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JUDICIAL NULLIFICATION OF JURIES: USE OF ACQUITTED CONDUCT AT SENTENCING

EANG NGOV*

ABSTRACT

At trial, defendants are afforded a panoply of rights—right to counsel, to proof beyond a reasonable doubt, to confront witnesses, and to exclude inadmissible evidence. However, these rights, except for the right to counsel, disappear at sentencing. In deciding a defendant's sentence, a court may consider conduct that has not been proven beyond a reasonable doubt and even conduct of which the jury has acquitted the defendant. Consideration of acquitted conduct has resulted in dramatic increases in the length of defendants' sentences—sometimes resulting in life imprisonment—based merely on a judge's finding that a defendant more likely than not committed the offense. Courts have relied on *United States v. Watts* and *United States v. Booker* to support their continued use of acquitted conduct at sentencing. This Article argues that *Watts* is not viable and that the merits majority opinion in *Booker*, as opposed to the remedial majority opinion, is most consistent with the Court's precedent established by *Apprendi v. New Jersey* and its progeny. This Article concludes that use of acquitted conduct violates the Sixth Amendment right to a jury trial. In addition to offering a constitutional basis, this Article examines the following policy grounds for prohibiting the use of acquitted conduct: the role served by juries and benefits they provide, the dramatic impact of sentencing enhancements based on acquitted conduct, the potential for misuse by prosecutors, and the end of actual or legal innocence. Finally, this Article suggests that *United States v. Gall* and *United States v. Kimbrough* have restored judicial discretion in sentencing, providing judges with the independence to reject the use of acquitted conduct on the grounds that it contravenes the purposes of sentencing set forth in 18 U.S.C. § 3553(a)—to promote respect for the law, afford deterrence, and avoid unwarranted disparity.

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INTRODUCTION

Henry Lombard, Jr. endured a week and a half long trial¹ in the Maine Superior Court on two counts of murder.² The jury acquitted him on both charges.³ However, Lombard's victory was short-lived. Just a year after his acquittal on the state murder charges, Lombard faced another judge and jury.⁴ This time, a federal jury convicted him of illegal possession of a firearm.⁵ Because the firearm was the alleged murder weapon in the earlier state case,⁶ the federal judge was able to consider the murders for which Lombard was acquitted in determining his sentence for the firearm possession. Despite the acquittal, the federal judge found, by a preponderance of the evidence, that Lombard committed the two murders.⁷ Although he was not accused of the murders in federal court,⁸ and the federal government could never prosecute Lombard for the murders,⁹ the murders formed the basis for his life sentence.¹⁰

In federal court and many state courts,¹¹ once a defendant is convicted,

1. Telephone interview with Ronald W. Bourget, Counsel for Henry Lombard, Jr., Bourget & Bourget, P.A. (Jul. 1, 2008).

2. *United States v. Lombard* (Lombard I), 72 F.3d 170, 172 (1st Cir. 1995). For additional discussion of Lombard's case, see *infra* Part IV.A-B.

3. *Lombard I*, 72 F.3d at 172.

4. *Id.* at 173.

5. *Id.* at 172.

6. *See id.*

7. *Id.*

8. *Id.* at 179.

9. The federal government could not prosecute Lombard for the murders because it lacked the jurisdiction to do so. *Id.* at 178 n.11 (discussing "the imposition of a life sentence 'enhancement' based on a federally unprosecutable murder").

10. *Id.* While in prison, Lombard committed suicide. Interview with Ronald W. Bourget, *supra* note 1.

11. *See* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 528 (1993) ("Nearly every state allows sentencing courts to engage freely in real-offense sentencing as a matter of discretion."); *see also* *State v. Shuler*, 780 P.2d 1067, 1069 (Ariz. Ct. App. 1989) (holding that a defendant's criminal history and prior criminal conduct, even if an arrest did not result in a conviction, may be considered at sentencing); *People v. Towne*, 186 P.3d 10, 13 (Cal. 2008) ("We conclude that because facts considered by the court in selecting the appropriate sentence within the available sentencing range need not be proved beyond a reasonable doubt, a trial court, in this setting, is not prohibited from considering evidence underlying charges of which a defendant has been acquitted."); *State v. Huey*, 505 A.2d 1242, 1245-46 (Conn. 1986) (concluding that courts may consider uncharged, dismissed, and acquitted conduct at sentencing); *People v. Lowery*, 642 P.2d 515, 518 (Colo. 1982) (en banc) (finding that "[w]ithin the court's broad discretion to sentence one convicted of a crime, it is proper for the judge to consider aggravating or mitigating information, including other charges dismissed at the time of the plea, in order to best balance the competing sentencing goals of punishment, deterrence, rehabilitation, and protection of society"); *People v. Deleon*, 882 N.E.2d 999, 1009 (Ill. 2008) ("It is well established that 'evidence of criminal conduct can be considered at sentencing even if the defendant previously had been acquitted of

under the concept of relevant conduct, the defendant's sentence can be increased by the consideration of uncharged, dismissed, or even acquitted conduct of the defendant,¹² like in Lombard's case. Relevant conduct allows a

that conduct.”) (quoting *People v. Jackson*, 599 N.E.2d 926, 930 (Ill. 1992)); *People v. Thomas*, 561 N.E.2d 57, 77 (Ill. 1990) (finding prior criminal conduct, even if it has not been adjudicated, admissible at sentencing as long as “it is relevant, reliable and subject to cross-examination”); *Flinn v. State*, 563 N.E.2d 536, 544 (Ind. 1990) (“A sentencing court, however, is not limited to considering only convictions in assessing a defendant's criminal history; pending charges and uncharged crimes may be considered.”); *Smith v. State*, 517 A.2d 1081, 1087 (Md. 1986) (providing cases from thirty-six states that permit consideration of uncharged or unconvicted conduct at sentencing); *People v. Ewing*, 458 N.W.2d 880, 885 (Mich. 1990) (permitting consideration of uncharged conduct and pending charges at sentencing “where those facts have been developed through sworn testimony”); *People v. Brownell*, No. 279543, 2008 WL 2514186, at *5 (Mich. Ct. App. Jun. 24, 2008) (“Although the jury acquitted defendant of an additional count of digital penetration, a sentencing court may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded an opportunity to challenge the information and, if it is challenged, it is substantiated by a preponderance of the evidence.”) (internal quotation marks omitted); *State v. Walker*, 167 P.3d 879, 882 (Mont. 2007) (“We have held that the sentencing court may consider ‘other acts, even those resulting in acquittal or which are dismissed pursuant to a plea bargain agreement.’” (quoting *State v. Mason*, 82 P.3d 903, 908 (Mont. 2003))); *State v. Jenkins*, No. 97-05-0467, 2008 WL 2434869, at *2 (N.J. Super. Ct. App. Div. Jun. 13, 2008) (affirming the trial court's enhanced sentence based on its finding at sentencing that the defendant committed manslaughter using a gun, despite the jury's acquittal of gun charges); *People v. Yung*, 557 N.Y.S.2d 978, 980 (N.Y. App. Div. 1990) (permitting consideration of thirty uncharged burglaries at sentencing); *State v. Jones*, No. 06MA109, 2008 WL 852071, at *14 (Ohio App. 7 Dist. Mar. 17, 2008) (“[A] sentencing court may consider the existence of other prior charges and arrests even if the defendant has been acquitted on those charges or those charges have been dismissed prior to trial.”); *State v. Epley*, Nos. 97APA11-1467, 97APA11-1468, 1998 WL 542694, at *3 (Ohio Ct. App. Aug. 15, 1998) (finding that the trial court's consideration of acquitted conduct at sentencing was permissible under *United States v. Watts*, 519 U.S. 148 (1997)); *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000) (“[A] sentencing court may apply an enhancement factor based on facts underlying an offense for which the defendant has been acquitted, so long as the facts have been established in the record by a preponderance of the evidence.”); *Elias v. State*, 286 N.W.2d 559, 562 (Wis. 1980) (holding that a sentencing court may consider uncharged and nonconviction offenses at sentencing “since those other offenses are evidence of a pattern of behavior”); *State v. Aguilar*, No. 2007AP114, 2007 WL 4245638, at *3 (Wis. Ct. App. Dec. 5, 2007) (“The sentencing court may consider conduct for which the defendant has been acquitted.”). *But cf.* *State v. Burgess*, 943 A.2d 727, 731 (N.H. 2008) (“[J]udges in sentencing should not rely upon allegations of other crimes by the defendant when such allegations are unsubstantiated, resolved by acquittals, or the product of speculation.”); Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 10 FED. SENT'G REP. 51, 53 (1997) (pointing out that Minnesota, Oregon, Pennsylvania, and Washington permit sentences to be based only on convicted offenses); David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 271 (2005) (concluding that state sentencing schemes “are largely charge-based and make only modest use of real-offense sentencing”).

12. See U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.3 to -4 (2004).

sentencing court to reach as far back in time as can be said to be part of the scheme, plan, or enterprise related to the defendant's convicted offense.¹³

In addition to the type of conduct permitted for consideration, the defendant's sentence is affected by the standard of proof applied at sentencing. The government need only prove by a preponderance of the evidence that the defendant committed the uncharged, dismissed, or acquitted acts.¹⁴ Thus, the

13. *Id.*

14. In *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986), the Supreme Court held that, at sentencing, a preponderance of the evidence standard satisfies due process. In 1991, the U.S. Sentencing Commission amended its commentary and endorsed the preponderance of the evidence standard, stating, "The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (2004).

Only when the sentence enhancement becomes the "tail which wags the dog of the substantive offense" (i.e., the enhancement for the nonconviction offenses outweighs the maximum exposure the defendant would have received based solely on the convicted offense) will some courts require a higher standard of proof. *McMillan*, 477 U.S. at 88. The Tenth Circuit, for example, has recognized that a more stringent standard of proof may be necessary in such circumstances. *See* *United States v. Zuni*, 506 F. Supp. 2d 663, 667 (D.N.M. 2007), *aff'd*, 273 F. App'x 733 (10th Cir. 2008). In some cases, the Eighth Circuit has implicitly left open the possibility of a higher standard of proof. *See* *United States v. Okai*, 454 F.3d 848, 852 (8th Cir. 2006), *cert. denied*, 549 U.S. 1065 (2006) ("[W]e have recognized that due process may require sentencing courts to apply a higher standard of proof in situations where the sentencing enhancement becomes the 'tail which wags the dog of the substantive offense.'" (quoting *McMillan*, 477 U.S. at 88)). *But see* *United States v. Johnson*, 450 F.3d 831, 833 (8th Cir. 2006) ("[The defendant] requests that we at least adopt a clear and convincing standard in cases in which enhancements have a 'disproportionate impact on the sentence.' It is clearly established in this circuit that sentencing enhancements must be proven by a preponderance of the evidence, however."); *United States v. Garcia-Gonon*, 433 F.3d 587, 593 (8th Cir. 2006) ("Under an advisory Guidelines regime, sentencing judges are only required to find sentence-enhancing facts by a preponderance of the evidence.") However, the Eighth Circuit in at least one instance has taken the approach that a court may not require proof beyond a reasonable doubt unless there is a disproportionate impact between the offense of enhancement and offense of conviction. *See Okai*, 454 F.3d at 852. The Ninth Circuit has required "clear and convincing" evidence in some cases. *See, e.g., United States v. Jordan*, 256 F.3d 922, 927 (9th Cir. 2001). The Ninth Circuit has identified six factors in determining if a clear and convincing standard is warranted:

(1) whether "the enhanced sentence fall[s] within the maximum sentence for the crime alleged in the indictment;" (2) whether "the enhanced sentence negate[s] the presumption of innocence or the prosecution's burden of proof for the crime alleged in the indictment;" (3) whether "the facts offered in support of the enhancement create new offenses requiring separate punishment;" (4) whether "the increase in sentence [is] based on the extent of a conspiracy;" (5) whether "the increase in the number of offense levels [is] less than or equal to four;" and (6) whether "the length of the enhanced sentence more than double[s] the length of the sentence authorized by the initial sentencing guideline range in a case where the defendant would otherwise have received a relatively short sentence."

Id. at 928 (quoting *United States v. Valensia*, 222 F.3d 1173, 1182 (9th Cir. 2000)). These are

defendant's sentence for a single convicted offense can be increased at sentencing by a judge's determination that the defendant more likely than not committed additional criminal conduct, despite a jury's previous acquittal of that conduct. Not only is the government excused from the rigors of proof beyond a reasonable doubt, but the government is also excused from the rules of evidence customarily attendant at trial.¹⁵ Hearsay, double hearsay, and even triple hearsay is permissible¹⁶ as long as there is an "indicia of reliability."¹⁷ Finally, although the additional facts found at sentencing can dramatically increase a defendant's sentence, the right to confront witnesses, one of the basic rights at trial, is not recognized at sentencing.¹⁸

examples of some approaches used by the circuits, but an extensive discussion is beyond the scope of this Article.

15. FED. R. EVID. 1101(d)(3). See generally Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years: The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 885-91 (1992) (proposing amendment of the Rules of Evidence to provide additional protection at sentencing); Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED. SENT'G REP. 96 (1992) (arguing for the need to have evidentiary rules that prohibit prosecutors from introducing evidence at sentencing regarding uncharged conduct and acquitted conduct); Deborah Young, *Untested Evidence: A Weak Foundation For Sentencing*, 5 FED. SENT'G REP. 63 (1992) (discussing measures to improve evidentiary foundation at sentencing).

16. The Eighth Circuit stated, "Uncorroborated hearsay evidence and unprosecuted criminal activity are both proper topics for the court's consideration, as long as the defendant is afforded an opportunity to explain or rebut the evidence." *United States v. York*, 830 F.2d 885, 893 (8th Cir. 1987) (per curiam); see also *United States v. Evans*, 891 F.2d 686, 688 (8th Cir. 1989) ("Uncorroborated hearsay evidence contained in a presentence report may be considered by the sentencer provided the persons sentenced are given an opportunity to explain or rebut the evidence."). Courts have justified the use of hearsay evidence based on the belief that "due process does not mandate an evidentiary hearing to establish the accuracy of . . . information contained in a presentence report before it can be considered by a trial court." *York*, 830 F.2d at 893 (citing *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983)).

17. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) (2004) ("In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.")

18. The lack of confrontation rights at sentencing has its roots in *Williams v. New York*, 337 U.S. 241 (1949). In *Williams*, the Supreme Court upheld a death sentence that was imposed based on information received from the probation department, which relied on a witness whom the defendant did not have an opportunity to examine and confront. *Id.* at 242, 252. The jury had recommended life imprisonment, but the sentencing court imposed death because of additional information from the probation department relating to thirty other burglaries committed by the defendant within the vicinity of the murder and the defendant's "morbid sexuality." *Id.* at 242, 244.

In affirming the sentence, the Supreme Court explained the distinction between trial and sentencing:

Whether use of acquitted conduct at sentencing should continue requires an examination of constitutional law and policy. Although consideration of acquitted conduct at sentencing is common in federal and state courts, the United States Supreme Court has rarely addressed its constitutionality. In *United States v. Watts*,¹⁹ the Court, without full briefing or oral argument, held that consideration of acquitted conduct at sentencing is “consistent with the Double Jeopardy Clause”²⁰ because it “does not result in ‘punishment’ for any offense other than the one of which the defendant was convicted.”²¹ Later, in *United States v. Booker*,²² the Court considered whether the Federal Sentencing Guidelines (“Guidelines”) violated the Sixth Amendment right to jury trial by

In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant-if not essential-to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Id. at 246–47.

For additional discussion about confrontation rights at sentencing and the Court's jurisprudence after *Williams*, see John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005) (critiquing the distinction between trial rights and sentencing rights and arguing “for a unified theory of Sixth Amendment rights” in capital cases and sentencing), and Christopher K. Tahbaz, Note, *Fairness to the End: The Right to Confront Adverse Witnesses in Capital Sentencing Proceedings*, 89 COLUM. L. REV. 1345, 1346 (1989) (arguing for an extension of confrontation rights to capital sentencing proceedings). See generally Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the “Elements of the Sentence,”* 35 WM. & MARY L. REV. 147 (1993) (arguing that defendants should have confrontation rights when the government presents witnesses against the defendant at sentencing); Alan Dubois & Anne E. Blanchard, *Sentencing Due Process: How Courts Can Use Their Discretion to Make Sentencing More Accurate and Trustworthy*, 18 FED. SENT'G REP. 84 (2005) (arguing that confrontation and cross examination rights would make sentencing more accurate); Michael S. Pardo, *Confrontation Clause Implications of Constitutional Sentencing Options*, 18 FED. SENT'G REP. 230 (2006) (arguing for the right of confrontation at sentencing in some circumstances).

19. 519 U.S. 148 (1997) (per curiam).

20. *Id.* at 154–55.

21. *Id.*

22. 543 U.S. 220 (2005).

allowing judges to find facts at sentencing that were not admitted by the defendant or proved to a jury beyond a reasonable doubt.²³ The Court provided two majority opinions. The merits majority held that the Guidelines infringed on a defendant's Sixth Amendment right,²⁴ but rather than engrafting the Sixth Amendment onto the Guidelines, the remedial majority rendered the Guidelines advisory by excising the mandatory language.²⁵ This Article examines whether use of acquitted conduct is constitutionally permissible under the advisory Guidelines.²⁶

Although all federal circuits permit use of acquitted conduct, their reliance on *Booker* to support consideration of acquitted conduct at sentencing is an exercise of selective interpretation that ignores the substance of the merits majority.²⁷ The merits majority in *Booker* recognized the traditional role of juries in guarding against judicial despotism²⁸ and reaffirmed *Apprendi v. New Jersey*.²⁹ This Article argues that use of acquitted conduct to enhance sentences, even under the advisory Guidelines, violates the Sixth Amendment because judges are permitted to find facts that enhance a defendant's sentence beyond that authorized by the jury's verdict and that *Watts* is not viable in light of the merits majority in *Booker*, which is consistent with precedence.

From a policy perspective, the role of the jury, impact of acquitted conduct on defendants' sentences, potential for misuse by prosecutors, and the meaning of an acquittal as it relates to legal or actual innocence are important considerations. Allowing a judge to determine by a preponderance of the evidence that a defendant committed a crime of which the jury acquitted raises the question of who should be the fact finder. Juries provide several benefits:

23. *Id.* at 245.

24. *Id.* at 244.

25. *Id.* at 259.

26. Although *Booker* and its precursors have attracted much attention from scholars, there has been relatively little written about the use of acquitted conduct in sentencing after *Booker*. Only a few works have examined the use of acquitted conduct at sentencing after *Booker*. See Steven G. Kalar & Jon M. Sands, *An Object All Sublime—Let the Punishment Fit the Crime*, 32 CHAMP. 20, 27 (2008) (reviewing *Gall* and *Kimbrough* and predicting that acquitted conduct is “the next major front in the sentencing battle”); James J. Bilsborrow, Note, *Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 WM. & MARY L. REV. 289 (2007) (arguing that use of acquitted conduct is unconstitutional); Franaz Farkish, Note, *Docking the Tail that Wags the Dog: Why Congress Should Abolish Acquitted Conduct at Sentencing and How Courts Should Treat Acquitted Conduct After United States v. Booker*, 20 REGENT U. L. REV. 101, 123 (2007) (proposing that Congress amend 18 U.S.C. § 3661, the statute prohibiting limitation of information that judges receive, to restrict consideration of acquitted conduct).

27. See *infra* notes 142–50.

28. *Booker*, 543 U.S. at 238–39.

29. *Id.* at 244. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court held: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

they serve as a check on the government, the judiciary, and the law, and they reinforce democratic norms. The diversity, group dynamics, and neutrality of juries offer benefits in fact-finding over that of a single judge. Consideration of acquitted conduct by a judge after a jury has already deliberated sends a message that the work of the jury was unnecessary and, in turn, threatens to undermine the role the jury serves and advantages it provides over judicial fact-finding.

Additionally, consideration of acquitted conduct to support an enhanced sentence for another offense can add years to a defendant's sentence³⁰ and in some cases even result in life imprisonment.³¹ Allowing a judge to find that a defendant committed the acquitted conduct through a preponderance of the evidence provides prosecutors with the opportunity to take a "second bite" after they have previously failed at trial to prove that the defendant committed the offense beyond a reasonable doubt.³² Coupled with the absence of the rules of evidence and procedural safeguards at sentencing, such as the right to confront witnesses, the power differential is further shifted in the direction of the prosecution.³³

Another question raised by the use of acquitted conduct is what is the significance of an acquittal? *Watts* found that without specific jury findings, an acquittal does not prove that a defendant is innocent but merely that the government did not prove its case beyond a reasonable doubt.³⁴ At the very least, an acquittal should mean that the defendant is legally innocent—that no legal repercussions should result. Otherwise, other than protecting the defendant from the stigma of an additional conviction, acquittals are relatively meaningless because a defendant can be sentenced to the same length of imprisonment that would have been imposed had he actually been convicted of the offense.³⁵

A final consideration is whether use of acquitted conduct promotes the purposes of sentencing specified in 18 U.S.C. § 3553(a). This statute instructs courts to consider whether their sentencing decision will promote respect for the law, afford deterrence, and avoid unwarranted disparity. Anecdotes suggest that the general public and even lawyers are unaware that an acquittal can be

30. See, e.g., *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992), *aff'd sub nom. United States v. Frias*, 39 F.3d 391, 392 (2d Cir. 1994) (per curiam) (The district court's consideration of acquitted conduct enhanced the sentence from a range of 1 to 1½ years to the maximum of 20 years; upon remand, the sentence was reduced to 12 years.).

31. See, e.g., *United States v. Lombard* (Lombard I), 72 F.3d 170 (1st Cir. 1995) (enhancing sentence from an original range of 262 to 327 months to life imprisonment after consideration of acquitted conduct).

32. Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 182–83 (1996).

33. See Beale, *supra* note 18, at 151.

34. *United States v. Watts*, 519 U.S. 148, 155 (1997) (per curiam).

35. See discussion *infra* Part IV.A.

used at sentencing, which negatively affects the public's respect for the law and deterrence.³⁶ The legislative history shows that the intent was to avoid unwarranted disparity between those who have been convicted of an offense, rather than those acquitted of an offense.³⁷ Sentence enhancements often expose a defendant who was acquitted of a crime to the same sentence received by another defendant who was actually convicted of that very crime. This practice creates unwarranted similarities, rather than avoids unwarranted disparities in sentencing. This Article, therefore, proposes that federal courts³⁸ should use the judicial discretion afforded by *Booker*, *Gall v. United States*,³⁹ and *Kimbrough v. United States*⁴⁰ to evaluate the purposes of sentencing and should reject the use of acquitted conduct.⁴¹

36. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1714 (1992).

37. See generally Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) After Booker*, 37 MCGEORGE L. REV. 627, 635–39 (2006) (discussing the legislative history of 18 U.S.C. § 3553(a)(6)).

