* dissent.[182] Rather, in light of that dissent, a "fact that gives rise to special punishment" must be any fact that has a harmful effect on the defendant's *potential* sentence. Thus, for example, where — as in *McMillan* — the establishment of a fact makes it less likely (or impossible) for a defendant to get the minimum sentence, such a fact would be a "fact that gives rise to special punishment," notwith-

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180 *See generally The Expressive Function of Punishment, in* J. FEINBERG, DOING AND DESERVING (1970).

181 The only imaginable situation in which that stigma would be relevant would be when the defendant contends that he is insane, and thus must be treated but not punished. There is, unquestionably, a stigma connected with a finding of insanity, but indeed there is no punishment. I am not entirely sure how, or whether, Justice Stevens's proposed standard would apply to such a situation. It is, however, a relatively rare occurrence, and I will not explore it here.

182 *See* McMillan v. Pennsylvania, 477 U.S. 79, 103 (1986) (Stevens, J., dissenting).

standing that the punishment ultimately received was within the range that the defendant *might* have received even had the fact not been established.[183] Obviously, facts like those at issue in *Walton*, the establishment of which gave rise to a greater punishment than would otherwise have been available, are also "facts that give rise to special punishment."

In light of these clarifications, a possible test might be formulated thus:

> *The government is required to prove to the jury beyond a reasonable doubt any fact that (A) is part of a prohibited transaction — including (i) all narcotics that may be attributed to the defendant (in a federal narcotics case), and (ii) all "relevant conduct" of the defendant (in a case governed by the Guidelines) — and that (B) has a harmful effect on the defendant's potential sentence.*

As stated, the test avoids the due process problems of the other proposed solutions for it honors the principle of *Winship* by preventing the legislature from constructing a statutory system in which a defendant's punishment is enhanced by factors not found beyond a reasonable doubt. Moreover, it avoids *Walton*'s evisceration of the Sixth Amendment, for it makes the jury the finder of fact for any parts of the criminal transaction. Finally, it allows the sentencing court latitude to fashion a sentence that takes into account the defendant's "life and characteristics," which is ideally what a sentencing judge should do.

Such an approach would substantially change current practices in federal courts. With respect to sentencing for convictions under the federal narcotics laws, it would require the jury, not the judge, to determine the amount of narcotics that the defendant distributed, for that is the determinative factor in the defendant's sentence, and it is within the scope of the jury's responsibility to find it. Similarly, because relevant conduct, rather than the offense of conviction, is the basis for a defendant's sentence under the Guidelines, all of the

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[183] This interpretation of the term "special punishment" is supported by *Lindsey v. Washington*, 301 U.S. 397 (1937), in which the Supreme Court struck down on *ex post facto* grounds the application of a law that narrowed a defendant's potential sentence so that he was eligible to receive only the maximum term of imprisonment that had been available to him at the time that he committed his crime. *See* Lindsey v. Washington, 301 U.S. 397 (1937). In *Lindsey*, the Court held that the defendant's lost opportunity for a lesser sentence was, in itself, sufficient to create an *ex post facto* violation. *Id.* at 401-02. *See also* Miller v. Florida, 482 U.S. 423, 429-36 (1987) (applying *ex post facto* analysis to application of Florida's revised sentencing guidelines); United States v. Saucedo, 950 F.2d 1508, 1515 n.12 (10th Cir. 1991) (*ex post facto* analysis applies to enhanced Guidelines); United States v. Bell, 788 F. Supp. 413, 416-22 (N.D. Iowa 1992) (same).

facts that constitute relevant conduct would have to be proven beyond a reasonable doubt. Finally, it is clear that a court could not impose additional penalties on the basis of conduct that a jury has expressly found *not* to be proven beyond a reasonable doubt.

D. Five Potential Objections to the Proposed Standard

One objection to the approach set forth in this Article is that it would unduly constrain sentencing judges. As seen above, sentencing has historically been left to judges rather than juries because sentencing involves a multifaceted calculation, and requires a careful balancing of ends — retribution, general deterrence and rehabilitation — that is beyond the scope of the jury's function.[184] By requiring the jury to decide any facts that occurred during the criminal transaction that may adversely affect the defendant's sentence, this argument runs, the sentencing judge's hands will be tied, and she will be unable to carry out her delicate task.

