SENTENCING ENHANCEMENTS UNDER THE FEDERAL SENTENCING GUIDELINES: PUNISHMENT WITHOUT PROOF

MICHAEL R. SCHECHTER*

A mere respect for constituted authority must not be confused with fidelity to law.[1]

INTRODUCTION

Criminal law is an amalgam of moral judgments, policy decisions, and constitutional limitations. The legislature delineates social from anti-social behavior and prescribes punishments according to contemporary social mores and policy considerations. This power of the legislature is conscribed by constitutional requirements of process, whereby the rights of the accused are protected from arbitrary or excessive legislation. In enforcing these standards, the judiciary applies a combination of constitutional analysis, precedent, and legal theory. These elements, once combined, become "the law."[2]

Traditionally, the criminal process identifies a set of morally culpable facts, forces the government to prove beyond a reasonable doubt that these facts are true, and then creates a punishment which turns on the relative moral severity of the proven facts. This process is evident in the Fourth, Fifth,

* B.A., 1988, University of Michigan; J.D., 1993, New York University School of Law (expected). The author would like to thank Professor Burt Neuborne, Peter Zinman, and the staff of Social Change.

1. LON L. FULLER, *The Morality That Makes Law Possible*, *in* THE MORALITY OF LAW 33, 41 (1964).

2. *See* LOUIS FISHER, CONSTITUTIONAL DIALOGUES 231-74 (1988); J. WOODFORD HOWARD, *Judicial Values and Judicial Votes*, *in* COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 159-88 (1981); GERALD ROSENBERG, *The Dynamic and the Constrained Court*, *in* THE HOLLOW HOPE 9-36 (1991); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70-72 (Gerald L. Geison ed., 1983); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298-1302 (1976).

and Sixth Amendments,[3] and in the Supreme Court's rulings in *In re Winship*[4] and *Mullaney v. Wilbur*.[5] The moral severity of the facts proven thus provide a framework that gives criminal punishments their meaning.

These traditional concepts have been challenged by two developments. The first was the creation of affirmative defenses which sever facts relevant to moral guilt from facts relevant to the adjudication of legal guilt. Once distinguished from guilt facts, affirmative defense facts do not need to be proven by the prosecution but must be disproved by the defense during the trial. Affirmative defenses were created to advance modern penology by allowing defendants to experiment with new exculpatory theories.[6] Examples of affirmative defense facts may be facts relating to insanity or emotional disturbance.

The second, and more recent, development is the invention of sentencing factors, which distinguish guilt facts from facts relating to the creation of a meaningful punishment. Sentencing factors are adjudicated in the sentencing phase rather than during the trial. Examples may include participation in organized crime or the dangerousness of the weapon used (e.g., an uzi as opposed to a switchblade). Under the indeterminate sentencing scheme, the relationship between sentencing factors and the net sentence was amorphous since the factors were aggregated and weighed by the moral sensitivities of the judge. With the advent of determinate sentencing schemes, however, sentencing factors became definitive statutory requirements. For instance, a sentencing guideline might force a judge to increase a defendant's sentence from five years to ten years once the prosecution showed that the defendant used an uzi instead of a switchblade during an assault. The prosecution controls the use of sentencing factors such that the power to create sentences is shifted from the judge to the prosecutor.

The fatal flaw in distinguishing sentencing factors from guilt facts is demonstrated by the Federal Sentencing Guidelines' weapons enhancement provision[7] which increases the sentence of a drug trafficker "if a dangerous weapon (including firearm) was possessed."[8] The interpretation of the weapons enhancement provision is controlled by the language in comment 3 of the Guidelines:[9]

> The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant,

3. U.S. CONST. amends. IV, V, VI.
4. 397 U.S. 358 (1970).
5. 421 U.S. 684 (1975).
6. *See* Patterson v. New York, 432 U.S. 197 (1977).
7. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 2D1.1(b) (1991) [hereinafter U.S.S.G.].
8. *Id.*
9. *See* U.S.S.G., ch.1, pt. 4, at 4.

> arrested at his residence, had an unloaded hunting rifle in the closet.[10]

Unlike the uzi-switchblade analysis above which stratifies the moral severity of a fact already proven at trial, this provision deals with the existence or relationship of a new fact — the possession of a weapon. Sentencing factors collapse the elements upon which the criminal process is based and thus create a dangerous hybrid. Rather than trying a defendant for a crime which carries a determined sentence, a defendant is sentenced for a behavior for which she has not stood trial, thereby depriving her of the guarantees of due process incumbent in a trial. The dangers of this methodology become apparent in cases like *United States v. Stewart*,[11] in which the defendant's sentence was enhanced because he kept a weapon at his home — fifteen miles from where the offense occurred.

The introduction of a new fact in the sentencing phase, characterized as a sentencing factor, raises two main questions of use and constitutionality. The first question is what is the requisite standard of proof to show that a weapon was possessed and was used in relation to the base offense? The courts, looking to the intent of the Federal Sentencing Commission, have construed different standards from comment 3. The Ninth Circuit has interpreted "clearly improbable" as shifting the burden of proof and creating an affirmative defense,[12] requiring the defendant to prove that the weapon was not related to the drug trafficking offense. Alternatively, the Eighth Circuit has interpreted comment 3 as establishing the standard of proof to be by a preponderance of the evidence,[13] leaving the prosecution to show that it is more likely than not that a weapon was possessed and that it was used in relation to the base offense. Although not adopted by any court, another argument contends that because of the novelty of sentencing factors, courts should create a more appropriate though less traditional standard of proof, that of clear and convincing evidence.[14]

The second question to consider is at what point a fact characterized as a sentencing factor, or a fact demonstrating that the moral severity of a crime requires a more severe punishment, constitutes a fact pertaining to moral guilt, and therefore triggers the constitutional guarantees of due process. This is perhaps the key question in determining the viability of sentencing factors.

The Supreme Court in *In re Winship*[15] held that the prosecution must prove each element of a crime beyond a reasonable doubt and that the definition of an element is determined by culpability. The difficulty in distinguishing sentencing factors from elements is that both are defined in terms of

10. U.S.S.G. § 2D1.1 cmt. 3.
11. 926 F.2d 899 (9th Cir. 1991).
12. United States v. Restrepo, 884 F.2d 1294 (9th Cir. 1989).
13. United States v. Khang, 904 F.2d 1219 (8th Cir. 1990).
14. *See, e.g.*, Richard Husseini, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as Burden of Proof*, 57 U. CHI. L. REV. 1387 (1990).
15. 397 U.S. 358 (1970).

culpability. The danger in this distinction is that the legislature could characterize substantive offenses as sentencing factors and thus sidestep a defendant's rights to due process. For instance, the legislature could create a general crime of murder; if the prosecution wanted to punish the defendant for premeditation of murder, the prosecution could move for a sentence enhancement in the sentencing phase rather than proving murder in the first degree at trial. The prosecution would achieve the same punishment without ever proving premeditation beyond a reasonable doubt.

This Note analyzes sentencing factors by focusing on the Federal Sentencing Guidelines' weapons enhancement provision. Section I will provide a brief overview of the provision and will then examine how the circuits interpret it and why their interpretations are unconstitutional. Section II will question the constitutionality of sentencing factors in general by looking at the Sentencing Guidelines. This Note concludes that the Guidelines are unconstitutional because their use of sentencing factors punishes defendants for crimes for which they have not been convicted and thus sidestep the constitutional guarantees of due process.[16]

I

APPLICATION OF THE WEAPONS ENHANCEMENT PROVISION

To understand the weapons enhancement provision, it is necessary to have a basic understanding of how the Sentencing Guidelines work.[17] The Guidelines are summarized for the judge in the Sentencing Table which has been reproduced on the following page.[18] In the table, each type of crime is assigned a base offense level which is placed on a vertical axis. The offender's criminal history is evaluated in terms of points, which are placed on a horizontal axis. By reading down the offense level and across the criminal history axis, a judge can locate the range of months to which the offender must be sentenced. This range is essentially mandatory.[19]

16. These issues were not raised in United States v. Mistretta, 488 U.S. 361 (1988) (upholding the Federal Sentencing Guidelines on non-delegation and separation of powers grounds). *See infra* notes 130-37 and accompanying text.