38. Because most states permit judicial discretion to consider real offense characteristics, the purposes of sentencing stated in 18 U.S.C. § 3553(a) would be worth considering in state sentencing matters and the suggestions proposed in this Article would be applicable in state sentencing schemes as well.

39. 128 S. Ct. 586 (2007).

40. 128 S. Ct. 558 (2007).

41. There is little scholarship analyzing 18 U.S.C. § 3553(a) purposes of sentencing as they relate to acquitted conduct. See Farkish, *supra* note 26, at 123 (discussing acquitted conduct generally but making only cursory reference to two 18 U.S.C. § 3553(a) factors).

For works generally about 18 U.S.C. § 3553(a) sentencing purposes, but unrelated to acquitted conduct, see William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and Its Progeny*, 40 CONN. L. REV. 631 (2008) (arguing that prioritizing the purposes of sentencing would better guide judges and proposing an approach similar to that of the United Kingdom); Kenneth R. Feinberg, *The Federal Guidelines and the Underlying Purposes of Sentencing*, 10 FED. SENT'G REP. 39 (1997) (providing statutory history of 18 U.S.C. § 3553(a)); Thomas W. Hillier II, *Linking Judicial Sentences to Congressional Purposes*, 8 FED. SENT'G REP. 24 (1995) (proposing that judges identify purpose of sentencing for each case); Leonard J. Long, *Miller's Algebra of Purposes at Sentencing*, 66 S. CAL. L. REV. 483, 486–87 (1992) (commenting on Marc Miller's article); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 424 (1992) [hereinafter Miller, *Purposes at Sentencing*] (exploring congressional intent of the purposes behind sentencing, discussing how judges have used the purposes at sentencing, and arguing that judges should consider purposes at sentencing in each case); Michael Edmund O'Neill & Linda Drazga Maxfield, *Judicial Perspectives on the Federal Sentencing Guidelines and The Goals of Sentencing: Debunking the Myths*, 56 ALA. L. REV. 85 (2004) (providing judicial assessment of achieving sentencing goals); Regina Stone-Harris, *How to Vary from the Federal Sentencing Guidelines Without Being Reversed*, 19 FED. SENT'G REP. 183 (2007) (providing pre-*Gall* and *Kimbrough* discussion of 18 U.S.C. § 3553(a)); Symposium, *Accomplishing the Purposes of Sentencing—The Role of the Courts and the Commission*, 15 FED. SENT'G REP. 179 (2003) (discussing method for determining purposes of sentencing and who should make that determination); Lee D. Heckman, Note, *The Benefits of Departure Obsolescence: Achieving the Purposes of Sentencing in the Post-Booker World*, 69 OHIO ST. L.J. 149, 152–54 (2008) (proposing that Congress declare departures obsolete and

This Article consists of five parts. Part I provides a brief history of the Federal Sentencing Guidelines and sentencing case law relating to “relevant conduct.” Part II explores the viability of *Watts* in light of *Booker*, the motivation of the merits majority in *Booker*, and the justifications offered by the *Booker* remedial majority against engrafting the Sixth Amendment into the Federal Sentencing Guidelines. Part III illustrates instances when courts have disregarded the jury’s verdict and suggests that the jury’s acquittal be respected because of the valuable role served by juries and the benefits of jury fact-finding. Part IV provides additional policy reasons against consideration of acquitted conduct at sentencing. Finally, Part V examines how consideration of acquitted conduct affects the purposes of sentencing: promoting respect for the law, effecting deterrence, protecting the public, and avoiding unwarranted disparities and unwarranted similarities. This Article suggests that through consideration of the purposes of sentencing, judges can use their newfound discretion to respect the jury’s verdict and restore legal significance to acquittals.

I. BACKGROUND

This section provides background information regarding the Federal Sentencing Guidelines and cases relevant to acquitted conduct, judicial determination of sentencing facts, and the appellate standard of review for sentencing decisions made by federal district courts. For those familiar with the history and developing case law, the argument begins at section II.

A. A Brief History of the Sentencing Guidelines and Relevant Conduct

Before the Guidelines, the sentencing regime consisted of parole and indeterminate sentencing in which judges had discretion to sentence.⁴² At this time, the rehabilitative model garnered support for indeterminate sentencing, but around the mid-1970s criticism of this form of sentencing grew.⁴³ Critics decried the unwarranted disparity, which they perceived to be the result of unfettered judicial discretion.⁴⁴

One of the most influential critics, Judge Marvin E. Frankel, proposed sentencing reforms that called for an administrative agency to make sentencing

suggesting a preference for variance).

For an extensive and timely source about sentencing matters, see Professor Douglas Berman’s Sentencing Law and Policy Blog at http://sentencing.typepad.com/sentencing_law_and_policy.

42. For a detailed history of the Guidelines, see *Mistretta v. United States*, 488 U.S. 361, 363–66 (1988); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

43. Stith & Koh, *supra* note 42, at 227–28.

44. *Id.* at 227.

rules that would bind courts.⁴⁵ In response, Congress passed the Sentencing Reform Act of 1984.⁴⁶ The Act created the United States Sentencing Commission (“Commission”) and charged it with promulgating guidelines for sentencing.⁴⁷ Congress instructed the Commission to “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”⁴⁸

The end product of the Commission’s work was the Federal Sentencing Guidelines⁴⁹—a complex system that would become an endless focus of scholars and the bane of some sentencing judges.⁵⁰ In creating the Guidelines,

45. *Id.* at 228.

46. *Id.* at 224–25 (chronicling the Sentencing Reform Act).

47. 28 U.S.C. § 991(a)–(b)(1)(A) (2003).

48. 28 U.S.C. § 991(b)(1)(B) (2003). Congress set forth that the Commission’s purposes are to:

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

Id. Congress specified other duties of the Commission in 28 U.S.C. § 994 (2006).

49. The Commission promulgated the Guidelines in 1987, but the Guidelines were not fully implemented until the Supreme Court upheld the constitutionality of the Commission in *Mistretta v. United States*, 488 U.S. 361 (1989).

The Guidelines establish ranges of sentences for various offenses and defendants, which are represented on a grid. U.S. SENTENCING GUIDELINES MANUAL § 5A (2007). To decide where a particular defendant falls within the grid, judges must calculate the offense level, which appears on one axis of the grid, and the offender’s criminal history, appearing on another axis. *Id.* The intersection of the offense level and the criminal history category is the sentencing range. *Id.* The complex grid includes forty-three offense levels and six criminal history categories, creating 258 guideline ranges. *Id.*

50. Judges have felt constrained by the Guidelines. See *United States v. O’Meara*, 895 F.2d 1216, 1221–23 (8th Cir. 1990) (Bright, J., dissenting in part) (observing “the sometimes bizarre and topsy-turvy world of sentencing under the Guidelines” and that judges “have lost something in this substitution of technical proficiency for the thoughtful exercise of discretion by the federal judiciary”); Jack H. McCall, Jr., *The Emperor’s New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 TENN. L. REV. 467, 493–94 (1993) (discussing Judge Greene’s view that the Guidelines restriction on a judge’s use of

the Commission was faced with a policy decision as to whether to adopt a charge offense system or real offense system of sentencing.⁵¹

A pure charge offense system imposes sentences based on the offenses for which a conviction was obtained.⁵² Because a defendant's sentence would be limited to the convicted offense, those who oppose a charge offense system believe that it would not reflect the gravity of the defendant's conduct and the breadth of his or her culpability.⁵³ On the other hand, real offense sentencing imposes punishment for all the circumstances underlying the defendant's offense, regardless of whether the additional conduct amounted to convictions or charges.⁵⁴ As Justice Breyer—a member of the first Commission⁵⁵—points out,

The proponents of such a system . . . minimize the importance of the *procedures* that courts must use to determine the existence of the additional harms, since the relevant procedural elements are not contained in the typical criminal statute. . . .

"accumulated experience, judgment, and . . . wisdom" has disturbed "the due process balance essential to the fairness of criminal litigation"); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1236–37 (2004) [hereinafter Miller, *Domination & Dissatisfaction*] ("Judges spoke early and often about their displeasure with the sentencing rules."); Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1157 n.91 (2005) (noting specific instances of judicial criticism of the Guidelines); Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 363–64 (1992) ("[T]here is considerable justification for believing that guideline sentencing will continue to undermine federal criminal adjudication in more subtle and insidious ways. . . . We have fewer occasions on which to share our thoughts and concerns about the appropriateness of our sentences, and their effects on the people whom we are sentencing and the general public."); Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1, 25 (2005) ("Here is a proposition that few observers of federal sentencing would dispute: the Federal Sentencing Guidelines constrain sentencing judges more than any other guidelines system does.").

Some members of the judiciary have retired to escape the rigidity and harshness of the Guidelines. For example, Judge Martin wrote in a *New York Times* editorial, "When I took my oath of office 13 years ago I never thought that I would leave the federal bench. While I might have stayed on despite the inadequate pay, I no longer want to be part of our unjust criminal justice system." John S. Martin, Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (explaining that congressional changes to sentencing has led to his retirement); see also Miller, *Domination & Dissatisfaction*, *supra* note 50, at 1249 ("The *New York Times* has reported on a series of orders and sharp comments by judges in federal courts, including, in an echo of reactions to the early guidelines, judges taking early retirement to avoid sentencing cases.").

51. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8–9 (1988).

52. *Id.* at 9.

53. *Id.*

54. *Id.* at 10–11.

55. He was a judge on the First Circuit at the time. *Id.* at 1.

Of course, the more facts the court must find in this informal way, the more unwieldy the process becomes, and the less fair that process appears to be.⁵⁶

In the end, the Commission adopted a modified real offense system that takes into consideration the defendant's "relevant conduct."⁵⁷ Under this type of sentencing scheme, a defendant can be punished for convicted, acquitted, or uncharged conduct.⁵⁸ A judge may take into account not only the defendant's conduct but also conduct of codefendants that was reasonably foreseeable when the defendant undertook the actions, regardless of whether the government charged the codefendants' conduct.⁵⁹

A defendant's relevant conduct can dramatically increase a defendant's sentence from one guideline range to another by increasing the offense level.⁶⁰

56. *Id.* at 10.

57. U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1 to -1.3 (2007). The Guidelines provide the following instructions to determine the defendant's sentencing range:

(a) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* § 1B1.2. (b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed. (c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three. (d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly. (e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three. (f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments. (g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above. (h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution. (i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

Id. § 1B1.1. For additional detailed explanations regarding the mechanics of the Guidelines, see Federal Criminal Procedure Committee of the American College of Trial Lawyers, *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1463 (2001); Stephen Breyer, *supra* note 51, at 6–7 (providing a step-by-step example of a guideline calculation); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1354–56 (1997).

58. U. S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES 26 (2004), *available at* http://www.ussc.gov/15_year/15_year_study_full.pdf.

59. *Id.*

60. *See, e.g.,* United States v. Miller, 910 F.2d 1321, 1322 (6th Cir. 1990) (enhancing sentence to sixty months based on the judge's finding that there were 1169.5 grams of drugs despite pro se defendant's plea to being involved with 35.5 grams of drugs, which would have exposed defendant to fifteen to twenty months in prison).

However, the determination of facts that underlie relevant conduct can be made without affording the defendant the rights and procedures normally accorded at trial. For example, a defendant is not entitled to confront witnesses at sentencing.⁶¹ Furthermore, because the rules of evidence do not apply,⁶² evidence that was once inadmissible at trial is now fair game.⁶³ Finally, the standard of proof diminishes from the highest level at trial (proof beyond a reasonable doubt) to the lowest level at sentencing (preponderance of the evidence).⁶⁴ At sentencing, although a defendant's punishment can be increased significantly, a judge need only determine the relevant conduct by a preponderance of the evidence, a standard that is even less than the clear and convincing standard that is sometimes applied in the civil context.⁶⁵ Thus, as

61. See *United States v. Petty*, 982 F.2d 1365, 1370 (9th Cir. 1993) ("The Confrontation Clause does not apply at sentencing to preclude a court from considering hearsay evidence."); *United States v. Wise*, 976 F.2d 393, 401 (8th Cir. 1992) ("We conclude that the enactment of the Guidelines has not so transformed the sentencing phase that it constitutes a separate criminal proceeding. The right to confront witnesses, therefore, does not attach."); *United States v. Beaulieu*, 893 F.2d 1177, 1180 (10th Cir. 1990) ("The Supreme Court has made clear that the constitutional requirements mandated in a criminal trial as to confrontation and cross-examination do not apply at non-capital sentencing proceedings."); *United States v. Giltner*, 889 F.2d 1004, 1008 (11th Cir. 1989) ("While due process requires that appellant be afforded the opportunity to refute the information brought against him at sentencing, it does not require that appellant be given the opportunity to call and cross-examine witnesses to rebut the information."); *United States v. Agyemang*, 876 F.2d 1264, 1272 (7th Cir. 1989) ("But by insisting that a defendant have a 'reasonable opportunity to rebut' contested hearsay, we do not mean that a judge must hold an elaborate trial-type proceeding before considering hearsay in sentencing; instead, the judge must simply give the defendant an opportunity to show why the hearsay information is wrong and to present his side of the story."); *United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989) ("It is not a denial of due process for the trial judge, when determining sentence, to rely on evidence given by witnesses whom the defendant could neither confront nor cross-examine.").

62. FED. R. EVID. 1101(d)(3).

63. See U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) (2007) ("In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.").

64. See *id.* § 6A1.3 cmt.; see also *United States v. Wong*, 2 F.3d 927, 935-36 (9th Cir. 1993) (Norris, J., dissenting) ("The evidence need not persuade the sentencing judge of guilt beyond a reasonable doubt, but by a mere preponderance of the evidence—the more-probable-than-not standard used in civil cases.").

65. See *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276, 285 & n.18 (1966) (noting that a clear and convincing standard "has been traditionally imposed in cases involving allegations of civil fraud, . . . adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, and the like). Although acquitted conduct can significantly increase a defendant's sentence, and consequently increase a defendant's deprivation of liberty, a defendant is afforded a lower standard of proof at a criminal sentencing proceeding than is available at a deportation hearing. In *Woodby*, the Supreme Court held that a person may not be deported without a showing of "clear, unequivocal, and convincing

stated by one court, real offense sentencing can have the “effect . . . [of] permit[ing] the harshest penalty outside of capital punishment to be imposed not for conduct charged and convicted but for other conduct as to which there was, at sentencing, at best a shadow of the usual procedural protections, such as the requirement of proof beyond a reasonable doubt.”⁶⁶

B. Relevant Cases: United States v. Watts, United States v. Booker, Gall v. United States, and Kimbrough v. United States

1. *United States v. Watts*: Use of Acquitted Conduct and Double Jeopardy

In *United States v. Watts*,⁶⁷ the Supreme Court considered the constitutionality of using acquitted conduct at sentencing as it relates to double jeopardy concerns. *Watts* is the only time the Court has considered the use of acquitted conduct at sentencing. This issue came before the Court through two cases, *United States v. Watts* and *United States v. Putra*, which were consolidated on appeal.⁶⁸ In each case, the district court found by a preponderance of the evidence that the defendant had committed an act for which the jury had acquitted and, consequently, imposed an enhanced sentence based on this acquitted conduct.⁶⁹ The Ninth Circuit vacated both sentences,

evidence.” *Id.* at 285. The Court recognized that a deportation hearing is not a criminal proceeding, but reasoned that because of the “drastic deprivations” that may result from deportation, a person should not be “banished from this country upon no higher degree of proof than applies in a negligence case.” *Id.*

For general discussions about the preponderance of the evidence standard and proposals for a higher standard of proof, see David N. Adair, Jr., *House Built on a Weak Foundation—Sentencing Guidelines and the Preponderance Standard*, 4 FED.SENT’G REP. 292 (1992); Lauren Greenwald, Note, *Relevant Conduct And The Impact Of The Preponderance Standard Of Proof Under The Federal Sentencing Guidelines: A Denial Of Due Process*, 18 VT. L. REV. 529 (1994).

66. *United States v. Lombard* (Lombard I), 72 F.3d 170, 177–78 (1st Cir. 1995).

67. 519 U.S. 148 (1997) (per curiam).

68. *Id.* at 149.

69. In *Watts*, the defendant was indicted for possession of the cocaine base found in his kitchen cabinet and two loaded guns and ammunition that were concealed in a bedroom closet. *Id.* at 149. At trial, the jury convicted Watts of possession of cocaine with intent to distribute but acquitted him of using a firearm related to a drug offense. *Id.* at 149–50. The district court, despite the jury’s acquittal on the firearm charge, enhanced the defendant’s base level by two points because the court found by a preponderance of the evidence that the defendant had possessed the guns in connection to a drug offense. *Id.* at 150.

In *Putra*, the government indicted Putra on one count of aiding and abetting possession with intent to distribute one ounce of cocaine and a second count involving five ounces. *Id.* The jury convicted the defendant of the first count involving one ounce of cocaine but acquitted the defendant on the second count that alleged five ounces of cocaine. *Id.* However, the district court at sentencing found that the defendant, by a preponderance of the evidence, had taken part in conduct alleged in the second count and, consequently, aggregated

holding that a district court may not consider acquitted conduct at sentencing regardless of the standard of proof.⁷⁰ The Ninth Circuit reasoned that the jury's verdict represented an "explicit rejection" of the defendant's involvement in the additional conduct and an enhanced sentence based on this conduct "would be effectively punishing [the defendant] for an offense for which she has been acquitted."⁷¹

However, the Supreme Court reversed and held that consideration of acquitted conduct at sentencing does not violate the Double Jeopardy Clause when the conduct at issue is proven by a preponderance of the evidence.⁷² The Court rejected the Ninth Circuit's view of double jeopardy and reiterated its prior conclusions in *Witte v. United States*:⁷³

"[C]onsideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." Rather, the defendant is "punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment"⁷⁴

An acquittal, as the Court distinguished, "does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt."⁷⁵ The Court opined, "[A]n acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences"⁷⁶ Therefore, the Court concluded that "the jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty."⁷⁷

the amount of drugs from both sales to determine the defendant's base offense level. *Id.* at 150–51.

70. *Id.*

71. *Id.* at 151.

72. *Id.* at 157.

73. 515 U.S. 389 (1995).

74. *Watts*, 519 U.S. at 155 (quoting *Witte*, 515 U.S. at 401, 403) (citation omitted).

75. *Id.* (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984)).

76. *Id.* (quoting *United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996) (Wallace, C.J., dissenting)) (alteration in original).

77. *Id.* at 155. Interestingly, on January 2, 1997, just four days before the *Watts* decision, the Commission was considering amendments to the Guidelines regarding the use of acquitted conduct at sentencing. It published the following proposal:

9. Synopsis of Proposed Amendment: This amendment addresses the issue of whether acquitted conduct may be considered for sentencing purposes. Option 1 of this amendment excludes the use of acquitted conduct as a basis for determining the guideline range. Option 1 has two suboptions, either or both of which could be added. Option 1(A) adds the bracketed language, in the guideline and application note, providing that acquitted conduct

2. *United States v. Booker*: The Sixth Amendment and Judicial Fact-Finding

In *United States v. Booker*,⁷⁸ the Supreme Court considered whether application of the Sentencing Guidelines that permitted judges to find facts violated the Sixth Amendment in the consolidated cases of *United States v. Booker* and *United States v. Fanfan*.⁷⁹ The Supreme Court provided two majority opinions in *Booker*: one discussing the constitutional question and another providing the remedy.⁸⁰ Regarding the merits question, the Court held

shall be considered if established independently of evidence admitted at trial. Option 1(B) invites the use of acquitted conduct as a basis for upward departure. Option 2 is derived from a "compromise" proposal suggested several years ago by the Commission's Practitioners' Advisory Group. It excludes acquitted conduct from consideration in determining the guideline range unless such conduct is established by the "clear and convincing" standard, rather than the less exacting "preponderance of the evidence" standard generally applicable to the determination of relevant conduct. Option 3 expressly provides what currently is arguably implicit in the Relevant Conduct guideline: that acquitted conduct should be evaluated using the same standards as any other form of unconvicted conduct and included in determining the guideline range if those standards are met. However, the amended commentary invites a discretionary downward departure to exclude such conduct if the use of that conduct to enhance the sentence raises substantial concerns of fundamental fairness. It also states what should be the obvious appropriate floor for such a downward departure. *Proposed Amendment*: [Option 1A: Section 1B1.3 is amended by inserting the following new subsection: "(c) Acquitted conduct, i.e., conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall not be considered relevant conduct under this section unless it is independently established by evidence not admitted at trial."]

Sentencing Guidelines for United States Courts, 62 Fed. Reg. 152, 161 (Jan. 2, 1997).

78. 543 U.S. 220 (2005).

79. *Id.* The defendant Booker was convicted by a jury for possession with the intent to distribute at least 50 grams of crack cocaine after the jury heard evidence that the defendant had possessed 92.5 grams of drugs. *Id.* at 227. The defendant's base sentencing range, after considering his criminal history, would have been 210 to 262 months imprisonment. *Id.* However, during the sentencing hearing, the district court found by a preponderance of the evidence that the defendant had possessed an additional 566 grams of crack and obstructed justice. *Id.* The inclusion of these additional facts increased the defendant's sentence to a new sentencing range of 360 months to life imprisonment. *Id.*

In Fanfan's case, the jury found him guilty of conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine. *Id.* at 228. The maximum sentence resulting from the jury's verdict would have been 78 months. *Id.* Later, at the sentencing hearing, the district court attributed to the defendant 2.5 kilograms of cocaine powder and 261.6 grams of crack. *Id.* The court also found that the defendant had a leadership role in the drug activity. *Id.* As a result of the additional findings, the new sentencing range for the defendant was 188 to 235 months imprisonment. *Id.*

80. In this rare opinion, the remedial majority is comprised of the Justices who dissented in the merits opinion, except for Justice Ginsburg, who was the swing vote. Justices Stevens, Scalia, Souter, Thomas, and Ginsburg formed the merits majority; Justices Breyer, Rehnquist, O'Connor, Kennedy, and Ginsburg formed the remedial majority.

that the Sixth Amendment applies to the Guidelines and that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”⁸¹ For the remedy, rather than engrafting the Sixth Amendment right onto the Guidelines, the Court severed and excised two provisions of the statute and cross-references to those provisions, thereby making the Guidelines advisory.⁸²

a. The Merits Majority

The Court’s merits holding rested on its Sixth Amendment jurisprudence developed through *Apprendi v. New Jersey*,⁸³ *Ring v. Arizona*,⁸⁴ and *Blakely v. Washington*.⁸⁵ In *Apprendi*, the district court issued an enhanced sentence based on finding at sentencing that the defendant acted with racial animus.⁸⁶ The Supreme Court set aside the enhanced sentence, holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁸⁷ The fact that the state of New Jersey characterized the hate crime as an enhancement did not obviate these protections.⁸⁸

Later, in *Ring*, the Court made clear that the characterization of a critical fact, as either an element or a sentencing factor, was irrelevant.⁸⁹ Arizona law had permitted judges to determine the existence of aggravating factors to impose the death penalty following a jury’s determination of guilt in a first degree murder trial.⁹⁰ In deciding whether Arizona’s practice of allowing

81. *Id.* at 244.

