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Reasonable Doubt in Doubt: Sentencing and the Supreme Court in *United States v. Watts*

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Reasonable Doubt in Doubt: Sentencing and the Supreme Court in *United States v. Watts*

I. INTRODUCTION	661
II. LANGUAGE, HISTORY, AND STRUCTURAL IMPLEMENTATION OF THE FEDERAL SENTENCING GUIDELINES	663
III. THE NINTH CIRCUIT'S INTERPRETATION OF THE GUIDELINES IN <i>WATTS</i> AND <i>PUTRA</i>	665
IV. THE SUPREME COURT MAJORITY'S INTERPRETATION OF THE GUIDELINES	667
V. THE SUPREME COURT CONCURRENCES AND DISSENTS	671
A. <i>The Supreme Court Concurrences</i>	671
B. <i>The Supreme Court Dissents</i>	672
VI. THE PRESUMPTION OF INNOCENCE AND CONSTITUTIONAL DUE PROCESS	677
VII. THE PRAGMATIC IMPLICATIONS OF HANDING OVER FACT-FINDING DISCRETION TO PROSECUTORS AND JUDGES UNDER THE GUISE OF "SENTENCING"	683
VIII. CONCLUSION	689

I. INTRODUCTION

On January 6, 1997, the United States Supreme Court held that a sentencing court may use conduct for which a defendant has been acquitted, to enhance a sentence for conduct of which the defendant has been convicted.¹ The holding, which resolved a split between the Ninth Circuit and all other Circuits, arose from two Ninth Circuit cases, *United States v. Watts*² and *United States v. Putra*.³ In *Watts*, the government indicted the defendant for possessing cocaine base with the intent to distribute, and for using a firearm in connection with a drug offense.⁴ A jury convicted him on the narcotics charge, but acquitted him on the weapons charge.⁵ In *Putra*, the government indicted the defendant on two counts of aiding and abetting possession with intent to distribute cocaine. The first count involved one ounce of cocaine. The second count involved five ounces of cocaine.⁶ The jury convicted the defendant on the first count, but acquitted her on the second.⁷ In both *Watts* and *Putra*, the district court used the acquitted conduct to enhance the defendants' sentences.⁸ In both cases, the Ninth Circuit reversed and

1. See *United States v. Watts*, 117 S. Ct. 633 (1997).

2. *United States v. Watts*, 67 F.3d 790 (9th Cir. 1995).

3. *United States v. Putra*, 78 F.3d 1386 (9th Cir. 1996).

4. See *Watts*, 67 F.3d at 793.

5. See *id.*

6. See *Putra*, 78 F.3d at 1387.

7. See *id.* at 1388.

8. In *Watts*, the district court applied a preponderance of the evidence standard to section 2D1.1(b)(1) of the U.S. Sentencing Guidelines to enhance Watts' base offense level by two levels. See *Watts*, 67 F.3d at 797-98; U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (1995)

remanded, holding it to be improper for sentencing judges to use facts rejected by the jury through its acquittal, for purposes of sentence enhancement.⁹ On a single petition for *certiorari*, the U.S. Supreme Court reversed and remanded the Ninth Circuit's decisions.¹⁰ In its consolidated decision in *United States v. Watts*, the Supreme Court held that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.¹¹

In rendering its 7-2 *per curiam* decision, the Court ostensibly reiterated the principle expressed in *Williams v. New York*,¹² and codified in 18 U.S.C. § 3661: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."¹³

This Note will analyze the Supreme Court's *Watts* decision and its implications for the future of judicial discretion in criminal sentencing. Part I provides a contextual look at the language, history, and structural implementation of the Federal Sentencing Guidelines. Part II examines the Ninth Circuit's solitary interpretation of the Guidelines as presented by their decisions in *Watts* and *Putra*. Part III examines the Supreme Court majority's interpretation of the Guidelines in the context of 18 U.S.C. § 3661, the plain language of the Guidelines themselves, and *Williams* and other precedent bearing on that interpretation. Part IV critiques the majority decision in light of Justices Scalia's and Breyer's concurrences, and Justices Stevens' and Kennedy's dissents. Part V highlights the extent to which the majority's decision is irreconcilable with the purposes of the federal criminal system, as embodied in the presumption of innocence and constitutional due process. Ultimately, Part VI condemns the pragmatic implications of handing over fact-finding discretion to prosecutors and judges under the guise of "sentencing."

[hereinafter SENTENCING GUIDELINES]. Section 2D1.1(b)(1) of the Guidelines applies where "a dangerous weapon (including a firearm) was possessed" during the offense of conviction. SENTENCING GUIDELINES, *supra*, at § 2D1.1(b)(1); *see also Watts*, 67 F.3d at 796 (citing same provision). In *Putra*, the sentencing court determined that the preponderance of the evidence showed that Putra aided and abetted on two counts of possession with intent to distribute cocaine. *See Putra*, 78 F.3d at 1387.

9. *See Watts*, 67 F.3d at 797-98; *Putra*, 78 F.3d at 1388-89 (upholding *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991)).

10. *See United States v. Watts*, 117 S. Ct. 633, 638 (1997).

11. *See id.*

12. *Williams v. New York*, 337 U.S. 241 (1949).

13. 18 U.S.C. § 3661 (1994).

II. LANGUAGE, HISTORY, AND STRUCTURAL IMPLEMENTATION OF THE FEDERAL SENTENCING GUIDELINES

In October, 1984, Congress passed the Comprehensive Crime Control Act which incorporated the Sentencing Reform Act of 1984.¹⁴ The Sentencing Guidelines promulgated thereunder took effect in 1987, under the direction of the United States Sentencing Commission.¹⁵ In enacting the Guidelines, Congress sought truth¹⁶ and proportionality¹⁷ in sentencing. Moreover, it aimed at producing uniformity and predictability¹⁸ by reducing the broad sentencing discretion of judges, who were giving out disparate sentences for convictions involving substantially the same circumstances.¹⁹

Under the current Sentencing Guidelines, sentences are based, not so much upon a defendant's actual conduct, but upon conduct that constitutes the elements of the offense for which he is charged and convicted. In other words, the current system is a charge-offense system to the extent that the offense for which the defendant is convicted secures the base offense level in the Sentencing Guidelines.²⁰ However, the cur-

14. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2017, which contains the Sentencing Reform Act of 1984 (codified at 18 U.S.C. §§ 3551-3559 (1994)). For a basic description of the Federal Sentencing Guidelines and a summary of their historical development, see Michael K. Forde, Note, *The Exclusionary Rule at Sentencing: New Life Under the Federal Sentencing Guidelines?*, 33 AM. CRIM. L. REV. 379, 386 (1996); Joshua M. Weber, Note, *United States v. Brady: Should Sentencing Courts Reconsider Disputed Acquitted Conduct for Enhancement Purposes Under the Federal Sentencing Guidelines*, 46 ARK. L. REV. 457, 459-63 (1993); William J. Kirchner, Note, *Punishment Despite Acquittal: An Unconstitutional Aspect of the Federal Sentencing Guidelines?*, 34 ARIZ. L. REV. 799, 800-03 (1992).

