SUFFOLK UNIVERSITY
LAW REVIEW

Volume XLIX 2016 Number 1

The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It

Barry L. Johnson*

I. INTRODUCTION

On November 28, 2007, a jury convicted Joseph Jones, Desmond Thurston, and Antuwan Bell of distributing a relatively small amount of crack cocaine. The defendants were acquitted of a number of more serious charges, including conspiracy to distribute a much larger quantity of crack.[1] At the defendants' respective sentencing hearings, the sentencing judge found that—despite the jury's verdict of acquittal on the conspiracy charge—each of the defendants' criminal activities had been part of a conspiracy to distribute large quantities of crack cocaine in the Congress Park area of Southeast Washington, D.C.[2] Based in significant part on these findings, each defendant was given a much more severe sentence than their United States Sentencing Guidelines (Guidelines) ranges would otherwise have suggested as appropriate.[3]

Can a criminal defendant's sentence really be enhanced on the basis of conduct underlying criminal charges of which he or she has been acquitted by a jury? Yes, it can. In *United States v. Watts*,[4] the United States Supreme Court

* Professor, Oklahoma City University School of Law.

1. *See* United States v. Jones, 744 F.3d 1362, 1365 (D.C. Cir. 2014).

2. *See id*. at 1366-69.

3. *See id.* at 1368-69. According to the defendants, their suggested Guidelines ranges would have been between twenty-seven and seventy-one months imprisonment. *See id.* at 1369. These suggested ranges were substantially below the range that the judge deemed applicable in light of the conspiracy findings. *See id*. Jones's suggested Guidelines sentencing range was 324 to 405 months, while Thurston's was 262 to 327 months, and Ball's 292 to 365 months. *See id*. Each received a sentence below the lower end of their respective Guidelines sentencing ranges—180 months for Jones, 194 months for Thurston, and 225 months for Ball. *See id.* However, the sentencing judge's factual finding that the defendants were engaged in a conspiracy to distribute crack cocaine resulted in sentences three to six times lengthier than the Guidelines would have suggested in the absence of that finding. *See id.* at 1365-66.

4. 519 U.S. 148 (1997).

held that in applying the Guidelines, a sentencing judge is permitted to enhance a criminal offender's sentence on the basis of conduct, determined by the sentencing judge to be relevant to sentencing, underlying charges of which the offender had been acquitted by a jury.[5] The Court viewed this reliance on acquitted conduct as authorized by applicable statutory provisions, by the Guidelines, and as consistent with relevant constitutional limitations.[6] While permitting sentence enhancement on the basis of acquitted conduct has long struck many observers as, at best, peculiar,[7] the Court's decision in *Watts* merely reaffirmed sentencing practices that prevailed widely, both before and after the adoption of the Guidelines.[8]

However, only three years after *Watts* in *Apprendi v. New Jersey*,[9] the Court decided the first in a series of cases that would dramatically alter the constitutional regime governing sentencing practices. The *Apprendi* Court held that, in certain circumstances, the use of judicially determined facts to enhance an offender's sentence is impermissible under the Sixth Amendment.[10] Five years later, in *United States v. Booker*,[11] the Court concluded that the judicial fact-finding required by the then-existing federal guidelines scheme could not be squared with the principles of *Apprendi* and declared the Guidelines unconstitutional.[12] The *Booker* Court, however, declared that the proper remedy for this constitutional flaw was to treat the Guidelines as advisory rather than binding, creating the current system of advisory guidelines.[13]

One might think, at first glance, that the recognition of a Sixth Amendment right to have a jury rather than a judge determine relevant sentencing facts would put an end to the use of acquitted conduct. One would be wrong, however, at least so far. The federal appellate courts have been unanimous in holding that reliance on acquitted conduct to enhance an offender's sentence is

5. *See id*. at 157 (holding acquittal verdict does not bar sentencing based on conduct of acquitted charge).

6. *See infra* notes 91-97 and accompanying text (noting courts have rejected constitutional challenges to use of acquitted conduct). "Acquitted conduct" is conduct from the underlying charges for which the defendant has been found not guilty either by a jury, or through a judge's decision to grant a motion to dismiss. *See generally* 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, 157 (1996). It is useful to distinguish acquitted conduct from "unadjudicated conduct," which refers to conduct that could potentially have been characterized as criminal, but that was not formally adjudicated either through trial or by a guilty plea. This can occur either as a result of a prosecutorial decision not to charge the defendant, or as a result of dismissal of charges in connection with a plea bargain. *See id.* at 157-58.

7. *See Watts*, 519 U.S. at 156-57; *see also infra* note 15 (collecting articles critical of use of acquitted conduct).

8. *See Watts*, 519 U.S. at 157 (upholding use of acquitted conduct).

9. 530 U.S. 466 (2000).

10. *See infra* notes 98-124 and accompanying text (offering more complete discussion of *Apprendi* line of cases).

11. 543 U.S. 220 (2005).

12. *See infra* notes 127-134 and accompanying text (discussing *Booker* holding in more detail).

13. *See id.* (discussing *Booker* remedy in more detail).

still permissible under the now-advisory Guidelines.[14] While recent academic commentary has largely taken the opposing view on the constitutionality of acquitted conduct,[15] there is currently little reason to believe that the courts will be persuaded to change their views on this issue any time soon.[16]

This Article examines the problem of acquitted conduct in modern federal sentencing and proceeds in three parts. Part II describes how the use of acquitted conduct has been legally justified in federal sentencing under each of the three distinct modern federal sentencing regimes: under the discretionary sentencing regime of the pre-Guidelines era, under the era of binding Guidelines, and under the current regime of advisory Guidelines.[17] Part III undertakes a policy assessment of acquitted conduct, describing and evaluating

14. *See* United States v. White, 551 F.3d 381, 384-86 (6th Cir. 2008) (en banc) (holding defendant's right to jury trial not violated by applying acquitted conduct to sentencing); United States v. Mercado, 474 F.3d 654, 656-58 (9th Cir. 2007) (collecting cases from every circuit, except Sixth); United States v. Gobbi, 471 F.3d 302, 314 (1st Cir. 2006) (stating pre and post-*Booker* case law allows acquitted conduct to form basis of sentencing); United States v. Farias, 469 F.3d 393, 399-400 (5th Cir. 2006) (holding district courts can use facts contradicting jury findings if proved by preponderance of evidence); United States v. Faust, 456 F.3d 1342, 1348 (11th Cir. 2006) (explaining courts may consider acquitted conduct concerning defendant's background, character, and conduct for sentencing); United States v. Dorcely, 454 F.3d 366, 371 (D.C. Cir. 2006) (deciding sentencing courts may base sentence on acquitted conduct without violating Sixth Amendment); United States v. High Elk, 442 F.3d 622, 626 (8th Cir. 2006) (declaring courts may use acquitted conduct for calculating Guidelines range); United States v. Vaughn, 430 F.3d 518, 525-27 (2d Cir. 2005) (disagreeing with claim *Booker* precluded sentencing based on acquitted conduct); United States v. Price, 418 F.3d 771, 787-88 (7th Cir. 2005) (joining other courts holding *Watts* decision remains law after *Booker*); United States v. Ashworth, 139 F. App'x 525, 527 (4th Cir. 2005) (per curiam).

15. Several commentators have argued that the use of acquitted conduct cannot withstand Sixth Amendment scrutiny in the wake of the *Apprendi* line of cases. *See, e.g.*, James J. Bilsborrow, Note, *Sentencing Acquitted Conduct to the Post-*Booker *Dustbin*, 49 WM. & MARY L. REV. 289, 321-31 (2007) (contending use of acquitted conduct violates Sixth Amendment); Mark T. Doerr, Note, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 252-56 (2009) (emphasizing acquitted conduct cannot withstand Sixth Amendment scrutiny in wake of *Apprendi*); Peter Erlinder, *"Doing Time" . . . After the Jury Acquits: Resolving the Post-*Booker *"Acquitted Conduct" Sentencing Dilemma*, 18 S. CAL. REV. L. & SOC. JUST. 79, 98-113 (2008); Lucius T. Outlaw III, *Giving an Acquittal Its Due: Why a Quartet of Sixth Amendment Cases Means the End of* United States v. Watts *and Acquitted Conduct Sentencing*, 5 U. DENV. CRIM. L. REV. 173, 187-89 (2015). Others have criticized acquitted conduct largely on policy grounds, while also suggesting that its use likely is unconstitutional. *See, e.g.*, Eang Ngov, *Judicial Nullication of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 258-69 (2009) (characterizing use of acquitted conduct as inconsistent with Sixth Amendment focus of majority in *Booker*); Orhun Hakan Yalinçak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent," and "Pernicious,"* 54 SANTA CLARA L. REV. 675, 679 (2014). Yalinçak criticizes use of acquitted conduct largely on policy grounds, but claiming that "use of acquitted conduct at sentencing should be prohibited on *both constitutional* and normative ground[s]." *Id*. (emphasis added). Farnaz Farkish, on the other hand, characterizes the constitutional arguments against use of acquitted conduct as weak. *See* Farnaz Farkish, *Docking the Tail that Wags the Dog: Why Congress Should Abolish the Use of Acquitted Conduct at Sentencing and How Courts Should Treat Acquitted Conduct After* United States v. Booker, 20 REGENT U. L. REV. 101, 115 (2007). Farkish's principal thesis appears to be that acquitted conduct represents poor sentencing policy, and that Congress should fix the acquitted conduct problem by prohibiting its use. *See id.* at 121-23.

16. *See infra* notes 174-216 and accompanying text (noting case law support for use of acquitted conduct).

17. *See supra* Part II.

the arguments for and against its use. This part concludes that, on balance, use of acquitted conduct is a poor sentencing practice, inconsistent with a number of important sentencing policies and process interests.[18] Part IV examines the various ways acquitted conduct might be eradicated from the federal sentencing landscape, including constitutional reforms imposed by courts, modifications to the Guidelines promulgated by the United States Sentencing Commission (the Commission), and legislative reforms enacted by Congress. Part IV also briefly examines the possibility that prosecutors or sentencing judges could exercise discretion to refrain from reliance on acquitted conduct.[19] Finally, Part IV examines the advantages of each possible route to reform, as well as their problems and limitations.[20]

II. THE USE OF ACQUITTED CONDUCT IN THE THREE ERAS OF MODERN FEDERAL SENTENCING

A. Acquitted Conduct in the Pre-Guidelines Era (1949-1987)[21]

1. Rehabilitation, Discretion, and Judicial Access to "the Fullest Possible Information" Concerning the Offender and His Offense

Throughout much of the Twentieth Century, sentencing judges in both state and federal courts possessed virtually unlimited discretion to impose any sentence from within broad statutory ranges provided for in various criminal offenses.[22] Sentencing judges typically were not required to specify on the record the factors that influenced their sentencing choices. Nor were judges constrained in terms of the type of information upon which they could rely when imposing a sentence.[23] Judicial sentencing discretion was not subject to meaningful appellate review and similarly broad discretion was granted to parole officials in determining the release dates of offenders.[24]

The broad discretion granted to sentencing judges and other actors in the criminal justice system was a function of the prevailing penal philosophy dominant at the time, which emphasized the rehabilitation of offenders as the

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part IV.

21. Obviously, the pre-Guidelines era extends much farther back in time than 1949. This date is selected as the starting point for this sentencing era because that is when the United States Supreme Court published its opinion in the landmark case of *Williams v. New York*, 337 U.S. 241 (1949), which represents a classic embodiment of this first phase of "modern" federal sentencing. While the approach to sentencing discussed and approved in *Williams* pre-dated that opinion, it represents a convenient demarcation of this era of sentencing.

22. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5-7 (1973).

23. *See id.* at 39-41.

24. *See* United States v. Tucker, 404 U.S. 443, 447 (1972) (observing "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review"); s*ee also* Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 814-15 (1975) (noting traditional absence of clear legislative or judicial guidance to structure parole decisions).

primary purpose of criminal sentencing.[25] This focus on offender rehabilitation was thought to require broad flexibility for judges and parole officials to craft individualized sentences to maximize the rehabilitative progress of offenders.[26] In turn, the individual rehabilitative needs of particular offenders was thought to require judges to consider a wide array of facts about the offense and the offender, including facts that would be inadmissible at trial.[27]

In its 1949 decision in *Williams v. New York*,[28] the United States Supreme Court fervently embraced this rehabilitative ideal and the resulting need for broad judicial sentencing discretion. Writing for the Court, Justice Hugo Black explained that the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime" required judges to exercise broad discretion, and in turn required judges to access a wide array of information that might be helpful in crafting a sentence.[29] He elaborated:

> [A judge's] 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 trial.[30]

Applying these principles, the *Williams* Court affirmed the trial judge's imposition of a death sentence after the defendant's conviction for first-degree murder, despite a jury recommendation of life imprisonment.[31] The death sentence the judge imposed was based, in part, on inculpatory information inadmissible at trial but supplied to the judge in the presentence report.[32] The Court rejected Williams's claim that the sentencing judge's reliance on this information violated either principles of due process, or Williams's constitutional right to confront witnesses against him.[33] The Court concluded

25. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893-96 (1990) (explaining link between rehabilitative model of sentencing and resulting practice of discretionary, indeterminate sentencing).

26. *See id.* at 894.

27. *See* FRANKEL, *supra* note 22, at 27-28.

28. 337 U.S. 241 (1949).

29. *Id.* at 247.

30. *Id.*

31. *See id*. at 252. The irony of extolling the glories of offender rehabilitation to justify affirming a death sentence appears to have been lost on Justice Black.

32. *See Williams*, 337 U.S. at 244. The presentence report included evidence suggesting that Williams had committed as many as thirty burglaries for which he had not been charged, as well as suggestions that Williams may have been guilty of various sex crimes of an unspecified nature. *See id*.

33. *See id.* at 244-45, 250, 252 (describing caution in judicial consideration of factors not heard at trial).

that "[t]he considerations we have set out admonish us against treating the due-process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence."[34]

Subsequent cases such as *United States v. Tucker*[35] and *United States v. Grayson*[36] cited *Williams* approvingly, reiterating the view that the need for judicial discretion in crafting sentences demanded freedom from evidentiary constraints applicable at trial.[37] The sentencing judge's role was, in effect, the role of sentencing expert, using whatever information about the offender or his offense that the judge deemed appropriate to fashion the appropriate individualized sentence to promote rehabilitation.

2. Judicial Discretion, Rehabilitation, and Use of Acquitted Conduct

Though *Williams* involved the use of unadjudicated conduct, the logic of the Court's analysis extended to the use of acquitted conduct as well.[38] In a leading pre-Guidelines case on acquitted conduct, *United States v. Sweig*,[39] the U.S. Court of Appeals for the Second Circuit affirmed a criminal sentence imposed, in part, on the basis of evidence of acts of official corruption that underlay charges of which a jury found Sweig to be not guilty.[40] Sweig challenged his sentence, arguing it was impermissible to enhance his sentence based on crimes of which the jury had acquitted him. The Second Circuit rejected Sweig's argument, emphasizing the broad discretion that sentencing judges possess.[41] The court reasoned that the sentencing judge's reliance on acquitted conduct was indistinguishable from reliance on the type of

34. *Id.* at 250-51.