82. *Id.* at 245.

83. 530 U.S. 466 (2000).

84. 536 U.S. 584 (2002).

85. 542 U.S. 296 (2004).

86. The defendant pled guilty to charges of possession of an unlawful firearm and unlawful possession of a bomb. *Apprendi*, 530 U.S. at 469–70. At sentencing, the court found that the defendant had acted with racial bias and enhanced the defendant’s sentence pursuant to a hate crime statute. *Id.* at 471. However, the charges neither alleged that the defendant acted with racial animus nor referred to the hate crime statute. *Id.* at 469. The defendant would have faced a maximum of 20 years imprisonment for the pled charges but faced a maximum of 30 years due to the enhancement. *Id.* at 470.

87. *Id.* at 490.

88. *Id.* at 492.

89. *Ring*, 536 U.S. at 584.

90. *Id.* at 588. At sentencing, the judge sitting alone, found two aggravating factors—that the defendant committed the crime for pecuniary gain and “in an especially heinous, cruel or depraved manner”—and sentenced the defendant to death. *Id.* at 594–95. However, based solely on the jury’s determination of guilt, the statutory maximum punishment was life imprisonment. *Id.* at 592, 597. Only through the sentencing judge’s additional findings of fact was the

judges to find aggravating factors violated the Sixth Amendment's right to trial by jury, the Court pointed out that "[t]he dispositive question . . . 'is one not of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."⁹¹

In *Blakely*, the Court addressed the question of when does a sentence exceed the statutory maximum punishment to trigger the Sixth Amendment requirement of a jury's determination of proof beyond a reasonable doubt, as the Court recognized in *Apprendi*.⁹² The defendant pled guilty to kidnapping, which carried a maximum sentence of 53 months.⁹³ However, Washington state law permitted a judge to impose an "exceptional" sentence if a court determined that the defendant acted with "deliberate cruelty."⁹⁴ The sentencing court found that the defendant had indeed acted with deliberate cruelty and sentenced him to 90 months.⁹⁵

In considering the question presented in *Blakely*, the Court invoked the principles underlying the right to jury trial articulated in *Apprendi* and found that the Washington statute violated the Sixth Amendment.⁹⁶ The Court explained:

[The] commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.⁹⁷

In *Booker*, the Court compared the sentencing scheme in *Blakely* with the federal Guidelines and found that there was no distinction between the Washington sentencing procedure that was invalidated in *Blakely* and the Guidelines in question.⁹⁸ Both were mandatory.⁹⁹ Judges were bound to the requirements of the Guidelines because 18 U.S.C. § 3553(b) instructed that courts "*shall* impose a sentence of the kind, and within the range."¹⁰⁰ Thus, the

defendant at risk for the imposition of the death penalty. *Id.* at 596.

91. *Id.* at 602 (quoting *Apprendi*, 530 U.S. at 494) (citation omitted).

92. *Blakely v. Washington*, 542 U.S. 296, 301 (2004).

93. *Id.* at 298–99.

94. *Id.*

95. *Id.* at 298.

96. *Id.* at 305.

97. *Id.* at 305–06 (citation omitted).

98. *United States v. Booker*, 543 U.S. 220, 233–34 (2005).

99. *Id.*

100. *Id.* at 234 (quoting 18 U.S.C. § 3553(b) (2006)) (emphasis added).

Sixth Amendment concerns applied equally to both the Guidelines and the Washington scheme.

Applying the Sixth Amendment, the *Booker* Court found that the federal Guidelines violated the right to have a jury determine facts beyond a reasonable doubt.¹⁰¹ It reaffirmed *Apprendi* and explained the following:

More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles are unquestionably applicable to the Guidelines. They are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law. The Framers of the Constitution understood the threat of “judicial despotism” that could arise from “arbitrary punishments upon arbitrary convictions” without the benefit of a jury in criminal cases. The Founders presumably carried this concern from England, in which the right to a jury trial had been enshrined since the Magna Carta.¹⁰²

b. The Remedial Majority

Because the mandatory language in the Guidelines would render them unconstitutional, the remedial majority fashioned a remedy by excising the mandatory language from the Guidelines.¹⁰³ First, the Court excised 18 U.S.C. § 3553(b)(1), which required courts to impose sentences within the range mandated by the Guidelines.¹⁰⁴ Although excision of the mandatory language created advisory Guidelines, courts must still consider the Guidelines during sentencing.¹⁰⁵ Judges must also consider the purposes of sentencing articulated in 18 U.S.C. § 3553(a)—that the sentence must be as follows:

sufficient, but not greater than necessary . . .

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.¹⁰⁶

Second, the Court excised § 3742(e), the provision requiring *de novo*

101. *Id.* at 243–44.

102. *Id.* at 238–39 (quoting THE FEDERALIST No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (citations omitted).

103. *Id.* at 245.

104. *Id.* at 259.

105. *Id.* at 259–60.

106. 18 U.S.C. § 3553(a) (2006) (emphasis added).

review of departures from the Guidelines, because it depended on the Guidelines being mandatory.¹⁰⁷ The Court then specified that sentences on appeal would be reviewed for “unreasonableness” as they relate to § 3553(a).¹⁰⁸ It explained that “[s]ection 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.”¹⁰⁹ However, this brief explanation left many unanswered questions. Later, through *Gall v. United States*¹¹⁰ and *Kimbrough v. United States*,¹¹¹ the Court began to provide additional guidance regarding the balance of judicial discretion and “reasonableness” review.

3. *Gall v. United States*: Presumption of Unreasonableness

The “reasonableness” standard for appellate review established in *Booker* has led to questions about how appellate courts should apply this standard—in other words, when is a district court’s sentencing decision reasonable? In *Gall v. United States*, the Supreme Court addressed the question of whether a sentence below the recommended Guidelines could be construed by appellate courts as presumptively unreasonable.¹¹² Because of Gall’s law-abiding conduct in having withdrawn from the conspiracy, his continued abstinence from drug usage since 2002, and his initiative to start a business, the district court found that the recommended guideline range was greater than necessary to meet the purposes of sentencing as stated in 18 U.S.C. § 3553(a).¹¹³ The district court

107. *Booker*, 543 U.S. at 259.

108. *Id.* at 261.

109. *Id.*

110. 128 S. Ct. 586 (2007).

111. 128 S. Ct. 558 (2007).

112. *Gall v. United States*, 128 S. Ct. 586, 591 (2007). This case arose from the defendant’s drug activities in college. During his second year of college, the defendant used and distributed ecstasy. *Id.* at 591–92. A couple of months after joining the ecstasy-selling enterprise, the defendant stopped his ecstasy use, and after seven months’ involvement in ecstasy distribution, the defendant withdrew from the conspiracy. *Id.* at 592. Some time later, after graduating in 2002, the defendant moved to Arizona to work in the construction industry. *Id.*

While in Arizona, the defendant was questioned by federal agents about the ecstasy distribution, to which the defendant admitted his involvement. *Id.* A year and a half after his initial contact with the federal agents and three and a half years after the defendant’s withdrawal from the drug conspiracy, the government charged him and other codefendants with conspiracy to distribute cocaine, ecstasy, and marijuana. *Id.* During the time that had lapsed between the interview with federal law enforcement and his indictment, the defendant had moved to Colorado and became a master carpenter. *Id.* After the indictment, the defendant surrendered himself to the authorities, and while released on his own recognizance, he began a construction business. *Id.*

113. *Id.* at 593.

sentenced him to 36 months of *probation*, as opposed to the 30 to 37 months of *imprisonment* recommended by the presentence report.¹¹⁴

On appeal, the Eighth Circuit held that a sentence falling outside of the Guideline range must “be supported by a justification that ‘is proportional to the extent of the difference between the advisory range and the sentence imposed.’”¹¹⁵ Because the difference between probation and the bottom range of 30 months was, in the Eighth Circuit’s view, “extraordinary,” the Eighth Circuit required that this “100% downward variance” be justified by extraordinary circumstances.¹¹⁶ The Eighth Circuit found none existed and reversed the sentence.¹¹⁷

The Supreme Court reversed the Eighth Circuit, holding that regardless of the degree of variance from the Guideline range, appellate review of sentences must be conducted under a deferential abuse-of-discretion standard.¹¹⁸ Applying that standard, the Court held that the sentence imposed by the district court was reasonable.¹¹⁹

Additionally, the Court outlined the proper process in reviewing sentences:

[An appellate court] must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.¹²⁰

Once an appellate court determines that the district court’s sentencing determinations comport with the above procedural considerations, then the appellate court should review the sentence for “substantive reasonableness” using an abuse-of-discretion standard.¹²¹

Although an appellate court may consider the degree of variance from the Guidelines range and the extent of justification provided by the district court, the Supreme Court rejected “an appellate rule that requires, ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range.”¹²² The Court further rejected “the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the

114. *Id.*

115. *Id.* at 594.

116. *Id.*

117. *Id.*

118. *Id.* at 591.

119. *Id.*

120. *Id.* at 597.

121. *Id.*

122. *Id.* at 595.

justifications required for a specific sentence.”¹²³ Although the Court in *Rita v. United States*¹²⁴ permitted a presumption of reasonableness for sentences within Guideline ranges, the *Gall* Court explained that a presumption of unreasonableness for sentences outside of the Guideline ranges is impermissible because it contravenes *Booker*.¹²⁵ An appellate court “must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.”¹²⁶

4. *Kimbrough v. United States*: Purposes of Sentencing in 18 U.S.C. § 3553(a) and the Post-*Booker* Reasonableness Standard of Review

In *Kimbrough v. United States*,¹²⁷ the Court considered whether a district court’s sentence that fell outside of the advisory Guidelines because of its disagreement with the crack/powder cocaine Guidelines was reasonable under *Booker*’s standard of review.¹²⁸

At sentencing, the district court calculated a Guidelines range of 228 to 270 months.¹²⁹ Had the defendant been involved with powder cocaine, rather than crack cocaine, the defendant’s Guideline range would have been 97 to 106 months.¹³⁰ This disparity is due to the Guidelines’ 100 to 1 ratio for powder to crack cocaine.¹³¹ The district court pointed out the “disproportionate and unjust effect that crack cocaine guidelines have in sentencing” and consequently concluded that a sentence in the range of 228 to 270 months was “greater than necessary” to meet the objectives of sentencing articulated in 18 U.S.C. § 3553(a).¹³² After considering the defendant’s history and characteristics, the nature of the offense, and the difference in Guideline ranges between offenses involving crack cocaine versus powder cocaine, the court imposed a sentence of 180 months in prison plus five years of supervised release.¹³³ The Fourth Circuit vacated the sentence, following precedent that had established that a

123. *Id.*

124. 127 S. Ct. 2456 (2007).

125. *Gall*, 128 S. Ct. at 595.

126. *Id.* at 597.

127. 128 S. Ct. 558 (2007).

128. *Id.* at 564. The government indicted the defendant for “conspiracy to distribute crack and powder cocaine; possession with intent to distribute more than 50 grams of crack cocaine; possession with intent to distribute powder cocaine; and possession of a firearm in furtherance of a drug-trafficking offense.” *Id.* The defendant pled guilty to all the charges. *Id.*

129. *Id.* at 565.

130. *Id.*

131. *Id.* at 564.

132. *Id.*

133. *Id.*

sentence outside of the Guideline range resulting from a disagreement with the crack to powder ratio was per se unreasonable.¹³⁴

The Supreme Court reversed the Fourth Circuit, clarifying that all Guidelines were advisory after *Booker*, even the cocaine Guidelines.¹³⁵ The Supreme Court explained that “[a] district judge must include the Guidelines range in the array of factors warranting consideration. The judge may determine, however, that, in the particular case, a within-Guidelines sentence is ‘greater than necessary’ to serve the objectives of sentencing.”¹³⁶ In considering § 3553(a) factors, a court may take into account the disparity in Guideline ranges between crack and powder cocaine.¹³⁷ Therefore, the Supreme Court found that the district court’s sentencing decision was not unreasonable.¹³⁸

II. USE OF ACQUITTED CONDUCT AND THE SIXTH AMENDMENT

A. *The Viability of Watts*

Although no U.S. Supreme Court case has directly addressed the question of whether use of acquitted conduct offends the Sixth Amendment, the Court’s Sixth Amendment jurisprudence supports the conclusion that use of acquitted conduct does indeed violate the Sixth Amendment.¹³⁹ *Watts* is the only case that was presented with an issue arising out of acquitted conduct, but it did not address the Sixth Amendment.¹⁴⁰ Additionally, the application of *Watts* should be limited because the Court “did not even have the benefit of full briefing or oral argument.”¹⁴¹

Although all federal circuits permit the use of acquitted conduct at sentencing,¹⁴² some of them recognize the tension between *Watts* and the

134. *Id.*

135. *Id.* at 564.

136. *Id.* (quoting 18 U.S.C. § 3553(a)).

137. *Id.*

138. *Id.* at 576.

139. An argument could be made that it would also violate the Fifth Amendment, but this is beyond the scope of the Article.

140. The *Booker* Court remarked on the limitations of *Watts*: “In neither *Witte* nor *Watts* was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment.” *United States v. Booker*, 543 U.S. 220, 240 (2005).

141. *Id.* at 240 n.4.

142. See *United States v. Mercado*, 474 F.3d 654, 655–56 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1736 (2008); *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States v. Farias*, 469 F.3d 393, 399–400 (5th Cir. 2006); *United States v. Dorcelly*, 454 F.3d 366, 371 (D.C. Cir. 2006); *United States v. Hayward*, 177 F. App’x 214, 215 (3d Cir. 2006); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 525–27 (2d Cir. 2005); *United States v. Price*, 418 F.3d 771, 787–88 (7th Cir. 2005); *United States v. Ashworth*, 139 F. App’x 525, 527 (4th Cir. 2005) (*per curiam*); *United States v.*

Booker merits opinion.¹⁴³ For example, in *United States v. Magallanez*,¹⁴⁴ the Tenth Circuit addressed the issue of whether *Booker* and *Blakely* required the sentencing court to accept the jury's special verdict on drug quantity, rather than allowing the sentencing court to calculate the amount on its own.¹⁴⁵ The circuit court conceded that "[a]t first blush, there might seem to be force to [the defendant's] argument."¹⁴⁶ It acknowledged that:

[t]he defendant in this case might well be excused for thinking that there is something amiss, under this constitutional principle, with allowing the judge to determine facts on which to sentence him to an additional 43 months in prison in the face of a jury verdict finding facts under which he could be required to serve no more than 78 months.¹⁴⁷

The court even went so far as to cite support¹⁴⁸ for the defendant's

Magallanez, 408 F.3d 672, 684–85 (10th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297, 1304–05 (11th Cir. 2005).

But Judge McKee's dissent raises an important point:

My colleagues in the majority find solace in the fact that the holding here "accords with the decisions of each of our sister circuits that has addressed this issue." I am not nearly as comforted by that fact as they. As I have noted elsewhere, "before *Booker* was decided, one could have developed an even more impressive list of the courts that had incorrectly concluded that *Apprendi* does not apply to the federal sentencing guidelines."

United States v. Grier, 475 F.3d 556, 606 (3d Cir. 2007) (en banc) (McKee, J., dissenting), *cert. denied*, 128 S. Ct. 106 (2007) (citations omitted).

143. See *United States v. Wilson*, 232 F. App'x 540, 543 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 638 (2007); *United States v. Lindsey*, 482 F.3d 1285, 1294 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 438 (2007); *Mercado*, 474 F.3d at 657; *Farias*, 469 F.3d at 399–400; *Hayward*, 177 F. App'x at 215; *Dorcely*, 454 F.3d at 372; *United States v. Faust*, 456 F.3d 1342, 1347–48 (11th Cir. 2006); *United States v. Poyato*, 454 F.3d 1295, 1297 (11th Cir. 2006); *High Elk*, 442 F.3d at 626; *Vaughn*, 430 F.3d at 525–27; *Price*, 418 F.3d at 787–88; *Ashworth*, 139 F. App'x at 527; *Magallanez*, 408 F.3d at 683–85; *Duncan*, 400 F.3d at 1304–05.

144. 408 F.3d 672, 683 (10th Cir. 2005).

145. *Id.* at 683–84.

146. *Id.* at 683.

147. *Id.*

148. The court acknowledged the holding in *United States v. Pimental*, 367 F. Supp. 2d 143, 145 (D. Mass. 2005), that a sentence enhancement may not be imposed for acquitted conduct. It also conceded the following:

[t]he constitutional violation identified in *Blakely* and *Booker*, after all, was the Sixth Amendment right to trial by jury. *Blakely*, 124 S. Ct. at 2538–39; *Booker*, 125 S. Ct. at 746. As Justice Scalia wrote for the Court in *Blakely*, "the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power." 124 S. Ct. at 2540. See also *id.* at 2542 (noting the unfairness when a convicted defendant "see[s] his maximum potential sentence balloon from as little as five years to as much as life imprisonment, based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.").

contention that the sentencing judge was required to abide by the jury's findings. The court only concluded that the sentencing court was permitted to consider other conduct rejected by the jury because it relied strictly on the remedial majority opinion in *Booker* to reason that *Booker* did not alter 18 U.S.C. § 3661.¹⁴⁹

Several district courts and individual judges in the circuits have questioned the continued viability of *Watts*. Judge Barkett's concurrence in *Faust* illustrates a reluctance to follow what she believed precedence required, while fully appreciating that use of acquitted conduct violates Fifth and Sixth Amendment rights.¹⁵⁰ Judge Barkett lamented, "I . . . concur in [the] sentencing decision only because I am bound by Circuit precedent. . . . I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."¹⁵¹

Further, Judge Gertner of the District of Massachusetts has pointed out:

United States v. Booker substantially undermines the continued vitality of *United States v. Watts* both by its logic and by its words. It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, and *also* conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing.¹⁵²

Others have echoed the same:¹⁵³

Magallanez, 408 F.3d at 683.

149. *Magallanez*, 408 F.3d at 684–85; *see also* *United States v. Faust*, 456 F.3d 1342, 1348 (11th Cir. 2006) (applying similar analysis: "We also note 18 U.S.C. § 3661, on which *Watts* relied, remains intact post-*Booker*. Under § 3661, '[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.' Because the Supreme Court in *Booker* excised only two provisions of the Sentencing Act, 18 U.S.C. § 3553(b)(1) and § 3742(e), *see Booker*, 543 U.S. at 259, it follows that courts may still consider relevant facts concerning a defendant's 'background, character, and conduct' when making sentencing calculations, even if those facts relate to acquitted conduct.").

150. *Faust*, 456 F.3d at 1349–50.

151. *Id.* at 1349.

152. *United States v. Pimental*, 367 F. Supp. 2d 143, 150 (D. Mass. 2005) (citation and footnote omitted).

153. *See, e.g.*, *United States v. Mercado*, 474 F.3d 654, 661 (9th Cir. 2007) (Fletcher, J., dissenting) ("In short, *Watts* has been 'explicitly disavowed by the Supreme Court as a matter of Sixth Amendment law[and] has no bearing on [on the Sixth Amendment issue] in light of the Court's more recent and relevant rulings.'" (first alteration in original) (quoting *Faust*, 456 F.3d at 1349 (Barkett, J., dissenting))), *cert. denied*, 128 S. Ct. 1736 (2008); *United States v. Duncan*, 400 F.3d 1297, 1349 (11th Cir. 2005) (Barkett, J., concurring); *United States v. Coleman*, 370 F. Supp. 2d 661, 676 (S.D. Ohio 2005) ("The viability of *Watts*, however, was questioned by Justice Stevens' constitutional majority opinion in *Booker*. While stating that

A paradox is thus presented. *Apprendi* and its progeny, including *Booker*, have elevated the role of the jury verdict by circumscribing a defendant's sentence to the relevant statutory maximum *authorized* by a jury; yet, the jury's verdict is not heeded when it specifically withholds authorization. Stated differently, the jury is essentially ignored when it disagrees with the prosecution. This outcome is nonsensical and in contravention of the thrust of recent Supreme Court jurisprudence. The Fifth and Tenth Circuit Courts of Appeal have attempted to reconcile this paradox, thereby upholding *Watts*' validity, by focusing solely on the narrow remedial holding of Justice Breyer's opinion. . . . [T]hese cases [are] unpersuasive and [] the jury's central role in the criminal justice system is better served by respecting the jury's findings with regard to authorized *and* unauthorized conduct. To consider unauthorized conduct would be to denigrate wholly the right to a jury trial, which is a "fundamental reservation of power in our constitutional structure."¹⁵⁴

B. Booker's Sixth Amendment Motivation

Booker is a schizophrenic opinion.¹⁵⁵ The only commonality between the merits majority and the remedial majority is Justice Ginsburg. Because the remedial opinion was written by the dissenting Justices (except Justice Ginsburg) who concluded there was no constitutional violation in the first place, it is not surprising that the two majority opinions are in conflict. Some

Watts is not 'inconsistent with today's decision,' Justice Stevens remarked that *Watts* did not involve 'any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment.'"); *United States v. Gray*, 362 F. Supp. 2d 714, 721–22 (S.D. W. Va. 2005), *aff'd*, 491 F.3d 138 (2007), *cert. denied*, 128 S. Ct. 1226 (2008).

154. *Coleman*, 370 F. Supp. 2d at 670–71; *see also Mercado*, 474 F.3d at 661–62 (Fletcher, J., dissenting) ("While sentences that exceed the statutory maximum lack the necessary jury authorization, so too do sentences that rely on conduct for which the jury has explicitly withheld authorization. In both cases, the judge's sentence relies on a factual finding not made by the jury, exposing the defendant to a penalty exceeding the maximum to which he would have otherwise been subject. By failing to consider the substantive impact that the consideration of acquitted conduct has on the right to a jury trial, each of these decisions ignores the impact of *Jones*, *Apprendi*, *Ring*, *Blakely*, and *Booker*. Thus, I am not content, as the majority is, to join this 'parade of authority.'")

155. Others have similarly diagnosed *Booker*. *See, e.g.,* Vikram David Amar, *Implementing an Historical Vision of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines*, 47 S. TEX. L. REV. 291, 300 (2005) ("Let me explain what I mean when I advert to the remedial incoherence or schizophrenia of *Booker*, and how that schizophrenia calls into doubt the integrity and future of this whole line of cases."); Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 407 (2006) ("Not only did the Court's schizophrenic results in *Booker* reveal the Justices' enduring division on sentencing issues, but the Court's reasoning suggested a profound conceptual confusion in the minds of all the Justices."); Erwin Chemerinsky, *Making Sense of Apprendi and Its Progeny*, 37 MCGEORGE L. REV. 531, 544 (2006) ("Thus, the schizophrenia in *Booker* reflects history and not logic.").

judges have recognized the internal inconsistency of the two majority opinions in *Booker*.¹⁵⁶ and have begun to reject consideration of acquitted conduct altogether.¹⁵⁷ More courts should follow their lead by consulting the merits opinion in *Booker*, where the substantive discussion lies, in deciding the constitutionality of using acquitted conduct at sentencing, rather than looking to *Watts* or the remedial opinion in *Booker*.