17. For a description of the Guidelines' history, philosophy, and effects, see Stephen H. Glickman & Steven M. Salky, *Criminal Defense in the Era of Sentencing Guidelines*, *in* NATIONAL CONFERENCE ON SENTENCING ADVOCACY 807 (Charles J. Ogletree Jr. ed., 1989); Jon M. Sands & Cynthia A. Coates, *The Mikado's Object: The Tension Between Relevant Conduct and Acceptance of Responsibility in the Federal Sentencing Guidelines*, 23 ARIZ. ST. L.J. 61 (1991); Kathryn A. Walton, *The Federal Sentencing Guidelines: Miracle Cure for Sentencing Disparity (Caution: Apply Only as Directed)*, 79 KY. L.J. 385 (1990-91).

18. U.S.S.G. Sentencing Table. Reprinted with permission from Federal Sentencing Guidelines Manual, 1992 Edition, West Publishing Company.

19. The sections of the Sentencing Table marked A, B, and C represent the ranges where a judge has limited discretion to deviate from the Guidelines. In section A the judge may incarcerate offenders up to six months, in section B, the judge may assign probationary terms, and in section C, the judge may split the sentence or impose non-incarcerative penalties up to one-half of the minimum term. Any sentence of more than ten months must be satisfied by incarceration, less adjustment for good behavior. U.S.S.G. §§ 5B1.1(a)(1), 5B.1(a)(2), 5C1.1(c)(3), 5C1.1(d)(2).

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
A 3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	1–7	2–8	4–10	8–14	12–18	15–21
B 8	2–8	4–10	6–12	10–16	15–21	18–24
C 9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	21–27	24–30
11	8–14	10–16	12–18	18–24	24–30	27–33
12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24	21–27	27–33	33–41	37–46
15	18–24	21–27	24–30	30–37	37–46	41–51
16	21–27	24–30	27–33	33–41	41–51	46–57
17	24–30	27–33	30–37	37–46	46–57	51–63
18	27–33	30–37	33–41	41–51	51–63	57–71
19	30–37	33–41	37–46	46–57	57–71	63–78
20	33–41	37–46	41–51	51–63	63–78	70–87
21	37–46	41–51	46–57	57–71	70–87	77–96
22	41–51	46–57	51–63	63–78	77–96	84–105
23	46–57	51–63	57–71	70–87	84–105	92–115
24	51–63	57–71	63–78	77–96	92–115	100–125
25	57–71	63–78	70–87	84–105	100–125	110–137
26	63–78	70–87	78–97	92–115	110–137	120–150
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–Life
38	235–293	262–327	292–365	324–405	360–Life	360–Life
39	262–327	292–365	324–405	360–Life	360–Life	360–Life
40	292–365	324–405	360–life	360–Life	360–Life	360–Life
41	324–405	360–life	360–life	360–Life	360–Life	360–Life
42	360–life	360–life	360–life	360–Life	360–Life	360–Life
43	life	life	life	Life	Life	Life

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

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For example, the base offense level for trafficking 210 kg of hashish is 32.[20] If the defendant has a criminal history equivalent to two points, her sentence range would be from 135 months (11 ¼ years) to 168 months (14 years).[21] The weapons enhancement provision increases the base offense level

20. *Id.* § 2D1.1(c).

21. *See id.* § 4A1.1(b).

two points if the defendant possesses a weapon in relation to a drug trafficking offense. The provision states that, "If a dangerous weapon (including a firearm) was possessed during commission of the offense, increase by 2 levels."[22] Thus, if the defendant described above also possessed a weapon pursuant to section 2D1.1(b), her base offense level would be enhanced two points, from 32 to 34. The defendant's new sentence range would be from 168 months (14 years) to 210 months (17 ½ years) representing a minimum increase of 33 months (2 ¼ years) and a maximum increase of 41 months (3 ½ years).

A. The Burdens of Proof Interpretation: Affirmative Defense

The United States Constitution requires that the prosecution prove, beyond a reasonable doubt, each element of the crime for which a defendant is to be punished.[23] The elements of a crime are those which enhance the culpability of the offense. The burden of proof for facts which are not an element of the offense can be assigned to the defendant as an affirmative defense, thus shifting both the burdens of production and persuasion to the defendant.[24] Thus, the court assumes that a fact is true unless the defense shows that the fact is more likely than not untrue.[25] Affirmative defenses are appropriate when the defense wishes to prove the existence of an exculpatory circumstance. For instance, after the prosecution has proven that a defendant is legally guilty of murder, the statute may allow the defendant to show that she acted in self-defense. If she could make such a showing, the murder would be considered legally justified because the defendant acted to save her own life.[26]

An affirmative defense is unconstitutional if it forces the defendant to disprove an element of the crime.[27] Otherwise, the State could assume a defendant's guilt and require her to prove her innocence. For example, if a defendant is accused of driving recklessly and under the influence of alcohol, the State cannot assume that the defendant was drunk and make her prove that

22. *Id.* § 2D1.1(b). Following each section is a commentary, designed to help the courts interpret the Guidelines. Section 2D1.1 cmt. 3, the only commentary pertaining to the weapons enhancement provision, reads, "[t]he enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." *See also* Richard Husseini, *supra* note 14, at 1387-88; Stephen Breyer, *Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

23. Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); *In re* Winship, 397 U.S. 358 (1970).

24. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE §§ 346, 987 (Edward W. Cleary ed., 1984). The burden of production is the initial burden of producing evidence sufficient to allow a reasonable jury to decide the case in favor of the moving party. The burden of persuasion is the amount of evidence that must be presented in order for the judge or jury to find the facts in question.

25. Anthony J. Dennis, *Fifth Amendment — Due Process Rights at Sentencing*, 77 J. CRIM. L. & CRIMINOLOGY 646, 661 (1986).

26. *Mullaney*, 421 U.S. 684; *see also* MCCORMICK, *supra* note 24, § 346.

27. *Winship*, 397 U.S. 358.

she was sober. To be convicted, the State must prove beyond a reasonable doubt both that she drove recklessly and that she was drunk.

The Ninth Circuit has interpreted 'clearly improbable' in comment 3 of the weapons enhancement provision as shifting the burden of proving the relationship of the weapon to the defendant, thus creating an affirmative defense.[28] The Ninth Circuit bases its affirmative defense interpretation upon the legislative construction of comment 3.[29] The holding rests on three premises: (1) the weapons enhancement provision defines a sentencing factor, not an element of a crime; (2) proof that the weapon was unrelated to the crime is a mitigating circumstance (thus the enhancement is not an aggravating circumstance); and (3) the commentary provides sufficient evidence of legislative intent to warrant the creation of an affirmative defense.[30] Under this interpretation, a defendant's sentence will be enhanced unless she affirmatively proves that the weapon was not related to the base offense.[31] To sustain its constitutionality, this interpretation maintains that proving that the weapon was not related to the offense is a mitigating circumstance. Such an interpretation, though, denies that possessing a weapon while trafficking in drugs is more culpable or that enhancing the punishment demonstrates that the factors are aggravating circumstances. Instead, the courts hold that proving that the weapon was unrelated to the base offense is a mitigating circumstance. This view, however, ignores the defendant's constitutional rights and the traditions of due process.