15. 132 CONG. REC. H3278-02 (daily ed. June 3, 1986) (statement of Rep. Rodino); see also Jason Ebe, Note, *Witte v. United States: Conduct May Be Considered for Multiple Punishments Without Violating Double Jeopardy*, 37 ARIZ. L. REV. 1279, 1280-83 (1995) (delineating the Commission's responsibilities).

16. Congress sought to promote honesty in sentencing by eliminating indeterminate sentences and disempowering the parole commission from significantly reducing how much of that sentence the offender actually served. See Ebe, *supra* note 15, at 1281; Forde, *supra* note 14, at 386.

17. Congress sought proportionality in sentencing by imposing appropriately different sentences for different criminal conduct of varying severity. See Ebe, *supra* note 15, at 1281; Forde, *supra* note 14, at 386.

18. 133 CONG. REC. E3608-02 (daily ed. Sept. 17, 1987) (statement of Rep. Synar of Oklahoma).

19. The professed purpose of the Guidelines was to: "provide certainty and fairness in . . . sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991 (1994). "Imposition of a sentence:

(a) factors to be considered in imposing a sentence . . .

. . . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553 (1994). See also 132 CONG. REC. H3278-02 (daily ed. June 3, 1986) (statement of Rep. Rodino).

20. See Kirchner, *supra* note 14:

rent system is also a compromised charge system incorporating real-offense sentencing,²¹ in that the Sentencing Guidelines require judges to consider the defendant's actual conduct in carrying out his crime, regardless of the charges for which he was indicted or convicted.²² Accordingly, Sentencing Guidelines Section 1B1.3(a) lists the following as "relevant conduct" in determining the applicable base level and concomitant guideline range for purposes of sentencing:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) . . . all reasonable foreseeable acts and omissions of others in furtherance of . . . jointly undertaken criminal activity, that occurred *during the commission of the offense of conviction*, in preparation of that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) . . . all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from . . . and all harm that was the object of such acts and omissions²³

In determining the appropriate guideline range, the "relevant conduct" context in section 1B1.3 of the Sentencing Guidelines directs judges to take into account the manner in which the criminal defendant carried out the crime of conviction.²⁴ What section 1B1.3 leaves unresolved is the

The offense for which the defendant was convicted (the "charge offense") forms the starting point or "base level offense." The judge then evaluates other relevant conduct committed by the offender (the "real offense" element of the system) to determine if enhancement or reduction of the offense level is warranted. The "combined adjusted offense level" thus reflects a blend of these two elements.

Id. at 80 (citations omitted). See also Ebe, *supra* note 15, at 1281-82; Forde, *supra* note 14, at 386.

21. See SENTENCING GUIDELINES, *supra* note 8, at § 1B1.3; see also 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, 159-62 (1996) (discussing relevant conduct and real-offense sentencing under the Guidelines); Forde, *supra* note 14, at 386 (same); Ebe, *supra* note 15, at 1282 (same).

22. The Guidelines generally direct judges to: (1) locate the statute of conviction; (2) determine the base offense level; (3) add specific characteristics; (4) add adjustments; (5) calculate a criminal history score; (6) determine the sentence within the Sentencing Table; and (7) impose a guideline sentence, or, under unusually mitigating or aggravating circumstances, depart from and impose a non-Guideline sentence. See Ebe, *supra* note 15, at 1282; see also Johnson, *supra* note 21, at 158-59 (discussing sentencing process); Kirchner, *supra* note 14, at 801-03 (same).

23. SENTENCING GUIDELINES, *supra* note 8, at § 1B1.3(a) (emphasis added).

24. See also *id.* § 1B1.3 commentary, at 17:

The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability . . . the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.

precise parameters of such "relevant conduct" in the context of concurrent or past acquitted conduct. In particular, section 1B1.3 does not speak to the issue of whether acquitted conduct, relevant or not, is "conduct" in the first place. When the issue of acquitted conduct did arise before Congress in 1992, in the form of a proposed amendment to section 1B1.3, the amendment was rejected. The proposed amendment read as follows: "Proposed Amendment: Section 1B1.3 is amended by inserting the following additional subsection: '(c) Conduct of which the defendant has been acquitted after trial shall not be considered under this section.'"²⁵

Ultimately, because the language of section 1B1.3 may be interpreted broadly enough to embrace acquitted conduct,²⁶ and because attempts to limit that language have been unsuccessful, the text and context of the current Guidelines have caused all but the Ninth Circuit to anticipate the Supreme Court's decision in *Watts*. It remained common practice for both pre-Guidelines²⁷ as well as post-Guidelines judges to use acquitted conduct as a factor in sentencing.²⁸ Nevertheless, it was not until the Court's disposition of *Watts* that the use of acquitted conduct at sentencing became a judicially endorsed feature of the Sentencing Guidelines themselves.

III. THE NINTH CIRCUIT'S INTERPRETATION OF THE GUIDELINES IN *WATTS* AND *PUTRA*

Watts arose when the government filed a single petition for *certiorari* seeking review of two Ninth Circuit cases, *United States v. Watts* and *United States v. Putra*.²⁹ In both cases, the Ninth Circuit held that sentencing courts could not consider underlying charges of which defendants had been acquitted for sentencing purposes.³⁰ Every other circuit had held that a sentencing court may do so if the government established the acquitted conduct by a lowered preponderance of the evi-

25. Proposed Amendment to U.S. Sentencing Guidelines Manual § 1B1.3, 57 Fed. Reg. 62832 (proposed Dec. 31, 1992):

The Commentary to § 1B1.3 captioned "Application Notes" is amended by inserting the following additional note: "11. Subsection (c) provides that conduct of which the defendant has been acquitted after trial shall not be considered in determining the offense level under this section. In an exceptional case, however, such conduct may provide a basis for an upward departure"

Id. Similar amendments in 1993 were also rejected. See 57 Fed. Reg. at 62848 (proposed Dec. 31, 1992); 58 Fed. Reg. 67522, 67541 (proposed Dec. 21, 1993).

