Recognizing Constitutional Rights at Sentencing

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There are a number of traditional sentencing factors, which judges use when selecting the precise sentence within the statutory sentencing range, that infringe on the constitutional rights of criminal defendants. Yet courts have not engaged in traditional constitutional analysis when permitting the use of these factors. Instead, they have rejected constitutional challenges to sentencing factors on the grounds that recognizing substantive constitutional limits on sentencing considerations would be inconsistent with historical practice and would interfere with the judiciary’s ability to impose a proper sentence. This Article challenges these claims. It demonstrates that these oft-repeated justifications do not warrant the judiciary’s disregard of constitutional rights at sentencing. Consequently, courts should directly grapple with the Constitution in imposing sentencing, instead of disregarding it on the ground that sentencing is unique. The Article then explores some possible changes to sentencing to address the problem of courts’ use of these factors at sentencing.

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INTRODUCTION

Nelson Guerrero served four years in prison for crimes of which he was never convicted.1 Robert Mercado was sentenced to seventeen years in prison for committing several violent crimes, even though a jury had acquitted him of those crimes.2 Thomas Jones served six months in prison for insisting that he be tried in front of a jury.3 And Jeffrey Cramer was sentenced to two years in prison based on a judge’s speculation that he was likely to commit crimes in the future.4

One might think that the individuals named in the previous paragraph live in a totalitarian regime without the protection of basic individual rights. But they live (or have lived) in the United States, and their sentences were handed down by American trial courts and subsequently affirmed by appellate courts. Any person with basic knowledge of the United States Constitution should be troubled by the stories above. Each example involves punishment seemingly forbidden by the Constitution.

American courts routinely increase sentences for reasons that seem to conflict with constitutional protections. With few exceptions, the judiciary has rejected constitutional challenges to non-capital sentencing factors.5

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2. United States v. Mercado, 474 F.3d 654, 659 (9th Cir. 2007).
5. One of the few sentencing factors that the courts have deemed unconstitutional in non-capital cases is the increase of sentence based on race. See infra note 34. By contrast, there are a large number of rights that the courts have recognized in capital sentencing proceedings that they
Consequently, judges routinely make sentencing decisions based on considerations that could not constitutionally be considered in the decision whether to punish an individual in the first place. A sentence may, for example, be increased on the basis of acquitted conduct, even though the Double Jeopardy Clause would forbid the state from retrying the defendant for that acquitted crime. Under this approach, considerations that cannot form the basis for the imposition of punishment can form the basis for deciding the amount of punishment to impose.

Courts often reject constitutional challenges to sentencing factors based on the *ipse dixit* that sentencing is somehow different, instead of examining the relevant constitutional provision, as they would in any other part of the trial. Courts use two principal rationales to support this idea of sentencing exceptionalism: first, that it is a long-established practice for courts not to recognize constitutional rights at sentencing; second, that recognizing constitutional rights at sentencing would hinder courts from achieving the goals of punishment in imposing sentence. Although courts have almost universally rejected similar arguments of expediency and preserving the status quo in other constitutional contexts, they have accepted them for sentencing.

This claim of sentencing exceptionalism, though oft repeated, is highly suspect. Constitutional rights are designed to limit the state’s ability to deprive individuals of their liberty. Sentencing is the process through which the state deprives those convicted of crimes of their liberty. Thus, the recognition of constitutional rights at sentencing is paramount. This Article argues that sentencing is not unique in such a way that exempts it from ordinary constitutional scrutiny, and that courts should consider defendants’ constitutional rights during sentencing at least to the extent that those rights are considered during trial.

have not yet extended to non-capital proceedings. One example is the right to have the jury properly instructed about sentencing options. See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145, 1150 n.14 (2009) (addressing only non-capital sentencing).


7. As Elizabeth Lear has explained, courts have “devised a convenient yet dangerous fiction in the form of the ‘punishment-enhancement’ distinction. According to this theory, a sentence enhancement does not constitute punishment.” Elizabeth T. Lear, *Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent-Prosecution Dilemma*, 60 Brook. L. Rev. 725, 726 (1994).


9. The strict scrutiny test, for example, recognizes that the government cannot ignore constitutional rights to achieve government objectives except in the most compelling circumstances. See, e.g., Johnson v. California, 543 U.S. 499, 505 (2005).
Other commentators have occasionally questioned the constitutionality of discrete sentencing factors. In doing so, however, they have not considered the broader question of the validity of the judiciary’s claim that sentencing is different. Thus, rather than attempting to demonstrate definitively that a particular sentencing factor is unconstitutional, this Article addresses the broader question of whether a defendant’s constitutional rights ought to limit the factors a sentencing judge can consider when selecting the amount of punishment a defendant will receive upon conviction.

This Article reevaluates the approach to constitutional rights at sentencing. Part I briefly describes the evolution of the sentencing process in the United States, and it identifies the small number of sentencing factors that courts have identified as constitutionally prohibited. Part II builds the positive case for why constitutional rights should be recognized at sentencing. It begins by explaining that sentencing is the process by which the government denies liberty, and that the reason for constitutional rights is to protect against government impairments of liberty. Part II then identifies several constitutional rights that are implicated by a number of traditional sentencing factors.

Part III directly addresses the three main justifications for refusing to enforce constitutional rights at sentencing. First, Part III refutes the claim that historical practice justifies the current failure to recognize constitutional rights at sentencing. Second, Part III addresses the argument that defendants forfeit their rights upon conviction and consequently cannot object to any sentence within the statutorily authorized range. It explains that the mere fact that a conviction authorizes the state to punish a defendant up to the statutory

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11. Contrast Lear, supra note 8, at 1238 (noting that the argument advanced “requires only that the nonconviction offense be excluded from the sentencing inquiry; it says nothing . . . about the applicability of the Due Process Clause to factors properly considered at the sentencing hearing”). Of course, there is a rich academic literature on the underenforcement of constitutional rights generally, as opposed to specifically at sentencing. See, e.g., Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274, 1277–79 (2006) (arguing that the effort to create judicially manageable standards is one reason for judicial underenforcement of constitutional rights); Richard H. Fallon, Jr., Foreword: Implementing the Constitution, 111 Harv. L. Rev. 56 (1997) [hereinafter Fallon, Implementing the Constitution] (arguing that underenforcement may result from desire to avoid social costs); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1227 (1978) (identifying the phenomenon of underenforcement of constitutional rights); Richard L. Hasen, The Democracy Canon, 62 Stan. L. Rev. 69, 98–99 (2009) (discussing underenforcement of constitutional norms in the voting context).
maximum does not mean that the state may ignore the Constitution in imposing punishment. Finally, Part III addresses the argument that recognizing constitutional rights at sentencing undermines the goals of punishment. It contends that recognizing constitutional rights at sentencing largely promotes the values underlying the goals of punishment, and that to the extent punishment goals and constitutional values conflict, the constitutional values should prevail. This Article ends with a brief conclusion and recommendations for courts’ future treatment of sentencing and sentencing factors.

I.
THE HISTORY OF CRIMINAL SENTENCING AND ITS CURRENT CONSTITUTIONAL LIMITATIONS

During colonial times and at the Founding, the process of sentencing was virtually indistinguishable from the process of conviction. A judge ordinarily did not conduct a separate sentencing proceeding following a defendant’s conviction; instead, most crimes carried a particular penalty. The offense of conviction determined the sentence, and aggravating and mitigating factors did not alter that sentence. This determinate sentencing scheme presented no occasion to consider the extent to which constitutional protections should be treated differently at sentencing than at trial; because sentencing was part of the trial, any constitutional protections the defendant received at trial he received at sentencing as well.


Beginning in the late eighteenth century, these determinate sentencing schemes gave way to discretionary sentencing schemes that prescribed a range of punishment for a particular crime. Under the new discretionary regimes, after a defendant had been convicted, the judge would conduct a separate sentencing proceeding at which he would impose a sentence within the statutory range based on his assessment of “sentencing” characteristics. These discretionary systems originally were premised on the punishment rationale of rehabilitation. Discretionary schemes allowed judges to tailor sentences to the specific characteristics of the individual defendant with an eye towards reforming the defendant’s lawbreaking ways.

In selecting a specific sentence, judges began to consider any number of factors in addition to the offense of conviction. Judges modified sentences based on the particular facts and circumstances surrounding the crime, such as harm to the victim or the defendant’s motive. Judges also varied sentences based on facts about the offender himself, such as any previous convictions, employment history, family ties, educational level, military service or charitable activities, and the defendant’s age.

Even today, sentencing schemes, as a general matter, continue to individualize punishment. Sentences do not depend solely on the crime of conviction. Instead, statutes prescribe a range of potential sentences for particular crimes, and judges base the particular sentence on facts in addition to the conviction itself. The amount of judicial discretion in setting the sentence varies by jurisdiction. Some states afford judges broad discretion to impose sentence based on their findings at sentencing; others grant judges substantially less discretion. In the federal system, the Sentencing Guidelines


14. See Klein, supra note 12, at 696; see also Carissa Byrne Hessick, Motive’s Role in Criminal Punishment, 80 S. CAL. L. REV. 89, 131 n.183 (2006) (noting that “everyone seems to agree that discretionary sentencing was the norm by the late nineteenth century”).
15. See Apprendi, 530 U.S. at 481; CAMPBELL, supra note 12, at 10–11; Character Evidence, supra note 12, at 715–16.
16. More recently, courts and commentators have justified individualized sentencing through other theories of punishment. See infra Part III.C.
17. CAMPBELL, supra note 12, at 223.
20. For example, some states have developed “presumptive sentencing guidelines.” In these presumptive systems, legislatures or sentencing commissions identify a narrow presumptive sentence for the “ordinary case” of a given crime. Judges retain the power to sentence above or below the presumptive sentence in an unusual case, but these sentencing decisions are subject to appellate review. Kevin R. Reitz, Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium, 64 U. COLO. L. REV. 645, 647 & n.10 (1993). The presumptive sentence
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direct judges to impose a sentence within a narrow range, which is based on factual matters other than a prior conviction. Regardless of the amount of discretion afforded to judges in a particular jurisdiction, the discretion in modern systems allows judges to impose sentences based on facts in addition to the fact of conviction.

Though most modern sentencing schemes afford judges discretion in imposing sentences, in recent times courts have nonetheless begun to recognize some constitutional limitations to that discretion. Most of the constitutional rights recognized at sentencing have been procedural. The Supreme Court has recognized that defendants have the right to effective representation by counsel at sentencing and that the privilege against self-incrimination applies at sentencing in some limited form. The Court has also suggested that there is a due process right to advance notice of facts that a court relies on to impose a higher sentence. More recently, the Supreme Court’s Apprendi line of cases often depends not only on the offense of conviction, but also on an offender’s prior record of convictions. Examples of such systems include Arizona, California, and Washington, which created presumptive, mitigated, and aggravated sentences. See Ariz. Rev. Stat. Ann. §§ 13-604, 13-702 (2001 & Supp. 2007); Cal. R. Ct. 4.420; Wash. Rev. Code Ann. § 9.94A.535 (West 2003); see also Cunningham v. California, 549 U.S. 270, 276–78 (2007) (describing the California system).

21. Although once mandatory, the Guidelines were rendered advisory by United States v. Booker, 543 U.S. 220 (2005). Booker’s increased judicial discretion creates more opportunity for sentences to be based on constitutionally suspect reasons. Such discretion is not, of course, central to our claim. Our point is that sentences are being set based on constitutionally suspect factors. It is irrelevant whether the constitutionally suspect factor is included because of judicial discretion or legislative fiat.

22. See, e.g., United States v. O’Brien, 130 S. Ct. 2169, 2176 (2010) (noting that “[s]entencing factors traditionally involve characteristics of the offender—such as recidivism, cooperation with law enforcement, or acceptance of responsibility”—all of which involve facts other than that of conviction).

23. See Alan C. Michaels, Trial Rights at Sentencing, 81 N.C. L. Rev. 1771, 1773–74 (2003) (noting that in the “half-century since Williams,” courts have decided cases recognizing more rights at sentencing “than many have supposed”).

24. Although courts have been more willing to recognize procedural rights at sentencing than to recognize substantive constitutional limitations on the consideration of various factors, judicial recognition of procedural rights is not complete. For example, despite a renewed interest in Confrontation Clause rights at trial, see e.g., Crawford v. Washington, 541 U.S. 36 (2004), courts consistently refuse to recognize a right to confrontation at sentencing, e.g., United States v. Littlesun, 444 F.3d 1196, 1200 (9th Cir. 2006); United States v. Bustamante, 454 F.3d 1200, 1202–03 (10th Cir. 2006); United States v. Monteiro, 417 F.3d 208, 215 (1st Cir. 2005); United States v. Luciano, 414 F.3d 174, 178–80 (1st Cir. 2005); United States v. Martinez, 413 F.3d 239, 242 (2d Cir. 2005); United States v. Stone, 432 F.3d 651, 654 (6th Cir. 2005); United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005); United States v. Brown, 430 F.3d 942, 944 (8th Cir. 2005); United States v. Chau, 426 F.3d 1318, 1323 (11th Cir. 2005).


27. Burns v. United States, 501 U.S. 129, 138 (1991) (noting that a failure to give defendant advance notice of facts that would result in a higher sentence might raise serious due process concerns); Michaels, supra note 23, at 1811 n.165 (identifying a number of lower court decisions holding that “the defendant must have notice of facts relied upon by the court in
have outlined the additional procedural requirements that the Sixth Amendment imposes on sentencing proceedings. 28

The recognized rights at sentencing have not been solely procedural. Courts have also placed some substantive limitations on what courts may consider in imposing sentence. 29 For example, courts have held that consideration of certain types of information at sentencing violates due process. In Townsend v. Burke, the Supreme Court held that basing a sentence on “materially untrue” assumptions about the defendant’s criminal record violated the Due Process Clause. 30 Similarly, in North Carolina v. Pearce, 31 the Supreme Court concluded that when a defendant successfully appeals her conviction, the trial court cannot consider that successful appeal at resentencing. Although noting that the Constitution does not require that a defendant receive the same sentence after retrial as at the original sentencing, 32 the Court nonetheless stated that a trial court may not impose a higher sentence to punish the defendant for successfully appealing her original conviction. The Pearce Court explained that hindering a defendant’s ability to appeal in this way would violate due process. 33

noncapital sentencing cases”).

28. See, e.g., United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000). The Apprendi analysis relied, in part, on whether a fact identified by statute as requiring a higher sentence was an “element” or a “sentencing factor.” Apprendi, 530 U.S. at 494 n.19 (explaining that the term “sentencing factor” . . . describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury’s finding,” and it may be found by a judge by a preponderance of the evidence; in contrast, “when the term ‘sentence enhancement’ is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element” and must be submitted to a jury and proved beyond a reasonable doubt). The Apprendi Court did not, however, limit its analysis to the formal distinction between elements and sentencing factors; rather it stated that “the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” Id. at 494. Subsequent decisions in Blakely and Booker confirmed that Apprendi’s procedural requirements applied to sentencing.

29. There are also isolated decisions objecting to the consideration of various sentencing factors. See, e.g., People v. Bolton, 589 P.2d 396, 400–01 (Cal. 1979) (holding that a sentencing court cannot constitutionally impose a higher sentence on a defendant because he had fathered children out of wedlock).