35. 404 U.S. 443, 446 (1972) (establishing judge's inquiry "broad in scope" appropriate in federal sentencing). The *Tucker* Court explained that a federal sentencing judge had "wide discretion in determining what sentence to impose" and "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Id.*

36. 438 U.S. 41 (1978) (citing *Williams* in affirming authority of judges to enhance offender's sentencing due to offender's false testimony).

37. *See Tucker*, 404 U.S. at 446 (analyzing discretion of federal sentencing judges). A federal sentencing judge had "wide discretion in determining what sentence to impose" and "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Id.* The *Grayson* Court stressed the link between the emphasis on rehabilitation as the primary focus of punishment and the need for maximum judicial discretion to take into account offender conduct for which no conviction had been obtained. *See* 438 U.S. at 47-48.

38. *See generally infra* notes 91-97 and accompanying text (noting courts have rejected constitutional challenges to use of acquitted conduct).

39. 454 F.2d 181 (2d Cir. 1972). Prior to its 1997 decision in *Watts*, the United States Supreme Court had not ruled on whether use of acquitted conduct was permissible.

40. *See id.* at 181-83. Sweig was convicted of one count of perjury and acquitted on fourteen other charges involving a variety of alleged offenses. *See id.*

41. *See id.* at 183-84 (citing Williams v. New York, 337 U.S. 241 (1949)) (referring to Supreme Court decision discussing broad sentencing discretion of trial judges).

unadjudicated conduct the United States Supreme Court approved in *Williams*.[42]

Other courts addressing acquitted conduct generally adopted the reasoning of *Sweig*, or otherwise cited the case approvingly.[43] Consequently the authority of sentencing judges to rely on acquitted conduct became sufficiently widely accepted that by the early 1980's, then-United States Court of Appeals Judge Antonin Scalia was safely able to observe that it was "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted."[44]

In short, pre-Guidelines cases approving use of acquitted conduct were steeped in the then-prevailing focus on offender rehabilitation and the accompanying need for unfettered judicial discretion to promote that rehabilitation. Moreover, the very breadth of this discretion made it nearly impossible, as a practical matter, to prevent sentencing judges from relying on acquitted conduct. Sentencing judges in that era were not required to provide any explanation at all for their sentencing choices, so rules against use of acquitted conduct would have been unenforceable anyway.[45]

B. Acquitted Conduct under the Binding Guidelines (1987-2005)

1. Regime Change: Binding Guidelines, Reduced Discretion, and Judicial Fact-Finding

Increased skepticism throughout the 1970's and 1980's about offender rehabilitation, coupled with rising concern about discretion-fueled disparities in sentences among similarly situated offenders, spurred efforts to reform sentencing practices.[46] A key product of this reform movement was the Sentencing Reform Act of 1984, which created the United States Sentencing Commission and authorized the Commission to promulgate sentencing guidelines.[47] Congress envisioned binding sentencing guidelines as a way to

42. *See* 454 F.2d at 183-84. "Just as the sentencing judge may rely upon information as to crimes with which the defendant was charged but not tried, so here the judge could properly refer to evidence with respect to crimes of which the defendant was acquitted." *Id.*; *see also Williams*, 337 U.S. at 224-45.

43. *See* Johnson, *supra* note 6, at 170-73 (collecting cases generally adopting reasoning of *Sweig*).

44. United States v. Donelson, 695 F.2d 583, 590 (D.C. Cir. 1982).

45. *See* United States v. Boney, 977 F.2d 624, 645 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part). Judge Randolph noted that because a sentencing judge "inevitably would be influenced by evidence he has heard already anyway," appellate courts in the pre-Guidelines era apparently viewed it as "a better practice not to reverse a judge so influenced for candidly disclosing the reasons for the sentence." *Id.* The United States Supreme Court made a similar observation with respect to unadjudicated conduct in *United States v. Grayson* by acknowledging that "[n]o rule of law, even one garbed in constitutional terms, can prevent improper use of first-hand observations of perjury." 438 U.S. 41, 54 (1978).

46. *See* Michael Vitiello, Note, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012-19 (1991) (describing judicial and scholarly attacks on rehabilitative model); Nagel, *supra* note 25, at 899-902 (detailing how national attention drawn toward sentencing reform).

47. *See* Nagel, *supra* note 25, at 899 (explaining why 98th Congress created United States Sentencing Commission).

reduce judicial sentencing discretion, and, therefore, reduce sentencing disparities.[48]

The promulgation of the Guidelines, which went into effect in November of 1987, fundamentally changed the character of federal criminal sentencing. The pre-Guidelines practice had been characterized by indeterminate sentences, imposed largely at the judge's discretion, without the need for formal fact-finding, and without appellate review. In contrast, the Guidelines scheme featured determinate sentences, constrained by elaborate rules requiring extensive judicial fact-finding,[49] which were subject to robust appellate review.[50] Implicit in these changes was a shift in sentencing philosophy, de-emphasizing the role of offender rehabilitation, and emphasizing considerations of "just punishment" of offenders.[51] As Douglas Berman has observed, these reforms made sentencing in the federal system more fact-driven and offense-oriented. He noted, "[t]he sentencing instructions to judges in new statutes and guidelines typically focus on offense conduct, often require defined sentencing outcomes based solely on facts relating to the offense, and limit directly or indirectly the opportunity for judges to make their own case-specific sentencing assessments."[52]

The Guidelines transformed the sentencing process into a more adjudicative enterprise in which particular findings of fact had specific, fixed consequences for offender punishment.[53] Accordingly, some commentators concluded that this new regime required adoption of more robust procedural protections pertaining to judicial fact-finding.[54] The focus of this critique was on the

48. *See id.* at 899-901 (explaining how judicial discretion inherent in practice of indeterminate sentencing leads to sentencing disparity).

49. *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 82-84 (1998) (describing highly detailed, complicated determinations made by sentencing judges in applying Guidelines).

50. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 5 (2008) (describing scope of appellate review under binding Guidelines).

51. *See* STITH & CABRANES, *supra* note 49, at 55 (describing how idea of punishment for harm significantly influenced Guidelines). The Sentencing Commission did not purport to ground its initial guidelines in any particular theory of punishment. *See id.* at 53 (explaining various dictates of Sentencing Reform Act prevented commission from pursuing "an intelligible and consistent philosophy of punishment"). Nevertheless, Paul Hofer and Mark Allenbaugh argued convincingly that the Guidelines are grounded implicitly on what they called modified just desert considerations. *See* 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, 51-68 (2003); *see also* Russell J. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 306 (2005) (characterizing modified just desert as underlying sentencing philosophy of federal guidelines). *But see* Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 557, 571 (2003) (arguing many features of Guidelines explained only under utilitarian theories of punishment).

52. Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387, 395-96 (2006).

53. *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, 91-92 (2003). Barkow notes that in contrast to the pre-Guidelines scheme, under the binding Guidelines, a "judge's factual findings had predetermined consequences for the defendant's punishment." *Id.* at 91.

54. *See* Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal*

controversial "relevant conduct" provisions of the Guidelines.

2. The Relevant Conduct Provisions

A key policy decision that designers of a system of sentencing guidelines must make is whether to base the guidelines exclusively on the offense(s) of conviction—a "charge offense" system—or whether to permit the guidelines to take into account additional behavior for which the offender has not been formally convicted, a "real offense" system.[55] Procedural fairness is a principal virtue of a charge offense system. Under such a system, the offender's punishment is tied directly to the offense of conviction. No punishment may arise from facts not found by the jury (or pled to by the offender, in the case of a plea bargain).[56] Some state sentencing guidelines regimes are charge offense systems of this sort.[57]

The Commission concluded, however, that a pure charge offense system was unworkable, given the existing content of the federal criminal code. Because a particular crime may be committed in a variety of different ways, involving various factors that are not captured in the elements of the crime, a charge offense system treats offenders similarly even when they are not similarly situated.[58] In his 1988 article explaining the Commission's key policy decisions, Justice Stephen Breyer demonstrated the limitations of the pure charge offense system using the example of bank robbery.[59] Breyer observed that not all bank robbery offenders deserve the same sentence. One robber might have used a firearm in connection with the offense, while another did not. One robber might have taken a large amount of money, while another may have taken a much smaller amount. One might have injured a teller or other bystander during the robbery, while another did not; the victims of the robbery may have been especially vulnerable due to age, physical or mental infirmity, and therefore subjected to an unusual degree of harm by the offense, or they

Sentencing Guidelines and the Limits of Due Process, 66 S. CAL. L. REV. 289, 308 (1992) (advocating findings of fact relevant to sentencing subjected to reasonable doubt standard); Elizabeth T. Lear, *Is Conviction Irrelevant?* 40 UCLA L. REV. 1179, 1218-37 (1993) (advocating same proposition as Herman).

55. *See generally* David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 406-17 (1993) (discussing "charge offense" and "real offense" sentencing systems).

56. *See id.* at 415-16 (noting facts not proved nor admitted may be used in real-offense system).

57. *See* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L . REV. 523, 535-41 (1993) (highlighting success of charge-offense model in Florida, Minnesota, and Washington).

58. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9-10 (1988) (describing disadvantages of charge-offense system). Prior to his appointment to the United States Supreme Court, Justice Breyer was a member of the United States Sentencing Commission, serving from 1985 until 1989. *See Former Commissioner Information*, U.S. SENT'G COMMISSION, http://www.ussc.gov/about/commissioners/former-commissioner-information (last visited Nov. 2, 2015) [http://perma.cc/9BRA-NTNG].

59. *See* Breyer, *supra* note 58, at 5 (offering bank robbery scenario).

may not have been.[60] None of these real offense factors are elements of the crime of bank robbery, yet all appear relevant to evaluating the seriousness of the offense, and therefore the severity of the sentence to be imposed under the guidelines.[61]

The Commission ultimately decided to adopt Guidelines based on a "modified" real offense model, where the offense of conviction is the starting point for determining offense seriousness, with various real offense factors then taken into account, allowing for adjustment of the assessment of the offense seriousness upwardly or downwardly.[62] Given the variety of factors that might influence the evaluation of offense seriousness, the Commission concluded that it would be unworkable to have full-blown, trial-like procedures determine these facts. Therefore, the Guidelines provided that the sentencing judge should determine these facts, without the use of certain formal, trial-like procedural limitations, such as hearsay rules and the requirement of proof beyond a reasonable doubt.[63]

Justice Breyer noted that the introduction of these real offense elements to Guideline sentencing determinations involved real costs, specifically in terms of the procedural fairness of the fact-finding process. He explained, however, that the Commission's modified real offense system represented a necessary compromise, harmonizing competing interests of procedural fairness on the one hand, and substantive sentencing accuracy and workability on the other.[64]

The Commission's modified real offense system was operationalized most clearly through the relevant conduct provisions of the Guidelines. These provisions specify that the sentencing judge is to take into account conduct "that is not formally charged or is not an element of the offense of conviction" in calculating the Guidelines sentence.[65] These provisions also specify that

60. *See id*. at 9-10 (listing potential real offense sentencing factors).

61. Some other real offense sentencing factors, not mentioned by Justice Breyer, might be added to an account of relevant real offense conduct. For example, the offender's role in the offense—was he an organizer or leader of criminal group activity, or was he a minor or minimal participant? Did the offender abuse a position of public trust in committing the offense? Did the defendant recklessly endanger the lives or safety of others during the offense, or in fleeing from law enforcement? Did the defendant obstruct the administration of justice in connection with the offense? Each of these factors and many, many more are rationally viewed as influencing the assessment of the seriousness of the offense, and the resulting sentencing that should be imposed.

62. *See* Lear, *supra* note 54, at 1192-1202 (noting offense of conviction beginning of analysis). By now, the basic mechanics for determining a sentence under the Guidelines are quite familiar to observers with any exposure to the federal criminal law. *See id*. A more complete explanation of the process of calculating a Guidelines sentence is provided by Lear. *See generally* Lear, *supra* note 54.

63. *See* Breyer, *supra* note 58, at 10-11; *see also* Nagel, *supra* note 25, at 925 n.228. Nagel explains that a real-offense system permits the sentencing judge to "differentiate between seemingly alike offenders whose offense behavior is actually quite different." *See generally* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

64. *See* Breyer, *supra* note 58, at 11. "A sentencing guideline system must have some real elements, but not so many that it becomes unwieldy or procedurally unfair. The Commission's system makes such a compromise." *See id.*

65. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 cmt. 10 (U.S. SENTENCING COMM'N 2011)

relevant conduct includes "all acts or omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction."[66] Under these provisions, a defendant convicted of a single count of drug trafficking involving a small quantity of, say, cocaine, can have the severity of his sentence substantially enhanced by a judicial finding that he also participated in a number of other drug sales involving a significantly larger quantity of drugs.[67]

Judicial fact-finding is a central feature of the Guidelines in ways not involving the relevant conduct provisions as well. Each offense category in the Guidelines contains a series of "specific offense characteristics" that could influence the assessment of offense seriousness, and therefore, the resulting Guidelines sentencing. For example, a judge can enhance a drug offender's base offense score if the judge finds, by a preponderance of the evidence, that the offender possessed a firearm during the commission of the offense.[68] Or, to take Justice Breyer's bank robbery example, factors such as the amount of money taken, whether anyone was injured during the robbery, or whether anyone was abducted or physically restrained to facilitate commission of the offense, are all specific offense characteristics in the robbery guideline.[69] These characteristics of the offense, as well as a host of other factors found by the sentencing judge, but not charged and proven as elements of the offense of conviction, could have a substantial influence on the offender's sentence under the binding Guidelines.

3. Acquitted Conduct under the Binding Guidelines

The Guidelines contain no specific language addressing the use of acquitted conduct, nor did important early commentators like Breyer or Nagel mention acquitted conduct in their published explanations of background, rationales, and workings of the Guidelines.[70] Nevertheless, courts interpreted the broad,

[hereinafter U.S.S.G.].

66. *Id.* §1B1.3(a)(2). An application note provides the example of a drug offender engaged in three separate drug sales involving ten, fifteen, and twenty grams of cocaine, respectively. *See id.* The relevant conduct provisions specify that in calculating the drug quantity involved in the offense (which can be a significant factor in influencing the ultimate sentence imposed under the Guidelines), the total quantity of all three sales (forty-five grams) is to be used, even though the offender is convicted of a single count, charging only one of the sales. *See id.*

67. *See* Lear, *supra* note 54, at 1196-97 (describing operation of Guidelines pertaining to drug sentencing in light of relevant conduct provisions). Under the Guidelines, the overall quantity of drugs involved in the offense significantly influences the offender's base offense level, a rough proxy for the seriousness of the offense, whether or not the drugs were part of the particular offense of conviction. *See id.*

68. *See* U.S.S.G., *supra* note 65, § 2D1.1(b)(1).

