NOTES

SENTENCING ACQUITTED CONDUCT TO THE POST-*BOOKER* DUSTBIN

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INTRODUCTION

Robert Mercado was an alleged member of the Mexican mafia operating in Los Angeles.[1] He was charged, tried by a jury, and subsequently convicted on various counts of drug conspiracy.[2] Based upon his drug convictions, the federal Sentencing Guidelines ("Guidelines") recommended a punishment of thirty to thirty-seven months' imprisonment.[3] Additionally, Mercado was charged and acquitted of several violent offenses, including participation in three murders, commission of violent crimes in the aid of racketeering, and assault with a deadly weapon.[4] At Mercado's sentencing, however, the district judge set aside the jury's acquittals with respect to the violent crimes, finding "beyond a reasonable doubt that [Mercado] had participated in the murders and conspiracies to murder of which [he] had been acquitted."[5] As a result of the judge's singular sentencing determination, Mercado received a twenty-year sentence, increasing the punishment recommended by the Guidelines—and the jury verdict—by over seventeen years.[6]

Although the sentencing determination in Mercado's case may strike many nonlawyers as confusing,[7] or as some judges have characterized it, "Kafka-esque,"[8] the practice is not unusual.[9] In

1. *See* United States v. Mercado, 474 F.3d 654, 655 (9th Cir. 2007).
2. *Id.*
3. *Id.* at 659 (Fletcher, J., dissenting).
4. *See id.* at 658-59.
5. *Id.* at 659.
6. *Id.*
7. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1714 (1992) (noting that most "ordinary citizens ... are astonished to learn that a person in this society may be sentenced to prison on the basis of conduct of which a jury has acquitted him...").
8. United States v. Ibanga, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) ("Sentencing a defendant to time in prison for a crime that the jury found he did not commit is a Kafka-esque result."). The district judge in *Ibanga*, Walter D. Kelley, went on to compare consideration of acquitted conduct to the fictional use of "non-final 'acquittals'" in Kafka's *The Trial*, which permitted an accused to be acquitted but allowed him to potentially be re-arrested at a later time for the same offense. *Id.* at 536 n.2.
9. Recent cases in which a district judge has considered conduct for which a jury has acquitted the defendant are numerous. *See, e.g.*, United States v. Campbell, 491 F.3d 1306 (11th Cir. 2007); United States v. Horne, 474 F.3d 1004 (7th Cir. 2007); United States v. Dorcely, 454 F.3d 366 (D.C. Cir. 2006); United States v. High Elk, 442 F.3d 622 (8th Cir.

fact, judges have long considered acquitted conduct—defined in this Note as conduct for which an offender has been charged and found not guilty by a jury—when fashioning a defendant's sentence.[10] Furthermore, the Supreme Court specifically sanctioned the practice in 1997 in *United States v. Watts*.[11] Arguably, the *Watts* ruling was consistent with over fifty years of sentencing jurisprudence, in which the Court repeatedly declined to extend the trial phase's procedural protections to sentencing,[12] instead preferring to allow judges broad access to offender information in an attempt to craft an individualized sentence.[13] As *Watts* indicated, acquitted conduct is "'[h]ighly relevant—if not essential—to [the judge's] selection of an appropriate sentence;'"[14] the Court thus held that even if the defendant is ultimately acquitted on a charge, that charge alone is probative of the defendant's character.[15]

Although the Court's sentencing jurisprudence remained relatively static over time, the logistical realities of sentencing changed drastically.[16] In the 1980s, every state and the federal government enacted guideline sentencing schemes, which transferred an increasing amount of fact-finding responsibility from the jury to the judge.[17] Under most such schemes, juries continued to find the basic facts necessary to establish guilt, but judges acquired responsibility for determining numerous factual questions that could significantly add to or subtract from an offender's sentence.[18] Additionally, guidelines regimes were highly determinate in nature: each additional fact found at sentencing mechanically corresponded with a requisite increase or decrease in an offender's sentence.[19]

2006); United States v. Vaughn, 430 F.3d 518 (2d Cir. 2005); United States v. Price, 418 F.3d 771 (7th Cir. 2005); United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005).

10. *See* discussion *infra* Part II.

11. 519 U.S. 148, 154 (1997) (per curiam) ("[W]e are convinced that a sentencing court may consider conduct of which a defendant has been acquitted.").

12. Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 343-44 (2006).

13. *See* discussion *infra* Part II.A.

14. *Watts*, 519 U.S. at 151-52 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

15. *See id.*

16. *See* discussion *infra* Part II.B.

17. *Id.*

18. *Id.*

19. *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 82-85 (1998).

The consequences of this transfer of determinate fact-finding authority ultimately led the Court to extend once unnecessary procedural protections to the sentencing phase.[20] In 2000—just three years after *Watts*—the Court decided *Apprendi v. New Jersey*,[21] definitively signaling the beginning of a robust application of the Sixth Amendment jury trial right to the sentencing stage.[22] Specifically, the Court held that the Sixth Amendment required the jury, rather than the judge, to find all facts necessary to justify a defendant's sentence.[23] In holdings subsequent to *Apprendi*, the result of the Court's new Sixth Amendment jurisprudence has been profound: not only have the guideline sentencing regimes of Washington[24] and California[25] been invalidated, but in *United States v. Booker*,[26] the Court struck down the federal Guidelines sentencing scheme.

The implications of the Court's modern Sixth Amendment jurisprudence clearly have been widespread and continually evolving. Although the Court has not directly revisited the acquitted conduct question presented in *Watts*, its recent decisions imply that this once-permissible practice is no longer constitutionally acceptable. In passing, some commentators have even observed the seeming contradiction between the Court's ruling in *Booker* and its validation of the consideration of acquitted conduct in *Watts*,[27] but no scholarship has analyzed the question in depth. In an attempt to fill this gap, this Note argues that the judicial consideration of acquitted conduct has been rendered unconstitutional by the Court's modern Sixth Amendment jurisprudence.

Part I of this Note will examine the values underlying the jury trial right. In particular, this Part will focus on two structural aspects of the Sixth Amendment embraced by the Court's recent

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20. *See* discussion *infra* Part III.
21. 530 U.S. 466 (2000).
22. *See* discussion *infra* Part III.
23. *Apprendi*, 530 U.S. at 476.
24. Blakely v. Washington, 542 U.S. 296 (2004).
25. Cunningham v. California, 127 S. Ct. 856 (2007).
26. 543 U.S. 220 (2005).
27. *See, e.g.*, Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 678 (2006); Debra Young, *The Freedom to Sentence: District Courts After* Booker, 37 MCGEORGE L. REV. 649, 674 (2006).

sentencing decisions: the jury's role as fact-finder and its right to issue an unreviewable verdict. With these historical values in mind, Part II will contrast the pre-Guidelines roles of judge and jury with their respective roles under the Guidelines regime. Specifically, this Part will illustrate the manner in which the Guidelines transferred determinate fact-finding authority from the jury to the judge, resulting in a division of labor at odds with the Sixth Amendment's constitutional design. Furthermore, this Part will discuss the *Watts* decision in detail, highlighting the inherent contradiction between the sentencing efficiency sought by the *Watts* Court and the values of the jury trial reserved by the Sixth Amendment.

Part III will then review the Court's response to this modern sentencing regime—a robust jurisprudence that extends Sixth Amendment protections to the sentencing phase. Although the Court's modern Sixth Amendment jurisprudence should have prompted changes in the lower courts with respect to consideration of acquitted conduct, Part IV will examine the persistent refusal among many circuits to invalidate the practice. Finally, Part V will argue that the principles espoused by the Court in *Apprendi* and its progeny, in addition to the constitutional history relied upon in these cases, renders the consideration of acquitted conduct unconstitutional.

I. THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL

Article III of the Constitution establishes that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury...."[28] As its textual placement in the Constitution suggests, the jury trial right occupies a position of significant importance in the judicial branch.[29] But the Framers determined that this reservation of power for the jury was insufficient; thus, the Sixth Amendment supplements Article III by guaranteeing the right to a jury trial in

28. U.S. CONST. art. III, § 2, cl. 3.

29. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196 (1991) (stating that the Article III mandate of trial by jury is of equal importance to other Article III commands); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 291 (1994) ("The power of juries has a stronger claim to legitimacy than does that of judges.").

a criminal proceeding.[30] Consequently, a criminal defendant has a constitutional right to demand that all charges against him be proven to a jury beyond a reasonable doubt.[31] Before critiquing the method by which modern sentencing schemes dilute the jury's constitutional role, however, the values underlying the right to a jury trial must be defined. This Part will first briefly examine the history of the jury trial and, with this context in mind, proceed to discuss the manner in which the Framers envisioned that the criminal jury would function.

A. A Brief History of the Right to a Jury Trial

The right to a trial by jury has an illustrious history in the common law. William Blackstone himself traced the roots of the jury system to the signing of the Magna Carta[32] and praised the English jury both for the measure of protection it afforded the accused and as an institution of judicial democracy.[33] According to Blackstone, the jury protections ensured that one "cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals."[34] Such high praise was typical among Englishmen of Blackstone's time; in fact, the late seventeenth century has been called "the heroic age of the English jury,"[35] an era in which juries famously acquitted defendants who were prosecuted for speaking out against government abuses.[36]

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30. The Sixth Amendment guarantees the accused a "public trial, by an impartial jury." U.S. CONST. amend. VI.

31. *See In re* Winship, 397 U.S. 358, 363 (1970); *see also* United States v. Gaudin, 515 U.S. 506, 515 (1995).

32. WILLIAM BLACKSTONE, 3 COMMENTARIES *350.

33. WILLIAM BLACKSTONE, 4 COMMENTARIES *343 (emphasizing that no accused could be punished absent the unanimous consent of his peers).

34. WILLIAM BLACKSTONE, 3 COMMENTARIES *379.

35. J.M. Beattie, *London Juries in the 1690s*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800, at 214 (J.S. Cockburn & Thomas A. Green eds., 1988).

36. *See* Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 384-85 (describing two cases, the *Seven Bishops' Case* and *Bushell's Case*, in which juries refused to convict in the face of royal prosecution).

Following this common law tradition, the colonists took immediate steps to preserve the criminal jury when building their new communities in North America.[37] Colonial juries were structured so that the jury continued to stand between the government and the accused and, in the tradition of their English predecessors, colonial juries employed their acquittal power to provide an explicit check against government overreaching.[38] The most notorious instance occurred in the case of John Peter Zenger in 1734.[39] Attempting to punish Zenger for publishing criticism of his administration, the royal governor of New York unsuccessfully made three attempts to obtain a grand jury indictment for sedition.[40] Each time, colonial juries refused to indict.[41] Finally, the governor circumvented the grand jury, proceeding on the basis of an "information."[42] At trial, however, the jury nonetheless returned a verdict of not guilty.[43] Colonists celebrated these repeated acquittals as an expression of the popular will, and Zenger's story "became the American primer on the role and duties of jurors" in the colonies.[44]

During the Revolutionary period, as tensions with the Crown escalated, colonists continued to utilize their role as jurors to check government oppression.[45] Grand juries refused to indict individuals accused of "political" offenses,[46] and petit "juries devised extralegal ways of avoiding a guilty verdict."[47] In response, English legislators

37. *See* Andrew J. Gildea, *The Right to Trial by Jury*, 26 AM. CRIM. L. REV. 1507, 1508 (1989) (recounting that the Plymouth colony immediately instituted provisions to provide for jury trials in criminal cases).