26. See Johnson, *supra* note 21, at 162.

27. See *id.* at 163.

28. See *id.* "Sentence enhancement through acquitted conduct is an entrenched feature of the Guidelines." *Id.* at 164.

29. See *United States v. Watts*, 117 S. Ct. 633, 634 (1997).

30. See *id.*

dence standard.³¹

In *Watts*, police officers conducted a probation search of Vernon Watts' house.³² They recovered crack cocaine, two loaded firearms, and ammunition.³³ Subsequently, the state charged Watts with possessing cocaine base with intent to distribute³⁴ and with using a firearm in connection with a drug offense.³⁵ The jury convicted Watts on the narcotics charge, but acquitted him on the weapons charge. The district court sentenced him to 262 months in prison and sixty months of supervised release.³⁶ This sentence resulted from a two-level enhancement of Watts' base offense level under Sentencing Guidelines section 2D1.1(b)(1), because the district court found by a preponderance of the evidence that Watts possessed a firearm during his drug offense.³⁷ On appeal to the Ninth Circuit, Watts successfully argued that the jury's acquittal of him on the weapons charge precluded this enhancement under *United States v. Brady*.³⁸

Similarly, in *Putra*, the District Court of Hawaii charged Cheryl Ann Putra with aiding and abetting the possession of one ounce of cocaine with intent to distribute; aiding and abetting the possession of five ounces of cocaine with intent to distribute; and conspiring knowingly and intentionally to distribute in excess of 500 grams of cocaine.³⁹ After a jury convicted Putra of aiding and abetting the possession with intent to distribute one ounce of cocaine, and acquitted her on the two other charges, the district court sentenced her to twenty-seven months in prison. The sentence was based on a twenty-seven to thirty-three month sentencing range.⁴⁰ To reach this range, the district court departed upward from the Guidelines sentencing range for Putra's convicted crime (fifteen to twenty-one months), by aggregating the amount of

31. *See id.*

32. *See United States v. Watts*, 67 F.3d 790, 793 (9th Cir. 1995). California probationers are subject to warrantless searches of their property. *See id.*

33. *See id.* at 793.

34. *See id.* Possession of cocaine base with the intent to distribute is a violation of 21 U.S.C. § 842(a)(1) (1994). *See id.*

35. *See Watts*, 67 F.3d at 793. Use of a firearm in relation to a drug offense is a violation of 18 U.S.C. § 924(c) (1994). *See id.*

36. *See id.*

37. *See id.* at 797. The district court stated that "although the jury did not find beyond a reasonable doubt that all of the elements [of the weapons offense] . . . were proven . . . the only logical explanation for the gun is that they emboldened Mr. Watts in his . . . drug dealings." *Id.* at 797-98.

38. *United States v. Brady*, 928 F.2d 844, 854 (9th Cir. 1991) (holding that the defendant's acquittal of first degree murder and assault with intent to commit murder, precluded the district court from enhancing the defendant's sentence for conviction of voluntary manslaughter and assault with a dangerous weapon).

39. *See United States v. Putra*, 78 F.3d 1386, 1387 (9th Cir. 1996).

40. *See id.* at 1387.

cocaine involved in her two acquitted charges.⁴¹ The court justified its departure from Putra's base offense level by determining Putra's "guilt" in the acquitted charges by a preponderance of the evidence.⁴² As in *Watts*, the Ninth Circuit reversed and remanded based on *United States v. Brady*.⁴³

Under *Brady*, a district court cannot reconsider facts which the jury necessarily rejected by its acquittal on another count in order to sentence a criminal defendant for a convicted offense.⁴⁴ "Otherwise, any time a judge disagreed with the jury's verdict, the judge could 'reconsider' critical elements of the offense to avoid the restrictions of the Guidelines and push the sentence to the maximum—in effect punishing the defendant for an offense for which he or she had been acquitted."⁴⁵

In contrast to all other circuits, the Ninth Circuit applied *Brady* as a bright line rule prohibiting sentencing judges, "under any standard of proof,"⁴⁶ from relying on facts on which the defendant was acquitted.⁴⁷ Thus, in *Watts*, the Ninth Circuit rejected the government's argument that, because Watts' sentencing enhancement for possession of a firearm under section 2D1.1(b)(1) contained fewer elements than the acquitted statutory weapons offense under section 924(c), the district court's determination that Watts possessed a firearm was not a reconsideration of facts rejected by the jury.⁴⁸ Instead, the court held that: "the only difference between Section 2D1.1(b)(1) and Section 924(c) is the assignment and standard of the burden of proof"⁴⁹ Similarly, in *Putra*, the Ninth Circuit held that the jury's acquittal of Putra for aiding and abetting the possession with intent to distribute five ounces of cocaine was an explicit finding that Putra "was not involved, did not commit, did not aid or abet, and was not engaged in" possession of that cocaine.⁵⁰

IV. THE SUPREME COURT MAJORITY'S INTERPRETATION OF THE GUIDELINES

In reversing the Ninth Circuit in *Watts*, the Supreme Court relied on 18 U.S.C. § 3661 and its "long-standing principle" of giving sentenc-

41. *See id.*

42. *See id.*

43. *See id.* at 1389.

44. *See United States v. Brady*, 928 F.2d 844, 851 (9th Cir. 1991).

45. *Id.* at 851-52.

46. *Id.* at 851.

47. *See, e.g., United States v. Pinkney*, 15 F.3d 825, 828-29 (9th Cir. 1994) (holding that the defendant's acquittal on an armed robbery charge precluded the district court from enhancing the defendant's sentence for conviction of conspiring to commit robbery).

48. *See Watts*, 67 F.3d at 797.