69. *See id.* § 2B3.1(b)(6) (specifying increase in offense level, based on victim's financial loss); *Id.* § 2B3.1(b)(3) (specifying increase in offense level based on existence and extent of bodily injury to victims); *Id.* § 2B3.1(b)(4) (specifying how abduction or physical restraint to facilitate offense or escape will increase offense level).

70. *See* Nagel, *supra* note 25; Breyer, *supra* note 58.

general language of the relevant conduct provisions as permitting sentencing judges to rely on acquitted conduct to enhance offenders' Guidelines sentences.[71] These courts also justified the use of acquitted conduct in part by reference to pre-Guidelines practice, which tolerated its use. These courts argued, in effect, that acquitted conduct was part of pre-Guidelines sentencing practices, and the Commission's embrace of real offense sentencing, together with the absence of any specific provisions prohibiting acquitted conduct, reflected an intent to continue the use of acquitted conduct.[72] In its 1997 decision in *Watts*, the United States Supreme Court ratified this view, holding that the Guidelines authorized sentencing judges to rely on acquitted conduct in determining offenders' sentences.[73] The Court began its analysis by noting that Congress had enacted a federal statute codifying the principle that sentencing judges have the authority to rely, in sentencing, on a broad array of information that is not necessarily admissible at trial.[74] The Court also relied on the "well established" pre-Guidelines use of acquitted conduct,[75] as well as the Commission's "sweeping language" in the relevant conduct provisions, in concluding that nothing in the applicable statutory scheme nor in the Guidelines themselves prohibited a sentencing judge from enhancing an offender's sentencing on the basis of acquitted conduct.[76]

In his concurring opinion, Justice Breyer agreed that the Guidelines should be interpreted to authorize use of acquitted conduct, making the following observation:

---

71. *See* United States v. Boney, 977 F.2d 624, 635 (D.C. Cir. 1992) (noting relevant conduct language in Guidelines sufficiently broad to incorporate relevant conduct); United States v. Fonner, 920 F.2d 1330, 1332 (7th Cir. 1990) (noting similar point as *Boney* case).

72. *See* Johnson, *supra* note 6, at 163.

73. *See* United States v. Watts, 67 F.3d 790, 152-54 (9th Cir. 1995), *rev'd per curiam*, 519 U.S. 148 (1997). In *Watts* and its companion case, *United States v. Putra*, different panels of the United States Court of Appeals for the Ninth Circuit held that sentencing judges could not consider acquitted conduct in Guidelines sentencing. *See* United States v. Putra, 78 F.3d 1386, 1393 (9th Cir. 1996), *rev'd per curium*, 519 U.S. 148 (1997); *Watts*, 67 F.3d at 797. Noting that other circuits were unanimous in reaching the opposite conclusion, the United States Supreme Court granted certiorari and summarily reversed in a per curiam opinion. *See Watts*, 519 U.S. at 152.

74. *See* 18 U.S.C. § 3661 (2012). This statute 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." *Id.* Citing *Williams v. New York*, the *Watts* Court noted the marked contrast between the significant evidentiary limitations applicable at trial, compared to the near-absence of analogous limitations in the sentencing context. *See Watts*, 519 U.S. at 151-52. Curiously, the Court characterized *Williams* as having "reiterated" the broad discretion principle of § 3661. *Id.* at 151. This is rather odd, given that Congress passed § 3661 in 1970, twenty-one years after the Court decided *Williams*, and purported to be a codification of the principle announced in *Williams*. *See infra* notes 228-229 and accompanying text (noting Justice Scalia's analysis of these issues).

75. *Watts*, 519 U.S. at 152 (quoting United States v. Donelson, 695 F.2d 583, 590 (D.C. Cir. 1982)).

76. *Id.* The Court in *Watts* quoted from § 1B1.3 language providing that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." *Id.* at 152-53; *see also* U.S.S.G., *supra* note 65, § 1b1.3.

> In telling judges in [the] ordinary case to consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction," the Guidelines recognize the fact that before their creation sentencing judges often took account, not only of the precise conduct that made up the offense of conviction, but of certain related conduct as well. And I agree with the Court that the Guidelines, as presently written, do not make an exception for related conduct that was the basis for a different charge of which a jury acquitted that defendant.[77]

In short, the Court interpreted the Guidelines to require sentencing judges to account for acquitted conduct in application of the relevant conduct provisions. But both the majority and Justice Breyer identify the Guidelines' treatment of acquitted conduct as derived from the more general relevant conduct provisions. The Guidelines do not specifically mention acquitted conduct. There is no affirmative embrace of its use, much less some effort to defend it as a matter of sentencing policy. As in the pre-Guidelines case law discussing its legal permissibility, acquitted conduct seems a mere afterthought, an accidental derivative of unadjudicated conduct, which was deemed an essential component of the Guidelines system.[78]

The Court's analysis in *Watts* was not limited to its interpretation of the Guidelines—and the governing statutory regime—as they pertained to acquitted conduct. The Court also addressed arguments that the Guidelines' use of acquitted conduct violated the Constitution.[79] In order to understand the context of these arguments, it is useful to pause for a moment to briefly examine some commentators' claims that the transformation of sentencing purposes and processes occasioned by the Guidelines also transformed the constitutional landscape of sentencing.

4. A Brief Digression Regarding the Constitutionality of Real Offense Fact-Finding under the Binding Guidelines

While the constitutional authority of sentencing judges to rely on unadjudicated conduct was settled by the Supreme Court in *Williams*, and the related authority to rely on acquitted conduct was widely viewed by courts as similarly governed by that case,[80] some commentators have argued that Congress's shift to the structured sentencing system of the Guidelines was a

77. *Watts*, 519 U.S. at 158-59 (Breyer, J., concurring) (citations omitted) (emphasis added).

78. *See supra* notes 58-70 and accompanying text (discussing centrality of unadjudicated relevant conduct to operation of Guidelines system).

79. *See* United States v. Watts, 519 U.S. 148, 159-70 (1997) (Stevens, J., dissenting) (discussing Constitutional implications).

80. *See id.* at 151-52 (relying in part on *Williams* to affirm use of acquitted conduct under binding Guidelines).

transformative event, requiring a comprehensive re-evaluation of the constitutional regime governing sentencing. For example, Professor Susan N. Herman argued that under a structured sentencing regime like the binding Guidelines, there was no longer adequate justification for the clear bifurcation of trial procedures, governed by robust constitutional and evidentiary, procedural protections, and sentencing procedures, where judicial discretion reigned supreme. She explained:

> Because of our unexamined assumption that sentencing is a distinct and secondary phase of the criminal proceeding, it is generally assumed that these radical differences in procedure are appropriate. In my view, this assumption is unfounded in the brave new world of sentencing under the federal sentencing guidelines and in the current sentencing systems of many states. Our concept of what should happen during the sentencing phase of a criminal proceeding, and the constitutional law that has shaped itself around that concept, derives from a pre-Guidelines world, in which the philosophy underlying sentencing, the nature of decisions made at sentencing, and the relative roles of the legislature, sentencing judge, and prosecutor were all different. Sentencing as it is performed under the federal sentencing guidelines demands different procedural safeguards and different judicial constraints on the factors that may be considered at sentencing rather than at trial.[81]

Basically, Professor Herman characterized *Williams* as an artifact of a bygone sentencing era, grounded in the old offender-oriented, indeterminate sentencing regime in which judges engaged in "future-oriented" inquiries about the offender's prospects for rehabilitation.[82] The *Williams* approach was a poor fit for the world of binding Guidelines sentencing in which the judicial fact-finding regarding the seriousness of the offense was much more trial-like in nature.[83]

Other commentators have expressed similar views. Judge Gerald W. Heaney identified four key differences between the *Williams* regime and that of binding Guidelines: first, that offender rehabilitation, the primary goal of sentencing in the *Williams* era, was no longer a major sentencing consideration; second, that the Guidelines' real-time sentencing rules have replaced the old indeterminate sentencing regime in which parole played a major role in

81. *See* Herman, *supra* note 54, at 292-93 (advocating more robust protections for defendants sentenced under binding Guidelines).

82. *See id*. at 302 (analyzing *Williams* decision and sentencing regime it furthered).

83. *See id.* at 318-19. Herman notes that the *Williams* view that "the limiting concept of 'evidence' was incoherent and overly restrictive at an administrative sentencing hearing, where psychiatrists and other non-legal experts seek to predict the future" does not translate to the Guidelines world, where "the future is not particularly relevant." *Id*. Issues typically relate to "those parts of the past pertaining to the offense with which the defendant has been charged," making appropriate "[t]rial-type procedures" with "more procedural rigor." *Id*.

sentence length; third, that the sentencing judge's decision to rely on unconvicted conduct, discretionary in the *Williams* era, was mandatory under the binding Guidelines regime; and finally, that the binding Guidelines specify a fixed weight to be given to the sentence-enhancing facts the judge finds.[84] These key differences rendered the absence of constitutional constraints on real-offense judicial fact-finding inappropriate for the binding Guidelines regime.[85]

Courts, however, including the United States Supreme Court, were slow to embrace the view that the shift to a structured sentencing regime changed the constitutional calculus. For example, in *McMillan v. Pennsylvania*,[86] the Court rejected a constitutional challenge to a Pennsylvania law requiring the sentencing judge to impose a five-year mandatory minimum sentence if the judge found, by a preponderance of the evidence, that the offender visibly possessed a firearm during the commission of certain enumerated offenses.[87] The *McMillan* Court rejected the argument that proof of firearm possession should be treated as an element of the offense, and therefore subject to the due process requirement of proof beyond a reasonable doubt.[88] The Court also rejected any Sixth Amendment requirement that the finding of visible firearm possession be made by a jury.[89]

In short, the *McMillan* Court viewed legislative changes linking a specific, nondiscretionary quantum of punishment to specific factual determinations that the sentencing judge made as having no significance for the constitutional limits on sentencing procedures. The lower federal courts addressing challenges to Guidelines sentencing procedures embraced a similar view, rejecting constitutional challenges to various Guidelines sentencing

84. *See generally* Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771 (1992).

85. *See id.*; *see also* William J. Kirchner, Note, *Punishment Despite Acquittal: An Unconstitutional Aspect of the Federal Sentencing Guidelines?*, 34 ARIZ. L. REV. 799, 815-23 (1992) (arguing use of acquitted conduct in binding Guidelines sentencing violated Fifth Amendment's Double Jeopardy provisions); Lear, *supra* note 54, at 1218-37 (contending real-offense sentence under binding Guidelines violated various constitutional guarantees).

86. 477 U.S. 79 (1986).

87. *See id.* at 81-82 n.1, 91.

88. *See id*. at 84-91.

89. *See id*. at 93 (focusing on due process claim). The entire Sixth Amendment analysis was contained in the following paragraph:

> In light of the foregoing, petitioners' final claim—that the Act denied them their Sixth Amendment right to a trial by jury—merits little discussion. Petitioners again argue that the jury must determine all ultimate facts concerning the offense committed. Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even when the sentence turns on specific findings of fact.

McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986).

procedures.[90] Specifically, courts rejected challenges to the use of acquitted conduct.[91]

5. Acquitted Conduct Is Deemed Constitutional under the Binding Guidelines

In *Watts*, the United States Supreme Court finally addressed the constitutionality of judges' use of acquitted conduct in the binding Guidelines sentencing regime.[92] After concluding that relevant statutory and Guidelines provisions contemplated judicial reliance on acquitted conduct in Guidelines sentencing, the Court addressed the constitutional issues that the Ninth Circuit's opinions raised, and characterized these issues as a double jeopardy argument.[93] The *Watts* Court rejected the view that the court unduly punished the defendant by taking acquitted conduct into account at sentencing, characterizing the enhanced sentence as part of the punishment for the crime of which he was convicted.[94] The sentencing judge's enhancement of Watts' drug trafficking sentence for using a firearm in relation to that offense constituted punishment for the drug trafficking offense, not punishment for the separate firearms offense, and therefore presented no double jeopardy problem.[95]

Moreover, the *Watts* Court concluded that a sentencing judge need not infer from an acquittal that the defendant is actually innocent of the conduct. Rather, the sentencing judge was free to conclude, on the basis of the lower preponderance of the evidence standard of proof, that the defendant engaged in the conduct and that such conduct justified a more severe sentence than would otherwise be appropriate.[96] The Court also cited with approval *McMillan v. Pennsylvania* for the proposition that the Guidelines' use of the preponderance standard comports with relevant due process limitations.[97]

In short, *Watts* suggested that the Court viewed the procedural world of

90. *See* Johnson, *supra* note 6, at 176 (noting courts' rejection of challenges to Guidelines' use of preponderance of evidence standard at sentencing).

91. *See id.* at 177-78, n.152 (collecting cases demonstrating appellate courts' rejection of constitutional challenges to use of acquitted conduct).

92. *See* United States v. Watts, 519 U.S. 148, 154-56 (1997) (explaining courts can use acquitted conduct for sentencing without violating double jeopardy or due process).

93. *See id.* at 154 (characterizing Ninth Circuit's rejection of acquitted conduct as "based on erroneous views of our double jeopardy jurisprudence").

94. *See Watts*, 519 U.S. at 154-55 (citing Witte v. United States, 515 U.S. 389 (1995)). In *Witte*, the Court rejected a double jeopardy challenge to an indictment that included alleged cocaine sale charges that were previously used as relevant conduct to enhance the defendant's Guidelines sentence in a prior marijuana conviction. The Court concluded that Witte was not being punished a second time "for" the cocaine sale because the previous sentence enhancement was part of his punishment "for" the offense of conviction in the marijuana case. *See Witte*, 515 U.S. at 397-400.

95. *See Watts*, 519 U.S. at 154-55.

96. *See id.* at 155-56. The Court explained, "[a]cquittal on the criminal charges does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt." *Id.* at 155 (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984)).

97. *See* United States v. Watts, 519 U.S. 148, 156 (1997) (citing *McMillian v. Pennsylvania* to support holding).

Williams v. New York as fully compatible with the realities of mandatory Guidelines sentencing.[98] The Court deemed acquitted conduct a constitutionally acceptable feature of that Guidelines regime. However, a major shift in the Court's jurisprudence in this area was a mere three years away. This shift would result in the death of the binding Guidelines regime, ushering in an era of advisory Guidelines and raising new questions about the legal status of acquitted conduct.