30. Townsend v. Burke, 334 U.S. 736, 740–41 (1948); see also United States v. Tucker, 404 U.S. 443 (1972) (reaffirming Townsend); United States v. González-Castillo, 562 F.3d 89, 81 (1st Cir. 2009) (defendants have “a due process right to be sentenced upon information which is not false or materially incorrect” (citing United States v. Pellerito, 918 F.2d 999, 1002 (1st Cir. 1990))).


32. Id. at 720; see also Stroud v. United States, 251 U.S. 15 (1919) (noting that because the state has the power to retry a defendant who has succeeded in getting his first conviction set aside, it also has the power, upon the defendant’s reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction).

33. Pearce, 395 U.S. at 724. The Court explained that, if a conviction had been set aside because of constitutional error, allowing courts to punish the appeal on retrial would “penaliz[e] those who choose to exercise constitutional rights,” and may “serve to ‘chill the exercise of basic constitutional rights.’” (quoting United States v. Jackson, 390 U.S. 570, 581–82 (1968)). In a
Courts have also held that the Constitution prohibits sentencing courts from considering factors that could lead to unwarranted discrimination. For this reason, courts have forbidden consideration of race, national origin, or gender at sentencing. Similarly, they have held that a sentence may not be increased based on the fact that the defendant is not a resident of the state in which he committed the crime. Some courts have based these restrictions on the Due Process Clause, while others have relied on the Equal Protection Clause.

Courts have also expressed concern about the consideration of religious beliefs at sentencing. Although many courts have traditionally allowed information about a defendant’s religion to be presented to the sentencing judge, several courts have recently stated that a defendant’s religious belief, or lack thereof, is an inappropriate aggravating sentencing factor. Thus, in State v. Fuerst, the Wisconsin Court of Appeals vacated a sentence where the trial subsequent case, the Court clarified that vindictiveness on the part of the trial court will not be presumed if a higher sentence is imposed at resentencing, but the Court reaffirmed the constitutional holding of Pearce. Alabama v. Smith, 490 U.S. 794, 802–03 (1989).

34. See, e.g., United States v. Kaba, 480 F.3d 152, 156 (2d Cir. 2007) (“A defendant’s race or nationality may play no adverse role in the administration of justice, including at sentencing.”) (quoting United States v. Leung, 40 F.3d 577, 586 (2d Cir. 1994)).

35. See, e.g., id.; United States v. Borrero-Isaza, 887 F.2d 1349, 1355–57 (9th Cir. 1989) (vacating a sentence that appears to have been partially based on defendant’s national origin); United States v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986) (remarking that it “obviously would be unconstitutional” to punish a defendant more severely solely based on nationality).

36. See Williams v. Currie, 103 F. Supp. 2d 858, 863 (M.D.N.C. 2000). In United States v. Maples, the Fourth Circuit vacated the fifteen-year sentence imposed on a male defendant whose codefendant received only a ten-year sentence because she was a female. 501 F.2d 985 (4th Cir. 1974) (stating that “some or all of the disparity in sentences was attributable to the fact that the co-defendant was female”). The court explained that until empirical research demonstrates that an individual’s sex is relevant to his or her susceptibility to rehabilitation or deterrence, “sex, alone, is an impermissible basis for a disparity in sentence.” Id. at 985. Maples is particularly noteworthy because it was decided in 1974, when federal courts generally “disclaim[ed] the right to exercise general appellate review over sentences.” Id. at 986; see also Dorszynski v. United States, 418 U.S. 424, 431 (1974) (noting “the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end”); Carissa Byrne Hessick & F. Andrew Hessick, Appellate Review of Sentencing Decisions, 60 ALA. L. REV. 1, 4 (2008) (“For the greater part of American history, appellate review of federal criminal sentences was non-existent in most cases.”).

37. United States v. Diamond, 561 F.2d 557, 559 (4th Cir. 1977); Jackson v. State, 772 A.2d 273, 278 (Md. 2001) (“Simply stated, it is not permissible to base the severity of sentencing on where people live, have lived, or where they were raised.”).

38. See, e.g., Jackson, 772 A.2d at 279; see also United States v. Leung, 40 F.3d 577, 586 (2d Cir. 1994) (reversing sentence that appeared to be based on race, explaining that “justice must appear apportionable justice”).

39. See, e.g., United States v. Smart, 518 F.3d 800, 804 n.1 (10th Cir. 2008).

40. See, e.g., Theodore Levin, Toward a More Enlightened Sentencing Procedure, 45 NEB. L. REV. 499, 504 (1966) (“The presentence report contains all the information considered necessary for the proper disposition of the case. This includes . . . a complete report of the defendant’s . . . religion.”); see also United States v. Mitchell, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman, J., concurring) (stating that religion is “an area often appropriately discussed in presentence reports”).
court imposed a higher sentence on a defendant than it otherwise would have because the defendant had “very little religious conviction” and did not attend church. According to the court of appeals, imposing a particular sentence based on the defendant’s religious convictions and practices violated the defendant’s First Amendment right to religious freedom.

Sentencing is a critically important phase of the criminal justice system for determining the punishment a defendant will receive, and it continues to grow in importance because most criminal defendants plead guilty rather than proceed to trial. While courts have recognized some constitutional rights at sentencing, they ignore many important protections that are afforded to criminal defendants during the rest of trial. The Parts that follow will explore the idea of sentencing exceptionalism and particular sentencing factors that violate defendants’ constitutional rights.

II. CONSTITUTIONALLY DOUBTFUL SENTENCING FACTORS

Although the examples in the preceding Part might convey the impression that courts enforce the Constitution as rigorously at sentencing as in criminal trials, that is not accurate. Constitutional limitations on sentencing factors are the exception rather than the rule. For the most part, courts have not recognized constitutional limitations on what information may be considered at sentencing. Instead, courts have generally rejected constitutional challenges to judicial consideration of particular sentencing factors, concluding instead that sentencing judges “may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come” in determining what sentence to impose.

41. State v. Fuerst, 512 N.W.2d 243, 244–45, 247 (Wis. Ct. App. 1994); see also United States v. Bakker, 925 F.2d 728, 740–41 (4th Cir. 1991) (vacating on due process grounds sentence that appeared to have been based on the trial judge’s sense of “religious propriety”).

42. Fuerst, 512 N.W.2d at 245–46. Fuerst forbade consideration of religion at sentencing. It explained that the Constitution might allow sentencing courts to consider whether the defendant’s religion somehow gave rise to the crime—for example, if the reason that a defendant charged with a drug offense used illicit drugs was that her religious practices involved the use of those drugs. It further stated that a defendant’s religion could be considered to provide general information about the defendant’s moral character. Id. at 246–47. This latter consideration might itself raise First Amendment concerns, if the absence of religious beliefs is deemed to be evidence of lack of moral fiber.

43. See, e.g., Josh Bowers, Punishing the Innocent, 156 U. PA. L. REV. 1117, 1155 n.195 (2008) (“In 2002, the plea rate nationally was 95% for all state court felony convictions.”); William J. Stuntz, Plea Bargaining and Criminal Law’s Disappearing Shadow, 117 HARV. L. REV. 2548, 2568 (2004) (explaining that in 2000 there was a “federal guilty plea rate of 95% . . . [and] [i]n some federal districts, the rate exceeds 99%”).

44. United States v. Tucker, 404 U.S. 443, 446 (1972); see also United States v. Morgan, 595 F.2d 1134, 1136 (9th Cir. 1979) (“[J]udges have discretion to consider a wide variety of information from a variety of sources in order to tailor the punishment to the criminal rather than to the crime.”); United States v. Doyle, 348 F.2d 715, 721 (2d Cir. 1965) (“The aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man
The consequence is that courts have systematically failed to recognize a number of constitutional rights at sentencing that are otherwise recognized during trial.

That courts should protect constitutional rights at sentencing should be a rather obvious proposition. The basic function of constitutional rights is to limit the government’s ability to interfere with individual liberties. Sentencing is the process by which the government determines precisely how much liberty it will take from a defendant. Sentencing courts therefore should not impose sentence based on matters protected by the Constitution.

But as the following examples demonstrate, courts have repeatedly permitted the consideration of a number of constitutionally doubtful sentencing factors. Instead of engaging in ordinary constitutional analysis when defendants challenge these factors, courts have swept constitutional concerns under the proverbial rug based on the ungrounded conclusion that the sentencing process is somehow unique and thus shielded from constitutional review.

At present, there is a lively debate about what procedural protections ought to apply at sentencing. The Supreme Court’s recent Apprendi line of cases indicates that, at least in some sentencing systems, the jury has a fact-finding role to play. And some commentators have argued for additional procedural protections, such as the Confrontation Clause right, at sentencing. While this Part occasionally references that debate and relies on analysis from Apprendi and its progeny, it is largely concerned with whether constitutional rights ought to limit the factors that courts consider when imposing sentence, rather than the procedures courts employ at sentencing.

The goal of this Part is not to demonstrate definitively that the consideration of various sentencing factors violates the Constitution. Because of space constraints, we cannot provide exhaustive analysis for each constitutional right that appears to be infringed by various sentencing factors. Rather, the purpose is to show that there is at least a colorable constitutional objection to a number of traditional sentencing factors, and that courts have failed to grapple with these objections.

45. See supra note 28.
A. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment provides that no person “shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.” 47 This provision has been interpreted to prohibit the government from seeking to punish a person for an offense for which he has already been acquitted. 48 According to the Supreme Court, this prohibition is necessary to ensure that the State does not make “repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.” 49

The prohibition on double jeopardy has not enjoyed much protection at sentencing. 50 A number of jurisdictions permit the consideration at sentencing of criminal conduct for which the jury entered an acquittal. 51 Under this arrangement, individuals may be punished (by having their sentences increased) based on the very conduct for which they have already been acquitted. Enhancing sentences based on prior acquitted conduct presents the same problems as subsequent prosecutions for that conduct 52—namely, even after acquittal, an individual remains insecure about his future because of the potential that his acquitted conduct may form the basis for an enhancement.

One objection to the claim that use of acquitted conduct at sentencing violates the Double Jeopardy Clause is that the text of the Double Jeopardy Clause prohibits subsequent prosecutions for the same “offenses,” and sentencing enhancements are not offenses but merely enhancements. 53 But the

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47. U.S. Const. amend. V.
50. Courts, in fact, often increase sentences based on prior convictions. See Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998) (remarking that the “prior commission of a serious crime . . . is as typical a sentencing factor as one might imagine.”); see also Carissa Byrne Hessick, Why Are Only Bad Acts Good Sentencing Factors?, 88 B.U. L. Rev. 1109, 1114–16 (2008) [hereinafter Hessick, Bad Acts]. Although this practice may also violate the Double Jeopardy Clause, it is not an example of sentencing exceptionalism. Prior convictions are used not only as an aggravating sentencing factor, but also as an element in some crimes, see id. at 1114 (discussing habitual offender statutes). This does not undercut our thesis that courts generally underenforce rights at sentencing; it may demonstrate only that courts have eroded the Double Jeopardy Clause at both sentencing and trial.
52. For additional commentary on the double jeopardy issue, see Shors, supra note 10, at 1363–69.
53. It is clear that the offense forming the basis of the enhancement is the “same” as the
principle behind the Double Jeopardy Clause is to prevent multiple attempts to punish for the same conduct. Thus, the distinction between enhancements and substantive criminal prohibitions is irrelevant, because sentencing enhancements are a form of punishment.54

Courts have generally focused on a different point. They have rejected double jeopardy challenges to sentencing enhancements for acquitted conduct on the ground that sentencing enhancements do not constitute “punishment” for that acquitted conduct.55 The courts’ reasoning has followed different lines depending on whether the acquitted conduct was related to the charge of conviction. For conduct related to the charge of conviction, courts have reasoned that the “sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction.”56 As for acquitted conduct unrelated to the crime of conviction, courts have explained that the enhancement is appropriate because, although the defendant was acquitted, the past criminal acts demonstrate the defendant’s disrespect for the legal process and other objectionable aspects of his character.57

These objections are unsatisfactory. When a sentence is enhanced based on acquitted conduct, the same conduct is the basis for both the government’s

54. See Witte v. United States, 515 U.S. 389, 407 (1995) (Scalia, J., concurring) (noting that there is “no real difference” between “punishing twice for the same offense” and “punishing twice as much for one offense” solely because the defendant also committed another offense, for which the defendant will also be punished).

55. Id. at 399–401.

56. Watts, 519 U.S. at 154; see also Witte, 515 U.S. at 402–03. Watts illustrates the point. There, Watts was charged with possession of cocaine and possession of a firearm after police discovered a bucket containing the cocaine and firearms in his residence. Watts was convicted of the cocaine charge but acquitted of the firearms charge. Watts, 519 U.S. at 149–50. The Court explained that a sentencing enhancement based on the possession of firearms, however, could be appropriate, because the presence of firearms with the cocaine could render the possession of cocaine more dangerous. Id. at 154–56.

57. See United States v. Plisek, 657 F.2d 920, 927 (7th Cir. 1981) (upholding sentence based on “the circumstances surrounding a prior acquittal” because of the information those facts provided about “the background, character and conduct”); Billiteri v. U.S. Bd. of Parole, 541 F.2d 938, 944 (2d Cir. 1976) (stating that a “sentencing judge may properly take into account evidence of crimes of which the accused was acquitted” because that evidence bears on “the personal history and behavior of the convicted accused”); State v. Ramsay, 499 A.2d 15, 22 (Vt. 1985); see also Watts, 519 U.S. at 155 (“consideration of information about the defendant’s character at sentencing does not result in ‘punishment’ for any offense other than the one of which the defendant was convicted”). See generally Benjamin R. King, Departures From the Federal Sentencing Guidelines Based on Prior Dissimilar Nonconvicted Conduct: A Call for a Finding of Relatedness, 72 S. CAL. L. REV. 899 (1999).
first effort to punish and the additional punishment under the sentence enhancement. The defendant is exposed to potential punishment twice for each offense: once at the trial, and once during sentencing for other offenses. The courts’ justifications do not establish that the past conduct is not the basis for punishment; instead, they simply describe how the past offense will be factored into the punishment decision.

**B. Guarantee of Jury Trial**

Enhancing sentences based on acquitted conduct raises concerns about the Sixth Amendment guarantee to a jury trial as well. The Supreme Court has recently reemphasized that the purpose of the Sixth Amendment’s Jury Clause is to limit the power of the government, including courts, to punish individuals for alleged criminal conduct. According to the Court, together with the Due Process Clauses, the jury trial guarantee makes a finding of guilt beyond a reasonable doubt by a jury of peers a prerequisite to the imposition of punishment.

Allowing for sentencing enhancements based on acquitted conduct undermines this jury trial guarantee. An acquittal by a jury reflects the jury’s determination that the government has failed to satisfy the prerequisites for punishing the defendant. Increasing sentences based on that acquitted conduct ignores, or at least circumvents, that determination.