The difficulty in determining whether or not an element is aggravating or mitigating depends, in part, on semantics. If the legislature defines an offense as having two elements, possession and relation, then both of those elements must be proven by the prosecution. However, if the legislature defines the offense as having only one element, possession, then absence of a relationship appears to be a mitigating circumstance. To prevent the legislature from whittling away due process protections through semantics, the Supreme Court has ruled that elements of a crime are determined, not by how the legislature defines the offense, but by examining the culpable nature of the act.[32]

An act is considered more culpable if it represents an increased risk of harm to society, leads to an impairment of the defendant's personal liberty, or stigmatizes the defendant.[33] In *Mullaney v. Wilbur*,[34] a Maine statute defined murder as the unlawful killing of a human with malice aforethought while providing for a lesser crime if the defendant could prove that she acted in the heat of passion. The Supreme Court held this affirmative defense unconstitu-

28. *See, e.g.*, United States v. Villarreal, 920 F.2d 1218 (5th Cir. 1991); United States v. Heldberg, 907 F.2d 91 (9th Cir. 1990); United States v. Restrepo, 884 F.2d 1294 (9th Cir. 1989).

29. *See Restrepo*, 884 F.2d 1294.

30. *Id.*

31. MCCORMICK, *supra* note 24, at 987-88.

32. *In re* Winship, 397 U.S. 358, 696 (1970).

33. Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975).

34. *Id.*

tional because it forced the defendant to disprove a factor which heightened the culpability of the offense. The Court held that,

> Criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less blameworthy . . . they are subject to substantially less penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the [defendant's interests in due process of law].[35]

Elements affecting the degree of criminal culpability, or even elements "that would stigmatize the defendant and that might lead to a significant impairment of personal liberty" are considered to be elements of the crime and must be proved by the prosecution beyond a reasonable doubt.[36]

In contrast, *Patterson v. New York*[37] involved a New York law which defined second degree murder as having an intent to kill a specific person and causing that person's death.[38] Once the prosecution proved these elements beyond a reasonable doubt, the statute allowed for an affirmative defense that the defendant acted "under the influence of extreme emotional disturbance."[39] The Supreme Court upheld the New York law because the law did not "negative any facts of the crime which the State is to prove in order to convict of murder."[40] In other words, the lack of extreme emotional disturbance is not an element of the mens rea for second degree murder and thus has no bearing on culpability.[41]

The Ninth Circuit's burdens of proof interpretation relies heavily upon

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35. *Id.* at 697-98.

36. *Id.* at 698; *see also* Stephen Saltzburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 AM. CRIM. L.R. 393, 409 (1983). Saltzburg theorizes that:

> [I]t probably would be constitutional, even if unwise, to punish a person who possessed drugs as severely as one who distributed them. Since there would be no distinction between the two crimes, proof of distribution would not increase the culpability of the offense, and there would be no *Mullaney* conflict.

Id.

37. 432 U.S. 197 (1977).

38. N.Y. PENAL LAW § 125.25 (McKinney 1975). The New York legislature defined two elements of second degree murder: (1) intent to cause the death of another person; and (2) causing the death of another person or of a third person.

39. *Patterson*, 432 U.S. at 198. Proving extreme emotional disturbance would be sufficiently exculpatory to reduce the offense to manslaughter. *E.g.*, *id.* at 201.

40. *Id.* at 207.

41. This is important in relation to insanity defenses. Twenty-three jurisdictions consider insanity to be an affirmative defense. Twenty-eight jurisdictions and the federal government assume a defendant is sane, but once evidence of insanity is introduced, the burden shifts to the prosecution to prove the defendant is sane beyond a reasonable doubt. *See* Commonwealth v. Kostka, 350 N.E.2d 444 (1976); *see also* Dennis, *supra* note 25; Saltzburg, *supra* note 36, at 409-10; Jonathan E. Scharff, *Federal Sentencing Guidelines — Due Process Denied*, 33 ST. LOUIS U. L.J. 1049, 1060 (1989).

McMillan v. Pennsylvania[42] to support its view that the federal weapons enhancement provision creates an affirmative defense. In *McMillan*, the Supreme Court upheld Pennsylvania's version of a weapons enhancement provision which explicitly created an affirmative defense. *McMillan*, however, has a narrow holding specific to Pennsylvania's weapons enhancement provision which operates very differently from the federal provision. Thus, the reasoning which led the Court to uphold the Pennsylvania provision does not apply to the federal provision.

The Pennsylvania Mandatory Minimum Sentencing Act requires that a defendant who has been convicted of an enumerated felony and who "visibly possessed a firearm" during the commission of an offense must be sentenced to at least five years in prison.[43] The provision thus raises the floor but not the ceiling of the defendant's potential sentence. If an offender faces a prison term of three to eight years, evidence that he visibly possessed a firearm would narrow this range to five to eight years imprisonment. Unlike the Federal Sentencing Guidelines, the Pennsylvania provision affects the minimum and not the maximum sentence, and therefore does not increase the stigma or culpability of the sentence.

This reasoning narrowly convinced the Supreme Court to uphold the Pennsylvania provision.[44] Justice Rehnquist wrote for the majority that *Pat-*

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42. 477 U.S. 79 (1986).

43. *Id.* at 81 (citing 42 PA. CONS. STAT. § 9712 (1982)):

> (a) Mandatory Sentence — Any person who is convicted in any court of this Commonwealth of murder in the third degree, voluntary manslaughter, rape, involuntary deviant sexual intercourse, robbery . . . or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.
>
> (b) Proof at Sentencing — Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

The statute then specified the authority of the court in sentencing, provided for appeals, and defined firearms.

44. McMillan and several other defendants were convicted of one of the enumerated felonies, but the sentencing judges found the Act unconstitutional and imposed lesser sentences. The cases were consolidated and reversed by the Pennsylvania Supreme Court because (1) the Act did not upgrade the offense but merely limited the judge's discretion, (2) the Act was consistent with *Patterson* and *Mullaney* since it did not increase the culpability of the offense, (3) the legislature expressly reasoned and weighed the issues involved, and (4) the state's interests in deterring the illegal use of firearms were compelling enough to diminish the defendant's liberty interests at the sentencing phase of the criminal procedure. The Supreme Court upheld the Act by a 5-4 vote. *See McMillan*, 477 U.S. at 81-86; Michael Kopech, *Casenotes: Criminal Law — Fourteenth Amendment Due Process Clause — Preponderance Standard Satisfies Due Process Where State Makes Visible Possession of Firearm Sentencing Factor Rather Than Component of Crime*, 18 ST. MARY'S L.J. 543 (1986); Scharff, *supra* note 41, at 1059-60.

terson was controlling, not *Mullaney*, because the defendants were subject to the same maximum sentence. Since the possession of the weapon cannot enhance the severity of the punishment, "[the enhancement] operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it."[45]

Justice Stevens, in a dissenting opinion, wrote that the Pennsylvania provision did increase the culpability of the crime since the defendant "may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[46] He held:

> That fact does not . . . minimize the significance of a finding of visible possession of a firearm whether attention is focused on the stigmatizing or punitive consequences of that finding. The finding identifies conduct that the legislature specifically intended to prohibit and to punish by a special sanction . . . . The constitutional significance of the special sanction cannot be avoided by the cavalier observation that it merely "ups the ante" for the defendant.[47]

Justice Stevens placed special emphasis on the stigma a finding of guilt can create. This stigma, coupled with the narrowed sentencing range, is equivalent to enhancing the culpability of the offense. His dissent concluded that the Pennsylvania provision unconstitutionally shifts the burden of proof of an element of the offense to the defendant. The majority's rejection of his argument demonstrates its reliance on culpability being defined, not by a court's findings per se, but by whether those findings led to an actual impairment of the defendant's liberties. In *McMillan*, the findings did not increase the defendant's expected punishment, so it did not enhance the culpability.

A broad reading of *McMillan* has been used to promote the argument that an affirmative defense is constitutional when applied to the Federal Sentencing Guidelines' weapons enhancement provision.[48] This reading, though, is too broad. The *McMillan* majority specifically reaffirmed *Winship*[49] and *Mullaney*[50] in upholding the Pennsylvania statute because it raised the floor, but not the ceiling of the sentencing range.[51] The *McMillan* Court suggests in dicta that had the ceiling of the range been raised, the culpability would have

45. *Id.* at 86, 88. Rehnquist also noted that (1) the legislature clearly and specifically expressed its intentions, *id.* at 85-86; (2) the State has a compelling interest in defining crime and prescribing penalties as it did, *id.* at 86; and (3) the preponderance standard satisfies the due process clause in the sentencing phase. *Id.* at 91-93.