C. Acquitted Conduct under the Advisory Guidelines (2005-present)

1. New Sixth Amendment Based Limitations on Judicial Fact-Finding in Sentencing, and the Death of the Binding Guidelines

The demise of the binding Guidelines can be traced to the United States Supreme Court's 2000 decision in *Apprendi v. New Jersey*.[99] The defendant, Charles Apprendi fired gunshots at the house of an African-American family that had recently moved into an all-white neighborhood.[100] Apprendi was charged with a variety of weapons-related offenses and pled guilty to three of those counts, the most serious of which carried a statutory maximum sentence of ten years imprisonment.[101] As part of the plea deal, however, the prosecution reserved the right to seek imposition of an enhanced sentence under a New Jersey hate crime provision. If the sentencing judge found, by a preponderance of the evidence, that the crime was motivated by racial animus, the provision authorized the sentencing judge to impose a sentence higher than the otherwise-applicable maximum of the offense of conviction.[102] The judge accepted the plea and later found, after a lengthy hearing, that Apprendi's crime was racially motivated, triggering the enhanced sentence.[103] Apprendi was sentenced to a term of twelve years in prison, two years longer than the maximum sentence that would have been available in the absence of the judicially determined hate-crime enhancement.[104]

The United States Supreme Court declared that Apprendi's sentence violated his constitutional right to trial by jury under the Sixth Amendment, as well as his right to Due Process under the Fourteenth Amendment. The *Apprendi* Court announced the rule 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."[105]

98. *See Watts*, 519 U.S. at 151 (noting holding's compatibility with *Williams* case).
99. 530 U.S. 466 (2000).
100. *See id*. at 469.
101. *See id.* at 470.
102. *See id.*
103. *See Apprendi*, 530 U.S. at 466.
104. *See id*. at 471.
105. *Id.* at 490 (emphasis added).

The implications of *Apprendi* for existing practices under structured sentencing regimes, including the Guidelines, were potentially significant, though initially unclear. On the one hand, the logic of *Apprendi* called into question extensive reliance on judicial fact-finding in making sentencing decisions. Vigorously dissenting in *Apprendi*, Justices O'Connor and Breyer each criticized the majority for overreaching and made dire predictions about the potential effects of that case on modern sentencing practices.[106] On the other hand, some language in the majority opinion invited a narrower interpretation of that decision. Specifically, the Court's emphasis on the critical role of the statutory maximum suggested that the decision's logic did not extend to a guidelines scheme that structured judicial sentencing discretion *within* applicable statutory maxima.[107]

This narrower construction of *Apprendi* appeared to win the day when the Court, two years later, held in *Harris v. United States*[108] that the facts needed to trigger mandatory minimum sentences were not subject to the principles of *Apprendi*. The 5-4 *Harris* majority reaffirmed the continuing validity of *McMillan* and, in doing so, suggested that judicial fact-finding within a structured sentencing system was permissible under the Sixth Amendment, as long as the facts the judge found did not change the maximum sentence permitted by law to which the offender may be exposed.[109]

After *Harris*, it appeared that it was business as usual in the land of the Guidelines. As Professor Stephanos Bibas colorfully put it, the *Harris* Court appeared to have "caged the potentially ravenous, radical *Apprendi* tiger that threatened to devour modern sentencing law."[110] The Court appeared to have drawn a bright line permitting judges to find, on the basis of the preponderance of the evidence, facts that increased the offender's Guidelines sentence as long as the sentence falls within the range the statute authorized defining the offense of conviction.[111] Only facts that actually shifted the upper end of the permissible statutory range, as did the finding of racial animus in *Apprendi*,

106. *See id.* at 543-45 (O'Connor, J., dissenting) (characterizing as "severe" effects of *Apprendi* on state and federal determinate sentencing schemes). In his dissent, Justice Breyer noted the Court's decision would "impede legislative efforts" to channel judicial sentencing discretion. *See id.* at 565 (Breyer, J., dissenting).

107. *See* Andrew J. Fuchs, Note, *The Effect of* Apprendi v. New Jersey *on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399, 1430-34 (2001) (suggesting narrower interpretation of *Apprendi*). Fuchs suggests that *Apprendi* is applicable only to situations in which the contested fact changes the applicable statutory maximum, creating, in effect, a different crime. *See id.*

108. 536 U.S. 545 (2002), *overruled by* Alleyne v. United States, 133 S. Ct. 2151, 2163 (2013). *Alleyne* held that any fact that increases the mandatory minimum sentence applicable to a defendant should be treated as an element of the crime that must be submitted to a jury. *See Alleyne*, 133 S. Ct. at 2163.

109. *See Harris*, 536 U.S. at 556-68.

110. Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending* Apprendi *To Upset Most Sentencing*, 15 FED. SENT'G REP. 79, 82 (2002).

111. *See id.* at 80-81 (explaining Court's rationales in *Harris* for concluding *Apprendi* protections inapplicable to mandatory minimum sentences).

were subject to the Sixth Amendment limits.[112]

However, the Guidelines' reprieve from *Apprendi* was short-lived. On June 24, 2004, the Court issued its opinion in *Blakely v. Washington*,[113] a case described as an earthquake,[114] and "the most significant criminal procedure case in the past century."[115] Defendant Blakely was convicted in a Washington state court for the crime of second degree kidnapping with a firearm, which carried a statutory maximum sentence of ten years in prison.[116] Under the Washington Guidelines, however, the "standard range" for this crime was forty-nine to fifty-three months.[117] Here, the sentencing judge found that Blakely had committed the crime with "deliberate cruelty," a statutory aggravator which permitted imposition of a sentence above the standard range.[118] Accordingly, the judge imposed a sentence of ninety months imprisonment.[119] A state intermediate appellate court affirmed the sentence, and the Washington Supreme Court denied review. [120]

By a narrow 5-4 majority, the *Blakely* Court shocked the criminal justice world by declaring that Blakely's sentence violated the Sixth Amendment.[121] This result was surprising because most federal appellate courts[122] and commentators agreed that the *Apprendi* rule applied only to a sentence enhancement that went beyond the maximum sentence allowed by the statute governing the underlying offense of conviction.[123] That is, the conventional understanding of *Apprendi* would have permitted a sentence enhancement in *Blakely* up to the ten-year maximum sentence for the crime of kidnapping with a firearm without triggering *Apprendi*.[124] Writing for the majority in *Blakely*, Justice Scalia rejected this settled understanding of "statutory maximum," and embraced the view that the top end of a binding sentencing guidelines range

112. *See id.* at 81 (highlighting "the upshot [of Harris] is that factual findings that raise guidelines calculations do not have to be made by juries, so long as they do not raise statutory maxima").

113. 542 U.S. 296 (2004).

114. Douglas A. Berman, *Examining the* Blakely *Earthquake and its Aftershocks*, 16 FED. SENT'G REP. 307 (2004).

115. Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of* Blakely v. Washington, 41 AM. CRIM. L. REV. 217, 218 (2004).

116. *See Blakely*, 542 U.S. at 299.

117. *See id.*

118. *See id.* at 300.

119. *See id.*

120. *See Blakely*, 542 U.S. at 301.

121. *See id.* at 313-14.

122. *See, e.g.*, Berman, *supra* note 114, at 308 (observing *Apprendi*'s impact limited, because most state and lower federal courts had interpreted it narrowly).

123. *See* Bowman, *Train Wreck?*, *supra* note 115, at 220 (explaining many commentators, including Bowman himself, viewed *Apprendi*'s "maximum sentence" as significantly limiting its scope); Bibas, *supra* note 110, at 79 (explaining sentence enhancement permissible if within range set by statute governing underlying offense).

124. *See supra* notes 107-108 and accompanying text (explaining majority understanding of *Apprendi* analysis).

was the maximum sentence a judge could impose, for *Apprendi* purposes.[125]

Although *Blakely* invalidated a sentence imposed under the Washington State Guidelines, not the United States Sentencing Guidelines, the implications of the Court's reasoning for the latter were immediately apparent. In strong dissents, Justices O'Connor and Breyer accused the majority of killing the modern sentencing reform movement.[126] When the Court agreed to consider, on an expedited basis, *Blakely*'s effect on the Guidelines, most observers expected the judicial fact-finding central to the Guidelines to be declared unconstitutional. Though the Court did not disappoint in this regard, there was still another major twist in the *Apprendi* saga.

2. The Court's Surprising Approach in Booker*: Advisory Guidelines*

In *United States v. Booker*,[127] the Court "resolved" the uncertainty *Blakely* created in an extraordinarily lengthy and complex set of opinions, including two distinct majority opinions containing only one overlapping Justice—Justice Ginsburg.[128] The first opinion, written by Justice Stevens, held that the type of judicial fact-finding prominent under the Guidelines violates the Sixth Amendment.[129] In other words, Justice Stevens' opinion (the "merits" opinion) held that *Blakely* applied to the Guidelines.

In a separate opinion written by Justice Breyer, the Court held that in light of the merits holding and congressional intent regarding the proper operation of the Guidelines, the appropriate remedy for the constitutional infirmity identified in the merits opinion was to invalidate the provisions of the Sentencing Reform Act that made the Guidelines mandatory.[130] In other

125. *See* Blakely v. Washington, 542 U.S. 296, 303-05 (2004). According to Justice Scalia, a "statutory maximum" for *Apprendi* purposes is the maximum sentence that a judge may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303. Any additional fact that raises the defendant's sentence is subject to the constitutional protections of the Sixth Amendment outlined in *Apprendi*. *See id*. at 303-05.

126. *See id.* at 326 (O'Connor, J., dissenting). "What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy." *Id*. Justice Breyer stated, "[u]ntil now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts. Today's case dispels that illusion." *Id.* at 346 (Breyer, J., dissenting).

127. 543 U.S. 220 (2005).

128. *See generally id*. Booker was convicted of possession with intent to distribute 50 grams or more of crack cocaine, a conviction carrying a sentencing range of ten years to life in prison. *See id*. at 227. Based on evidence presented at trial indicating that Booker had 92.5 grams of crack in his duffel bag, the district judge selected a base sentence of 210-262 months in prison. *See id*. At a post-trial sentencing proceeding, the judge concluded, by a preponderance of the evidence, that Booker had possessed an additional 566 grams of crack, requiring the imposition of a sentence from the range of 360 months to life in prison. *See id.* The judge imposed the 360 month sentence. *See id.* at 232.

129. *Id.* at 232. Writing for the same five Justices that comprised the *Blakely* majority, Justice Stevens held that the lower courts had correctly concluded that *Blakely*'s analysis of the Sixth Amendment applies to the Guidelines. *See id.* at 235.

130. *See id*. at 258-59 (invalidating provisions making Guidelines mandatory). Specifically, the Court excised 18 U.S.C. §3553(b)(1), a provision that made the Guidelines binding on sentencing judges and required

words, Justice Breyer's opinion (the "remedy" opinion) holds that the Guidelines were no longer to operate as binding rules, but instead as advisory guidelines.[131]

The lynchpin of Justice Breyer's opinion lay in Justice Stevens' acknowledgment that the unconstitutionality of Booker's sentence depended upon the binding nature of the upper end of his Guidelines sentencing range. That is,

> [i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, *everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges . . . .*[132]

This followed from the Court's reliance on the "statutory maximum" language of *Apprendi*, as modified in *Blakely* to encompass the top end of a binding Guidelines sentencing range. If the Guidelines are merely advisory, then the upper end of the suggested range is not a "statutory maximum" within the meaning of *Apprendi* and *Blakely*. That is, once the Guidelines are made advisory, the top end of the Guidelines sentencing range no longer operates as a maximum sentence that the judge can legally impose in the absence of the added judicially determined facts. The "statutory maximum" is once again (as before *Blakely*) the maximum sentence set out by Congress in the statute that defines the offense of conviction.

Though the Guidelines had to be advisory to comport with the Sixth Amendment, the *Booker* "remedial majority" retained a significant role for the now-advisory Guidelines. Now sentencing judges were instructed to consider the Guidelines, along with other factors relevant to sentencing, that Congress, in the Sentencing Reform Act, already required sentencing judges to take into account.[133] The Court also retained a form of appellate review of sentences

---

them to impose a sentence from within the Guidelines' mandated range, subject to narrow exceptions. The Court also removed § 3742(e), a provision requiring appellate judges to apply a de novo standard of review to sentences involving departures from the Guidelines. *See id.*

131. *See Booker*, 543 U.S. at 245.

132. *Id.* at 233 (emphasis added).

133. *See id.* at 259 (explaining even without mandatory provision of §3553(b), Sentencing Reform Act "requires judges to take account of the Guidelines together with other sentencing goals"); 18 U.S.C. § 3553(a) (2012). That provision begins by requiring a sentencing judge to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" set out in that provision. 18 U.S.C. § 3553(a). It then lists seven factors that a sentencing judge must consider. First, "the nature and circumstances of the offense and the

imposed under the advisory Guidelines regime, instructing appellate courts to evaluate whether the sentence imposed is reasonable in light of the Section 3553(a) factors relied upon by the sentencing judge.[134]

In the wake of *Booker*, it was not completely clear how the newly minted advisory Guidelines regime should operate. In a pair of 2007 cases, *Rita v. United States*[135] and *Gall v. United States*,[136] the Court provided a somewhat more detailed roadmap to sentencing judges and appellate courts navigating the terrain of post-*Booker* advisory Guidelines. In brief, the *Gall* Court instructed sentencing judges to begin the sentencing process by calculating the applicable Guidelines sentencing range, as the Guidelines provide "the starting point and the initial benchmark," for the determination of the sentence.[137] Then the sentencing judge must consider all of the factors set out in Section 3553(a), making an "individualized assessment" of the proper sentence to be imposed, in light of the particular facts of the case.[138] If, based on these factors, the sentencing judge concludes that a sentence outside the advisory Guidelines range is called for, the judge has the authority to vary from the advisory Guidelines sentence.[139] Nevertheless, the judge must adequately explain the variance, in order to permit meaningful appellate review of that sentence's reasonableness.[140]

The appellate court, in reviewing the sentence for reasonableness, is required

history and characteristics of the defendant." *Id*. §3553(a)(1). Second, § 3553 requires the judge to take into account the traditional purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation. Specifically, the judge is instructed to consider:

> [T]he need for the sentence imposed—(A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; (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.

18 U.S.C. § 3553(a)(2) (2012).

The provision further instructs sentencing judges to consider "the kinds of sentences available," (§ 3553(a)(3)), the applicable United States Sentencing Guidelines specified sentencing range, (§ 3553(a)(4)), the United States Sentencing Commission's promulgated applicable policy statements (§ 3553(a)(5)), as well as "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct," (§ 3553(a)(6)), and "the need to provide restitution to any victims of the offense" (§ 3553(a)(7)). *Id*. § 3553(a).

134. United States v. Booker, 543 U.S. 220, 261-62 (2005) (discussing reasonableness standard for appellate review).

135. 551 U.S. 338 (2007).

136. 552 U.S. 38 (2007).

137. *Id.* at 49.

138. *Id.* at 50.

139. *See id*.