The answer to this objection is that the proposed standard takes away from the sentencing court only certain factual findings; it does not, however, limit the way in which the sentencing judge weighs and balances the various factors and concerns in determining a sentence. The distinction drawn between findings of fact and sentencing decisions is a reasonable one: finding facts is precisely the job of the jury, and determining the correct sentence, *given the facts found by the jury*, is the proper province of the judge. It remains for the sentencing judge to determine what sentence would best serve the law's penalogical objectives.

A second potential objection is rooted in the notion that historical practice has probative value in the analysis of constitutional issues.[185] A constitutional standard, such as the one proffered in this Article, that does not have historical precedent indeed bears a greater burden than one that does. History, however, cannot *control* constitutional analysis.[186] The Supreme Court has repeatedly held that due process requires states to institute procedures that were not historically required;[187] there-

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184 *See supra* notes 78-79 and accompanying text.

185 *See, e.g.*, Medina v. California, 112 S. Ct. 2572, 2577 (1992).

186 *See generally* J.H. ELY, DEMOCRACY AND DISTRUST 60-63 (1980).

187 *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68 (1985) (right to psychiatric examination in certain circumstances); Chambers v. Mississippi, 410 U.S. 284 (1973) (right to production of certain evidence); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (right to hearing and counsel before probation is revoked); Sheppard v. Maxwell, 384 U.S. 333 (1966) (right to protection from prejudicial publicity); Brady v. Maryland,

fore, history's hold is necessarily limited. Moreover, the history of criminal sentencing is not as monolithic as might be thought; because there are various traditions within the field of criminal sentencing, there must be some care given in determining which tradition is most relevant to any particular case. For example, judicial discretion was substantially circumscribed in capital cases at the time the Bill of Rights was adopted;[188] therefore, in any particular case one might ask which tradition is more relevant, the general sentencing tradition, in which the sentencing judge's discretion is vast, or the tradition in capital cases, with its more limited discretion?[189] Similarly, some crimes are relatively new, originating from statutes rather than the common law. To take an important example, there were no federal criminal narcotics laws until the Harrison Act of 1914. Arguably, any tradition associated with federal narcotics sentencing, being of such recent vintage, would have less force than a tradition of longer standing. Thus, the proffered constitutional standard might face a different historical burden as applied to federal narcotics crimes than as applied to other crimes. Once again, the question is which tradition is more relevant: the relatively stronger general tradition of sentencing, or the relatively weaker tradition of sentencing in federal narcotics cases? Finally, the hold of history in federal sentencing procedure is especially weak because the Guidelines have made wholesale changes in how defendants are sentenced. Given those changes, it would be reasonable to suppose that the claims of tradition, whatever they may be in any particular case, are weaker under the Guidelines than they might be in other contexts.

A third potential objection to the proposed standard is that it does not go far enough. As noted above, a sentencing judge may impose an especially harsh sentence on a defendant due to "background facts" regarding the defendant.[190] One might argue that the jury should be required to find all facts about a defendant that may have a harmful effect on the defendant's potential sentence.

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373 U.S. 83 (1963) (due process right to discovery of exculpatory evidence); Griffin v. Illinois, 351 U.S. 12 (1956) (due process right to a trial transcript on appeal).

188 *See* Welsh S. White, *Fact-finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1 (1989).

189 *Cf.* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 944 (1978) ("[I]t makes all the difference in the world what level of generality one employs to test the pedigree of an asserted liberty claim.").

190 *See, e.g., supra* text accompanying notes 92-95.

The first problem with this objection is that it is plainly impractical. If sentencing is to be at all flexible and attentive to the particular features of each defendant, then it is probably impossible to determine all of the factors that contribute to the sentence in every case. Requiring a jury to find every fact relevant to a defendant's sentence would convert every jury from being finders of fact about a particular crime to a miniature probation department, and would unacceptably prolong every trial. Second, asking the jury to expand its focus beyond the alleged criminal transaction would risk severe prejudice. Unattractive background information might turn a jury against a defendant even if there is insufficient evidence of the crime charged. By requiring the jury to focus exclusively on the alleged criminal transaction, the jury is prevented from receiving information that may prejudice it for or against the defendant.