49. *Id.*

50. *Putra*, 78 F.3d at 1389.

ing courts "broad discretion to consider various kinds of information."⁵¹ This section states: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."⁵² In light of cases involving use of uncharged conduct in sentencing, the Supreme Court majority interpreted section 3661 to stand for the general proposition that sentencing judges "may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted."⁵³ In particular, the majority relied on *Williams v. New York*, a 1949 pre-Guidelines case decided by the Supreme Court.⁵⁴ In *Williams*, the Court held that in sentencing a murder defendant to death, the sentencing judge could legitimately rely on information that the defendant had been involved in thirty burglaries, even though he had not been convicted for any of them.⁵⁵

According to the Court, the Guidelines, promulgated in 1984 and effective in 1987, did not alter the sentencing court's broad discretion to use acquitted conduct in sentencing.⁵⁶ The Court turned to sections 1B1.4 and 1B1.3 of the Sentencing Guidelines to support its view. Section 1B1.4 of the Sentencing Guidelines states: "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."⁵⁷ The commentary to section 1B1.3 states: "Conduct that is not formally charged or is not formally an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range."⁵⁸ Section 1B1.3, which applies to sentencing based on multiple counts, instructs the sentencing court to consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction" even though the defendant is not *convicted* for multiple counts.⁵⁹ Thus, in accordance with Federal Sentencing Guide-

51. *Watts*, 117 S. Ct. at 635.

52. 18 U.S.C. § 3661 (1994).

53. *Watts*, 117 S. Ct. at 635 (quoting *United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.)). See also Kirchner, *supra* note 14, at 804-05 (delineating the effects of uncharged, unconvicted, and acquitted conduct on the "relevant conduct" clause and on outright departure from the guideline range).

54. *Williams v. New York*, 337 U.S. 241 (1949).

55. See *id.* at 244, 252.

56. See *Watts*, 117 S. Ct. at 637.

57. SENTENCING GUIDELINES, *supra* note 8, at § 1B1.4.

58. *Id.* § 1B1.3 commentary, at 23.

59. *Id.* § 1B1.3 commentary, at 16. See also *id.* § 1B1.3 commentary, at 21 (stating that

lines commentary, the Supreme Court's approach in *Watts* directs courts sentencing drug offenders to consider the total quantity of drugs involved in a series of drug sales, even though the defendant is only convicted on one of the sales.⁶⁰ This was the approach adopted by the dissent in the Ninth Circuit's disposition of *Putra*.⁶¹ The Ninth Circuit, however, distinguished acquitted conduct from uncharged conduct and held that the jury's acquittal constituted a finding that Putra "was not involved, did not commit, did not aid or abet, and was not engaged in" the charged and acquitted drug transaction.⁶² In contrast, the Supreme Court *Watts* majority viewed the "sweeping" language of section 1B1.3 as applying the same way to acquitted conduct as to uncharged conduct.⁶³ Hence, the Supreme Court interpreted the plain language of the Sentencing Commission Guidelines as directing sentencing courts to consider all related conduct whether or not it resulted in a conviction.

The *Watts* majority found further support in its double jeopardy jurisprudence.⁶⁴ In *Witte v. United States*, the Court held that the double jeopardy clause did not preclude subsequent prosecution for an uncharged drug offense that the sentencing court had used to enhance a prior convicted drug offense under the Guidelines.⁶⁵ In interpreting that case, the *Watts* majority explained that sentencing enhancements "do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction."⁶⁶ Thus, according to the majority, using acquitted conduct in sentencing does not constitute imposing *punishment* for the acquitted conduct. Rather, the acquitted conduct becomes part of the manner in which the convicted crime was committed.

Extending this principle, the Court turned to *Dowling v. United States* and *McMillan v. Pennsylvania* for the proposition that "an acquit-

"[a]pplication of this provision does not require the defendant, in fact, to have been convicted of multiple counts.").

60. See *id.* § 1B1.3 commentary, at 21 (stating as example, that "where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales.").

61. See *Putra*, 78 F.3d at 1389-90 (Wallace, C.J., dissenting).

62. *Id.* at 1387-89.

63. See *Watts*, 117 S. Ct. at 635-36.

64. "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U. S. CONST. amend. V. cl. 2; see also *United States v. Mespouledé*, 597 F.2d 329, 337 (1979) ("Allowing a second jury to reconsider the very issue upon which the defendant has prevailed . . . implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause.").

65. See *Witte v. United States*, 515 U.S. 389, 406 (1995).

66. *Watts*, 117 S. Ct. at 636.

tal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof."⁶⁷ In *McMillan*, the Court held that sentencing courts could use a preponderance of the evidence standard where there was no allegation that the sentencing enhancement was "a tail which wags the dog of the substantive offense."⁶⁸ The *Watts* majority found support for this in the commentary to section 6A1.3 of the Guidelines which states: "The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."⁶⁹

Accordingly, the *Watts* majority upheld the idea that an acquittal does not constitute a finding or rejection of any fact.⁷⁰ According to the Court, acquittal on a criminal charge simply means that the prosecution was unable to prove its case to the jury beyond a reasonable doubt.⁷¹ It does not prove that a defendant is innocent.⁷² In this sense, the *Watts* Court rejected the idea of factual innocence, and imported into the judicial arena a legal conception of innocence based on alternate burdens of proof.⁷³

67. *Id.* at 637 (citing *Dowling v. United States*, 493 U.S. 342, 349 (1990)).

68. *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986), *cited in Watts*, 117 S. Ct. at 637-38.

69. SENTENCING GUIDELINES, *supra* note 8, at § 6A1.3 commentary, at 319.

70. *See Watts*, 117 S. Ct. at 637 (quoting Chief Justice Wallace's dissenting opinion in *United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996)).

71. As one commentator put it: "[W]ith all the opportunities to explore the accused's innocence, the defense need only disprove guilt." William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 377 (1995).

72. *See Sherry F. Colb, Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1462 n.21 (1996). Colb states, "Although all criminal defendants benefit procedurally from an evidentiary presumption of innocence, that presumption does not mean that such defendants are actually 'innocent' until convicted. The presumption ensures that the government meets a high standard of proof, but it does not define the actual culpability of the defendant." *Id.*

73. *See Watts*, 117 S. Ct. at 636-37. Whereas factual innocence connotes actual non-culpability, legal innocence refers to a status recognized in law. In short, although a criminal defendant may in fact have committed the crime of which he is accused, the law recognizes him as innocent until the state is able to constitutionally prove its case against him. Thus, if the state is prevented from proving guilt beyond a reasonable doubt by the Fourth Amendment's bar against the use of illegally gathered evidence, a factually culpable thief may be deemed legally innocent after trial. *See also* Laufer, *supra* note 71, at 352 ("an accused is legally innocent, and therefore not criminally culpable, where procedural rules are not strictly observed or where viable defenses and excuses are relevant"); LeRoy Pernell, *The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence—A Brief Commentary*, 37 CLEV. ST. L. REV. 393, 398-99 (1989) (distinguishing legal and factual guilt).