The merits opinion in *Booker* is a more appropriate guide for courts because it respects the Sixth Amendment. The merits majority's central concern was to protect a defendant's right to a jury trial, specifically the right to have a jury determine facts beyond a reasonable doubt.¹⁵⁸ As the merits majority explained, it was motivated by "the need to preserve Sixth Amendment substance."¹⁵⁹ The Court invoked the historical underpinning of the Sixth Amendment: "The Framers of the Constitution understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases."¹⁶⁰ As the Court recognized earlier in *Apprendi*:

[T]o guard against a spirit of oppression and tyranny on the part of rulers, and as the great bulwark of [our] civil and political liberties, trial by jury has been understood to require that *the truth of every accusation*, whether preferred in

156. See *United States v. Henry*, 472 F.3d 910, 918 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (observing that the remedial opinion was "[i]n some tension with the *Booker* constitutional opinion"); *United States v. Kandirakis*, 441 F. Supp. 2d 282, 286 (D. Mass. 2006) ("How logically to implement these two majority opinions has been a question with which the lower federal courts have been grappling ever since."). Judge Michael McConnell of the Tenth Circuit noted that "[t]he *Booker* opinions, taken in tandem, do not get high marks for consistency or coherence. . . . The most striking feature of the *Booker* decision is that the remedy bears no logical relation to the constitutional violation." Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 677 (2006).

157. *United States v. Faust*, 456 F.3d 1342, 1352 (11th Cir. 2006) (Barkett, J., concurring) ("When a sentencing judge finds facts that could, in themselves, constitute entirely free-standing offenses under the applicable law—that is, when an enhancement factor could have been named in the indictment as a complete criminal charge—the Due Process Clause of the Fifth Amendment requires that those facts be proved beyond a reasonable doubt."); *Kandirakis*, 441 F. Supp. 2d at 286; *Coleman*, 370 F. Supp. 2d at 668, 671; *Pimental*, 367 F. Supp. 2d at 145; *Gray*, 362 F. Supp. 2d at 720; *United States v. Carvajal*, No. 04 CR 222AKH, 2005 WL 476125, at *4 (S.D.N.Y. Feb. 22, 2005) ("I declined to accept the Government's argument that, notwithstanding the jury's verdict that Carvajal was not guilty of actually distributing crack, I should nevertheless consider that the acts necessary for completing the substantive crimes were proved by a preponderance of the evidence."), *cert. denied*, 128 S. Ct. 1097 (2008); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1028 (D. Neb. 2005) ("[T]he court finds that it can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt."), *aff'd*, 158 Fed. App'x 754 (8th Cir. 2005).

158. *United States v. Booker*, 543 U.S. 220, 237 (2005).

159. *Id.*

160. *Id.* at 238–39.

the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours"¹⁶¹

The Court further explained that “the reliance on the reasonable doubt standard among common-law jurisdictions reflect[s] a profound judgment about the way in which law should be enforced and justice administered.”¹⁶²

These principles are equally applicable in considering the use of acquitted conduct. It is a greater offense to the Sixth Amendment for a judge to supplant the will of the jury after it has considered the “truth of [the] accusation”¹⁶³ and decided to acquit. Indeed, allowing arbitrary punishment upon *nonconviction*—or worse, upon an affirmative refusal to convict—represents the ultimate form of judicial despotism.

Use of acquitted conduct at sentencing would not only contravene the historical foundation of the Sixth Amendment, but also ignore the impact of *Apprendi* and its progeny. As the Court definitively declared in *Blakely*, “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.”¹⁶⁴ The merits majority in *Booker* reaffirmed this declaration, and nothing was changed by the remedial opinion. A post-*Booker* court’s finding by a preponderance of the evidence that the defendant committed the acquitted conduct still violates the principles of *Apprendi* because it is not reflected in the jury verdict or admitted by the defendant. *Blakely* clearly defined “statutory maximum”:

[T]he relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” and the judge exceeds his proper authority.¹⁶⁵

Under advisory Guidelines, judges use acquitted conduct to enhance a defendant’s sentence from one advisory Guideline range to another. In doing so, judges exceed their authority when they impose a sentence that relies on factual findings contrary to the jury’s verdict because it exposes the defendant to punishment beyond what the defendant would have otherwise received.

Some contend that when the remedial majority in *Booker* severed and excised the mandatory language in the Guidelines, the sentencing ranges within

161. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (alterations in original) (citations and internal quotation marks omitted).

162. *Id.* at 478 (alterations in original) (internal quotation marks omitted).

163. *Id.* at 477.

164. *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

165. *Id.* at 303–04 (citation omitted).

the Guidelines no longer set the maximum permissible sentence.¹⁶⁶ The argument is that, under the advisory Guidelines, the maximum sentence corresponds with the statutory maximum specified in the U.S. Criminal Code. Thus, there is no “enhancement,” and thus, no Sixth Amendment violation.

However, this argument is flawed for two reasons. First, it mirrors a similar argument previously rejected in *Blakely*. In *Blakely*, the state attempted to distinguish the case from *Apprendi* by arguing that the relevant “statutory maximum” was a 10-year maximum established for class B felonies of which the defendant was convicted, rather than a 53-month maximum.¹⁶⁷ The state argued that because the “exceptional” sentence imposed by the court fell within the 10-year maximum, there was no *Apprendi* violation.¹⁶⁸ This argument failed to persuade the Court.¹⁶⁹

Second, the argument ignores the reality of *Booker*. As the Court pointed out in *Ring*, “The dispositive question . . . is one not of form, but of effect.”¹⁷⁰ The effect of *Booker* is that courts may and do enhance a sentence under the advisory Guidelines. Courts still use the pre-*Booker* “enhancement” terminology when they compute sentences under advisory Guidelines.¹⁷¹

As long as the Guidelines continue to impact sentencing, even in an advisory form, use of acquitted conduct raises Sixth Amendment concerns. Had *Booker* returned sentencing to the pure indeterminate state prior to the Guidelines, then perhaps the Sixth Amendment might not be implicated. But as *Booker* and *Gall* made clear, this is not the case—judges must still consider the Guidelines. In *Booker*, the remedial Court clarified its ruling:

Without the mandatory provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. The Act nonetheless requires judges to consider the Guidelines sentencing range

166. See, e.g., *United States v. Grier*, 475 F.3d 556, 564 (3d Cir. 2007) (en banc), cert. denied, 128 S. Ct. 106 (2007) (“The excision of these provisions rendered the Guidelines advisory, freeing the trial judge to impose any sentence permitted under the United States Code using the calculated Guidelines range as only one of the seven considered factors. The maximum legislatively authorized punishment to which the defendant is exposed is no longer the maximum prescribed by the Guidelines; instead, it is the maximum prescribed by the United States Code. Therefore, findings of fact relevant to the Guidelines need not be submitted to a jury.” (citations omitted)); *United States v. Dorcely*, 454 F.3d 366, 372 (D.C. Cir. 2006) (“[T]he *Booker* remedial opinion expressly endorsed 18 U.S.C. § 3661, concluding that it poses no Sixth Amendment problem. Section 3661 provides, ‘No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence’ and permits a sentencing court to consider acquitted conduct.” (citations omitted)).

167. *Blakely*, 542 U.S. at 303.

168. *Id.*

169. *Id.*

170. *Ring v. Arizona*, 536 U.S. 584, 602 (2002).

171. An electronic search of cases reveals that 383 federal cases still refer to sentencing “enhancement” after *Booker*.

established for . . . the applicable category of offense committed by the applicable category of defendant, the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims.¹⁷²

Also, *Gall* instructed that “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. . . . [T]he Guidelines should be the starting point and the initial benchmark.”¹⁷³ In fact, even though the Guidelines are advisory, a miscalculation of the Guideline range can be grounds for appeal.¹⁷⁴ *Gall* advised that “[the appellate court] must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.”¹⁷⁵ Moreover, the cases following *Booker*, such as *Rita v. United States*¹⁷⁶ and *Gall*, have centered on whether within Guideline sentences or outside Guideline sentences are reasonable. The Court has required that if the sentencing judge “decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.”¹⁷⁷ Thus, the practical effect of *Booker* is that the Guideline ranges still play a predominant role in sentencing procedures.

Although the merits majority conceded that the Sixth Amendment would not be implicated if the Guidelines were advisory,¹⁷⁸ the Guidelines are not “advisory” in the pure meaning of the word. The post-*Booker* Guidelines are shadows that loom over judges at sentencing from which judges cannot separate without providing justifications.¹⁷⁹ The Guidelines can be more appropriately characterized as “coercively advisory.” Therefore, since courts must accurately calculate Guideline ranges and provide detailed justification for their rejection of the Guidelines in their sentencing decision, the Sixth Amendment is still implicated even under advisory Guidelines.

And because *Booker* requires consideration of the Guidelines, the maximum sentence is still set by the “advisory” Guidelines. As previously stated, judges may not impose any sentence, even if it is within the maximum of the U.S. Code, without first calculating the Guideline range. Aggravating

172. *Booker*, 543 U.S. at 259–60 (second alteration in original) (citations and internal quotation marks omitted).

173. *Gall v. United States*, 128 S. Ct. 586, 596 (2007).

174. *Id.* at 597.

175. *Id.*

176. 127 S. Ct. 2456 (2007). The Court held that appellate courts may apply a presumption of reasonableness when reviewing a district court’s sentence that falls within the Guidelines range. *Id.* at 2459.

177. *Gall*, 128 S. Ct. at 597.

178. *See Booker*, 543 U.S. at 233.

179. *United States v. Kandirakis*, 441 F. Supp. 2d 282, 335 (D. Mass. 2006) (perceiving the “pervasive shadow the so-called ‘advisory’ Guidelines continue to cast over federal sentencing today”).

and mitigating factors still operate to increase or decrease a defendant's sentence from one range to another. A deviation below or above the Guideline range requires a justification, much like before *Booker*. Therefore, the advisory Guidelines in effect set the maximum sentence and that sentence can be enhanced from one advisory range to another. Consequently, when the sentence is enhanced through consideration of acquitted conduct, the Sixth Amendment is violated.

C. The Remedial Majority's Avoidance Maneuvers in Booker

Refusal to use acquitted conduct at sentencing is consistent with the substantive and remedial opinions in *Booker*. This section addresses frequently asserted justifications that invoke the remedial portion of *Booker* to continue consideration of acquitted conduct at sentencing.

Had the solution been to engraft the Sixth Amendment onto the Guidelines, the remedial opinion would be logically consistent with the merits opinion, and that would be the end of the inquiry—use of acquitted conduct would clearly be impermissible. However, the remedial majority objected to this solution because of concerns about increasing prosecutorial discretion, the limitation on judges to consider real conduct, and the complexity of charging documents and jury fact-finding. But these objections are not applicable in the case of acquitted conduct.

The remedial majority was concerned that attaching a Sixth Amendment requirement onto the Guidelines would make sentencing too dependent upon prosecutorial charging discretion. The remedial Court expected that this change would limit the availability of information:

Such a system would have particularly troubling consequences with respect to prosecutorial power. Until now, sentencing factors have come before the judge in the presentence report. But in a sentencing system with the Court's constitutional requirement engrafted onto it, any factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely.¹⁸⁰

In the case of acquitted conduct, however, any limitation on the court's ability to consider information regarding acquitted conduct would not be the result of prosecutorial discretion, but rather of jury deliberation. Therefore, the prohibition against using acquitted conduct would not create an imbalance of power between the court and prosecutor, as the remedial Court feared.

Additionally, the remedial Court reasoned that engrafting the jury trial right to the Guidelines would prevent judges from considering real conduct. The Court explained, "Congress' basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of

180. *Booker*, 543 U.S. at 256–57.

conviction.”¹⁸¹ Related to the need to consider real conduct was the concern that engrafting the Sixth Amendment to the Guidelines would prevent judges from considering information that may not have been available until after the trial.¹⁸²

Again, these concerns are not present when acquitted conduct is prohibited from use at sentencing. The need to consider real conduct at sentencing arose out of prosecutorial discretion to withhold or dismiss charges at the charging stage and plea negotiation stage,¹⁸³ which minimized the amount of information presented to the court for sentencing consideration. To cure this situation, the relevant conduct provisions afforded judges an opportunity to consider “real conduct” that would otherwise be unavailable to the court. However, this concern has no bearing on consideration of acquitted conduct because acquitted conduct results from the affirmative act of the prosecutor to test the case at trial, not from the prosecutor’s concealment of information. Acquitted conduct is the quintessential manifestation of the prosecutor’s disclosure of information—information disclosed via the charging document and via trial. There is no new information related to acquitted conduct to warrant a court’s reconsideration at sentencing; the government had the opportunity to fully present its case at trial. Moreover, the need to consider real conduct was to reduce unwarranted disparity among *convicted* offenses, not acquittals.¹⁸⁴ Therefore, because a trier of fact previously had the opportunity to consider the conduct underlying the acquitted crime, there is no justification for its reconsideration at sentencing.

Another argument advanced by the remedial majority was that attaching a Sixth Amendment requirement onto the Guidelines would be contrary to 18 U.S.C. § 3661. That provision states: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”¹⁸⁵ But this language is not as sweeping as some would contend. Limitations on the information that judges may consider already exist, such as when a defendant’s conviction results from constitutional violations, like the right to counsel. The Supreme Court held in *Burgett v. Texas*,

To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for

181. *Id.* at 250.

182. *See id.* at 251 (“Judges have long looked to real conduct when sentencing. Federal judges have long relied upon a presentence report, prepared by a probation officer, for information (often unavailable until *after* the trial) relevant to the manner in which the convicted offender committed the crime of conviction.”).

183. *See* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1204–05 (1993) (pointing out that the decision to include uncharged conduct resulted from the Commission’s concern over prosecutorial discretion and charge bargaining).

184. *See* discussion *infra* at Part V.B.4.

185. 18 U.S.C. § 3661 (2006).

another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.¹⁸⁶

Even in an era when judicial discretion was broad, the Court reaffirmed *Burgett* in *United States v. Tucker* to prohibit use of prior uncounseled felony convictions to enhance a sentence.¹⁸⁷ A prohibition against use of acquitted conduct at sentencing would be consistent with the logic of *Burgett* and *Tucker*. It makes little sense that uncounseled felony convictions are prohibited from use to enhance sentences but acquittals may be considered.

Also, it is illogical that in answering the question of whether the use of acquitted conduct at sentencing violates the Sixth Amendment, some would rely on 18 U.S.C. § 3661 to argue that because the statute prohibits limitation on information, the practice does not result in any constitutional violation. If the constitutional question is answered first, then 18 U.S.C. § 3661 is irrelevant. Surely, if the issue came up regarding whether use of an uncounseled felony conviction violates the Sixth Amendment, it would be illogical to respond that because 18 U.S.C. § 3661 prohibits limitations on information a judge may consider, use of an uncounseled felony conviction does not violate the Sixth Amendment. Section 3661 should be consulted only after determinations of constitutional violations and other prohibitions have been made. Thus, 18 U.S.C. § 3661 does not make available all conduct for sentencing consideration, does not answer the constitutional question, and consequently should not be a ground for making acquitted conduct open for reconsideration at sentencing.¹⁸⁸

Last, the remedial majority in *Booker* decided against engrafting the Sixth Amendment protection onto the Guidelines because it would make charging documents too complex, which in turn would be too difficult for a jury to understand.¹⁸⁹ These concerns are not present with acquitted conduct. First, in instances involving acquitted conduct, the prosecutor has already resolved charging issues, which rebuts the concern of unwieldy charging documents. Second, the jury, by virtue of being able to render a verdict, has proven that the charges are not too complex.¹⁹⁰ Therefore, an acquittal is a manifestation of the

186. *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (citation omitted).

187. *United States v. Tucker*, 404 U.S. 443, 447-49 (1972).

188. See 18 U.S.C. § 3661 (2006).

189. See *Booker*, 543 U.S. at 254-55.

190. A study conducted by the National Center for State Courts found that "[i]n general, most juries did not appear to view their trials as highly complex. And most jurors confidently said that it was easy to understand the evidence, expert testimony, and judicial instructions." Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33, 44 (2003). In instances when the juries found the case difficult to understand, it was more likely that a hung jury would make this conclusion than one that reached a verdict. *Id.*

prosecutor's ability to charge and the jury's ability to evaluate the evidence, consider the charges, and arrive at a decision. Third, "the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in" efficiency and expediency.¹⁹¹

In sum, a reliance on the remedial majority to answer the constitutional question regarding acquitted conduct ignores the essence of the Sixth Amendment protection afforded in the merits opinion. The remedial opinion should be a guide for questions about the advisory nature of the Guidelines and appellate procedure, while the merits opinion should be the source for questions relating to the constitutionality of sentencing.

III. JUDICIAL NULLIFICATION OF JURIES

A. Illustrations of Judicial Nullification

1. Special Verdicts

Courts justify consideration of acquitted conduct based on *Watts*, relying on the oft-quoted statement, "An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences"¹⁹² Yet when specific jury findings exist, sentencing courts continue to disregard the jury's findings. In instances when special verdicts have been issued by the jury or when the jury has delivered a verdict relating to lesser included charges, consideration of acquitted conduct amounts to jury nullification that cannot be supported by *Watts*.

For example, in *United States v. Magallanez*,¹⁹³ it was possible to determine the exact facts found by the jury because the jury received a special interrogatory to determine the amount of drugs attributable to the defendant.¹⁹⁴ Among the choices were "0–50 grams, 50–500 grams, and over 500 grams."¹⁹⁵ The jury found that the defendant was responsible for 50–500 grams, which would have exposed him to a sentence of sixty-three to seventy-eight months.¹⁹⁶ Despite the jury's findings, the district court attributed 1.21 kilograms of drugs to the defendant using a preponderance of the evidence standard, thereby

191. *Booker*, 543 U.S. at 244.

192. *United States v. Watts*, 519 U.S. 148, 155 (1997) (alteration in original) (quoting *United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996)).

193. 408 F.3d 672 (10th Cir. 2005).

194. *Id.* at 682.

195. *Id.*

196. *Id.* at 682–83.

exposing him to a sentencing range of 121–151 months.¹⁹⁷

Similarly in *United States v. Vaughn*,¹⁹⁸ the sentencing court also rejected the jury's findings. The jury returned a special verdict that found the defendant guilty beyond a reasonable doubt of possession of "at least fifty kilograms . . . but not more than 100 kilograms" of marijuana.¹⁹⁹ At sentencing, the court supplanted the jury's findings by attributing 544 kilograms of marijuana to the defendant.²⁰⁰

Another example is *United States v. Duncan*.²⁰¹ The jury found by special verdict that the defendant was guilty of conspiracy involving "five kilograms or more of cocaine [powder], but found that the government failed to prove beyond a reasonable doubt that the conspiracy involved fifty grams or more of cocaine base [("crack")]."²⁰² When the court sentenced the defendant, the court found that the defendant had converted a portion of the cocaine powder into 12.24 kilograms of cocaine base.²⁰³ If the court had respected the jury's verdict and sentenced the defendant solely for the cocaine powder, the defendant's base level would have been thirty-two.²⁰⁴ However, because the court considered the acquitted conduct, it raised the defendant's base level to thirty-eight and sentenced the defendant to life imprisonment.²⁰⁵

The jury's special verdict can assist judges to "logically or realistically draw . . . factual finding inferences," thereby making the distinction in *Watts* between acquittal and innocence that was premised on the absence of special findings inapplicable.²⁰⁶ It is readily apparent that the jury did not believe the defendant was responsible for more than 500 grams in *Magallanez*, for more than 100 kilograms in *Vaughn*, or for more than cocaine powder in *Duncan*.²⁰⁷ In these cases, the special verdicts were clear and the defendants' acquitted conduct should not have been a part of the sentencing. Allowing a judge to find, simply by a preponderance of the evidence, the existence of additional drugs in these cases negated the purpose of a special verdict. In fact, this practice would cause special verdicts to become obsolete at trial since judges would use their own judgment to find the probable existence of facts.

197. *Id.* at 682.

198. 430 F.3d 518 (2d Cir. 2005).

199. *Id.* at 521.

200. *Id.* at 526.

201. 400 F.3d 1297 (11th Cir. 2005).

202. *Id.* at 1300.

203. *Id.*

204. *Id.*

205. *Id.*

206. *United States v. Watts*, 519 U.S. 148, 155 (1997) (quoting *United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996)).

207. See *United States v. Vaughn*, 430 F.3d 518, 521 (2d Cir. 2005); *United States v. Magallanez*, 408 F.3d 672, 682 (10th Cir. 2005); *Duncan*, 400 F.3d at 1300.

2. Lesser Included Offenses

Another instance where one can make a logical inference from the jury's findings is when a jury declines to find a defendant guilty of a higher level offense and chooses instead to convict on the lesser included offense. *United States v. Coleman*²⁰⁸ provides an example. In *Coleman*, the government charged defendants with five counts of introduction of an unapproved new drug into interstate commerce.²⁰⁹ The jury found that the defendants lacked the intent to defraud or mislead as required for the felony offenses, but it convicted the defendants of the lesser included misdemeanor offenses of introduction of an unapproved new drug into interstate commerce without intent to mislead or defraud.²¹⁰ Additionally, the defendants were tried for three felonious counts of introducing misbranded drugs into interstate commerce.²¹¹ Again, the jury rejected the allegation that the defendants intended to defraud or mislead and acquitted the defendants of the felony charges, but it convicted the defendants on the lesser included misdemeanor offense of introduction of misbranded drugs into interstate commerce without intent to defraud or mislead.²¹² The government also charged one count of failure to register a drug manufacturing facility.²¹³ Once more, the jury found that the defendants did not have the requisite intent to defraud or mislead and acquitted on the felony charge, and it only convicted defendants of the lesser included misdemeanor charge of failing to register a drug manufacturing facility without intent to defraud or mislead.²¹⁴ Finally, the defendants faced three counts of misbranding drugs while held for sale after shipment in interstate commerce.²¹⁵ Once again, the jury acquitted the defendants on the felony offense that required intent to mislead or defraud and found defendants guilty of the lesser included misdemeanor offense.²¹⁶ The jury also acquitted the defendants on one count of conspiracy and six counts of mail fraud but convicted them on two counts of adulterating drugs.²¹⁷

At sentencing, the presentence investigation report recommended increases to the defendants' base level because their conduct involved fraud.²¹⁸ The government argued that *Watts* supported the sentence enhancement for fraud if the government proved that fact by a preponderance of the evidence.²¹⁹ Judge Marbley rejected the government's contention:

208. 370 F. Supp. 2d 661 (S.D. Ohio 2005).

