

Unbranding Confrontation as Only a Trial Right

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This Article challenges the oft-cited but unpersuasive rule that the Sixth Amendment Confrontation Clause only applies at the trial stage of a “criminal prosecution.” I examine the most likely interpretation of the term “criminal prosecution” at the time of the Founding and conclude that the term would have included felony sentencing. I explore the Counsel Clause’s early rejection of the “trial-right-only” rule and the recent erosion of the “trial-right-only” rule with regard to the Jury Trial Clause in Alleyne v. United States. I advocate for eliminating the trial-right-only theory of the Confrontation Clause to allow cross-examination of testimonial statements that are material to punishment and where cross-examination assists in assessing truth and veracity. In such cases, I advocate a practical application of the fundamental right to confront witnesses during felony sentencing. Ultimately, I propose a uniform application of the Sixth Amendment’s structurally identical Counsel, Jury Trial, and Confrontation Clauses at felony sentencing.

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INTRODUCTION

This is the second work in which I advocate for the extension of confrontation rights at felony sentencing hearings. In the first work, *Making the Right Call for Confrontation at Felony Sentencing*,¹ I examined and challenged whether judicial authority existed in pre-Founding felony cases to consider un-cross-examined testimony for purposes of fixing punishment. This Article examines and challenges another popular argument against confrontation at felony sentencing: that confrontation only applies at the trial stage of the “criminal prosecution.” The majority of the federal circuit courts that have examined the question of confrontation rights at felony sentencing have ruled that the Confrontation Clause is a right that only applies at trial.² I reexamine this

1. Shaakirrah R. Sanders, *Making the Right Call for Confrontation at Felony Sentencing*, 47 U. MICH. J.L. REFORM 791 (2014).

2. See, e.g., *United States v. Francis*, 39 F.3d 803, 810 (7th Cir. 1994) (holding that a criminal sentencing hearing is not within the meaning of the Sixth Amendment); *United States v. Petty*, 982 F.2d 1365, 1367–70 (9th Cir. 1993) (agreeing that confrontation rights do not apply at sentencing), *amended by* 992 F.2d 1015 (9th Cir. 1993); *United States v. Silverman*, 976 F.2d 1502, 1511 (6th Cir. 1992) (en banc) (finding that confrontation is among those rights that are applicable at trial, but not sentencing); *United States v. Tardiff*, 969 F.2d 1283, 1287 (1st Cir. 1992) (“[A] defendant’s Sixth Amendment right to confront the witnesses . . . does not attach during the sentencing phase.”); *United States v. Johnson*, 935 F.2d 47, 50–52 (4th Cir. 1991) (holding that cross-examination at sentencing is not required of probation officers regarding the substance of information included in the presentence report); *United States v. Marshall*, 910 F.2d 1241, 1244 (5th Cir. 1990) (holding that hearsay is admissible for sentencing purposes); *United States v. Beaulieu*, 893 F.2d 1177, 1180–81 (10th Cir. 1990) (distinguishing between rights at trial and rights at sentencing and concluding that confrontation rights do not apply at sentencing); *United States v. Sunrhodes*, 831 F.2d 1537, 1541 (10th Cir. 1987) (“Because restitution hearings are part of the sentencing process, [only] the Due Process Clause applies.” (citation omitted)); *United States v. Fatico*, 579 F.2d 707, 711–12 (2d Cir. 1978) (“[M]ost of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.”) (quoting *Williams v. New York*, 337 U.S. 241, 250 (1949))). *But see* *United States v. Fortier*, 911 F.2d 100, 103–04 (8th Cir. 1990) (holding that while there is a right to cross-examine witnesses at criminal sentencing, the hearsay standard of reliability governs confrontation challenges), *overruled by* *United States v. Wise*, 976 F.2d 393, 400 (8th Cir. 1992) (en banc) (“[P]rotections of the

approach and contribute to the scholarship surrounding the fundamental right of confrontation, arguing that this right should in fact extend through felony sentencing.³

Although recent Confrontation Clause jurisprudence mandates cross-examination of testimonial statements at trial,⁴ those new rules do not apply for purposes of felony sentencing.⁵ However, the adversarial process does not end once a plea or verdict of guilt is rendered; it extends through felony sentencing. Testing the veracity of testimonial statements that are material to punishment is as compelling at felony sentencing as at trial, because felony sentencing courts have discretion to increase punishment based on un-cross-examined testimonial statements about several categories of unproven criminal conduct.⁶ Thus, such findings of fact are as qualitatively vital as those made during trial.⁷ Due to the current system of plea bargaining,⁸ the vast majority of felony defendants do not have the opportunity to test the veracity of testimonial statements made against them before the sentencing hearing. As such, the fundamental right to cross-examine a witness is unavailable at the most critical stage of the criminal prosecution: the sentencing hearing.⁹

right of confrontation apply at the guilt phase, but it does not follow that the same protections apply at sentencing simply because facts proved at sentencing may increase a defendant's sentence.”).

3. Readers may be surprised to discover the impressive amount of student scholarship related to the subjects of this work. See, e.g., Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187; Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933 (1995); Amanda Harris, Note, *Surpassing Sentencing: The Controversial Next Step in Confrontation Clause Jurisprudence*, 64 FLA. L. REV. 1447 (2012); David A. Hoffman, Note, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 DUKE L.J. 382 (1992); Nigel Hugh Holder, Comment, *Confrontation at Sentencing: The Logical Connection Between Crawford and Blakely*, 49 HOW. L.J. 179 (2005); Christine Holst, Note, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, 2010 U. ILL. L. REV. 1599; Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968).

4. *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004).

5. See *Sunrhodes*, 831 F.2d at 1543 (citing *Mancusi v. Stubbs*, 408 U.S. 204, 211 (1972)) (“The right to confrontation is basically a trial right.”); see also *Barber v. Page*, 390 U.S. 719, 725 (1968).

6. *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959) (affirming *Williams*, 337 U.S. at 241, and holding that sentencing judge is not restricted to evidence presented at trial for purposes fixing punishment). See generally Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 281–83 (2009). But see *Specht v. Patterson*, 386 U.S. 605, 607–11 (1967) (holding that Colorado may not convict under one statute that authorizes a maximum sentence of ten years, but sentence for an indeterminate term under another statute).

7. Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 2 CAP. U. L. REV. 1, 7–8 (1993) (describing steps of guidelines sentencing).

8. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citation omitted) (noting that ninety-seven percent of federal convictions and ninety-four percent of state convictions result from a plea of guilty).

9. See Becker, *supra* note 7, at 14–16; see also Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 391 (2006).

The Confrontation Clause is not the only fundamental Sixth Amendment right to be branded a right that only applies at trial. In the past, neither the Counsel nor the Jury Trial Clauses automatically applied at felony sentencing.¹⁰ *Gideon v. Wainwright* eventually applied the Counsel Clause to all critical stages of the criminal prosecution,¹¹ which was ultimately deemed to include sentencing in *Mempa v. Rhay*.¹² *McMillan v. Pennsylvania* initially established that the Jury Trial Clause only applied to “elements” of the offense, not to “enhancements” to the punishment.¹³ The distinction proved significant considering that elements must be established beyond a reasonable doubt at trial and enhancements could be established by a preponderance of the evidence at sentencing.¹⁴ *Apprendi v. New Jersey* radically changed the trial “element” versus sentencing “enhancement” distinction and applied the Jury Trial Clause to any fact that increased the statutory *maximum* punishment.¹⁵ During the 2013 term, the Court quietly but dramatically expanded the scope of *Apprendi* to include mandatory *minimum* sentences in *Alleyne v. United States*.¹⁶

I advocate for reexamination of the theory that the Confrontation Clause is a right that only applies at trial. The Counsel, Confrontation, and Jury Trial Clauses are structurally identical and appear to apply in a broad sense “[i]n all criminal prosecutions.”¹⁷ Each has been deemed essential to our system of criminal prosecutions¹⁸ but until recently it was generally well accepted that the Confrontation Clause only “reflect[ed] a preference for face-to-face confrontation at trial.”¹⁹ Previously, there was

10. See Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 520–21 (2009) (discussing the Court’s interpretation of “criminal prosecution,” the meaning of which depends on the procedural right at issue, and advocating for a broad definition based on the term “criminal offense”); see also *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963) (holding that the Fourteenth Amendment Due Process Clause makes the Sixth Amendment right to counsel obligatory on the states); *Pointer v. Texas*, 380 U.S. 400, 403–08 (1965) (incorporating the Confrontation Clause); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (incorporating the Jury Trial Clause). These cases were decided within six years of each other.

11. 372 U.S. at 343–45 (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

12. 389 U.S. 128, 136–37 (1967).

13. 477 U.S. 79, 83–91 (1986).

14. *Id.* at 91.

15. 530 U.S. 466, 476 (2000).

16. 133 S. Ct. 2151, 2155 (2013).

17. See U.S. CONST. amend. VI.

18. *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963) (deeming the right to counsel fundamental); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (noting that the appearance of confrontation rights in the Sixth Amendment’s text reflects the Framers’ belief that “confrontation was a fundamental right essential to a fair trial in a criminal prosecution”); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (“[W]e believe that trial by jury in criminal cases is fundamental to the American scheme of justice.”).

19. See *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (emphasis added), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004); see also *Maryland v. Craig*, 497 U.S. 836, 846–48 (1990) (reasoning

a close link between the Confrontation Clause and due process-based hearsay rules.²⁰ The understanding of lower courts that examined the applicability of the Confrontation Clause at felony sentencing was that confrontation and hearsay both originated from due process and were designed to protect similar values—trustworthiness and reliability.²¹ But the Court’s re-examination of the historical origin and text of the Confrontation Clause in *Crawford v. Washington* established that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”²²

This Article proposes uniform application of the Sixth Amendment’s Counsel, Jury Trial, and Confrontation Clauses at felony sentencing. I argue the Confrontation Clause should apply at what is now the most critical post-verdict stage of felony criminal prosecutions where testimonial statements are at issue: the sentencing hearing. Part I discusses the Sixth Amendment’s text and structure, and the pre-Founding model of determinate sentencing. It also explains the origin of the trial-right-only rule and discusses the Counsel Clause’s early rejection of the theory. Part II discusses the decline of indeterminate sentencing as the dominant model for fixing punishment in the United States. It also discusses the decades-long erosion of the trial-right-only theory of the Jury Trial Clause, as demonstrated in 2013 in *Alleyne*. Part III explains why Counsel and Jury Trial Clause jurisprudence, as well as the Court’s recent interpretations of the Confrontation Clause, control the issue of whether cross-examination should be allowed at felony sentencing. Ultimately, I argue that where testimonial statements are material to punishment and where cross-examination will assist the fact finder in assessing truth, confrontation should be branded as a right that applies through sentencing.

that the primary purpose of confrontation is to ensure reliability, but that face-to-face confrontation is only a preference).

20. See *United States v. Kikumura*, 918 F.2d 1084, 1102–03 (3d Cir. 1990), *overruled by* *United States v. Grier*, 449 F.3d 558 (2006) (arguing that confrontation violations occur only when a court relies on misinformation of a constitutional magnitude because hearsay is normally considered at sentencing as long as the due process standard is met); see also Chhablani, *supra* note 10, at 498–99 (discussing the Burger Court and its reading of confrontation rights to require a showing of unreliability as a definitional element).

21. See *Roberts*, 448 U.S. at 66 (“[It is a] truism that hearsay rules and the Confrontation Clause are generally designed to protect similar values, and stem from the same roots.” (citations omitted) (internal quotation marks omitted)); G. Michael Fenner, *Today’s Confrontation Clause (After Crawford and Melendez-Diaz)*, 43 CREIGHTON L. REV. 35, 37 (2009) (noting that until *Crawford*, confrontation jurisprudence “more or less tracked the hearsay rule”); see also *supra* note 2.

22. *Crawford*, 541 U.S. at 68–69. “Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation . . . [which] reflects a judgment . . . about how reliability can be best determined.” *Id.* at 61.

I. ORIGIN AND EARLY REJECTION OF THE COUNSEL CLAUSE AS ONLY A TRIAL RIGHT

The rule that confrontation does not apply at felony sentencing relies on a reading of the Sixth Amendment that is not apparent from the text itself.²³ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.²⁴

The introductory clause, “[i]n all criminal prosecutions,” prefaces all of the included procedural rights and protections,²⁵ of which there are as many as seven. This Article focuses on three: the Counsel, Jury Trial, and Confrontation Clauses.²⁶

The Sixth Amendment is silent with regard to whether sentencing is part of the “criminal prosecution,” a term that the Amendment leaves undefined. Moreover, Founding era documents do not provide guidance on the meaning or scope of the term.²⁷ This is not surprising, because at the time of ratification, felony sentencing was determinate.²⁸ Essentially, sentencing proceedings were “virtually indistinguishable from the process of conviction.”²⁹ Felony crimes were submitted to a jury and punishment

23. Benjamin C. McMurray, *Challenging Untested Facts at Sentencing: The Applicability of Crawford at Sentencing After Booker*, 37 MCGEORGE L. REV. 589, 605–07 (2006) (discussing lower court’s “fail[ure] to seriously engage the text of the Sixth Amendment” in ruling that confrontation did not apply at felony sentencing).