46. *Id.* at 97 (Stevens, J., dissenting) (quoting *In re* Winship, 397 U.S. 358, 363-64 (1970)).

47. *McMillan*, 477 U.S. at 1034 (Stevens, J., dissenting).

48. *See, e.g.*, United States v. Restrepo, 884 F.2d 1294 (9th Cir. 1989).

49. 397 U.S. 358 (1970) (holding that a defendant cannot be forced to disprove an element of an offense).

50. 421 U.S. 684 (1975) (holding that an act which increases the culpability of the offense, defined as representing an increased risk of harm to society, leading to an impairment of the defendant's personal liberties, or stigmatizing the defendant, is considered aggravating and the defendant cannot be forced to disprove it); *see* notes 33-36 and accompanying text.

51. *McMillan*, 477 U.S. at 85-89.

been increased and the affirmative defense would have been unconstitutional.[52] Since the Federal Sentencing Guidelines' weapons enhancement provision raises both the floor and the ceiling of the sentencing range, *McMillan* cannot be used to justify the federal weapons enhancement provision.

The Ninth Circuit also bases its affirmative defense interpretation on the theory that not enhancing a sentence is tantamount to a mitigating circumstance. In *United States v. Restrepo*,[53] the defendant was not charged with, tried for, nor proved guilty of possessing a weapon in connection with a drug trafficking offense.[54] At sentencing though, his sentence was enhanced two levels for possession of a firearm.[55] The appellate court affirmed the sentence and held that if the defendant proved that the weapon was unrelated to the offense, then the enhancement would not apply.[56] The court wrote, "[t]he Commentary, therefore, creates an exception to the terms of the Guidelines, not a presumption that a connection existed."[57] The defendant's sentence range increased from 41-51 months to 51-63 months, more than would have been allowed had the enhancement not applied.[58]

The *Restrepo* court's interpretation has been followed by the Ninth, Sixth, and Fifth Circuits.[59] In *United States v. McGhee*,[60] the Sixth Circuit distinguished the Federal Sentencing Guidelines from the Maine law in *Mullaney* on the grounds that the Guidelines are "a factor bearing on the extent of punishment, while [the Maine law] is more appropriately categorized as one of the elements of the substantive offense."[61] The conclusion of the *McGhee* and *Restrepo* courts that not enhancing a sentence is a mitigating circumstance and

52. *Id.* (finding the statute valid since the section "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it . . . . [It] merely 'ups the ante' for the defendant."); *see also* United States v. Hawkins, 811 F.2d 210, 220, 224 (3d Cir. 1987) (holding Armed Career Criminal Act an enhancement provision and not a separate federal offense); *cf.* United States v. Brewer, 841 F.2d 667, 676 (6th Cir. 1988) (Krupansky, J., dissenting) (reversing sentence which increased level of punishment beyond that permitted for the crime charged in the indictment).

53. 884 F.2d 294 (9th Cir. 1989).

54. The prosecution did not prove at trial, beyond a reasonable doubt, either that Restrepo possessed the gun or that the gun was related to the drug offense. *Id.*

55. *Id.* at 1295.

56. *Id.* at 1296.

57. *Id.*

58. *Id.* at 1295.

59. *See* United States v. Stewart, 926 F.2d 899 (9th Cir. 1991) (enhancing defendant's sentence for possession of a firearm in relation to the offense even though the weapon was possessed at his home fifteen miles away); United States v. Villarreal, 920 F.2d 1218 (5th Cir. 1991) (enhancing defendant's sentence even though he was arrested outside of his apartment and the weapon was inside); United States v. Foreman, 905 F.2d 1335 (9th Cir. 1990) (upholding enhancement under U.S.S.G. § 3B1.3); United States v. Heldberg, 907 F.2d 91 (9th Cir. 1990) (upholding enhancement for an unloaded firearm locked in a briefcase in a trunk connected to a drug trafficking offense); United States v. McGhee, 882 F.2d 1095 (6th Cir. 1989) (placing on the defendant the burden of proving that it was "clearly improbable" that the weapon was connected to the drug trafficking offense does not violate due process).

60. 882 F.2d 1095 (6th Cir. 1989).

61. *Id.* at 1098.

therefore the affirmative defense interpretation is constitutional rests on two fallacies: (1) that the State is punishing the defendant for possessing a weapon, as opposed to possessing a weapon in *relation* to a drug trafficking offense, and (2) that proving that the weapon was not related to the offense is a mitigating circumstance, as opposed to an aggravating factor.[62]

The Sentencing Commission punishes possession of a gun while drug trafficking because the *use* of a weapon creates an increased risk of harm to society.[63] The *Restrepo* and *McGhee* courts, through semantics, define the elements of the enhancement as possession only, ignoring the facts of relationship to the underlying offense.[64] The result of this interpretation is to punish a defendant for the mere possession of a gun whether or not she used the weapon in relation to the offense. Thus, if a drug trafficker owns a weapon, she has an incentive to use it in relation to the offense since she will receive the same penalty regardless. For instance, in *United States v. Stewart*,[65] a defendant's sentence was enhanced even though he left his gun at home, fifteen miles from where the drug trafficking offense took place.[66]

The *Restrepo* and *McGhee* courts also held that proving the absence of a relationship between the weapons possession and the base offense is a mitigating factor.[67] Imagine though, that the enhancement was defined as a separate offense: drug trafficking in the first degree if a weapon were possessed, and drug trafficking in the second degree if it were not. This would resemble assault, which is generally divided between simple assault and assault with a deadly weapon. Because using a weapon while attacking a person is more dangerous and poses a greater risk of harm to others than attacking a person without a weapon, assault with a deadly weapon is considered more culpable than simple assault.[68] Proof that the defendant used the weapon, moreover, is considered an aggravating circumstance. This scheme makes sense for the weapons enhancement provision because, like other use-related crimes, the act is intuitively more culpable when one uses a weapon to promote the crime.[69]

Another useful analogy is the Model Penal Code's distinction between

62. *Id.* at 1097-99.

63. U.S.S.G., ch.1, pt. 4 cmt. 3.

64. United States v. Restrepo, 884 F.2d 1294, 1294-99 (9th Cir. 1989); *McGhee*, 882 F.2d at 1097-99.

65. 926 F.2d 899 (9th Cir. 1991).

66. *See* Franklin H. Marshall, *Diversion and Probation, in* THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE 153, 162 (Dean J. Champion ed., 1989); *see also* Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357 (1990); Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

67. *Restrepo*, 884 F.2d at 1295-99; *McGhee*, 882 F.2d at 1098-99.

68. *See* MODEL PENAL CODE §§ 211.1-3 (1962).

69. *But see Patterson*, 432 U.S. 197 (1977) (upholding shifting to the defense the burden of proving a justifying circumstance where the crime of murder had been established). It is not necessarily illegal to possess a gun, but it is illegal to use a gun in connection with committing a crime. Thus it is the relation between possession and the criminal activity that is to be criminalized.

aggravating and mitigating circumstances for criminal homicide. The list of aggravating circumstances includes: creating a great risk of death to many persons; a previous conviction for murder; and committing a murder for pecuniary gain.[70] The mitigating factors include: lack of criminal history, mental or emotional disturbance, duress, and moral justification. Under the Model Penal Code's definition, owning a weapon but not using it in relation to a drug trafficking offense would not be considered a mitigating circumstance.[71]

The federal weapons enhancement provision raises the ceiling of the defendant's maximum sentence, and thus "gives rise to both a special stigma and a special punishment."[72] By distinguishing the sentences of those who use and do not use weapons in relation to their drug trafficking, but by not requiring the prosecution to prove the relationship, the State denigrates the defendant's due process rights.[73] The sentence enhancement is justified by the increased risk of harm to society posed by the use of weapons during drug crimes, but the court then ignores the use in order to shift the burden of proof to the defendant. The enhancement, though, raises both the floor and the ceiling sentence ranges, increases the culpability, and thus cannot be made into an affirmative defense under the standards set forth in *Winship* and *Mullaney*. Therefore the burdens of proof interpretation is unconstitutional.