209. *Id.* at 663.

210. *Id.* at 663–64.

211. *Id.* at 664.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 663–64.

218. *Id.* at 664–65.

219. *Id.* at 669.

[T]he jury exercised its power and, after four days of deliberation, found Defendants . . . not guilty of mail fraud, 18 U.S.C. § 1341, and found that they acted without intent to defraud or mislead, a prerequisite to felony violations of 21 U.S.C. §§ 331, 333, and 355. Here, the verdict is clear: the jury unequivocally found Defendants not guilty on seven counts of mail fraud and found that Defendants did not have the intent to defraud or mislead on thirteen counts.²²⁰

The court concluded that “considering acquitted conduct would disregard completely the jury’s role in determining guilt and innocence.”²²¹

The approach used by Judge Marbley demonstrates the more reasoned approach that should have been applied in *Magallanez*, *Vaughn*, and *Duncan*. Whether in the case of special verdicts or lesser included offenses, the jury’s verdict is clear and should be respected. Applying a preponderance of the evidence standard to acquitted conduct in these instances would contravene the reasoning in *Watts*.

3. Judicial Nullification Resulting from General Distrust of Juries

The use of the preponderance of the evidence standard in *Magallanez*, *Vaughn*, and *Duncan*, where the jury’s findings were made unambiguous through special verdicts,²²² constitutes a total disregard of the jury’s findings. One problem with using acquitted conduct as a basis for sentencing, as identified by the Ninth Circuit in *United States v. Brady*,²²³ is that “any time a judge disagreed with the jury’s verdict, the judge could ‘reconsider’ critical elements of the offense to avoid the restrictions of the Guidelines and push the sentence to the maximum—in effect punishing the defendant for an offense for which he or she had been acquitted.”²²⁴ Although *United States v. Watts* overruled *Brady* by permitting courts to consider acquitted conduct in sentencing,²²⁵ the Supreme Court neglected to address the concern about

220. *Id.* at 671–72.

221. *Id.* at 672. Had the government been successful in convincing the court to enhance the defendants’ sentence for fraud, it would have increased their base level by seven levels. *Id.* at 672 n.15.

222. See *United States v. Vaughn*, 430 F.3d 518, 521 (2d Cir. 2005); *United States v. Magallanez*, 408 F.3d 672, 682 (10th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297, 1300 (11th Cir. 2005).

223. 928 F.2d 844 (9th Cir. 1991).

224. *Id.* at 851–52.

225. *United States v. Watts*, 519 U.S. 148, 157 (1997). *Watts* found the following: The Court of Appeals [in *Brady*] likewise misunderstood the preclusive effect of an acquittal, when it asserted that a jury ‘reject[s]’ some facts when it returns a general verdict of not guilty. The Court of Appeals failed to appreciate the significance of the different standards of proof that govern at trial and sentencing. We have explained that “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.” As then-Chief Judge Wallace pointed out

judicial nullification of juries, as raised in *Brady*.²²⁶

*United States v. Juarez-Ortega*²²⁷ exemplifies the reality of this concern.²²⁸ In *Juarez-Ortega*, the jury convicted the defendant of two counts of distribution of cocaine but acquitted him of the charge of carrying a firearm during a drug trafficking offense.²²⁹ At the time of arrest, the firearm was in the physical possession of the codefendant.²³⁰ As to the codefendant's charges, the jury convicted him of the two counts of distribution and one count of possession of a firearm.²³¹ At sentencing, the court was incredulous over the jury's acquittal of Juarez-Ortega for the firearm count.²³² Despite the defense attorney's explanation that the acquittal could have been the result of the jury's assessment of the credibility of the witnesses, which they were charged to do per jury instructions, the court refused to consider these explanations and concluded that the jury was simply wrong, as shown by the dialogue below:

THE COURT: The jury could not have made—the jury could not have listened to the instructions.

[DEFENSE COUNSEL]: Your Honor,—

THE COURT: The testimony was so strong. The gun was even in the apartment. That's all they needed. There was no dispute of that fact. The mere fact that that gun was in the apartment, being used in association with—he didn't have to have it on his person.

[DEFENSE COUNSEL]: They perhaps didn't believe it was being used in association with drug-related activity, your Honor.

THE COURT: Well, I'll tell you something: I have been disappointed in jury verdicts before, but that's one of the most important ones, because what it did, it set up a disparity in result between the two defendants. Your client was consistently selling cocaine from his apartment and using a firearm. The fact is that the officers came in and testified that it was in your client's waistband

in his dissent in *Putra*, it is impossible to know exactly why a jury found a defendant not guilty on a certain charge.

"[A]n acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences. . . ."

Thus, contrary to the Court of Appeals' assertion in *Brady*, the jury cannot be said to have "necessarily rejected" any facts when it returns a general verdict of not guilty.

Id. at 155 (citations omitted).

226. See *Brady*, 928 F.2d at 851–52.

227. 866 F.2d 747 (5th Cir. 1989).

228. For other discussions about this case, see Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 434 (1999) [hereinafter Judge Gertner, *Circumventing Juries*]; Johnson, *supra* note 32, 197–99; Reitz, *supra* note 11, at 531–33.

229. *Juarez-Ortega*, 866 F.2d at 748.

230. *Id.* at 747.

231. *Id.*

232. *Id.* at 748–49.

and described, had an officer on the stand, a man who is an ATF agent, who is capable and knows what a firearm looks like, telling them, "This is what I saw."

There is no reason for him not to have seen that, since it's undisputed that the firearm was in the apartment and it's undisputed that the firearm was used in connection with drug sales and used [for] the purpose of protecting drug sales. And then here in number twelve, there is no doubt at all that the firearm was brought for him. It's all a pattern. This firearm was used. They had to absolutely disregard the testimony of a government agent for no reason—no reason.

[DEFENSE COUNSEL]: Perhaps they considered the testimony of the other agent who testified that he couldn't be sure, your Honor.

THE COURT: Well, you can take it up with an appellate court, because I've made my findings on the record.

Do you have anything further you'd like to say?

[DEFENSE COUNSEL]: No, your Honor, other than we would hope the court would follow the guidelines as set forth in the pre-sentence investigation, that being the guidelines of from twelve to eighteen months of determining the sentence of Mr. Ortega.

THE COURT: All right. The court is going to disregard the guidelines in this case.²³³

On appeal, the Fifth Circuit upheld the sentence despite clear indications that the trial court supplanted the jury's verdict.²³⁴ The trial court imposed the identical sentence for Juarez-Ortega, who had been acquitted of the firearm count, as it imposed for the codefendant, who had actually been convicted of the firearm possession.²³⁵ The Fifth Circuit explained that it was not an abuse of discretion because "[t]he sentencing court was not relying on facts disclosed at trial to punish the defendant for the extraneous offense, but to justify the heavier penalties for the offenses for which he was convicted."²³⁶

Juarez-Ortega represents a distrust of juries and the discretion judges may exercise to question the competency of juries.²³⁷ *Juarez-Ortega* raises troubling questions. It is contradictory to accept the jury's verdict regarding one charge but to discount it as to another. The jury's conviction demonstrates the jury's ability to effectively marshal the evidence and determine facts.²³⁸ Why does the court at sentencing suddenly question the jury's competency?²³⁹

233. *Id.*

234. *Id.* at 749.

235. *Id.*

236. *Id.*

237. In fact, there are reasons to suggest that a jury may be better suited to determine facts than judges. See discussion *infra* Part III.C.

238. As one judge observed, "Juries are fully capable of addressing evidence provided to them, even scientific evidence . . ." Judge Michael H. Marcus, *Post-Booker Sentencing Issues for a Post-Booker Court*, 18 FED. SENT'G REP. 227, 228 (2006); see also Hans, *supra* note 190, at 12.

239. Ironically, defendants fare better being tried by a judge rather than a jury. In 2004,

Moreover, another troubling aspect of considering acquittals at sentencing is the one-sidedness of the act.²⁴⁰ Courts trust the jury's work when the jury renders a guilty verdict. However, only in instances of acquittals do some courts feel free to second-guess the jury.²⁴¹ If in fact a court were justified in doubting the competency of the jury and conducting a quality control-like measure by reevaluating the facts at sentencing, then it would make more sense to use the highest standard—proof beyond a reasonable doubt—not the lowest one.

B. The Roles Juries Serve in Society and Consequences of Nullifying Juries

1. Protection Against Tyranny

The use of acquitted conduct at sentencing invites courts to nullify juries and risks undermining the vital roles that juries serve in the justice system. Juries are essential to the checks and balance system built into our democratic government. The Supreme Court has recognized that the jury was “designed ‘to guard against a spirit of oppression and tyranny on the part of rulers,’ and ‘was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.’”²⁴² Alexander Hamilton

judges had an acquittal rate of 71% as compared with juries acquitting in 21% of the jury trials. See BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 62 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0404.pdf>. In 2004, there were 2,313 jury trials and 490 acquittals by juries, and 317 bench trials and 226 acquittals by judges. *Id.*

240. See *Lear*, *supra* note 183, at 1205 (observing that inclusion of nonconviction offenses at sentencing may be a corrective measure to address prosecutorial or jury errors, but the “adjustment for ‘accuracy’ never results in a lower sentence. It is a one-way adjustment-up.”).

241. The National Center for State Courts conducted a study on juries, with a particular focus on hung juries. PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM? (2002), available at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf. In its study, the NCSC found that when juries convict, judges agree with the conviction 93.7% of the time. *Id.* at 55–56. However, when juries acquit, judges agree in 70.3% of the cases. *Id.* These rates have not changed significantly since 1966 when Kalven and Zeisel conducted their ground breaking study of 3,576 criminal trials for judge-jury agreement, as encapsulated in HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 10, 56 (1966).

242. *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995) (citations omitted); *accord* *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968) (“A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.” (footnote omitted)).

expressed in Federalist No. 83 the importance of juries in protecting liberty:

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 of jury . . . [A]ll are satisfied of the utility of the institution, and of its friendly aspect to liberty. . . . Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings.²⁴³

To facilitate a system of checks, the Framers constructed a judicial system wherein each player had a specific role. As early as 1628, it was understood that the judge was charged with the duty to decide the law and the jury with the duty to decide facts.²⁴⁴ The Framers feared a concentration of judicial power.²⁴⁵ Allowing judges to reconsider facts at sentencing—that have previously been

For more perspectives on the historical role of juries, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1187 (1991); Stephanos Bibas, *Judicial Fact-finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1123–33 (2001); Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 378–81 (2005); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 317–30 (2003); Chris Kemmitt, *Function Over Form: Reviving the Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 98–111 (2006); Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment Can Teach the Sixth Amendment*, 39 GA. L. REV. 895, 901–02 (2005); Lear, *supra* note 183, at 1223–37.

243. THE FEDERALIST NO. 83, at 443–44 (Alexander Hamilton) (J. R. Pole ed., 2005).

244. See *United States v. Jones*, 526 U.S. 227, 247 n.8 (1999). But see Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48–49 (2003) (recognizing that a criminal defendant's constitutional right to demand that a jury decide guilt or innocence on every issue grants a jury the power to apply the law to facts); Kirgis, *supra* note 242, at 904 (“The black-letter rule of common-law procedure at that time was that juries decide questions of fact and judges decide questions of law. In fact, the evidence suggests that fine distinctions between fact and law were seldom drawn and that juries were given broad latitude to decide all issues in a case, legal or factual.”).

245. See Gardina, *supra* note 242, at 378–81 (“The Framers assumed the intra-branch check was necessary because federal judges, although protected from political pressures by Article III’s tenure and salary requirements, were, in the end, government employees. In the words of one Anti-Federalist, ‘Judges, unincumbered by juries, have been ever found much better friends to the government than to the people.’ The Framers identified the jury as playing a major role in protecting ordinary citizens against judicial participation in governmental oppression. Jurors would be drawn from the community and were not permanent government officials on the government payroll. The inclusion of the jury within Article III was a natural outgrowth of the Framers’ experience that judges, acting without juries, would participate in the oppression of the people.” (footnotes omitted)); Iontcheva, *supra* note 242, at 317–28 (noting that the use of sentencing juries was seen as “a better safeguard against unfair sentences than a single judge” and was likely a response to “a more general fear of unelected judges, who were perceived as elitist and unresponsive to popular wishes”).

determined by a jury—gives judges a type of concentrated, absolute power that interferes with the roles envisioned by the Framers.

The Framers' confidence in the jury system has been enshrined throughout parts of the Constitution. Article III and the Sixth Amendment manifest the confidence that the forefathers had in juries to try crimes and determine issues of fact. Article III secures the right to a jury trial for federal crimes: "Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."²⁴⁶ The Sixth Amendment provides a similar right: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district"²⁴⁷ The Framers, through the Seventh Amendment provision for jury trials in civil matters, similarly entrusted juries with determining facts in civil cases: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the trial by jury shall be preserved"²⁴⁸ The Eighth Amendment, through the Double Jeopardy clause, protects the finality of jury decisions.²⁴⁹ These provisions in the Constitution embody the Framers' confidence in the jury's ability to try cases and determine facts, be it in criminal or civil trials. Therefore, judicial determination of facts previously determined by juries intrudes upon the province of the jury and the finality of jury acquittals that the Framers sought to safeguard.

2. Substantive Check on the Law

A related societal benefit is that juries function as a substantive check on the law. As one commentator explains, juries, through their authority to acquit defendants, act as a corrective measure to rein in overinclusive laws²⁵⁰ and hold prosecutors and law enforcement to a higher standard. Legislatures exhibit a tendency and preference to write overinclusive laws, as opposed to underinclusive ones, because they trust prosecutors to use their discretion not to prosecute cases that should be weeded out.²⁵¹

Juries act as a final check should cases undeserving of punishment pass through the prosecutorial sieve. Jury acquittals provide the legislature with concrete examples, as derived from the facts of the cases, of when the law may be applied unjustly and signal the legislature to redraft poorly written laws.²⁵² For example, jury acquittals of defendants for first-degree murder to avoid the mandatory imposition of the death penalty resulted in a positive change in the law for more humane punishment.²⁵³

Like the check on overinclusive laws, juries also serve as a check on the

246. U.S. CONST. art. III, § 2, cl. 3.

247. U.S. CONST. amend. VI.

248. U.S. CONST. amend. VII.

249. See U.S. CONST. amend. VIII.

250. See Barkow, *supra* note 244, at 61–65.

251. *Id.* at 62–63.

252. *Id.* at 82.

253. *Id.* at 79.

behavior of prosecutors and law enforcement. A jury acquittal may send a similar signal to law enforcement and prosecutors to change their conduct.²⁵⁴ However, the force of the acquittal is blunted and the message muffled when judges can trigger punishment for otherwise acquitted conduct. Prosecutors and law enforcement may feel vindicated if a defendant can suffer additional punishment for the acquitted conduct, rather than perceiving the acquittal as a rejection of the prosecutorial and law enforcement actions. Allowing judges to sentence based on acquitted conduct diminishes the corrective role of the jury on the legislature, prosecutors, and law enforcement and perpetuates the existence of overly broad laws.

3. Reinforce Democratic Norms

Another benefit derived from the jury system is that “[j]ury participation serves the dual purposes of reinforcing democratic norms by encouraging citizen participation in administration of the criminal justice system.”²⁵⁵ As acknowledged by the Court, “Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.”²⁵⁶ A judge’s consideration of acquitted conduct as a basis for sentencing on other conduct perverts the jury system and undermines public confidence in the justice system. As Judge Nancy Gertner reminds us,

The jury is intended to be the centerpiece of the criminal justice system. Determining “more than actual truth, guilt, or innocence, its decisions represent a popular conception of a ‘just verdict.’” In effect, juries rule on “legal guilt, guilt determined by the highest standard of proof we know, beyond a reasonable doubt. And when a jury acquit[s] a defendant based on that standard, one would have expected no additional criminal punishment would follow.”²⁵⁷

By second guessing the jury’s findings, the court mocks the work of the jury and sends a message that the jury has wasted its time.²⁵⁸

254. See *Lear*, *supra* note 183, at 1233 (arguing that use of acquitted conduct at sentencing undermines the jury’s ability to influence law enforcement decisions through nullification).

255. Johnson, *supra* note 32, at 184.

256. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

257. United States v. Pimental, 367 F. Supp. 2d 143, 150 (D. Mass. 2005) (citation omitted) (quoting Judge Gertner, *Circumventing Juries*, *supra* note 228, at 433).

258. See Federal Criminal Procedure Committee of the American College of Trial Lawyers, *supra* note 57, at 1486; Johnson, *supra* note 32, at 185.

C. Reasons Against Judicial Nullification: The Superiority of Jury Fact-Finding

1. Jury Diversity

Judicial determination of sentencing facts underlying acquitted conduct undermines the role served by juries, as well as eviscerates the benefits of jury fact-finding that result from diversity, group dynamics, and neutrality. Federal juries come from a cross-section of society, bringing with them a rich diversity that is useful in deliberations. Courts and Congress have recognized that selecting a petit jury from a cross-section of the community is fundamental to the Sixth Amendment right to a jury trial and the administration of justice.²⁵⁹ Consequently, Congress declared in 28 U.S.C. § 1861 that “[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes,” and allowed district courts to randomly select juries from voter registration lists, lists of actual voters, and city directories.²⁶⁰ These methods of selection ensure that a fair cross section is available for choosing petit juries, and in turn for choosing juries.

On the other hand, the federal judiciary represents a narrow section of society. In November 2008, the racial composition of the federal judiciary was as follows: 91.7% White, 4.8% African American, 2.8% Hispanic American, 0.5% Asian American, and 0.06% Native American.²⁶¹ From 1945–2000, the

259. See *Ballew v. Georgia*, 435 U.S. 223, 233–34 (1978); *Taylor*, 419 U.S. at 528–30; *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968).

260. 28 U.S.C. § 1861 (1994). Congress articulated the plan for random selection in 28 U.S.C. § 1863 (b)(2), requiring district courts to take the following actions:

specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title. The plan for the district of Massachusetts may require the names of prospective jurors to be selected from the resident list provided for in chapter 234A, Massachusetts General Laws, or comparable authority, rather than from voter lists.

261. See Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj> (follow “The Federal Judges Biographical Database” hyperlink; then select “Race or Ethnicity” query; then select each race from the drop-down menu) (last visited November 18, 2008). In November 2008, there were the following numbers of judges in each race: 153 African American, 17 Asian American, 90 Hispanic American, 2

average age of the judges on the federal judiciary was 61–65 years.²⁶² In terms of gender, 91.4% of the judges were male; 8.6% were female.²⁶³

In contrast, in 2007, Whites represented 66% of the general U.S. population, Hispanics 15%, Blacks 12%, and Asians 4%.²⁶⁴ Also in 2007, the gender composition of the U.S. population was 49.3% male and 50.7% female, and the median age was 36.6 years.²⁶⁵

As Blackstone recognized, a jury composed of the “middle rank” provides a benefit superior to a single judge:

[I]n settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen, chosen from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice.²⁶⁶

The diversity represented by juries from the “middle rank” “may protect ‘legal innocence’ differently from the judge through its factfinding responsibility.”²⁶⁷ Because the jury is selected from a fair cross section of the community, it is

Native American, and 2906 White. *Id.* The percentages were calculated by dividing from the total of 3,168 judges. *Id.*

262. Albert Yoon, *Love's Labor Lost? Judicial Tenure Among Federal Court Judges: 1945–2000*, 91 CAL. L. REV. 1029, 1048 (2003).

263. See Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj> (follow “The Federal Judges Biographical Database” hyperlink; then select “Gender” query; then select “Male” or “Female” from the drop-down menu) (last visited November 18, 2008). In November 2008, there were 2894 male judges and 274 female judges, totaling 3,168 federal judges. *Id.*

264. U.S. Census Bureau, National Population Estimates — Characteristics, National Sex, Race, and Hispanic Origin, <http://www.census.gov/popest/national/asrh/NC-EST2007-srh.html> (follow “Excel” hyperlink) (last visited Nov. 18, 2008). The percentages were calculated by dividing from a total population of 301,621,157. *Id.*

265. U.S. Census Bureau, Quick Tables, DP-1 General Demographic Characteristics, http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=PEP_2007_EST_DP1&-geo_id=01000US&-ds_name=PEP_2007_EST&-lang=en&-format=&-CONTEXT=qt (last visited Jan. 19, 2009). The percentages were calculated by dividing from a total population of 301,621,157. *Id.*

266. Daniel P. Collins, *Making Juries Better Fact Finders*, 20 HARV. J.L. & PUB. POL’Y 489, 491 (1997) (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *380); see also *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace . . .” (citation omitted)).

267. Barkow, *supra* note 244, at 72.

more likely to reflect community values and views on crime and the criminal justice system than judges, for whom there is no similar cross section requirement. As judicial profiles have shown, judges do not, as a group, represent the social, economic, racial, or gender characteristics of the communities in which they serve.²⁶⁸

2. Group Dynamics and Jury Competency

Juries, as a group, offer additional benefits over the individual determination of a judge. Research reveals that “[g]roups may . . . have an advantage over individuals in decisions involving judgments (or evaluation) rather than decisions involving selecting between two alternatives because groups are better at taking multiple factors into account.”²⁶⁹ Additionally, as would be expected, the collective memory of jurors is superior to that of one individual.²⁷⁰ The group dynamic of juries further contributes to the effectiveness of fact finding because “jurors learn from each other in the process of deliberation and perhaps reach solutions that would not have occurred to them individually. Deliberative results are also more informed in that they are better targeted to the individual case.”²⁷¹ Furthermore, comparisons between group deliberation and individual decision-making have shown that groups produce more accurate results because groups counterbalance the prejudices of individuals²⁷² and were more motivated and self-critical.²⁷³ Thus, as supported by empirical evidence, there is a direct, positive correlation between group size and productivity and performance.²⁷⁴

Although the expectation might be that training makes judges better factfinders, no conclusive empirical evidence supports this assumption.²⁷⁵ The

268. *See id.*

269. Robinson & Spellman, *supra* at 50, at 1144.

270. Kirgis, *supra* note 242, at 945.

271. Iontcheva, *supra* note 242, at 341; *see also* Robinson & Spellman, *supra* at 50, at 1143–44 (“To the extent that all information is shared by the group, however, the group may have a larger information base than an individual judge, and therefore may be better at factfinding.”).

272. *See* Ballew v. Georgia, 435 U.S. 223, 233–34 (1978), Kirgis, *supra* note 242, at 946; Iontcheva, *supra* note 242, at 363–64.

273. *Ballew*, 435 U.S. at 233–34.

274. *See id.* at 233 n.11 (1978) (citing Thomas & Fink, *Effects of Group Size*, 60 PSYCH. BULL. 371, 373 (1963) (concluding that a larger group size was superior, under all conditions, to a smaller sized group concerning performance and productivity)).