140. *See Gall*, 552 U.S. at 50. In subsequent cases, the Court has made it clear that "variance" is the proper term for the sentencing judge's exercise of her authority to deviate from the advisory Guidelines sentence in the post-*Booker* regime. *See* Irizarry v. United States, 553 U.S. 708, 714 (2008). This is distinct from a "departure," which is the exercise of the sentencing judge's authority *within* the Guidelines (including the pre-*Booker* binding Guidelines regime) to deviate from the applicable Guidelines sentencing range. *See id.*

to use a deferential abuse of discretion standard of review.[141] The appellate court must first review the sentence for procedural error.[142] If there is no procedural error, the appellate court is to consider the substantive reasonableness of the sentence imposed. If the sentence is within the advisory Guidelines range, the court may (but is not required to) apply a presumption of reasonableness.[143] If the sentence varies from the advisory Guidelines range, the appellate court may not apply a presumption of unreasonableness, but instead must give due deference to the district court's use of the Section 3553(a) factors in determining the reasonableness of the nature and extent of the variance.[144]

The takeaway from *Booker*, *Rita*, and *Gall* is that the skeleton of the Guidelines regime survives the *Apprendi/Blakely* Sixth Amendment revolution.[145] The sentencing judge's determination of the Guidelines sentencing range proceeds exactly as it had done under the binding Guidelines system. The fact-finding process of sentencing judges, deemed a Sixth Amendment violation under the binding Guidelines, remains intact in the world of advisory Guidelines. Nevertheless, the sentencing judge's authority to vary from that range is substantially expanded, and the appellate courts' role in policing compliance with the Guidelines is correspondingly reduced. The seriousness with which the *Gall* Court took appellate due deference is demonstrated by the Court's application of the substantive reasonableness review to Gall's case. The Court affirmed the sentencing judge's downward variance despite its acknowledgment that the sentence would not have been a permissible downward departure under the mandatory Guidelines.[146]

3. Acquitted Conduct in the Advisory Guidelines Era

Not surprisingly, defendants on the wrong end of acquitted-conduct-based sentence enhancements were quick to argue that the Sixth Amendment constraints on judicial fact-finding that had torpedoed the binding Guidelines also barred the use of acquitted conduct to enhance their sentences. After all, what could nullify the jury trial right more clearly than such use of acquitted conduct? Unfortunately for these defendants, the advisory nature of the post-

141. *See* Gall v. United States, 552 U.S. 38, 51 (2007).

142. *See id.* The *Gall* Court identified six types of procedural errors: Failure to calculate the advisory Guidelines sentencing range; improper calculation of the advisory Guidelines sentencing range; impermissibly treating the Guidelines as mandatory; failing to consider the § 3553(a) factors; basing the sentence on clearly erroneous facts; and failing to adequately explain the chosen sentence, including an explanation for any deviation from the advisory Guidelines sentencing range. *See id.*

143. *See id.* (citing Rita v. United States, 551 U.S. 338, 347 (2007)).

144. *See supra* note 133 (explaining § 3553(a) provisions); *see also Gall*, 552 U.S. at 51.

145. This feature of *Booker* has troubled many observers. *See, e.g.*, Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 453 (2010) (criticizing Court's opinions in *Booker*, *Rita*, and *Gall*); Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 677-78 (2006) (questioning internal consistency of *Booker* opinion).

146. *See* Gall v. United States, 552 U.S. 38, 58-59 (2007).

Booker Guidelines has frustrated efforts to use the Sixth Amendment to block acquitted conduct.

The Sixth Circuit's approach in *United States v. White* is fairly typical.[147] Defendant White was the getaway driver in a bank robbery, during which White's accomplices held bank tellers at gunpoint and fired a shot near one teller's head.[148] White led police officers on a lengthy high-speed chase during which shots were fired from the car at pursuing officers.[149] A jury found White guilty of two of the six charges filed against him, including armed robbery, but acquitted him of the charges related to the use of firearms in connection with the offense.[150] Nevertheless, the sentencing judge, applying the Guidelines' relevant conduct provisions, imposed enhancements for shots fired in the bank and at pursuing officers, as well as for assaulting an officer during flight from the crime scene.[151]

The Sixth Circuit affirmed White's sentence, characterizing the sentencing judge's reliance on acquitted conduct as permissible under *Booker*. While it acknowledged that the Supreme Court's rejection of a double jeopardy challenge to acquitted conduct in *Watts* did not "close the door" on subsequent Sixth Amendment challenges, the advisory nature of the post-*Booker* Guidelines does.[152] The Sixth Amendment is violated only when judicially determined facts generate a sentence exceeding the maximum sentence legally permitted without those facts.[153] In the world of advisory Guidelines, the top of the advisory Guidelines range is not legally binding, so the maximum, legally-permitted sentence is the statutory maximum sentence that Congress authorized for the offense of conviction.[154] Judicial findings that increase a sentence below the statutory maximum present no *Apprendi* problem. According to *White*, acquitted conduct is just like any other judicially determined fact. As the court noted,

> Neither White nor the dissent offers any explanation why sentences based on acquitted conduct differ for Sixth Amendment purposes from any other sentence driven by judge-found facts but falling within the statutorily defined sentencing range. And they offer no explanation why that claim makes sense post-*Booker*. By freeing a district court to impose a non-guidelines sentence, *Booker* pulled out the thread that holds White's Sixth Amendment claim together.[155]

147. 551 F.3d 381 (6th Cir. 2008) (en banc).
148. *See id.* at 382.
149. *See id.*
150. *See id*.
151. *See White*, 551 F.3d at 381.
152. *Id.* at 384.
153. *See* United States v. White, 551 F.3d 381, 392 (6th Cir. 2008) (en banc).
154. *See id.* at 384-85.
155. *Id.* at 385. The other courts of appeals addressing acquitted conduct under the advisory Guidelines

III. ASSESSING ACQUITTED CONDUCT AS A MATTER OF SENTENCING POLICY

The authority of sentencing judges to rely on acquitted conduct has been a feature of federal sentencing under all three modern federal sentencing regimes. Does this authority reflect sound sentencing policy? Virtually all academic commentators conclude that it does not. The use of acquitted conduct has been characterized as, among other things, "Kafka-esque, repugnant, uniquely malevolent, and pernicious."[156] Others have observed that use of acquitted conduct "makes no sense as a matter of law or logic,"[157] and characterized its use as a "perver[sion] of our system of justice,"[158] as well as "bizarre" and "reminiscent of *Alice in Wonderland*."[159] On the other hand, there must be *some* justification for a principle possessing the staying power of acquitted conduct. The following sections will briefly examine the key arguments for and against the use of acquitted conduct.

A. The Case Against Acquitted Conduct

Critics have identified numerous justifications for abolishing acquitted conduct as a sentencing factor. These arguments fall into several different categories, ranging from concerns about the basic fairness of the sentencing process and concerns about prosecutorial overreach, to ways in which acquitted conduct undermines citizen participation in the sentencing process, and the resulting implications for democratic legitimacy and respect for the law.

1. Acquitted Conduct Undermines the Jury's Role in Determining a Defendant's Eligibility for Punishment

The core critique of acquitted conduct is that it permits prosecutors and sentencing judges to circumvent the jury, effectively negating the jury's role in determining criminal responsibility and resulting eligibility for criminal punishment.[160] This eliminates an important procedural check in the criminal justice system, replacing fact-finding from a jury of the defendant's peers with the decision of a single judge.[161] Use of acquitted conduct undermines the significance of jury-determined legal innocence.[162] As one judge observed:

> As the connection between verdict and punishment erodes, the significance of

have reasoned similarly. *See supra* note 14 (collecting cases).

156. And this is merely in one law review article; in its title. *See* Yalinçak, *supra* note 15.

157. *See* United States v. Pimental, 367 F. Supp. 2d 143, 153 (D. Mass. 2005).

158. *See* United States v. Brady, 928 F.2d 844, 850-52 (9th Cir. 1991).

159. *See* United States v. Frias, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring).

160. *See* Yalinçak, *supra* note 15, at 722 (observing use of acquitted conduct prevents jury from protecting individuals from governmental overreach).

161. *See* Ngov, *supra* note 15, at 292-93 (observing reliance on acquitted conduct increases risk of erroneous punishment).

162. *See id.*

> the jury's verdict is correspondingly diminished. Such attenuation makes it increasingly unlikely that the jury verdict has authorized the ensuing punishment . . . . The jury simply cannot protect a defendant against the overzealous prosecutor or the compliant, biased, or eccentric judge, if those same individuals have the authority to ignore the jury's verdict.[163]

2. Acquitted Conduct Undercuts Verdict Finality

A related, but distinct, concern about acquitted conduct is the way in which it undermines the defendant's interest in verdict finality, giving prosecutors a proverbial second bite at the apple by permitting factors already rejected by the jury to influence the defendant's punishment.[164] This does not violate Double Jeopardy principles because the defendant is being punished for the offense of conviction, not for offense of acquittal; however, it implicates as a policy matter the interests of the defendant in being free from prosecutors' repeated efforts to establish that the defendant was responsible for the sentence-enhancing behavior.[165] This "second bite" problem is particularly troubling because the defendant is offered fewer procedural protections at sentencing than at trial.[166] As a result, "[c]onsideration of acquitted conduct skews the criminal justice system's power differential too much in the prosecution's favor."[167]

3. Acquitted Conduct Undermines Citizen Participation in the Criminal Trial Process and Democratic Legitimacy of the Criminal Justice System

Wholly distinct from concerns about fairness to the defendant, critics of acquitted conduct emphasize the way that it frustrates the role of citizen participation in the criminal justice system, robbing that system of the democratic legitimacy conferred by the jury's role, and diminishing the civic value of juror participation in the criminal justice process.[168] As one commentator put it:

> Judicial consideration of acquitted conduct, however, conveys a message to the jury that the fruit of their service is unimportant. Instead of instilling notions of democratic accountability in the criminal justice system, the message conveyed to jurors is that their fact-finding was trivial. As a policy matter, we should be

163. United States v. Mercado, 474 F.3d 654, 663-64 (9th Cir. 2007) (Fletcher, J., dissenting).

164. *See* Johnson, *supra* note 6, at 181-83.

165. *See* Ngov, *supra* note 15, at 288-89.

166. *See id.* at 288 (highlighting inappropriate tactical advantages prosecutors obtain from use of acquitted conduct). Prosecutors benefit not only from the lower standard of proof at sentencing, but from the absence of procedural protections conferred by the rules of evidence and the defendant's right to confront witnesses. *See id.*

167. *Id.* (quoting United States v. Coleman, 370 F. Supp. 2d 661, 672-73 (S.D. Ohio 2005)).

168. *See* Johnson, *supra* note 6, at 185 (explaining acquitted conduct creates gap between punishment deserved, and sentence received).

> hesitant to encourage any procedure whose likely effect is to diminish the just implementation of the criminal law while simultaneously diminishing the importance of public participation.[169]

4. Acquitted Conduct Risks Diminished Public Confidence in the Criminal Justice System

The use of acquitted conduct to enhance a defendant's sentence seems to strike nearly anyone aware of it as outrageous.[170] The obvious disconnect between the lofty rhetoric of the Due Process Clause and the Sixth Amendment and the gritty reality of heightened punishment despite acquittal could well undermine public faith in the basic fairness of the criminal justice system. As Doerr puts it, "acquitted-conduct sentencing is the very type of deviation from the public's understanding of a defendant's right to a jury trial that could undermine public confidence in the criminal justice system."[171] Moreover, the justifications for acquitted conduct's legality are viewed as, at best, excessively formal and hyper-technical. As Ngov observes, "[t]o 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."[172] In short, many commentators have vigorously urged a fairly persuasive case against the use of acquitted conduct as a matter of policy.

B. The Case for Acquitted Conduct

Advocates for the use of acquitted conduct are hard to find. Appellate courts focus on sentencing judges' power to use acquitted conduct, not the wisdom of doing so. Congress and the Commission offer no policy justification for acquitted conduct because neither entity actually affirmatively embraces it. Rather, acquitted conduct appeared, almost by accident, as a variant of real offense sentencing and an extension of the more palatable idea of unadjudicated conduct.[173]

The academic literature is nearly uniformly critical of acquitted conduct. There is only one published law review article, so far as I am aware, making an affirmative case for its use.[174] It argues that, so long as there is proof by a

169. *See* Bilsborrow, *supra* note 15, at 333.

170. *See supra* notes 152-155 and accompanying text (characterizing use of acquitted conduct as illogical and bizarre).

171. Doerr, *supra* note 15, at 252.

172. Ngov, *supra* note 15, at 284.

173. *See supra* note 85 and accompanying text (noting Court's acceptance of acquitted conduct as outgrowth of broader idea of real-offense sentencing).

174. *See* Joshua M. Webber, Case Note, United States v. Brady*: Should Sentencing Courts Reconsider Disputed Acquitted Conduct for Enhancement Purposes Under the Federal Sentencing Guidelines*, 46 ARK. L. REV. 457, 473 (1993). To be fair, there is at least one other article that, while not arguing affirmatively for the use of acquitted conduct, acknowledges its legitimacy in at least some subset of cases. *See* Gerald Leonard &

preponderance of the evidence that the defendant engaged in the behavior that justifies the sentence enhancement, the sentencing judge should take that behavior into consideration as it has clear probative value.[175] In a sense, depriving the judge of the ability to account for behavior that has actually occurred, risks reducing the "accuracy"[176] of the sentence. Webber explains:

> From a policy standpoint it makes sense to encourage sentencing courts to be cognizant of a defendant's particular circumstances by allowing sentences to be fact-conscious. Common sense tells us that our judicial system should discourage procedures that hide relevant, accurate information from a sentencing court's consideration and cloud the court's perception of the offender and the circumstances surrounding the offense.[177]

Webber's view is partially premised on the different burdens of proof at trial and sentencing. Because the prosecution is required to prove every element of the charged offense beyond a reasonable doubt, the jury's acquittal of the defendant may be based on the failure to satisfy the heightened standard. That is, an acquittal may not necessarily be inconsistent with the view that the defendant "really" engaged in the sentence-enhancing behavior.[178] Assuming, for purposes of argument, that judicial finding of sentencing enhancing facts is more "accurate" than a jury finding of the sentence-enhancing facts.[179] Is the marginal increase in such accuracy sufficient to justify the judicial reliance on acquitted conduct? Surely not. Any marginal "accuracy" achieved through use of acquitted conduct, assuming there is any at all, comes at the expense of the jury's role in determining legal guilt and eligibility for punishment.[180]

IV. ERADICATING ACQUITTED CONDUCT

How can the problem of acquitted conduct best be addressed? There are five

Christine Dieter, *Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing*, 17 BERKELEY J. CRIM. L. 260, 295 (2012) (acknowledging legitimacy of using acquitted conduct when "properly disciplined").

175. *See* Webber, *supra* note 174, at 469-70.

176. By accuracy, I mean the extent to which the severity of the sentence adequately reflects the seriousness of the crime. For example, if the sentencing judge concludes that the defendant brandished a firearm in connection with a bank robbery, an advocate of acquitted conduct would contend that the defendant's sentence should reflect that fact, even if the jury acquitted the defendant on the separate firearm charge.

177. Webber, *supra* note 174, at 471.

178. *See* Doerr, *supra* note 15, at 261 (explaining acquittal not tantamount to jury proclamation of defendant's innocence of alleged behavior).