B. The Standards of Proof Interpretation: The Preponderance Standard

The Eighth Circuit has rejected the affirmative defense interpretation and instead treats the weapons enhancement provision as creating a permissive inference. In *United States v. Khang*,[74] the defendant's sentence was enhanced even after the prosecution conceded that the weapon had no relationship to the base offense in a plea bargain agreement.[75] The Eighth Circuit Court of Appeals reversed[76] on two grounds: (1) the sentence enhancement is an aggravating circumstance, thus it cannot be an affirmative defense, and (2) the sentencing phase is adversarial, so "the burden of proof falls on the party asserting the sentence adjustment."[77] The court based its opinion in part on

70. MODEL PENAL CODE § 210.6(3).

71. *Id.* § 210.6(4).

72. McMillan v. Pennsylvania, 477 U.S. 79, 96 (1986) (Stevens, J., dissenting); *see also* Mullaney v. Wilbur, 421 U.S. 684, 697-8 (1975).

73. *Mullaney*, 421 U.S. at 697-9.

74. 904 F.2d 1219 (8th Cir. 1990).

75. The judge stated that, "The court cannot say that a connection between the gun and the offense is 'clearly improbable'." *Id.* at 1221 (quoting from Sentencing Transcript).

76. The *Khang* court concluded that "[B]ecause of the aggravating nature of U.S.S.G. § 2D1.1(b)(1), because courts strictly construe penal statutes, and because of Congress' intent in developing the Guidelines and the Specific Offense Characteristics, the government must establish a relationship between a defendant's possession of the firearm and the offense which he or she committed." *Id.* at 1223.

77. *Id.* at 1222; *see also* United States v. Wilson, 884 F.2d 1355, 1356 (11th Cir. 1989) ("The government has the burden of proving the applicability of sections which would enhance the offense level and the defendant has the burden of proving the applicability of guideline sections which would reduce the level.").

the accepted notion that a defendant may not have a right to any specific sentence, but she does have a right to be sentenced "in accordance with the applicable law and based upon reliable evidence."[78] Five other circuits have concurred with this interpretation.[79]

This standard of proof interpretation views comment 3, not as shifting the burden of proof to the defense, but as establishing the standard of proof to that of a preponderance of the evidence.[80] The interpretation allows a permissible inference that the weapon was used in relation to the offense.

A permissible inference, or presumption, recognizes the natural inference which can be drawn between two facts, and thus is less imposing than an affirmative defense. If a crime has three elements, A, B, and C, a presumption provides that C can be inferred from proof of A and B, at least provisionally.[81] Unlike an affirmative defense, a presumption shifts only the burden of production to the defense. For instance, if a gun is found in the front seat of defendant's car (A), and the defendant is in the car (B), the court may infer that the defendant possessed the gun (C).[82] Thus, C can be established by proving A and B, and showing that A and B are rationally related to C.[83] Once the defense introduces evidence which refutes the presumption, the presumption vanishes, like a bursting bubble, and the prosecution can no longer rely on the inference but must prove C.[84]

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78. *Id.* at 1222 n.5.

79. *See, e.g.*, United States v. Kirk, 894 F.2d 1162 (10th Cir. 1990); United States v. McDowell, 888 F.2d 285 (3d Cir. 1989); United States v. Wilson, 884 F.2d 1335 (11th Cir. 1989); United States v. Urrego-Linares, 879 F.2d 1234 (4th Cir.), *cert. denied*, 493 U.S. 943 (1989); United States v. Lee, 818 F.2d 1052 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987); *see also* United States v. Nash, 929 F.2d 356 (8th Cir. 1991); United States v. Turpin, 920 F.2d 1377 (8th Cir. 1990).

80. United States v. Khang, 904 F.2d 1219 (8th Cir. 1990); *Kirk*, 894 F.2d 1162; *McDowell*, 888 F.2d 285; *Wilson*, 884 F.2d 1335; *Urrego-Linares*, 879 F.2d 1234; *Lee*, 818 F.2d 1052; *see also Nash*, 929 F.2d 356; *Turpin*, 920 F.2d 1377.

The issue of the appropriate standard of proof required is beyond the scope of this Note. For a discussion, see United States v. Restrepo, 946 F.2d 654 (9th Cir. 1991); William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 517-520; Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665 (1987).

81. MCCORMICK, *supra* note 24, § 346, at 988.

82. County Court of Ulster v. Allen, 442 U.S. 140 (1979).

83. MCCORMICK, *supra* note 24, § 346, at 988.

84. A presumption is constitutional if (1) the inference is rationally based, (2) the evidence is sufficient to prove the inferred fact, (3) it is fair to presume the fact true, and (4) the creation of the presumption is justified. MCCORMICK, *supra* note 24, § 347; Leslie J. Harris, *Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*, 77 J. CRIM. L. & CRIMINOLOGY 308, 315-16 (1986); *see also* United States v. Jessup, 757 F.2d 378 (1st Cir. 1985); United States v. Fatico, 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd on other grounds*, 579 F.2d 707 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980).

The Federal Rules of Evidence favor the Thayer presumption (a bursting bubble presumption). For a discussion of the different types of presumptions, see Rose v. Clark, 478 U.S. 570 (1986); Francis v. Franklin, 471 U.S. 307 (1985); United States v. Jessup, 757 F.2d 378 (1st Cir. 1985) (presumption for preliminary hearing).

The Supreme Court held in *Tot v. United States*[85] that the prosecution must show a rational relationship between the base facts and the presumed fact in all criminal cases.[86] For the relationship to be considered "rational," it must be either (1) naturally inferred from the facts, or (2) supported by evidence sufficient to justify its use (a sufficiency test). A naturally inferred fact is one which confirms inferences based on common sense. For example, in *United States v. Gainey*,[87] the Supreme Court held that presence at a still was rationally related to the inference that the defendant was participating in the distillery business. In contrast, the Court held in *United States v. Romano*[88] that it was not constitutional to infer possession of an illegal still from mere presence at the site of a still.[89]

A sufficiency test weighs the available evidence to determine if the use of the presumption is justified. In *United States v. Leary*,[90] the Court found unconstitutional a presumption that the defendant knew that marijuana was imported since the presumed fact did not "flow from the proved fact on which it is made to depend."[91] The following year, in *Turner v. United States*,[92] the Court found that so little heroin was domestically produced that it was constitutional to presume that the defendant knew that the heroine was imported.[93] Finally, in *Barnes v. United States*[94] the Court held that the prosecution must show "in light of present-day experience"[95] that the presumed fact flows from the base facts beyond a reasonable doubt.

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85. 319 U.S. 463 (1943).

86. *Id.* at 464-65. For instance, if the prosecution proved that the defendant owned a bike, one could not infer that she sold bikes since the fact that one owns a bike is not rationally related to an inference that one is selling bikes. If, however, the defendant owned a bike store, then the presumption would be rationally related to the facts.

87. 380 U.S. 63, 67-8 (1965) (stating that "the implications of seclusion only confirm what folklore teaches — that strangers to the illegal business rarely penetrate the curtain of secrecy").

88. 382 U.S. 136 (1965).

89. The Court distinguished *Romano* from *Gainey* because presence could support the broad inference of participation in the activity; but presence could not support the inference of the narrower charge of possession, custody, and control of the activity. *Id.* at 140 ("Count 1 of this indictment charges 'possession, custody, and control' of an illegal still as a separate and distinct offense. Section 5601(a)(1) obviously has a much narrower coverage than has section 5601(a)(4) with its sweeping prohibition of carrying on a distilling business.").