The Sixth Amendment concerns are not limited to acquitted conduct enhancements. Sentencing enhancements for uncharged criminal conduct raise

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58. U.S. CONST. amend. VI (guaranteeing the “right to a . . . trial, by an impartial jury”). Article III of the Constitution also guarantees the right to a jury trial. U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”). For convenience, we shall refer only to the Sixth Amendment right.

59. See, e.g., Blakely v. Washington, 542 U.S. 296, 305–06 (2004); Apprendi v. New Jersey, 530 U.S. 466, 477–78 (2000); see also THE FEDERALIST No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.”); Barkow, supra note 12, at 48–65 (tracing the importance of the jury in American history).

60. Apprendi, 530 U.S. at 477–79; In re Winship, 397 U.S. 358, 361 (1970). Apprendi considered only the procedural requirement that a jury make findings necessary to increasing sentences beyond the statutory maximum. It did not consider the more substantive question whether conduct for which the jury acquitted could be the basis for punishment. Even so, Apprendi’s holding highlights the importance of the jury trial guarantee in the imposition of punishment.

61. See, e.g., United States v. White, 551 F.3d 381, 391–97 (6th Cir. 2008) (en banc) (Merritt, J., dissenting); Bilsborrow, supra note 10, at 320–33; Shors, supra note 10, at 1382–91.

62. White, 551 F.3d at 394 (en banc) (Merritt, J., dissenting); Joh, supra note 12, at 910–11; see also Barkow, supra note 12, at 99–100. Juries ordinarily do not impose sentence in non-capital cases. See Jenia Iontcheva, Jury Sentencing as Democratic Practice, 89 Va. L. Rev. 311, 314 (2003) (“Only six states currently employ jury sentencing in non-capital cases, down from thirteen in 1960.”) In capital cases, however, a jury decides whether to impose the death penalty.
similar concerns. As with acquitted conduct, sentencing enhancements based on uncharged conduct are quite common. These increases allow the government to impose punishment for particular conduct without the jury’s approval. Consequently, if a prosecutor is unsure of her ability to secure a conviction for a particular offense, she may charge a defendant with a more easily proven crime and use the uncharged conduct as a basis for increasing the penalty.

Increasing sentences based on uncharged conduct may seem less objectionable than increasing sentences based on acquitted conduct, because in the latter situation, the jury’s determination is actually being ignored. But the central point is that the right to trial by jury permits punishment for criminal conduct based only on conviction by a jury. Regardless of why the jury does not convict for particular conduct—be it because the conduct was never charged or because they issued an acquittal—increased punishment at sentencing is inappropriate in light of the jury clause guarantee.

The primary reason offered by courts in relying on uncharged and acquitted conduct is that such conduct provides information about the defendant’s life and characteristics on which sentencing decisions should be based. But this does not respond to the point that punishment is being imposed for conduct for which the jury did not enter a conviction. Even if the unproven conduct is used simply to provide information about the defendant’s character, that information still results in the defendant receiving a harsher

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63. For examples of courts permitting increased sentences on the basis of uncharged conduct, see Williams v. New York, 337 U.S. 241 (1949); State v. Green, 303 A.2d 312 (N.J. 1973); State v. Carico, 968 S.W.2d 280 (Tenn. 1998). For a particularly striking example of the effect uncharged conduct can have on sentencing, see Logan G. Carver, Prieto Gets Life in Prison for Beating, LUBBOCK AVALANCHE-JOURNAL, May 14, 2010 (reporting that a defendant who was eligible for parole received a sentence of life in prison based on prosecutors’ efforts to prove him guilty of a number of crimes for which he had not yet been convicted).

64. See Lear, supra note 8, at 1206 (noting that allowing uncharged conduct to increase sentences is “an open invitation” to prosecutors “to ‘undercharge’ and beef up the punishment level at the sentencing hearing”); David Yellen, Reforming the Federal Sentencing Guidelines’ Misguided Approach to Real-Offense Sentencing, 58 STAN. L. REV. 267, 275 (2005) (“It is one thing to consider facts about an offense for which the defendant has been convicted. It is quite another to allow the government to bypass the trial or plea bargaining process but still obtain the sentencing ‘benefit’ of the alleged criminal conduct.”). After Blakely v. Washington, 542 U.S. 296 (2004), a judge cannot increase a sentence beyond the statutory maximum based on uncharged conduct. But the important question is whether a judge may cite uncharged conduct as the reason for increasing a sentence although staying within the statutory maximum.

65. See Joh, supra note 12, at 910–11 (making such an argument).

66. Of course, the imposition of punishment at sentencing based on unconstitutional considerations, even if found by a jury, should be impermissible.

67. Williams, 337 U.S. at 247; United States v. Miller, 588 F.2d 1256, 1266 (9th Cir. 1978) (considering uncharged conduct assists the judge in imposing a “proper sentence” that is “based on an accurate evaluation of the particular offender and designed to aid in his personal rehabilitation”); Green, 303 A.2d at 323 (information about prior arrests was necessary to allow sentencing courts access to “total data . . . to enable a tailoring of the sentence to fit the offender as well as the offense”); Carico, 968 S.W.2d at 287–88.
Courts have responded that the failure to obtain a conviction does not establish that the defendant was *innocent* of the conduct charged. Even in the case of an acquittal, the verdict may simply reflect that the prosecution failed to meet its burden to prove each element of the crime beyond a reasonable doubt, which is significant because the standard of proof at sentencing is only a preponderance of the evidence. But this response misses the mark. The point is that even if a judge believes the defendant committed the crime, punishment is appropriate only upon a jury’s conviction.

Enhancements for uncharged or acquitted conduct are not the only sentencing factors that implicate the Sixth Amendment guarantee to a jury trial. The enhancement of sentences for individuals who refuse to plead guilty and insist on going to trial also raises Sixth Amendment concerns. Defendants who proceed to trial routinely receive longer sentences than those who plead guilty. This practice appears to punish a defendant for exercising his right to a jury trial instead of pleading guilty. Punishing a person because he chooses to exercise a constitutional right is itself unconstitutional. The constitutional complaint seems particularly acute in the jury right context, because the very purpose of the jury guarantee is to prohibit the government from punishing a

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68. Courts have occasionally argued that the consideration of conduct for which the defendant was not convicted is no more objectionable than the consideration of other sentencing factors that pose potential constitutional problems. See, e.g., United States v. Doyle, 348 F.2d 715, 721 (2d Cir. 1965) (“To argue that the presumption of innocence is affronted by considering unproved criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions.”). But the argument does not justify enhancements based on unproven conduct. Courts may be erring in allowing those other sentencing factors. The existence of bad law does not justify creating more bad law.

69. *E.g.*, United States v. Watts, 519 U.S. 148, 155 (1997) (“[The] ‘acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.’ . . . [I]t is impossible to know exactly why a jury found a defendant not guilty on a certain charge.”).

70. See *Lear*, *supra* note 8, at 1207 (allowing sentencing increases based on uncharged and acquitted conduct “demonstrates an unquestioning faith in a single judge’s ability to accurately assess whether a defendant ‘really’ committed additional crimes,” and it “treats trial procedures designed to avoid incorrect assessments of guilt as mere surplusage, having no bearing on the truth of the accusation”).


defendant without a jury’s approval. It results in a perverse situation in which
the government punishes a person because he demands that the government
satisfy this exact prerequisite to punishment.

Despite these objections, the Supreme Court has upheld the imposition of
longer sentences on those who refuse to plead guilty. It has done so by
conceptualizing longer sentences for those who exercise their right to trial not
as additional punishment for those who opt to exercise their jury rights, but
instead as the absence of leniency afforded to those who plead guilty. However, framing longer sentences in terms of withholding leniency instead of
imposing additional punishment does not convincingly address the
constitutional difficulties. The refusal to grant a defendant leniency that is
given to others because the defendant performed some act—exercising his right
to a jury—seems analytically indistinct from increasing that defendant’s
punishment because he performed that same act. In both situations, greater
punishment is imposed on the defendant because of his conduct.

Courts have recognized this lack of an analytical difference between
punishing an individual for exercising a right and denying a benefit to an
individual because he exercises a right in the doctrine of unconstitutional
conditions. Courts have held that the government cannot withhold benefits
from an individual simply because that individual has exercised a constitutional
right, explaining that to deny a benefit because an individual exercises a right
effectively punishes the exercise of that right. An example outside the

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742 (1970). Prior to these decisions, at least one circuit court held that longer sentences could not
be imposed on defendants who insisted on proceeding to trial. See United States v. Wiley, 278
F.2d 500, 504 (7th Cir. 1960).
77. See United States v. Jones, 997 F.2d 1475, 1477 (D.C. Cir. 1993) (en banc)
(questioning “the ultimate validity of distinctions between denials of leniency and enhancements
of punishment”). The Supreme Court has not offered a defense of distinguishing between denial of
leniency and increasing punishment, saying only that its jurisprudence regarding plea bargains
supports the distinction. See Corbitt, 439 U.S. at 223–24.
78. Distinguishing between reward and penalty is all the more difficult under the post-
Blakely and Booker worlds of indeterminate sentencing. Indeterminate sentencing schemes created
baseline sentences based on the particular offense of conviction. Under these schemes, sentence
reductions based on guilty pleas could more readily be classified as leniency since they were the
product of pre-determined deductions from the presumptive sentence. See United States v. Klotz,
943 F.2d 707, 710 (7th Cir. 1991). Under indeterminate sentencing schemes, there is no
presumptive sentence for an offense. Thus, the differential sentences between those who plead and
those who go to trial cannot be conclusively categorized as the result of leniency or punishment.
doctrine of unconstitutional conditions, “the government may not deny a benefit to a person on a
basis that infringes his constitutionally protected . . . freedom of speech even if he has no
entitlement to that benefit”); Richard A. Epstein, Foreword: Unconstitutional Conditions, State
Congress cannot, consistent with the First Amendment, condition support for broadcast stations on
sentencing context may help to illustrate the point. Imagine a statute imposing a thousand-dollar tax on members of the Republican Party. This statute would doubtless be unconstitutional since it discriminates against Republicans by imposing a penalty for being a member of that party. Reframing the tax as the conferral of a benefit—for example, a statute imposing a tax of two thousand dollars on all taxpayers, but granting a thousand-dollar exemption for those taxpayers who are not members of the Republican Party—would not solve the problem. Although this latter tax scheme purports to withhold a benefit instead of imposing a penalty, it has substantially the same effect as the first tax statute. It discriminates against members of the Republican Party and consequently is equally unconstitutional as a direct penalty on Republicans.

For these reasons, viewing longer sentences for those who exercise their right to trial as withholding leniency for those who waive their jury rights, instead of as punishment for those who exercise their jury rights, fails to alleviate the constitutional difficulties. It changes merely the form of the problem, not the substance.

C. Self-Incrimination

Courts arguably fail to enforce the Fifth Amendment’s privilege against self-incrimination at sentencing by enhancing the sentences of defendants who fail to express a lack of remorse. The Supreme Court has interpreted the Fifth Amendment privilege to impose broad limitations on the government. It has held that the privilege prohibits the government from obtaining a confession based on “any direct or implied promises, however slight.” Evidence obtained in violation of the prohibition on self-incrimination cannot

81. Some courts have attempted to characterize the sentencing increases imposed on those defendants who proceed to trial as attributable not to an exercise of the defendant’s trial rights, but rather as a response to the lack of remorse or failure to accept responsibility that proceeding to trial embodies. E.g., Brady v. United States, 397 U.S. 742, 753 (1970) (noting that a defendant “demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary”); Jones, 997 F.2d at 1478, 1480 (noting that “[t]he law also has long recognized that a defendant’s decision to plead guilty is good evidence of acceptance of responsibility and possibly even sincere remorse” and, therefore, a “judge may consider the defendant’s decision to go to trial as evidence that the defendant’s ultimate acceptance [of responsibility] may have been half-hearted”). But, as noted in infra Parts II.C and II.D, sentencing a defendant based on a perceived lack of remorse raises its own constitutional concerns.

82. U.S. Const. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . . .”).

form the basis for a conviction.\textsuperscript{84} The Court has further protected the privilege by ruling that a defendant’s refusal to testify cannot form the basis for an adverse inference against the defendant,\textsuperscript{85} and that the privilege prohibits the government from extracting potentially incriminating testimony before any government tribunal, not simply during a criminal trial.\textsuperscript{86}

Defendants do not enjoy the same benefits of the privilege at sentencing. Most states provide for increased sentences for those defendants who fail to express remorse for their crimes.\textsuperscript{87} Federal courts likewise have routinely imposed longer sentences on those who do not express remorse.\textsuperscript{88} For a defendant to express remorse for committing a crime, she must admit to having committed that crime. The availability of a shorter sentence is contingent on her making such an incriminating statement, and thus the ordinary Fifth Amendment privilege, which would protect silence, is not fully recognized at sentencing.\textsuperscript{89}

\textsuperscript{84} Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347 (1963). In some, though not all, circumstances evidence obtained in violation of the Fifth Amendment may be used for impeachment purposes. See Kansas v. Ventris, 129 S. Ct. 1841, 1845 (2009) (delineating the circumstances where evidence obtained in violation of self-incrimination clause may be used for impeachment).

\textsuperscript{85} Griffin v. California, 380 U.S. 609 (1965).

\textsuperscript{86} See Kastigar v. United States, 406 U.S. 441, 444–45 (1972) (the privilege “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory”). Indeed, the Court has read the clause to limit the government’s ability to extract statements outside the courthouse. E.g., Miranda v. Arizona, 384 U.S. 436 (1966) (holding, based on the privilege against self-incrimination, that before interrogating a suspect in custody, police must inform that suspect of his right to remain silent).


\textsuperscript{88} Some federal courts operating under the Guidelines scheme have pointed to USSG § 3E1.1, which calls for a reduction for an offender who “accepts responsibility” for her crime, see, e.g., United States v. Herrera-Zuniga, 571 F.3d 568, 574 n.2 (6th Cir. 2009), while others have concluded that lack of remorse is an independent consideration at sentencing authorized by 18 U.S.C. § 3553(a), see United States v. Douglas, 569 F.3d 523, 528 (5th Cir. 2009). The latter group has the better understanding: Defendants who proceed to trial could receive a sentencing reduction for expressing remorse at sentencing, see, e.g., United States v. Jones, 997 F.2d 1475 (D.C. Cir. 1993) (reviewing sentencing reduction for defendant who proceeded to trial, but also received Federal Sentencing Guidelines reduction for acceptance of responsibility), while a defendant who pleads guilty will not receive a sentencing reduction if she appears insufficiently remorseful, see United States v. Purchess, 107 F.3d 1261, 1269 (7th Cir. 1997) (“a guilty plea entered for the apparent purpose of obtaining a lighter sentence does not entitle a defendant to a reduction for acceptance of responsibility”). As for federal courts operating outside the Guidelines, they have recognized that whether a defendant expresses remorse is an appropriate factor for judges to consider in their sentencing discretion. See, e.g., United States v. Malquist, 791 F.2d 1399, 1402–03 (9th Cir. 1986) (“inclusion of [defendant’s] lack of repentance in the court’s sentencing calculus was permissible”).