275. *See* Robinson & Spellman, *supra* at 50, at 1138–40 (2005) (noting the inadequacy of field studies and that few judges participate in laboratory studies, which leads to a lack of research on judicial factfinding performance); *see also* Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1193 (2005) (“There is no empirical support for the view that a single professional is better at determining credibility than a group of amateurs sharing information. The studies can and do demonstrate that professionals arrive at similar judgments about who is telling the truth, but they do not

observation made by the Court in *Ring* that “the superiority of judicial factfinding in capital cases is far from evident”²⁷⁶ can also be said of judicial factfinding generally. As the Court in *Blakely* pointed out, “Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.”²⁷⁷ Judge Young of the District of Massachusetts pointed out the reliability of jury factfinding:

[T]he conclusions of twelve lay people who have examined the evidence and deliberated thereon are more likely to be correct (and accepted) than the pronouncement of a single, jaded and calloused employee of the state. Moreover, unlike the Court, which must consider extra-evidence data such as the pre-sentence report, if the only data relied upon by the jury are those that pass muster under the Federal Rules of Evidence (which themselves exist to serve truth-seeking), the result reached is likewise more likely to be accurate.²⁷⁸

Additionally, studies show that the general assessment of jury competency by experienced litigators and judges is high. One study conducted by the National Center for State Courts found that “[o]verall, judges, prosecutors, and defense attorneys rated the jurors positively on how well they understand the evidentiary and legal issues in the case.”²⁷⁹

Also, although some may criticize the use of juries as factfinders because of the potential to be influenced by pretrial publicity, appearance of witnesses and defendants, and inadmissible evidence, no research proves that judges are immune from these same factors.²⁸⁰ In fact, it has been long recognized that even the most influential members of society are susceptible to inherent prejudices. As a Constitutional Convention delegate wrote, “Prejudice, resentment, and partiality, are among the weaknesses of human nature, and are

demonstrate that these judgments are more accurate than those arrived at by non-professionals. If anything, the judgments are likely to be less accurate since they are made according to shared professional norms which are themselves without sound empirical basis.”)

276. *Ring v. Arizona*, 536 U.S. 584, 607 (2002).

277. *Blakely v. Washington*, 542 U.S. 296, 313 (2004) (citing WILLIAM BLACKSTONE, 3 COMMENTARIES *373–74, *379–81).

278. *United States v. Kandirakis*, 441 F. Supp. 2d 282, 324 (D. Mass. 2006) (citation omitted).

279. *Hans*, *supra* note 190, at 44–45. Interestingly, questions of jury competency generally do not arise unless there is a hung jury. *Id.* at 12–13 (“[O]nce the jury hung, judges and prosecutors (but not defense attorneys) expressed concern about juror comprehension of the evidence and law. It is important to note that this rating came after the jury reached a verdict or hung, so courtroom personnel might have been taking the result into account as they search for a reason for a hung jury.”).

280. *Robinson & Spellman*, *supra* at 50, at 1138–40; *see Barkow*, *supra* note 244, at 75 (pointing out the susceptibility of juries to acquit on the basis of the race of the defendant but recognizing that these same dangers are present with any actor authorized with discretion).

apt to pervert the judgment of the greatest and best of men.”²⁸¹

Furthermore, even if judges are more consistent, that consistency does not translate into findings that “are closer to the truth than the one-time-only jury finding.”²⁸² Rather, “consistency can be the downside of experience. Having seen many trials, judges may develop schemas for certain ‘types’ of trials. These schemas may create expectations. . . . Thus, judges might misconstrue the facts of one case based on similarity to previous cases when such an inference is not warranted.”²⁸³ Motivated by the goal of consistency, judges may be unable to recognize a past error or that justice demands a deviation from the past. Also, the repetition of overseeing jury trials and sentencing hearings may numb judges to the devastatingly life-altering impact of a criminal trial. The value unique to a jury may lie in its one time performance and ability to offer a fresh perspective without the burden of an institutional track record.

3. Jury Neutrality

Public perception of juries as being neutral is another reason to protect the jury’s acquittal. A 1998 study revealed that the public has high confidence in juries: 90% of people “believe the criminal jury system was somewhat or very fair.”²⁸⁴ Participants in another study “rated juries higher than judges in terms of fairness, accuracy, lack of bias, and the representation of minorities.”²⁸⁵ A 1999 study by the American Bar Association showed that 80% of survey respondents agreed, that “in spite of its problems, the American justice system is still the best in the world.”²⁸⁶ The study credited juries for the public’s confidence in the justice system: “[T]he root of this support seems to lie in the jury system, as more than three-quarters, 78%, say it is the fairest way to determine guilt or innocence, and more than two-thirds, 69%, believe that juries are the most important part of our justice system.”²⁸⁷

This trust in the jury enhances the justice system because the public’s trust leads to greater acceptability of the jury’s decision.²⁸⁸ Professor Kirgis explains,

281. Collins, *supra* note 266, at 490–91.

282. Robinson & Spellman, *supra* at 50, at 1142.

283. *Id.*

284. Iontcheva, *supra* note 242, at 349.

285. Barkow, *supra* note 244, at 84 n.225 (citing Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens’ Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 338 tbl.2 (1988)).

286. AM. BAR ASS’N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 6 (1999), available at <http://www.abanet.org/media/perception/perceptions.pdf>.

287. *Id.* at 6–7.

288. Kirgis, *supra* note 242, at 945; *see also* Iontcheva, *supra* note 242, at 342 (“Because the deliberating group hears and considers diverse opinions and remains free to choose among them, the result carries legitimacy, even when the outcome does not satisfy all points of view.”).

A community is more likely to accept verdicts when the decisions reflect or incorporate societal norms. The jury, as both the symbolic and actual representative of the community, is more likely to render verdicts based on widely accepted standards than are other authorities. The shared responsibility of a jury verdict also aids its acceptance within the community. When a single judge makes a legal determination that produces dissatisfaction, the discontent centers on that individual decision maker. The displeased can see the outcome as resulting from one person's whims, caprices, prejudices, stupidity, or lack of common sense. With the shared accountability of a jury's decision, however, the locus of any discontent is more diffuse and, consequently, less intense.²⁸⁹

Therefore, the unique benefits of jury fact-finding and the roles served by juries are considerations against judicial nullification, which occurs when judges find facts that underlie acquitted conduct.

IV. ADDITIONAL POLICY REASONS AGAINST CONSIDERING ACQUITTED CONDUCT

A. Doing the Time Without Doing the Crime

Consideration of acquitted conduct in effect is punishing a defendant for a crime that he did not commit. In *In re Winship*, the Court declared:

"Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."²⁹⁰

But the "relevant conduct" portion of the advisory Guidelines permit judges to consider the defendant's conduct that a jury has already acquitted, thereby exposing the defendant to an additional loss of liberty that a defendant otherwise would not have to endure.

Courts have predicated the use of acquitted conduct at sentencing on the distinction provided in *Watts* that a court is not punishing a defendant for the acquitted conduct but rather is "increas[ing] his sentence because of the manner in which he committed the crime of conviction."²⁹¹ To the public, the defendant, and even lawyers, it is difficult to see the significance of this legalistic and hyper-technical distinction when acquitted conduct has been the basis of extreme increases in sentences.²⁹² Relevant conduct can potentially add

289. Kirgis, *supra* note 242, at 945 (2005) (citing RANDOLPH N. JONOKAIT, *THE AMERICAN JURY SYSTEM* 76 (2003)).

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

291. *United States v. Watts*, 519 U.S. 148, 154 (1997).

292. See O'Sullivan, *supra* note 57, at 1375 ("To many, the distinction between a sentence

up to 18 points to the base offense level for fraud or tax evasion, 20 points for theft, and 36 points for drug offenses.²⁹³ These points make a sizeable difference in a defendant's sentence—an increase of 36 points could turn an initial sentence of probation into a mandatory life sentence.²⁹⁴

*United States v. Lombard*²⁹⁵ serves as the ultimate example of the drastic impact that consideration of acquitted conduct can have on a defendant's sentence. In that case, defendants Lombard and Hartley were tried separately in the Maine Superior Court for murder.²⁹⁶ The juries acquitted them both. Later, the federal government indicted them for firearms and other charges related to the murders. Hartley pled guilty to the charges, but Lombard did not and was convicted by a jury on two charges,²⁹⁷ one being the illegal possession of a firearm by a three-time convicted felon.²⁹⁸

At sentencing, the district court found that Lombard had used the firearm to commit the murders for which he had been previously acquitted.²⁹⁹ The district court reached this conclusion as a result of a cross-reference in the Guidelines. The Guideline provision governing illegal possession of a firearm made a cross reference to another provision, instructing the court to apply the base offense level of the offense in which the defendant had used the firearm.³⁰⁰ The district court determined that the firearm had been used in connection with the state murders, and consequently, Lombard received a sentence consistent with a murder conviction.³⁰¹ The Guidelines required a sentence of life imprisonment, but the Maine law would not have mandated such a sentence if Lombard had been convicted.³⁰²

Lombard's sentence for the firearm conviction was the very sentence that would have been imposed had he been convicted of a federal murder charge,³⁰³ yet he had not been indicted for murder in a federal court nor could he have been. Without consideration of the murders, Lombard's sentence would have been 262–327 months.³⁰⁴ Although the First Circuit later held that section 5K2.0 of the Guidelines granted the district court the discretion to depart downward,³⁰⁵ the district court, on remand, reimposed the life sentence.³⁰⁶

enhancement for nonconviction conduct and 'punishment' for that conduct appears 'semantic.'").

293. *United States v. Wong*, 2 F.3d 927, 932 (9th Cir. 1993) (Norris, J., dissenting).

294. *Id.*

295. *United States v. Lombard* (Lombard I), 72 F.3d 170 (1st Cir. 1995).

296. *Id.* at 172.

297. *Id.*

298. *Id.* at 174.

299. *Id.* at 172.

300. *Id.* at 174–75.

301. *Id.* at 172.

302. *Id.*

303. *Id.* at 178.

304. *Id.*

305. *Id.* at 172.

306. *United States v. Lombard* (Lombard II), 102 F.3d 1, 2 (1st Cir. 1995).

United States v. Concepcion provides another example of how acquitted conduct can dramatically increase a defendant's sentence, thereby increasing the deprivation of the defendant's liberty.³⁰⁷ The government charged defendant Frias with conspiracy to distribute heroin, using a firearm in relation to drug trafficking, possession of a firearm by a convicted felon, and possession of an unregistered firearm.³⁰⁸ The jury acquitted Frias of the heroin conspiracy charge and the charge for use of a firearm in relation to narcotics trafficking but convicted him of possession of an unregistered firearm and possession of a firearm by a convicted felon.³⁰⁹ Despite the two acquittals, however, the district court found by clear and convincing evidence that he engaged in the heroin conspiracy and by a preponderance of the evidence that he used a firearm in connection with the conspiracy,³¹⁰ consequently increasing his sentencing exposure to a range of 210 to 262 months (17½ to 22 years).³¹¹ If Frias had been convicted of all four charges, his sentencing range likewise would have been 210 to 262 months (17½ to 22 years).³¹² If his sentence had been based solely on the convicted conduct, he only would have been exposed to a range of 12 to 18 months (1 to 1½ years).³¹³ Thus, sentencing for relevant conduct increased his sentencing exposure by 24 levels (from level 12 to level 36).³¹⁴

Consideration of acquitted conduct in *Concepcion* subjected the defendant to potentially the same sentence as he would have received had he actually been convicted by the jury of all charges.³¹⁵ Similarly, in *Lombard*, such considerations exposed the defendant to a mandatory sentence equaling the maximum that state law would have sanctioned had he been convicted of murder.³¹⁶ In the face of *Lombard* and *Concepcion*, the distinction articulated

307. 983 F.2d 369, 390–91 (2d Cir. 1992), *aff'd sub nom.* *United States v. Frias*, 39 F.3d 391, 392 (2d Cir. 1994) (per curiam). Another example is *United States v. Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992), where the court increased the defendant's sentence more than six-fold based on acquitted conduct. In *Boney*, the defendant was convicted of one count to distribute .199 grams of cocaine and acquitted of possession with intent to distribute 12.72 grams of cocaine. *Id.* Despite the acquittal, the court sentenced the defendant for a combined weight of 12.919 grams, which resulted in a sentencing range of 63 to 78 months. *Id.* Had the defendant been sentenced solely for the conduct for which he had been convicted, he would have faced a range of 10 to 16 months. *Id.*

308. *Concepcion*, 983 F.2d at 376.

309. *Id.*

310. *Id.* at 385–86.

311. *Id.* at 389.

312. *Id.* at 393 (Newman, J., concurring). Only three charges affected Frias's sentence: conspiracy to distribute heroin, possession of an unregistered firearm, and possession of a firearm by a convicted felon. *Id.* The Second Circuit rejected an additional upward adjustment for the offense of possession of a firearm in connection with the conspiracy because it would be an "impermissible double-counting." *Id.* at 389–90 (majority opinion).

313. *Id.* at 389.

314. *Id.*

315. *Id.* at 393 (Newman, J., concurring).

316. *United States v. Lombard* (Lombard I), 72 F.3d 170, 179 (1st Cir. 1995).

in *Watts* upon which courts hinge their practice of considering acquitted conduct is illusory.

Because of the dramatic impact that consideration of acquitted conduct can have on a defendant's liberty, it is by no means a trivial matter. Although the current plea rate of 95.8%³¹⁷ shows that fewer cases proceed to trial, data on acquittals is not negligible. In 2004, 0.86% of federal cases (716 out of 83,391 cases) resulted in acquittals,³¹⁸ in 2003, 0.89% of federal cases (760 out of 85,106 cases) resulted in acquittals.³¹⁹ Based upon this rate, a minimum of 700 defendants in each of those years could have been affected by the use of acquitted conduct at sentencing.

The extent to which consideration of acquitted conduct can adversely affect a defendant's sentence is not isolated to instances of acquittals in federal court. As seen in *Lombard*, an acquittal in state court can be used against a defendant in federal court.³²⁰ Additionally, an acquittal that occurs subsequent to a defendant's conviction may also impact the defendant's revocation hearing in either state or federal proceedings.³²¹ A defendant on probation can be arrested and imprisoned for additional time if it is determined at the revocation hearing, generally by a preponderance of the evidence, that the defendant committed a new violation despite the resulting acquittal.³²² The precise number of acquittals in state courts is difficult to ascertain, but one commentator estimated that in 1996, there were as many as 13,000 acquittals nationwide.³²³ Therefore, acquitted conduct could potentially affect thousands of federal defendants.³²⁴

317. U. S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (11th ed. 2006), available at <http://www.ussc.gov/ANNRPT/2007/FigC.pdf>.

318. In 2004, there were 490 acquittals by juries and 226 acquittals by judges. BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 62 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0404.pdf>.

319. In 2003, there were 478 acquittals by juries and 282 acquittals by judges. BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 62 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs03.pdf>.

320. *Lombard II*, 102 F.3d at 2.

321. Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1333 (2000).

322. See, e.g., *State v. Gibbs*, 953 A.2d 439, 441–42 (N.H. 2008) (concluding that although acquitted conduct may not be considered at sentencing, such acquitted conduct may be considered for revocation of probation hearings because probation is intended to be remedial).

323. See Leipold, *supra* note 321, at 1327. In 1996, there were 61,000 federal criminal cases, and the acquittals rate was 1.6%. *Id.* In 1994, the rate of acquittals in state courts for the 75 largest counties in the country was 1% for felony cases. *Id.* Leipold assumed the same rate of acquittal nationwide, and out of approximately 1,348,608 state felony defendants in 1996, he estimated 13,000 acquittals. *Id.* at 1327 n.107.

324. This statement assumes an intersection of state acquittals with federal convictions and it assumes that the misconduct was in the same course or scheme. There is no way to know the total breadth of the effect of acquitted conduct on federal sentencing without reviewing the judgment and sentence of each convicted defendant, which totaled 72,765 in 2007. See U. S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (12th ed. 2007),

B. Prosecution Gets a Second Bite and Bootstrapping

A second reason against consideration of acquitted conduct is that the practice of sentencing a defendant based upon acquitted conduct affords the government “a second bite at the apple.”³²⁵ “Consideration of acquitted conduct skews the criminal justice system’s power differential too much in the prosecution’s favor”³²⁶ by providing prosecutors with the ability to enhance sentences using conduct that previously failed the scrutiny of a jury. Having had a test run of the case at trial, the prosecution can perfect its case at sentencing with the added benefits of (1) proving its case using the lowest standard of proof, and (2) having a new trier of fact.³²⁷ Additionally, the prosecution can introduce evidence that ordinarily would be inadmissible at trial because the rules of evidence do not apply at sentencing.³²⁸ Moreover, at sentencing, a defendant loses the right to confront witnesses, a right that is afforded at trial.³²⁹

available at <http://www.ussc.gov/ANNRPT/2007/nat07.pdf>. Because the data maintained by the Commission does not track the impact of acquittals, no information is available regarding the number of cases in which sentences have been enhanced due to acquitted conduct from a federal or state court or the degree of enhancement.

325. *United States v. Wendelsdorf*, 423 F. Supp. 2d 927, 938 (N.D. Iowa 2006); see also *Johnson*, *supra* note 32, at 182–83.

326. *United States v. Coleman*, 370 F. Supp. 2d 661, 672–73 (S.D. Ohio 2005).

327. See Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 351 (1992) (arguing that use of acquitted conduct violates the Double Jeopardy Clause because the “defendant will suffer additional anxiety from being made to run the gauntlet a second time. It is also thought that with practice, the prosecution may perfect its techniques and gain an unfair advantage in meeting its burden of proof in the second proceeding.”); Reitz, *supra* note 11, at 551 (“Acquittal charges must be defended twice, and the defense must be more vigorous the second time around because the available procedures are more spare. On policy grounds, we should question the wisdom of requiring those accused of crime to ‘run the gauntlet’ of successive proceedings, apart from the unseemliness of ignoring the jury’s decision.”).

328. FED. R. EVID. 1101(d)(3). For example, in *United States v. McCrory*, police broke down an apartment door and searched the defendant’s apartment without a warrant. *United States v. McCrory*, 930 F.2d 63, 65 (D.C. Cir. 1991). The search yielded crack cocaine, weapons, paraphernalia, and a sum of money. *Id.* at 65. Because the defendant argued that the search violated his Fourth Amendment rights, the government agreed not to present any evidence seized at the apartment in its case-in-chief. *Id.* However, at sentencing, the government used this evidence as relevant conduct to argue for an upward adjustment. *Id.* Consideration of the illegally obtained evidence raised the defendant’s sentencing range from 27–33 months to 235–293 months. *Id.* at 66. The district court sentenced the defendant to 235 months. *Id.* Had the evidence been lawfully obtained, a conviction based on the lawful evidence would have resulted in a sentencing range of 248–295 months. *Id.* By obtaining a sentence similar to one that could have resulted only from a legal seizure and a successful trial, the government suffered nothing for violating the defendant’s constitutional rights.

329. See *supra* note 18.

The *Lombard* case further illustrates the danger of permitting the government to use acquitted conduct at sentencing. This case “raise[d] the danger of the defendant’s trial and conviction being turned into a means of achieving an end that could not be achieved directly: the imposition of a life sentence ‘enhancement’ based on a federally unprosecutable murder.”³³⁰ The murder charge was outside the jurisdictional reach of the federal prosecutors.³³¹ Because the “federal prosecution followed on the heels of [Lombard’s state court] acquittal,”³³² the First Circuit aptly surmised the government’s motivation:

[I]t would ignore reality not to recognize that the federal prosecution arose out of and was driven by the murders, and that the prosecution was well aware that the Sentencing Guidelines would require consideration of the murders at sentencing. This reality was reflected in the prosecution’s statement at the pre-sentencing conference that “it was quite clear from the beginning; Mr. Lombard was looking at a life sentence.” The government, by its own words, had intended “from the beginning” that consideration of the murders would result in a life sentence.³³³

By means of a lesser standard of proof at sentencing, federal prosecutors achieved a sentence that the Maine prosecutors failed to obtain earlier—life imprisonment, which was the maximum that the defendant could have been sentenced had he been convicted under the Maine statute.³³⁴

Another example of the susceptibility of the Guidelines for misuse comes in *United States v. Wendelsdorf*.³³⁵ In *Wendelsdorf*, the defendant had been acquitted of two different crimes in two different judicial proceedings—once in state court and again in federal court.³³⁶ At sentencing, as the federal district court observed, the government sought “to exact its ‘pound of flesh’” for the alleged criminal acts that had resulted in acquittals.³³⁷

The federal government attempted to use “two levels of acquitted conduct”³³⁸ to enhance the defendant’s advisory guidelines range from 121–151 months to life in prison.³³⁹ The federal government charged the defendant with two counts of drug-related conspiracy for two different time periods.³⁴⁰ The jury acquitted him of the first count of conspiracy but convicted

330. *United States v. Lombard* (Lombard I), 72 F.3d 170, 178 (1st Cir. 1995).

331. *Id.* at 174 n.2.

332. *Id.* at 179.

333. *Id.*

334. *Id.*

335. 423 F. Supp. 2d 927 (N.D. Iowa 2006).

336. *Id.*

337. *Id.* at 929 & n.1 (quoting WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc.

1).

338. *Id.* at 929.

339. *Id.* at 937.

340. *Id.* at 929.

him of the second count of conspiracy that involved five or more grams of pure methamphetamine.³⁴¹ Notwithstanding the defendant's acquittal, the government argued that the drugs involved in the first count should be attributed to the defendant as conduct relevant to the convicted offense, and thereby, the defendant's sentence should be enhanced.³⁴² In addition, the government sought an upward sentencing departure by attributing a murder to the defendant, for which he had been acquitted in state court.³⁴³ The government's objective was to increase the defendant's base offense level from 32 to 43 and his prior criminal history category from I to III.³⁴⁴ The result would have been life imprisonment, although the government admitted that, under the federal drug conspiracy statute, the defendant could only be sentenced to a maximum of forty years.³⁴⁵

The government attempted to increase the defendant's sentence by bootstrapping the murder that was acquitted in state court to the conspiracy that was acquitted in federal court, all to be considered as relevant conduct for the convicted conspiracy.³⁴⁶ However, as the district court pointed out, the facts the government argued as relevant conduct were not facts that ordinarily relate to the convicted offense, such as "the presence of a gun or the vulnerability of the victim."³⁴⁷ Consequently, the court rejected the government's contentions:

Such a result, in the eyes of this court, is untenable. In its discretion, this court will not allow the Government—having failed to meet its burden of proof not just once, but twice at trial—to get a second bite at the apple for two, distinct and separate, criminal acts from the offense of conviction. In the eyes of this court, such a result is an abomination of the Guidelines and merely an attempt by the Government to relitigate and perfect its previously lost cases.³⁴⁸

These cases highlight the susceptibility of both the relevant-conduct provisions and the preponderance of the evidence standard to manipulation. The Guidelines provide prosecutors with an arsenal of tools that, when coupled with the lowest standard of proof, can be manipulated to avoid the spirit and protections of *Winship* and *Booker*. Even if only a few opportunistic prosecutors would do so, manipulations raise concerns because of the gravity of the enhancements that could result. As Judge Ambro has advocated:

[A] less manipulable rule should be set—that constitutional protections apply not only to those facts that authorize the "statutory maximum" . . . , but to

341. *Id.*

342. *Id.* at 930.