90. 395 U.S. 6 (1969).

91. *Id.* at 36. The Court held that, "one must have circumstantial data regarding the beliefs of marijuana users generally [and] about the source of the drug they consume." *Id.* at 37-38. Declining to accept Congress' conclusions outright, the Court independently reviewed the evidence, and estimated that approximately 50% of the marihuana sold in the United States was imported, "It would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marihuana." *Id.* at 53; *see also* Peter Bewley, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 346 (1970); George Christie & Kenneth Pye, *Presumptions and Assumptions in Criminal Law: Another View*, 1970 DUKE L.J. 919, 922.

92. 396 U.S. 398 (1970).

93. *Id.* at 415-24.

94. 412 U.S. 837 (1973).

95. *Id.* at 844-45. The Court held that even impressive historical inferences must pass due process standards "in light of present-day experience." *Id.* at 843-5.

In *County Court of Ulster County v. Allen*,[96] the Court held that a permissive inference could be proved by a preponderance standard because it is accompanied by other evidence in the record and leaves "the trier of fact free to credit or reject the inference."[97] This means that the presence of a permissive inference merely tells the factfinder that there is a relationship between the base facts and the presumed fact. The factfinder is free to disregard this inference if she so chooses. A permissive inference does not satisfy the prosecution's persuasion burden and so the defendant does not need to refute the inference. Therefore, there is little risk that the defendant will be convicted on the basis of the inference alone.[98]

The Court also discussed, in dicta, a mandatory presumption which would satisfy the production burden and force the defendant to introduce evidence to refute the presumption.[99] It is uncertain what the Court means by a mandatory presumption, though, since due process would forbid a presumption satisfying the persuasion burden in a criminal case.[100]

The standards of proof interpretation ignores the differences between the procedures in the trial phase and in the sentencing phase. The Sentencing Guidelines shift the power to set the sentence from the judge to the prosecutor and are mandatory in nature. The judge's discretion whether or not to accept the evidence of a weapons possession is therefore shackled by the mandatory nature of the Guidelines. The permissive inference thus acts de facto like a mandatory presumption, which is not allowed in criminal law.

The mandatory nature of the Sentencing Guidelines leaves the judge with no discretion to enhance the sentence.[101] In the Sentencing Reform Act of 1984,[102] Congress ordered judges to observe the Sentencing Guidelines. In the

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96. 442 U.S. 140 (1979).

97. *Id.* at 157.

98. *Id.* at 167 ("The prosecution may rely on all of the evidence in the record to meet the reasonable-doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. . . . It need only satisfy the test described in *Leary*.").

99. *Id.* at 157.

100. A court cannot instruct a jury to return a directed verdict in a criminal case. *See* United States v. Jessup, 757 F.2d 378 (1st Cir. 1985); United States v. Fatico, 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd on other grounds*, 579 F.2d 707 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980). In discussing mandatory presumptions, the *Allen* Court wrote:

> "[I]t may affect not only the strength of the 'no reasonable doubt' burden but also the placement of burden; it tells the trier [of fact] that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." 442 U.S. at 167.

Once the prosecution proves the relationship beyond a reasonable doubt, the burden shifts such that the defense is compelled to refute the presumption; the defendant is faced with a greater risk of being convicted on the basis of the presumption alone.

101. While the Guidelines specify that the judge may deviate from the Guidelines, this is only in exceptional cases, and such practice is subject to appeal. *See supra* notes 17-22 and accompanying text.

102. 18 U.S.C. § 3553(b) (1988).

introduction to the Guidelines, the Sentencing Commission reminds judges that the Guidelines are mandatory.[103] The only time a judge may depart from the Guidelines is when the judge finds "an atypical case, one to which a particular guideline linguistically applies, but where conduct significantly differs from the norm."[104] Such departures must also be justified by the record.[105]

Judges have responded by accepting their role as lacking discretion in sentencing decisions.[106] Justice Scalia wrote that, "A judge who disregards [the Guidelines] will be reversed."[107] An appellate court held that, "Though not formally binding, the Sentencing Commission's notes are normally entitled to 'substantial weight' when we interpret the guidelines."[108] Once the prosecution introduces evidence of the weapons possession, the judge is not free to disregard the inference of relationship but must give the inference substantial weight. Most often, the judge acts as an actuary to calculate the enhancement of the sentence, unless the defense shows cause to deviate from the Guidelines.[109] In fact, several judges have resigned, protesting that their roles had become actuarial and not judicial.[110]

This restricted discretion on the judges puts great pressure on the defense to refute the presumption. The burden of proof thus shifts de facto to the defense and operates as a mandatory presumption. Over time, it will become the norm to enhance a sentence unless the defense refutes the presumption. The standards of proof interpretation is thus unconstitutional since it restricts the discretion of the factfinder to disregard the permissive inference.[111]

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103. U.S.S.G. ch.1, pt. A(2), intro.

104. *Id.* at pt. A(4)(b), intro.

105. *Id.*

106. *See* Mistretta v. United States, 488 U.S. 361 (1989) (finding that the Guidelines are a mandatory system which binds judges and courts in their exercise of passing sentences); United States v. Green, 952 F.2d 414 (D.C. Cir. 1991), *petition for cert. filed*, (Mar. 26, 1992) (holding that the commission expressly provided for the Guidelines to be mandatory, thus the judge has no discretion); United States v. LaFleur, 952 F.2d 1637 (9th Cir. 1991) (holding that sentences are mandatory); United States v. Guajardo, 950 F.2d 203 (5th Cir. 1991); United States v. Martinez, 950 F.2d 222 (5th Cir. 1991), *petition for cert. filed*, (Dec. 17, 1991); United States v. Cappas, 949 F.2d 1465 (7th Cir. 1991) (finding no discretion in applying Guidelines); *cf.* United States v. Daven, 937 F.2d 1041 (6th Cir. 1991) (vacated).

107. Mistretta v. United States, 488 U.S. at 413 (Scalia, J., dissenting).

108. United States v. Valencia, 913 F.2d 378, 384 (7th Cir. 1990); *see also* United States v. McNeal, 900 F.2d 119, 123 n.5 (7th Cir. 1990); United States v. Pinto, 875 F.2d 143, 144 (7th Cir. 1989).

109. *See* United States v. Jessup, 757 F.2d 378 (1st Cir. 1985) (creating a true permissive presumption).

110. David Margolick, *Full Spectrum of Judicial Critics Assail Prison Sentencing Guides*, N.Y. TIMES, Apr. 12, 1992, at A1; *World News Tonight: American Agenda* (ABC television broadcast, Nov. 19, 1991); *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at A22 (quoting Judge J. Lawrence Irving as saying, "I just can't, in good conscience, continue to [follow the Guidelines]"); Marvin E. Apsen, *Where Will We Put All the Inmates*, CHI. TRIB., June 8, 1989, at C25; Lee Hockstader, *U.S. Judge Here Refuses to Use Sentencing Rules*, N.Y. TIMES, Aug. 30, 1988, at B3.

111. Shortly after *Allen*, the Court unanimously held that a mandatory presumption is unconstitutional under *Winship* and *Mullaney* if it shifts to the defense the burden of persuasion of an element of the crime with which the defendant is charged. *See* Sandstrom v. Montana,

C. An Alternative Approach: A Permissive Inference

An alternative approach to the Guidelines is proposed by Richard Husseini, who argues that courts should use a clear and convincing standard of proof for aggravating circumstances under the Sentencing Guidelines.[112] Though this would force the prosecution to introduce more evidence to substantiate the permissive inference, it is uncertain whether this heightened standard would adequately countermand the effects of the mandatory nature of the Guidelines. Most likely a judge would still feel compelled to justify rejecting the enhancement, thus the inference would still be less than permissive, and hence, unconstitutional.