38. *See* United States v. Kandirakis, 441 F. Supp. 2d 282, 310 (D. Mass. 2006) (describing the history of colonial jury practice).

39. For a more thorough account of the Zenger trial and its ramifications, see Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871-75 (1994).

40. *Id.* at 872.

41. *Id.*

42. *Id.* This process essentially bypassed the grand jury. *Id.*

43. *Id.* at 872-73.

44. *Id.* at 873-74 (noting that the pamphlet recounting Zenger's trial was reprinted fourteen times and was celebrated as an instance of freedom from state oppression throughout the colonies).

45. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 233 (2005).

46. JOHN PHILLIP REID, IN A DEFIANT STANCE 45 (1977).

47. Apprendi v. New Jersey, 530 U.S. 466, 479 n.5 (2000).

weakened the power of colonial juries[48] and "barr[ed] the right to jury trial when defining new, statutory offenses."[49] In general, the colonists deeply resented royal attempts to infringe upon the jury trial right.[50] Perhaps the most egregious example, at least from the colonists' perspective, was the British practice of trying Stamp Act violators in London admiralty courts—among English juries.[51] Unsurprisingly, Britain's attempt to emasculate the colonial jury, especially with respect to the Stamp Act, was a grievance specifically decried in the Declaration of Independence.[52]

The notion that any functional justice system must afford the right to a jury trial was so entrenched among the Framers that it engendered almost no debate at the Constitutional Convention.[53] A similar sentiment was shared nationwide: each state constitution written between 1776 and 1787 included its own guarantee of a criminal jury trial right.[54] Furthermore, when it came time to add the Bill of Rights to the federal Constitution, "the jury-trial guarantee was one of the least controversial provisions."[55] In this fashion, "[f]or Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights...."[56] Common law history had proven, and the Framers understood, that the jury was an integral aspect of any system of justice that valued the protection of individual liberty.

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48. *See* Jones v. United States, 526 U.S. 227, 245 (1999) (recounting the Revolutionary history).

49. *Id.*

50. *See* Harrington, *supra* note 36, at 394-96.

51. *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 118 (1997).

52. THE DECLARATION OF INDEPENDENCE paras. 20-21 (U.S. 1776) (alleging that the British had "deprive[d] us in many cases, of the benefits of Trial by Jury," and "transport[ed] us beyond Seas to be tried for pretended offenses").

53. *See* THE FEDERALIST NO. 83 (Alexander Hamilton) ("The friends and adversaries of the plan of the Convention ... concur at least in the value they set upon the trial by jury."); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 34 (2003).

54. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 83 (1998) [hereinafter AMAR, BILL OF RIGHTS].

55. Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

56. WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 96 (1994).

B. The Functional Operation of the Jury

The Framers conceived of the Sixth Amendment as a mechanism to engender democratic accountability;[57] by requiring the government to obtain a verdict from a group of laymen, the jury would operate as a critical check on the overzealous prosecutor or judge, thereby standing as a bulwark between the accused and the state.[58] In order to accomplish this function, two fundamental values were integral: the jury's role as fact-finder and the power of the jury to issue an unreviewable verdict of acquittal.

First, at the time of the Framing, the jury's role was to find facts and apply those facts to the law,[59] whereas a judge's role was simply to apply the sentence mandated by the jury's findings.[60] Because most sentences were predetermined by statute, the jury's fact-finding was the "pivotal event";[61] a judge's task was simply to apply the sentence dictated by the jury's verdict.[62]

As a result of its functional role as fact-finder, the jury retained the power to issue a general verdict of "guilty" or "not guilty."[63] When the latter verdict was delivered in a criminal proceeding, it was unreviewable,[64] leaving the jury as the final authority on

57. In fact, Jefferson famously implied that the jury trial's guarantees of democratic accountability were arguably more important than similar guarantees in the legislative branch. *See* Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789), *in* VII THE WRITINGS OF THOMAS JEFFERSON 423 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) ("Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative.").

58. *See* AMAR, BILL OF RIGHTS, *supra* note 54, at 87; *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (Leonard W. Levy ed., DeCapo Press 1970) (1833) (arguing that the Framers intended the jury trial right to guard against government tyranny). Story's sentiment has repeatedly been echoed by Sixth Amendment jurisprudence in the modern era. *See* Duncan v. Louisiana, 391 U.S. 145, 151 (1968) (describing the jury trial as a fundamental "protection against arbitrary rule").

59. *See* United States v. Gaudin, 515 U.S. 506, 513-14 (1995).

60. *See* John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, at 36-37 (Antonio Padoa Schioppa ed., 1987).

61. Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 424 (1999) [hereinafter Gertner, *Circumventing Juries*].

62. *See* Langbein, *supra* note 60, at 36-37.

63. Barkow, *supra* note 53, at 35-36.

64. *See* AMAR, BILL OF RIGHTS, *supra* note 54, at 96; *see also* Kepner v. United States, 195 U.S. 100, 130 (1904) ("[I]n this country, a verdict of acquittal ... is a bar to subsequent

criminal liability.[65] At its most extreme, this authority allowed the jury to nullify the law by purposely misapplying or ignoring certain facts.[66] Although controversial, the nullification power was intentionally bestowed by the Framers, an outgrowth of the lessons of their colonial experience with the despotic British government.[67] The nullification power granted the American jury a tool with which to check government overreaching, much like colonial jurors had blocked royal prosecution in the Zenger trial. As Judge Hand later wrote, the nullification power "introduces a critical check on the government ... and provides a mechanism for correcting over-inclusive general criminal laws."[68] Essentially, nullification was a vital component of the jury's democratic accountability function, and it is the best evidence that the Sixth Amendment intended the jury verdict to *mean* something.

This Part has attempted to expound on the fundamental values underlying the Sixth Amendment right to a criminal jury trial. Although the operation of the jury changed over time, the jury's role as fact-finder, as well as its unreviewable power to acquit, was generally preserved by the courts and legislature. The modern sentencing era, however, seriously diluted the jury's fact-finding role and, consequently, undermined the importance of the jury verdict.

II. THE MODERN SENTENCING SYSTEM

The beginning of the twentieth century ushered in a sentencing era focused upon offender rehabilitation.[69] Federal judges worked with parole officers in order to best fashion a sentence that would

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prosecution for the same offense.").

65. *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 124.

66. *See* Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1012-17 (1980) (commenting on the jury's constitutional "prerogative to acquit against the evidence"). Michael Stokes Paulsen has referred to this right as a "trump everyone" power. Paulsen, *supra* note 29, at 289.

67. After all, when Revolutionary era juries refused to indict individuals for "political offenses," they were exercising the power of nullification.

68. United States *ex rel.* McCann v. Adams, 126 F.2d 774, 775-76 (2d Cir. 1942).

69. *See* STITH & CABRANES, *supra* note 19, at 18.

"treat" the criminal's sickness.[70] Under this system, juries continued to operate as fact-finders, determining the guilt of the accused; once the accused was adjudicated guilty, the judge and parole officer went to work devising the most appropriate sentence.[71] As the focus of sentencing transformed from rehabilitation to retribution, however, the jury's role began to change. This Part describes that transformation; specifically, as the federal government moved toward uniform, guideline-oriented punishment, the jury's fact-finding authority was increasingly transferred to the judge. Consequently, the sentencing phase became a second trial, in which facts and witnesses were presented, and fact-finding by a judge often dramatically impacted an offender's sentence. In its most extreme form—illustrated in *United States v. Watts*[72]—a judge was able to reject the jury's fact-finding and replace it with his own singular determinations.

A. Pre-Guidelines: A World of Indeterminacy

Prior to enactment of the Guidelines, judicial sentencing was driven by the "rehabilitative ideal."[73] Quite simply, the overriding goal of the sentencing phase was to customize a punishment that would most likely rehabilitate the offender.[74] As Douglas Berman has explained, the "rehabilitative ideal was often conceived ... in medical terms: offenders were described as 'sick' and punishments aspired to 'cure the patient.'"[75] Accordingly, under this sentencing regime judges played the role of medical physicians, utilizing their curative expertise to fashion a proper punishment.[76] Two aspects of this rehabilitation-focused regime are worth noting: the distinct

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70. *See id.* at 19-21.

71. *See id.*

72. 519 U.S. 148 (1997) (per curiam).

73. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 240 (1993).

74. *See* SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 5-6 (1985).

75. Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387, 389 (2006) [hereinafter Berman, *Conceptualizing* Booker].

76. *Id.* at 388-89.

division of labor between judge and jury, and the indeterminate nature of facts heard at sentencing.[77]

First, in the pre-Guidelines regime, judge and jury performed distinct functions. True to the role historically intended by the Framers, the jury's responsibility in this era was to objectively find facts bearing on the offender's substantive guilt. Judges, on the other hand, did not participate in objective fact-finding; rather, they acted as a "sentencing expert," weighing a range of information in order to select a sentence within the broad range authorized by statute.[78] After the jury reached its verdict, the judge possessed nearly carte blanche to collect additional information during the sentencing phase regarding the defendant's character, his commission of the offense, and any other pertinent facts that could prove beneficial in individualizing the punishment.[79]

The second important feature of the pre-Guidelines scheme was the indeterminate effects of evidence heard at sentencing. In contrast to the Guidelines era, none of the facts collected by a judge at sentencing required a mechanical increase or decrease in the offender's sentence.[80] Rather, judges were to draw upon their specialized knowledge and employ their discretion when crafting a sentence.[81] Practically, this meant that a judge was free to consider a range of evidence and to disregard evidence he decided was irrelevant or should not be considered.[82] Because sentencing facts carried indeterminate consequences and because the judge, as sentencing expert, could weigh those facts appropriately, it was unnecessary to extend to the sentencing phase the Sixth Amendment procedural protections afforded the defendant at trial.[83]

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77. This Note assumes that the fact-finder at trial is always a jury. Of course, this is often not the case; but, because this Note is concerned with the Sixth Amendment, it assumes that the accused has not waived his right to a jury trial.

78. *See* Nancy Gertner, *What Has* Harris *Wrought*, 15 FED. SENT'G. REP. 83, 84 (2002) [hereinafter Gertner, *What Has* Harris *Wrought*].

79. *See* 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, 168-69 (1996). Johnson referred to this as the "let-it-all-in" philosophy. *Id.* at 172.

80. *See* STITH & CABRANES, *supra* note 19, at 9-11.

81. *See id.* at 19-21.

82. *See* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1186-88 (1993).

83. *See* Gertner, *What Has* Harris *Wrought*, *supra* note 78, at 84.

Williams v. New York is perhaps the most illustrative example of the pre-Guidelines sentencing rationale.[84] After a jury found Williams guilty of first degree murder, the trial judge imposed capital punishment based on additional facts elicited only at sentencing.[85] Despite Williams's objections, the Supreme Court declined to extend due process safeguards to the sentencing phase.[86] Rather, the Court pointed to the different roles played by the jury at trial versus the judge at sentencing.[87] Dispositive in the Court's analysis was the notion that information collected by a judge for sentencing purposes had indeterminate consequences.[88] No longer would "every offense in a like legal category call[] for an identical punishment."[89] Instead, a judge had the duty to ensure that the punishment fit the individual, given the "defendant's life and characteristics."[90] As *Williams* made clear, procedural protections were only appropriate at the trial phase, where the jury's fact-finding carried determinate effects.