A fourth objection is that the proposed standard is too narrow because it requires proof beyond a reasonable doubt only for *aggravating* factors, that is, factors that increase a defendant's sentence. Instead, according to this objection, the jury should be required to find all facts that are part of the criminal transaction that have any potential impact, beneficial or harmful, to the defendant's sentence. The basis for this objection is that just as aggravating facts — like the depravity with which a murder was committed[191] — are judgments properly made by the community's foremost moral voice, mitigating factors should be as well. For example, a statute might provide a lesser penalty if it is found that the criminal act was done for humanitarian reasons (say, a mercy killing) than if it was performed for particularly heinous reasons (say, a murder for hire). The jury should characterize the reasons for the act, this objection runs, whether those reasons are potentially aggravating or mitigating, for in either case it is important for the jury's moral voice to be heard.

This objection calls for, of course, an extention of the proposed standard rather than a limitation of it. The proposed extention may be warranted but, before adopting it, it is important to recognize that aggravating and mitigating factors need not be treated identically for all purposes, and probably should not be. As argued above, *Winship* and its progeny demand that any alleged aggravating facts occurring during the prohibited transaction must be proven *by the Government beyond a reasonable doubt*; there is no such constitutional restriction on alleged mitigating

191 *See* Walton v. Arizona, 110 S. Ct. 3047, 3052 (1990).

factors. Indeed, a legislature could constitutionally require the defendant to bear the burden of proving the existence of mitigating factors,[192] and impose on the defendant any burden of proof it chose. One argument against the amendment to the proposed standard, however, is that it might create confusion; a jury would be required to find certain facts beyond a reasonable doubt with the burden on the Government, and at the same time find other facts by a lesser standard with the burden on the defendant. The danger of confusion is real, difficult to measure, and a possible argument against leaving mitigating factors for the jury.[193] I leave the possible extension of the proposed standard for future consideration and debate.

The final objection that I shall consider here is that legislatures could easily override the proposed standard's protections for criminal defendants. Once again, the objection focuses on the distinction between aggravating and mitigating factors. Because the proposed standard requires proof beyond a reasonable doubt only for aggravating factors, a legislature could avoid the standard by defining an offense broadly with a harsh sentence, and then placing the burden of proof on the defendant to demonstrate specified mitigating factors.[194] To take a hypothetical example, the proposed standard would prohibit a law providing that bank robbers would be sentenced to five years' imprisonment unless the court found by a preponderance of the evidence that the robber used a gun, in which case his sentence would be ten years' imprisonment. The standard would not,

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[192] It is, indeed, the general rule that whichever party would receive a benefit by the establishment of a particular fact in a sentencing proceeding bears the burden of proof of that fact. *See, e.g.*, United States v. Anders, 956 F.2d 907, 911 (9th Cir. 1992) ("defendant bears the burden of proving the appropriateness of a downward departure") (citation omitted); United States v. Rutana, 932 F.2d 1155, 1159 (6th Cir. 1991) (citations omitted) ("the burden of persuading the sentencing court that a downward departure is warranted rests with the defendant"), *cert. denied*, 112 S. Ct. 300 (1991); United States v. McDowell, 888 F.2d 285, 291 (3d Cir. 1989) (burden of proof falls on party seeking to adjust the offense level); United States v. Urrego-Linares, 879 F.2d 1234, 1238-39 (4th Cir.) ("defendant has the burden of establishing . . . the applicability of the mitigating factor in question"), *cert. denied*, 493 U.S. 943 (1989).

[193] The danger of confusion might be diminished by the use of special verdict forms. *Cf.* Griffin v. United States, 112 S. Ct. 466, 475 (1991) (Blackmun, J., concurring) (commending the use of special interrogatories for the jury in "complex conspiracy prosecutions").

[194] McMillan v. Pennsylvania, 477 U.S. 79, 100 (1986) (Stevens, J., dissenting) ("States may reach the same destination either by criminalizing conduct and allowing an affirmative defense, or by prohibiting lesser conduct and enhancing the penalty. . . .").

however, prohibit a law that imposed a sentence of ten years imprisonment on all bank robbers unless they could demonstrate to the sentencing judge that they had not used a gun in connection with the robbery, in which case they would receive only five years' imprisonment. The danger envisioned by this objection is that *if* the proposed standard were in fact adopted, and *if*, in response, Congress or a state legislature changed the criminal laws in the way just described, *then* criminal defendants would be in the anomalous position of being worse off as a direct result of the strengthening of their constitutional rights.[195]