343. *Id.* at 930 & n.2.

344. *Id.* at 930.

345. *Id.*

346. *Id.* at 938.

347. *Id.*

348. *Id.*

every fact (save prior convictions) identified by the law itself as deserving of additional punishment, no matter what that fact may be called. Only in this way can the principles of *Appendi*—followed through in *Blakely*, *Booker*, and, most recently, *Cunningham*—be fully respected.³⁴⁹

C. A Death Sentence for Actual Innocence and Legal Innocence

Consideration of acquitted conduct means a death sentence for innocence. The *Watts* Court concluded that without specific jury findings, no one can surmise the jury's findings in an acquittal and consequently, an acquittal does not equate to innocence.³⁵⁰ Additionally, according to *Watts*, "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted."³⁵¹ By allowing consideration of acquitted conduct at sentencing, however, it is impossible for innocence to have any significance. *Watts* "ignores cases in which the jury acquitted because of actual innocence, failure of proof even by a preponderance of the evidence, or the jury's constitutional prerogative to acquit against the evidence."³⁵²

Consider the case of *Lombard*. Although *Lombard* had already been acquitted of the murders, imagine that years later DNA evidence provides unequivocal evidence that he was not responsible for the murders. What then of the murder enhancement? Must the defendant spend his entire life in prison because, applying the logic in *Watts*, the life sentence is not punishment for the murder but for the firearm charge? Because under *Watts* a jury's acquittal is an insufficient declaration of innocence, must a defendant provide DNA-type evidence in order to avoid an enhanced sentence?

Under *Watts*, it would seem that only if the sentencing court found that the prosecution failed to prove its case by a preponderance of the evidence at sentencing can we begin to make inferences about the defendant's innocence. Moreover, taking the rationale in *Watts* to its logical conclusion would mean that a court could sentence a defendant who was acquitted on all counts, because the jury's verdict is not a vindication of guilt and relevant conduct could be established through a preponderance of the evidence. Of course this is an absurd proposition, but there is no meaningful difference between this proposition and the current practice of allowing acquitted conduct to be the basis of a sentence for another charge.

Additionally, if an acquittal is not a sufficient indicator of innocence to relieve a defendant of sentencing repercussions, then why not permit the jury to

349. *United States v. Grier*, 475 F.3d 556, 574 (3d Cir. 2007) (Ambro, J., concurring).

350. *See United States v. Watts*, 519 U.S.148, 155 (1997) (per curiam).

351. *Id.* (quoting *Witte v. United States*, 515 U.S. 389, 401 (1995)).

352. Federal Criminal Procedure Committee of the American College of Trial Lawyers, *supra* note 57, at 1486. A discussion about the government's failure to meet the requisite burden of proof and jury nullification is beyond the scope of this Article. For excellent explorations of these topics, see Leipold, *supra* note 321, and Givelber, *supra* note 275.

acquit only when its verdict is 100% certain of innocence? Or why not require the jury to complete special verdict forms when it acquits a defendant? The jury could indicate whether the acquittal is the result of a belief that the defendant is innocent rather than simply the result of a belief that the government failed to prove its case beyond a reasonable doubt.³⁵³ Because the *Watts* Court determined that "it is impossible to know exactly why a jury found a defendant not guilty on a certain charge" and that "the jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty,"³⁵⁴ carrying *Watts* to its logical conclusion would require a special verdict of innocence in order for a defendant to avoid a sentence enhancement based on acquitted conduct. Otherwise, we should just lessen the government's burden to only require proof by a preponderance of the evidence at trial.³⁵⁵

353. One commentator made a similar suggestion:

A defendant who has been acquitted of criminal charges, or who has had the charges against him dismissed, should have the statutory right to ask for a determination that he is factually innocent. If a defendant is acquitted in a bench trial, or if the charges are dismissed prior to trial, the defendant should be permitted to ask the judge for a finding that, not only has the government failed to prove guilt, but also that the evidence shows his innocence. If the case is tried to a jury, the defendant should be allowed to request that the jurors be given three verdict options: guilty, not guilty, and innocent. If either the court or jury makes a determination of innocence, the defendant's record related to that charge should be expunged, and should be inadmissible in any future proceeding.

Leipold, *supra* note 321, at 1300.

Interestingly, some state and local governments have given the fullest weight to acquittals by allowing acquitted persons to request their records be sealed after an acquittal. See John P. Sellers III, *Sealed with an Acquittal: When Not Guilty Means Never Having to Say You Were Tried*, 32 CAP. U. L. REV. 1, 1-3 (2003) (arguing against the sealing of records in acquittals when there is a public interest). In Cincinnati, once a record is sealed, no evidence of a trial having taken place exists. See *id.* at 1. Police officers are prohibited from disclosing their knowledge of the investigations, and violators are subject to misdemeanor prosecution. See *id.* at 2. In California, the acquitted person's record may be expunged after proving to the court that "no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." Leipold, *supra* note 321, at 1324.

354. *Watts*, 519 U.S. at 155.

355. The requirement of the proof beyond a reasonable doubt standard at trial originated with *In re Winship*, where the Court held that due process requires proof beyond a reasonable doubt at the adjudication stage of a juvenile proceeding. *In re Winship*, 397 U.S. 358, 364-65 (1969). In deciding the case, the Court relied on the nation's historical practice:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

Id. at 363-64.

Although a defendant who is convicted of an offense does not suffer additional stigma

Accordingly, the underlying message of *Watts* undermines the foundation of our criminal justice system. *Watts* defies the basic principle that it is better to let a guilty defendant go free than to imprison an innocent person. The *Watts* Court reasons that the lack of specific jury findings in an acquittal leaves open the possibility that an acquitted defendant is not innocent and, therefore, may be punished for such conduct.³⁵⁶ Yet, the *Watts* Court never acknowledges the corollary—that a defendant may actually be innocent—and by failing to do so, it sanctions imprisoning the potentially innocent. One may argue that a subsequent finding at sentencing, by preponderance of the evidence, that the defendant committed the acquitted act negates the possibility of innocence. However, such an argument would ignore the reality of exonerated defendants who previously had been convicted by proof beyond a reasonable doubt. Exonerations reveal the fallibility of the justice system even when defendants have been afforded the right to require proof beyond a reasonable doubt, to confront witnesses, and to have inadmissible evidence excluded. A sentencing system that allows for a determination of guilt by a lesser standard of proof and omission of other critical rights is even more fallible.³⁵⁷

from consideration of acquitted conduct, the additional liberty restriction that can result from the acquitted conduct may have a greater impact than the stigma of a conviction or the sentence that would have been imposed for the convicted offense, alone.

356. *Watts*, 519 U.S. at 155.

357. Some appellate courts' characterizations of fact-finding at sentencing demonstrate the unreliability of factual determinations of "guilt" that occur at sentencing. Examples include the following: "far reaching," "nothing more than a guess," "arbitrary," "founded on the bare assumption unsubstantiated," "nebulous eyeballing," "create[d]," "bas[ed] on hunch," "based on conjecture," "pulled out of thin air," and the result of "choos[ing] a random number." See, e.g., *United States v. Rivera-Maldonado*, 194 F.3d 224, 232 (1st Cir. 1999) ("[T]he inferential leap in the instant case is founded on the bare assumption unsubstantiated, if not directly undermined, by record testimony."); *United States v. Marrero-Ortiz*, 160 F.3d 768, 780 (1st Cir. 1998) ("[W]e cannot uphold a drug quantity calculation on the basis of hunch or intuition."); *United States v. Jarrett*, 133 F.3d 519, 530 (7th Cir. 1998) (criticizing the fact finding in *United States v. Henderson*, 58 F.3d 1145, 1152 (7th Cir. 1995), for figures that were "pulled out of thin air"); *Henderson*, 58 F.3d at 1152 (noting that "the [district] court explicitly stated that its 10% multiplier may have been an arbitrary figure" and concluding that the district court "could not appropriately choose a random number simply because it believed more drugs were involved than the sales indicated"); *United States v. Baro*, 15 F.3d 563, 569 (6th Cir. 1994) ("[T]he sentencing judge may not, without further findings, simply sentence a defendant based on conjecture."); *United States v. Zimmer*, 14 F.3d 286, 290 (6th Cir. 1994) (concluding that the district court's approximation was "improper and a violation of *Walton* to simply 'guess'"); *United States v. Garcia*, 994 F.2d 1499, 1509 (10th Cir. 1993) ("To find that these particular shipments were of average size is nothing more than a guess and clearly insufficient to carry the government's burden."); *United States v. Duarte*, 950 F.2d 1255, 1265 (7th Cir. 1991) ("Factual determinations under the Guidelines need not emulate the precision of Newtonian physics, but nor may they be based on the kind of nebulous eyeballing employed in the report."); *United States v. Hewitt*, 942 F.2d 1270, 1274 (8th Cir. 1991) (finding the district court's "assumption to be far reaching" when it calculated additional amounts of drugs based on a probation officer's report that relied on a detective's representation that the defendant admitted making prior drug

Currently, there is no method in place to determine how often acquittals result from the jury's belief that the defendant is innocent versus other explanations. However, we can glean some information from what we know about the wrongfully convicted. There have been 227 persons exonerated as a result of post-conviction DNA evidence.³⁵⁸ But this number does not reflect the actual number of wrongfully convicted persons because, in some cases, DNA evidence may not be available, the state may not admit this type of evidence, or DNA evidence may not be relevant to the case—for example, a perjury charge. One study estimated that approximately 0.5% of innocent people are wrongfully convicted by plea or trial.³⁵⁹ Given that there were 83,391 federal criminal cases and 74,782 convictions in 2004,³⁶⁰ approximately 373 people may have been wrongfully convicted.

This estimate shows that it is all the more likely that defendants are acquitted because of their innocence, rather than because of other explanations. Professor Givelber explains the following:

[Actual innocence] [a]t a minimum, . . . cannot be the *least* likely explanation for a not guilty verdict. If there is a skill imbalance between adversaries, the prosecutor is the one who typically enjoys the advantage. If there is probative or even prejudicial evidence pointing towards guilt, the state is generally successful in getting at least some of it before the jury. The prosecution can secure testimony through promises that the defense cannot make. The police are far more likely to find and produce recalcitrant witnesses on behalf of the prosecutor than they are to do so for the defense. Reasonable doubt is, of course, the defendant's friend, but the jury knows that the defendant would not be present in court if the state did not believe he was a criminal. Actual innocence provides at least as powerful [an] explanation for an acquittal as any of the other reasons, and a more powerful explanation than most. We don't acknowledge it because it is unpleasant to contemplate innocent people going to trial, not because it does not happen regularly.³⁶¹

V. PROPOSAL: REBIRTH OF JUDICIAL DISCRETION TO EFFECT A REBIRTH OF INNOCENCE

A. Rebirth of Judicial Discretion after Booker, Gall, and Kimbrough

Booker represents a rebirth of judicial discretion. Although judges must first consider the Guidelines, they can free themselves from such constraints by

trips, but without specifying the dates or amounts).

358. The Innocence Project, Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php> (last visited Jan. 20, 2009).

359. Givelber, *supra* note 275, at 1199.

360. BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 62 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0404.pdf>.

361. Givelber, *supra* note 275, at 1198.

weighing other factors, such as the Sentencing Commission policy statements and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).³⁶² A judge may now reject a Guideline sentence by finding that a sentence within the Guidelines is greater than necessary to fulfill the purposes of sentencing in § 3553(a), such as “to avoid unwarranted sentencing disparities, . . . provide restitution to victims, . . . reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.”³⁶³

Gall has fortified this new judicial discretion by requiring that appellate courts “give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.”³⁶⁴ Once a district court has shown compliance with the procedures outlined in *Gall* by accurately calculating the Guideline range, considering § 3553(a) factors, and adequately explaining its sentence and deviation from the Guidelines,³⁶⁵ a court’s rejection of acquitted conduct should be given deference pursuant to *Gall*.

Finally, the fact that, in *Kimbrough*, a sentencing decision that deviated from the contentious cocaine Guidelines based on section 3553(a) factors withstood appellate review reflects a new opportunity for judges to exercise sentencing discretion.³⁶⁶ The Court’s holding that a “judge may determine, . . . that, in the particular case, a within-Guidelines sentence is ‘greater than necessary’ to serve the objectives of sentencing”³⁶⁷ empowers judges to use factors in § 3553(a) as a sword to reject acquitted conduct and a shield to withstand appellate review of reasonableness.

B. Effecting a Rebirth of Innocence by Evaluating Sentencing Purposes to Reject Use of Acquitted Conduct

After *Booker*, *Gall*, and *Kimbrough*, judges now have an opportunity to reestablish the legal significance once equated with acquittals, making legal or actual innocence a possibility again. This section provides a proposal for judges to use their new found discretion to reject the use of acquitted conduct because it conflicts with the purposes of sentencing. The intent of this section is to offer some considerations for judges to take into account when evaluating the

362. See *United States v. Booker*, 543 U.S. 220, 259–60 (2005).

363. *Id.* (citing 18 U.S.C. § 3553(a) (2000 & Supp. IV)).

364. *Gall v. United States*, 128 S. Ct. 586, 597 (2008).

365. *Id.*

366. *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2008).

367. *Id.*

purposes of sentencing articulated in 18 U.S.C § 3553(a).

Section 3553(a) of the Guidelines sets forth the factors to be considered in sentencing:

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
-
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found *guilty* of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.³⁶⁸

1. Promote Respect for the Law

Use of acquitted conduct at sentencing risks creating a society that does not respect the law. Consider the public's disbelief and outrage upon the revelation that a person can be subject to the same punishment when acquitted as another defendant who was actually indicted and convicted. As stated by one court:

What could instill more confusion and disrespect than finding out that you will be sentenced to . . . extra . . . years in prison for the alleged crimes of which you were acquitted? The law would have gone from something venerable and respected to a farce and a sham.

From the public's perspective, most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted.³⁶⁹

Imposition of additional punishment for acquitted conduct can result in

368. 18 U.S.C. § 3553(a) (2003) (emphasis added). See generally Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003) (identifying the philosophy behind the Guidelines and applying the philosophy to sentencing purposes). A discussion of the rehabilitative purpose is beyond the scope of this Article.

369. *United States v. Ibang*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006).

“confusion as to the law, and confusion breeds contempt.”³⁷⁰

Research shows that two factors affect a person’s contempt or respect for the law: the credibility of the source and the strength with which the public holds their own countervailing views.³⁷¹ If a source is deemed more credible, it is more likely to garner respect and persuade, and if a person strongly holds a particular view, that person is less likely to be persuaded.³⁷² Applying these two factors, the public will likely have an unfavorable view of a court’s use of acquitted conduct because the public firmly believes that punishment should not result from acquittals.

Both courts and scholars have pointed out this public perception. As one federal district court anticipated, “[a] layperson would undoubtedly be revolted by the idea that, for example, a person’s sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.”³⁷³ One commentator pointed out:

Most lawyers, as well as ordinary citizens unfamiliar with the daily procedures of criminal law administration, are astonished to learn that a person in this society may be sentenced to prison on the basis of conduct of which a jury has acquitted him, or on the basis of charges that did not result in conviction.³⁷⁴

Another commentator has remarked,

[A]lmost every lay person, regardless of political inclination, is shocked to learn that a federal judge must increase a sentence based on conduct for which the defendant has been acquitted. . . . [T]he reason for this shock is the intuitive judgment that society’s right to punish an individual flows directly from, and is limited by, the conduct for which that individual has been convicted.³⁷⁵

Additionally, the First Circuit gave a similar warning:

370. *Id.*

371. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 475-77, 485 (1997).

372. *Id.* at 485-86.

373. *United States v. Coleman*, 370 F. Supp. 2d 661, 671 n.14 (S.D. Ohio 2005) (internal quotation marks omitted).

374. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1714 (1992).

375. David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing*, 91 NW. U. L. REV. 1434, 1437 (1997). For an international reaction to real offense sentencing, see Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1758 (1999) (“When I describe federal real offense sentencing to lawyers and judges outside the United States, the reaction is always a combination of incredulity and disapproval.”).

[M]any judges think that the guidelines are manifestly unwise, as a matter of policy, in requiring the use of acquitted conduct in calculating the guideline range. A lawyer can explain the distinction logically but, as a matter of public perception and acceptance, the result can often invite disrespect for the sentencing process.³⁷⁶

Finally, judges have remarked that “[s]entencing a defendant to time in prison for a crime that the jury found he did not commit is a Kafka-esque result,”³⁷⁷ that this practice is “unseemly and unworthy of the United States of America,”³⁷⁸ and that the process “criminalizes activity ‘on the cheap.’”³⁷⁹

As these remarks show, the general public, lawyers, and even judges hold the strong belief that no one should suffer punishment for conduct of which they have been acquitted. Thus, a conflict exists between the law and this

376. *United States v. Lombard (Lombard II)*, 102 F.3d 1, 5 (1st Cir. 1996) (citation omitted); *see also* *United States v. Baylor*, 97 F.3d 542, 551 (D.C. Cir. 1996) (Wald, J., concurring) (“Some of our own judges have recognized that this justification could not pass the test of fairness or even common sense from the vantage point of an ordinary citizen. The ‘law,’ however, has retreated from that standard into its own black hole of abstractions.”); *United States v. Frias*, 39 F.3d 391, 392–94 (2d Cir. 1994) (Oakes, J., concurring) (pointing out that enhancing sentences for acquitted conduct “is, reminiscent of *Alice in Wonderland*. As the Queen of Hearts might say, ‘Acquittal first, sentence afterwards.’”); *United States v. Concepcion*, 983 F.2d 369, 396 (2d Cir. 1992) (Newman, J., dissenting) (“A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal.”); *United States v. Boney*, 977 F.2d 624, 647 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part) (“[T]his conceptual nicety might be lost on a person who . . . breathes a sigh of relief when the not guilty verdict is announced without realizing that his term of imprisonment may nevertheless be ‘increased’ if, at sentencing, the court finds him responsible for the same misconduct. That the Double Jeopardy Clause protects him from reprosecution on the acquitted count, or that his acquittal means that his maximum potential sentence will be determined solely on the basis of the count on which he was convicted is doubtless of little comfort.”); *United States v. Galloway*, 976 F.2d 414, 438 (8th Cir. 1992) (en banc) (Bright, J., dissenting) (remarking about a sentence that was enhanced from a range of 21–24 months to a range of 63–72 months for uncharged conduct: “Only in the world of *Alice in Wonderland*, in which up is down and down is up, and words lose their real meaning, does such a sentence comply with the Constitution.”).

377. *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (explaining that “[i]n his novel, *THE TRIAL*, Franz Kafka described a totalitarian state in which the judicial system was used to suppress freedom. One of the techniques used by the state was non-final ‘acquittals.’ Kafka describes these ‘acquittals’ as follows: ‘That is to say, when [the accused] is acquitted in this fashion the charge is lifted from [his] shoulders for the time being, but it continues to hover above [him] and can, as soon as an order comes from on high, be laid upon [him] again.’” (alterations in original)).

378. *United States v. England*, 966 F.2d 403, 410 n.5 (8th Cir. 1992); *see also* Boyce F. Martin, Jr., *The Cornerstone Has No Foundation: Relevant Conduct in Sentencing and the Requirement of Due Process*, 3 SETON HALL CONST. L.J. 25 (1993) (arguing the unconstitutionality of the standard of proof for the relevant conduct portion of the Guidelines).

379. *United States v. Grier*, 475 F.3d 556, 574 (3d Cir. 2007) (Ambro, J., concurring).

strong belief. Such a conflict between public perception and the Guidelines decreases the respect the public has for the law.

Sociological and psychological evidence suggests that procedural fairness or fairness of the process also affects the public's view of the legitimacy of the law.³⁸⁰ Consistent with intuition, research indicates that the public is more likely to comply with the law when they "buy into" the decisions and rules of governmental and legal authorities.³⁸¹ The public is more likely to "buy in" if the public perceives the legal process and the outcome as fair.³⁸² As Professor Tonry notes, "Legitimacy is increasingly recognized as a key element in how people relate to government. Whether people have confidence in, support, and cooperate with public institutions is influenced by the institution's legitimacy in their eyes."³⁸³ Therefore, the public's cooperation with and confidence in governmental authority are closely connected to the public's perception of the government's legitimacy.³⁸⁴

The benefits of legitimacy exceed public compliance; studies show that society needs the public to be proactive to fight crime.³⁸⁵ A public that experiences or observes procedural fairness is one that is motivated to be proactive.³⁸⁶ As a result, legitimacy is more likely to garner public support and cooperation in crime prevention and crime fighting.³⁸⁷ While there is much to gain from legitimacy, concomitantly, there is much to lose if the public views the criminal justice system and legal process as illegitimate. During a time

380. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003).

381. *Id.* See also Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 8 (1987) ("Public perception gives criminal law the moral force that just punishment theory demands, and provides the threat upon which deterrence is based. Only a sentencing system that appears to distribute sanctions on a principled basis will inspire the confidence of the public and of participants in the system.").

382. Tyler, *supra* note 380, at 292.

383. Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 60 (2005) [hereinafter Tonry, *Sentencing Reform*].

384. Tyler, *supra* note 380, at 284–85; see also Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005) ("For [Max] Weber, legitimacy numbered among several foundations of political authority. 'Legal legitimacy,' he thought, played the foremost role in explaining the generally law-abiding character of modern states. In the Weberian sense, legitimacy signifies an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest." (footnotes omitted)); Robinson & Darley, *supra* note 371, at 485 ("When a criminal law offends the moral intuitions of the governed community, the power of the entire criminal code to gain compliance from the community is risked. That there exists such unavoidable sources of injury to the criminal law's moral credibility means that it is that much more important that the criminal law be formulated to maximize its moral credibility in all those respects that are within the control of law makers.").

385. Tyler, *supra* note 380, at 343–44.

386. *Id.* at 344.

387. See *id.* at 284.

when public confidence in the law and legal authorities is declining,³⁸⁸ it is even more important to recognize the danger of using acquitted conduct in sentencing.³⁸⁹

2. Deterrence

Contempt for the law that results from use of acquitted conduct at sentencing can undermine the law's deterrent effect. Among the factors articulated in the Guidelines that must be considered in sentencing is "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct."³⁹⁰ This factor appears to encompass general deterrence and specific deterrence, both of which would be undermined by using acquitted conduct.

a. General Deterrence

General deterrence seeks to prevent criminality by the general public. A defendant's prosecution and subsequent punishment serve as an example to the public of the consequences of engaging in similar behavior. Enhancing sentences for relevant conduct through the consideration of acquitted conduct results in an increase in the severity of the punishment.³⁹¹ However, it has been known and proven since the eighteenth century that certainty and celerity of punishment are more effective deterrents³⁹² and increasing severity has no

388. *Id.* at 291.