To be sure, the Supreme Court has recognized a limited form of the privilege against self-incrimination in sentencing proceedings. In *Mitchell v. United States*, the Court held that the privilege prohibited a judge from drawing an adverse inference about the amount of drugs the defendant was involved in selling based on her silence. The Court limited its holding “to factual determinations respecting the circumstances and details of the crime.” It explicitly stated that it expressed no view on whether “silence bears upon the determination of a lack of remorse.” Consistent with this language, a number of courts have rejected arguments that the Fifth Amendment prohibits an inference based on a defendant’s silence of lack of remorse, and other courts have cited this language when holding that considering lack of remorse as a sentencing factor does not violate the Fifth Amendment. Courts have not based their conclusion that lack of remorse is a permissible sentencing factor on an analysis of the Fifth Amendment question. Rather, the justification these courts have offered is simply that a defendant’s failure or refusal to show remorse or accept responsibility is an appropriate factor for sentencing because it provides information about the likelihood of a defendant’s rehabilitation.

**D. Free Speech**

Enhancing sentences for lack of remorse also raises free speech issues. The Free Speech Clause of the First Amendment generally forbids the government from punishing a person based on the content of her speech. It

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90. See *Mitchell v. United States*, 526 U.S. 314, 328–29 (1999) (“[A] sentencing hearing is part of the criminal case—the explicit concern of the self-incrimination privilege. In accordance with the text of the Fifth Amendment, we must accord the privilege the same protection in the sentencing phase of ‘any criminal case’ as that which is due in the trial phase of the same case.”).
91. 526 U.S. at 328.
92. Id.
93. Id. at 330.
also protects an individual from being compelled to speak. The government
cannot, as a general matter, punish an individual for refusing to speak. Thus, in
*West Virginia State Board of Education v. Barnette*, the Court struck down a
statute requiring expulsion for students who refused to recite the pledge of
allegiance.

That courts increase sentences based on lack of remorse demonstrates that
these First Amendment protections are weaker at sentencing. Courts have
increased sentences based both on a defendant’s failure to show remorse, and
on affirmative statements made by the defendant at trial or at sentencing that
reveal a lack of remorse. These increases directly implicate the First
Amendment. Increases based on a defendant’s failure to express remorse
pressure the defendant to express the belief that her conduct was wrong, even if

government officials from subjecting an individual to retaliatory actions, including criminal
prosecutions, for speaking out . . . ”). The prohibition, of course, is not complete. Certain types of
speech—such as obscenity, libel, and disclosure of state secrets—do not fall within the protections
of the First Amendment, see *District of Columbia v. Heller*, 554 U.S. 570, 683 (2008), and some
speech, such as commercial speech, enjoys only partial protection, see *Thompson v. W. States
Med. Ctr.*, 535 U.S. 357, 367 (2002). Still, the exceptions to the First Amendment are narrowly
drawn. The general rule is that the government may not punish a person for her speech. Indeed, so
important is this protection that courts have created an exception to the rules regarding facial
challenges. Ordinarily, a law survives a facial challenge if there are any conceivable constitutional
plaintiff can only succeed in a facial challenge by ‘establish[ing] that no set of circumstances
exists under which the Act would be valid,’ i.e., that the law is unconstitutional in all of its
applications.”). But in the First Amendment context, a court may strike a law with some
constitutional applications if it also prohibits a substantial amount of protected speech. United States v.
doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech”).

Amendment may prevent the government from prohibiting speech, the Amendment may prevent
the government from compelling individuals to express certain views.”); *Wooley v. Maynard*, 430
U.S. 705, 714 (1977) (noting that “the right of freedom of thought protected by the First
Amendment against state action includes both the right to speak freely and the right to refrain
from speaking at all” and that “[t]he right to speak and the right to refrain from speaking are
complementary components of the broader concept of ‘individual freedom of mind’”).

compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s
right to speak his own mind, left it open to public authorities to compel him to utter what is not in
his mind”).

100. *See Dawson v. Delaware*, 503 U.S. 159, 163–64 (rejecting defendant’s argument that
“the Constitution forbids the consideration in sentencing of any evidence concerning beliefs or
activities that are protected under the First Amendment” as “too broad” a principle).

101. *See supra* notes 87–89, 94–96 and accompanying text.

102. *See, e.g.*, Kapadia v. Tally, 229 F.3d 641, 647 (7th Cir. 2000) (upholding sentence
increase based on anti-semitic statements, which reflected lack of remorse).

(noting that “an apology ideally contains a statement of remorse, an acknowledgment of
responsibility, and a promise of forbearance” and that “[b]ecause such statements strike at the
heart of an individual’s conscience, ordering an individual to apologize raises core First
Amendment concerns”).
she does not hold that view. Likewise, increases based on a defendant’s affirmative statements indicating a lack of remorse limits the scope of allowable speech, pressuring a defendant to say only what will placate the court.

Framing the issue as punishing the defendant not for his failure to express remorse, but instead for his failure to feel remorse, does not cure the problem. Underlying the First Amendment is the notion that individuals have the right to think and hold beliefs without risk of punishment. Whether a defendant feels remorse depends on his individual thoughts and viewpoints about his alleged crime. Thus, an enhancement based on lack of remorse is punishment of thought.

In rejecting First Amendment challenges to lack of remorse as a sentencing factor, courts have not conceptualized lack of remorse as a free speech issue. Instead, they have framed lack of remorse as a fact that informs the sentencing judge’s judgment about a defendant’s likelihood of recidivism and amenability to rehabilitation, both of which are traditional sentencing considerations. This justification, however, does not cure the First Amendment problem. The First Amendment protects the holding and expressing of beliefs. Those protections apply to any regulation targeting expression, regardless of the reasons for the regulation.

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104. Cf. Hessick, Bad Acts, supra note 50, at 1156 (noting that “there are undoubtedly people who think that some of our criminal prohibitions are inappropriate,” for example, “we do not have a complete public consensus that the use or abuse of certain substances should be illegal”).

105. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977); see also Barnette, 319 U.S. at 642 (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .”).

106. For example, in affirming a defendant’s sentence the Ninth Circuit stated: Smith argues that his First Amendment free speech and Fifth Amendment due process rights were violated because he was punished with a higher sentence for expressing his views on the district court’s lack of jurisdiction. But the district court made it clear that it was increasing the sentence based on Smith’s lack of remorse, and his threat to the financial safety of the public when released. These are legitimate sentencing factors. United States v. Smith, 424 F.3d 992, 1016 (9th Cir. 2005).

107. Kapadia v. Tally, 229 F.3d 641, 647 (7th Cir. 2000) (relating lack of remorse to low likelihood of rehabilitation); accord United States v. Rosenberg, 806 F.2d 1169, 1179 (3d Cir. 1986); State v. Baldwin, 304 N.W.2d 742, 751–52 (Wis. 1981) (stating that “[a] defendant’s attitude toward the crime may be relevant” in these assessments); see also United States v. Miller, 343 F.3d 888 (7th Cir. 2003) (acknowledging remorse may not convince the sentencing judge of the defendant’s prospects for rehabilitation). At least one court has suggested that, although lack of remorse is an appropriate sentencing factor, it is impermissible for a judge to consider a defendant’s “social or political views” in imposing sentence. United States v. Brown, 479 F.2d 1170, 1174 (2d Cir. 1973) (“Although Judge Travia’s statement that Brown must ‘take responsibility for saying those words’ is not entirely free from doubt, we are satisfied from the sentencing minutes, considered as a whole, that he did not base the sentence on his revulsion arising out of Brown’s social or political views, which would be improper.”).

108. The First Amendment limits the ability to regulate protected speech, even when the reason for the regulation is to achieve a secondary purpose. See, e.g., New Albany DVD, LLC v. City of New Albany, 581 F.3d 556, 561 (7th Cir. 2009); see also City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 449 (2002) (Kennedy, J., concurring in the judgment) (stating that,
secondary effects is still a regulation of speech. If secondary effects could generally justify regulations of speech, the government could substantially restrict expression at the core of the First Amendment. The government could, for example, punish a person for advocating the legalization of marijuana—clearly protected speech—because that advocacy suggests that the individual smokes marijuana. In short, although the government has a legitimate interest in rehabilitating offenders and preventing recidivism, the First Amendment imposes limits on the government’s ability to achieve those goals through the regulation of speech.

One might argue that sentencing increases for lack of remorse are hardly out of the ordinary, because courts regularly use their powers of contempt to impose punishment based on speech in all courtroom proceedings, not just sentencing. Through contempt, courts may regulate who may speak, when they may speak, and to some degree, what they may say. They may even hold in contempt a person who refuses to testify despite a court’s order to do so. But that courts may impose contempt based on speech in the courtroom does not signify that courts may generally punish speech in the courtroom. To the contrary, the Supreme Court has justified the contempt power on the ground that courts must be able to impose contempt to maintain order in their courtrooms. Similar interests do not justify punishment based on a failure to testify.

when government regulates speech to suppress secondary effects, it “must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact”). By contrast, courts have generally upheld laws that seek to regulate unprotected activity, but that nevertheless burden speech. See Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 HARV. L. REV. 1175, 1177–78 (1996). For example, in City of Erie v. Pap’s A.M., 529 U.S. 277 (2000), the Court upheld a prohibition on nude dancing because “the ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare” caused by nude dancing establishments. Id. at 291. Similarly, in United States v. O’Brien, 391 U.S. 367 (1968), the Court upheld a prohibition on the burning of draft cards on the theory that the prohibition was aimed at the unprotected conduct of burning the cards, not at suppressing the message of draft resistance that protestors sought to convey by burning their draft cards. Id. at 382.

109. See New Albany DVD, 581 F.3d at 559 (“reduction in adverse secondary effects may not be achieved just by curtailing speech”).
110. Of course, the government may regulate speech when its interest is sufficiently strong. Thus, for example, the government may forbid perjury because of its impact on the judicial system.
113. Bridges v. California, 314 U.S. 252, 266 (1941) (justifying constitutionality of the contempt power on the ground that it is necessary to “protect [courts] from disturbances and disorder in the court room”); United States v. Wilson, 421 U.S. 309, 316 (1975) (stating that the refusal to testify “disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court as well as to provide the recalcitrant witness with some incentive to testify”).
express remorse at sentencing. Courts punish for the failure to express remorse not because the expression of remorse is necessary to maintain order, but because the failure to express it reveals something about the defendant’s past and potential future conduct outside the courtroom.\footnote{114. \textit{E.g.}, United States v. Miller, 343 F.3d 888, 890–91 (7th Cir. 2003) (stating “the district court must decide whether the defendant has indeed accepted responsibility and evinced a character trait that implies a lower risk of recidivism”).}

One could also argue that lack of remorse enhancements ought to be permitted because they promote some other important government interest. Generally speaking, a law that infringes or coerces speech may be constitutional only if it satisfies strict scrutiny—that is, the law is narrowly tailored to achieve a compelling government interest.\footnote{115. See \textit{Wooley v. Maynard}, 430 U.S. 705, 715–16 (1977).} \footnote{116. See \textit{Schall v. Martin}, 467 U.S. 253, 264 (1984) (identifying prevention of crime as compelling interest).} An enhancement for lack of remorse could arguably promote the compelling government interest of preventing future crimes, because a defendant who fails to express remorse may feel less compunction about committing crimes.\footnote{117. For a law to be narrowly tailored, it cannot infringe on the First Amendment any more than is necessary to accomplish the government’s compelling interest. This has both qualitative and quantitative components. The government cannot cause a greater infringement of one person’s First Amendment rights than necessary to accomplish its compelling interest; nor can the government infringe the First Amendment rights of more people than necessary to recognize that interest. See \textit{United States v. Playboy Entm’t Grp., Inc.}, 529 U.S. 803, 815–16 (2000).} But it is not evident that the enhancements are narrowly tailored to meet this goal.\footnote{118. As Michael O’Hear has explained: \textit{Despite the conventional wisdom that present feelings of remorse predict future desistance from crime, very little research has been done to substantiate the remorse-recidivism connection. To be sure, psychologists recognize that a person’s feelings of guilt regarding something he or she has done tend to induce pro-social behavior . . . . But it is far from clear that the emotion that sentencing judges characterize as “remorse” or “contrition” is the same (or at least has the same behavioral consequences) as the emotion that psychologists label “guilt,” as opposed, for instance, to such emotions as shame and embarrassment, with which guilt is often confused.\textit{Michael H. O’Hear, Appellate Review of Sentences: Reconsidering Deference, 51 WM. & MARY L. REV. 2123, 2144–45 (2010).}}}\footnote{119. For an obvious example, compare the father who feels no remorse for killing the murderer of his children but is unlikely to kill again because his crime arose from unique circumstances, and the robber who feels bad about his crime but nevertheless will rob again if he needs money.} Determining whether a sentencing enhancement for lack of remorse satisfies the narrowly tailored requirement would require empirical research into the question of whether the failure to express remorse is an accurate predictor of recidivism; however, there are no such studies.\footnote{118. As Michael O’Hear has explained: \textit{Despite the conventional wisdom that present feelings of remorse predict future desistance from crime, very little research has been done to substantiate the remorse-recidivism connection. To be sure, psychologists recognize that a person’s feelings of guilt regarding something he or she has done tend to induce pro-social behavior . . . . But it is far from clear that the emotion that sentencing judges characterize as “remorse” or “contrition” is the same (or at least has the same behavioral consequences) as the emotion that psychologists label “guilt,” as opposed, for instance, to such emotions as shame and embarrassment, with which guilt is often confused.\textit{Michael H. O’Hear, Appellate Review of Sentences: Reconsidering Deference, 51 WM. & MARY L. REV. 2123, 2144–45 (2010).}}} Moreover, it seems unlikely that the failure to express remorse is a particularly good predictor of recidivism. Common experience suggests that a number of defendants who do express remorse recidivate, and a number of defendants who do not express remorse do not recidivate.\footnote{119. For an obvious example, compare the father who feels no remorse for killing the murderer of his children but is unlikely to kill again because his crime arose from unique circumstances, and the robber who feels bad about his crime but nevertheless will rob again if he needs money.} In any event, even if enhancements for the failure to express could be justified on these grounds, courts have not sought to do so. Instead,
courts have refused to consider First Amendment challenges at all.

E. Due Process

In one sense, all of the previously mentioned constitutionally objectionable sentencing factors described in this Part violate the Due Process Clause, because the Due Process Clause forbids the deprivation of liberty based on inappropriate considerations. Here we address one sentencing factor in particular that raises due process problems—risk of future dangerousness.120

The central purpose of the Due Process Clause is to ensure basic concepts of justice.121 Basic fairness dictates that a person should be held accountable only for what he has already done, not for what he might do.122 A person who has not yet committed a punishable act is not culpable and therefore not deserving of punishment.123 This rationale explains why the doctrine of attempt requires significant action on the part of the defendant—we do not punish mere preparation or unlawful intent because it might result in the punishment of “persons who might voluntarily turn back from criminal activity.”124

By contrast, the threat of committing future crimes is one of the most common sentencing enhancements.125 Virtually every sentencing system

120. Cf. Rebecca Frank Dallet, Note, Foucha v. Louisiana: The Danger of Commitment Based on Dangerousness, 44 CASE W. RES. L. REV. 157 (1993) (arguing that basing the decision to commit those defendants found not guilty by reason of insanity violates due process if based only on predictions of future dangerousness).