179. *But see* Ngov, *supra* note 15, at 279-84 (arguing jury fact-finding underlying sentence enhancements more reliable than judicial fact-finding). Juries tend to be more reliable due to factors such as the jury's diversity and the dynamics of group decision-making. *See id.*

180. *See supra* notes 156-169 and accompanying text (noting jury's role in protecting individuals from state).

distinct institutions potentially equipped to ameliorate the acquitted conduct problem, each with its particular advantages and limitations. First, the courts—in particular, the United States Supreme Court—could eliminate acquitted conduct by declaring its use incompatible with the Sixth Amendment.[181] Second, the Commission could amend the Guidelines to prohibit the use of acquitted conduct.[182] Third, Congress could amend the statutory regime governing federal sentencing, eliminating acquitted conduct.[183] Fourth, the Department of Justice could issue prosecutorial guidelines eliminating or discouraging efforts to use acquitted conduct to enhance sentences. Finally, sentencing judges could opt out of the acquitted conduct business by using their discretion under the advisory system to avoid acquitted conduct in sentencing. Let's examine each of these possibilities in turn.

A. The Courts: Abolition of Acquitted Conduct through Constitutional Interpretation

While the Supreme Court has not addressed the constitutionality of judges' use of acquitted conduct under the current advisory Guidelines, the courts of appeals are unanimous in concluding such use is constitutionally permissible.[184] Critics suggest that the courts of appeals have it wrong.[185] While there is some appeal to this view, a careful analysis of the limits of the *Apprendi* cases suggests that, in this instance, the conventional wisdom is likely correct. There is little reason to believe that the Court will declare the use of acquitted conduct constitutionally impermissible any time in the near future.

1. The Case for the Unconstitutionality of Acquitted Conduct, and Its Problems

Advocates claiming that the post-*Booker* use of acquitted conduct is unconstitutional typically start by noting that *Watts* is a Double Jeopardy Clause case that did not address the Sixth Amendment issue central to *Apprendi*. Advocates claim that this leaves the door open to a Sixth Amendment attack on acquitted conduct.[186] This observation is accurate. Justice Stevens acknowledged as much in the merits portion of the Court's opinion in *Booker*, in which he dismissed *Watts* as not bearing on the specific constitutional arguments addressed in that case.[187]

181. This is the approach a number of the academic critics of acquitted conduct favor. *See supra* note 15 (noting claims of Bilsborrow, Doerr, Erlinder, Outlaw, and Yalinçak that use of acquitted conduct is or should be unconstitutional).

182. I argued for this approach in an earlier piece. *See* Johnson, *supra* note 6.

183. *See* Farkish, *supra* note 15, at 121-22.

184. *See supra* note 14 and accompanying text.

185. *See* Bilsborrow, *supra* note 15, at 320-21.

186. *See* Erlinder, *supra* note 15, at 98-103 (stating *Watts* precarious foundation on which to negate Sixth Amendment argument regarding acquitted conduct).

187. *See* United States v. Booker, 543 U.S. 220, 240 (2005) (explaining Sixth Amendment not involved in *Watts*). Justice Stevens noted that in "neither *Witte* nor *Watts* was there any contention that the sentencing

With *Watts* out of the way, acquitted conduct's critics then explore the fundamental tension between use of acquitted conduct and the role of the jury as envisioned in *Apprendi* and its progeny.[188] The *Apprendi* cases envision the jury as a centerpiece of the criminal justice system, operating as the final arbiter of legal guilt, and the final check on the other branches of government.[189] These cases are premised on the notion that the Sixth Amendment right to jury trial requires the jury to determine, beyond a reasonable doubt, the facts that meaningfully increase an offender's sentence. In this view, while any reliance on unadjudicated conduct to enhance an offender's sentence is constitutionally suspect, reliance on acquitted conduct is a particularly egregious affront to Sixth Amendment principles. As Ngov puts it:

> 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" 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.[190]

The gist of the claim is that use of acquitted conduct is so contrary to the purposes and policies of the Sixth Amendment that it cannot possibly be constitutionally permissible after *Apprendi*.[191] The argument that use of acquitted conduct is fundamentally at odds with the role of the jury appears, on its face, unassailable. The problem with the argument is that it ignores the formal doctrinal limits that the United States Supreme Court has placed on the *Apprendi* principle. The entire line of cases is premised on the idea that the Sixth Amendment and Due Process violations occur only when judicial fact-finding enhances an offender's sentence above the *statutory maximum* otherwise applicable without the additional facts found by the judge. *Blakely* extended the definition of "statutory maximum" to encompass the upper end of a *binding* guidelines sentencing range, which is why the Guidelines ran afoul of the *Apprendi* protections according to the *Booker* merits majority.[192] The Court, however, has generally resisted further extension of the *Apprendi*

enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment," and concluded that the issue the Court faced in *Booker* therefore "simply was not presented." *Id.*

188. *See* Ngov, *supra* note 15, at 263 (suggesting use of acquitted conduct contravenes Sixth Amendment and ignores *Apprendi*).

189. *See id.* at 275-78 (stating juries work as check for legislatures, prosecutors, and law enforcement).

190. *See id.* at 263 (citations and internal quotations omitted) (emphasis in original); *see also* Bilsborrow, *supra* note 15, at 322 ("Compared to the sentencing practices struck down in *Apprendi*, *Blakely*, and *Booker*, the consideration of acquitted conduct appears even more egregious.").

191. *See id.*

192. *See supra* notes 117-123 and accompanying text (explaining differences between *Apprendi* and *Blakely* and resulting implications).

protections.[193] Judicial fact-finding may, without violating *Apprendi*, be used to increase an offender's sentence within an applicable sentencing range. Unless the judicially determined sentencing facts breach a "statutory" ceiling, there is no Sixth Amendment problem.

A corollary to this is that the *Apprendi* protections are completely inapplicable to a discretionary sentencing system. Hence, the *Booker* remedial opinion, and its creation of a scheme of advisory Guidelines. The entire *Booker* Court accepted the proposition that *Apprendi*'s requirements are inapplicable to the advisory Guidelines.[194] This view may be rigidly formalist. It may be questionable from a policy perspective. It may have resulted in an end run around the spirit and purpose of the *Apprendi* line of cases. Nevertheless, as a matter of constitutional jurisprudence, it follows that judicial fact-finding, that influences sentencing outcomes within the advisory Guidelines scheme *Booker* created, does not run afoul of *Apprendi*. The appellate courts' unanimous view that nothing in the *Apprendi* line of cases prohibits the use of acquitted conduct in the advisory Guidelines system represents an accurate reflection of the Supreme Court's jurisprudence.

Critics respond that while the post-*Booker* system is nominally advisory, the guidelines calculations continue to exert such a significant effect on sentencing that the post-*Booker* Guidelines should be viewed as effectively binding, bringing *Apprendi*'s Sixth Amendment limitations back into play.[195]

2. "De Facto Mandatory" Guidelines?

Critics condemn the post-*Booker* regime as a wolf in sheep's clothing, a "de facto mandatory" regime that purports to be advisory.[196] Certainly, the Guidelines continue to exert a substantial influence on sentencing after *Booker*. A sentencing judge is required to begin the sentencing process by calculating the applicable Guidelines sentencing range, just as she would have under the binding Guidelines prior to *Booker*.[197] The Guidelines thus are expressly designed to operate as "the starting point and the initial benchmark," for the ultimate determination of each offender's sentence.[198]

In addition, while a sentencing judge is independently required to consider the Section 3553(a) factors in addition to the Guidelines, any sentence representing a variance from the Guidelines requires explanation and is subject

193. *See infra* notes 213-222 and accompanying text (discussing recent Supreme Court cases interpreting *Apprendi* protections narrowly).

194. *See supra* note 129 and accompanying text (noting *Booker* Court's view that judicial fact-finding under advisory Guidelines would comport with Sixth Amendment).

195. *See* Rita v. United States, 551 U.S. 338, 341 (2007) (holding courts of appeals may presume reasonableness of sentence within Guidelines range).

196. *See* Bilsborrow, *supra* note 15, at 330.

197. *See* Gall v. United States, 552 U.S. 38, 43-44 (2007).

198. *Id.* at 49.

to appellate review for reasonableness.[199] In effect, if the sentencing judge fails to articulate an adequate justification for a sentence that falls outside the Guidelines range, the appellate court must reverse that sentence. While considerably less robust than the appellate review of departures under the pre-*Booker* binding Guidelines, the prospect of appellate review of variances raises questions about the "advisory-ness" of the current advisory regime.[200]

Moreover, asymmetries in appellate review of within-Guidelines sentences and sentence variances arguably further tip the balance in favor of within-Guidelines sentencing. Appellate courts are permitted, though not required, to presume the reasonableness of a sentence selected from within the Guidelines sentencing range calculated by the sentencing judge. No such presumption of reasonableness is afforded to sentences that vary from the Guidelines range.[201]

Viewed together, these factors suggest that the current advisory Guidelines regime is not like the pre-Guidelines regime, in which the sentencing judge possessed nearly unfettered discretion. Rather, the current regime may reasonably be characterized as a "hybrid regime"[202] or "coercively advisory."[203] At the very least, the Guidelines continue to exert a substantial gravitational effect on the decision-making of sentencing judges under the advisory Guidelines regime.[204] Rates of within-Guidelines sentences have remained relatively high in the years since *Booker*.[205]

Yet the post-*Booker* regime is substantially less coercive than the critics suggest. While a sentencing judge is required to calculate the Guidelines sentencing range, *Gall* also commands the judge to consider all of the Section 3553(a) factors and to make an "individualized assessment" of the appropriate sentence based on the facts presented.[206] The sentencing judge is expressly prohibited from presuming that the Guidelines sentencing range is

199. *Id.* at 51.

200. *See* Rita v. United States, 551 U.S. 338, 369-70 (2007) (Scalia, J., concurring in part and concurring in the judgment). Justices Scalia and Thomas have argued that a reasonableness review containing any substantive component at all is problematic, because of the possibility that a particular sentence, which would otherwise be unreasonable, could be salvaged only because of the presence of additional, judge-found facts. *See id*.

201. *See Gall*, 552 U.S. at 47 (rejecting "impermissible presumption of unreasonableness for sentences outside the Guidelines range"). Some appellate courts had previously embraced these presumptions. *See id*.

202. Bilsborrow, *supra* note 15, at 330.

203. Ngov, *supra* note 15, at 265.

204. *See* Michael M. O'Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 482 (2009) (noting "the Guidelines exert a special gravitational pull in the sentencing process"); *see also* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 508 (2014). Bennett states the Guidelines have too large an effect on sentencing decisions, due to, among other things, the anchoring effects, which cognitive psychologists Daniel Kahneman and Amos Tversky identified. *See* Bennett, *supra.*

205. *See* Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1238 (2014) (noting rate of sentences imposed outside Guidelines range rose modestly after *Booker*).

206. Gall v. United States, 552 U.S. 38, 49-50 (2007).

reasonable.[207]

Appellate review of variances from the Guidelines, while more robust than the virtually non-existent appellate review of the pre-Guidelines era, remains highly deferential. While there is considerable confusion about the precise nature of reasonableness review, it is clear that sentencing judges retain substantial authority to deviate from the Guidelines for almost any rational reason, even based on the judge's policy disagreement with the content of the Guidelines. The United States Supreme Court has continually reaffirmed this authority. In *Kimbrough v. United States*,[208] for example, the Court affirmed the sentencing judge's decision to impose a substantial downward variance from the advisory Guidelines sentencing range. The Court based its decision on the sentencing judge's conclusion that crack cocaine sentences under the Guidelines were excessively harsh, and would, in Kimbrough's case, have generated a sentence more severe than necessary to achieve the sentencing goals outlined in Section 3553(a). The Court recognized that this latitude of varying from the Guidelines range flowed directly from the advisory nature of the Guidelines,[209] and did not depend on the sentencing judge's finding that there were any characteristics unique to Kimbrough's case that made it an atypical offense.[210] The Court reaffirmed this approach in *Spears v. United States*,[211] emphasizing that "a categorical disagreement with and variance from the Guidelines is not suspect."[212]

The broad authority, after *Booker*, to deviate from the Guidelines is also apparent in *Pepper v. United States*.[213] In *Pepper*, the Court affirmed the authority of a sentencing judge to vary from the Guidelines on the basis of the offender's post-sentencing rehabilitation, a factor the Commission *specifically prohibits* as a basis for departure.[214] In so doing, the Court again emphasized the substantial discretion afforded sentencing judges to vary from the Guidelines, as well as the deference appellate courts owe sentencing judges in reviewing those variances.[215]

In short, it is clear that while a sentencing judge is still required to determine the applicable Guidelines sentence as a starting point, the judge has broad authority to deviate from that sentence, subject only to a very deferential appellate review for "reasonableness" of the resulting sentence. As Professor

207. *See id*.
208. 552 U.S. 85 (2007).
209. *See id*. at 91-92.
210. *See id.* at 100-02.
211. 555 U.S. 261, 262 (2009).
212. *Id.* at 264.
213. 562 U.S. 476 (2011).
214. *See* U.S.S.G, *supra* note 65, § 5K2.19. "Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense." U.S.S.G, *supra* note 65, § 5K2.19.
215. *See Pepper*, 562 U.S. at 489-90.

Frank Bowman so colorfully put it:

> In practical fact, district court judges are now at liberty to adhere to or to ignore guideline ranges as the spirit moves them, subject only to the requirement that a sentence outside the range be accompanied by some explanation which (a) is couched in the gloriously inclusive terminology of 18 U.S.C. §3553(a), and (b) is not on its face barking mad.[216]

Bowman observes that analysis of recent Commission data shows that the number of cases in which a sentence was reversed as substantively unreasonable is vanishingly small, amounting to only about eight cases a year since the United States Supreme Court's opinion in *Gall*.[217]

Given sentencing judges' wide latitude to vary from the Guidelines, characterizing the existing Guidelines regime as "de facto mandatory" distorts the meaning of that phrase beyond recognition. While the Guidelines are a factor in the sentencing calculus, the Guidelines would appear to be sufficiently advisory to avoid running afoul of *Apprendi*.

3. The Supreme Court's Recent Analyses of the "Bindingness" of the Guidelines: Peugh v. United States *and* Jones v. United States

Two fairly recent developments in the Unites States Supreme Court reinforce the view that the current Guidelines are truly advisory for Sixth Amendment purposes. First, in 2013, the Court decided *Peugh v. United States*,[218] which held that use of new Guidelines, becoming effective only after the defendant's crime was committed, violated the Constitution's Ex Post Facto Clause. In *Peugh*, the version of the Guidelines in effect at the time of the defendant's crime would have produced a lower advisory sentence.[219] The Court rejected the Government's argument that the advisory nature of the Guidelines meant that they had insufficient legal effect to trigger the Ex Post Facto Clause. In observing that the Guidelines retained some degree of legal "force as the framework for sentencing," the Court emphasized many of the key characteristics of bindingness noted above.[220] The Court also expressly acknowledged that the Guidelines "will anchor both the district court's discretion and the appellate review process," in a variety of ways.[221]

216. Bowman, *Dead Law Walking*, *supra* note 205, at 1238 fig.3 (internal citations omitted).

217. *See id*. at 1232 n.23.

218. 133 S. Ct. 2072 (2013).

219. *See id*. at 2078-79. The sentencing judge used the 2009 version of the Guidelines in effect at the time of Peugh's sentencing to determine the advisory Guidelines sentencing range, rather than the 1998 version in effect at the time of Peugh's illegal conduct. *See id.* The 2009 Guidelines were considerably harsher than the 1998 version, which was applied to Peugh's conduct. *See id*. at 2079. The low end of the 2009 range was 33 months higher than the high end of the 1998 range. *See id*.