V. THE SUPREME COURT CONCURRENCES AND DISSENTS

A. *The Supreme Court Concurrences*

Justice Breyer concurred in the Court's decision because he did not consider that the Guidelines in their current written form make an exception for acquitted conduct as "relevant conduct."⁷⁴ He argued, however, that the power to rewrite the Guidelines in order to exclude the use of acquitted conduct, remains with the Commission,⁷⁵ and suggested that the Commission could do so in the future in light of pertinent policy considerations and the central role of juries and acquittals to our judicial system.⁷⁶

Justice Scalia concurred separately because he disagreed with Justice Breyer's assertion that the Commission has the authority to reverse the Court's decision.⁷⁷ Justice Scalia posited that the plain language of 28 U.S.C. § 994(b)(1) and 18 U.S.C. § 3661, as written by Congress, mandates the Commission and the courts to approve sentence enhancements and departures from the Guidelines.⁷⁸ Title 28 U.S.C. § 994(b)(1) requires the Commission to promulgate Guidelines "consistent with all pertinent provisions of title 18, United States Code."⁷⁹ Title 18, in turn, requires that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."⁸⁰ Ultimately, Justice Scalia suggested that the Commission and the courts lack the power to impose a preponderance of the evidence standard with respect to acquitted conduct at sentencing: "neither the Commission, nor the courts have authority to decree that information which would otherwise justify enhancement . . . or . . . departure from the Guidelines, may not be considered for that purpose (*or may be considered only after passing some higher standard of probative worth than the Constitution and laws require*) if it pertains to acquitted conduct."⁸¹ Thus, although the Commission may make recommendations to Congress, according to Justice Scalia, Congress alone is empowered to make changes restricting the use of "relevant conduct," including acquitted conduct, at sentencing.⁸²

74. See *Watts*, 117 S. Ct. at 638-39 (Breyer, J., concurring).

75. See *id.* See also Johnson, *supra* note 21, at 187 (arguing that the Commission clearly has the authority to rewrite the Guidelines to exclude acquitted conduct).

76. See *Watts*, 117 S. Ct. at 639.

77. See *id.* at 638 (Scalia, J., concurring).

78. See *id.*

79. 28 U.S.C. § 994(b)(1) (1994).

80. 18 U.S.C. § 3661 (1994) (emphasis added).

81. *Watts*, 117 S. Ct. at 638 (emphasis added).

82. See *id.*

B. *The Supreme Court Dissents*

Justice Stevens' dissent rejected the majority's broad view of the Sentencing Guidelines, and endorsed a contextual look at the pertinent statutory provisions. Acknowledging that the Sentencing Guidelines did not supersede 18 U.S.C. § 3661, enacted in 1970, Justice Stevens commenced his analysis by reviewing the policies and historical exigencies which gave rise to the Guidelines in the first place.⁸³ According to Justice Stevens, the Guidelines comprised much more than suggested by their "modest name"; their advent was a revolution in sentencing, with "the force and effect of laws."⁸⁴ In contrast to the pre-Guideline ideals of fairness and rehabilitation cited in *Williams*,⁸⁵ the Guidelines aimed to reduce judicial discretion by implementing "strict mandatory rules . . . dramatically confin[ing] the exercise of judgment based on a totality of the circumstances."⁸⁶

Justice Stevens explained that section 3661 "does support [the Supreme Court majority's] narrow holding that sentencing courts may *sometimes* consider conduct of the defendants underlying other charges of which they had been acquitted."⁸⁷ However, in the same way that section 3661 is not impinged upon by Guideline provisions that bar sentencing judges from considering evidence of economic hardship, drug or alcohol dependence, or lack of youthful guidance, section 3661 is not necessarily impinged upon by barring sentencing courts' use of acquitted conduct.⁸⁸ Rather, section 3661 makes clear to judges that otherwise inadmissible evidence at trial can be considered for purposes of sentencing, but does not instruct judges how to weigh the significance of such "relevant conduct."⁸⁹ Ultimately, to the extent that it is constrained by the Sentencing Guidelines, section 3661 does not authorize sentencing judges to consider any and all inadmissible evidence at sentencing.

Justice Stevens further distinguished the interaction of section 3661 and the Guidelines for purposes of *setting* a sentencing range, from the interaction of section 3661 and the Guidelines for purposes of sentencing *within* that range. According to Justice Stevens, section 3661 grants sentencing judges broad discretion to enhance or minimize sentences

83. See *id.* at 639 (Stevens, J., dissenting).

84. *Id.*

85. Stevens compares *Williams v. New York*, 337 U.S. 241, 247-48 (1949) ("Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence"), with 28 U.S.C. § 994(k) (1994) (rejecting rehabilitation as a sentencing goal) and 18 U.S.C. § 3553(a)(2) (1994) (stating that "punishment should serve retributive, deterrent, educational and incapacitative goals"). *Watts*, 117 S. Ct. at 639 n.1.

86. *Watts*, 117 S. Ct. at 639.

87. *Id.* at 639 (emphasis added).

88. See *id.* at 639.

89. See *id.* at 640.

within a particular Guideline range.⁹⁰ However, the mandatory rules of the Sentencing Guidelines strictly cabin judges' ability to set that Guideline range in the first place.⁹¹ In sum, "the Guidelines incorporate the broadly inclusive language of Section 3661 only into those portions of the sentencing decision in which the judge retains discretion."⁹² This interpretation accords with the Guidelines' purpose of producing uniformity in sentencing.