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

25. McMurray, *supra* note 23, at 615.

26. Chhablani, *supra* note 10, at 492 (explaining seven procedural protections under the Sixth Amendment).

27. See McMurray, *supra* note 23, at 616, 616 n.191; Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB. POL’Y 45, 46 (2011).

28. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2011 (2005) (cautioning against the conclusion that history suggests that “the Sixth Amendment contemplates no sentencing rights” simply “because it contemplates no separate sentencing proceeding”).

29. See Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 51 (2011) (noting that colonial judges did not conduct a formal sentencing proceeding following conviction, and that most crimes instead carried a particular penalty and the conviction determined the punishment); see also Bibas, *supra* note 27, at 46 (“Eighteenth-century trials contained no sentencing phase.”); Douglass, *supra* note 28, at 1972 (noting that unitary guilt and sentencing phases for capital trials were the norm at the time of the Founding); Penny J. White, “He Said,” “She Said,” and *Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 396 (2007) (“When the Sixth Amendment was adopted . . . the sentencing decision was ‘collaps[ed] . . . into the proceeding for determining guilt.’”). See generally Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 302–03 (1992).

was linked to the crime.³⁰ This model of “unitary prosecution”³¹ required felony “sentencing evidence” to be presented to a jury and confronted by defense counsel during the trial.³² The trial was the sentencing in purpose and effect.³³

An “original objective meaning” interpretation³⁴ of the Sixth Amendment supports the argument that pre-Founding “criminal prosecutions” included sentencing.³⁵ An early nineteenth century dictionary defined the term “prosecution” as the “institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and

30. See *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000); see also 4 WILLIAM BLACKSTONE, COMMENTARIES *376 (requiring that after verdict, “the court must pronounce that judgment, which the law hath annexed to the crime”); *Bibas*, *supra* note 27, at 46, 48 (noting that after a conviction the punishment was immediately imposed); *Douglass*, *supra* note 28, at 1977 (describing English and early American criminal law as dominated by mandatory penalties, not by sentencing discretion); *McMurray*, *supra* note 23, at 592 (describing sentences in the determinate era as corporal punishment or specific fine and noting that from the face of the charging instrument, defendants could predict a sentence with precision); *White*, *supra* note 29, at 397 (characterizing substantive criminal law as sanction-specific or prescribing a specific sentence for an offense).

31. *Douglass*, *supra* note 28, at 2008; *White*, *supra* note 29, at 397 (noting that in 1789, two years before ratification of the Sixth Amendment, “criminal prosecution[s]’ began with the return of an indictment that contained sufficient facts to notify the defendant of the charge. The jury in the case then heard the evidence and determined both the guilt and the punishment of the defendant.”).

32. The rules appeared to be different for misdemeanors. See *Apprendi*, 530 U.S. at 480 n.7 (noting that colonial sentencing judges frequently imposed fines in misdemeanor cases); see also *Douglass*, *supra* note 28, at 2016 (noting that in the late eighteenth century, English and colonial American judges exercised discretion in punishing misdemeanants).

33. See *Douglass*, *supra* note 28, at 1972 (“Bifurcation—separating the guilt determination from the choice of an appropriate penalty—was a procedure that evolved after the [F]ounding, initially for noncapital sentencing.”); see also *Hessick & Hessick*, *supra* note 29, at 51 (describing pre-Founding sentencing as part of the trial).

34. “Original objective meaning” or “original public meaning” refers to “the reasonable meaning of the text of the Constitution at the time of the framing.” Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions As a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 462. According to Maggs, some Justices, particularly Antonin Scalia, consider this meaning to be the most significant. *Id.* As used in this work, “original objective meaning” should be distinguished from “original intent” and “original understanding.” Original intent is the meaning the Constitution’s Framers intended, i.e., the meaning and intention of the convention that framed and proposed the Constitution for adoption and ratification in the states. *Id.* at 461. Original understanding refers to what those persons who participated in state ratifying conventions thought the Constitution meant. *Id.*

35. See *Douglass*, *supra* note 28, at 2008 (arguing that the answer to the question whether sentencing is part of the “criminal prosecution” is self-evident because “why bother with the process of criminal prosecution if not for the sentence?”); see also *White*, *supra* note 29, at 393 (asserting that the argument that the right to confront applies at a capital sentencing hearing is supported by a simple reading of the relevant constitutional text). At least one jurist agreed with *Douglass* and *White*. *United States v. Wise*, 976 F.2d 393, 407 (8th Cir. 1992) (en banc) (Arnold, C.J., concurring in part and dissenting in part) (“Surely no one would contend that sentencing is not a part, and a vital one, of a ‘criminal prosecution.’”).

pursuing them to *final judgment*.”³⁶ Eminent pre-Founding scholar William Blackstone³⁷ described twelve stages of the prosecution, ranging from the arrest to execution.³⁸ Blackstone did not specifically list or separately label sentencing hearings.³⁹ But his ninth stage, which was labeled “Judgment, and its consequences,” corresponds to our modern understanding of criminal sentencing.⁴⁰ In fact, at sentencing modern courts do precisely what Blackstone described at the “judgment” stage.⁴¹ Contemporary scholarship agrees with Blackstone’s description of the sentencing process as one stage of a criminal prosecution.⁴² Francis Heller, a mid-twentieth century historian, explained that the “criminal prosecution” started at arraignment and ended after the sentence was announced, unless the defendant was found not guilty.⁴³

Unfortunately, no post-ratification Sixth Amendment jurisprudence provides insight into the question of whether pre-Founding “criminal prosecutions” included sentencing. Supreme Court decisions regarding the scope of Sixth Amendment rights at felony sentencing hearings do not appear until the early twentieth century, when in *Johnson v. Zerbst*⁴⁴ the Court turned its attention to the Counsel Clause. Johnson was

36. See 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 45 (1828) (emphasis added); see also *Crawford v. Washington*, 541 U.S. 36, 51 (2004); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1552 (2d ed. 1987). These definitions clarify that the term “criminal prosecution” is properly recognized to include all aspects of the criminal proceedings, from charging to punishment or acquittal.

37. The standard way of determining original objective meaning of the words and phrases of the Constitution is to examine founding period writings. See Maggs, *supra* note 34, at 462; see also McMurray, *supra* note 23, at 616–17, 616–18 nn.190–99. “Scholars concerned with an original understanding of the term ‘prosecution’ are likely to ask how the term was understood by . . . the scholarly legal literature of the time—such as William Blackstone’s *Commentaries on the Laws of England*, which was widely read and relied on by the founders.” *Id.* at 616.

38. The twelve stages of the prosecution described by Blackstone include arrest; commitment and bail; prosecution; process upon indictment; arraignment and its incidents; plea, and issue; trial and conviction; benefit of clergy; judgment, and its consequences; reversal of judgment; reprieve and pardon; and execution. See BLACKSTONE, *supra* note 30, at *v–vi, *289–406. McMurray notes that the “prosecution” stage only refers to charging. McMurray, *supra* note 23, at 617.

39. See McMurray, *supra* note 23, at 617–18.

40. See *id.* (noting that stage nine “falls chronologically right where sentencing falls under modern criminal procedure: between trial and appeal”).

41. See *id.*; see also BLACKSTONE, *supra* note 30, at *375–89.

42. See Douglass, *supra* note 28, at 2008 (“[Pre-Founding,] a unitary trial and single jury verdict determined not only guilt or innocence, but life or death as well. With that system as their point of reference, they crafted a single set of adversarial rights to govern all of the proceedings that might lead to the penalty of death.”); see also McMurray, *supra* note 23, at 618.

43. See FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 54 (1951); see also White, *supra* note 29, at 395 (“Sixth Amendment rights do not begin and end with the in-court proceeding commonly known as a trial.”); McMurray, *supra* note 23, at 616 (arguing that the entire process of securing the criminal judgment is the prosecution and noting that the government will typically not dismiss other counts until after sentencing, which supports the argument that the prosecution is not yet over until the defendant has been sentenced).

44. 304 U.S. 458 (1938).

charged, tried, convicted, and sentenced in federal district court without the benefit of counsel.⁴⁵ The Court ruled Johnson's conviction and sentence could not stand under the Sixth Amendment because he was not represented by, and had not competently and intelligently waived, counsel.⁴⁶ By the late 1950s, the Court squarely rejected the trial-right-only theory of the Counsel Clause in *Moore v. Michigan*.⁴⁷ In *Moore*, the Court held that counsel's representation was not confined only to the trial.⁴⁸ Less than a decade after *Moore*, the Court held in *Gideon v. Wainwright* that the Counsel Clause applied in state courts.⁴⁹ Shortly thereafter, the Court in *Mempa v. Rhay* applied the Counsel Clause to an array of post-conviction proceedings, including sentencing, appeals, and probation hearings.⁵⁰

Mempa remains the preeminent post-ratification case discussing the application of the Counsel Clause at felony sentencing proceedings in state and federal courts.⁵¹ *Mempa* involved unrelated convictions of two defendants who pleaded guilty in Washington state court on the advice of counsel.⁵² Both defendants were sentenced to terms of imprisonment and released on probation under Washington's deferred sentencing statutes.⁵³ The prosecutor moved to have the probations revoked because other crimes were allegedly committed post-release.⁵⁴ Neither defendant was provided counsel at their probation revocation hearings, and both

45. *Id.* at 460.

46. *Id.* at 468. Much of the Court's reasoning focused on the importance and role of counsel in felony cases. *Id.* at 462-67. The Court referred to the Counsel Clause as "one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty." *Id.* at 462. Moreover, the right to be heard would mean little if counsel were unavailable, as defendants are often in need of the "guiding hand of counsel at every step in the proceedings against him." *Id.* at 463. The purpose of counsel is to protect defendants from conviction and sentences resulting from their own ignorance of legal and constitutional rights. *Id.* at 465. Ten years later, the Court affirmed *Johnson* in *Townsend v. Burke*, but declined to hold that counsel was required in all cases. 334 U.S. 736, 739 (1948). Instead, the Court reasoned that the conviction and sentence were predicated on misinformation or a misreading of court records that could have been prevented had defendant been provided with counsel. *Id.* at 741.

47. 355 U.S. 155 (1957).

48. *Id.* at 160. Moore, a seventeen-year-old African-American youth, was charged with murdering an elderly Caucasian woman and was sentenced to solitary confinement and hard labor for life after confessing to the murder. *Id.* at 156. Moore challenged his conviction and sentence based on Michigan's failure to provide counsel during Moore's plea and sentencing hearings. *Id.* The Court noted that the trial judge's inquiry into the voluntariness of the plea fulfilled the state's constitutional duty. *Id.* at 158. The Court held, however, that Moore's case fell within the class of cases in which the intervention of counsel was an essential element of a fair hearing. *Id.* at 159. The Court emphasized that the assistance of counsel was of such critical importance as to be an element of Due Process under the Fourteenth Amendment and that Moore had not intelligently waived counsel. *Id.* at 161.

49. 372 U.S. 335, 339-45 (1963).

50. 389 U.S. 128, 136 (1967).

51. *See generally id.*

52. *Id.* at 130-33.

53. *Id.*

54. *Id.*

were re-incarcerated as a result.⁵⁵ Both defendants filed habeas petitions and claimed violations of the Counsel Clause.⁵⁶ The Court reversed the Washington Supreme Court's denial of both petitions.⁵⁷

Admittedly, *Mempa* does not answer the question whether the Confrontation Clause applies at sentencing. But *Mempa* ultimately rejected a strict trial-right-only theory of the Counsel Clause and acknowledged that post-trial proceedings could be of a critical nature in a criminal case.⁵⁸ In doing so, the *Mempa* Court was not persuaded by arguments that the revocation hearing was a mere formality or that any violation of the Counsel Clause was remedied because defendants were provided with the assistance of counsel at trial.⁵⁹ At the revocation hearing, counsel was necessary for marshaling and proving the facts, introducing evidence, and generally aiding and assisting the defendants.⁶⁰ Fundamentally, the Court affirmed *Gideon's* mandate of counsel at every stage of the "criminal prosecution" that implicated procedural and substantial rights.