122. See Simmons v. South Carolina, 512 U.S. 154, 163 (1994) (“Arguments relating to a defendant’s future dangerousness [are ordinarily] inappropriate at the guilt phase of a trial, as the jury is not free to convict a defendant simply because he poses a future danger . . . .”). Several procedural protections in criminal trials—such as the presumption of innocence and the requirement of proof beyond a reasonable doubt—operate to preserve this basic principle as well.

123. People v. Juillet, 475 N.W.2d 786, 811 (Mich. 1991) (“The act requirement . . . guarantees that the accused has done something to merit punishment, preserves the sphere of personal autonomy in which an individual can think and act without fear of government intrusions, and prevents arbitrary and abusive exercise of government power in the criminal law arena.”); Jonathan C. Carlson, The Act Requirement and the Foundations of the Entrapment Defense, 73 VA. L. REV. 1011, 1023 (1987) (“One who does not violate the law is presumed not to deserve punishment.”). To be sure, the failure to act can be the basis for criminal liability in situations where an individual has a duty to act, but only because we conceptualize the omission as a voluntary act of restraint. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 105 (5th ed. 2009) (“[A] defendant’s omission of a common law duty to act, assuming that she was physically capable of performing the act, serves as a legal substitute for a voluntary act.”) (emphasis in original).

124. DRESSLER, supra note 123, at 397.

125. See, e.g., 18 U.S.C. § 3553(a)(2)(C) (2006) (directing courts to consider the need “to protect the public from further crimes of the defendant” in imposing sentence); U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(a)(1) (2010) (“If reliable information indicates that the defendant’s criminal history category substantially under-represents . . . the likelihood that the defendant will commit other crimes, an upward departure may be warranted.”); HAW. REV. STAT. § 706-621(2)(g) (2010) (providing for mitigation if the “character and attitudes of the defendant indicate that the defendant is unlikely to commit another crime”); IDAHO CODE ANN. § 19-2521(1)(a) (2010) (imprisonment may be appropriate if there “is undue risk that . . . the defendant will
individualizes sentences based on predictions of future dangerousness.\textsuperscript{126} These enhancements for future dangerousness fail to satisfy the principle of punishing individuals for only past acts. They allow punishment to be imposed based on acts that the defendant has not committed, and may never commit in the future. Punishment therefore depends not on the defendant’s conduct, but instead on “judicial intuition” of possible future acts he may perform.\textsuperscript{127}

Enhancing a sentence for future dangerousness also implicates another facet of due process—notice. Due process requires that the government afford a defendant with adequate notice before being deprived of life, liberty, or property.\textsuperscript{128} Overly vague statutes, for example, are unconstitutional because they do not provide such notice.\textsuperscript{129} For this reason, a criminal statute must specify the actus reus—“the wrongful deed that comprises the physical components of a crime”\textsuperscript{130}—that triggers criminal liability.\textsuperscript{131} This requirement allows members of the public to conform their behavior to avoid engaging in illegal activities, and provides guidance to criminal justice actors in order to prevent arbitrary and discriminatory enforcement of the law.\textsuperscript{132}

Enhancements based on future dangerousness, however, do not give such notice.\textsuperscript{133} Judges are permitted to impose enhancements based on any conduct that they think might reveal a proclivity to commit crime in the future.\textsuperscript{134} Consequently, individuals cannot conform their behavior to avoid increased punishment, and the government has virtually unbridled discretion in deciding whether to seek such punishment. To be sure, jurisdictions have sometimes explicitly identified factors—such as substance abuse or lack of employment

\begin{itemize}
\item commit another crime\textsuperscript{a}); N.J. STAT. ANN. § 2C:44-1(a)(3) (2010) (identifying the “risk that the defendant will commit another offense” as an aggravating sentencing factor); see also IDAHO CODE ANN. § 19-2521(2)(i) (2010) (providing for mitigation if “character and attitudes of the defendant indicate that the commission of another crime is unlikely”). Indeed, many aggravating sentencing factors can trace their roots to concerns about recidivism. See, e.g., OHIO REV. CODE ANN. § 2929.12(D) (2010) (directing courts to consider prior offenses, drug or alcohol use, and lack of remorse as indications of future risk).
\item 129. See, e.g., id. at 572–73.
\item 130. BLACK’S LAW DICTIONARY 39 (9th ed. 2009).
\item 131. See McBoyle \textit{v}. United States, 283 U.S. 25, 27 (1931).
\item 132. Kolender \textit{v}. Lawson, 461 U.S. 352, 357–58 (1983); see also Carlson, supra note 123, at 1024.
\item 133. In \textit{Specht v. Patterson}, 386 U.S. 605, 608–09 (1967), the Court struck down a criminal law that enabled the State to punish for potential future criminal acts, but in doing so did not consider the due process concerns of punishing for future acts.
\item 134. See, e.g., statutes cited supra, note 125.
\end{itemize}
history—that are believed to indicate future dangerousness. But, as a general matter, enhancements for future dangerousness are not limited to those explicitly identified considerations, and may be based on any evidence that leads a judge to conclude that the defendant may commit crimes in the future.

There are few cases in which defendants have challenged judicial findings of future dangerousness on due process grounds. In those few cases, courts have not engaged in independent analysis of the due process claim; rather, they simply assert that it is necessary to “predict a convicted person’s probable future conduct” in imposing sentence, or they note that such predictions are common in sentencing. In both situations, these courts rely on Jurek v. Texas, a case in which the Supreme Court rejected a challenge to allowing juries to consider future dangerousness as an aggravating factor in determining whether to impose the death penalty. The Court justified its decision in Jurek by noting that:

[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge’s prediction of the defendant’s future conduct. And any sentencing authority must predict a convicted person’s probable future conduct when it engages in the process of determining what punishment to impose.

Thus, due process objections to future dangerousness as a sentencing factor have essentially been rejected based on nothing more than a statement of fact that courts frequently use future dangerousness as a sentencing factor.

135. See, e.g., CAL. R. CT. 4.414(b)(4); OHIO REV. CODE ANN. § 2929.12(D).
136. The paucity of challenges may be attributable to the widespread acceptance of incapacitation as a sentencing goal.
139. Jurek v. Texas, 428 U.S. 262 (1976). The challenge in Jurek was only that future dangerousness was so broad that it failed to provide a criterion by which juries could meaningfully distinguish between defendants. In rejecting that claim, the Court did not address the separate question whether allowing future dangerousness as an aggravating factor provides adequate notice of conduct individuals should avoid.
140. Id. at 275.
141. Cf. Lear, supra note 8, at 1208 (noting that, in response to constitutional challenges to other sentencing factors, “the courts of appeals have consistently answered such claims with a description of the current system, rather than a discussion of the constitutional propriety of punishment” imposed by the system).
III.
QUESTIONING SENTENCING EXCEPTIONALISM

There are three commonly made arguments for why constitutional rights ought not be recognized at sentencing. The first is that full recognition of constitutional rights at sentencing is inconsistent with historical practice. The second is that defendants forfeit their rights upon being convicted. So long as a defendant receives a sentence within the statutory range, he has no right to challenge his sentence. The third argument is that enforcing constitutional rights is simply incompatible with the goals of individualized punishment. This Part considers whether these reasons sufficiently justify the consideration of constitutionally doubtful sentencing factors. It ultimately concludes that they do not.

A. Historical Practice

One common justification for refusing to enforce rights at sentencing is based on history.\textsuperscript{142} The argument is that, historically, courts have considered future dangerousness, lack of remorse, and many of the other factors identified in Part II in imposing sentence and, therefore, consideration of those sentencing factors must be appropriate.\textsuperscript{143}

This historical argument is not one of originalism; it is not, in other words, an argument that historical practice at the Founding establishes the constitutionality of these sentencing considerations.\textsuperscript{144} That is because, as noted earlier, at the time of the Founding, laws prescribed mandatory sentences based solely on the crime of conviction.\textsuperscript{145} Sentencing thus was not a separate proceeding at which individual characteristics were considered. This scheme

\textsuperscript{142}. See Michaels, supra note 23, at 1775 (noting that courts have sometimes based their sentencing decisions on “historical practice,” and further noting that the justification is not offered when it does not support the courts’ desired result).

\textsuperscript{143}. See Mitchell v. United States, 526 U.S. 314, 340 (1999) (Scalia, J., dissenting) (stating that “determinations of acceptance of responsibility, repentance, character, and future dangerousness, in both federal and state prosecutions . . . is probably the bulk of what most sentencing is all about”).

\textsuperscript{144}. According to originalists, the Constitution should be interpreted “as originally understood by the people who ratified it.” Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 YALE L.J. 541, 551 (1994). Original meaning is also relevant for non-originalists, but unlike with originalists, it is not the only consideration that informs constitutional meaning. See Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution’s Secret Drafting, 91 GEO. L.J. 1113, 1126 (2003) (“For example, ‘non-originalist’ scholars often employ originalist methodology to establish a historical baseline for non-originalist inquiry . . . .”).

\textsuperscript{145}. See Apprendi v. New Jersey, 530 U.S. 466, 478–81 (2000); see also supra notes 12–13. But cf. Williams v. New York, 337 U.S. 241, 246 (1949) (“[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.”).
presented no occasion for constitutional drafters to consider the extent to which constitutional protections should be afforded at sentencing. Aside from a few scattered examples, the practice of separate consideration of sentencing characteristics developed in the nineteenth century. Because individualized sentencing was virtually unknown at the Founding, originalism cannot justify the refusal to recognize rights at sentencing.

Instead of relying on originalism, those who point to the historical practice to justify the disregard of rights at sentencing claim simply that the sheer longevity of the practice establishes its constitutionality. Some have argued that considerations of this sort should inform constitutional meaning. As with any other method of constitutional interpretation, one may debate whether the fact that a practice has a long pedigree establishes its constitutionality. After all, accepting that principle potentially undermines decisions like *Brown v. Board of Education*—given our country’s long history of segregation prior to

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146. See *Apprendi*, 530 U.S. at 480 n.7 (noting that, while judges exercised no discretion in sentencing for felonies, the “common law of punishment for misdemeanors” was “substantially more dependent upon judicial discretion,” and judges “most commonly imposed discretionary ‘sentences’ of fines or whippings upon misdemeanants”).

147. *Apprendi*, 530 U.S. at 481 (noting “the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range”).

148. To be sure, courts had begun considering these sentencing factors at the time of the adoption of the Fourteenth Amendment. But in evaluating the constitutionality of state conduct, the Supreme Court has not considered the practice in 1868; instead, it has continued to look to the practice in 1791 to evaluate the constitutionality of state sentencing schemes. See, e.g., *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi*, 530 U.S. 466; cf. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (rejecting the argument that the state and federal government should be subject to different standards under the Fifth and Fourteenth amendments).

149. See *Michaels*, supra note 23, at 1775.


151. A long-standing tradition of allowing a practice may suggest that society has accepted the practice as constitutional, which according to Professor Fallon may be sufficient to establish the constitutionality of the practice. See Fallon, *Stare Decisis*, supra note 150, at 582 (arguing that constitutionality depends on “acceptance coupled with reasonable justice”). But, the Court has disregarded such traditions in the past when assessing the constitutionality of sentencing procedures. United States v. Booker, 543 U.S. 220, 235–236 (2005) (rejecting argument about historical tradition in holding Federal Sentencing Guidelines violate the Sixth Amendment jury trial right).

the Court’s decision in Brown. Still, as the Supreme Court has concluded, a “universal and long-established tradition” of allowing certain conduct may be reason to presume that the conduct is constitutional, because it reflects a conclusion by others charged with interpreting the Constitution that the practice is constitutional. This presumption, however, should not apply to the question of whether to recognize constitutional rights at sentencing because the disregard of such rights is not a universal, longstanding tradition. Although courts historically may have recognized few constitutional rights at sentencing, they have become more proactive at enforcing them in more recent times. For example, American courts and legislatures once considered race and gender to be appropriate sentencing factors, yet courts are now forbidden from basing sentences on such factors.

The judiciary’s willingness to recognize greater constitutional protections at sentencing has been most apparent with respect to procedural rights. Sentencing was historically a wholly informal proceeding at which few procedural protections were afforded; but in recent years courts have recognized an ever-increasing number of constitutional protections at sentencing relating to burdens of proof, the right to a jury, the right to remain silent, and the right to counsel. This pattern suggests a growing commitment to recognizing constitutional rights at sentencing. For example, although sentencing courts “traditionally heard evidence and found facts without any prescribed burden of proof,” McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986), courts have more recently stated that due process requires that facts supporting sentencing decisions must be proven by at least a preponderance of the evidence. United States v. Berry, 553 F.3d 273, 280 (3d Cir. 2009) (stating that due process requires that facts supporting sentencing decisions must be proven by at least a preponderance of the evidence); see also Glover v. United States, 531 U.S. 198, 202–04 (2001) (recognizing a right to effective assistance of counsel at sentencing); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that, under the Sixth Amendment, any fact that increases the sentence beyond the statutory maximum must be found by a jury); Mitchell v. United States, 526 U.S. 314, 330 (1999) (extending a portion of the privilege against self-incrimination to sentencing); Burns v. United States, 501 U.S. 129, 138 (1991) (noting that failure to give defendant advance notice of facts that would result in a higher sentence would raise a serious due process question); Mempa v. Khay, 389 U.S. 128, 137 (1967) (recognizing the

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153. See Lear, supra note 8, at 1185 n.16.
155. See Lear, supra note 8, at 1185 (“Tradition is no substitute for constitutionality; the steadfastness with which the courts have proclaimed the constitutionality of [a constitutionally doubtful sentencing factor] should not deter [its] re-examination.”).
157. See supra notes 34–36 and accompanying text. Indeed, the explicit consideration of a defendant’s race or gender at sentencing is believed to be so problematic that it results not only in the reversal of a sentence, but also often in the case being assigned to a new judge for resentencing. E.g., United States v. Kaba, 480 F.3d 152, 159 (2d Cir. 2007); United States v. Leung, 40 F.3d 577, 586–87 (2d Cir. 1994). But see United States v. Borrero-Isaza, 887 F.2d 1349, 1357 (9th Cir. 1989) (finding it unnecessary to remand to different judge for resentencing).
158. See Carissa Byrne Hessick, Ineffective Assistance at Sentencing, 50 B.C. L. REV. 1069, 1100–02 (2009) (noting the increasing formality and constitutional protections at sentencing in recent decades).
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to protecting rights at sentencing rather than to disregarding them.159

B. Forfeiture

Another justification given for the refusal to recognize constitutional rights at sentencing is that once an individual is convicted, he becomes an “outlaw, a person with no legal rights.”160 Under this theory, a defendant forfeits the right to object to the imposition of any sentence that is within the statutory range,161 and any sentence imposed below the maximum authorized sentence is merely the product of judicial mercy.162 This justification is unpersuasive.

This forfeiture theory rests on the idea that constitutional protections apply only to those who abide by the law. But this is not so. The Constitution protects all individuals, guilty or innocent.163 Indeed, the Eighth Amendment’s right to counsel at sentencing proceedings; Michaels, supra note 23, at 1811 n.165 (identifying a number of lower court decisions holding that “the defendant must have notice of facts relied upon by the court in noncapital sentencing cases”).