220. *Id.* at 2087-88.

221. *Id.* at 2087.

The fact that the advisory Guidelines carry sufficient force to trigger an Ex Post Facto violation seems to support the claims of critics who argue that the Guidelines are "de facto mandatory." The *Peugh* Court, however, expressly rejected the claim that its analysis applied to the Sixth Amendment analysis of *Apprendi*. The Court explained:

> But the Sixth Amendment and *Ex Post Facto* Clause inquiries are analytically distinct. Our Sixth Amendment cases have focused on when a given finding of fact is required to make a defendant legally eligible for a more severe penalty. Our *ex post facto* cases, in contrast, have focused on whether a change in law represents a significant risk of a higher sentence; here whether a sentence in conformity with the new Guidelines is substantially likely. The *Booker* remedy was designed, and has been subsequently calibrated, to exploit precisely this distinction: it is intended to promote sentencing uniformity while avoiding a Sixth Amendment violation.[222]

This language dashes any hope that the Court is prepared to rethink the notion that the advisory Guidelines are, for Sixth Amendment purposes, really advisory.

The other important recent development involved what the Court did not do in *United States v. Jones.*[223] In October 2014, the Court denied a petition for a writ of certiorari in *Jones*, avoiding the opportunity to address the constitutional validity of acquitted conduct under the advisory Guidelines.[224] In so doing, the Court left standing the D.C. Circuit's ruling rejecting the defendants' claim that the sentencing judge's reliance on acquitted conduct violated the Sixth Amendment. Of course, the Court's certiorari denial has no precedential effect.[225] But it is yet another indication that the Court is not exactly eager to declare acquitted conduct unconstitutional.[226]

In short, there is some appeal to the view that use of acquitted conduct under the advisory Guidelines cannot possibly be permissible under the Sixth Amendment, given the logic of *Apprendi* and its progeny. The Court appears

222. *Peugh*, 133 S. Ct. at 2088.

223. 744 F.3d 1362 (D.C. Cir. 2013), *cert. denied*, 135 S. Ct. 8 (2014).

224. *See* Brief of Law Professor as Amicus Curiae in Support of Petitioners at I, Jones v. United States, 744 F.3d 1362 (D.C. Cir. 2013), *cert. denied*, 135 S. Ct. 8 (2014) (No. 13-10026), 2014 WL 2940844. The question presented was whether "the petitioners' Sixth Amendment jury trial rights [were] violated when a judge significantly aggravated the calculated Guideline sentencing range based on alleged offense 'facts' expressly rejected by the people through the jury verdicts of not guilty . . . ." *Id.*

225. *See* Maryland v. Balt. Radio Show, 338 U.S. 912, 919 (1950) (explaining denial of certiorari has no bearing on merits of case).

226. *But see* Outlaw, *supra* note 15, at 194. Outlaw presented a more optimistic take on *Jones*, emphasizing Justice Scalia's dissent from the denial of certiorari in that case, and speculating that there may be as many as four votes among the Court's current membership for ending acquitted conduct sentencing. *See id*. Of course he also acknowledged such "speculation must be tempered by the reality of the vote to deny review in the *Jones* case." *Id*.

willing, however, to adhere to the formalism of the "binding" upper limit requirement.[227] Critics' claims that acquitted conduct violates *Apprendi* are contrary to the character of the post-*Booker* cases, and would require overruling precedents that the Court has been careful not to disturb. Of course, the Court could always change direction. It has surprised observers of the federal sentencing scene before.[228] For now, however, reliance on acquitted conduct in crafting of sentences under the advisory Guidelines is constitutionally permissible. It is wishful thinking to claim otherwise.

B. The Sentencing Commission: Amending the Guidelines

If courts seem disinclined to offer relief from acquitted conduct by reinterpreting applicable constitutional limitations to bar its use, the Commission would seem to be a logical alternative. Congress gave the Commission the task of monitoring and amending the Guidelines, a task it undertakes on an annual basis.[229] The Commission could simply amend the Guidelines to prohibit sentencing judges from using acquitted conduct.[230] Or can it? There are two potential barriers to the Commission's power to fix the acquitted conduct problem. First, there is Justice Scalia's claim that Congress has, by statute, effectively barred the Commission from restricting sentencing judges' authority to rely on acquitted conduct. This turns out not to be an impediment to Commission action. There is, however, a second, more serious problem: namely that the logic of the advisory Guidelines reduces the potential effectiveness of Commission restrictions on acquitted conduct.

1. Section 3661 as Statutory Impediment to the Commission's Elimination of Acquitted Conduct?

When the Supreme Court ruled in *United States v. Watts* that sentencing judges retained their traditional authority to use acquitted conduct to enhance Guidelines sentences, Justice Breyer filed a separate concurring opinion. Breyer observed that the Commission remained free to amend the Guidelines to

227. *See* Bowman, *Debacle*, *supra* note 145, at 468-69. Bowman notes that because the post-*Booker* Guidelines are formally advisory, "the constitutional argument for heightened due process rights for determination of the Guidelines facts that continue to drive federal sentencing outcomes is deeply compromised, if not completely demolished." *Id*. at 468.

228. *See* Bowman, *Train Wreck?*, *supra* note 115, at 218-19 (discussing shock at holding in *Blakely*); Amber K. Rutledge, Note, *Plain Error? The Supreme Court's Refusal To Resolve the Circuit Split in* Booker *Pipeline Appeals and the Resulting "Geographic Crazyquilt,"* 55 DRAKE L. REV. 233, 239 (2006) (noting surprise at *Booker* decision given how soon after *Blakely* it was decided).

229. *See* 28 U.S.C. § 994(o) (2006) (noting Commissions responsibilities). "The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." *Id.*; *see also* 28 U.S.C. § 994(p) (2006) (describing Guidelines amendment cycle).

230. *See* Johnson, *supra* note 6, at 189-91 (elucidating proposal to amend Guidelines to prohibit use of acquitted conduct).

restrict the use of acquitted conduct.[231]

Justice Scalia also issued a concurring opinion expressly rejecting Justice Breyer's view of the Commission's authority.[232] Justice Scalia argued that 18 U.S.C. § 3661 flatly prohibited either the courts or the Commission from restricting the use of acquitted conduct at sentencing.[233] That statute provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct on 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."[234] Justice Scalia's literal interpretation of the Section 3661 "no limitation" language would render the Commission powerless to restrict sentencing judges' use of acquitted conduct at sentencing.[235] However, this interpretation of Section 3661 was flatly wrong.

Justice Scalia's analysis of Section 3661 was cursory, consisting exclusively of the statutory language quoted in the previous paragraph, followed by the conclusion that the statute prevents the Commission from restricting the use of acquitted conduct.[236] In keeping with his reputation as a textualist,[237] Justice Scalia's apparent rationale was that the "no limitation" language should be read literally.[238] He further observed that a Commission rule restricting sentencing judges from using acquitted conduct would constitute a prohibited limitation on information available to sentencing judges. On its surface, this is arguably a plausible, though simplistic, interpretation of Section 3661's text. A closer look at that statute in the context of the Sentencing Reform Act as a whole, however, suggests it cannot possibly mean what Justice Scalia said it did.

Taken literally, the provision's "no limitation" language negates the entire Guidelines enterprise. The Guidelines limit the information the sentencing judge considers in various ways. Specifically, they prescribe the factors used in

231. *See* United States v. Watts, 519 U.S. 148, 158 (1997) (Breyer, J., concurring).

> I join the Court's per curiam opinion while noting that it poses no obstacle to the Sentencing Commission itself deciding whether or not to enhance a sentence on the basis of conduct that a sentencing judge concludes did take place, but in respect to which a jury acquitted the defendant.

Id.

232. *Id*. at 158 (Scalia, J., concurring).

233. *Id.* "[N]either the Commission nor the courts have authority to decree that information which would otherwise justify enhancement of sentence or upward departure from the Guidelines may not be considered for that purpose . . . ." *Id*.

234. 18 U.S.C. § 3661 (2012).

235. *See* Farkish, *supra* note 15, at 121-22 (arguing Congress should amend § 3661 to prohibit use of acquitted conduct at sentencing).

236. United States v. Watts, 519 U.S. 148, 158 (1997). Justice Scalia's entire concurring opinion contained only five sentences. *See id.* It is fair to say that his interpretation of the effects of Section 3661 was hardly systematic and comprehensive.

237. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 30 (2006) (characterizing Justices Scalia and Thomas as "only self-identified textualists on the Supreme Court").

238. *See id*. at 29 ; *see also Watts*, 519 U.S. at 158.

calculating the Guidelines sentencing range and give precise weight to these factors. Indeed, the perceived rigidity of the Guidelines, together with the corresponding restriction on judicial sentencing discretion, were focal points of the criticism of the mandatory Guidelines.[239] If Section 3661 did in fact provide a general override of the Guidelines, by permitting judges to depart from the Guidelines for whatever reason(s) the judge thought appropriate,[240] one would think that someone would take notice.[241]

Although sentencing judges had some limited authority to depart from the Guidelines during the era of binding Guidelines, the statute and Guidelines themselves severely restricted this ability.[242] Many potential departure factors were completely off limits. Pursuant to Congressional directives, the Guidelines flatly prohibited sentencing judges from taking into account characteristics of the offender such as race, sex, national origin, creed, religion, and socio-economic status.[243] The Commission also prohibited sentencing judges from departing from the Guidelines on the basis of the offender's lack of guidance as a youth.[244] The Commission also severely restricted sentencing judges' authority to take into account other individual offender characteristics that had traditionally been used in the pre-Guidelines era, such as the offender's age, education, vocational skills, mental and emotional condition, physical condition (including drug or alcohol dependence or abuse), employment record, family ties and responsibilities, military or civic service, charitable work, or public service activities.[245]

The Sentencing Reform Act and the Guidelines restricted the information sentencing judges could use in other ways as well. For example, the substantial assistance provisions of Section 5K1.1 required a government motion to depart downwardly because the defendant assisted authorities in the investigating and

239. *See* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 941, 945 (1991).

240. Because, after all, no limitation could be placed on the information to be received and considered for purposes of sentencing.

241. Indeed, to be fair, someone did. The Commission itself addressed the Section 3661 language in Section 1B1.4, which sought to harmonize the language of Section 3661 with the Guidelines project by acknowledging that the statute preserves the traditional discretion of the sentencing judge in determining what sentence to impose, within the Guidelines range, and in evaluating whether departure from the range would be appropriate. *See* United States v. Fairman, 947 F.2d 1479, 1482 (11th Cir. 1991) (rejecting defendant's claim that Guidelines provision disallowing consideration of emotional condition in determining sentence under Guidelines violates § 3661).

242. *See* 18 U.S.C. § 3553(b) (2012) (requiring sentencing judges impose sentence within Guidelines range, except in limited circumstances); U.S.S.G., *supra* note 65, § 5K2.0 (operationalizing § 3553(b) by restricting departures for limited circumstances).

243. *See* U.S.S.G., *supra* note 65, § 5H1.10.

244. *See id.* § 5H1.12.

245. *See* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 283-85 (2005) (noting Commission's restrictive approach to relevance of such individual offender characteristics in Guidelines sentencing).

prosecuting of others.[246] A sentencing judge was prohibited from departing from the Guidelines without a government motion, even if the judge believed strongly that the defendant provided departure-worthy information. This obvious restriction on the information that a sentencing judge "may receive and consider" was a source of bitter complaint as a policy matter,[247] but the Commission's authority to require a government motion was without question.[248]

In short, Justice Scalia's interpretation of Section 3661 in *Watts* would have created an absurd conflict with key provisions of the Sentencing Reform Act, and the resulting Guidelines.[249] Having addressed analogous statutory interpretation issues in other cases, Justice Scalia should have been more attuned to the structural disconnect his interpretation would have generated.[250] Perhaps the sloppiness of Justice Scalia's interpretation of Section 3661 was a

246. *See* U.S.S.G., *supra* note 65, § 5K1.1. The government motion requirement parallels similar requirements imposed by Congress for substantial, assistance-based deviations from otherwise applicable mandatory minimum sentences contained in 18 U.S.C.A § 3553(e) (2012). *See also* Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 13-16 (1999).

247. *See* Avern Cohn, *The Unfairness of "Substantial Assistance*," 78 JUDICATURE 186, 186 (1995) (criticizing government motion requirement for substantial assistance departure); Cynthia K.Y. Lee, *The Sentencing Court's Discretion To Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal To Eliminate the Government Motion Requirement*, 23 IND. L. REV. 681, 696 (1990) (same).

248. *See* Wade v. United States, 504 U.S. 181, 186 (1992) (explaining prosecutor's decision not to file motion seeking substantial assistance departure not reviewable by court, unless defendant makes "substantial threshold showing" decision based upon unconstitutional motive). Defendant is required to make "substantial threshold showing" that the decision was based upon an unconstitutional motive for a district court to be able to review the lack of motion. *See id*.

249. *See* Linda D. Jellum, *Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917, 921 (2011). The absurdity doctrine is a canon of statutory construction that instructs judges to avoid interpreting a statute in such a way as to generate absurd outcomes. *See id*. A classic application of the absurdity canon is found in *Holy Trinity Church v. United States*, in which the Court held a provision of the Alien Contract Labor Act inapplicable to a situation in which defendant contracted with a pastor in England to immigrate to the U.S. in order to serve as a pastor in its church. 143 U.S. 457 (1892). Even though the plain meaning of the statutory language, which extended to "labor . . . of any kind," was conceivably broad enough to encompass the defendant's situation, the Court found the literal interpretation of that language absurd, in light of the evident purposes of the provision. *See Holy Trinity Church*, 143 U.S. at 458-59. The Court has relied on the absurdity canon in more recent cases as well. *See* Jellum, *supra*, at 926 n.59 (collecting cases). Lower federal courts and state courts have also recently used this doctrine. *See id.* at 927 nn. 63-64 (highlighting lower federal and state court cases involving absurdity canon).

250. *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 409 (1999) (noting implausibility of broad interpretation of statute). In *Sun-Diamond*, the Court interpreted the federal illegal gratuities statute to require the prosecution to prove a nexus between the thing of value conferred upon the public official and some specific official act by that official. *See id*. Writing for the Court's majority, Justice Scalia rejected the government's argument that the unauthorized compensation given to the public official need not be linked to any act by that official, in part because such an interpretation would have been inconsistent with "[the] intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." *Id*. at 409. In addition, Justice Scalia has applied the absurdity canon, in one way or another, in a number of cases. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419 nn.122-23 (2003) (collecting cases in which Scalia has utilized absurdity canon); Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1011 (2011) (exploring how Justice Scalia approves of and utilizes absurdity canon).

function of the procedural posture of *Watts*; recall that the Court summarily reversed the Ninth Circuit, eschewing the opportunity for full briefing and oral arguments.[251] Or, perhaps not. The problems with Justice Scalia's interpretation of Section 3661 are strikingly similar to issues raised in the 2015 Term's highest-profile case, *King v. Burwell*.[252]

In *Burwell*, the United States Supreme Court had to determine whether certain subsidies for purchasers of health plans were available solely through state-established exchanges, or whether they were also available to consumers using federally facilitated exchanges. Plaintiffs argued that the plain language of the statute allowed subsidies to be paid only "through 'an Exchange established by the State,'" thus excluding the federally established exchanges.[253] Justice Scalia, joined by Justices Thomas and Alito, embraced the plaintiffs' literal interpretation of this language in a vigorous dissent.[254] By a six-to-three margin, the Court rejected Scalia's interpretation of the statute, holding that consumers using the federal exchange would be eligible for the subsidies.