II. ORIGIN AND EROSION OF THE JURY TRIAL CLAUSE AS ONLY A TRIAL RIGHT

The rule that the Jury Trial Clause applied solely at the trial stage of a criminal prosecution developed simultaneously as indeterminate sentencing lost favor as the dominant model of fixing punishment in the United States. During the indeterminate era, broad judicial discretion existed to ensure that punishment fit the offender as well as the offense.⁶¹ At the height of the indeterminate era, judicial discretion was curbed only by the Eighth Amendment's proscription against excessive fines and

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* Additionally, the Court recognized that a number of lower courts had already ruled that the Sixth Amendment right to counsel extends to sentencing in federal cases. *Id.* at 134 n.4 (citing *Nunley v. United States*, 283 F.2d 651 (10th Cir. 1960); *McKinney v. United States*, 208 F.2d 844 (D.C. Cir. 1953); *Martin v. United States*, 182 F.2d 225 (5th Cir. 1950)).

59. *Mempa*, 389 U.S. at 135.

60. *Id.*

61. See Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 654 (2005). Berman argues that the "rehabilitative medical model" was conceived and discussed in medical terms, with offenders described as sick and punishments aspiring to cure. *Id.* (citing J.L. MILLER ET AL., SENTENCING REFORM: A REVIEW AND ANNOTATED BIBLIOGRAPHY 1-6 (1981)). For Berman, sentencing became both administrative, in that sentencing judges and parole officials were expected to craft individualized sentences, and clinical, "almost like a doctor or social worker." See Berman, *supra*, at 655 (citing *United States v. Mueffelman*, 327 F. Supp. 2d 79, 83 (D. Mass. 2004)); see also Douglass, *supra* note 28, at 2018 n.295 (describing individualized punishment as "reflecting a 'scientific' view that crime was a form of sickness that might be cured with proper treatment of an individual"); SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 5-6 (1985); McMurray, *supra* note 23, at 592; Hessick & Hessick, *supra* note 29, at 52.

cruel and unusual punishment.⁶² Sentencing judges were not required to seek the jury's guidance⁶³ and frequently engaged in post-trial fact finding to punish within the statutory range.⁶⁴ This contrasted sharply with pre-Founding determinate era felony sentencing, when judges rarely engaged in post-verdict fact finding to fix punishment.⁶⁵

As indeterminate sentencing developed, improved means of transportation and communication brought people closer together, multiplied frictions, and required increased governmental supervision.⁶⁶ This burdened law enforcement officials,⁶⁷ courts,⁶⁸ and the public.⁶⁹

62. McMurray, *supra* note 23, at 592.

63. *Id.* (citing Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 697 (2005)); Jenia Iontcheva, *Jury Sentencing As Democratic Practice*, 89 VA. L. REV. 311, 316–19, 354 (2003) (noting that by 1796, one state sentenced by jury, and by 1919, fourteen states sentenced by jury, but that by 2003, only six states sentenced by jury). *But see* Douglass, *supra* note 28, at 2013–14 (describing the widespread practice of jury sentencing in capital cases during the American constitutional period).

64. Hessick & Hessick, *supra* note 29, at 52. Hessick and Hessick noted that discretionary schemes were originally premised on the punishment rational of rehabilitation and that judges' assessments were based on specific sentencing characteristics with an eye toward reforming the criminal defendant's law breaking ways. *Id.* Sentencing characteristics included the defendant's age, prior criminal history, employment history, family ties, educational level, military service, and charitable activities. *Id.*

65. McMurray, *supra* note 23, at 592 (noting that confrontation at sentencing was irrelevant under the determinate model because there was no fact finding at the time the sentence was announced and thus, no witnesses to confront). Blackstone reported that only in exceptional cases did determinate era sentencing judges exercise discretion to impose fines or determine the length of imprisonment. BLACKSTONE, *supra* note 30, at *378. Generally, the "nature of the punishment . . . [either] by fine or imprisonment, [was] . . . fixed and determinate: though the duration and quantity of each must vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances." *See id.*; *see also* Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1814 n.180, 1814–25 (2003).

66. *See* Justin Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1, 18 (1927); *see also* J.C. McWhorter, *Abolish the Jury*, 57 AM. L. REV. 42, 43 (1923) (opining that automobiles afforded criminals the ability to "play hide and seek" with law enforcement).

67. Miller, *supra* note 66, at 19. Miller argued that inadequacies with regard to law enforcement staff, equipment, and cohesive administrative guidance and direction made it impossible for law enforcement "to cope successfully with the professional banditry of th[e] scientific age." *See id.*; *see also* Sam B. Warner & Henry B. Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years*, 50 HARV. L. REV. 583, 590, 595 (1937) (noting the large increases in petty offenses and the recent revival of outlawry, which the author attributed to the inability of the courts and authorities to handle modern crime); McWhorter, *supra* note 66, at 42 ("[T]he public mind is becoming so accustomed to lawlessness that it is acquiring that listless indifference which long and unconcerned familiarity begets. Unpunished crime has become a matter-of-course thing in the public mind.").

68. *See* Miller, *supra* note 66, at 20 (noting the inadequacy of courts to accommodate their increased burden and the irksome burden of jury duty on the public); *see also* Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1728 (2005) (reviewing GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003)) (arguing that increased caseloads significantly contributed to the judiciary's changing attitude about the merits of negotiated pleas); Warner & Cabot, *supra* note 67, at 590 (noting that the number of judges did not keep pace with the striking population growth).

69. *See* Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 106 (1928) (noting the small minority of convictions that actually involved a jury); McWhorter, *supra* note 66, at 47, 51 (arguing

Inadequacies and lack of cohesive administrative guidance made it impossible to combat the “professional banditry of th[e] scientific age.”⁷⁰ Large increases in “outlawry” further evidenced the inability of authorities to handle “modern” crime.⁷¹ J.C. McWhorter, an early twentieth century legal commentator, lamented in 1923 that the public had become listlessly indifferent to lawlessness because crime so often went unpunished.⁷² As incarceration became an increasingly available form of punishment, the public was increasingly persuaded by policy arguments in favor of individualized rather than determinate sentences.⁷³

The role of counsel in criminal cases also expanded during the indeterminate era,⁷⁴ perhaps as a direct effect of the Constitution’s adoption of an adversarial system of trial, or perhaps due to the increase in criminality.⁷⁵ Throughout the U.S. colonies, knowledgeable and experienced defense bars emerged.⁷⁶ By the mid-eighteenth century, the acquittal rate for represented defendants in New Jersey was seventy-seven percent, while the acquittal rate for unrepresented defendants was merely eighteen percent.⁷⁷ In 1834, almost a century later, virtually every defendant in New York requested or received the assistance of counsel.⁷⁸ That counsel was available to defendants did not mean that the adversarial system that we know today existed during the emergence of indeterminate sentencing.⁷⁹ The point here is that by the height of the indeterminate era, the United States had developed a distinct adversarial system. Yet few constitutionally prescribed controls limited judicial discretion at felony sentencing, in part due to a lack of uniform sentencing procedures and in part due to a reduced number of felony trials.

Counsel’s expanded role emerged simultaneously with two other notable developments of post-Founding indeterminate sentencing: plea-bargaining⁸⁰ and bifurcation of trial and sentencing.⁸¹ Bifurcation created

that the jury has “lived out the days of . . . usefulness,” stating that it was “difficult to imagine a more illogical and unbusiness-like way of trying cases than by a jury of twelve men selected as they are”).

70. Miller, *supra* note 66, at 19.

71. Warner & Cabot, *supra* note 67, at 590, 595.

72. McWhorter, *supra* note 66, at 43.

73. Douglass, *supra* note 28, at 2018.

74. See Miller, *supra* note 66, at 16–18 (noting the creation of new laws prohibiting the manufacture and sale of liquor, regulating securities, and governing the issuances of checks and other evidences of value, as well as new laws regulating automobiles); see also Warner & Cabot, *supra* note 67, at 585 (noting the increase in criminality and prosecutions).

75. Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 327–28 (2009).

76. *Id.* at 331.

77. *Id.* at 330–31 (noting that by the middle of the eighteenth century, a defendant in colonial New Jersey was roughly four times more likely to be acquitted if represented by counsel).

78. *Id.* at 331–32.

79. *Id.* at 334.

80. See Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830–1860*, 33 LAW & SOC’Y REV. 161, 161, 173 (1999) (noting the emergence of

separate “sentencing hearings,” resulting in a distinct and separate procedural phase of the criminal prosecution⁸² during which judges exercised broad discretion to determine the length of imprisonment.⁸³ By necessity, this appeared to require consideration of information about the defendant that was not presented during the trial.⁸⁴ Once guilt was entered, sentencing judges exercised virtually unlimited discretion to determine the range of imprisonment.⁸⁵

It is difficult to pinpoint when bifurcation or guilty pleas became the norm. Like bifurcation, evidence of guilty pleas prior to the Founding in the English common law system and the U.S. colonies is rare.⁸⁶ But by the late 1830s, guilty pleas arose in the colonies, and ten years later, they were accepted for practically every sort of offense.⁸⁷ By mid-century, plea bargaining was well institutionalized⁸⁸ and judges were willingly involved in the process.⁸⁹ But early plea bargaining may not have been initiated by

plea bargaining during the 1830s and 1840s). The adoption of adult parole and probation services was also an important development during the post-Founding era. *See* Warner & Cabot, *supra* note 67, at 599 (discussing the creation of reformatories for young male offenders and arguing that adoption of the indeterminate sentencing and parole law occurred together). Warner and Cabot also noted that the first instances of probation occurred in seventeenth century Massachusetts and that by 1910, twenty states had adopted adult probation statutes. *See id.* at 598–99. Warner and Cabot indicated that the duty of the probation officer was to furnish the judge with information about a defendant’s criminal history. *Id.* at 607. While the sentencing judge decided the punishment, it was the parole board that decided the date of release. *See id.* *See generally* Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 11 (2010) (discussing early statutory history of probation in federal system).

81. *See* Iontcheva, *supra* note 63, at 314–30 (2003) (discussing origins of jury sentencing in the United States and causes of its decline); Michaels, *supra* note 65, at 1814 n.180.

82. *See* Herman, *supra* note 29, at 302.

83. Douglass, *supra* note 28, at 2019. Douglass suggests that bifurcation was the result of the need to separately consider information at a sentencing hearing that could not be introduced at trial. *Id.* at 2018–19 (arguing that the rules of evidence conflicted with the emerging preference for making punishment fit not only the crime, but also the individual criminal because evidence relating to bad character was considered unfairly prejudicial and inadmissible at trial).

84. *Id.* at 2018 (noting the new goal of individualized sentences and arguing that if indeterminate era “judges were to tailor their sentences to fit individual offenders, they needed to know more about that individual than a trial—or guilty plea—was likely to tell them”).

85. Warner & Cabot, *supra* note 67, at 606–07.

86. *See* Vogel, *supra* note 80, at 161, 173.

87. *See id.* at 175 (demonstrating surge in guilty pleas in Boston from less than 15% in 1830, to 28.6% in 1840, 52% in 1850, 55.6% in 1860, and 88% in 1880). Vogel argued that plea bargaining rose as part of a “process of political stabilization,” as part of an “effort to legitimate institutions of self-rule,” and as part of an imposition of “social control in a way that avoided any delegitimizing use of force.” *Id.* at 161, 227.

88. *See id.* at 174–75 (discussing plea bargaining in nineteenth century Boston).

89. Miller, *supra* note 66, at 2. Miller argued that the concept of forgiveness by an aggrieved person, which he described as “condonation,” was long recognized by 1927, but had no effect in preventing prosecution. *Id.* “In practice, however, the condonation and compromise of criminal cases [was] frequent and the methods of evading the clear purpose of the written law [were] varied.” *See id.*; *see also* Moley, *supra* note 69, at 107, 118 (noting generational increase in the proportion of guilty pleas). Moley notes that by 1926 in Cook County, Illinois, 13,117 felony prosecutions entered

the same parties as it is today. Some indeterminate era judges openly bargained with the defendant in court⁹⁰ while others refused to participate in negotiations between the parties.⁹¹ Judges who participated in pleas could have also privately expressed to the parties the propriety of a settlement.⁹²

Critics of indeterminate sentencing initially questioned the lack of procedural and substantive rules governing the bifurcated sentencing hearings⁹³—and to a lesser extent, guilty pleas.⁹⁴ The Honorable Marvin E. Frankel, widely considered the father of modern sentencing reform,⁹⁵ lamented wide disparities in punishment, which substantively turned “arbitrarily upon the variegated passions and prejudices of individual judges.”⁹⁶ Judge Frankel also noted the absence of procedural rules⁹⁷ and the limited role of appellate courts, which had authority to review

preliminary hearing and 492 resulted in a complete jury trial; during the same year in Chicago, slightly more than one percent of cases initiated as felonies resulted in a jury verdict of guilty on the felony charge. *Id.* There also appeared to be an increase in jury trial waivers, presumably in favor of bench trials. *See Warner & Cabot, supra* note 67, at 592 (noting that in the late nineteenth century waiver of jury trial in criminal cases was common in few states, but that by 1937 it was “permitted by constitution, statute or judicial decision in the federal courts and those of over half the states”). These sources do not specify whether the remaining cases were resolved by dismissals, guilty pleas, or bench trials.