In this fashion, *Williams* endorsed the prevailing pre-Guidelines practice of allowing a sentencing judge access to as much information as possible with few, if any, procedural safeguards. As U.S. District Judge Nancy Gertner has summarized: "No one challenged judges' sentencing procedures as somehow undermining the Sixth Amendment's right to a jury trial precisely because judge and jury had 'specialized roles,' the jury as fact finder, the judge as sentencing expert."[91] Individualized punishment and the rehabilitative ideal, however, fell into disfavor in the 1960s and 1970s, replaced by the twin penal values of deterrence and retribution.[92] When the focus of sentencing policy shifted, the once bedrock value of pre-Guidelines sentencing—indeterminacy—was discarded, fund-

84. 337 U.S. 241 (1949).

85. *Id.* at 242-43. Specifically, the judge heard evidence that Williams had participated in over thirty uncharged burglaries. *Id.* at 244.

86. *Id.* at 246.

87. *Id.*

88. *Id.* at 247-48.

89. *Id.* at 247.

90. *Id.*

91. Gertner, *What Has* Harris *Wrought*, *supra* note 78, at 84.

92. *See* STITH & CABRANES, *supra* note 19, at 29-35.

amentally altering the jurisprudential justification for disallowing procedural trial protections at sentencing.

B. The Guidelines Are Born: A World of Determinacy

When Congress passed the Sentencing Reform Act of 1984 (SRA),[93] it completely overhauled prevailing federal sentencing procedures.[94] Not only did the SRA create the United States Sentencing Commission, but it laid the groundwork for the Commission's eventual promulgation of the Federal Sentencing Guidelines in 1987.[95] Although Congress's motivation for passing the SRA was complex, significant agreement existed among lawmakers that the bill should rectify what had become a nationwide problem of sentencing disparity.[96] Concluding that this disparity was rooted in a penal philosophy that treated judges as sentencing experts, Congress consciously sought to tie the judiciary's hands by crafting a more mechanistic sentencing system.[97] Accordingly, the Sentencing Commission, rather than the judge, would function as sentencing expert and the judge would mechanically apply the Commission's Sentencing Guidelines. The result was a reversal of the prevailing pre-Guidelines practice: judges began to play the role of objective fact-finders, and sentencing facts carried determinate consequences.

First, the Guidelines created a scheme in which all sentencing facts had mechanistic, determinate consequences. For example, under the Guidelines, a judge's starting point was a 258-box matrix called the "Sentencing Table."[98] To compute an offender's sentence, the judge first considered the base level offense that resulted in a conviction and matched this base level offense with a corresponding

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93. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C. (1984)).

94. *See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 3-10 (2004).

95. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C. (1984)).

96. *See generally* STITH & CABRANES, *supra* note 19, at 9-37 (providing a full history cataloguing the enactment of the federal Guidelines).

97. *See* FIFTEEN YEARS OF GUIDELINE SENTENCING, *supra* note 94, at 11-12.

98. U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (2006).

"Offense Level" score on the Sentencing Table's vertical axis.[99] This score was then adjusted by considering what the Commission dubbed "relevant conduct"[100]—factors that would aggravate or mitigate the sentence's length.[101] Once the offense level was computed, the judge determined the defendant's criminal history score, based on prior convictions, along the horizontal axis.[102] The proper sentencing range was then ascertained mechanically,[103] by locating the box where the defendant's offense level and prior criminal history scores intersected.[104] Sentencing had become entirely determinate.

In many ways, relevant conduct determinations were the "cornerstone" of the Guidelines scheme.[105] To compare, when a judge considered "relevant conduct" in the pre-Guidelines regime, he was not required to mechanically increase or decrease an offender's sentence.[106] Under the Guidelines, however, findings of relevant conduct resulted in determinate outcomes, to be plugged into the 258-box Sentencing Table;[107] moreover, relevant conduct simply needed to be found by a preponderance of the evidence.[108] The more facts a sentencing judge branded as "relevant conduct,"

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99. *Id.*; *see also id.* § 1B1.1(a), (b).

100. *Id.* § 1B1.3.

101. *See* Johnson, *supra* note 79, at 160 ("Relevant conduct includes a vast array of activity related to the offense of conviction and deemed pertinent to the offender's culpability....").

102. U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A & § 1B1.1(f) (2006).

103. Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 357 (2005) ("[T]he mechanical nature of the guidelines is hard to ignore.").

104. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2006) (describing the steps a judge must take to arrive at the proper sentence); *see also* Gardina, *supra* note 103, at 357 ("In the box at which the defendant's Criminal History Category and Offense Level intersect is the range within which the judge may sentence the defendant.").

105. William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 496 (1990).

106. *See* David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 418 (1993).

107. *See* Barkow, *supra* note 53, at 91-92 (arguing that in the pre-Guidelines scheme, "the consideration of relevant conduct [did not] yield a predetermined amount of punishment," while under the Guidelines, the "judge's factual findings had predetermined consequences for the defendants' punishment").

108. *See* U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (2006).

the lengthier the resulting sentence.[109] Furthermore, once a judge found facts that were considered relevant conduct, he was required to impose the corresponding increase in sentence.[110] In this way, "the offense of conviction ... was merely the starting point" in the determination of the ultimate sentence.[111] Once the trial phase ended, the judge was left to resolve a number of additional factual issues, such as whether the defendant was especially culpable, or guilty of any prior convictions, or whether the victim was particularly vulnerable; each of these factual issues mechanically increased the offender's sentence if proven by a preponderance of the evidence.[112]

As a result of the Guidelines' emphasis on determinate fact-finding at sentencing, the judge ceased to function as a sentencing expert and became an objective fact-finder.[113] Accordingly, sentencing hearings transformed into elaborate trial-like events, where testimony was heard from victims, experts, and often the defendant.[114] Of course, all of this fact-finding occurred absent Sixth Amendment protections. Despite an increasing similarity to the trial phase, however, the courts declined to extend trial-like procedural protections to sentencing. Instead, claims seeking such protections for the sentencing phase were analyzed under the permissive, pre-Guidelines *Williams* rubric.[115]

Representative of this analysis was *McMillan v. Pennsylvania*,[116] the initial challenge to part of a determinate Guidelines sentencing regime—in this case, Pennsylvania's mandatory minimum provision.[117] Essentially, the state scheme required the trial judge, rather than the jury, to determine whether an offender was in possession of a firearm during commission of the offense and, if so,

109. *See* United States v. Ibanga, 454 F. Supp. 2d 532, 535 (E.D. Va. 2006) (describing mechanical operation of the Guidelines).

110. *See* Witte v. United States, 515 U.S. 389, 402 (1995) ("The relevant conduct provisions are designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional.").

111. Gertner, *Circumventing Juries*, *supra* note 61, at 428.

112. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 3A1.1, 5K2.3.

113. *See* Gertner, *What Has* Harris *Wrought*, *supra* note 78, at 84.

114. *See* STITH & CABRANES, *supra* note 19, at 82-85.

115. *See* Berman, *Conceptualizing* Booker, *supra* note 75, at 399.

116. 477 U.S. 79 (1986).

117. *Id.*

mechanically impose a minimum sentence.[118] Upholding the statute, the Supreme Court indicated that certain factual issues could be categorized as "sentencing factor[s]," to be determined at the post-trial hearing under the preponderance standard of proof.[119] By creating such a categorization, the legislature could remove certain facts from the province of the jury and mandate that such facts were subject to judicial fact-finding.[120] To support its conclusion, the Court pointed to *Williams* and its preference for inclusivity of information at sentencing.[121] What the Court failed to mention was the fundamental difference between the pre-Guidelines sentencing scheme in *Williams*—with a focus on indeterminate fact-finding—and the new determinate Guidelines regime in *McMillan*.

Nine years later, in *Witte v. United States*, the Court upheld a district judge's ability to consider evidence of crimes for which the defendant had not even been charged—and to take that evidence as true—when fashioning a sentence.[122] Specifically, Witte pled guilty to marijuana possession but protested at his sentencing when the government presented evidence attributing to him over 1000 kilograms of cocaine.[123] Under the federal Guidelines, the judge's singular determination that Witte was in possession of the cocaine added multiple points to his base offense level, corresponding to an increase of several years.[124] Again citing *Williams*, the Court pointed to historical practices that allowed a sentencing judge "wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed."[125]

Both *McMillan* and *Witte* are illustrative of the Court's sentencing jurisprudence shortly after the enactment of the Guidelines. Rather than addressing the way in which new guidelines regimes fundamentally changed the nature of post-trial sentencing facts, the

118. *Id.*
119. *Id.* at 86.
120. *Id.*
121. *Id.* at 91 ("Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all.").
122. 515 U.S. 389, 395, 397-98 (1995).
123. *Id.* at 391-95.
124. *Id.* at 394-95.
125. *Id.* at 397-98 (quoting Williams v. New York, 337 U.S. 241, 246 (1949)).

Court blithely cited pre-Guidelines precedent handed down in an entirely distinct era of sentencing.[126] Enactment of Guidelines regimes on both the state and federal level had drastically altered the formerly dichotomous roles of judge and jury, but the Court pretended as if the SRA was never adopted.

C. Acquitted Conduct Under the Guidelines Regimes

The Guidelines altered the manner in which sentences were computed, but the Sentencing Commission retained the pre-Guidelines preference for inclusivity of information, mandating that judges consider a wide range of "relevant conduct" at sentencing.[127] Within this umbrella category fell acquitted conduct.[128] As previously stated, acquitted conduct refers to actions for which a defendant was charged but found not guilty by a jury.[129] Under the Guidelines, even if a jury rejected the charge, the government was required to present the facts to the judge at sentencing for consideration as relevant conduct.[130] If a judge found the facts to be true, regardless of the jury determination, he was required to treat the facts as relevant conduct and factor them into the offender's sentence.[131]

Take a common example: the government charges defendant with possession of X weight in drugs and a jury finds defendant guilty of a lesser weight, Y.[132] Despite the jury's factual findings, at sentencing the government presents evidence that defendant possessed X weight in drugs. Considering the facts under a preponderance

126. *See* Berman, *Conceptualizing* Booker, *supra* note 75, at 398-400.

127. *See supra* notes 105-112 and accompanying text.

128. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. background (2006) ("Conduct 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.").

129. For the purposes of this Note, acquitted conduct does not include conduct that was uncharged.

130. *See* Johnson, *supra* note 79, at 164-68.

131. *See id.* at 162-64.

132. This hypothetical is analogous to a number of actual cases. For one particularly illustrative example, see United States v. Boney, 977 F.2d 624 (D.C. Cir. 1992). In *Boney*, the defendant was convicted of distributing 0.199 grams of cocaine, but acquitted of intent to distribute 12.72 grams of cocaine. *Id.* at 627-28. Despite the acquittal, the district judge attributed the full 12.72 grams to the defendant at sentencing, increasing the Guideline range from 10-16 months to 63-78 months. *Id.* at 635.

standard, the judge finds, despite the jury's factual determination to the contrary, that defendant did possess X weight in drugs. As a result, rather than calculating a Guidelines range using weight, Y, the judge calculates using the greater weight, X, which significantly increases defendant's punishment. From defendant's perspective, the jury might as well have convicted him of possessing weight, x; the end result is identical.