Accordingly, Justice Stevens described section 3661 as being only incorporated into section 1B1.4. Section 1B1.4 addresses application of relevant conduct *within* a guideline range: "Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)."⁹³ Section 1B1.3, on the other hand, directs the determination of which guideline range to apply in the first place: "This section [1B1.4] distinguishes between factors that determine the applicable guideline sentencing range (S 1B1.3) and information that a court may consider in imposing sentence within that range."⁹⁴

Justice Stevens pointed out that the majority's interpretation of section 1B1.3 was flawed, both in that the majority ignored the explicit incorporation of section 3661 only into section 1B1.4, and in that the majority cited background commentary to section 1B1.3 out of context. The *Watts* majority cited background commentary to section 1B1.3 as follows: "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."⁹⁵ However, the majority omitted the surrounding interpretation which gives section 1B1.3 real import:

This section prescribes rules for determining the applicable sentencing range, whereas [Section] 1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court

90. See *id.* at 640; see also SENTENCING GUIDELINES, *supra* note 8, at § 1B1.4 commentary, at 25:

A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information the determination of the applicable guideline sentence range may be considered in determining whether and to what extent to depart from the guidelines.

91. See *Watts*, 117 S. Ct. at 640. Of course, sentencing judges retain the power to depart from the Guideline ranges where there are mitigating or aggravating factors: "[T]he court shall impose a sentence . . . within the range . . . unless the court finds that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" 18 U.S.C. § 3553(b) (1994).

92. *Watts*, 117 S. Ct. at 640.

93. SENTENCING GUIDELINES, *supra* note 8, at § 1B1.4.

94. *Id.* at 25.

95. *Id.* § 1B1.3 commentary, at 23.

may consider in adjudging sentence once the guideline sentencing range has been determined. 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. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.⁹⁶

Justice Stevens emphasized the absurd implications of the Supreme Court majority's interpretation. This interpretation enabled the district court in *Putra* to use Putra's prior acquittal to impose the same sentencing range as it would have had to impose if Putra had been convicted.⁹⁷ In effect, Putra's acquittal caused her sentence to be six months longer than the maximum allowed for the only crime she was convicted of beyond a reasonable doubt.⁹⁸

Moreover, Justice Stevens critiqued the majority's misplaced use of precedent to justify its outcome.⁹⁹ In particular, Justice Stevens distinguished *Williams v. New York*, because *Williams* dealt with the exercise of discretion within an authorized sentencing range, and not with the limitations in setting that range in the first place.¹⁰⁰ In addition, because the accuracy of the judge's determination at sentencing was never challenged by the appellant, the burden of proof applicable at sentencing was not even an issue in *Williams*.¹⁰¹ Above all, *Williams* represented pre-Guidelines ideals of rehabilitation and reform in sentencing.¹⁰² Thus, the Supreme Court *Watts* majority misapplied *Williams* in the context of post-Guideline rejection of unfettered judicial discretion serving those ideals.¹⁰³ Interestingly, the jury in *Williams* recommended that the defendant be spared the death penalty; yet the judge overrode the jury's recommendation, and imposed the death sentence.¹⁰⁴ Despite reliance on such an extreme case, the *Watts* majority skirted the issue of the admissibility of "relevant" acquitted conduct that would dramatically increase a defendant's sentence.¹⁰⁵

In support of its reliance on *Williams*, the *Watts* majority cited *Nichols v. United States*, *United States v. Donelson*, and *BMW of North*

96. *Id.*

97. *See Watts*, 117 S. Ct. at 640-41.

98. *See id.* at 641.

99. *See id.* at 641-42.

100. *See id.* at 641.

101. *See id.*

102. *See id.* at 641-42.

103. *See id.* at 642.

104. *See Williams v. New York*, 337 U.S. 241, 242 (1949).

105. *See Watts*, 117 S. Ct. at 637-38.

America, Inc. v. Gore.¹⁰⁶ However, the majority did not explain how these cases supported an extension of the *Williams* holding to acquitted conduct as well as to uncharged conduct.¹⁰⁷ In fact, *Nichols* was a DUI case involving use of a past misdemeanor conviction (not acquittal) in sentencing,¹⁰⁸ and *Donelson* was an equal protection claim involving the sentencing of youthful offenders.¹⁰⁹ *BMW* was a civil damages case having no connection to sentencing or the issue of acquitted conduct under the Guidelines.¹¹⁰ A review of these cases simply illustrates that *Williams* is still cited (in these cases as dicta) for the proposition that a sentencing judge may consider "past criminal behavior which did not result in a [criminal] conviction."¹¹¹

Furthermore, Justice Stevens distinguished *McMillan v. Pennsylvania*, because *McMillan* merely stated that the Constitution does not require sentencing factors to be established beyond a reasonable doubt, where those sentencing factors operate solely to increase the minimum sentence without altering the maximum.¹¹² As the Court made clear in *McMillan*, its decision did not alter the maximum penalty for the crime committed, but limited sentencing discretion "in selecting a penalty within the range already available."¹¹³ Thus, *McMillan* does not apply, factually or legally, to the situation in *Watts* or *Putra*, where the defendants' sentences were increased beyond the Guideline maximums for the convicted offenses. Moreover, the *McMillan* Court conceded its inability to lay down any bright line rule by reasoning that it was interpreting a clearly written state statute in which the issued sentencing factor did not present itself as a "tail which wags the dog of the substantive offense."¹¹⁴ As Justice Stevens' dissent pointed out, the Sentencing Reform Act of 1984 does not present the same congressional clarity as the state statute construed in *McMillan*.¹¹⁵

In the same way that he disagreed with the holding in *McMillan*,

106. See *id.* at 635 (citing *Nichols v. United States*, 511 U.S. 738 (1994); *United States v. Donelson*, 695 F.2d 583 (D.C. Cir. 1982); *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996)).

107. See *Watts*, 117 S. Ct. at 635.

108. See *Nichols*, 511 U.S. at 740.

109. See *Donelson*, 695 F.2d at 584.

110. See *BMW*, 116 S. Ct. at 1593.

111. *Id.* at 1597 n.19 (citing *Williams*, 337 U.S. 241 as dicta); see also *Nichols*, 511 U.S. at 747.

112. See *Watts*, 117 S. Ct. at 642 (Stevens, J., dissenting).

113. *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).

114. *Id.*

115. See *Watts*, 117 S. Ct. at 642; see also Susan N. Herman, *Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 323 (1992).