90. *See id.*; *see also* Moley, *supra* note 69, at 103 (describing the early use of guilty pleas as a defense strategy that also had advantages for prosecutors, who would not be “compelled to carry through an onerous and protracted trial,” and judges, who “escape[] the danger of being reversed on some point of law”).

91. Miller, *supra* note 66, at 8, 10. Cases in which pleas were commonly used included violation of liquor laws; automobile thefts; desertion or failure to provide for wife or children; sex cases, including seduction and statutory rape; and larceny or accusations for issuing fraudulent checks or obtaining money or property by fraudulent means. *Id.* at 12–16.

92. *Id.* at 10.

93. *See* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 5, 7–8, (1972); *see also* United States v. Clark, 792 F. Supp. 637, 650 (E.D. Ark. 1992) (citing SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES 3 n.15 (1987)); Stephen A. Saltzburg, *Due Process, History, and Apprendi v. New Jersey*, 38 AM. CRIM. L. REV. 243, 243 (2001) (noting that the absence of standards that governed criminal sentencing in the indeterminate era adduced an arbitrariness that was compounded by the absence of rules of evidence and standards of proof).

94. *See* Klein, *supra* note 63, at 699 (noting decline of indeterminate model in the early 1970s); *see also* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 279 (2005); Berman, *supra* note 9, at 393.

95. *See, e.g.*, Steven Greenhouse, *Marvin Frankel, Federal Judge and Pioneer of Sentencing Guidelines, Dies at 81*, N.Y. TIMES, Mar. 5, 2002, at C15 (describing Frankel as a “legal scholar whose views helped to establish sentencing guidelines for federal courts”). This Article refers to the federal sentencing guidelines as “the Guidelines.”

96. Frankel, *supra* note 93, at 5, 7–8; Berman, *supra* note 61, at 655 (noting that some outcomes and disparities could be attributed to race, gender, and socioeconomic status).

97. Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2044 (1992) (noting common use of information at sentencing that had not been cross-examined or otherwise exposed to adversarial or independent scrutiny).

sentences only on rare or extraordinary grounds.⁹⁸ He pondered whether rehabilitative goals were necessary and realistic⁹⁹ and noted that judges and probation officers rarely communicated about a defendant or his “treatment.”¹⁰⁰ Finally, Judge Frankel described the trial court’s physical observations of the defendant as a minor and fleeting factor at best, and at worst—overdrawn and overweighed judicial folklore.¹⁰¹

Critique of the lack of procedural and substantive criminal sentencing rules was partially addressed in *In re Winship*,¹⁰² *Mullaney v. Wilbur*,¹⁰³ and *Patterson v. New York*.¹⁰⁴ *Winship* dubbed the reasonable doubt standard a protectant of the presumption of innocence¹⁰⁵ and established that every fact necessary to constitute the charged offense¹⁰⁶ must be proven by that standard.¹⁰⁷ *Winship* remained silent on how to

98. Frankel, *supra* note 93, at 5, 7, 23–24. Frankel points out that unless there was an egregious departure from the law, indeterminate era sentences were unreviewable “if within the commonly extravagant bounds of the statute.” *See id.* at 23; *see also* Saltzburg, *supra* note 93, at 244 (noting that sentences in the indeterminate era, whether imposed by judges or by juries, were “largely uncontrolled by appellate review”).

99. *See* Frankel, *supra* note 93, at 29–31; *see also* Berman, *supra* note 94, at 279.

100. Frankel, *supra* note 93, at 10–12; *id.* at 37–38 (describing “poor performance record” of probation office). Frankel also questioned the common practice of separating questions of guilt from punishment. *Id.* at 5.

101. *Id.* at 27.

102. 397 U.S. 358 (1970).

103. 421 U.S. 684 (1975).

104. 432 U.S. 197, 205–07 (1977).

105. *Winship*, 397 U.S. at 363.

106. *Id.* at 358–59. Section 712 of the New York Family Court Act defined a juvenile delinquent as “a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime.” *Id.* at 359. *Winship*, who was less than sixteen years of age, allegedly entered a locker and stole \$112 from a woman’s pocket book. *Id.* at 359–60. Section 744(b) of the New York Family Code required that “[a]ny determination at the conclusion of [an adjudicatory] hearing that a [juvenile] did act or acts must be based on a preponderance of the evidence.” *Id.* at 360. *Winship*’s eighteen-month sentence was subject to annual extensions until his eighteenth birthday, for a total of six years. *Id.* at 359–60. The Appellate Division of the New York Supreme Court affirmed without opinion. *See id.* at 360; *see also In re Samuel W.*, 247 N.E.2d 253, 254 (N.Y. 1969). According to the New York Court of Appeals, a lawyer’s duty in a criminal case was to see her client acquitted, the charges reduced, or the punishment minimized. *Id.* at 255. In a juvenile proceeding, the lawyer’s duty is to do what is in the best interest of the child. *Id.* at 255–56. Findings of guilt in juvenile adjudications were not convictions that affected rights or privileges and thus enjoyed the protective cover of confidentiality. *Id.* Because delinquency status was not a crime and juvenile proceedings were not criminal, there was no deprivation of due process. *Id.* at 257–58. According to the New York courts, equal protection arguments failed because juvenile proceedings were distinguishable from criminal prosecutions. *Id.*

107. *Winship*, 397 U.S. at 364. According to the Court, the requirement of guilt beyond a reasonable doubt dated at least to the Founding and was long assumed to be constitutionally required in criminal cases. *Id.* at 360, 362. *But see id.* at 377 (Black, J., dissenting) (doubting whether guilt by proof beyond a reasonable doubt was expressly or impliedly commanded in the Constitution). At the Founding, guilt by proof beyond a reasonable doubt was required in both delinquency proceeding against juveniles and criminal proceedings against adults. *Id.* at 367–68. *But see id.* at 386 (Black, J., dissenting) (“[W]hen, as here, a State through its duly constituted legislative branch decides to apply a

determine which facts were necessary to prove the charge.¹⁰⁸ A narrow approach was chosen in *Mullaney*, which only required proof beyond reasonable doubt of the “elements of the offense.”¹⁰⁹ Two years later, *Patterson* excluded affirmative defenses from the category of facts that must be proven beyond a reasonable doubt.¹¹⁰

Less than a decade after *Winship*, *Mullaney*, and *Patterson*, the federal government and the states heeded calls for limited judicial discretion at criminal sentencing and for structured criminal procedural rules that provided tougher appellate review of sentences.¹¹¹ The Sentencing Reform Act (“SRA”) was passed in 1984 and would provide the blueprint for felony sentencing rules in federal courts.¹¹² The SRA created the United States Sentencing Commission (“Commission”), which was tasked with drafting the U.S. Sentencing Guidelines (“Guidelines”).¹¹³ The Guidelines rejected rehabilitation as the central principle for structured sentencing and expressly called for sentences to provide “just punishment.”¹¹⁴ The Guidelines also calculated punishment

different standard, then that standard, unless it is otherwise unconstitutional, must be applied to insure that persons are treated according to the ‘law of the land.’”).

108. See *id.* at 364; see also Ronald J. Allen et al., *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195, 202 (2005). See generally Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1103 (2001); Leslie Yalof Garfield, *Back to the Future: Does Apprendi Bar a Legislature’s Power to Shift the Burden of Proof away from the Prosecution by Labeling an Element of a Traditional Crime As an Affirmative Defense?*, 35 CONN. L. REV. 1351, 1357 (2003).

109. In *Mullaney*, the Court interpreted a Maine law that defined murder as an unlawful killing with malice aforethought, which was presumed; a killing without malice aforethought was manslaughter. *Mullaney v. Wilbur*, 421 U.S. 684, 686 n.3 (1975) (quoting ME. REV. STAT. ANN. tit. 17, § 2651 (1964)). Maine argued that defendants had the burden to prove heat of passion, which would qualify the killing as manslaughter. *Id.* at 699. The Court reasoned that *Winship* was not limited to “elements” as defined by state law and held that the prosecution has the burden to prove heat of passion beyond a reasonable doubt. *Id.*

110. See *Patterson v. New York*, 432 U.S. 197, 205–08 (1977) (distinguishing between affirmative defenses and statutory elements and reasoning that affirmative defenses do not allow the state to presume or infer any facts against defendants); see also Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 462–63 (1985) (characterizing tension between *Mullaney* and *Patterson* as “a dispute over how to delineate the limits of a state’s power to define the ‘essential facts’ of a crime”). Additionally, there was no constitutional presumption of innocence at sentencing. Michaels, *supra* note 65, at 1778. See generally Mark D. Knoll & Richard G. Singer, *Searching for the “Tail of the Dog”: Finding “Elements” of Crimes in the Wake of McMillan v. Pennsylvania*, 22 SEATTLE U. L. REV. 1057, 1081 (1999) (“*Patterson* opened the door for creative legislatures to evade the fundamental protections afforded in *Winship* by carefully drafting their statutes.”).

111. Berman, *supra* note 9, at 394; Frankel, *supra* note 93, at 54.

112. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at scattered sections of 18 U.S.C.).

113. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988); see also Saltzburg, *supra* note 93, at 243 n.2.

114. Berman, *supra* note 94, at 280; see Kyron Huigens, *Panel Two: Considerations at Sentencing—What Factors Are Relevant and Who Should Decide? Solving the Williams Puzzle*, 105 COLUM. L. REV. 1048, 1052 (2005) (discussing policy arguments for discretionary and guidelines sentencing).

by assigning points to specific facts¹¹⁵ about the offender and offense.¹¹⁶ The Guidelines were mandatory: sentencing courts were required to explain the basis for departures from the applicable range of punishment¹¹⁷ and appellate courts were granted increased authority to review sentences.¹¹⁸

Two years after the SRA was enacted, the Supreme Court tested Pennsylvania's Mandatory Minimum Sentencing Act ("MMSA")¹¹⁹ in *McMillan v. Pennsylvania*. The MMSA imposed a minimum sentence of five years for offenses committed while in "visible possession" of a firearm.¹²⁰ The MMSA did not require visible possession to be proven to a jury beyond a reasonable doubt before application of the five-year minimum sentence.¹²¹ Instead, the MMSA permitted Pennsylvania sentencing judges to consider evidence already introduced at trial as well as evidence produced for the first time at the sentencing hearing, all of which would be judged by the court by a preponderance of the evidence.¹²² If the prosecution established that the underlying offense involved visible possession of a firearm, the MMSA divested sentencing judges of discretion to impose a sentence of less than five years.¹²³ Presumably, sentences in excess of the statutory maximum were also not authorized.¹²⁴ Four Pennsylvania sentencing judges refused to apply the MMSA because it did not allow the jury to evaluate visible possession.¹²⁵ The Court coined the term "sentencing enhancement,"¹²⁶ which was distinguishable from an "offense element," and held that state legislatures had authority to designate certain facts as "enhancements."¹²⁷

115. Breyer, *supra* note 113, at 7–8. Categories and sentence length were determined by an analysis of 10,000 actual cases. *See id.* at 7; *see also* Becker, *supra* note 7, at 7–8.

116. *See* Breyer, *supra* note 113, at 5; *see also* Bascuas, *supra* note 80, at 8–9 (discussing methodology of the Guidelines); Becker, *supra* note 7, at 7–8 (same).

117. *See* Breyer, *supra* note 113, at 5; *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 93 (2003).

118. Breyer, *supra* note 113, at 5–6; *see* Bascuas, *supra* note 80, at 28 (discussing standard of review under the Guidelines).

119. Breyer, *supra* note 113, at 3; Berman, *supra* note 9, at 394.

120. *McMillan v. Pennsylvania*, 477 U.S. 79, 80 (1986).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 82–84.

126. *Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000) (Thomas, J., concurring) ("*McMillan* . . . spawned a special sort of fact known as a sentencing enhancement."); Knoll & Singer, *supra* note 110, at 1058 (describing *McMillan* as marking the "birth of the 'sentencing factor'"); Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL'Y 53, 62 (2011) (defining a sentencing factor as a particular fact that the legislature determined should subject the defendant to an increased sentence).