Although this practice raised troubling Sixth Amendment concerns for some judges,[133] the Supreme Court sanctioned the consideration of acquitted conduct in *United States v. Watts*,[134] largely following the "hands-off jurisprudence" of *McMillan* and *Witte*.[135] Watts was convicted of possession of cocaine but acquitted of possession of a firearm.[136] Despite the jury's finding to the contrary, the district judge at sentencing held that Watts was in possession of a firearm and added four years to his sentence.[137] In a per curiam opinion, the Supreme Court upheld the sentence.[138] Responding to Watts's claim that the government was trampling the jury's fact-finding authority, the Court again pointed to pre-Guidelines precedent, which recognized the essentiality that judges possess the "fullest information possible concerning the defendant's life and characteristics."[139] The Court added, "The Guidelines did not alter this aspect of the sentencing court's discretion."[140] Curiously, the Court offered no substantive explanation as to why the Guidelines analysis was unaffected despite radical changes in modern sentencing. Finally, the Court addressed the *appearance* of a Sixth Amendment contradiction: even if the jury's acquittal seemingly exonerated Watts of committing his crime in a certain way—in this case by using a firearm—the Court noted that "acquittal on criminal charges does not prove that the defendant is

133. *See* United States v. Frias, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) (calling consideration of acquitted conduct "jurisprudence reminiscent of *Alice in Wonderland*. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards'").

134. 519 U.S. 148 (1997) (per curiam).

135. *See* Berman, *Conceptualizing* Booker, *supra* note 75, at 400-01.

136. *Watts*, 519 U.S. at 149-50.

137. *Id.* at 150.

138. *Id.* at 157.

139. *Id.* at 152 (citation omitted).

140. *Id.*

innocent; it merely proves the existence of reasonable doubt as to his guilt."[141]

Although *Watts* placed the Court's stamp of approval on the use of acquitted conduct under the Guidelines, it left disturbing implications for the right to a jury trial.[142] After all, in sentencing Watts, the district court judge effectively disregarded the jury's acquittal, replacing it with his own singular determination of the facts under a preponderance standard.[143] Such a result seemingly contravenes the core Sixth Amendment principles discussed in Part I, including both the jury's right to find facts and to issue an unreviewable acquittal.[144]

In order to overcome any constitutional objections, the Court simply sought validation in pre-Guidelines precedent,[145] just as it had done in *McMillan* and *Witte*. The analytical difficulty with this approach, of course, was rooted in the Court's refusal to acknowledge that enactment of the Guidelines rendered the sentencing phase more trial-like, thus undermining the *Williams* rationale for withholding procedural protections at sentencing. Rather than address this change, however, the Court's opinion read as if *Williams* and *Watts* were decided only months, rather than forty-eight years, apart. But only three years after *Watts*, the Court made an about-face, announcing a new Sixth Amendment jurisprudence fundamentally at odds with both *Watts* and its prior sentencing decisions.

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141. *Id.* at 155 (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984)). The Court went on to remark that it is "impossible to know exactly why a jury found a defendant not guilty on a certain charge." *Id.*

142. In something of an understatement, the *Watts* dissent noted as much, worrying that judicially increasing a sentence based on acquitted conduct "does raise concerns about undercutting the verdict of acquittal." *Id.* at 170 (Kennedy, J., dissenting).

143. *Id.* at 150.

144. *See supra* notes 59-68 and accompanying text. Quite simply, "with *United States v. Watts*, the judge could effectively reverse the jury's acquittal." Gertner, *Circumventing Juries*, *supra* note 61, at 426.

145. *Watts*, 519 U.S. at 151-52 (invoking *Williams* to justify unfettered judicial access to relevant conduct-type information).

III. HOW THE COURT GOT ITS SIXTH AMENDMENT GROOVE BACK

As the previous Part demonstrated, the jury's responsibility for finding facts was palpably curtailed in the state and federal guidelines sentencing schemes enacted in the 1980s.[146] In 2000, however, the Court began to push back, crafting what would eventually become a powerful new Sixth Amendment jurisprudence. Central to this new jurisprudence was a concern that modern sentencing regimes structurally transferred an undue proportion of fact-finding power from jury to judge, thereby diluting the ultimate authority of the jury's verdict. As a result, the jury was no longer functioning in the manner envisioned by the Framers. In this way, the Court's post-2000 sentencing jurisprudence expressed the concern that the historical values underlying the right to a jury trial, examined in Part I, had been sacrificed in exchange for the efficiency and uniformity of modern sentencing.

The first major signal that the Court would embark down this new Sixth Amendment path was *Apprendi v. New Jersey*.[147] Three days before Christmas in 1994, in the middle of the night, Charles Apprendi fired multiple gunshots into the home of an African American family that had recently moved into an all-white neighborhood in Vineland, New Jersey.[148] During his subsequent interrogation, Apprendi told the police that although he did not know the family, "because they are black in color he [did] not want them in the neighborhood."[149] Under New Jersey's hate crime statute, a judge was required to impose a sentence enhancement of up to twenty years' imprisonment for a crime committed with racial animus.[150] Furthermore, as with similar relevant conduct determi-

146. *See supra* Parts II.B-C.

147. 530 U.S. 466 (2000). The Court's ruling in *Apprendi* was foreshadowed the year before, in *Jones v. United States*, when the Court held that certain key facts, the finding of which would dramatically increase an offender's sentence, must be proved to a jury beyond a reasonable doubt. *See* Jones v. United States, 526 U.S. 227, 229-32 (1999).

148. *Apprendi*, 530 U.S. at 469.

149. *Id.*

150. *See* N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000). The statute actually allowed a sentencing enhancement if the offender "acted with a purpose to intimidate ... because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.*

nations under guidelines regimes, this finding of improper motivation was a fact for the judge to find rather than the jury.[151]

Rejecting this legislative designation of "sentencing facts," the Court held that Sixth Amendment jury protections were applicable to the sentencing phase.[152] Although in the past the Supreme Court had routinely declined to extend any trial phase procedural protections to the post-trial sentencing hearing, the *Apprendi* Court indicated that the rights associated with the jury trial "extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'"[153] In language that would come to define this new sentencing jurisprudence, the Court stated: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[154] For the first time, the Court forcefully extended the procedural protections to the sentencing phase that it had withheld in *McMillan*, *Witte*, and *Watts*.[155]

The Court expanded its new Sixth Amendment jurisprudence four years later in *Blakely v. Washington*, finding Washington State's determinate guidelines regime—which was modeled after the federal Guidelines—unconstitutional.[156] *Blakely* presented the Court with what had become a routine fact pattern under mandatory guidelines schemes: Ralph Blakely pleaded guilty to kidnapping his wife, which carried a maximum Guidelines sentence of fifty-three months' imprisonment.[157] At his sentencing hearing, however, the trial judge heard evidence that during the course of the kidnapping, Blakely bound his wife with duct tape, forced her into a wooden box in the bed of his pickup truck and aimed a

151. *Apprendi*, 530 U.S. at 470-71.

152. *Id.* at 484.

153. *Id.* (quoting Almendarez-Torres v. United States, 523 U.S. 224, 251 (1997) (Scalia, J., dissenting)).

154. *Id.* at 490.

155. Supreme Court watchers immediately recognized *Apprendi* as a watershed, and one commentator called it "one of the most important U.S. Supreme Court decisions in years." Erwin Chemerinsky, *Supreme Court Review: A Dramatic Change in Sentencing Practices*, 36 TRIAL 102, 102 (2000).

156. 542 U.S. 296 (2004).

157. *Id.* at 298.

shotgun at her face.[158] Additionally, all of this was done in the presence of their thirteen year-old son, Ralphy.[159] Based on these facts, the trial judge found that Blakely acted with "deliberate cruelty," allowing the judge to impose a sentence enhancement of thirty-seven months' imprisonment.[160] The judge summarily rejected Blakely's contention that he had a right to a jury determination on the cruelty issue.[161]

Two interrelated factors motivated the Court in its invalidation of Washington's sentencing scheme: under the state guidelines regime, judicial fact-finding carried determinate consequences and because these consequences were not the result of jury deliberation, the scheme violated core protections embodied in the Sixth Amendment.[162] Initially, the Court was concerned with Washington's requirement that compelled a judge to make relevant conduct determinations at sentencing, which then mechanically increased an offender's sentence above that authorized by the jury.[163] For Blakely, this mechanical increase forced the judge to impose a sentence outside the guideline range explicitly authorized by the guilty verdict.[164] In fact, the Court specifically contrasted Washington's regime with the sentencing scheme in *Williams*, in which sentencing facts had an entirely indeterminate effect.[165] Whereas the *Williams* judge was free to disregard the product of any post-trial fact-finding, the trial judge in *Blakely* had no choice but to impose the thirty-three month increase once he determined the requisite cruelty to exist.[166] Essentially, Washington's sentencing scheme improperly distorted the specialized role of judge and jury that the Court sanctioned in *Williams*, therefore making *Williams* inapposite.

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158. *Id.*
159. *Id.*
160. *Id.* at 300.
161. *Id.* at 300-01.
162. *Id.* at 304-14.
163. *See id.* at 304-05.
164. *Id.* at 304 (noting that the judge "could not have imposed the exceptional 90-month sentence" based on the guilty plea).
165. *Id.* at 305 ("*Williams* involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record....").
166. *See id.*

But the Court was not troubled by the notion that fact-finding carried determinate sentencing consequences per se; if the *jury* found facts that carried determinate consequences, *Blakely* would have presented no constitutional violation. Rather, the concern was with a regime that allowed a judge, as opposed to the jury, to play the role of determinate fact-finder. Quite simply, the judge's constitutional "authority to sentence derives wholly from the jury's verdict,"[167] and "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow," that punishment is unconstitutional.[168] As the Court noted, to hold otherwise would dilute the jury's historical role as an institution of democratic accountability, which "function[s] as [a] circuitbreaker in the State's machinery of justice."[169] According to the Court, a sentencing regime treating the jury in this fashion was in direct contradiction to the Framers' intent.[170]

By invoking the historical values underlying the right to a criminal jury trial, the Court provided insight into the rationale behind its new Sixth Amendment jurisprudence. In the modern sentencing era, the Court indicated that the jury right must maintain "intelligible content."[171] Although the Sixth Amendment was intended as a "fundamental reservation of power" to the jury,[172] guidelines sentencing had stripped the jury of its central role in finding facts and issuing an authoritative verdict. Paraphrasing Blackstone, Justice Scalia summarized the Court's fundamental objection to guidelines sentencing:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," rather than a lone employee of the State.[173]

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167. *Id.* at 306.
168. *Id.* at 304.
169. *Id.* at 306.
170. *See id.* at 313-14.
171. Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Scalia, J., concurring).
172. *Blakely*, 542 U.S. at 306.
173. *Id.* at 313-14 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *343).

Quite simply, the Sixth Amendment's primary concern was not efficiency, a goal at which the Washington guidelines seemed specifically directed.

The logical extension of *Blakely*, of course, was the Court's application of its new Sixth Amendment jurisprudence to strike down the federal Guidelines in *United States v. Booker*.[174] In *Booker*, the Court faced an all too similar sentencing fact pattern: although the jury found Booker guilty of possessing 92.5 grams of cocaine base—a sentence with a Guidelines maximum of ten years—on the basis of facts presented at sentencing, the judge imposed a thirty-year punishment.[175] Again, the Court found constitutional fault with a regime that excessively delegated determinate fact-finding decisions to the judge at the expense of the jury,[176] but this time the Court majority splintered badly when deciding the proper remedy.[177] Rather than requiring Congress to completely overhaul the Guidelines, the Court's remedial opinion simply excised the language from the SRA that caused the Guidelines to operate upon sentencing judges mandatorily, rendering the Guidelines merely advisory.[178] Consequently, judges were free to continue considering relevant conduct at sentencing and to continue using the basic rubric of the Guidelines.[179] Furthermore, although the Guidelines would ostensibly no longer *require* a judge to mechanically increase or decrease punishment based on fact-finding conducted at sentencing, the Court's remedial opinion indicated that Guidelines ranges should still be highly persuasive.[180]

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174. 543 U.S. 220 (2005).