159. In any event, the presumption of constitutionality established by historical practice is not conclusive. See White, 536 U.S. at 785. Courts would still be required to analyze the constitutional issues to determine whether the presumption has been overcome.


161. See United States v. Tucker, 404 U.S. 443, 447 (1972) (noting that “a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review”); Note, The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court’s “Elements” Jurisprudence, 117 Harv. L. Rev. 1236, 1248 (2004) (contending that “if a defendant has been afforded all these constitutional protections and has been convicted by a jury, then he has been adequately protected against an arbitrary liberty restriction by the state” and noting that the possibility that “the defendant might get less than the maximum punishment is immaterial, for he has been adequately protected against the maximum liberty restriction the state has deemed appropriate for the crime of which he has been convicted”); Note, Federal Court of Appeals Vacates Sentence on Grounds of Severity and Remands to District Court for Resentencing, 109 U. Pa. L. Rev. 422, 423 (1961) (noting “the overwhelming weight of authority states that the courts of appeals have no power to review sentences which are within the legal limits” and further noting that “[w]hile there has been no Supreme Court holding on point, Court dicta tend to support the view that, where there is a statutory limit on sentencing, sentences within that limit—though severe—are not reviewable”); see also John Bronsteen, Retribution’s Role, 84 Ind. L.J. 1129, 1139 (2009) (arguing that when an individual has broken the law, she has forfeited her right not to be punished by the state under retributive theory, but that utilitarian concerns may counsel in favor of punishing below the statutory maximum).

162. See Kadish, supra note 160, at 920 (noting the “older theory” that “dispensing less punishment than the legislature authorized was regarded as an act of merciful leniency to which there could be no legal claim, and hence, in the orthodox view, was a privilege and not a right”).

163. “There can be no doubt that the constitution continues to operate, even after a valid conviction, in the sentencing process.” United States v. Lemon, 723 F.2d 922, 937 (D.C. Cir. 1983); see also Kimmelman v. Morrison, 477 U.S. 365, 380 (1986) (“The constitutional rights of criminal defendants are granted to the innocent and the guilty alike.”). This is not to say that rights are absolute at sentencing. As with any rights, rights at sentencing can be trumped by other more important interests or rights. Thus, for example, a state could limit a defendant’s rights at sentencing if doing so was necessary to prevent a defendant from fleeing before sentencing or from killing a potential witness at a sentencing hearing.
prohibition on cruel and unusual punishment specifically applies only during the sentencing phase of a criminal case, after a defendant has been convicted.\textsuperscript{164} For this reason, it is hardly surprising that modern courts have not relied on the forfeiture theory in rejecting constitutional challenges to sentencing factors. While older cases relied on forfeiture, modern cases have focused on historical practice or the need for individualization at sentencing when refusing to recognize constitutional rights.\textsuperscript{165}

Nor does the fact that a statute may authorize a sentence up to a certain amount mean that the defendant cannot raise constitutional objections to a sentence less than that maximum. To be sure, the statute prescribing the statutory range may not provide the defendant with a right to demand a sentence below the authorized maximum,\textsuperscript{166} but it does not mean that the defendant has no rights whatsoever.\textsuperscript{167} The defendant still is entitled to the protection of rights conferred by other sources—be it statutes, regulations, or constitutions.\textsuperscript{168} That is why, to the extent that certain sentencing considerations have been found unconstitutional, courts have reversed sentences based on those considerations, even when the sentence is within the authorized range.\textsuperscript{169}

More fundamentally, recognizing a theory of forfeiture would undermine the essence of the Constitution. One of the core animating principles of the Constitution was to protect individual liberty from the exercise of government power. This concern is most obviously reflected in those constitutional provisions providing specific rights limiting the government’s ability to

\textsuperscript{164} See U.S. Const. amend VIII.

\textsuperscript{165} People v. Riley, 33 N.E.2d 872, 875 (Ill. 1941) (describing convicted defendants at sentencing as “naked criminals, hoping for mercy but entitled only to justice”).

\textsuperscript{166} See Harris v. United States, 536 U.S. 545, 566 (2002) (“The Fifth and Sixth Amendments ensure that the defendant will never get more punishment than he bargained for when he did the crime, but they do not promise that he will receive anything less than that. If . . . the trial jury has found all the facts necessary to impose the maximum, . . . [t]he judge may select any sentence within the range . . . .”) (internal quotation marks omitted); Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (“I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years—and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge. . . . But the criminal will never get more punishment than he bargained for when he did the crime . . . .”); see also McMillan v. Pennsylvania, 477 U.S. 79, 92 n.8 (1986) (“[C]riminal sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt. Once the reasonable-doubt standard has been applied to obtain a valid conviction, ‘the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him.’”) (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976)).

\textsuperscript{167} Cf. Shors, supra note 10, at 1379–80 (making a similar argument based on the Due Process Clause).

\textsuperscript{168} Of course, the law under which the defendant is convicted and sentenced may preempt or otherwise displace the rights conferred from these other sources. But that is a separate issue we do not address here except to say that whether a sentencing law preempts another law depends on the precise content of the sentencing law.

\textsuperscript{169} See, e.g., Townsend v. Burke, 334 U.S. 736, 741 (1948) (holding that Due Process Clause forbids the imposition of sentence based on false information).
interfere with individual liberties.\textsuperscript{170} It is also apparent from the very structure of the government created by the Constitution. The reason for separating powers among the various branches, creating a system of checks and balances, and dividing authority between the state and federal governments was to minimize government power to interfere with individual liberty.\textsuperscript{171}

At its core, the theory of forfeiture rests on the assumption that the Constitution’s protections against the government apply only at criminal trial and not at sentencing after the defendant is found guilty of a crime.\textsuperscript{172} This assumption may have made sense when sentences were determined largely by the crime of conviction, but it is no longer sound now that sentences depend on factors other than the fact of conviction. Once this change in sentencing practices occurred,\textsuperscript{173} sentencing replaced trials as the process by which the government determined the amount of punishment to impose on—or how much liberty to take from—an individual for his conduct. Thus, in light of the Constitution’s goal of protecting individual liberty from the government, it seems ineluctable that the Constitution should apply to sentencing. Given the Constitution’s role in protecting against governmental deprivations of liberty, the government’s justifications for depriving an individual of liberty cannot rest on unconstitutional grounds.

To be sure, a defendant may forfeit some rights upon conviction. He may, for example, be incarcerated pending sentencing if the court determines that he

\textsuperscript{170} Examples include the rights provided by the Bill of Rights, the jury trial guarantee in Article III, and the restrictions on bills of attainder and \textit{ex post facto} laws found in Article I.


\textsuperscript{172} Forfeiture is ordinarily premised on a defendant’s bad conduct. See, e.g., Davis v. Washington, 547 U.S. 813, 833 (2006) (forfeiture of right to confrontation when the defendant causes the witness’s absence); Yakus v. United States, 321 U.S. 414, 444 (1944) (forfeiture resulting from “the failure to make timely assertion of the right”). Being convicted, however, involves no conduct, good or bad, by the defendant; conviction is an act of the court. The bad conduct of the defendant leading to the conviction is the commission of the crime. Conviction is a determination that the defendant has engaged in that bad conduct. Presumably, under the forfeiture theory, a defendant is entitled to constitutional protections during trial because there has not yet been a determination that he in fact engaged in the bad conduct. An individual may also affirmatively waive his constitutional rights. United States v. Olano, 507 U.S. 725, 733 (1993). Because constitutional rights exist to protect individuals against the government, which includes the courts, courts apply a high standard to determine whether a defendant has waived a constitutional right: waiver occurs only when a defendant knowingly and intelligently relinquishes his rights. Brady v. United States, 397 U.S. 742, 748 (1970) (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”). Being convicted of a crime does not meet this high standard. Conviction is an action of the court imposing judgment on the defendant. It does not entail any act by the defendant, much less an action that constitutes a knowing and intelligent waiver of rights.

\textsuperscript{173} See supra note 14.
poses a flight risk.\textsuperscript{174} But protecting constitutional values requires that forfeitures of this sort be extremely limited. Indeed, even inmates in prison continue to enjoy all those constitutional rights that are not inconsistent with the penological objectives of the corrections system.\textsuperscript{175} So too in sentencing, rights should be deemed forfeited only when recognition of rights would thwart a sufficiently important government interest at sentencing. For example, a state could limit a defendant’s right to be present at sentencing if doing so was necessary to prevent him from retaliating against a potential witness who testifies at the sentencing hearing. A general forfeiture of rights at sentencing, however, is unwarranted.

Moreover, accepting that the Constitution provides less protection at sentencing could ultimately undermine limitations on government prohibiting protected conduct. At present, the government cannot prohibit, for example, expression that is protected by the First Amendment. But if the Constitution does not apply with equal force to sentencing, the government could circumvent those restrictions by seeking sentencing enhancements for that protected conduct after an individual has been convicted for any other crime.\textsuperscript{176} Indeed, it might even create incentives for the state to engage in pretextual prosecutions for technical violations of statutes that it otherwise might not have enforced,\textsuperscript{177} simply in order to punish otherwise protected conduct. The Supreme Court recognized a variation of this point in \textit{Apprendi}, which holds that the Sixth Amendment prohibits a judge from increasing a maximum potential sentence based on his own factual findings. The Court explicitly based this conclusion on the ground that allowing judges to increase the possible punishment based on their own factual findings would circumvent the protections of the jury guarantee.\textsuperscript{178}

\textsuperscript{174} See, e.g., United States v. Bunn, 53 Fed. App’x. 179 (2d Cir. 2002).

\textsuperscript{175} Turner v. Safley, 482 U.S. 78, 95 (1987) (an inmate “retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system”) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)); Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (deliberate indifference to serious medical needs of prisoners by prison officials violates the Eighth Amendment and is actionable by prisoners under § 1983); Cruz v. Beto, 405 U.S. 319, 321 n.2 (1972) (per curiam) (prisoners retain limited First Amendment right to free exercise of religion).

\textsuperscript{176} For an example of this phenomenon, see United States v. Brown, 479 F.2d 1170, 1174–75 (2d Cir. 1973), in which a judge appears to have sentenced a defendant more harshly based on statements about his membership in the Black Panther Party.


\textsuperscript{178} Apprendi v. New Jersey, 530 U.S. 466, 485 (2000) ("[W]e dismissed the possibility that a State could circumvent the protections of \textit{Winship} merely by ‘redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.’") (quoting Mullaney v. Wilbur, 421 U.S. 684 (1975)). Although \textit{Apprendi} involved the procedural constitutional right to a jury, nothing in its reasoning suggest that those concerns
Further support for the notion that defendants should continue to enjoy constitutional protections at sentencing is the fact that courts have found some rights to apply specifically at sentencing, such as the right not to be sentenced based on race or gender. If defendants, based on the idea of forfeiture, have no right to object to the reasons behind a particular sentence, then courts would be permitted to impose longer sentences on individuals based on impermissible factors such as race or gender.

One might argue, of course, that the fact that defendants do not forfeit their Equal Protection rights upon conviction does not establish that other substantive constitutional rights apply at sentencing. But there is no apparent reason for giving equal protection rights more protection than other constitutional rights at sentencing.

The dominant theory supporting judicial protection of equal protection is that it ensures that minorities are not excluded from the democratic process. But many of the other constitutional rights courts have failed to recognize at sentencing also operate to protect the ability to participate effectively in the democratic process. The most obvious example is the First Amendment’s protection of free speech. The ability to voice viewpoints, especially disfavored viewpoints, is essential to the operation of a democratic system. Another example is the right to a jury trial. The right promotes participation not only by limiting the government’s power to impose punishment on those who pursue agendas contrary to the government’s interests, but also by providing an opportunity for the public to participate in the decision whether to punish by serving on a jury.

More fundamentally, the democratic participation theory underlying the Equal Protection Clause rests on an acceptance of the centrality of personal autonomy. Participation in the political process matters only if the participants have the power to make choices. But this conception of autonomy underlies all the individual rights protected by the Constitution. Those rights provide spheres of freedom from government intrusion on individual choice.

Nor can the greater protection of equal protection rights at sentencing be about circumvention are limited to procedural constitutional rights. Cf. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309 (1986) (refusing to draw a distinction in remedies between violations of substantive and procedural constitutional rights).

179. See supra notes 29–42 and accompanying text.


182. See William Blackstone, 4 COMMENTARIES *343–44.

183. Powers v. Ohio, 499 U.S. 400, 406 (1991) (“The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.”); see also Kevin K. Washburn, Restoring the Grand Jury, 76 FORDHAM L. REV. 2333, 2388 (2008).


185. See id. at 176–81.
justified based on a general judicial practice of affording equal protection rights special treatment. To the contrary, outside of the sentencing context, courts
themselves do not afford greater protection to the rights conferred under the
Equal Protection Clause than those substantive rights that are not recognized at
sentencing. For example, courts often allow discrimination—including
discrimination based on race or gender—so long as the government adequately
demonstrates that the discrimination is necessary to advance a sufficiently
important government interest. By contrast, courts have not recognized
comparable exceptions for the rights against double jeopardy and to a jury trial.
Under current doctrines, when these rights apply, the government cannot
overcome them, no matter how strong its interest in doing so.

A different argument for distinguishing between equal protection rights
and other constitutional rights at sentencing is that race and gender simply do
not provide information salient to the sentencing process. According to this
argument, unlike factors such as lack of remorse or future dangerousness,
which are believed to provide the sentencing court important information about
a defendant’s likelihood of recidivism, race and gender do not provide such
information. But this argument is also not well founded. There is ample
evidence that recidivism rates differ for different racial groups. Gender is
also relevant to recidivism; statistical studies show that women reoffend at far
lower rates than men. This is not to say that courts ought to consider race and
gender at sentencing. Rather, it illustrates that lack of remorse and future
dangerousness may be no more valuable at predicting recidivism than the
defendant’s race or gender. And thus the mere fact that a constitutionally

the different standards of review used in gender discrimination cases, as compared with those used
in racial discrimination cases).
187. See supra notes 81, 96, 107, & 137.
188. See Michael Tonry, Selective Incapacitation: The Debate over Its Ethics, in
PRINCIPLED SENTENCING 176 (Andrew von Hirsch & Andrew Ashworth eds., 1992) (“[R]ace is
significantly correlated with recorded criminality.”); see also U.S. SENTENCING COMMISSION,
Research/Research_Publications/Recidivism/200405_Recidivism_First_Offender.pdf [hereinafter
FIRST OFFENDER] (noting that white offenders account for 63.5% of all federal offenders with no
criminal history points and 61.0% of all federal offenders with a single criminal history point, but
they account for only 50.0% of federal offenders with two or more criminal history points; in
contrast, African American offenders account for 25.7% of all federal offenders with no
criminal history points and 30.3% of all federal offenders with a single criminal history point, but
they account for significantly more—41.8%—of federal offenders with two or more criminal history
points); U.S. SENTENCING COMMISSION, MEASURING RECIDIVISM: THE CRIMINAL HISTORY
COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 12 (2004), available at
(“[T]he race of the offender is associated with recidivism rates. Overall, Black offenders are more
likely to recidivate (32.8%) than are Hispanic offenders (24.3%). White offenders are the least
likely to recidivate (16.0%).”)
189. MEASURING RECIDIVISM, supra note 188, at 11 (“Overall, women recidivate at a
lower rate than men.”); see also FIRST OFFENDER, supra note 188, at 6–7 (noting that the
percentage of female offenders grows smaller as recidivism increases).
doubtful sentencing factor might give a sentencing judge information about a
defendant’s likelihood of recidivism does not distinguish that factor from other
factors that have been deemed impermissible.