127. *McMillan*, 477 U.S. at 85–86. According to the Court, the MMSA did not disregard the presumption of innocence; in fact, it created no presumptions. *Id.* at 86–87. Nor did the MMSA relieve the prosecution of its burden. *Id.* at 87. The MMSA did not alter the maximum penalty for the crime committed or create a separate offense calling for a separate penalty. *Id.* at 87–88. Finally, the MMSA

McMillan established the element/enhancement distinction as the constitutional limit to legislative authority¹²⁸ but allowed state legislatures to designate which facts were elements or enhancements.¹²⁹ By the millennium, *Jones v. United States*¹³⁰ limited *McMillan* to require Congress and state legislatures to include traditional elements in the definition of crimes.¹³¹ The next year, in *Castillo v. United States*,¹³² the Court appeared to provide a framework to distinguish between traditional elements and sentencing enhancements.¹³³ Castillo was indicted for conspiring to murder federal officers in violation of 18 U.S.C. § 924(c)(1), which prohibited the use or carrying of a “firearm” in relation to a crime of violence.¹³⁴ Penalties increased dramatically when the firearm was a machine gun.¹³⁵ The Court held that the “machine gun” finding constituted an element of a separate offense.¹³⁶

Castillo found type of firearm an offense element despite the fact that Congress designated it a sentencing enhancement.¹³⁷ In so holding, the *Castillo* Court did little to calm the escalating tension between the Jury Trial Clause and *McMillan*’s broad grant of legislative authority to choose between elements and enhancements. The Court’s internal

did not change the definition of any existing offense. *See id.* at 88–90; *see also* Bibas, *supra* note 108, at 1106 (detailing factors for the *Apprendi* Court’s finding that the sentencing enhancements were constitutional).

128. *McMillan*, 477 U.S. at 85–88.

129. *See id.* at 85 (“[I]t is normally ‘within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.’”) (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)); *see also* Berman, *supra* note 9, at 399.

130. *Jones v. United States*, 526 U.S. 227 (1999). Jones was convicted of violating the federal carjacking statute which carries a maximum fifteen-year sentence, unless serious bodily injury or death occurs. 18 U.S.C. §§ 2119(1)–(3) (1999). A twenty-five year imprisonment was imposed based on the finding at sentencing that serious bodily injury resulted. *Jones*, 526 U.S. at 230–31.

131. *Id.* at 231–44. The Court held that section 2119 defined three separate offenses that each must be proved beyond a reasonable doubt. *Id.* at 231–39. The Court warned that its holding rested on rules of statutory interpretation rather than the Constitution. *See id.* at 252 n.11; *see also* Andrew M. Levine, *The Confounding Boundaries of ‘Apprendi-Land’: Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 398 (2002).

132. *Castillo v. United States*, 530 U.S. 120 (2000).

133. *Id.* at 124–31.

134. *Id.* at 122.

135. *Id.*

136. *Id.* at 121.

137. *Id.* at 124. The *Castillo* Court made five specific findings to support its holding that firearm type was an offense element. First, the statute listed the basic offense elements in the first sentence and the sentencing enhancements in the remaining subsequent sentences. *Id.* at 124–25. Second, the type of firearm had not typically or traditionally been a sentencing factor because it neither involved characteristics of the offender nor special features the offense. *Id.* at 126–27. Third, to ask a jury, rather than the judge, to determine the type of firearm would rarely complicate trial or result in unfairness. *Id.* at 127–28. Fourth, the legislative history did not support interpreting section 924(c) as setting forth sentencing factors. *Id.* at 129–30. Finally, the twenty-five year increase attached to the machine gun finding was extreme, which weighed in favor of treating firearm type as an element. *Id.* at 131.

debate focused on procedural and substantive characteristics of felony sentencing at the time of the Founding.¹³⁸ A slight majority had come to understand that pre-Founding a pre-determined sentence resulted¹³⁹ once the jury found guilt.¹⁴⁰ This majority believed that the Sixth Amendment's text and structure reflected pre-Founding determinate jury sentencing in felony cases.¹⁴¹

On the day *Castillo* ruled that type of firearm was an element under section 924(c), *Apprendi v. New Jersey* overturned a sentence that was also based, in part, on post-verdict judicial fact finding.¹⁴² *Apprendi* was convicted under a New Jersey statute that classified unlawful possession of a firearm a second-degree offense.¹⁴³ Punishment for unlawful possession of a firearm ranged from five to ten years.¹⁴⁴ Under a separate statute, New Jersey extended the term of imprisonment for unlawful possession while committing a racially motivated crime.¹⁴⁵ The racial motive—or “hate crime” enhancement—did not require a jury, could be proved by a preponderance of the evidence, and increased punishment to a range of

138. See generally Donald A. Dripps, *The Constitutional Status of Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665, 1701 (1987); Herman, *supra* note 29, at 323–25, 328, 344; Knoll & Singer, *supra* note 110, at 1061–62, 1067–68, 1078–79 (discussing historical difference between an “offense” and its “elements,” as well as “elements” and “facts looked to by a judge to determine the sentence”).

139. See Douglass, *supra* note 28, at 2011 (citing Whitman J. Hou, *Capital Retrials and Resentencing: Whether to Appeal and Resentencing Fairness*, 16 CAP. DEF. J. 19, 30 (2003)); see also *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (citing HUGO A. BEDAU, *THE DEATH PENALTY IN AMERICA* 5–6, 15, 27–28 (rev. ed. 1967)) (“At the time the [Bill of Rights] was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses.”). Death could be accomplished by hanging, embowlement, and burying alive. BLACKSTONE, *supra* note 30, at *376–77. By no means was death the exclusive punishment for felonies, merely the most common. See *id.* at *377. Other punishment included deprivation of sensation by strangling, mutilation or dismembering, slitting of the nostrils, branding of the hand, whipping, hard labor, exile, banishment, loss of liberty, and temporary imprisonment. *Id.* Despite these myriad of options, Blackstone makes clear that the quantity or degree of punishment was “ascertained for every offence[,] and that it [wa]s not left in the breast of any judge, nor even of a jury, to alter that judgment.” *Id.* Blackstone warned that “if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates[,] and would live in society without knowing exactly the conditions and obligations which it lays them under.” *Id.*

140. White, *supra* note 29, at 396 (describing the modern day trial as involving a bifurcated process by which there is a finding of guilt or innocence by a jury and a subsequent determination of punishment by a judge); Douglass, *supra* note 28, at 1968 (describing the trial world as a highly structured and elaborate body of precedent that defines substantive rights, but describing the sentencing world as an informal, free-flowing kind of place that has with few hard rules). According to Douglass, “few ‘trial rights’ survive intact after a guilty verdict.” *Id.*

141. Hessick & Hessick, *supra* note 29, at 51 (noting that determinate sentencing schemes “presented no occasion to consider the extent to which constitutional protections should be treated differently at sentencing than at trial”). But see Fenner, *supra* note 21, at 37; Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1507–08 (2001).

142. See *Apprendi v. New Jersey*, 530 U.S. 466, 468–90 (2000); see also Michaels, *supra* note 65, at 1814 n.180.

143. *Apprendi*, 530 U.S. at 468.

144. *Id.*

145. *Id.* at 468–69.

ten to twenty years.¹⁴⁶ Apprendi pleaded guilty to unlawful possession and was never charged with any type of hate crime.¹⁴⁷ The judge imposed a twelve-year sentence based on the court's own finding at sentencing that Apprendi's acts were racially motivated.¹⁴⁸ The New Jersey Supreme Court, relying on *McMillan*, affirmed and held that motivation was a traditional sentencing factor.¹⁴⁹

The *Apprendi* Court examined the adequacy of New Jersey's sentencing procedure and qualified *McMillan*'s longstanding deference to legislative choice between elements and enhancements. The Court reasoned that the right to a jury determination of guilt of every element of the crime beyond a reasonable doubt was a historical foundation of the common law.¹⁵⁰ The Court reflected on criminal prosecutions at time of the Founding and the lack of judicial discretion because of sanction-specific criminal laws.¹⁵¹ During the Founding, guilt and punishment were invariably linked and there was no distinction between an element and an enhancement.¹⁵² In the Court's view, even though the practice of unitary trial and sentencing may have changed, *modern courts must still "adhere to the basic principle[s]."*¹⁵³ Because the jury trial right was one of surpassing importance in the common law,¹⁵⁴ there was no "principled basis for treating [enhancements and elements] differently."¹⁵⁵ Guilt beyond a reasonable doubt was designated a historically significant companion right to a jury verdict.¹⁵⁶ Both reflected "a profound judgment about the way in which law should be enforced and justice administered."¹⁵⁷

Apprendi also limited *McMillan* to the extent that designating certain facts as elements¹⁵⁸ rather than enhancements could thwart *Winship*.¹⁵⁹ To combat attempts to circumvent *Winship*, *Apprendi* embraced a principle

146. *Id.*

147. *Id.* at 469.

148. *Id.*

149. *Id.* at 471-74.

150. *Id.* at 477 (citing BLACKSTONE, *supra* note 30, at *343).

151. *Id.* at 479 (citations omitted).

152. *Id.* at 485.

153. *Id.* at 483-84 (emphasis added). *But see id.* at 518 (Thomas, J., concurring) (describing *Apprendi* not as a sharp break from the past, but a reflection of the Sixth Amendment's original meaning).

154. *Id.* at 476.

155. *Id.*

156. *Id.* at 478.

157. *Id.*

158. *See id.* at 485; *see also* Knoll & Singer, *supra* note 110, at 1114, 1118 (declaring "*Winship* lives again").

159. *See Apprendi*, 530 U.S. at 484-86, 487 n.13 ("[I]t [was] unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties."); *see also* Fisher, *supra* note 126, at 56 (concluding that the firearm enhancement was a classic example of an aggravated crime, and describing *Apprendi* as a very easy case).

that was foreshadowed a year earlier¹⁶⁰: “any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁶¹ By its terms, *Apprendi* applied only when post-verdict judicial fact finding involved imposition of a sentence more severe than the statutory maximum.¹⁶² The Court ruled that the hate crime enhancement required a jury determination of guilt beyond a reasonable doubt without reference to *Castillo*.¹⁶³

A broad reading of *Apprendi* seemed to require a jury determination of all facts that would increase punishment, which would fundamentally implicate structured sentencing schemes like the Guidelines. At least one member of the *Apprendi* majority rejected this view; one dissenter foresaw the threat.¹⁶⁴ Arguments that *McMillian* authorized legislatures—not sentencing commissions—to choose between elements and enhancements strengthened after *Apprendi*.¹⁶⁵ The Guidelines and other structured sentencing schemes were alleged to have eliminated judicial discretion too much,¹⁶⁶ which in turn lead to increased prosecutorial authority¹⁶⁷ and

160. See *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

161. See *Apprendi*, 530 U.S. at 490; see also Knoll & Singer, *supra* note 110, at 1114 (“The big news in *Jones*, however, is that the Court all but adopted a Constitutional rule, based on the Sixth Amendment jury trial right, precluding the designation as a sentencing factor any item that would significantly increase the sentence.”).

162. See *Apprendi*, 530 U.S. at 487 n.13; see also Levine, *supra* note 131, at 405.

163. *Apprendi*, 530 U.S. at 475–76 (“The question whether [Mr.] Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is *starkly presented*.” (emphasis added)).

164. Compare *Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., concurring) (“[i]t is likewise unnecessary to consider whether . . . the rule regarding elements applies to the . . . Guidelines”), with *id.* at 551–52 (O’Connor, J., dissenting) (questioning whether after *Apprendi*, state and federal courts should continue to assume the constitutionality of structured sentencing schemes like the Guidelines); see also Alex Ricciardulli, *The U.S. Supreme Court’s Surprise Ruling on Sentence Enhancements*, L.A. LAW., Feb. 2001, at 15 (noting that “[s]eldom has so big a case [*Apprendi*] received so little attention” and predicting the Guidelines did not implicate *Apprendi* unless a sentence greater than the maximum authorized by statute was imposed). Ricciardulli explains that the Guidelines and other structured sentencing laws merely allow increases in sentences within the statutory range and that such increases fall within *Apprendi*’s limiting principle. *Id.* at 16. “Laws that allow increases beyond a range, on the other hand, are in trouble.” See *id.*; see also Herman, *supra* note 29, at 296–97, 336–38, 344–45 (questioning the applicability of *McMillan* to the issue of the constitutionality of the Guidelines).

165. Herman, *supra* note 29, at 337–38, 344–45.

166. See, e.g., KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 78–103 (1998) (arguing against limiting sentencing discretion); Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission’s ‘Mandatory Guidelines’*, 4 FED. SENT’G REP. 129, 132, 133 n.12 (1991) (identifying lack of judicial discretion as a common complaint with the Guidelines).