Another argument in favor of a permissive inference is that since Congress has the power to criminalize mere possession of a weapon, it must also have the power to create a presumption that the weapon was used in relation to the offense. The argument postulates that, "If a state possesses the constitutional authority to exercise a particular power, within that authority is the implicit constitutionality of the exercise of any lesser portion of that power."[113] Due process under this argument, "cannot be violated unless the state exercises power it does not possess, or infringes upon other constitutionally prescribed protections in the valid exercise of state authority."[114]

When this argument was raised in *United States v. Romano*, the Supreme Court held that: (1) it would not rule on whether Congress had the authority the government claimed it did; (2) even if Congress did have this power, there is "no clear indication that it intended to so exercise this power;"[115] and (3) the evidence supporting the inference was insufficient and therefore the presumption was unconstitutional.[116] As in *Romano*, there is no indication that Congress intended to exercise this power when it authorized the Sentencing Guidelines and, even if it had, that the method is constitutional. Once the legislature distinguishes between degrees of an offense, the State must prove each of those degrees.[117]

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442 U.S. 510, 519, 524 (1979). In dicta, the Court also questioned the constitutionality of shifting the burden of production. *See* Francis v. Franklin, 471 U.S. 307 (1985) (misleading jury instruction created a mandatory presumption and unconstitutionally shifted the burden of persuasion of an element of the offense); Rose v. Clark, 478 U.S. 570 (1986); United States v. Jessup, 757 F.2d 378 (1st Cir. 1985) (shifting burden of production in a permissive presumption did not violate due process standards); *see also* Harris, *supra* note 84, at 334-37; Dripps, *supra* note 80, at 1668-69; Charles C. Collier, *The Improper Use of Presumptions in Recent Criminal Law Adjudication*, 38 STAN. L. REV. 423, 431-33 (1986).

112. HUSSEINI, *supra* note 14, at 1387-88.

113. Kopech, *supra* note 44, at 551; *see also* United States v. Romano, 382 U.S. 136 (1965).

114. *Id.*; *see also* Ronald J. Allen, Mullaney v. Wilbur, *The Supreme Court and the Substantive Criminal Law — An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977); Ronald J. Allen, *The Restoration of* In re Winship: *A Comment on Burdens of Persuasion in Criminal Cases after* Patterson v. New York, 76 MICH. L. REV. 30 (1977); Christie & Pye, *supra* note 90.

115. 382 U.S. at 144.

116. *Id.* at 143-44.

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

II
THE CONSTITUTIONALITY OF THE FEDERAL SENTENCING GUIDELINES: CHARACTERIZING GUILT FACTS AS SENTENCING FACTORS

The root problem with the current court interpretations of the weapons enhancement provision is that the culpable nature of the enhancement demands due process considerations which can not adequately be addressed in the sentencing phase.[118] The question is thus presented, at what point does a fact characterized as a sentencing factor constitute a fact pertaining to moral guilt?

The weapons enhancement provision is different from other types of sentencing factors since it introduces new facts in the sentencing phase. For instance, when the court imposes a stiffer sentence on a defendant who used an automatic machine gun instead of a knife, the court is quantifying the moral severity of a fact already proven at trial. With the weapons enhancement provision, however, the sentence increases after the introduction of a new fact, the possession of a weapon. Though both sentence increases are justified by an increased risk of harm to society, in the latter case, the court does not judge the moral severity of the fact, but punishes upon proof of a new fact.

The weapons enhancement provision is like other use-crimes, such as assault with a deadly weapon.[119] This suggests that the creation of the weapons enhancement provision was a semantic ploy intended to remove an element of an offense from the trial phase to the sentencing phase. For instance, if there existed a sentencing enhancement for assault with a deadly weapon, the prosecution would have the option of convicting the defendant for assault with a deadly weapon, or achieving a similar sentence by proving assault and enhancing the sentence with a sentencing factor for a weapons possession. Whatever the policy reasons for adopting such a system, it would be unconstitutional under the standards of *In re Winship*.[120]

Section 924(c)(1) of the Crime and Criminal Procedure Act criminalizes using or carrying a firearm "during and in relation to any crime of violence or drug trafficking crime."[121] The punishment is a sentence enhancement from five to twenty years, depending upon the weapon. The main difference between section 924 and the weapons enhancement provision is that, under section 924, the prosecution must prove beyond a reasonable doubt that the defendant possessed the weapon.[122] The prosecution thus has a means to punish a defendant for possessing a weapon during a drug trafficking offense. The

118. *See supra* notes 60-73 and accompanying text, and notes 95-116 and accompanying text.

119. *See supra* notes 67-71 and accompanying text.

120. 397 U.S. 358 (1970); *see supra* notes 23-50 and accompanying text.

121. 18 U.S.C. § 924 (c)(1) (1991). The punishment under section 924 is a sentence enhancement from five to thirty years, depending on the weapon.

122. United States v. Hawkins, 741 F. Supp. 1234 (N.D. W.Va. 1990); United States v. Dixon, 558 F.2d 919 (9th Cir.), *cert. denied*, 434 U.S. 1063 (1977); United States v. Eagle, 539

only practical use for the weapons enhancement provision is to avoid the due process requirements of section 924.

The wording of section 924 is more precise than the wording of the weapons enhancement provision. Section 924 makes it clear that Congress intended to punish people for possessing a weapon in relation to a drug trafficking offense, whereas the Sentencing Commission's weapons enhancement provision is vague on the element of relationship, as demonstrated by the Ninth Circuit's interpretation.[123] Therefore the weapons enhancement provision potentially punishes conduct which Congress may not have wished to criminalize, suggesting that the Sentencing Commission unconstitutionally exceeded its delegated authority.[124]

A prosecutor who has a weak case, or is simply lazy, could utilize the weapons enhancement provision *in lieu* of the more demanding section 924. Moreover, if a prosecutor fails to win a section 924 argument, she could still achieve the same sentence under the weapons enhancement provision, thus raising questions of double jeopardy. In *United States v. Rodriguez-Gonzalez*,[125] a district court enhanced the defendant's sentence after the jury acquitted him under section 924. The appellate court dismissed the defendant's double jeopardy claim because the court viewed the weapons enhancement provision as a sentencing factor, not a guilt fact. In doing so, the court relied heavily on *McMillan*, and on the opinion that, "acquittal does not have the effect of conclusively establishing the untruth of all of the evidence introduced against the defendant."[126] Such an argument eviscerates the substantive meaning of double jeopardy.

The Ninth Circuit, in an analogous case,[127] rejected this analysis as retrograde to the rights of the accused. The court stated:

> We acknowledge that in general the Guidelines permit a sentencing court to consider evidence of sentencing factors that are not elements of the conviction . . . . But it does not follow that the Guidelines permit a court to reconsider facts during sentencing that have been

F.2d 1166 (8th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977); United States v. Crew, 538 F.2d 575, *cert. denied*, 429 U.S. 852 (1976).

123. *See supra* notes 63-66 and accompanying text.

124. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-17, at 365 (2d ed. 1988) (stating that delegation of power is more likely to be found unconstitutional "when the action of the government agency claiming delegated power touches constitutionally sensitive areas of substantive liberty").

125. 899 F.2d 177 (2d Cir.), *cert. denied*, 111 S. Ct. 127 (1990).

126. *Id.* at 181-82. Four other circuits have allowed a district court to make findings of fact during the sentencing phase which were implicitly rejected by a jury's not guilty verdict. *See* United States v. Mocciola, 891 F.2d 13, 17 (1st Cir. 1989); United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989); United States v. Ryan, 866 F.2d 604, 608-10 (3d Cir. 1989); *see also*, United States v. Dawn, 897 F.2d 1444, 1449-50 (8th Cir.), *cert. denied*, 111 S. Ct. 389 (1990). *But cf.* United States v. Perez, 858 F.2d 1272, 1277 (7th Cir. 1988) ("This court has upheld the trial court's consideration of a prior acquittal as long as the acquittal is not relied upon to enhance the sentence.").