389. Not only will the application of proof by a preponderance of the evidence as applied to acquitted conduct risk causing disrespect for the law through the eyes of the public and the defendant, but also some commentators have suggested that it may lead to rage in the defendant and have lasting consequences in prison and upon release:

The danger of anger as it occurs in the criminal is that it has more harmful consequences than anger in the noncriminal. An anger reaction in the criminal "metastasizes." It begins with an isolated episode, but spreads and spreads until the criminal has lost all perspective.

Eventually, he decides that everything is worthless.

Amy D. Ronner, *Punishment Meted Out for Acquittals: An Antitherapeutic Jurisprudence Atrocity*, 41 ARIZ. L. REV. 459, 476-77 (1999) (quoting SAMUEL YOCHELSON & STANTON E. SAMENOW, *THE CRIMINAL PERSONALITY* 268 (1976)). Perhaps it was this sense of despair that led Lombard to commit suicide while serving time in the federal prison.

390. 18 U.S.C. § 3553 (a)(2)(B) (2003).

391. The Commission recognized that "[u]nder the guidelines, punishment became . . . more severe." United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 17 FED. SENT'G REP. 269, 270 (2005).

392. Tonry, *Sentencing Reform*, *supra* note 383, at 52; *see also* Tyler, *supra* note 380, at 302-03; Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 72 (2005) ("Research has found that offenders are more sensitive to the probability of punishment than to its severity." (citing ANDREW VON HIRSCH ET AL., *CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH* 5, 47 (1999))).

marginal effect on crime rates.³⁹³

In fact, an increase in severity may even increase crime. Professor Frase notes the following:

General deterrent effects depend on a number of factors: the severity of the penalty; the swiftness with which it is imposed; the probability of being caught and punished; the target group's perceptions of the severity, swiftness, and certainty of punishment; the extent to which members of the target group suffer from addiction, mental illness, or other conditions which significantly diminish their capacity to obey the law; and the extent to which these would-be offenders face competing pressures or incentives to commit crime.³⁹⁴

Some of these deterrence factors can interact to cause an unexpected result. A significant increase in the severity of punishment may decrease the swiftness and certainty of punishment because defendants facing increased penalties will more vigorously contest the charges.³⁹⁵

Moreover, because deterrence is dependent upon the public's awareness of, or at least, perception of the severity of punishment,³⁹⁶ enhancing sentences for acquitted conduct will unlikely result in general deterrence. One researcher explains the complexity of factors involved for an increase in sentence severity to affect deterrence:

[F]or a harsher sanction to have an impact, individuals must first believe that there is a reasonable likelihood that they will be apprehended for the offense and receive the punishment that is imposed by a court. Second, they must know that the punishment has changed. It does no good to alter the sanction if

393. For an extensive overview of deterrence studies and literature and critique of findings, see Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 146 (2003) (arguing that "sentence severity does not affect levels of crime"); Tonry, *Sentencing Reform*, *supra* note 383, at 52 ("Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects."); Michael Tonry, *Public Prosecution and Hydro-Engineering*, 75 MINN. L. REV. 971, 982 (1991) ("The National Research Council Panel on Deterrence and Incapacitation concluded that empirical evidence does not convincingly demonstrate variable marginal deterrent effects from manipulation of sanction severity" (citing DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 7 (A. Blumstein, J. Cohen & D. Nagin eds. 1978))).

394. Frase, *supra* note 392, at 71 ("Thus, increased severity may cause crime rates to remain the same or even increase.").

395. *Id.*

396. See Doob & Webster, *supra* note 393, at 181 ("The reduction of crime through general deterrence is based on a perceptual theory: the behavior of a person is hypothesized to be related to the severity of sentences because he or she knows-or perceives-the sanctions to have a certain level of magnitude."); see also Tonry, *Sentencing Reform*, *supra* note 383, at 53 ("[T]he idea that increased penalties have sizeable marginal deterrent effects requires heroic and unrealistic assumptions about 'threat communication,' the process by which would-be offenders learn that penalty increases have been legislated or are being implemented.").

potential offenders do not know that it has been modified. Consequences that are unknown to potential offenders cannot affect their behavior. Third, the individual must be a person who will consider the penal consequences in deciding whether to commit the offense. Finally, the potential offender—who knows about the change in punishment and perceives that there is a reasonable likelihood of apprehension—must calculate that it is “worth” offending for the lower level of punishment but not worth offending for the increased punishment.³⁹⁷

Sentencing based on acquitted conduct as a means to achieve deterrence is ineffective because it depends upon public awareness, and the shock of the news that acquitted conduct can affect sentencing would be a reasonable indicator of the public’s lack of awareness. Consequently, members of the public cannot alter their conduct for fear of the threat of punishment that they cannot imagine would or could result. Therefore, general deterrence is not an adequate justification to consider acquitted conduct at sentencing.

b. Specific Deterrence

Similarly, the use of acquitted conduct to enhance sentences does not achieve specific deterrence. Specific deterrence seeks to prevent further criminality by the defendant. It is contingent on a rational association in the defendant’s mind between the acquitted conduct and an increased sentence. Additionally, “improving marginal deterrence would require that such people—currently inclined to offend—be persuaded not to offend because of the enhanced penalty. This practice is unlikely if the possible penalty is not part of their decision-making process.”³⁹⁸

A defendant would not be deterred from future criminal activity because he or she would not associate the offense of conviction with the enhanced punishment resulting from the consideration of acquitted conduct. A defendant who has been acquitted of a particular crime but whose sentence is nevertheless enhanced based on the acquitted conduct is not likely to reason that he or she should avoid future crimes of a similar nature because that defendant, justifiably, will feel that he or she had been vindicated of the acquitted conduct. As explained above, the defendant’s feeling of vindication is not unfounded because that is the general public perception and likely that of the jury who issued the acquittal. Even though a court will explain the basis for the enhancement, the defendant is unlikely to grasp that, as *Watts* stated, sentencing based on acquitted conduct is not punishment for the acquitted conduct, but for the convicted offense.³⁹⁹ Therefore, the defendant is unlikely to modify his behavior because the legalistic distinction created by *Watts* is a technicality that probably will be lost on the defendant.

397. Doob & Webster, *supra* note 393, at 190.

398. *Id.* at 184.

399. See *United States v. Watts*, 519 U.S. 148, 154–55 (1997) (per curiam).

Enhanced prison sentences may even cause the opposite effect of specific deterrence. One study shows a negative correlation between recidivism rates and sentence severity.⁴⁰⁰ This study found that the peak of the pain felt has a greater effect on the recollection of painful experiences than the length of the experience.⁴⁰¹ Additionally, the study discovered that people tend to overweigh in their memory the level of pain during the end of the experience.⁴⁰² As a prisoner's experience improves through gaining seniority status and acquisition of survival skills over time, the prisoner's evaluation of the overall experience will become more favorable with time, consequently producing a negative correlation between prison term and specific deterrence.⁴⁰³ Therefore, to the extent that use of acquitted conduct at sentencing produces more severe sentences than would result without it, consideration of acquitted conduct is less effective at achieving specific deterrence.

3. Protecting the Public and Incapacitation

If the relevant conduct provision is grounded in a safety interest, that is, to safeguard the community from a defendant's bad acts, then consideration of acquitted conduct at sentencing is unlikely to significantly increase safety. An incapacitation-based system seeks to protect the public from the possibility of additional criminality by the defendant during the term of imprisonment. The premise of an incapacitation model is that increased punishment is "meted out" for more dangerous criminals—including those who are likely to recidivate—while those who are unlikely to reoffend receive less severe sentences.⁴⁰⁴ Those who are repeat criminals are considered more dangerous

400. Robinson & Darley, *supra* note 371, at 462.

401. *Id.* at 462 (citing Daniel Kahneman, *New Challenges to the Rationality Assumption*, 150 J. INST. & THEORETICAL ECON. 18, 33–34 (1994)).

402. *Id.*

403. *Id.*

404. As Hofer & Allenbaugh explain,

Under the modified just desert approach, the greatest weight in determining sentences is given to matching the severity of punishment to the seriousness of the present offense. The seriousness of an offense depends on both (1) the harm it causes, and (2) the offender's personal culpability for that harm. Almost all of the provisions in Chapters Two and Three of the *Guidelines Manual*, which determine each offender's "offense level," can be seen to measure harm and, to a lesser extent, culpability.

The next important factor in a modified just desert system is the need to incapacitate for longer periods the more dangerous offenders, as measured by their risk of recidivism. To minimize the tension between the goals of just desert and incapacitation, the Commission chose to measure recidivism risk based only on an offender's criminal history, on the theory that past offenses also increase an offender's culpability. The number of criminal convictions and the length of sentences that were imposed are translated into a "criminal history score." Together, the offense level and criminal history score determine the sentencing options available for each offender and the range of sentence lengths recommended for those who are imprisoned.

than a one-time offender.⁴⁰⁵ As applied, current sentencing policies are incapacitating the wrong people.⁴⁰⁶ The serious sentences imposed upon serious recidivists tend to incapacitate older offenders whose criminal activities will soon wane.⁴⁰⁷ Also, as soon as some offenders are incapacitated, such as those committing drug or gang-related crimes, they are quickly replaced by others who are eager to fill the vacancy.⁴⁰⁸

Also, predicting recidivism is quite difficult. An incapacitation system depends on accurate predictions of recidivism, but as studies show, judges are not the best predictors of recidivism.⁴⁰⁹ One study found that only one out of the three or four persons predicted to reoffend actually recidivate.⁴¹⁰ Another found that 47% of those predicted to recidivate did not reoffend, and 28% of those who did in fact recidivate were not persons predicted to reoffend.⁴¹¹

The false positives and false negatives in these studies present two problems. First, the false negatives are indicative of the system's failure to protect the public from those who do actually reoffend but were not incapacitated for a term that reflected this increased level of dangerousness. Second, the false positives are indicative of an inefficient system because defendants who were wrongly predicted to reoffend will have received longer sentences based on that prediction, and thereby, will unnecessarily crowd the prisons. Thus, the incapacitation policies behind use of acquitted conduct at sentencing are neither effective at crime prevention nor economical.⁴¹²

4. Unwarranted Disparities and Unwarranted Similarities

Consideration of acquitted conduct does not ameliorate problems of unwarranted disparities and in fact, risks causing unwarranted similarities, which is as egregious as the former. Excluding acquitted conduct at sentencing will not lead to unwarranted disparities because the relevant conduct provisions

Hofer & Allenbaugh, *supra* note 368, at 24.

405. *Id.*

406. Tonry, *Sentencing Reform*, *supra* note 383, at 54.

407. *See id.*

408. *See id.*; see also Frank O. Bowman III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 741-42 (1996) (explaining that as long as there is a demand for drugs, incapacitating drug dealers only changes the cost-benefit analysis of replacement dealers taking their place).

409. *See* Reitz, *supra* note 11, at 555 ("Research shows that, despite our faith that we can spot those offenders most likely to recidivate, individualized predictions of future dangerousness are little better than a game of chance. There is no doubt that some incapacitation occurs as a result of incarceration and other sanctions, but it does not occur because sentencing courts have made accurate forecasts of individual defendants' future criminality.").

410. *See* Tonry, *Sentencing Reform*, *supra* note 383, at 54.

411. Robinson & Darley, *supra* note 371, at 465.

412. Tonry, *Sentencing Reform*, *supra* note 383, at 54 ("From a cost-benefit perspective, locking up all those people is not an obviously good investment of public resources."); Robinson & Darley, *supra* note 371, at 466.

were intended to capture convicted conduct, not acquitted conduct.⁴¹³ Rather, consideration of acquitted conduct leads to unwarranted similarities by treating acquitted conduct as if a conviction had been obtained.

Courts justify consideration of acquitted conduct because they believe that a refusal to include acquitted conduct in sentencing determinations will cause unwarranted disparity in contravention of the relevant conduct provisions. Some judges are concerned that if they exclude acquitted conduct from sentencing considerations, it will result in disparate treatment among defendants who are equally culpable. These judges reason that if they find (usually using a preponderance of the evidence standard) that a defendant committed the acquitted conduct, then this defendant's culpability is similar to the culpability of defendants who have been convicted of the same crime (beyond a reasonable doubt), and thus, their sentences should be similar pursuant to the relevant conduct provisions.

However, a disparity based on nonconviction offenses is not unwarranted—it is justifiable to treat a defendant acquitted of an offense differently than one who had been convicted. According to the U.S. Sentencing Commission, “Fair sentencing is individualized sentencing.”⁴¹⁴ The Commission defines “unwarranted disparity” as “different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing.”⁴¹⁵ Even if a court were to find at sentencing that a defendant committed the acquitted conduct by a preponderance of the evidence, this defendant is not similarly situated as another defendant who has actually been convicted of that offense. The convicted defendant has had the benefit of

413. See 28 U.S.C. § 991(b)(1)(B) (2000).

414. U. S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES 113 (2004), *available at* http://www.ussc.gov/15_year/15_year_study_full.pdf.

415. *Id.* In its study of the Guidelines, the Commission conceded that disparity in sentences remains among regions and races, and between genders. Not only does regional disparity exist, but disparity “may have increased for some types of cases.” *Id.* at 99. The Commission also reported a disparity in sentences for African-American offenders versus offenders from other groups.

Most notably, while the gap in average sentences between White and minority offenders was relatively small in the preguidelines era, the gap between African-Americans and other groups began to widen at the time of guidelines implementation, which was also the period during which large groups of offenders became subject to mandatory minimum drug sentences. The gap was greatest in the mid-1990s and has narrowed only slightly since then.

Id. at xiv. The gender disparity is even greater than the racial or ethnic disparity. As shown by the Commission's study,

Like the gap between Black offenders and other groups, the gap in average prison terms between male and female offenders has widened in the guidelines era Gender effects are found in both drug and non-drug offenses and greatly exceed the race and ethnic effects discussed above. The typical male drug offender has twice the odds of going to prison as a similar female offender.

the most rigorous standard of proof and procedural protections available at trial. The evidence supporting a determination of “culpability” at sentencing pales in comparison to that at trial, where the proof beyond a reasonable doubt standard, rules of evidence, and confrontation rights apply.

Moreover, as Congress stressed, “[t]he key word in discussing unwarranted sentence disparities is ‘unwarranted.’”⁴¹⁶ Statutory language and legislative history support an understanding that Congress was concerned about disparity among convicted offenses, not just any offense.⁴¹⁷

First, the language of 18 U.S.C. § 3553(a)(6) and 28 U.S.C. § 991(b)(1)(B) supports the argument that the purpose of relevant conduct is to reduce unwarranted disparity among defendants who have been *convicted* of the same offense. Section 3553(a)(6) requires judges to “impose a sentence *sufficient, but not greater than necessary*, . . . to avoid unwarranted sentence disparities among defendants with similar records who have been found *guilty* of similar conduct.”⁴¹⁸ Also, 28 U.S.C. § 991(b)(1)(B) sheds light onto the disparity issue. It states:

- (b) The purposes of the United States Sentencing Commission are to—
 - (1) establish sentencing policies and practices for the Federal criminal justice system that—
 - (A) assure the meeting of the purposes of sentencing . . .
 - (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records *who have been found guilty* of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices⁴¹⁹

Both 18 U.S.C. § 3553(a)(6) and 28 U.S.C. § 991(b)(1)(B) make clear that disparity caused by acquitted conduct was not a concern.

416. Miller, *Purposes at Sentencing*, *supra* note 41, at 424 (quoting S. REP. NO. 225, at 161 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3344).

417. For excellent discussions about disparity, see Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of The Federal Guidelines*, 58 STAN. L. REV. 85 (2005) (concluding that disparity is not only empirical, but also normative); Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271 (2005) [hereinafter Miller, *Sentencing Equality Pathology*] (discussing concerns about uniformity in sentencing); O’Hear, *supra* note 37 (arguing that the statutory language, legislative history, and principles underlying *Booker* and *Blakely* support a disparity analysis based on convicted conduct); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992) (criticizing the excessive focus on disparity and evaluating the claims of Judge Heaney).

418. 18 U.S.C. § 3553(a)(6) (2003) (emphasis added).

419. 28 U.S.C. § 991(b)(1)(B) (2003) (emphasis added); *see also* Miller, *Sentencing Equality Pathology*, *supra* note 417, at 274; O’Hear, *supra* note 37, at 633.

Second, the Senate and House Judiciary Committees expressed an interest in reducing disparity resulting from convicted offenses. The Senate Judiciary Committee urged reforms after the following acknowledgment:

[E]very day [f]ederal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, *convicted* of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another—*convicted* of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment.⁴²⁰

The House Judiciary Committee was similarly concerned with disparity. The focus, as apparent from the House Judiciary Committee report, was on avoiding disparity between convicted offenses: “[S]imilar offenders *convicted* of similar offenses committed under similar circumstances should receive similar sentences.”⁴²¹ Although the statutory texts use the term “found guilty” and the legislative reports of the House and Senate use the term “convicted,” the terms are synonymous and are evidence that consideration of relevant conduct at sentencing was not intended to encompass acquitted conduct.

Logic buttresses this conclusion because by subsuming acquitted conduct under relevant conduct, a more flagrant form of disparity occurs—use of acquitted conduct to impose the same sentence as if a conviction had been obtained. It is fundamentally unfair that a defendant who has been acquitted by a jury receives the same sentence as another defendant who has been convicted of that offense. Indeed, the Supreme Court has implicitly approved consideration of avoiding unwarranted similarities (treating differently situated defendants alike), as well as avoiding unwarranted disparities (treating similarly situated defendants differently) in sentencing.⁴²² The Court in *Gall* recognized

that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated. The District Judge regarded Gall’s voluntary withdrawal as a reasonable basis for giving him a less severe sentence than the three codefendants . . . , who neither withdrew from the conspiracy nor rehabilitated themselves as Gall had done.⁴²³

The Court’s finding that the district court’s below-advisory-Guideline variance was reasonable, despite the defendant’s admission to the criminal activity, paves the way for judges to reject consideration of acquitted conduct because it would cause unwarranted similarities between a defendant convicted by a jury

420. Miller, *Sentencing Equality Pathology*, *supra* note 417, at 273–74 (quoting S. REP. NO. 98-225, at 38 (1984), *reprinted* in 1984 U.S.C.C.A.N. 3183, 3221–29) (emphasis added).

421. O’Hear, *supra* note 37, at 641 (quoting H.R. REP. NO. 98-1017, at 2 (1984)) (emphasis removed and added).

422. Kalar & Sands, *supra* note 26, at 27.

423. *Gall v. United States*, 128 S. Ct. 586, 600 (2007).

and one vindicated by a jury.

In sum, § 3553(a) factors provide judges with a vehicle to restore the venerable significance of acquittals and of juries. Once again, acquittals may signify the community's declaration of innocence, whether legal or actual.

CONCLUSION

Judges "have assailed the Guidelines" for their complexity and rigidity and for ignoring individual defendant characteristics.⁴²⁴ Some judges have criticized the Guidelines for reducing their role to "rubber-stamp bureaucrats" and "judicial accountants."⁴²⁵ Now, after *Booker* has relegated the Guidelines as advisory, some judges still presume that the sentence should fall within the Guideline range⁴²⁶ and display a reluctance to assert independence from the Guidelines. In 2003, before *Blakely* and *Booker*, 92.5% of the defendants were sentenced within or above Guideline range; 7.5% of the sentences were below Guideline range.⁴²⁷ In the year of *Booker*, 87% of the sentences were within or above advisory Guideline range; 13% of the sentences were below advisory Guideline range.⁴²⁸ Post-*Gall* and *Kimbrough*, judges sentenced within or above advisory Guidelines in 86.6% of the sentences; 13.4% of the sentences were below advisory Guideline range.⁴²⁹ Although the below Guideline sentences increased, these figures are not as dramatic as expected.

In fact, these figures are consistent with Judge Nancy Gertner's observations:

[J]udicial behavior that existed before *Booker* continue[s]. At a time when sentencing discretion [has been] apparently restored, court after court insist[s]

424. Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 284 (2005).

425. *Id.* at 284–85; see also Frank S. Gilbert, *A Probation Officer's Perception of the Allocation of Discretion*, 4 FED. SENT'G REP. 109, 109 (1991) ("A well-known and highly respected jurist recently observed that his sentencing role has been relegated to that of a 'notary public.'").

426. See Judge Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 525, 537 (2007) [hereinafter Judge Gertner, *American Judges and Sentencing*].

427. U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS § 2 fig.G (10th ed. 2005), available at <http://www.ussc.gov/ANNRPT/2005/fig-g-pre.pdf>. Throughout this Article, the statistics provided were the result of combining the amount of within and above range sentences, substantial assistance departures, and government sponsored departures.

428. *Id.* at § 3 fig.G, available at <http://www.ussc.gov/ANNRPT/2005/fig-g-post.pdf>. The Commission collected data for the fiscal year. *Id.* This data represents cases from January 12, 2005 through September 30, 2005. *Id.*

429. U.S. SENT'G COMM'N, PRELIMINARY POST-KIMBROUGH/GALL DATA REPORT tbl.1 (2008), available at http://www.ussc.gov/USSC_Kimbrough_Gall_Report_May_08_Final.pdf. The post-*Kimbrough/Gall* data is based on the collection of cases in which defendants were sentenced on or after December 10, 2007. *Id.* at tbl.1 n.1.

that the advisory Guidelines [are] entitled to considerable, even presumptive, weight, effectively trumping any standards that common law judges might create in their stead. Notwithstanding a rich history of judicial sentencing pre-dating the Guidelines, many federal judges . . . believe that they [are] not competent to sentence at all, absent explicit rules externally promulgated by Congress or the Commission. These entities, they conclude[], [have] far greater expertise than judges⁴³⁰

But judges do have the expertise and competence to sentence. Indeed, as the Eighth Circuit has concluded, “Control over this sentencing practice rests in the hands of the district judge.”⁴³¹ If judges embrace their independence, they can restore the significance of juries and acquittals by rejecting the use of acquitted conduct at sentencing.

430. Judge Gertner, *American Judges and Sentencing*, *supra* note 426, at 525; see also *United States v. Kandirakis*, 441 F. Supp. 2d 282, 333 n.76 (D. Mass. 2006) (“Judges once felt empowered just by virtue of their robes to do justice in sentencing; now they seem to feel incompetent without the Sentencing Manual.” (quoting Eric Citron, *Sentencing Review: Judgment, Justice, and the Judiciary*, 115 YALE L.J. POCKET PART 150, 153 (2006), <http://www.thepocketpart.org/2006/07/citron.html>)).

431. *United States v. Galloway*, 976 F.2d 414, 427 (8th Cir. 1992) (en banc).