167. See Saltzburg, *supra* note 93, at 248, 248 n.19, 251; see also Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 926 (1991) (arguing that prosecutors wield too much discretion under guidelines); Bradford C. Mank, *Rewarding Defendant Cooperation Under the Federal Sentencing Guidelines: Judges vs. Prosecutors*, 26 CRIM. L. BULL. 399, 402–04 (1990) (discussing issues resulting from increased prosecutorial discretion); Bascuas, *supra* note 80, at 12–13 (comparing shift in role of probation officer as social worker to guidelines range

harsher punishment.¹⁶⁸ *Apprendi* supported arguments that structured sentencing was a “trial-like enterprise”¹⁶⁹ and that *McMillan*’s elements/enhancement distinction violated the Jury Trial Clause.¹⁷⁰ Notable critic of structured sentencing, Professor Douglas Berman, argued that the Guidelines failed to provide comprehensive substantive and procedural constitutional protections.¹⁷¹

Notwithstanding critique of the Guidelines by Berman and others, a plurality of the Court affirmed *McMillan*’s elements/enhancements distinction in *Harris v. United States*.¹⁷² *Harris* involved whether 18 U.S.C. § 924(c)(1)(A) defines a single crime, to which brandishing is a sentencing factor that may be considered by a judge after the trial, or multiple crimes, to which brandishing is an essential element that must be proved to a jury.¹⁷³ Section 924(c)(1)(A)—as amended since *Castillo*—provides in relevant part:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.¹⁷⁴

In the indictment, the government neither alleged brandishing nor referenced subsection (ii).¹⁷⁵ Instead, the indictment charged that Harris

computer; also discussing change in presentence report from an instrument of potential mercy and mitigation to an instrument of inquisition and punishment).

168. See Barkow, *supra* note 117, at 85–87 (arguing that the Guidelines allowed little room to bend the law as a matter of justice or equity); see also Klein, *supra* note 63, at 708; Bascuas, *supra* note 80, at 37–38.

169. See Berman, *supra* note 94, at 285; Berman, *supra* note 9, at 396–97; see also Mark Chenoweth, *Using Its Sixth Sense: The Roberts Court Revamps the Rights of the Accused*, 2009 CATO SUP. CT. REV. 223, 239–40 (discussing *Apprendi* and concluding that removal of basic fact finding from juries violated jury trial rights); Huigens, *supra* note 114, at 1062, 1069–73 (distinguishing between indeterminate and guidelines sentencing, and noting the latter treats “sentencing like an exercise in the definition and adjudication of offense elements, so that the sentencing process more and more resembles the trial process”).

170. Barkow, *supra* note 117, at 109–12 (arguing that the Guidelines linked facts with punishment and that such factual determinations were traditionally made by juries); Berman, *supra* note 94, at 286 (“Twentieth century . . . sentencing regimes . . . changed the landscape and have appropriately raised Sixth Amendment concerns.”).

171. See Berman, *supra* note 61, at 659–60, 672 (discussing the Guidelines’ lack of procedural rules); see also SITH & CABRANES, *supra* note 166, at 154; Herman, *supra* note 29, at 315; THOMAS W. HUTCHINSON ET AL., *FEDERAL SENTENCING LAW AND PRACTICE* § 6A1.3 (1998).

172. 536 U.S. 545, 550, 560–61, 568–69 (2002) (reaffirming *McMillan* and holding that judicial factfinding necessary to trigger mandatory minimum penalty does not implicate the Jury Trial Clause).

173. *Id.* at 549–50.

174. 18 U.S.C. § 924(c)(1)(A) (2012).

knowingly carried a firearm during and in relation to a drug trafficking crime.¹⁷⁶ Harris was sentenced to seven years¹⁷⁷ based on the finding at the sentencing hearing that he brandished a firearm.¹⁷⁸ The Fourth Circuit ruled brandishing a sentencing factor, as had every other federal circuit court to address the question.¹⁷⁹ The plurality agreed.¹⁸⁰

The *Harris* plurality grounded itself on *McMillian*'s broad grant of legislative authority to determine which facts were offense elements and which facts were sentencing enhancements.¹⁸¹ The *Harris* plurality acknowledged that section 924(c)(1)(A) did not explicitly designate brandishing as an element or sentencing factor, but offered two competing interpretations of the statute. Either section 924(c)(1)(A) was structured like most federal statutes, which listed the offense elements in a single sentence and the separate sentencing factors into subsections.¹⁸² Or alternatively, Section 924(c)(1)(A) was a statute that appeared to list all offense elements in a single sentence but was nevertheless interpreted as setting out the elements of multiple offenses.¹⁸³ The plurality identified two "critical textual clues" to distinguish between its two interpretations. First, historically Congress had not treated brandishing as an offense element.¹⁸⁴ Second, the two-year increase for brandishing was insignificant.¹⁸⁵

Harris also distinguished *McMillian*-type facts that increased the mandatory *minimum* sentence from *Apprendi*-type facts that increased the mandatory *maximum* sentence.¹⁸⁶ The plurality denied that there was a fundamental inconsistency between *Apprendi* and *McMillian/Harris*. The Framers would have considered an *Apprendi* fact an element of an aggravated offense and thus the domain of the jury.¹⁸⁷ Facts that trigger a mandatory minimum sentence, like those at issue in *McMillian* and *Harris*, cannot claim the same because the jury's verdict would have authorized imposition of the minimum punishment with or without the

175. *Id.* at 551.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 552–53 (designating brandishing a sentencing factor); *see also* United States v. Barton, 257 F.3d 433, 443 (5th Cir. 2001); United States v. Carlson, 217 F.3d 986, 989 (8th Cir. 2000); United States v. Pounds, 230 F.3d 1317, 1319 (11th Cir. 2000).

180. *Harris*, 536 U.S. at 552–53.

181. *Id.* at 552–56.

182. *Id.* at 552–53.

183. *Id.* at 553–54.

184. *Id.*

185. *Id.* at 554–55. The two-year increase was described as "consistent with traditional understandings about how sentencing factors operate" and "precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration." *Id.* at 546, 554.

186. *Id.* at 557–58.

187. *Id.* at 557.

finding.¹⁸⁸ Judicial fact finding in the course of selecting a sentence outside the authorized maximum range implicates the Sixth Amendment.¹⁸⁹ As even *Apprendi* acknowledges (albeit in a footnote), only increases in the penalty above what the law provides function like traditional elements.¹⁹⁰ Thus, only “those facts setting the outer limits of a sentence . . . are elements of the crime for the purposes of the constitutional analysis.”¹⁹¹

Despite *Harris*, the Court declared that *Apprendi* applied more broadly to state and federal sentencing guidelines. In *Blakely v. Washington*, the Court invalidated a thirty-seven month enhancement imposed under state sentencing guidelines for “deliberate cruelty” on the grounds that the determination was not made by a jury.¹⁹² The next year the Court considered whether the Guidelines were unconstitutional.¹⁹³ In *United States v. Booker*, and its companion case *United States v. Fanfan*, defendants received sentencing enhancements in federal court based on amounts of drugs, role in the offense, and obstruction of justice.¹⁹⁴

In separate majority opinions, the Court ruled that the Guidelines violated the *Apprendi* rule, but not fatally so.¹⁹⁵ The first *Booker* majority concluded that a jury determination of facts that raised the sentencing ceiling was constitutionally protected as a firmly rooted basic precept of

188. *Id.*

189. *Id.* at 558.

190. *Id.* at 562–64 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 487 n.13 (2000) (“We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury’s verdict.”)).

191. *Harris*, 536 U.S. at 567.

192. 542 U.S. 296 (2004). Washington’s scheme permitted departures from the guidelines minimum up to the statutory maximum based on mitigating or aggravating circumstances found by a sentencing judge. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1086–89 (2005). All departures must be justified in writing and must be found by a preponderance. *Id.* The *Blakely* Court reasoned that the relevant “statutory maximum” for *Apprendi* purposes was not the maximum sentence after finding additional facts, but the maximum without additional facts. *Blakely*, 542 U.S. at 303. Because the additional facts were essential to punishment, they must be found by a jury. *Id.* at 303–04. The *Blakely* Court expressly declined an invitation to determine whether its ruling implicated the Guidelines. *Id.* at 305 n.9, 313 (“The Federal Guidelines are not before us, and we express no opinion on them.”). See generally Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 785 (2008) (discussing state sentencing models and noting a slight majority of states, twenty-nine, were unaffected by *Blakely* or *Booker*); Fisher, *supra* note 126, at 56–57 (discussing legal basis for argument that Washington’s sentencing guidelines undermined the Framers’ design); Klein, *supra* note 63, at 709–12; Berman, *supra* note 61, at 674.

193. *United States v. Booker*, 543 U.S. 220 (2005).

194. *Booker* received enhancements for obstructing justice and possession of an additional 566 grams of crack. *Id.* at 226–28. *Fanfan*’s jury found 500 or more grams of cocaine were involved. *Id.* at 228–29. The sentencing court found *Fanfan* responsible for 2.5 kilograms of cocaine powder and 261.6 grams of crack. *Id.* *Fanfan* was also found to have played a leadership role in the criminal activity. *Id.*

195. See *id.* at 244–45, 258–62; see also Timothy Lynch, *One Cheer for United States v. Booker*, 2005 CATO SUP. CT. REV. 215, 216 (describing the *Booker* oral argument as a direct reflection of the Court’s unreadiness to “untangle the knots that presently encumber[ed] the constitutional right to trial by jury”).

the common law.¹⁹⁶ This majority distinguished between mandatory and advisory sentencing models for Sixth Amendment purposes. Mandatory guidelines implicated the Jury Trial Clause¹⁹⁷—advisory guidelines did not.¹⁹⁸ The first *Booker* majority agreed with *Blakely* that the statutory maximum for *Apprendi* purposes was “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”¹⁹⁹ The Jury Trial Clause was violated to the extent that the Guidelines *required* judicial fact finding at sentencing hearings. The second *Booker* majority focused on whether the Guidelines could be remedied.²⁰⁰ Exercising its power of severability, the Court ruled that the mandatory nature of the Guidelines made them incompatible with the U.S. Constitution.²⁰¹ Advisory guidelines and a reasonableness standard of appellate review cured these incompatibilities.²⁰² The Court reinforced the *Apprendi* rule during the 2012 term in *Southern Union Company v. United States*²⁰³ by holding that the Jury Trial Clause applied to criminal fines.²⁰⁴

In 2013, the Court reconsidered the *Harris* plurality’s distinction between mandatory *minimum* and *maximum* sentences in *Alleyne v. United States*.²⁰⁵ *Alleyne* involved the same federal criminal statute at issue in *Harris*, section 924(c)(1)(A), and asked the same question as *Harris*, whether brandishing under subsection (ii) was an essential element or a sentencing enhancement.²⁰⁶ *Alleyne* was convicted of one count of robbery affecting interstate commerce and one count of using or carrying a firearm during a crime of violence.²⁰⁷ *Alleyne* was also charged with brandishing a firearm under subsection (ii)²⁰⁸ but the jury did not

196. *Booker*, 543 U.S. at 230.

197. *Id.* at 233 (reasoning that if the federal Guidelines were advisory, there would be no Sixth Amendment implications).

198. *Id.* at 233 (“[W]hen a judge exercises his discretion to select a specific sentence . . . the defendant has no right to a jury determination of the facts that the judge deems relevant.”).

199. *Id.* at 232 (emphasis omitted) (quoting *Blakely v. Washington*, 542 U.S. 296, 303 (2004)).

200. *Booker*, 543 U.S. at 244–45.

201. *Id.* at 258.

202. *Id.* at 261–63.

203. 132 S. Ct. 2344 (2012).

204. *Id.* at 2348–49. *Southern Union Company* involved the imposition of a \$38.1 million fine under the Resource Conservation and Recovery Act of 1976 (the “RCRA”), which set a maximum fine of \$50,000 per day of violation. *Id.* At the sentencing, the district court found that Southern Union violated the RCRA for 762 days; the jury was not asked to determine the precise duration of the violation. *Id.* at 2349. The First Circuit ruled *Apprendi* did not apply to criminal fines, creating a split among the circuits. *Id.* (citing *United States v. Pfaff*, 619 F.3d 172 (2nd Cir. 2010) (per curiam); *United States v. LaGrou Distribution Sys., Inc.*, 466 F.3d 585 (7th Cir. 2006)). The Court disagreed and held there was no principled basis rooted in longstanding common law practice to treat criminal fines differently than other forms of punishment where *Apprendi* applies. *S. Union Co.*, 132 S. Ct. at 2350–57.

205. 133 S. Ct. 2151, 2155 (2013).

206. *Id.*

207. *Id.* at 2155–56.