127. United States v. Brady, 928 F.2d 844 (9th Cir. 1991).

> rejected by a jury's not guilty verdict. Otherwise, any time a judge disagreed with the jury's verdict, the judge could "reconsider" critical elements of the offense to avoid the restrictions of the Guidelines and [enhance] the sentence . . . in effect punishing the defendant for an offense for which he or she has been acquitted.[128]

The weapons enhancement provision punishes a person on the basis of the same essential facts as section 924: weapons related to drug trafficking. The former is broader than the latter. The fact that the weapons enhancement provision is a sentencing factor and that section 924 is a crime demonstrates more the danger of the Sentencing Guidelines than the rightness of the categorization.

Justice Stevens warned in his *McMillan* dissent that *Mullaney* should apply in cases in which an affirmative defense threatens due process rights, or else "[s]tates may reach the same destination either by criminalizing conduct and allowing an affirmative defense, or by prohibiting lesser conduct and enhancing the penalty."[129] The weapons enhancement provision demonstrates a new threat. It empowers the government, under the guise of sentencing factors, to avoid the due process demands of a trial *and* to revisit acquittals.

The Sentencing Commission viewed sentencing factors in the same vein as affirmative defense facts, both capable of being severed from guilt facts. The reasons for severing affirmative defense facts, though, does not apply to sentencing factors. The Supreme Court in *Patterson*[130] created affirmative defenses based on a theory of penology. It held that by allowing the defense to create new theories which might prove exculpatory, penological law would be advanced. Thus, affirmative defenses are really windows of opportunity for the defense to introduce new forms of exculpatory behavior and to help modernize the criminal process. Sentencing factors, however, weigh the culpability of guilt facts for punishment and will not help to advance modern penology. Thus *Mullaney*, not *Patterson*, must apply. Sentencing factors cannot be split from guilt facts.

The Sentencing Guidelines also violate the separation of powers doctrine, both by unconstitutionally shifting the power to decide sentences to the prosecutor, and by not providing adequate guidance to the delegated agency, the Sentencing Commission. In *Mistretta*, the Court reasoned that, even though the Sentencing Commission engaged in primarily legislative decision making,[131] Congress sufficiently specified and detailed its intent in the Sentencing

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128. *Id.* at 851.

129. McMillan v. Pennsylvania, 477 U.S. 79, 100 (1986) (Stevens, J., dissenting) (quoting *In re* Winship, 397 U.S. 358, 363-64 (1970)).

130. Patterson v. New York, 432 U.S. 197 (1977).

131. *See* United States v. Alves, 688 F. Supp. 70 (D. Mass. 1988) (stating that Congress has the exclusive power to create legislation); United States v. Richardson, 685 F. Supp. 111 (E.D.N.C. 1988) (holding that the Guidelines did not exceed Congress' delegation of power); United States v. Alves, 680 F. Supp. 1411 (S.D. Cal. 1988); United States v. Arnold, 678 F. Supp. 1463 (S.D. Cal. 1988).

Reform Act. The delegation of legislative power thus passed the "intelligible principle test,"[132] and did not constitute a violation of separation of powers doctrine.[133]

The Court in *Mistretta*, though, did not consider a due process challenge to the Guidelines,[134] even though several district courts have held the Guidelines to be an unconstitutional violation of due process.[135] It also did not consider the added non-delegation problems in light of the conflicts between the weapons enhancement provision and section 924. *Mistretta* is therefore a beginning point, not an endpoint, in the discussion of the constitutionality of the Guidelines.

Though Congress provided a list of factors to aid in the interpretation of the Guidelines, it did not indicate how these factors should be weighed. Moreover, it did not authorize the invention of sentencing factors to camouflage guilt facts in order to avoid the constitutional demands of due process. The weapons enhancement provision is but one example of sentencing factors shifting the burden of proof of guilt facts in the sentencing phase and empowering the prosecutor, instead of the judge or the legislature, to decide the defendant's sentence. If the separation of powers or delegation of powers doctrines mean anything, then the Sentencing Guidelines must violate it.[136]

The weapons enhancement provision thus illustrates a problem which is endemic to the Sentencing Guidelines — the Sentencing Commission designed the Guidelines based on a retributive scheme of punishment.[137] It sought to create determinate punishments based, not on the crimes the defendant was convicted of committing, but on the underlying moral culpability of the defendant's acts. The product resembles a criminal code more than a sentencing

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132. *Mistretta*, 488 U.S. at 372 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)):

> So long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."

133. *Mistretta*, 488 U.S. at 375.

134. 488 U.S. 361.

135. *See, e.g.*, United States v. Belgard, 694 F. Supp. 1488 (D. Or. 1988), *aff'd in part and vacated in part*, 894 F.2d 1092 (9th Cir.), *cert. denied*, 111 S. Ct. 164 (1990); United States v. Weidner, 692 F. Supp. 968 (N.D. Ind. 1988); United States v. Kerr, 686 F. Supp. 1174 (W.D. Pa. 1988); United States v. Martinez-Ortega, 684 F. Supp. 634 (D. Idaho 1988), *aff'd in part and remanded in part sub nom.* United States v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989); United States v. Bolding, 683 F. Supp. 1003 (D. Md. 1988), *rev'd*, 876 F.2d 21 (4th Cir. 1989); United States v. Frank, 682 F. Supp. 815 (W.D. Pa.), *modified*, 864 F.2d 992 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989).

136. TRIBE, *supra* note 123, § 5-17, at 365.

137. *See* RALPH D. ELLIS & CAROL S. ELLIS, THEORIES OF CRIMINAL JUSTICE: A CRITICAL REAPPRAISAL (1989); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 113-184 (5th ed. 1989); Steven P. Lab, *Potential Deterrent Effects of the Guidelines*, *in* THE U.S. SENTENCING GUIDELINES, *supra* note 66, at 32, 34; *see also* LAWRENCE F. TRAVIS III, MARTIN D. SCHWARTZ & TODD R. CLEAR, CORRECTIONS: AN ISSUES APPROACH (2d ed. 1983).

scheme.[138] The problem with this system is that it enables the prosecution to punish for substantive offenses which are disguised as sentencing factors. Since sentencing factors are not adjudicated at trial, the result is to deprive the defendant of the constitutional protections of due process.

CONCLUSION

The Sentencing Commission envisioned the Sentencing Guidelines as a solution to the inequities of the indeterminate sentencing scheme and a means to reduce crime through stiffer penalties. In the process of redefining criminal sentencing, however, it also redefined criminal law. The Sentencing Guidelines created a new category of facts, sentencing factors, which distinguish guilt facts from facts relating to the creation of a meaningful punishment. The facts relating to the creation of a meaningful punishment are defined as those facts which demonstrate that the moral severity of the crime requires a more severe punishment. The problem with this definition is that guilt facts are also defined in terms of moral culpability. As a result, sentencing factors include guilt facts.

This new category of facts also does not fit neatly into the traditional concepts of criminal law. An analysis of the Ninth Circuit's interpretation of the weapons enhancement provision shows that the burden of proof cannot be constitutionally shifted because such a shift increases the culpability of the offense and resembles too closely an element of a crime. The Eighth Circuit's standard of proof interpretation is also unconstitutional because the mandatory nature of the Guidelines infects the application of the provision and creates, in substance, a mandatory presumption. A higher standard of proof may also be unconstitutional for the same reasons. The weapons enhancement provision thus defies a constitutional means of application.

This suggests that the enhancement is not a sentencing factor, but an element of a substantive offense. Comparing the weapons enhancement provision with section 924 of the Crime and Criminal Procedures Act reveals that the provision includes elements of a substantive offense, and therefore, cannot be a sentencing factor. The parallel statute also reveals latent constitutional problems, including, the unconstitutional use of delegated power, the unconstitutional denial of due process rights, and the unconstitutional risk of double jeopardy. The creation of a new category of facts and the severance of these facts from guilt facts demonstrate how precarious a defendant's rights actually are, and the subtle devices by which they slip away.

138. One instance is its categorization of punishments for drug offenses by the quantity of the drugs possessed, U.S.S.G. § 2d1.1(c).