The response to this objection is that it is too speculative. One cannot determine the wisdom or constitutionality of a proposed rule by speculating about what a legislature *might* do.[196] For example, law-abiding citizens may be so outraged by a defendant's constitutional right against self-incrimination that they sanction harsher criminal penalties than they otherwise would have; such speculation, though, hardly justifies reinterpretation and evisceration of the Fifth Amendment. Moreover, even if, in response to the judicial adoption of the Stevens proposal, a legislature did pass a mitigating factor statute that, with other things being equal, put a criminal defendant in a worse place than that defendant would have been had the *McMillan-Walton* doctrine been in force, that would still not be an argument against the proposed standard. A criminal defendant does not have a right to the criminal justice system of her choosing. Finally, even if the objection were more troubling, it could be avoided by amending the proposed standard in the manner described in connection with the objection considered immediately above—*i.e.*, the present objection could be met if the proposed standard were extended such that the jury was required to find all facts part of the criminal transaction and that have a potential impact, beneficial or harmful, on the defendant's sentence.

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[195] In other words, any rational criminal defendant would say to himself: "I would rather be a part of (i) a legal regime pursuant to which I am guaranteed a minimum punishment if I am found guilty of a crime, which punishment can be enhanced if the State proves, even by a very low standard of proof, certain additional factors [*i.e.*, the current *McMillan-Walton* doctrine], than (ii) a legal regime that guarantees me a maximum punishment if I am found guilty of a crime, which punishment will be reduced only if I satisfy the burden of proof with respect to certain mitigating factors [*i.e.*, the legal regime that would obtain if the proposed standard were adopted and legislatures responded by passing mitigating factor statutes]."

[196] *McMillan*, 477 U.S. at 100-02 (Stevens, J., dissenting).

V. CONCLUSION

If we have not yet reached the point at which sentences are determined before trials are held, we have arrived at a point in which a criminal defendant's fate could depend to a far greater degree on allegations made and facts established in the sentencing phase than on the charges contained in the indictment and the facts established at trial. The importance of the sentencing phase of the trial has been made possible by the Supreme Court's *McMillan-Walton* doctrine, an abandonment of the rights to due process and a criminal jury trial. The proposal set forth in this Article would place firm and sensible limits on criminal sentencing.

One question not considered here is why issues have been transferred to the sentencing phase of trials from the guilt-determination phase: What sociological or political factors have led courts and legislators to permit and encourage the rise of sentencing facts and the fall of criminal acts? At least two factors may be at work.

First, people's anger at what they perceive to be growing rates of criminality has likely led them to favor approaches that are "tough on crime," such as the *McMillan-Walton* doctrine, and laws that make it easier to convict and punish defendants. While such anger is understandable, it is precisely the purpose of a criminal defendant's constitutional rights to protect the defendant against the anger that people naturally feel and to assure the defendant a fair trial and correct punishment.

Second, the empowerment of judges that is implied by the increased importance of sentencing facts is consistent with a phenomenon increasingly prevalent in the law: the shifting of power from citizens to "experts," and, more generally, from those who are relatively accountable to those who are not. As more decisions are undertaken by administrative bodies rather than by state legislatures or Congress,[197] more decisions may be made by judges rather than by juries. To the extent that the jury's role is diminished, one of the fundamental values underlying the right

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[197] One prominent example is the Guidelines themselves, which were created when a relatively accountable body, Congress, turned lawmaking authority over to an unaccountable body, the Sentencing Commission. Of course, the Guidelines have been upheld by the Supreme Court in Mistretta v. United States, 488 U.S. 361 (1989), against the charge that they were passed pursuant to an unlawful delegation of authority.

to a jury — the involvement of the citizenry in governmental affairs — is diminished as well.

Like any other doctrine that is the product of judicial decisions, though, the *McMillan-Walton* doctrine need not be the final word on the relation between criminal acts and sentencing facts. Congress or any state legislature can change what the judiciary hath wrought. Congress could draw a firmer line between criminal acts and sentencing facts; it could accomplish by statute what Justice Stevens and this Article have argued is required as a matter of constitutional principle.[198] It would be particularly fitting for Congress to correct the current situation by passing a statute that would regulate federal criminal procedure and statutes in the manner suggested here. By rectifying the situation itself, Congress would at once open the door for citizens, through their participation in juries, to exercise power in self-government — and provide an example of the exercise of such power.

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[198] On Congress's special obligation to avoid laws that may pass judicial scrutiny but strain constitutional values and approach the outer boundaries of what is constitutionally permissible, see Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975).