Justice Stevens disagreed with the holding in *Witte v. United States*.¹¹⁶ However, he distinguished the issue of whether the double jeopardy clause permits conviction for conduct that has contributed to a determination of a defendant's base offense level in a previous conviction, from the issue of using acquitted conduct at sentencing.¹¹⁷ The Supreme Court *Watts* majority did not make this distinction between uncharged and acquitted conduct. Nor did the majority address the fact that *Witte* dealt with sentence enhancement *within* a sentencing range, rather than departure *from* a range as in *Watts*. Ultimately, in citing *Witte* for the proposition that: "[V]ery roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment,"¹¹⁸ the *Watts* majority did not address the implication that "relevant conduct" under the Guidelines may include *less* than all of the actions and circumstances that judges typically took into account prior to the Guidelines.¹¹⁹

As a final point in his dissent, Justice Stevens considered the interaction between "multiple offenses" and the Sentencing Guidelines.¹²⁰ Title 28 U.S.C. § 994(l) explicitly directs the imposition of incremental punishment for "multiple offenses" of which a defendant "*is convicted*."¹²¹ The effect of the majority's interpretation of section 994(l) in *Putra* was to impose an incremental penalty for each offense of which Putra was charged simply because she was convicted of at least one of these offenses. Justice Stevens rejected this result. He reasoned that the statute's language does not, as the majority interpreted it, authorize incremental punishment for multiple offenses of which the defendant is not convicted, let alone acquitted.¹²² Thus, Justice Stevens condemned the *Watts* majority's interpretation of the statute as an unwarranted abrogation of the reasonable doubt rule which has always applied to charges involving either multiple or single offenses.¹²³

Ultimately, Justice Stevens' dissent demonstrated that the historical and structural implications of the Sentencing Guidelines belie the majority's overall result, because the Guidelines were promulgated to reduce

116. 515 U.S. 389 (1995).

117. See *Watts*, 117 S. Ct. at 642-43 (Stevens, J., dissenting).

118. *Id.* at 635 (citing *Witte*, 515 U.S. at 402 (citing *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989))).

119. If this were not the case, the Guidelines would have little impact in reducing judicial discretion.

120. See *Watts*, 117 S. Ct. at 643 (Stevens, J., dissenting).

121. 28 U.S.C. § 994(l) (1994) (emphasis added).

122. See *Watts*, 117 S. Ct. at 643-44 (Stevens, J., dissenting).

123. See *id.* But see the majority's rejoinder arguing that the statute "is not cast in restrictive terms." *Id.* at 636 (quoting *United States v. Ebbale*, 917 F.2d 1495, 1501 (7th Cir. 1990)).

judicial discretion and disparate sentences.¹²⁴ Certainly, allowing judges to pick sentencing ranges indiscriminately contradicts the very purpose of eliminating bias and irregularity in sentencing. This purpose is effectuated by limiting discretion to sentencing within fixed uniform parameters. Consequently, as the dissent argued, the plain language and historical context of the Sentencing Guidelines contradict the Court's holding in *Watts*. Furthermore, by validating the use of the preponderance of evidence standard at sentencing, the Court's holding, in effect, sanctioned criminal sentencing upon relitigation at a lower standard of proof. This calls into question a central aspect of our judicial system: that the only constitutional relitigation of criminal issues at a lower standard of proof occurs in the civil arena.¹²⁵ This principle rests on the proposition that the constitutional rights of the accused are much more fundamental than the monetary liability at stake in civil actions.¹²⁶

Justice Kennedy dissented separately from Justice Stevens, because, although he did not necessarily disagree with the *Watts* majority's rationale, he thought that the majority skirted the distinction between uncharged and acquitted conduct.¹²⁷ Justice Kennedy conceded that the practicality of sentencing might diminish the distinction, but acknowledged that such diminution implicates concerns about undermining acquittal verdicts.¹²⁸ Thus, Justice Kennedy recommended that the case should have been set for full briefing and oral argument before the Supreme Court as an issue of first impression.¹²⁹

VI. THE PRESUMPTION OF INNOCENCE AND CONSTITUTIONAL DUE PROCESS

The Court's contention, that acquittal does not mean that a defendant is innocent, is both circular and at odds with historical notions of criminal justice in the American judicial process. In the most basic meaning of the term, criminal "acquittal" is "the legal and formal certification of the innocence of a person who has been charged with a crime;

124. See Forde, *supra* note 14, at 402-04 (arguing that *Williams* is a relic of the pre-Guideline system).

125. "Because different standards of proof are involved, acquittal in the criminal action does not bar a civil suit based on the same facts." See 2 CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 468 (2d ed. 1982).

126. See Miguel M. Delao, *Admissibility of Prior Acquitted Crimes Under Rule 404(b): Why the Majority Should Adopt the Minority Rule*, 16 FLA. ST. U. L. REV. 1033, 1051 n.148 (1989) (citing *United States v. Mespouledé*, 597 F.2d 329, 335 (2d Cir. 1979)).

127. See *Watts*, 117 S. Ct. at 644 (Kennedy, J., dissenting).

128. See *id.* See also Johnson, *supra* note 21, at 194 ("The bottom line is that acquittal carries a message about the defendant's legal innocence that mere absence of a conviction does not.").

129. See *Watts*, 117 S. Ct. at 644.

a deliverance or setting free a person from a charge of guilt."¹³⁰ The effect of acquittal, whether resulting from a jury or judicial verdict, is to terminate prosecution.¹³¹ Similarly, charges that have been dismissed are no longer at issue, and "testimony about them would have been irrelevant."¹³² The finality of acquittals is further embedded in our double jeopardy jurisprudence, whose maxim is that a verdict of acquittal is "final, and [cannot] be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution."¹³³

The finality of judgments is also a concept underlying the Eighth Amendment's ban on cruel and unusual punishment.¹³⁴ Despite the majority's claim that sentencing based on acquitted conduct is not punishment for acquitted charges, the use of acquitted conduct in sentencing, under a graduated preponderance of the evidence standard, constitutes punishment because the defendant is, in effect, "semi-guilty."¹³⁵ Such punishment harkens back to a substantive¹³⁶ or medieval¹³⁷ system whose premise was that the suspect always deserved punishment: after all, one cannot be "the object of suspicion and be completely innocent."¹³⁸

Yet, our current criminal system is premised on a rejection of such relativism.¹³⁹ Our criminal system presupposes a commitment to a

130. BLACK'S LAW DICTIONARY 25 (6th ed. 1990). "[O]ur judicial system treats an acquittal as a verdict of innocence." Delao, *supra* note 126, at 1050. It "is a basic tenet of our jurisprudence that . . . in the eyes of the law the acquitted defendant is to be treated as innocent." *Id.* at 1048.