208. *Id.*

find *Alleyne* guilty of that offense.²⁰⁹ At sentencing, the district court imposed the mandatory minimum sentence of seven years based on the finding that by a preponderance of the evidence *Alleyne* could have reasonably foreseen that his accomplice would brandish a firearm.²¹⁰ The Eleventh Circuit affirmed the post-verdict finding that brandishing occurred.²¹¹

The *Alleyne* Court ruled that *Apprendi* encompassed “not only facts that increase the ceiling, but also those that increase the floor.”²¹² *Alleyne* is premised on the “clear” relationship at common law between crime and punishment.²¹³ Additionally, in the common law substantive criminal law tended to be sanction specific. In other words, a particular sentence was prescribed for a particular offense.²¹⁴ *Alleyne* reasoned that at common law the “legally prescribed” penalty affixed to the crime included both ends of the punishment range.²¹⁵ It followed that any fact that triggered both the mandatory (or statutory) maximum *and* minimum sentence were “ingredient[s]” of the offense.²¹⁶ Elevating the low-end or “floor” of a sentencing range heightened “the loss of liberty associated with the crime”²¹⁷ and is as relevant as the high-end or “ceiling.”²¹⁸ *Apprendi*’s foundation is to ensure that a defendant can “predict the legally applicable penalty from the face of the indictment.”²¹⁹ In the *Alleyne* Court’s view, expanding *Apprendi* to include facts necessary to increase the mandatory minimum sentence allows a defendant to do so.²²⁰

Alleyne acknowledges that judicial fact finding at felony sentencing is a post-Founding development.²²¹ At the time of the Founding, little judicial discretion existed to influence felony punishment. Offense conduct that merited punishment was determined during the trial and sentencing only consisted of announcing the judgment. Modern bifurcation of the trial and sentencing stages of the criminal prosecution has shifted fact finding on offense conduct (and to a lesser extent offender characteristics) into a structured sentencing hearing. Once guilt is accepted (either as a result of a trial or a plea), sentencing becomes the

209. *Id.*

210. *Id.* at 2156.

211. *Id.*

212. *Id.* at 2158.

213. *Id.*

214. *See id.*; *see also* John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900*, at 36 (Antonio Padoa Schioppa ed., 1987).

215. *Alleyne*, 133 S. Ct. at 2160.

216. *Id.* at 2160–61.

217. *Id.* at 2161.

218. *Id.*

219. *Id.*

220. *Id.* at 2163–64.

221. *Id.* at 2173 (Alito, J., dissenting).

focus of all parties. *Mempa* establishes felony sentencing as a critical stage of the criminal prosecution for which counsel is necessary. *Apprendi* and its progeny, as most recently demonstrated in *Alleyne*, establish that the jury's fact finding role also extends beyond the trial stage of the criminal prosecution.

III. UNBRANDING THE CONFRONTATION CLAUSE AS ONLY A TRIAL RIGHT

This Part proposes uniform application at felony sentencing of the Sixth Amendment's structurally identical Counsel, Jury Trial, and Confrontation Clauses. I advocate eliminating the "trial-right-only" theory of the Confrontation Clause to allow cross-examination of testimonial statements that are material to punishment and where cross-examination assists in assessing truth.

The trial-right-only rule has endured longer in Confrontation Clause jurisprudence than both Counsel and Jury Trial Clause jurisprudence. Three years after ratification of the Sixth Amendment, a North Carolina court of equity expressed one of the earliest interpretations of the confrontation right in *State v. Webb*:²²² "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."²²³ Over the next century, state and federal courts retreated from *Webb* and confrontation became linked with hearsay rules.²²⁴ By the late twentieth century, confrontation and hearsay rules were generally thought to arise from the same due process origins and serve the same purposes of trustworthiness and reliability.²²⁵

Circuit courts that have ruled that confrontation rights do not apply at felony sentencing²²⁶ rely primarily on *Barber v. Page*²²⁷ and *Mancusi v. Stubbs*.²²⁸ *Barber* succinctly states, "[t]he right to confrontation is

222. 2 N.C. 103 (1 Hayw. 103) (1794).

223. *Id.* at 104.

224. Compare *Johnston v. State*, 10 Tenn. 58, 59–60 (2 Yer. 58) (1821) (holding that because the witness died before trial, reading of deposition testimony into evidence did not violate confrontation principles) and *Mattox v. United States*, 156 U.S. 237, 239–44 (1895) (holding that deceased witness was sufficiently unavailable for trial for purposes of hearsay exception), with *Motes v. United States*, 178 U.S. 458, 471–75 (1900) (holding admission at trial of statements made at preliminary hearing violated the Confrontation Clause due to an insufficient showing of unavailability). See generally *Goldsby v. United States*, 160 U.S. 70, 73 (1895) (holding that the failure to conduct a preliminary examination of the accused did not result in a confrontation violation).

225. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (stating it is a "truism that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' and 'stem from the same roots.'" (internal citations omitted)); see also *Fenner*, *supra* note 21, at 37.

226. See *supra* note 2.

227. 390 U.S. 719 (1968).

228. 408 U.S. 204 (1972).

basically a trial right,"²²⁹ but *Barber* was not a felony sentencing case.²³⁰ Neither was *Mancusi*, although the ruling in that case affected Stubbs's punishment. Stubbs was convicted and sentenced under New York's second offender law based in part on a Tennessee murder conviction that had been overturned due to the denial of effective counsel.²³¹ The New York court admitted witness statements from the prior Tennessee trial over Stubbs's objection.²³² The *Mancusi* Court found that there was sufficient evidence that the testimony of the unavailable Tennessee witness was reliable.²³³ Thus, the overturned Tennessee murder conviction could be counted as the predicate offense under New York's second offender law.

Barber and *Mancusi* rely heavily on the assumption that confrontation has always enjoyed a peaceful coexistence with hearsay rules.²³⁴ *Barber* and *Mancusi* were decided at a time when literal application of the Confrontation Clause was rejected for fear of abrogating most of the hearsay exceptions.²³⁵ Both cases turn on the prosecution's good faith showing of unavailability and defendant's prior opportunity to cross-examine the witness.²³⁶ *Barber* and *Mancusi* upheld the erroneous principle that because confrontation and hearsay were rooted in due process,²³⁷ reliability was a sufficient surrogate²³⁸ for cross-examination at trial.²³⁹ *Ohio v. Roberts* best articulates that principle:

[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.²⁴⁰

229. *Barber*, 390 U.S. at 725.

230. *Barber* objected at trial to the admission of un-cross-examined preliminary hearing testimony. *Id.* at 720–21. The Court granted habeas relief on the ground that state authorities failed to make good faith efforts to obtain the witness. *Id.* at 724–26.

231. *Mancusi*, 408 U.S. at 207–10.

232. *Id.*

233. *Id.* at 216.

234. *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1990). *But see* *California v. Green*, 399 U.S. 149, 155–56 (1970) (warning against the assumption that the overlap between hearsay rules and the Confrontation Clause is complete or the assumption that confrontation rights are nothing more than a codification of hearsay rules and their exceptions).

235. *Roberts*, 448 U.S. at 63.

236. *Id.* at 65–77.

237. *Id.* at 66.

238. Chhablani, *supra* note 10, at 514 (citing John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 206 (1999)).

239. *United States v. Fatico*, 579 F.2d 707, 711–12 (1978).

240. *Roberts*, 448 U.S. at 66.

Like *Barber* and *Mancusi*, *Roberts* established that the Confrontation Clause reflected only a “preference for face-to-face confrontation at trial.”²⁴¹ *Roberts* was arrested and charged with forgery and possession of stolen credit cards.²⁴² At trial, *Roberts* testified that Anita Isaacs, the daughter of the victims,²⁴³ provided the checkbook and credit cards with the understanding that he was allowed to use them.²⁴⁴ Upon questioning by defense counsel at the preliminary hearing Isaacs admitted that she knew *Roberts* and that she permitted *Roberts* to stay at her apartment for several days while she was away, but that she neither gave *Roberts* her parents’ checks and credit cards nor granted him permission to use them.²⁴⁵ Because Isaacs did not appear at trial,²⁴⁶ the prosecution was allowed to admit her preliminary hearing transcript to rebut *Roberts*’s testimony.²⁴⁷ While acknowledging that the Confrontation Clause was intended to limit some hearsay, the *Roberts* Court affirmed *Mancusi* and *Barber* to the extent that where a witness was unavailable, the confrontation requirement was satisfied by hearsay that was reliable and trustworthy.²⁴⁸ The Court found that the prosecution made a good faith showing of unavailability and that *Roberts* had an adequate opportunity to cross-examine Isaacs during the preliminary hearing.²⁴⁹

Roberts, *Mancusi*, and *Barber* are incompatible outliers from the Court’s more recent interpretations of the Confrontation Clause, beginning with *Crawford v. Washington*.²⁵⁰ *Crawford* involved the admission of pre-recorded testimonial statements by a wife against her

241. *See id.* at 63–64 (emphasis added); *see also* *Maryland v. Craig*, 497 U.S. 836, 846, 849 (1990) (reasoning that the primary purpose of confrontation is to ensure reliability and face-to-face confrontation is only a preference).

242. *Roberts*, 448 U.S. at 58.

243. The checks were in the name of Barnard Isaacs and the stolen credit cards belong to both Barnard and his wife, Amy. *Id.*

244. *Id.* at 59.

245. *Id.* at 58. According to the Court, defense counsel neither asked to have Isaacs declared a hostile witness nor requested permission cross-examine her. *Id.*

246. *Id.* at 59–60. Five subpoenas for four different trial dates were sent to Isaacs at her parents’ Ohio residence. *Id.* at 59. Anita was not present upon execution, nor did she contact the court. *Id.* Before admission of the transcript, the trial judge conducted a voir dire of Isaacs’s mother who testified she infrequently received telephone calls and knew of no emergency contact information for her daughter. *Id.* at 59–60.

247. The Court of Appeals reversed, finding that the prosecution failed to make a good faith showing of unavailability. *Id.* at 60. The court of appeals noted the state’s failure to seek Isaacs’s whereabouts for purposes of trial or otherwise determine whether she could be found. *Id.* The Ohio Supreme Court reinstated the trial court’s finding on availability, but held that *Roberts* was not afforded a constitutionally sufficient opportunity to cross-examine Isaacs at the preliminary hearing. *Id.* at 60–61. The Ohio Supreme Court reasoned that increased due diligence would not have procured Isaacs’s attendance at trial because her whereabouts were entirely unknown, but that defense counsel’s questioning at the preliminary hearing did not amount to a cross-examination. *Id.*

248. *Id.* at 65–67.

249. *Id.* at 74–77.

250. 541 U.S. 36 (2004).

husband, the defendant, and against whom she could not testify based on spousal privilege.²⁵¹ The Washington Supreme Court had previously affirmed admission of Mrs. Crawford's recorded statements, satisfied that they were both reliable and trustworthy.²⁵² The *Crawford* Court reversed and reasoned that hearsay rules have strayed too far from confrontation's "original meaning."²⁵³

Crawford recognized two historical inferences about the Founders' understanding of confrontation: first, the Confrontation Clause was intended to prohibit ex parte examinations as evidence against the accused;²⁵⁴ second, preratification testimonial statements of absent witnesses would not have been allowed without a showing of unavailability and a prior opportunity for cross-examination.²⁵⁵ The *Crawford* Court ruled that the due process standard was too unpredictable.²⁵⁶ Confrontation standards were higher: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."²⁵⁷ The Court ultimately found that Mrs. Crawford's statements closely paralleled those the Framers intended to regulate²⁵⁸ and that the admission of those statements violated Mr. Crawford's confrontation rights.²⁵⁹ Noting that "testimonial statements" can be used for purposes other than establishing the truth of the matter asserted,²⁶⁰ the Court

251. *Id.* at 38–40.

252. *Id.* at 41. The Washington Court of Appeals reversed and found that Mrs. Crawford's statements contradicted previous statements made in response to specific questions and that at one point Mrs. Crawford admitted she closed her eyes during the incident for which her husband was on trial. *Id.*

253. *Id.* at 60. *But see* Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 *BROOK. L. REV.* 105, 120–89, 196–206 (2005) (questioning the historical accuracy of *Crawford's* reasoning that cross-examination and unavailability would have been required at the time of the Founding, as well as the use of non-testimonial statements; also arguing that *Crawford* glossed over important distinctions between felony and misdemeanor procedure and that at the Founding, the law had yet to fully develop hearsay rules or their exceptions).

254. *Crawford*, 541 U.S. at 50.

255. *Id.* at 53–54.

256. *Id.* at 60–67 (examining and discussing inconsistencies in the application of hearsay rules in post-*Roberts* confrontation cases).

257. *See id.* at 68–69; *see also id.* at 61 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation . . . [which] . . . reflects a judgment . . . about how reliability can be best determined.")

258. *See id.* at 52 (concluding statements taken by police officers in the course of "interrogations bear a striking resemblance to examinations by justices of the peace in England"); *see also* Fisher, *supra* note 126, at 59 (describing *Crawford* as a "thoroughgoing originalist opinion").