The majority's central premise in *Burwell* was that statutory interpretation must avoid the blinkered literalism that the dissenters embraced. Rather, the meaning of the statutory language must be read in context, to best determine its meaning in light of the whole statutory scheme.[255] With this in mind, the Court concluded that the dissenters' interpretation of the "established by the state" language was fundamentally inconsistent with the central purposes of the Affordable Care Act. It concluded:

> In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—"to say what the law is." That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan. Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.[256]

In effect, the majority repudiated Justice Scalia's wooden literalism, embracing the view that statutory interpretation requires evaluation of the relevant language in the context of the broader structure of relevant statutory

251. *See Watts*, 519 U.S. at 170-71 (Kennedy, J., dissenting).

252. 135 S. Ct. 2480 (2015) (highlighting similar issues).

253. *See id*. at 2487-88 (internal citation omitted) (stating issue before Court).

254. *See id.* at 2496 (Scalia, J., dissenting) (criticizing Court's interpretation of statutory language).

255. *See id.* at 2492 (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2441 (2014)). The "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.*

256. *See King*, 135 S. Ct. at 2495-96 (internal citations omitted).

provisions. Justice Scalia's interpretation of Section 3661 involved the same flawed literalism and deserves the same repudiation.

Justice Breyer was right. At the time the Court decided *Watts*, Section 3661 posed no threat to the Commission's authority to determine the content of the Guidelines, including whether sentencing courts could use acquitted conduct. As we shall see in the next section, however, the scope of the Commission's authority to restrict use of acquitted conduct is considerably murkier under the regime of advisory Guidelines.

2. The Commission's Limited Authority To Eliminate Acquitted Conduct in the World of Advisory Guidelines

In *Pepper v. United States*,[257] the Court held that a sentencing judge may consider evidence of the defendant's post sentencing rehabilitation to support a downward variance from the advisory Guidelines sentencing range.[258] *Pepper* casts some doubt on the scope of the Commission's authority to restrict use of acquitted conduct in the existing advisory Guidelines regime. Of particular note is the fact that Section 5K2.19 states that post-sentencing rehabilitation is not an appropriate basis for a downward departure under the Guidelines.[259] That is, the Commission specifically and categorically barred sentencing judges from relying on post-sentencing rehabilitation to sentence below the otherwise applicable Guidelines range.[260] Under the old, binding Guidelines, the defendant's below-Guidelines sentence would have been reversed. However, the *Pepper* Court, citing Section 3661, as well as its prior opinion in *Kimbrough*, held that the Eighth Circuit erred in prohibiting the sentencing judge from justifying the defendant's below-Guidelines sentence on that ground.[261] The Court noted that, despite the Commission's "clear and unequivocal" prohibition on consideration of this factor, its "post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views."[262]

This suggests that the Commission's ability to restrict sentencing judges' use of information in sentencing is substantially diminished under the advisory regime. Sentencing judges are required still to calculate the Guidelines sentencing range as a first step in determining the appropriate sentence.[263] Therefore, if the analysis of Section 3661 in the previous section is correct, the

257. 562 U.S. 476 (2011).

258. *See id.* at 504-05.

259. *See* U.S.S.G., *supra* note 65, § 5K2.19.

260. *See Pepper*, 562 U.S. at 501.

261. *See id.* at 504.

262. *See* Pepper v. United States, 562 U.S. 476, 501 (2011).

263. *See supra* note 140 and accompanying text (noting *Rita* and *Gall* held Guidelines should be used as initial benchmark in sentencing).

Commission still possesses the authority to prevent judges from using acquitted conduct to calculate the Guidelines sentence. This would have prevented the uses of acquitted conduct in cases like *Jones*,[264] or *Watts*,[265] in which acquitted conduct was used to enhance the offense level used to calculate the offenders' sentences. Nevertheless, *Pepper* suggests that a sentencing judge may in the face of the Commission's prohibition of use of acquitted conduct, vary upwardly from the Guidelines on the basis of such conduct, so long as the variance is justified in light of relevant Section 3553(a) factors.[266]

In short, in 2004 the Commission would have been well-situated to abolish sentencing judges' use of acquitted conduct to increase offenders' sentences. However, the broader authority granted to individual sentencing judges under the advisory Guidelines regime suggests that the Commission can no longer comprehensively ban use of acquitted conduct. It can eliminate use of acquitted conduct in calculating the advisory Guidelines sentencing range, but it cannot prevent judges from varying upwardly on the basis of facts underlying counts on which the defendant is acquitted. Commission action to take acquitted conduct out of the Guidelines is still a good idea. But in the wake of *Booker*, it is not a complete solution.

C. The Legislative Solution: Eliminating Acquitted Conduct by Statute

Congress could address the problem of acquitted conduct in federal sentencing by legislating it out of existence. This is the approach Farkish recommends.[267] This approach has the virtue of clarity and comprehensiveness. In contrast to the Commission, Congress unquestionably possesses the authority to comprehensively prohibit any use of acquitted conduct, even in an advisory guidelines system. Nevertheless, there are some concerns with this approach as well: First, is there any serious prospect of congressional action? Second, do we really want Congress meddling with the mechanics of federal sentencing?

There are reasons to doubt that Congress is a realistic source of action on the issue of acquitted conduct. In recent years, Congress has been dysfunctional,

264. *See supra* notes 1-3 and accompanying text (offering example of how acquitted conduct can significantly change defendant's sentencing range).

265. *See supra* note 4 and accompanying text (highlighting case of *United State v. Watts*).

266. *Cf. supra* notes 1-3 and accompanying text. In a case like *Jones*, a Commission ban on use of acquitted conduct would prevent the sentencing judge from taking into account the drug quantities involved in the conspiracies in calculating the defendant's advisory Guidelines sentencing range. *See Gall*, 552 U.S. at 51 (explaining sentencing judge's incorrect calculation of advisory Guidelines sentencing range reversible error). Jones's suggested sentence would have been in the 63-71 month range, rather than the 324-405 month range. *See supra* notes 1-3 and accompanying text. But the sentencing judge still would have the authority to vary upwardly from the 63-71 month range, for any reason consistent with the broad Section 3553(a) factors. *See supra* notes 257-262 (discussing implications of Court's decision in *Pepper* for Commission's authority to restrict advisory Guidelines variances).

267. *See* Farkish, *supra* note 15, at 121-22 (recommending Congress amend § 3661 to prohibit sentencing courts from relying on acquitted conduct).

paralyzed by ideological extremism and partisan gamesmanship.[268] Moreover, with major battles looming over budget issues, taxes, and health care, minor criminal justice reform is unlikely a priority.[269] On the other hand, Congress has managed some targeted, sensible criminal justice reform in the recent past,[270] so the prospects are not utterly hopeless. Still, reform advocates should be concerned that Congress lacks the will to address the acquitted conduct problem.

Even if Congress decided to address acquitted conduct, it is not clear that the reforms would be limited to excising acquitted conduct, or that the net result would be viewed favorably by the reformers. In matters of criminal law and criminal justice, the tendency of Congress—and of legislatures in general—has long been to impose increasingly harsh and rigid regimes.[271] Who knows what a bill to address acquitted conduct could morph into? As Frank Bowman observed, the contours of congressional reform of sentencing are unpredictable, and the politics unfavorable for defendant-friendly sentencing reforms.[272]

D. The Executive Solution: Eliminating Acquitted Conduct Through Justice Department Policy

The Department of Justice (DOJ) may offer another possible solution to the problem of acquitted conduct. The DOJ could issue internal guidelines to federal prosecutors prohibiting them from seeking sentence enhancement on the basis of acquitted conduct. Internal guidelines of this sort, usually found in

268. *See* Ezra Klein, *14 Reasons Why This Is the Worst Congress Ever*, WASH. POST WONKBLOG (July 13, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/ [http://perma.cc/SNK8-BDMF]; Sophia Tesfaye, *GOP's Broken Promises: Gridlock & Dysfunction Still Rule the Day Despite Congressional Control*, SALON (Aug. 3, 2015, 12:47 PM), http://www.salon.com/2015/08/03/gops_broken_promises_gridlock_dysfunction_still_rule_the_day_despite_congressional_control/ [http://perma.cc/ZJD5-TMZT].

269. *See* Doerr, *supra* note 15, at 272 ("Despite Congress' broad authority, it is unlikely that acquitted-conduct sentencing reform will be a priority for any Congress."); *see also* Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-*Booker *Federal Sentencing System*, 24 FED. SENT'G REP. 356, 366 (2012) (observing "no political impetus now exists to change to post-*Booker* advisory system in any significant way.").

270. *See* Kyle Graham, *Sorry Seems To Be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 790-93 (2011). Graham describes the adoption of the Fair Sentencing Act of 2010, which reduced the disparity between crack cocaine and powder cocaine mandatory minimum sentencing in the federal system. *See id*.

271. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529-33 (2001) (noting legislative incentives to increase odds of conviction and severity of criminal punishments); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 242-52 (2004) (describing legislative motivation to restrict judicial discretion and increase punishment severity during binding Guidelines era).

272. *See* Bowman, *Train Wreck?*, *supra* note 115, at 260-62. Bowman observes that "the political elements of the Justice Department have formed an alliance with the more conservative elements of Congress to impose ever-longer sentences and accrue ever more sentencing authority to the prosecution at the expense of the judiciary." *Id*. at 261. Of course the politics and the personnel have changed somewhat, especially in the Department of Justice, since Bowman's article was published. And his fears of extremely rigid and/or harsh legislative revisions of sentence law have not yet come to pass.

the United States Attorney's Manual, provide comprehensive guidance to federal prosecutors on a variety of matters, ranging from charging to sentencing.[273]

A DOJ prohibition on the use of acquitted conduct would have the advantage of being comprehensive. For example, the DOJ could, in theory, bar prosecutors from using acquitted conduct both in determining the Guidelines sentencing range, and as a basis for seeking upward variance from that range. In that sense, the DOJ has broader authority than does the Commission to restrict use of acquitted conduct.[274]

On the other hand, there have been numerous instances of federal prosecutors violating DOJ guidelines,[275] including charging guidelines.[276] While such violation can, theoretically, result in internal discipline, the existence of these violations calls into question how effectively the DOJ can constrain the actions of prosecutors. Moreover, such directives are not only judicially unenforceable, they are reversible. Changes in Presidential administrations bring changes at the DOJ, which can, in turn, result in reversal of previous departmental directives.

E. Sentencing Judges: The "Just Say No" Approach

Finally, sentencing judges may be a source of relief from acquitted conduct. The Guidelines theoretically require sentencing judges to take into account acquitted conduct demonstrated by a preponderance of the evidence in calculating the advisory guidelines sentencing range.[277] Yet, sentencing judges appear to be free to vary downwardly, given the discretion granted to them in the post-*Booker* regime.[278] The same characteristics of the advisory regime that prevent the Commission from *prohibiting* judges from using acquitted conduct to enhance sentences, also prevent the Guidelines from requiring judges to impose the enhanced sentence that the offender's acquitted conduct

273. *See* Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice*," 13 CORNELL J. L. & PUB. POL'Y 167, 170-72 (2004) (discussing DOJ guidelines and applicability to variety of areas).

274. *See supra* notes 257-262 and accompanying text (discussing limits on Commission's authority to bar acquitted conduct in advisory Guidelines sentences).

275. *See* Podgor, *supra* note 273, at 176.

276. *See* Dennis E. Curtis, *Congressional Powers and Federal Judicial Burdens*, 46 HASTINGS L.J. 1019, 1027 (1995) (noting lack of enforceability of DOJ charging regulations); Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1207-08 (1977) (noting DOJ directive to U.S. Attorney's Offices often not scrupulously honored).

277. *See* United States v. Watts, 519 U.S. 148, 153-54 (1997) (explaining Guidelines' relevant conduct provisions direct sentencing courts to consider acquitted conduct); *see also* Ngov, *supra* note 15, at 243.

278. This is the mechanism to address the problem of acquitted conduct urged by Professor Ngov. *See* Ngov, *supra* note 15, at 243. "This Article, therefore, proposes that federal courts should use the judicial discretion afforded by *Booker*, *Gall v. United States*, and *Kimbrough v. United States* to evaluate the purposes of sentencing and should reject the use of acquitted conduct." *Id.*

might have required under the old mandatory Guidelines regime.[279] Individual sentencing judges thus appear free to ignore, or to offset, the effects of acquitted conduct.

The problem is that the very discretion available to sentencing judges prevents this from being a comprehensive reform. In the absence of legally binding constraints, judges are as free to reject exhortations to eliminate use of acquitted conduct as they are to follow them. At best, this approach represents merely a partial solution. At worst, it represents a possible continuing source of sentencing disparity, as the role of acquitted conduct would depend on the whims of the individual sentencing judge.[280]

V. CONCLUSION

Acquitted conduct has been a feature of the federal sentencing landscape for decades. An artifact of the unlimited discretion of sentencing judges in the pre-Guidelines era, it has managed to survive the dramatically altered sentencing landscapes of binding Guidelines and, now, advisory Guidelines. Despite the fact that there is a consensus that use of acquitted conduct is questionable sentencing policy, and in tension with the purposes underlying the Sixth Amendment right to a jury trial, use of acquitted conduct has continued.

Given the current state of the Supreme Court's Sixth Amendment jurisprudence, a direct, constitutional attack on acquitted conduct appears doomed to failure. Nevertheless, there is an opportunity for the Commission, Congress, the Department of Justice, and sentencing judges to take steps to restrict, if not to eliminate, use of acquitted conduct. It is imperative that each of these institutional actors consider its potential role in acquitted conduct reform.

279. Of course, a judge disinclined to use acquitted conduct to enhance a sentence is (and would have been, even under the mandatory Guidelines) free to simply decline to find that the prosecution had failed to establish by a preponderance of evidence the relevant facts underlying the offender's purported conduct. Such refusal to impose an acquitted-conduct-enhanced sentence would effectively be insulated from appellate review by the deferential appellate review standards applicable to judicial fact-finding. *See, e.g.*, Koon v. United States, 518 U.S. 81, 98 (1996) (imposing deferential abuse of discretion standard of review due in part to institutional advantages district courts possess in making "refined assessment of the many facts bearing on the outcome" of sentencing).

280. *See* Outlaw, *supra* note 15, at 180. "Not all judges engage in acquitted conduct sentencing, and the judges that do engage in the practice, do not do so in a uniform manner." *Id.*