In short, the theory of forfeiture does not justify the disregard of
constitutional rights at sentencing. As courts have begun to recognize in the
equal protection context, individuals simply do not forfeit their constitutional
rights at sentencing.

C. Incompatible with the Goals of Sentencing

A number of courts have contended that recognizing a defendant’s
constitutional rights at sentencing would unduly interfere with the goals of
sentencing in two ways. First, courts have argued that recognizing
constitutional rights would inhibit the ability to craft an individualized sentence
for each particular defendant. These courts have claimed that for a sentencing
judge to individualize a sentence appropriately, he must have complete
information about the defendant, and recognizing constitutional rights at
sentencing restricts the information available. Second, courts have claimed that
recognizing a defendant’s constitutional rights at sentencing may thwart the
ability of the judge to impose a sentence that appropriately punishes the
defendant under the various theories of punishment.

1. Information Maximization

One of the primary tenets of modern sentencing policy is that sentences
should be individualized for each defendant. A number of courts have
concluded that, to construct an appropriately individualized sentence,
sentencing judges must be able to consider all information, including
information that might be constitutionally protected. For this reason, these

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190. There are a number of older cases indicating that a sentencing judge has a duty to
individualize sentences, and cannot sentence an offender based merely on the offense
of conviction. See, e.g., United States v. Thompson, 483 F.2d 527, 529 (3d Cir. 1973); United States
v. Daniels, 446 F.2d 967, 970–71 (6th Cir. 1971); see also Williams v. Oklahoma, 358 U.S. 576,
585 (1959) (noting that “the exercise of a sound discretion in [sentencing] … required
consideration of all the circumstances of the crime” and that “[i]n discharging his duty of
imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of
the mitigating and aggravating circumstances involved in the crime”).

principle that sentencing courts have broad discretion to consider various kinds of information”);
Payne v. Tennessee, 501 U.S. 808, 820–21 (1991) (“[T]he sentencing authority has always been
free to consider a wide range of relevant material.”); United States v. Tucker, 404 U.S. 443, 446
(1972) (“[I]n determining what sentence to impose … a judge may appropriately conduct an
inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or
the source from which it may come”); Cross v. United States, 354 F.2d 512, 515 (D.C. Cir. 1965)
(noting that “sentencing judges do, and are entitled to, take into account a wide range of facts and
impressions gleaned from a variety of sources”); United States v. Magliano, 336 F.2d 817,
822 (4th Cir. 1964) (“The District Court has been given a wide latitude in the receipt and use of
information as an aid to the sentencing process … . . . After conviction, everything of possible
courts have rejected constitutional challenges to the consideration of sentencing factors. Although perhaps recognizing that various sentencing factors may raise constitutional problems, these courts have nevertheless allowed consideration of those factors on the ground that any limitation on the information a judge could consider would impair the sentencing judge’s ability to arrive at the “correct” sentence.192

This information maximization argument derives from the Supreme Court’s decision in Williams v. New York.193 Under New York law, judges had “broad discretion to decide the type and extent of punishment for convicted defendants” based on not only the offense in question, but also the defendant’s “past life, health, habits, conduct, and mental and moral propensities.”194 New York law allowed judges to gather this information through affidavits and reports to which the defendant had no access. Williams, whom the New York courts had sentenced to death, argued that the consideration of these materials violated his right to confrontation under the Sixth Amendment.195 The Supreme Court rejected the challenge, explaining that courts can fashion adequately individualized sentences only by knowing facts related to the defendant and that forbidding courts from relying on sources of information not potentially subject to cross examination would unduly hamper the courts’ ability to gather that information.196 Although raised in the context of the procedural right of confrontation, courts have applied the argument in Williams to the substance of sentencing factors, as subsequent cases make clear.197 Refusing to allow a pertinent may be considered . . . .

192. See Watts, 519 U.S. at 151–52. Alan Michaels has argued that the courts’ pattern of recognizing some rights at sentencing, but not others, can be explained as a pattern of rejecting those constitutional “protections a criminal defendant is afforded before a conviction to safeguard her liberty, but that nonetheless guarantees process directed at ensuring that the sentence is ‘accurate.’” Michaels, supra note 23, at 1777.


194. Id. at 244–45.

195. Id. at 245.

196. Id. at 244–45, 250. The Court justified the need for comprehensive information about a defendant on the ground that the information was necessary for courts to make intelligent assessments about the defendant’s prospects of rehabilitation. See id. at 247–48. And although the Court did not mention them, other criminal philosophies provide equal support for the Court’s conclusion. Retributivists, for example, often support individualized punishment in order to make fine distinctions between the blameworthiness of different offenders. See, e.g., Paul H. Robinson, A Sentencing System for the 21st Century?, 66 Tex. L. Rev. 1, 17–19 (1987). Similarly, those who subscribe to incapacitation endorse the concept in order to distinguish between those offenders who pose greater risk of future recidivism and those who do not. See, e.g., Note, Selective Incapacitation: Reducing Crime Through Predictions of Recidivism, 96 Harv. L. Rev. 511, 512 (1982).

197. See, e.g., Watts, 519 U.S. at 151–52 (relying on Williams in holding that courts may increase sentences based on acquitted conduct); see also State v. Carico, 968 S.W.2d 280, 287 (Tenn. 1998) (relying on Williams in holding that sentence could be enhanced based on uncharged conduct without violating the Sixth or Fourteenth Amendments). Although courts have extended Williams’s reasoning to substantive sentencing considerations, the precise holding of Williams itself has been undermined. See infra text accompanying notes 198–199.
sentencing judge to consider a particular piece of information related to the defendant similarly restricts the judge’s ability to craft a perfectly customized sentence.

But Williams does not provide a firm foundation for the information maximization argument. Although courts continue to rely on it,198 Williams itself is no longer good law. Williams was overruled in the death penalty context by Gardner v. Florida,199 and in the non-death penalty context it has been superseded by Federal Rule of Criminal Procedure 32(e). And in more recent decisions such as Apprendi, the Supreme Court has rejected the factual claim that at the founding judges had broad discretion to consider facts at sentencing; instead, the Court has explained, at the Founding, judges had virtually no discretion at sentencing, but were obliged to impose sentences based solely on the offense of conviction.200

More important, allowing the goal of individualization to trump constitutional rights is to turn constitutional law on its head. It is a basic principle of constitutional law that the government cannot ignore the Constitution when it hinders the government from accomplishing some goal. The Constitution’s limitations restrict the government regardless of its ultimate aim. The general need for information about a defendant to impose an individualized sentence therefore does not justify the refusal to recognize constitutional rights. Courts themselves have recognized this point by holding that the Constitution forbids certain considerations—such as race, ethnicity, and gender—from influencing a sentence.201

198. See, e.g., United States v. Dorcely, 454 F.3d 366, 372 (D.C. Cir. 2006); United States v. Petty, 982 F.2d 1365, 1367 (9th Cir. 1993); United States v. Silverman, 976 F.2d 1502, 1508 (6th Cir. 1992); United States v. Galloway, 976 F.2d 414, 419 (8th Cir. 1992); United States v. Croxford, 324 F. Supp. 2d 1230, 1246 (D. Utah 2004); Carico, 968 S.W.2d at 287 (Tenn. 1998); People v. Fisher, 503 N.W.2d 50, 55 (Mich. 1993).


201. See supra notes 29–42 and accompanying text. Even so, these courts have sometimes insisted that the information nevertheless ought to be provided to the sentencing judge. For example, although some courts have concluded that religious beliefs should not affect a defendant’s sentence, they have nonetheless said that religious information should still be provided to the sentencing judge, on the theory that a defendant’s religious practice is relevant background information for sentencing. See State v. Fuerst, 512 N.W.2d 243, 244–45 (Wis. Ct. App. 1994) (vacating sentence based on trial court comment that it was increasing sentence because the defendant had “very little religious conviction,” but stating that “[i]nformation about a defendant’s religious history, as well as his or her personal and social history is important to considerations of the defendant’s character”); see also United States v. Mitchell, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman, J., concurring) (expressing discomfort with the “apparent equation between moral well-being and the possession of certain religious beliefs” because “[t]o infer that an individual because he is an agnostic is of doubtful virtue or morality . . . overlook[s] that under our system of government all are guaranteed freedom of and from religion,” but stating that religion nevertheless is “an area often appropriately discussed in presentence reports”). But this conclusion begs the question. A sentencing factor cannot be legally relevant if the Constitution forbids its consideration. To state that a defendant’s religious background is “relevant” information about his character for sentencing clearly presumes that sentencing judges will make
Second, insisting that judges be allowed access to all aspects of a person’s life suggests that sentencing is an exercise in unbridled discretion. Exposure to the mountain of details about a defendant’s character inevitably leads judges to base sentences on general impressions of the defendant instead of on precise reasons. But sentencing ought not be a standardless enterprise, based on no more than a gut feeling. The core of due process is that government should not have uncabined discretion in making decisions impacting the liberty of individuals.

Finally, it is hardly clear that there is a correct individualized sentence for each defendant, which can be ascertained only if the sentencing court has unfettered access to all information about the defendant. The very notion of affording judges discretion in imposing sentences suggests that there is no single correct sentence for each defendant. Rather, reasonable people may disagree on which sentence is appropriate. Experience confirms the common sense notion that, when courts have any discretion in imposing sentencing (as they do to some extent in all jurisdictions), two sentencing courts presented with identical facts are unlikely to render identical sentences. Each judge comes to the bench with differing experiences and philosophies, and those attributes can just as likely affect a sentence as the facts of the case. Moreover, the fact that appellate courts tend to review sentencing decisions for an abuse of discretion further supports the conclusion that there is no single “correct” sentence for each defendant. Abuse of discretion review suggests

decisions, at least in part, on a defendant’s religious beliefs or practices—the very practice that courts have said is forbidden.

202. See Stith & Carranès, supra note 12, at 82. As Chief Justice Marshall famously explained, “a motion to [a court’s] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.” United States v. Burr, 25 F. Cas. 30, 35 (No. 14,692d) (C.C.D. Va. 1807).

203. See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433 (2001) (“Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause . . . imposes substantive limits on that discretion.”); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (describing “[f]reedom from bodily restraint” based on “arbitrary governmental action” as “the core of . . . the Due Process Clause”); see also Pierce O’Donnell, et al., Towards a Just and Effective Sentencing System 2–3 (1977) (noting that due process protections, including a statement of reasons for government action, that apply to agency action appear not to govern sentencing, as “there is no requirement that the sentence have any rational basis whatsoever”). Process, of course, offers no real protection if the government may deprive an individual of liberty for any reason it chooses.

204. Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 Hofstra L. Rev. 1, 4–5 (1988) (citing a study showing that, in district courts in the Second Circuit, sentences in factually identical cases ranged from three to twenty years in prison, depending on which judge presided over sentencing); see also United States v. Lopez, 974 F.2d 50, 52 (7th Cir. 1992) (“No judge can eliminate the ‘I’ in sentencing . . . .”).


that, for any defendant, there is a range of acceptable sentences, with none necessarily being optimal. Any sentence that falls within that range is legally correct. Since there is no single “correct” sentence, the notion that judges need complete information about a defendant to determine his sentence is far from compelling.

2. The Theories of Punishment

Several courts have argued that recognizing constitutional rights at sentencing impairs the ability of judges to impose sentences that appropriately punish defendants under the various theories of punishment. According to these courts, consideration of constitutionally doubtful sentencing factors is necessary to fashion an appropriate sentence.207

There are essentially two overarching theories of punishment—retributivism and utilitarianism. Retributivists seek to punish individuals for their criminal acts because those who commit such acts deserve punishment; punishment itself is the good to be achieved.208 Punishment must be proportionate to the offender’s moral desert, as determined by the harm he has caused and his blameworthiness for that harm.209

At first glance, retribution might seem to support the idea of ignoring constitutional limitations in punishing a defendant, because those sentencing factors might somehow inform a judge’s determination of the defendant’s moral desert. For example, one might argue that a defendant who fails to express remorse for his crime is more blameworthy, and thus deserves more punishment, than a remorseful defendant.210 But closer inspection reveals that the theory of retribution does not provide a solid justification for ignoring constitutional doubts. To start, some of the constitutionally suspect sentencing factors simply cannot be justified under a theory of retribution. The most obvious example is future dangerousness. Retributivism rests on the notion that a person deserves punishment only for those actions which she has actually

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207. See, e.g., United States v. Smith, 424 F.3d 992, 1016–17 (9th Cir. 2005); Kapadia v. Tally, 229 F.3d 641, 647–48 (7th Cir. 2000); State v. Knight, 701 N.W.2d 83, 88 (Iowa 2005); State v. Clegg, 635 N.W.2d 578, 580–81 (S.D. 2001); see also Michaels, supra note 23, at 1775 (noting that courts often base their sentencing decisions on “the purposes of sentencing,” and further noting that the justification is not offered when it does not support the courts’ desired result).


committed.\textsuperscript{211} Future dangerousness enhancements punish for potential future conduct, and thus are fundamentally at odds with the backwards-looking nature of retributivism.

More important, retributivism does not comfortably allow for punishment based on constitutionally protected conduct. Many retributivists have argued that retributivism is based on respect for individual autonomy.\textsuperscript{212} A person is punished because of his actions as a moral agent.\textsuperscript{213} This concern with autonomy suggests that retributivists may balk at disregarding constitutional rights at sentencing. At their core, constitutional rights operate to protect individual autonomy.\textsuperscript{214} They define areas of individual actions and choices into which the government may not intrude.