175. *Id.* at 227.

176. *See id.* at 235.

177. The merits portion of the opinion was composed of Justices Stevens, Ginsburg, Souter, Scalia, and Thomas—the same five-justice majority responsible for both *Apprendi* and *Blakely*. *Id.* at 226. Due to Justice Ginsburg's defection, however, the *Blakely* dissenters became the remedial majority in the second *Booker* opinion. *See id.* at 245.

178. *Id.* at 245 (remedial opinion).

179. *See id.* at 259-60 (stating that "the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals").

180. *Id.* at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."). Under its most recent sentencing decision, the Court ruled that a circuit may adopt a presumption that the Guidelines range is reasonable. Rita v. United States, 127 S. Ct. 2456, at 2466 (2007). Of course, pursuant to *Booker*, this presumption binds only the appellate courts, rather than the district judges imposing the sentence. *Id.* at 2469.

Unfortunately, the rationales underlying *Booker*'s two majority opinions were at odds.[181] The merits opinion, which invalidated the Guidelines, was a direct extension of the *Apprendi-Blakely* line of cases, reflecting the Court's new Sixth Amendment jurisprudence.[182] The remedial opinion, however, harkened back to the *McMillan*-esque deferential holdings, expressing preference for a robust judicial fact-finding role at sentencing.[183] The result of this muddle was confusion in the lower courts. In fact, by declaring the Guidelines advisory, but technically leaving them in place, the Supreme Court allowed lower courts the freedom to sentence offenders in exactly the same mechanistic manner as they had previously, often in strict adherence to the Guidelines.[184] Such a result was not unforeseen; in fact, Justice Scalia's *Booker* dissent predicted that the remedial opinion would "preserve *de facto* mandatory guidelines by discouraging district courts from sentencing outside Guidelines ranges."[185]

Empirically, the extent to which lower courts continue to adhere to the Guidelines post-*Booker* is stark: according to the U.S. Sentencing Commission, in the fiscal year following the *Booker* decision, 85.9% of offenders received sentences adhering to the Guidelines range, compared to 90.6% of offenders between 1990 and 2003.[186] In 2006, the rate increased to 86.3%.[187] As this data reveals, the imposition of within-Guidelines sentences is strikingly similar to corresponding rates prior to *Booker*. Furthermore, circuit courts reviewing within-Guidelines sentences have been almost univer-

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181. *See* Berman, *Conceptualizing* Booker, *supra* note 75, at 407-10 (commenting that if "*Apprendi* and *Blakely* suggested that a majority of Justices had fallen in love with jury trial rights, the Court in *Booker* chose a funny way to show it").

182. *See Booker*, 543 U.S. at 236-37 (merits opinion) (discussing "the need to preserve Sixth Amendment substance" in a new era of sentencing).

183. *See id.* at 251 (remedial opinion) (noting that federal judges have long relied on reports presenting information not heard during trial).

184. *See infra* notes 186-89 and accompanying text.

185. *Booker*, 543 U.S. at 313 (Scalia, J., dissenting).

186. *See* U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 57 (2006). The most recent data released by the Sentencing Commission shows that this trend continued into 2007. Nationally, between October 1, 2006, and March 31, 2007, 86.6% of offenders either received within-Guidelines sentences or received downward departures sponsored by the government. *See* U.S. SENTENCING COMMISSION, PRELIMINARY QUARTERLY DATA REPORT 1 (2007).

187. U.S. SENTENCING COMMISSION, 2006 ANNUAL REPORT 36 (2006).

sally approving, affirming at a rate above 99.9%.[188] In comparison, the circuits reversed below-Guidelines sentences nearly 85% of the time, but reversed above-Guidelines sentences in less than 5% of all cases.[189] As the data illustrate, courts largely operate according to the Guidelines rubric; to the extent courts deviate, however, above-Guidelines sentences are imposed.

In its last term, the Court partially acknowledged the persistence of the pre-*Booker* status quo under the new "advisory" regime.[190] Although largely dodging the issue, in *Rita v. United States* the majority upheld a circuit-level presumption that within-Guidelines sentences are reasonable.[191] To be sure, such a presumption—operating at the appellate level—does not technically affect the imposition of a sentence, thus avoiding *Apprendi*'s Sixth Amendment concerns.[192] In fact, the Court took pains to note that "a nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence."[193] Given that the presumption makes reversal less probable when sentences are within the recommended Guidelines range, however, the likely result is that more sentences will adhere to the Guidelines, effectively entrenching de facto mandatoriness.[194]

In light of both the sentencing data and the holding in *Rita*, it is safe to assume that the post-*Booker* "advisory" sentencing regime

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188. Sentencing Law and Policy, *http://sentencing.typepad.com/sentencing_law_and_policy/2006/10/are_999_of_guid.html* (Oct. 9, 2006, 20:29 EST) (last visited Sept. 19, 2007); *see also* Brief for the New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner at 3, Rita v. United States, 127 S. Ct. 551 (2007) (No. 06-5754), 2006 WL 3742254, at *3 (noting that out of 1152 within-Guidelines sentences appealed in the circuits, only one has been reversed as substantively unreasonable).

189. *See* Brief for New York Council of Defense Lawyers, *supra* note 188, at 6. The New York City Defense Lawyers' study found that of 154 above-Guidelines appeals heard in the circuits, only seven were reversed as unreasonable. *Id.* Additionally, of seventy-one below-Guidelines appeals, sixty were reversed as unreasonable. *Id.* If nothing else, these data illustrate a sharp hostility toward lenient Guidelines deviations as opposed to harsh ones.

190. *See* Rita v. United States, 127 S. Ct. 2456, at 2474 (2007) (Stevens, J., concurring) (acknowledging that "as a practical matter, many federal judges continue[] to treat the Guidelines as virtually mandatory after our decision in *Booker*").

191. *Id.* at 2466 (majority opinion).

192. *See id.* at 2465-67.

193. *Id.* at 2466.

194. In fact, the majority seemed to acknowledge as much, conceding that "Rita may be correct that the presumption will encourage sentencing judges to impose Guidelines sentences." *Id.* at 2467.

will continue to operate in a pre-*Booker* manner. Just as Justice Scalia warned, the district and circuit courts continue to function as if the Guidelines were mandatory, mechanically sentencing offenders just as had been done previously.[195] And, despite Justice Stevens's admonition in *Rita* that "those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum [should] now recognize that the Guidelines are truly advisory,"[196] the evidence suggests that lower courts have continued —and will continue—business as usual. With respect to the consideration of acquitted conduct, the result has been no different.

IV. *BOOKER*'S FALLOUT: THE SAME OLD ACQUITTED CONDUCT STORY

Apprendi and its progeny made clear that an offender's sentence must be fully authorized by the jury's verdict.[197] Though the Supreme Court has not specifically reconsidered its holding in *United States v. Watts*, which upheld the consideration of acquitted conduct,[198] the values underlying the Court's new Sixth Amendment jurisprudence clearly call the validity of *Watts* into question. Because the jury verdict alone must authorize the sentence, a sentencing regime that allows a judge to disregard a jury's verdict is highly suspect post-*Booker*. For the most part, however, the circuits have resoundingly disagreed, authorizing the continued consideration of acquitted conduct so long as a judge does not use such conduct to increase an offender's sentence beyond the statutory maximum authorized in the United States Code.[199] This Part reviews the common justifications for continuing to allow judicial consideration of acquitted conduct; the final Part of this Note will

195. *See id.*

196. *Id.* at 2474 (Stevens, J., concurring).

197. *See supra* notes 148-81 and accompanying text.

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

199. *See, e.g.*, United States v. Campbell, 491 F.3d 1306, at 1314 (11th Cir. 2007); United States v. Horne, 474 F.3d 1004, 1006-07 (7th Cir. 2007); United States v. Mercado, 474 F.3d 654, 657-58 (9th Cir. 2007); United States v. Dorcely, 454 F.3d 366, 371 (D.C. Cir. 2006); United States v. High Elk, 442 F.3d 622, 626 (8th Cir. 2006); United States v. Vaughn, 430 F.3d 518, 527 (2d Cir. 2005); United States v. Price, 418 F.3d 771, 786 (7th Cir. 2005); United States v. Magallanez, 408 F.3d 672, 683-85 (10th Cir. 2005); United States v. Duncan, 400 F.3d 1297, 1304 (11th Cir. 2005).

then critique these justifications in light of the Sixth Amendment jurisprudence expressed in *Apprendi* and its progeny.

Two central arguments underlie the appellate court justifications for the continued use of acquitted conduct post-*Booker*. First, the courts have reasoned, *Booker* merely invalidated the Guidelines sentencing regime to the extent that it was mandatory rather than advisory.[200] After all, the *Booker* majority seemed to indicate that were the Guidelines advisory, no constitutional difficulty would exist.[201] Accordingly, because the Guidelines are now advisory, a district judge is simply weighing acquitted conduct among the array of sentencing factors that may or may not be applied. This harkens back to the pre-Guidelines days, when district judges could consider a range of factors in choosing an appropriate sentence.[202] Because judges are no longer bound to impose sentence enhancements pursuant to post-trial fact-finding, their function is arguably more akin to the role of the sentencing judge in *Williams*: weighing facts with indeterminate consequences.

Second, the circuits have held that post-*Booker*, the consideration of acquitted conduct is only prohibited if it is used to enhance an offender's sentence above the statutory maximum; the Guidelines ranges—now merely advisory in nature—are simply helpful signposts.[203] The reasoning is simple: under the pre-*Booker* Guidelines,

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200. *See*, *e.g.*, *High Elk*, 442 F.3d at 626 ("Post-*Booker* case law permits judicial fact-finding for purposes of sentencing guidelines enhancements, provided that it is done with the understanding that the guidelines are applied in an advisory fashion."); *Vaughn*, 430 F.3d at 527 (allowing use of acquitted conduct as relevant conduct so long as the judge does not believe the Guidelines are mandatory).

201. *See* United States v. Booker, 543 U.S. at 220, 223 (2005) ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences ... their use would not implicate the Sixth Amendment."); *see also Duncan*, 400 F.3d at 1302 n.5 ("[*Booker*] acknowledged that there would have been no Sixth Amendment constitutional violations in the cases before them if the Guidelines were advisory.").

202. *See supra* Part II.A.

203. *See*, *e.g.*, *Dorcely*, 454 F.3d at 371 ("Under *Booker*, consideration of acquitted conduct violates the Sixth Amendment only if the judge imposes a sentence that exceeds what the jury verdict authorizes."); *Vaughn*, 430 F.3d at 527 (allowing consideration of acquitted conduct so long as such consideration does not result in a sentence that exceeds the statutory maximum); *Duncan*, 400 F.3d at 1304 ("*Booker* does not suggest that the consideration of acquitted conduct violates the Sixth Amendment as long as the judge does not impose a sentence that exceeds what is authorized by the jury verdict."). As noted by the Eleventh Circuit, some dicta in *Rita* arguably seems to support this view. *See Campbell*, 491 F.3d 1306, at 1314 n.11 (interpreting *Rita* as sanctioning the use of sentencing facts to impose any

each charge for which an offender was convicted corresponded to a Guidelines range within which a judge was required to sentence the offender.[204] For example, an offender convicted of possessing fifty grams of crack cocaine pre-*Booker* would receive a Guidelines punishment of 210 to 260 months' imprisonment.[205] Consequently, the maximum punishment exposure for this hypothetical offender would be the Guidelines ceiling, 260 months' imprisonment. Post-*Booker*, however, no Guidelines ceiling exists because the Guidelines ranges are merely advisory; according to the circuits, the upper ceiling for a given conviction is now the statutory maximum in the U.S. Code.[206] Consequently, so long as a judge sentences the defendant within the range statutorily authorized by the Code, there is no Sixth Amendment violation.