259. *Crawford*, 541 U.S. at 53. The Court found the absence of an oath and the fact that the interrogators were police officers irrelevant. *Id.*

260. *Id.* at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

explicitly limited the scope of the Confrontation Clause to “witnesses against the accused” who “bear testimony.”²⁶¹

Crawford’s interpretation of the Confrontation Clause applied only to testimonial statements; non-testimonial statements did not require more than reliability.²⁶² *Davis v. Washington* clarified the distinction between testimonial and non-testimonial statements.²⁶³ *Davis* involved the admissibility of statements of unavailable witnesses in unrelated criminal trials in Washington state and Indiana. The Washington courts concluded that statements made in response to questions from 911 operator who answered a victim’s call about a domestic dispute were non-testimonial and admissible.²⁶⁴ The Indiana courts disagreed about admission of a victim affidavit that was executed and given to law enforcement officers who responded to a domestic disturbance complaint at the victim’s home.²⁶⁵ *Davis* held that statements were *testimonial* when the circumstances objectively indicated that no ongoing emergency existed and that the primary purpose of the interrogation (or questioning) was to establish or prove past events potentially relevant to a subsequent criminal prosecution.²⁶⁶ Statements are *non-testimonial*, however, when given in the course of an interrogation (or questioning) and where circumstances objectively indicate that the primary purpose of the interrogation is to assist police during an ongoing emergency.²⁶⁷

Crawford makes clear that actual confrontation and cross-examination are the best methods to test the veracity of testimonial statements, and *Davis* demonstrates the fluidity of the testimonial/non-testimonial distinction.²⁶⁸ As confrontation speaks to the method of

261. See *Crawford*, 541 U.S. at 51–52 (internal quotation marks omitted).

262. *Id.* at 68.

263. 547 U.S. 813 (2006).

264. *Id.* at 818–19. In the call, the defendant’s ex-girlfriend provided defendant’s name and accused him of assault. *Id.* at 817–18. The defendant was present during this portion of the call. *Id.* After informing the operator that the defendant left the scene, the victim described the context of the assault and provided other identifying information about the defendant. *Id.* at 818.

265. *Id.* at 819–21. Officers found the victim alone on her front porch; she later gave permission for them to enter the home where the defendant, her husband was waiting in the kitchen. *Id.* at 819. After questioning the victim in her living room, officers provided an affidavit which she filled out and signed. *Id.* at 819–20. One officer remained in the kitchen with the defendant, who attempted to participate in the conversation. *Id.*

266. *Id.* at 822.

267. *Id.*

268. *Id.* (noting that while in *Crawford* a core class of testimonial statements were set forth, it was “unnecessary to endorse any of them, because ‘some statements qualify under any definition’”) (citation omitted). The *Davis* Court reasoned that “[w]ell into the 20th century . . . Confrontation Clause jurisprudence was carefully applied only in the testimonial context.” *Id.* at 824–25 (citations omitted). The testimonial character of the statement separated it from other hearsay that was subject to traditional limitations barring admission, but not the Confrontation Clause. *Id.* at 821. Statements taken by police officers in the course of interrogations were considered to be in the core class of testimonial statements. *Id.*

testing evidence, the rules governing the method of testing could easily apply at felony sentencing, and already leave vast room for judicial discretion.²⁶⁹ The Guidelines place no limitations on the use of information concerning the background, character, and conduct of a convicted defendant.²⁷⁰ Sentencing courts can reach far back in time to determine what conduct relates to the defendant's convicted offense.²⁷¹ This evidence may include statements recorded by probation officers during telephone interviews or signed witness statements gathered by law enforcement or prosecutors.²⁷² Such reports and statements are likely to include hearsay, double hearsay, and triple hearsay.²⁷³ During plea negotiations, defense counsel may be unaware which testimonial statements, if any, will be presented at sentencing. Moreover, there is usually little opportunity to investigate the statement's veracity once its materiality becomes apparent. Despite these serious implications, reliability is the current standard to test information presented at felony sentencing hearings.²⁷⁴

Testing the veracity of testimonial statements that are material to punishment is as compelling at felony sentencing as *Crawford* and *Davis* recognize at trial. Originally, the purpose of trial was to establish the specific offense conduct that merited punishment.²⁷⁵ The purpose of sentencing was to announce the punishment.²⁷⁶ Little judicial discretion

269. *But see* Becker, *supra* note 7, at 2 (warning that the combination of guidelines sentencing and expansive judicial discretion may cause serious adverse consequences to defendants).

270. Ngov, *supra* note 6, at 267 (citing 18 U.S.C. § 3661 (2012)); Becker, *supra* note 7, at 2 n.6.

271. Ngov, *supra* note 6, at 237–38.

272. *See* United States v. O'Meara, 895 F.2d 1216, 1223 (8th Cir. 1990) (“[I]t is a sad but true fact of life under the Guidelines that many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers.”) (Bright, J., concurring in part and dissenting in part); *see also* John S. Dierna, *Guideline Sentencing: Probation Officer Responsibilities and Interagency Issues*, 53 FED. PROBATION 3, 3 (1989). In the federal regime, probation officers play a critical role as the court's independent investigator. *Id.* Probation officers prepare all sections of the presentence report provided to the judge, including the tentative advisory guideline range based on the information gathered during the investigation. *See id.*; *see also* Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992); Becker, *supra* note 7, at 8.

273. Becker, *supra* note 7, at 161.

274. Use of acquitted conduct as a category of “relevant conduct” essentially second-guesses a jury's prior determination about the veracity of testimonial statements. Despite the jury's declaration of “legal innocence,” federal courts permit use of acquitted conduct to increase punishment. Ngov, *supra* note 6, at 258–60 nn.142–50, 284, 287 (discussing impact of acquitted conduct on subsequent proceedings, including probation and parole revocation hearings). Thus, in some cases, “a defendant can be sentenced to the same length of imprisonment that would have been imposed had he actually been convicted of the offense.” *Id.* at 242. *But see* BLACKSTONE, *supra* note 30, at *361–62 (“If the jury therefore find the prisoner not guilty, he is then for ever [sic] quit and discharged of the accusation.”). The prosecution is given a “second bite at the apple” to prove conduct already rejected as punishable, allowing the sentencing judge to ignore the jury's previous findings. Ngov, *supra* note 6, at 261, 267, 288, 291.

275. White, *supra* note 29, at 397.

276. *See id.*; *see also* Becker, *supra* note 7, at 5–6.

existed pre-Founding to influence felony sentencing.²⁷⁷ Modern sentencing procedure developed post-Founding and has shifted fact finding for purposes of fixing punishment into a structured sentencing hearing that occurs independent of the trial.²⁷⁸ Once guilt is rendered, either as a result of a verdict or a plea, sentencing becomes the focus of all parties and an accurate determination of facts that influence the sentence should be of primary importance for all parties.²⁷⁹

Apprendi warned that modern courts must adhere to constitutional principles²⁸⁰ even though the practice of unitary trial and sentencing may have changed. *Alleyne* provides a timely reminder of *Apprendi*'s warning. *Alleyne*'s vigorous (and successful) defense of the brandishing "element" was essentially rendered meaningless.²⁸¹ The Guidelines allowed reconsideration of *Alleyne*'s acquitted conduct, specifically the brandishing charge, as a category of "relevant conduct."²⁸² *Alleyne*'s sentencing court allowed the prosecution to re-allege brandishing as an "enhancement" and therefore prove it by a lower burden. *Alleyne* was punished as if the jury actually found brandishing.²⁸³ For the *Alleyne* Court, the inherent unfairness of these procedures, from a sentencing prospective, were no trivial matter and quite troubling.²⁸⁴ So too is that fact that defense counsel was not allowed use of the most effective tools to re-defend the allegation, namely cross-examination of the testimonial statements that supported the post-trial "finding" that brandishing occurred.

277. Blackstone, *supra* note 30, *378.

278. McMurray, *supra* note 23, at 592; Douglass, *supra* note 28, at 1972; Becker, *supra* note 7, at 6–7 (describing guidelines sentencing as thoroughly fact driving).

279. Becker, *supra* note 7, at 2.

280. *Apprendi v. New Jersey*, 530 U.S. 466, 483–84 (2000). *But see id.* at 518 (describing decision as a return to a status quo that reflected the original meaning of the Sixth Amendment, not as a sharp break from the past) (Thomas, J., concurring).

281. Ngov, *supra* note 6, at 261, 267, 288, 291 (arguing that it would be impossible for innocence to have any significance if the sentencing court is allowed to use acquitted conduct to increase the sentence; that there should be new evidence to warrant or justify a court's reconsideration of acquitted conduct; and that such an outcome is nonsensical and in contravention of recent Supreme Court Jury Trial Clause precedent, including *Apprendi*, *Blakely*, and *Booker*).

282. *Id.* at 267 (citing 18 U.S.C. § 3661 (2012)).

283. *See id.* at 258–60 nn.142–50, 242, 284; *see also, id.* at 287. (discussing impact of acquitted conduct on subsequent proceedings, including probation and revocation hearings). The Court addressed the use of acquitted conduct as a basis for punishment in a pre-*Crawford* per curiam opinion that held use of such information did not violate the Double Jeopardy Clause. *United States v. Watts*, 519 U.S. 148, 155 (1997) (“[A]n acquittal is not a finding of any fact. . . . Without specific jury findings, no one can logically or realistically draw any factual inferences.” (internal quotation marks omitted)). Even if acquittals only mean that the reasonable doubt standard was not met, not that the defendant is actually innocent, reconsideration of acquitted conduct is inherently unfair. Ngov, *supra* note 6, at 242 (citing Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 182–83 (1996)).

284. *See* Ngov, *supra* note 6, at 242 (citing Johnson, *supra* note 283, at 182–83).

Due to the prevalence of plea bargaining, most cases do not result in a trial like in *Alleyne*. As a result, the resolution of the material facts constituting the offense occurs after the plea and usually requires the use of testimonial statements at sentencing.²⁸⁵ In this manner, the sentencing hearing itself becomes quite similar to a trial but results in sentencing by ambush from the defendant's perspective.²⁸⁶ The inability to cross-examine testimonial statements ties defense counsel's hands and leaves the defendant with no meaningful opportunity to test the material evidence that supports the punishment.²⁸⁷ Counsel's ability to marshal and prove the facts, introduce evidence, and generally aid and assist the defendant is also significantly hindered.²⁸⁸ Allowing cross-examination of testimonial statements to prove the sentencing offense lessens the risk that the defendant will be punished based on unreliable evidence.²⁸⁹

This is not to say that confrontation should be required for all felony sentencing information.²⁹⁰ Instead, when determining whether to require cross-examination of testimonial statements at felony sentencing, two key factors are the statement's materiality to punishment and whether cross-examination will assist in assessing veracity or truth. Determining whether testimonial statements would assist in an assessment of truth is unnecessary where material facts about the sentencing offense are admitted by the defendant and entered into the record (or plea agreement) at the time the plea is accepted. At the sentencing, the trial judge can ascertain a defendant's knowing, intelligent, and voluntary acceptance of the statement's veracity in the same manner as the court establishes the knowing, intelligent, and voluntary acknowledgement or waiver of other constitutional rights at sentencing. Where the parties do not agree, cross-examination should be allowed at felony sentencing.

CONCLUSION

An accurate determination of the facts that support the punishment is primary to the integrity of the U.S. criminal justice system. Bifurcated trial and sentencing is a modern felony sentencing development, but constitutional principles must still be obeyed. The fundamental unfairness and prejudice associated with punishing a defendant based on un-cross-examined testimonial statements provides sufficient reason to unbrand

285. JAMES EDWARD BOND, PLEA BARGAINING AND GUILTY PLEAS 156-57 (1975) (noting that sentencing judges rarely make detailed inquiries regarding the factual basis for the plea before accepting it).

286. See Becker, *supra* note 7, at 7-10.

287. See *id.* at 9.

288. See *id.* at 8.

289. *Id.* at 19 (describing the Confrontation Clause as the obvious candidate to ensure basic fairness at sentencing proceedings).

290. In *State v. Hurt*, 616 S.E.2d 910 (N.C. 2005), the North Carolina Supreme Court rejected the trial-right-only theory of confrontation rights and recognized the pivotal role of counsel at modern sentencing.

confrontation as a right that only applies at the trial stage of the criminal prosecution. *Crawford* and *Davis* make clear that actual confrontation and cross-examination are the best methods to assess the veracity of testimonial statements.²⁹¹ Eliminating the “trial-right-only” theory of the Confrontation Clause creates uniformity with the structurally identical Counsel and Jury Trial Clauses. To be sure, confrontation should not be required for all evidence presented at felony sentencing hearings. Two key factors when determining whether to require cross-examination of testimonial statements at felony sentencing are the statement’s materiality to punishment and whether cross-examination will assist in assessing truth. Where both prongs of this inquiry are met, confrontation should be expanded through the sentencing stage of the felony prosecution.

291. See *Davis v. Washington*, 547 U.S. 813, 825–26 (2006); *Crawford v. Washington*, 541 U.S. 36, 69 (2004).