Unlike retributivists, utilitarians do not punish for punishment’s sake; instead, they punish to prevent future crimes. Punishment is not an end in itself, but rather it is a tool to prevent future crime through deterrence, rehabilitation, and incapacitation.\textsuperscript{215}

Some constitutionally doubtful sentencing factors punish for plainly utilitarian reasons. As noted earlier, future dangerousness cannot be justified on retributive grounds; the reason to enhance a sentence because of future dangerousness is to incapacitate the defendant so that he will not inflict future harms.\textsuperscript{216} Courts have offered utilitarian justifications for virtually every sentencing factor, even those that might be more readily justified under a theory of retribution. They have treated any conduct that reflects badly on the defendant as evidence that the defendant may offend again. Thus, for example, courts have justified enhancements for lack of remorse not on the ground that an offender who shows no regret is more deserving of punishment, but instead on the ground that a remorseless offender is less likely to be rehabilitated.\textsuperscript{217}

Like retributivism, utilitarianism does not provide a firm foundation for disregarding constitutional rights for sentencing purposes. Utilitarianism is not limited to criminal law; utilitarians seek to maximize social welfare generally. Many constitutionally recognized rights reflect a utilitarian judgment that protecting the right increases overall social welfare. For example, the First

\begin{itemize}
\item \textsuperscript{211} See Paul H. Robinson, Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice, 114 Harv. L. Rev. 1429, 1438 (2001) (“Desert arises from a past wrong, whereas dangerousness arises from the prediction of a future wrong.”).
\item \textsuperscript{212} Herbert Morris, Persons and Punishment, 52 Monist 475, 480 (1968).
\item \textsuperscript{213} See id. at 486 (“A person has a right to institutions that respect his choices. Our punishment system does; our therapy system does not.”).
\item \textsuperscript{214} See supra notes 170–171 and accompanying text. See Smith, supra note 184, at 176–80.
\item \textsuperscript{215} Sigler, supra note 209, at, 582–83.
\item \textsuperscript{216} Robinson, supra note 211, at 1439–41.
\item \textsuperscript{217} Rehabilitation theory justifies punishment as a method of modifying an offender’s behavior and attitude, thus decreasing her likelihood of reoffending. Rehabilitative punishment requires an individualized assessment of each offender in order to determine how punishment may be used to alter the offender’s propensity to commit crime. See Hessick, supra note 14, at 119.
\end{itemize}
Amendment’s protection of speech rests in part on the theory that the free exchange of ideas is likely to advance truth, which on the whole will generate greater social good. 218 Similarly, one justification for the Due Process Clause is that some amount of process is essential to produce accurate judgments. 219 Because the protection of these constitutional rights is based on the conclusion that they promote social welfare, utilitarians should not blindly sacrifice those rights in the name of punishment. Rather, rights should be disregarded only if doing so maximizes social welfare.

If the purpose of sentencing were solely to achieve the utilitarian goal of bettering society, one might think that the Constitution should not unnecessarily constrain courts in achieving that goal. 220 After all, courts have often concluded that constitutional provisions conferring rights to criminal defendants do not apply when the state’s goals are not punitive in nature. For example, the Supreme Court has held that juveniles are not entitled to a jury trial in delinquency proceedings, explaining that juvenile delinquency proceedings are not criminal but instead involve questions of “sympathy” and “paternal attention.” 221 Similarly, the Court has exempted forfeiture based on criminal wrongdoing from the Double Jeopardy Clause on the theory that forfeiture is civil, rather than criminal, in nature. 222 But the analogy to these civil proceedings is inapt. Even if the purposes of sentencing are not punitive, a sentence is still punishment, and punishment triggers constitutional protections. 223 Many criminal laws, such as those criminalizing antitrust violations and insider trading, exist for utilitarian reasons. But that those laws have utilitarian justifications does not mean that the Constitution gives less protection to defendants charged under those laws. The important point for constitutional analysis is that the conduct is punished. 224

218. See John Stuart Mill, On Liberty 45–47 (Oxford Univ. Press 1952) (1859); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (opining that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”). To be sure, some speech—like false statements about factual events—may seem not to benefit society, but even they may do so by forcing better articulations of factually accurate positions.


220. Of course, our system of punishment is not based solely on utilitarian goals. Otherwise, governments could justifiably punish a person for a crime committed by another, since that punishment would act as a deterrent. See Bronstein, supra note 161, at 1143.


223. Even in situations where the legislature indicates that a sanction is not meant to be punishment, courts will treat the sanction as punishment if the regime is “so punitive either in purpose or effect” as to negate its designation as civil. See United States v. Ursery, 518 U.S. 267, 277–78 (1996); United States v. Ward, 448 U.S. 242, 248–49 (1980).

224. Nor does it matter that courts may consider constitutionally doubtful sentencing factors for reasons other than to burden defendants’ rights. The specific intent to violate a right is
More important, to the extent that constitutional rights do not rest on utilitarian grounds, their inclusion in the Constitution signifies a conclusion that, at least to some extent, those rights trump utilitarian values. Constitutional rights derive from theories based on morality or individual autonomy, and the Constitution protects them even though they impose high social costs. Examples of these rights abound. Consider the Court’s decision in United States v. Booker rendering the Federal Sentencing Guidelines nonbinding. The decision imposed high costs on the judiciary and litigants by forcing them to adapt to a new, less predictable sentencing system. But the Court explained that, whatever the costs, the Sixth Amendment right to jury trial trumped them.

This is not to say that rights always trump utilitarian values. Most people agree that constitutional rights must yield when the societal costs of absolute enforcement would be too high—as Justice Jackson famously put it, the Constitution is not a “suicide pact.” A number of doctrinal tests for enforcing constitutional provisions weigh the interests protected by a constitutional provision against the costs of protecting those interests. Indeed, under the strict scrutiny doctrine, courts will allow the government to infringe even fundamental rights if necessary to avert catastrophe. Avoiding costs also plays an important role in the creation of doctrine. As others have noted, many constitutional provisions are too vague to be effective rules of law, and thus require the development of judicial doctrine for their implementation. One of the primary considerations that courts take into account in developing doctrine is avoiding intolerable consequences.

Not a prerequisite to violating that right. The First Amendment would prohibit a police officer from suppressing a peaceful protestor complying with permit rules, even if that officer did not mean to violate the First Amendment. What matters is whether the government’s conduct intrudes on a protected interest. When courts sentence based on constitutionally suspect sentencing factors, they specifically seek to regulate protected conduct.

225. Ronald Dworkin, Taking Rights Seriously 92, 95–96, 193, 200 (1977) (arguing that real rights cannot be trumped by budgetary or utilitarian calculations).
227. Id. at 244.
229. See Fallon, supra note 228, at 1306–08.
230. Fallon, Implementing the Constitution, supra note 11, at 62.
231. Id. at 64; Sager, supra note 11, at 1218.
The principal cost courts have noted in refusing to recognize constitutional rights at sentencing is that providing constitutional protections might result in more crime. This concern could potentially justify reduced protection of constitutional rights at sentencing, but there are no comprehensive studies on whether the various constitutionally doubtful sentencing factors are accurate indicators of future crime.

But even if this data were available, it would probably not justify the current practice of providing less protection of constitutional rights at sentencing than at trial. Treating sentencing differently would be warranted only if the cost of providing more constitutional protections at sentencing were higher than providing those protections at criminal trials. But it is hardly clear that this is so. Providing more protection at trial limits the government’s ability to punish at all for conduct that could justifiably be punished, while overprotection of constitutional rights at sentencing only marginally decreases punishment. The cost from overprotection at trial thus may exceed the cost of overprotection at sentencing. To be sure, less solicitously enforcing rights at trial also may impose greater costs than doing so at sentencing. Refusing to recognize a right at trial may expose a person to punishment when he should not be punished at all, while failing to enforce a right at sentencing may result only in a marginal increase in punishment. But this means that, at best, the costs are a wash. Affording more protection at trial than sentencing and affording less protection at trial than sentencing both present potential costs, and nothing about these costs indicates that courts should enforce rights differently at sentencing than at trial.

232. See Fallon, Implementing the Constitution, supra note 11, at 65. Avoiding institutional costs also drives interpretation. An example is the rational basis test, under which courts will sustain economic legislation so long as there is a conceivable basis for Congress to have concluded that the regulated activity involves interstate commerce. The test is not prescribed by the commerce clause, but instead derives from the conclusion that it would be too costly for the judiciary to gather the information to verify that the regulation involves interstate commerce. See F. Andrew Hessick, Rethinking the Presumption of Constitutionality, 85 NOTRE DAME L. REV. (forthcoming 2010) (manuscript at 27) (on file with authors). Institutional concerns of this sort do not explain the reduced enforcement of the Constitution at sentencing. The only institution involved in sentencing is the judiciary. No other institution makes a constitutional determination in the sentencing process (though there are multiple layers in the judiciary itself). Nor does this institutional rationale provide a basis for less enforcement of constitutional rights at sentencing than at other judicial proceedings. Whether a court is the best institution to enforce a constitutional norm does not depend on when the court seeks to enforce that norm; it depends on the content of that right. Thus, to the extent that courts already enforce constitutional norms in criminal trials, they are equally qualified to enforce those norms at sentencing.

233. See supra note 187.

234. Some courts have argued that full enforcement of constitutional rights at sentencing would have administrative costs and delays associated with trial. See, e.g., United States v. Bowdach, 561 F.2d 1160, 1172 (5th Cir. 1977). This is certainly true with respect to procedural rights. Recognizing those rights would mean that courts could sentence only based on facts that have been proved to a jury beyond a reasonable doubt and that courts must rely on witnesses
CONCLUSION AND IMPLICATIONS

A number of traditional sentencing factors arguably violate several constitutional rights. Yet courts have refused to give any scrutiny to determine whether these sentencing factors comport with the Constitution. Instead, they have dismissed constitutional challenges to sentencing factors on the ground that recognizing constitutional limits on substantive considerations at sentencing would interfere with the judiciary’s ability to impose a proper sentence and would be inconsistent with historical practice. These arguments are unsatisfying. Constitutional rights frequently impair the government’s ability to accomplish its goals, and there is nothing so special about sentencing that warrants the judiciary’s disregard of constitutional rights at sentencing because of these impediments. And contrary to these courts’ assertions, history does not reveal a pattern of disregarding constitutional rights at sentencing.

These constitutional concerns call for changes to sentencing practice. Our purpose here is not to provide the details of sentencing reform, but we note that there are two easy methods of reform that courts could employ to avoid these constitutional difficulties at sentencing. The first method is simply to exclude consideration of constitutionally doubtful sentencing factors. If a defendant raises a colorable claim that a particular sentencing factor impinges on his constitutional rights, then a sentencing judge should err on the side of caution and simply exclude that factor from her sentencing calculus.

The second method is for judges to undertake a close analysis of the constitutionality of the sentencing factors identified in this Article. Courts would evaluate whether a particular sentencing factor infringes a constitutional right, and if so, whether the sentencing factor nevertheless should be permitted. Of course, courts could conceivably reject some, or even all, of the constitutional arguments we have raised. As we noted at the outset, our goal is to show that there are a number of colorable constitutional claims that courts have refused to confront head-on when considering various sentencing factors; we do not claim to have proven definitively that these factors are, in fact, unconstitutional. Moreover, a judicial finding that a particular sentencing factor impinges on a defendant’s constitutional rights need not automatically result in the exclusion of that sentencing factor. Constitutional rights are not absolute. Courts could subject constitutionally doubtful sentencing factors to the same scrutiny that would apply in other contexts. For example, in determining whether to enhance a sentence for lack of remorse, courts would apply heightened scrutiny, the standard usually applied in assessing the instead of pre-sentence reports—all of which would make sentencing proceedings much lengthier and more costly. But this Article is not concerned with these procedural rights; its focus is on substantive sentencing factors that cannot be considered in other contexts, and it is less clear that stronger enforcement of those rights would similarly prolong sentencing proceedings. To the contrary, it might serve to shorten sentencing proceedings, as certain considerations would no longer be permitted.
Although these two approaches may sound like they require substantial alterations to sentencing, the changes would not be extensive. Neither approach requires states to abandon individualized sentencing. Courts could still sentence based on the characteristics of an individual defendant and the particular facts and circumstances of his offense; they simply could not consider those factors that impermissibly impinge on constitutional rights.

Between the two approaches, we believe the second to be more appealing. Most of the constitutionally dubious sentencing factors we have identified are aimed at reducing recidivism. If states are not permitted to use individualized sentencing to distinguish between those defendants likely to commit future crimes and those who are not, then sentencing is likely to impose high costs on society. Either all defendants who commit a crime would have to be incarcerated for long periods of time (which would impose costs on the defendants themselves and would also be quite expensive for the state), or all defendants, including those who pose a risk of future danger, would receive shorter sentences and recidivism is likely to increase (which would impose its own, different costs). But applying usual constitutional scrutiny to constitutionally doubtful sentencing factors may actually reduce these costs to society. To return to the previous example involving lack of remorse, if courts concluded that enhancements for lack of remorse infringe the First Amendment, courts could still impose the enhancement if the government demonstrated a sufficiently high correlation between a defendant’s refusal to express remorse and a propensity to commit future crime. Making this showing would require studies on whether lack of remorse is, in fact, an accurate predictor of recidivism. Such studies may reduce social costs if they reveal that some traditional sentencing factors that have not been subjected to empirical study are not accurate predictors of recidivism. This effort would lead the government to identify those factors that are reliable predictors of recidivism instead of relying on intuition.

Recognizing constitutional rights at sentencing would likely have a mixed

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236. It could, however, result in a change of focus in sentencing. Insofar as future dangerousness itself is a constitutionally doubtful basis for sentence enhancements, courts might focus on individual considerations at sentencing for retributive reasons.


238. It should be noted, however, that, while this approach is likely to lead to greater protections at sentencing, it could lead to less protection of rights generally. Unwillingness to discard traditional sentencing considerations might lead courts to water down constitutional doctrines so that they do not prevent the consideration of traditional factors.
reception. We suspect that, as a general matter, prosecutors would oppose recognition of more constitutional rights at sentencing because it would reduce prosecutorial leverage, while defense attorneys (and defendants) would be in favor of the greater recognition of rights because it would lead to shorter sentences. The full recognition of some rights—such as the right to a jury trial—might actually encounter opposition from all sides. Prosecutors might oppose recognition of the jury trial right at sentencing because it would limit plea bargaining, which minimizes the number of charges a prosecutor must prove. Defense attorneys would also likely oppose recognition of the jury trial right, because plea bargaining provides an opportunity for defendants to receive shorter sentences in exchange for waiving their right to trial. And judges and legislators might also oppose recognition because plea bargaining has become a critical device for processing the large number of criminal defendants every year. But these practical realities do not change the fact that, at present, the state is creating improper incentives (or penalties) in order to ensure that most criminal defendants never exercise their right to a jury trial. It may be that recognizing constitutional rights at sentencing will require states to re-prioritize their resources in order to allow for a significantly higher number of criminal trials. Perhaps the recognition of these rights will force states to rethink their bloated criminal codes in order to reduce the number of criminal prosecutions; or perhaps the country (or the Supreme Court) needs to re-evaluate its commitment to the right to jury trial.

How, precisely, to reform sentencing in order to protect constitutional rights is an open question. But the first step is recognizing that currently courts are not adequately protecting those rights.

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239. This enthusiasm might be short sighted. Although judicial recognition of more rights at sentencing would initially lead to shorter sentences for many defendants, these shorter sentences might prompt legislatures to increase sentences generally, resulting in longer sentences overall. On the other hand, defendants could conceivably oppose the recognition of constitutional rights at sentencing on the ground that it reduces judicial discretion at sentencing. They may argue that sentencing individualization tends to advantage most defendants, because it allows judges to sentence defendants well below the harsh statutory maximum penalties, thereby tempering the various political forces that have led to the modern trend toward higher statutory sentencing ranges. See Erik Luna, The Overcriminalization Phenomenon, 54 AM. U. L. REV. 703, 711–12 (2005) (detailing this legislative phenomenon). But it seems unlikely that reducing the judges’ ability to impose higher sentences based on constitutionally doubtful sentencing factors would lead them to impose higher sentences on those defendants who would not have received such enhancements.