Illustrative of this proposition is *United States v. Magallanez*.[207] A jury convicted Magallanez of possessing 50-500 grams of methamphetamine;[208] under the Guidelines, this exposed him to a sentence of 63 to 78 months' imprisonment.[209] The statutory maximum under the U.S. Code, however, was life imprisonment.[210] At sentencing, the judge determined that Magallanez was actually guilty of possessing over 1200 grams of methamphetamine.[211] According to the Guidelines, the increased quantity now exposed him to 121-151 months' imprisonment, an increase of at least three years.[212] Although the quantity altered the applicable Guidelines range, the statutory maximum under the Code remained unchanged. According to the Tenth Circuit's view, the fact that the quantity determi-

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sentence within Guidelines); *see also* Rita v. United States, 127 S. Ct. 2456, at 2465 (2007) (explaining that recent Sixth Amendment cases do not "automatically forbid a sentencing court to take account of factual matters not determined by a jury").

204. *See* Witte v. United States, 515 U.S. 389, 401-02 (1995) (holding that imposition of the Guidelines is mandatory, rather than optional).

205. *See* United States v. Booker, 543 U.S. 220, 235 (2005).

206. *See, e.g.*, *Vaughn*, 430 F.3d at 527 (holding that a sentence may not exceed the statutory range in the U.S. Code); United States v. Magallanez, 408 F.3d 672, 683 (10th Cir. 2005) (noting that it is constitutional error only if a judge increases a defendant's punishment beyond the statutory maximum).

207. *Magallanez*, 408 F.3d at 672.

208. *Id.* at 676.

209. *Id.* at 682-83.

210. *Id.* at 683.

211. *Id.* at 676.

212. *Id.* at 682.

nation increased the Guidelines range was irrelevant now that *Booker* had rendered the Guidelines advisory; as long as Magallanez received a punishment less than or equal to life imprisonment, his sentence was within the statutory maximum and, consequently, authorized by the jury's verdict.[213]

In this fashion, the circuit courts have sanctioned the continued consideration of acquitted conduct post-*Booker* by holding that the Guidelines ranges are simply advisory signposts. Rather than addressing the doctrinal implications of the Supreme Court decisions in *Apprendi* and *Blakely*, which extended Sixth Amendment jury trial protections to sentencing,[214] the circuits have found it easier to hide behind the remedial *Booker* opinion, conducting business as usual. Given the degree to which the federal courts continue to adhere to the Guidelines ranges,[215] for the circuits to claim that the Guidelines are now advisory—and to use this justification to sidestep Sixth Amendment concerns—is insincere to say the least.[216] As the above data indicates convicted relevant determinations, including consideration of acquitted conduct, continue to overwhelmingly dictate an offender's sentence.[217] Despite the circuits' collective embrace of the remedial *Booker* opinion and their persistent pre-*Booker* sentencing behavior, however, the Supreme Court's recent opinion in *Cunningham v. California* suggests that the Court's new Sixth Amendment jurisprudence has actually gained adherents since the remedial *Booker* setback.[218] The implication is that the Court majority will not accept mechanical adherence to the Guidelines in the lower courts indefinitely. As the final Part of this Note will discuss, the Court's continued commitment to its modern Sixth Amendment

213. *Id.* at 683-85.

214. *See supra* Part III.

215. *See supra* notes 186-89 and accompanying text.

216. *See* United States v. Pruitt, 487 F.3d 1298, 1310 (10th Cir. 2007) (McConnell, J., concurring) (criticizing the illusion that the Guidelines operate in an advisory manner); *see also* Rita v. United States, 127 S. Ct. 2456, at 2474 (2007) (recognizing that the post-*Booker* Guidelines are, in effect, "virtually mandatory") (Stevens, J., concurring).

217. *See supra* notes 186-89 and accompanying text.

218. *See* Cunningham v. California, 127 S. Ct. 856, 876 (2007). In *Cunningham*, the five-member majority of *Apprendi* and *Blakely* grew to six justices, with the addition of Chief Justice Roberts. *Id.* Implicitly, this indicates that what was a slim majority in *Apprendi* and *Blakely* has now increased with the loss of Justices Rehnquist and O'Connor, both *Apprendi* and *Blakely* dissenters.

jurisprudence suggests that the consideration of acquitted conduct is doctrinally flawed and ripe to be struck down.

V. THE END OF ACQUITTED CONDUCT

In the Supreme Court's most recent sentencing opinion, *Cunningham v. California*, the majority remarked, "*Booker*'s remedy for the Federal Guidelines ... is not a recipe for rendering our Sixth Amendment case law toothless."[219] With respect to the consideration of acquitted conduct, however, this is exactly how the circuit courts have applied the remedial *Booker* opinion.[220] The argument is simple: as a result of *Booker*, the Guidelines are advisory, the Guidelines ranges are mere recommendations, and a sentencing judge can consider any facts—including conduct for which an offender has been acquitted—and impose any punishment within the broad range authorized by the U.S. Code. If the punishment exceeds the requisite Guidelines range, but falls below the ceiling in the Code, the punishment is in accordance with *Booker*. According to this reading, consideration of acquitted conduct does not implicate the constitutional right to a jury trial.

But this is a disingenuous reading of the Supreme Court's modern Sixth Amendment jurisprudence. Affirming the central holding of *Apprendi-Blakely*, the *Cunningham* Court reiterated, "[U]nder the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge."[221] The logic of this reasoning is simply incompatible with the Court's pre-*Apprendi* decision in *Watts*.[222] In fact, when the merits opinion in *Booker* briefly addressed this point, it did so by directly disparaging the continued legitimacy of *Watts*, characterizing the case convicted as nothing but a per curiam double jeopardy opinion that did not even have the benefit of the full briefing of the Court.[223]

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219. *Id.* at 870 (citation omitted).

220. *See supra* Part IV.

221. *Cunningham*, 127 S. Ct. at 863-64.

222. *See* United States v. Pimental, 367 F. Supp. 2d 143, 150 (D. Mass. 2005) (holding that the Court's post-*Apprendi* Sixth Amendment jurisprudence "substantially undermines the continued vitality of ... *Watts* both by its logic and by its words").

223. *See* United States v. Booker, 543 U.S. 220, 240 n.4 (2005) (merits opinion) ("*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral

Furthermore, the fact that Justice Stevens emphasized that *Watts* was a double jeopardy challenge, rather than a Sixth Amendment challenge, implied that a Sixth Amendment analysis may have altered the holding.[224] To be fair, the Court did not explicitly overrule *Watts* in its *Booker* opinion,[225] but as this final Part will demonstrate, as both a constitutional matter and a normative matter, the consideration of acquitted conduct at sentencing should be prohibited and *Watts* should be explicitly overruled.

A. Acquitted Conduct: The Quintessential Unauthorized Punishment

If repetition is any indication of importance, one recurring phrase encapsulates the Court's modern Sixth Amendment jurisprudence: the jury verdict must authorize the full punishment imposed.[226] Specifically, whether judicial fact-finding relates to motive,[227] offender culpability,[228] or drug quantity,[229] if additional punishment results from such fact-finding, the jury verdict has not constitutionally authorized the sentence. But consider what occurs when judges factor an offender's acquitted conduct into a sentence: disregarding the "not guilty" verdict of the jury, the judge decides the truth of the very fact that the jury rejected. As a technical matter, when the jury acquits, it has not authorized a guilty verdict. But a de facto guilty verdict is precisely what the judge imposes by considering acquitted conduct in a sentencing calculation.[230]

For example, recall the case of Robert Mercado.[231] At trial, the jury returned a verdict of not guilty with respect to charges of

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argument.").

224. *Id.* at 240.

225. In fact, Justice Stevens's *Booker* opinion noted that the issues confronted in *Booker* were not presented in *Watts*. *Id.*

226. *See, e.g.*, *Cunningham*, 127 S. Ct. at 863-64; *Booker*, 543 U.S. at 235; Blakely v. Washington, 542 U.S. 296, 301-02 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

227. *See Apprendi*, 530 U.S. at 475-76 (finding racial animus as improper motive).

228. *See Blakely*, 542 U.S. at 300 (finding offender acted with "deliberate cruelty").

229. *See Booker*, 543 U.S. at 235 (finding offender possessed 566 grams of crack-cocaine when jury only found him guilty of possessing at least 50 grams).

230. *See* United States v. Pimental, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) ("[W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved.").

231. *See supra* notes 1-6 and accompanying text.

conspiracy to murder and violent crimes in aid of racketeering.[232] At sentencing, however, the judge not only disagreed with the verdict, but set it aside, replacing the jury's "not guilty" with his singular determination of guilt;[233] consequently, the judge increased Mercado's sentence by seventeen years.[234] Such a result epitomizes an unauthorized punishment, and the judge who punishes an offender based upon conduct for which the jury has returned an acquittal has simply decided to ignore the verdict.[235]

Compared to the sentencing practices struck down in *Apprendi*,[236] *Blakely*,[237] and *Booker*,[238] the consideration of acquitted conduct appears even more egregious. In those three cases, the Court worried about punishments based upon facts with which the jury was never presented, such as whether the defendant was motivated by racial animus[239] or acted with deliberate cruelty.[240] The constitutional problem simply centered upon the fact that with respect to the issues in question, the jury had not rendered any decision at all. In contrast, when a judge bases a sentence upon acquitted conduct, the facts have been considered by the jury and *rejected*. In a perverse reversal of procedural roles, the judge effectively nullifies the jury.[241] Given the Court's repeated admonitions that the punishment must be authorized by the jury's verdict, it seems paradoxical to allow such judicial nullification. As Judge Gertner has argued, "It makes absolutely no sense to conclude that the

232. United States v. Mercado, 474 F.3d 654, 655 (9th Cir. 2007).

233. *See id.*

234. *Id.* at 659 (Fletcher, J., dissenting).

235. *See* United States v. Coleman, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005) (finding that "the jury is essentially ignored when it disagrees with the prosecution").

236. Apprendi v. New Jersey, 530 U.S. 466, 475-76 (2000) (holding that punishment was unauthorized when jury made no determination that defendant had acted with racist motivation).

237. Blakely v. Washington, 542 U.S. 296, 303 (2004) (holding that punishment was unauthorized when jury made no determination that defendant acted with "deliberate cruelty").

238. United States v. Booker, 543 U.S. 220, 235 (2005) (holding that punishment was unauthorized when jury made no determination that defendant possessed given quantity of narcotics).

239. *See Apprendi*, 530 U.S. at 475-76.

240. *See Blakely*, 542 U.S. at 300.

241. *See* United States v. Ibanga, 454 F. Supp. 2d 532, 540 (E.D. Va. 2006) ("Imposing a sentence that effectively nullifies a jury acquittal undermines the foundational principle of criminal law ....").

Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, and *also* conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing."[242]

The extent to which consideration of acquitted conduct represents punishment unauthorized by the jury verdict is fully illustrated by contrasting the practice with the lone exemption to the *Apprendi* rule: the prior conviction exception upheld in *Almendarez-Torres v. United States*.[243] In *Almendarez-Torres*, which predated *Apprendi*, the Court considered the constitutionality of a sentence based in part on the defendant's prior conviction.[244] Hugo Almendarez-Torres was indicted and charged with unlawfully reentering the United States after being deported.[245] A conviction under the applicable statute carried a maximum prison term of two years; however, when an offender was deported following a conviction for an aggravated felony, the maximum punishment was twenty years' imprisonment.[246] Because Almendarez-Torres had three prior felony convictions, at sentencing the government sought a punishment range of seventy-seven to ninety-six months' imprisonment.[247] Almendarez-Torres argued that the government should be forced to prove the prior convictions to a jury beyond a reasonable doubt,[248] but the Supreme Court rejected this argument, holding that relitigation of a prior conviction for sentencing purposes was unnecessary.[249]

Two years later, the *Apprendi* Court spared the defendant in *Almendarez-Torres*, indicating that consideration of a prior conviction at sentencing was the sole exception to the rule requiring an offender's punishment to be wholly authorized by the jury verdict.[250] After all, a prior conviction was arguably authorized by a jury, just

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

243. 523 U.S. 224, 243-44 (1998).

244. *Id.* at 226.

245. *Id.* at 227.

246. *Id.* at 226. The statute in question was 8 U.S.C. § 1326(a). *Id.*

247. *Id.* at 227.

248. *Id.*

249. *Id.* at 247.

250. *See* Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000).

not the jury in the immediate case.[251] At some point, the facts underlying the prior conviction had either been found by a jury beyond a reasonable doubt or admitted by the offender; thus, the Court's concerns with respect to bypassing the jury's fact-finding role were less pressing.[252] Although this distinction satisfied the Court in *Apprendi*, the majority nonetheless disparaged the continued validity of the prior conviction exception. Noting that *Almendarez-Torres* "represents at best an exceptional departure from [the] historic practice,"[253] the Court suggested that the case was "incorrectly decided."[254] Justice Thomas, who provided the fifth vote for the *Almendarez-Torres* majority, went even further in his *Apprendi* concurrence, calling his previous decision to uphold the prior conviction exception an "error."[255]

When the prior conviction exception next comes before the Court, it will in all likelihood be invalidated. Just two years ago, Justice Thomas counted enough votes in favor of the exception's demise in *Shepard v. United States*[256] and remarked that "*Almendarez-Torres* ... has been eroded by th[e] Court's subsequent Sixth Amendment jurisprudence."[257] Although *Shepard* was decided in 2005—before the addition of Chief Justice Roberts and Justice Alito—the five justices tallied by Justice Thomas in *Shepard* remain on the Court, and there is no indication that their views have changed over the past few terms. Moreover, given that Chief Justice Roberts sided with the majority in *Cunningham*, if anything, Justice Thomas's *Shepard* tally has increased. Irrespective of Chief Justice Roberts's or Justice Alito's views on *Almendarez-Torres*, however, the same five votes tallied by Justice Thomas remain on the Court and, if

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251. *See id.* at 488.

252. *See id.*

253. *Id.* at 487.

254. *Id.* at 489. The harsh language describing *Almendarez-Torres* in the *Apprendi* majority led some commentators to remark that the Court was signaling its intent to strike down the prior conviction exception if given the opportunity in the near future. See Colleen P. Murphy, *The Use of Prior Convictions After* Apprendi, 37 U.C. DAVIS L. REV. 973, 989 (2004).

255. *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring).

256. 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring) (arguing that a majority of the Court now realizes that *Almendarez-Torres* was wrongly decided).

257. *Id.* at 27. Justice Thomas went on to characterize a sentence based upon an offender's prior conviction as unconstitutional. *Id.* at 28.

past voting behavior is any indication, would invalidate the exception if given the chance.

An analysis of the likelihood that the prior conviction exception will survive is beyond the scope of this Note, but the Court's leanings are enlightening because of the implications for acquitted conduct. Specifically, if the Court is uncomfortable with the prior conviction exception—and all indications suggest that it is—similar logic implies that it must be at least equally troubled by consideration of acquitted conduct. Essentially, sentencing based upon a prior conviction is nothing more than an embrace of a previous fact-finder's affirmative decision;[258] at some point, at least, the fact-finding has been authorized by a jury. Despite this rationale, the Court appears concerned, in light of modern Sixth Amendment jurisprudence, that the jury in the *immediate* case did not authorize the offender's punishment. Quite simply, when the currently empaneled jury does not find all the facts authorizing an offender's punishment—even if those facts were adjudicated by a jury once before—the Court majority as it now stands is likely to find Sixth Amendment defects.[259]

Judicial consideration of acquitted conduct is logically more egregious than a reliance on prior convictions. In the latter, a jury at one time made a positive choice and verified the offender's guilt. Sentencing based upon acquitted conduct, however, allows a judge to affirmatively disregard the current fact-finder's negative decision. Unlike the prior conviction exception, where the sentencing judge relies on a previous jury's affirmative determination, consideration of acquitted conduct allows judicial rejection of the current jury determination. In this fashion, the Court's constitutional concerns with the prior conviction exception are arguably more manifest in the use of acquitted conduct. If the Court is uneasy with a sentencing judge considering a prior jury's positive finding of guilt, it must be even more uncomfortable with a judge rejecting the current jury's negative finding of acquittal. As the next Part will emphasize, these concerns are rooted in the historical

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258. *See Murphy*, *supra* note 254, at 997-98.

259. To be fair, the prior conviction exception currently remains alive and well, though it has recently caused sharp controversy in the circuits. *See* United States v. Pineda-Arrellano, 492 F.3d 624 (5th Cir. 2007) (upholding prior conviction exception over vigorous dissent).

mandate that punishment be wholly authorized by the jury's verdict.

B. The Sixth Amendment Concerns

Under the Court's modern sentencing jurisprudence, in addition to the history detailed previously, the Sixth Amendment clearly forbids the consideration of acquitted conduct. As discussed in Part I, when the Framers embedded the right to a criminal jury trial in the Bill of Rights, they expressly intended the jury to function as a check on the prosecuting arm of the state.[260] In fact, Justice Story called the jury "the great bulwark" standing between the accused and the government.[261] When the jury rejects a prosecutor's charge, it exercises its role as a bulwark, telling the judge that the offender's punishment should not be increased by consideration of the facts that the jury rejected. When the judge considers acquitted conduct in spite of the jury's determination, "the jury is essentially ignored [because] it disagree[d] with the prosecution."[262] Allowing the jury to be ignored in this way contravenes the structural role that the Framers intended the jury to fulfill; specifically, the jury is unable to function as a check on each of the three branches of government.

First, when a judge is allowed to reject the fruits of the jury's fact-finding, the jury's role as an intra-branch check is destroyed. Quite simply, the founding generation viewed judges skeptically;[263] because judges were on the federal payroll, the Framers feared that judges would inherently sympathize with the government's position.[264] To prevent this tendency, the Sixth Amendment placed the jury between the judge and the accused. Even if a federal judge completely towed the government line, federal prosecutors would still be required to convince a lay jury of an offender's guilt. But, when a judge may simply disregard the jury's fact-finding and

260. *See supra* Part I.B.

261. STORY, *supra* note 58, at 652.

262. United States v. Coleman, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005).

263. *See* AMAR, THE BILL OF RIGHTS, *supra* note 54, at 83.

264. *See, e.g.*, RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 26 (2003); *Essay of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 61 (Herbert J. Storing ed., 1981) (remarking that judges were "always ready to protect the officers of government against the weak and helpless citizen").

impose punishment based on acquitted conduct, this intended intra-branch check is subverted.

Additionally, permitting judges to consider acquitted conduct during the sentencing phase undermines the Sixth Amendment's intended effect as an inter-branch check.[265] When the jury rejects a charge levied against an offender, but the executive branch may relitigate the issue at sentencing, the government receives a second bite at the apple.[266] Moreover, this second bite lacks the process protections of trial and comes with a lower standard of proof. As an example, consider the prosecution strategy in *United States v. Coleman*.[267] After a jury trial, Coleman was acquitted of several counts of using the mail to improperly distribute medicine.[268] During the sentencing phase, however, the government called a new expert witness in order to better convey confusing evidence already rejected by the jury, thus convincing the judge to consider the acquitted conduct.[269] This allowed "the prosecutor to try the same facts in front of two different fact-finders,"[270] and to learn from costly trial mistakes, transforming the jury from a check on government into a mere speedbump.

Perhaps most importantly from an originalist perspective, when the judge and prosecutor are able to bypass the jury in this way, the jury's power to issue an unreviewable verdict of acquittal is severely diluted.[271] The Framers, as well as the courts for most of the country's history, recognized that the jury's power to acquit, as well as its nullification power, "underlie[s] the prohibition against directed guilty verdicts and judgments of conviction notwithstanding a verdict."[272] Were this not the case, for example, the royal

265. *See* Gardina, *supra* note 103, at 380.

266. *See* Johnson, *supra* note 79, at 182-83.

267. 370 F. Supp. 2d 661 (S.D. Ohio 2005).

268. *Id.* at 663.

269. *Id.* at 672-73.

270. *Id.* at 673.

271. *See supra* Part I.B.

272. Johnson, *supra* note 79, at 181; *see also* United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977) (holding that a jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government"); United Bhd. of Carpenters & Joiners of Am. v. United States, 330 U.S. 395, 408 (1947) (noting that "guilt is determined by the jury, not the court"); Sparf & Hansen v. United States, 156 U.S. 51, 105-06 (1895) (recounting that the rule in a criminal case is that if the jury's "verdict is one of acquittal, the court has no power to set it aside") (internal quotations omitted).

governor of New York would have simply dispensed with the grand jury and thrown John Peter Zenger in prison for sedition.[273] As the *Blakely* Court specifically indicated, the jury's verdict power allows it to function as a "circuitbreaker" to check the power of state.[274] Clearly, any sentencing mechanism that allows a judge to reject a jury's acquittal—and override the jury's ability to act as such a circuitbreaker—contradicts the intent of the Sixth Amendment.

Supporters of judicial consideration of acquitted conduct may respond to these Sixth Amendment arguments in two ways. First, adopting an argument from the *Watts* opinion, one may claim that a jury's acquittal is hardly equivalent to a finding of innocence.[275] Rather, acquittal simply "proves the existence of a reasonable doubt as to [an offender's] guilt."[276] Consequently, when a sentencing judge considers acquitted conduct, he is not necessarily weighing facts that were rejected; the judge is merely weighing facts the government was unable to prove beyond a reasonable doubt.

Given the values underlying the right to a jury trial, however, this argument is normatively troubling. The structure of the criminal system demands that facts be proved beyond a reasonable doubt;[277] when the government cannot meet this exacting standard, it necessarily fails. Allowing consideration of acquitted conduct not only permits the government to bypass the age-old requirements of proof, but it also disregards the jury's determination that despite the enormous prosecuting power of the state, the prosecutor failed to meet his burden. True, an acquittal does not necessarily equal innocence, but the fact is that it could. And, without asking the jury to rule on innocence specifically, a failure to meet the reasonable doubt standard constitutes legal innocence. The jury carries these assumptions into its deliberations and by voting "not guilty," the

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273. *See supra* notes 39-44 and accompanying text.

274. *See* Blakely v. Washington, 542 U.S. 296, 306 (2004).

275. *See* United States v. Watts, 519 U.S. 148, 155-56 (1997) (per curiam).

276. *Id.* at 155 (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984)).

277. *See* CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 321, at 681-82 (1954) (discussing the common law standard of proof beyond a reasonable doubt); *see also* Apprendi v. New Jersey, 530 U.S. 466, 478 (2000) (stating that a defendant's right to have the facts alleged proved beyond a reasonable doubt is an age-old rule descended from the common law).

jury assumes that the defendant will be treated as if innocent.[278] Quite simply, the *Watts* rationale permits the government to change the rules at the end of the game, when a defendant's liberty is at stake, and to do so at the expense of the jury right. This is a result that is normatively repugnant.

Additionally, proponents of judicial consideration of acquitted conduct may press a second assertion: in order for the defendant to proceed to sentencing, the jury must have convicted him of *something*. Consequently, the structural checks envisioned in the Sixth Amendment are not subverted—the jury has specifically authorized some punishment and consideration of acquitted conduct simply allows the judge to select the proper punishment within a broad range. In fact, the circuit courts reviewing the post-*Booker* use of acquitted conduct put forth this exact rationale, holding that so long as a judge sentences the defendant within the applicable U.S. Code statutory ceiling, the sentence is valid and any facts considered to arrive at the sentence are constitutionally acceptable. Essentially, this rationale suffers from two flaws: first, it overstates the extent to which the Guidelines are now advisory; second, it affords improper weight to the fact that the jury affirmatively rejected the facts alleged. The following subsection deals with this argument in more detail.

1. Saved by the New Statutory Ceiling?

Proponents of the use of acquitted conduct may argue that *Booker* altered the sentencing ceiling and that if a judge imposes a sentence within the statutory ceiling allowed by the jury's conviction, it is irrelevant that he considers facts that the jury rejected. Viewed in this light, the effect of the *Booker* remedy was to push the district judge's role closer to that occupied in the pre-Guidelines "let-it-all-in" days of *Williams v. New York*.[279] As interpreted by the circuit courts, the new sentencing ceiling is the statutory maximum defined in the United States Code; the Guidelines exist merely to advise the judge's discretion.[280] According to this view, the Supreme

278. *See* Freed, *supra* note 7, at 1714.
279. 337 U.S. 241 (1949); *see supra* Part II.A.
280. *See supra* notes 203-06 and accompanying text.

Court effectively saved *Watts* by rendering the Guidelines advisory.[281]

This argument suffers from two faults. First, the claim fails to grasp that the Guidelines are de facto mandatory. Although the *Booker* remedy seemingly left the federal courts with an advisory Guidelines scheme, the Court's opinion also required a judge to continue operating within Guidelines ranges.[282] Specifically, the remedial opinion directs the courts to continue to apply the Guidelines,[283] and lower courts have applied *Booker* in such a way that sentences within the appropriate Guidelines range are presumptively reasonable.[284] Cognizant that they will be overturned for failing to apply the Guidelines, district courts have acknowledged that a judge "varies from a Guidelines sentence at his or her peril."[285] A cursory look at sentencing appeals in the circuit courts confirms this assertion: within-Guidelines sentences are almost always upheld on appeal, above-Guidelines sentences are usually upheld on appeal, and below-Guidelines sentences are routinely reversed.[286] In this way, the once-mandatory application of the Guidelines has been replaced by de facto mandatory Guidelines, which are strictly enforced by the circuit courts.

Given these sentencing realities—and contrary to those courts that cite to *Williams* for acquitted conduct support—the current sentencing regime is far removed from the pre-Guidelines indeterminate scheme in which a judge possessed "virtually unfettered discretion."[287] Rather, district judges operate in a "hybrid regime" in which facts continue to have determinate consequences;[288] as indicated above, a failure to apply those determinate consequences

281. In fact, Justice Stevens's dissent in *Watts* seems to agree with this proposition, as he admits that a judge "may consider otherwise inadmissible evidence, including evidence adduced in a trial that resulted in an acquittal." United States v. Watts, 519 U.S. 148, 162 (1997) (Stevens, J., dissenting). Of course, this dissent was written pre-*Apprendi*.

282. *See* United States v. Booker, 543 U.S. 220, 259-61 (2005) (remedial opinion).

283. *See id.* at 261. The remedial opinion also instructs appellate courts to uphold within-Guidelines sentences so long as they are "reasonable." *Id.*

284. *See supra* notes 186-89 and accompanying text. Of course, the use of such a presumption at the appellate level was also blessed in *Rita*. *See* Rita v. United States, 127 S. Ct. 2456, at 2462 (2007).

285. United States v. Ibanga, 454 F. Supp. 2d 532, 538 (E.D. Va. 2006).

286. *See supra* notes 186-89 and accompanying text.

287. Johnson, *supra* note 79, at 179.

288. United States v. Pimental, 367 F. Supp. 2d 143, 152 (D. Mass. 2005).

will likely result in reversal on appeal. Consequently, the post-*Booker* Guidelines ranges are applied in a remarkably similar manner to the pre-*Booker* regime: district judges continue to make relevant conduct determinations and these determinations are then plugged into the Sentencing Table to increase punishment in a mechanical fashion. Accordingly, when judicial fact-finding results in the consideration of acquitted conduct, an offender's punishment exposure determinately rises as directed by the Guidelines.[289]

Consider again *United States v. Magallanez*.[290] After trial, the jury was presented with an interrogatory on which it was to state the quantity of narcotics attributable to Magallanez. Given the choice of three quantity ranges, the jury selected the lowest quantity and found Magallanez guilty of possessing between 50 and 500 grams, thereby exposing him to a maximum of seventy-eight months' imprisonment under the Guidelines.[291] At sentencing, however, the judge determined that Magallanez possessed 1200 grams of methamphetamine, increasing the punishment exposure to a range of 121 to 151 months, a result mechanically dictated by the Guidelines.[292]

Throughout the sentencing phase, the judge and the litigants repeatedly referred to the applicable Guidelines ranges and the mechanical effects of sentencing facts on those ranges.[293] Neither the parties nor the judge acted as if the broad punishment range contained in the U.S. Code was relevant. Rather, all parties were aware that fact-finding by the sentencing judge would be plugged into the Guidelines, resulting in determinate increases in the punishment Magallanez received. The judge admitted as much in his opinion:

> The defendant in this case might well be excused for thinking that there is something amiss ... with allowing the judge to determine facts on which to sentence him to an additional 43

289. *See, e.g.*, United States v. Dorcely, 454 F.3d 366, 370 (D.C. Cir. 2006) (considering acquitted conduct to increase Guidelines range from zero to six months to twenty-four to thirty months); United States v. Price, 418 F.3d 771, 786 (7th Cir. 2005) (increasing defendant's base offense level from thirty-two to thirty-eight on the basis of acquitted conduct and thus imposing a life sentence).

290. 408 F.3d 672 (10th Cir. 2005).

291. *Id.* at 682-83.

292. *Id.*

293. *Id.* at 682-85.

> months in prison in the face of a jury verdict finding facts under which he could be required to serve no more than 78 months.[294]

Such language illustrates the fact that the *Magallanez* court, like nearly all courts post-*Booker*, continued to operate within the Guidelines framework, as opposed to the U.S. Code's framework. For the *Magallanez* court, the Guidelines ranges established the base punishment—seventy-eight months—and dictated the mechanical punishment increase—forty-eight months. Quite simply, the Code range was hardly relevant.

As this discussion should make clear, sentencing continues to operate according to the mechanical dictates of the Guidelines; therefore, the Sixth Amendment should prevent judges from inputting facts into the Sentencing Table when those facts were rejected by the jury. Moreover, as made clear above, sentences continue to be determined by the Guidelines; thus, although the U.S. Code is technically the ceiling, its functional relevance is of limited importance and appears more useful as a vehicle for the circuits to ignore the Court's new Sixth Amendment jurisprudence. But given the values underlying the jury trial right, which the Court has repeatedly embraced in *Apprendi* and its progeny, utilizing facts rejected by the jury seems not only unconstitutional, but normatively wrong.

C. As if the Constitutional Objections Were Not Enough—Policy Considerations

In addition to the constitutional objections, allowing offenders to be sentenced based on conduct that the jury has rejected is bad policy. Not only does it result in confusion among lay observers—including jurors and defendants—but this confusion undermines respect for the rule of law.[295] Commentators have observed that the sentencing phase under the Guidelines has become so complex that participants and observers no longer understand the process;[296] moreover, judges frequently admit that a sentence based

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294. *Id.* at 683. Then the court quickly noted that "Mr. Magallanez's argument is wrong." *Id.* at 684.

295. *See* United States v. Ibanga, 454 F. Supp. 2d 532, 541-42 (E.D. Va. 2006).

296. *See* Stith & Koh, *supra* note 73, at 287 (noting that sentencing proceedings already are confusing to most "victims, defendants, and the public").

on acquitted conduct is likely to engender consternation among the public.[297] When laypersons see that the product of a jury's fact-finding may be affirmatively set aside by a single judge, the civic value of jury service suffers. In this way, strictly as a matter of policy, judicial consideration of acquitted conduct harmfully impacts the jury's intended democratic accountability function.

The Framers did not simply intend the jury to be a means of protection for the accused; rather, the jury was also envisioned as a representation of popular legitimacy in the judicial branch.[298] As an institution, jury service imports citizen participation into the criminal justice system and, as a result, grants the public a popular stake in the function of that system.[299] The Supreme Court has often echoed the democracy-promoting value of the jury, lauding the manner in which jury service enables the citizenry to "shar[e] in the administration of justice."[300] Justice Scalia once even characterized the jury as the "spinal column of American democracy."[301] Additionally, by fostering democratic participation, jury service positively influences public confidence in the application of the criminal laws.[302] As Barry Johnson has argued, jury service educates citizens and furthers the law's moralizing function, "complementing the law's deterrent effect."[303]

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 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. When this policy objection is coupled with both the constitutional and normative objections to consideration of acquitted conduct, the arguments in favor of discontinuing the practice are overwhelming.

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297. *See* United States v. Coleman, 370 F. Supp. 2d 661, 671 n.14 (S.D. Ohio 2005).

298. *See* United States v. Kandirakis, 441 F. Supp. 2d 282, 314 (D. Mass. 2006) (recounting the colonial history).

299. *See* Johnson, *supra* note 79, at 184-85.

300. Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975) (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

301. Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring).

302. *See* Johnson, *supra* note 79, at 184-85.

303. *Id.* at 184.

CONCLUSION

The Court's modern Sixth Amendment jurisprudence strongly suggests that judicial consideration of acquitted conduct at sentencing—upheld in *United States v. Watts*—is no longer constitutionally permissible. As the history of the criminal jury trial right makes clear, such consideration would likely have been anathema to the founding generation and the values underlying the constitutional right to a criminal jury trial. Although the requirements of the modern penal system place a far greater strain on judges, litigants, and juries than the Framers could have ever imagined, the Sixth Amendment was not designed to promote efficiency.[304] Quite simply, the right to a jury trial is not subject to balancing tests, but bright line rules; with respect to the jury's power to issue an unreviewable verdict, the Sixth Amendment draws a line in the sand: across that line, we should not venture. As Justice Scalia made clear, the right to a jury trial "has never been efficient; but it has always been free."[305]

James J. Bilsborrow[*]

304. Blackstone argued that the inefficiencies of the criminal jury were a fair price for free nations to "pay for their liberty." WILLIAM BLACKSTONE, 4 COMMENTARIES *344.

305. Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

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