131. See WRIGHT, *supra* note 125, at § 468.

132. State v. Anderson, 370 N.W.2d 653, 666 (Minn. App. 1985) (quoting WRIGHT, *supra* note 125, at § 468).

133. Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When Is an Acquittal Not an Acquittal?*, 27 ARIZ. ST. L.J. 953, 954 (1995).

134. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

135. Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 498 (1989) (justifying the role of reasonable doubt in the criminal arena).

136. See *id.* at 498.

137. In medieval times, a criminal defendant was effectively presumed guilty, and had to overcome that presumption by submitting to arbitrary and cruel practices such as trial by ordeal (i.e., battling to the death, or carrying red hot irons) or by producing twelve peers to swear under oath to his innocence, in order to actually prove "divine" innocence. See CARLETON K. ALLEN, *LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE* 255, 259-73 (1931). See also Laufer, *supra* note 71, at 330-32 and accompanying notes for an excellent exploration of the presumption of innocence and the evolution of our current adversarial system from an inquisitorial system.

138. MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT* 42 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978).

139. "No principle is more firmly established in our system of criminal justice than the presumption of innocence." Kentucky v. Whorton, 441 U.S. 786, 790 (1979) (Stewart, J., dissenting). See also Sundby, *supra* note 135, at 457 ("The presumption [of innocence] has been called the 'golden thread' that runs throughout the criminal law, heralded as the 'cornerstone of Anglo-Saxon justice,' and identified as the 'focal point of any concept of due process.'").

bright line dualism that ensures that one either is or is not guilty or innocent. Thus, although factually "less than innocent," a criminal defendant is considered legally innocent if the government does not prove its case against him beyond a reasonable doubt.¹⁴⁰ In this sense, innocence is the effect of acquittal, as well as the cause.¹⁴¹

Moreover, because the process of adjudicating guilt continues beyond trial with no clearly demarcated end point through the appeals process, it is arguable whether the presumption of innocence disappears with respect to conduct for which a defendant has been tried and convicted.¹⁴² However, the axiom behind the presumption of innocence is that the defendant is innocent with respect to conduct for which he has *not* been tried, or for which he has been acquitted. Logically, then, acquitted conduct should fall within the purview of the presumption, whether at sentencing, or for purposes of double jeopardy, the Eighth Amendment ban against cruel and unusual punishment, or the due process protections afforded by the Fifth and Sixth Amendments.¹⁴³

Ultimately, despite the *Watts* Court's failure to distinguish them, and despite their patent similarities,¹⁴⁴ uncharged and acquitted conduct implicate different issues for purposes of sentencing.¹⁴⁵ On one level, although uncharged conduct is still presumed "innocent," the "innocence" of acquitted conduct is a judicially stamped fact. Moreover, acquitted conduct may refer either to conduct adjudicated and acquitted in a past trial, or to conduct adjudicated and acquitted in the same trial as the crime of conviction.¹⁴⁶ *Watts* and *Putra* involved only such contem-

140. See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970) (placing a high burden of persuasion on the government by holding that the due process clause requires the government to prove beyond a reasonable doubt every fact necessary to constitute the crime charged against a criminal defendant.)

141. Cf. Sundby, *supra* note 135, at 488 ("To speak of innocence as part of the presumption of innocence is to refer to an outcome, a result, with which the criminal justice system is concerned.").

142. See Laufer, *supra* note 71, at 360 n.136 (citing *Herrera v. Collins*, 506 U.S. 390, 399 (1993)). The "purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt." *Ross v. Moffit*, 417 U.S. 600, 610 (1974).

143. See Johnson, *supra* note 21, at 181-83.

144. For example, the following statement could apply equally to either uncharged or acquitted conduct:

It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime.

Delao, *supra* note 126, at 1045.

145. See Johnson, *supra* note 21, at 157-58 (arguing that use of acquitted conduct in sentencing raises distinct policy considerations from the use of unadjudicated conduct).

146. See *id.* at 158.

poraneous acquitted conduct. Theoretically, then, the Supreme Court majority's holding in *Watts* is limited to contemporaneous acquitted conduct. This makes sense in that, where acquittal is not contemporaneous, judges can only determine preponderance of the evidence reliability by examining the record of a trial at which they were not present. In sum, use of past acquitted conduct gives rise to more serious concerns about the right to a fair trial. However, in light of current practice in all but the Ninth Circuit, it is not likely that sentencing courts applying the Court's holding in *Watts* will pause to distinguish between past and contemporaneous conduct.

The *Watts* Court's failure to distinguish between uncharged and acquitted conduct is symptomatic of a pervasive dichotomy between the semantics of innocence¹⁴⁷ and the reality of our criminal justice system.¹⁴⁸ The semantics of innocence describes a surface commitment to the presumption of innocence. This surface commitment is embodied in such legal truisms as: "[I]n the eye of the law every man is honest and innocent, unless it be proved legally to the contrary";¹⁴⁹ and "the defendant is as innocent on the day before his trial as he is on the morning after his acquittal."¹⁵⁰ In reality, our criminal system poses a far less grandiose scenario:

The whole course of criminal procedure, from inception to close, is designed to shut out presumptions of innocence and invite presumptions of guilt. The secrecy of complaintmaking . . . , the mysterious inquisition of the grand jury room, the publicity of the arrest, the commitment to the lock-up, the demand of bail, the delay of trial, the enforced silence.¹⁵¹

In the final analysis, the presumption of innocence emerges as a compromise between a presumption of guilt and a commitment to due process: "it is better that ten guilty persons escape . . . than that one innocent suffer."¹⁵² In effect, the presumption becomes a calculator for the margin of error which society is prepared to accept in discarding the assumption of true factual innocence.¹⁵³

147. See Delao, *supra* note 126, at 1046.

148. See ALAN DERSHOWITZ, *THE BEST DEFENSE* xxi-ii (1982). Dershowitz defines the unwritten rules that dictate the reality of our criminal system on a day to day basis. Axiomatic to these rules is the pervasive understanding by everyone in the criminal system, including the defendant himself, that the defendant is guilty. See *id.*

149. JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 551-552 (1898) (citation omitted).

150. *United States v. Salerno*, 481 U.S. 739, 764 (1987) (Marshall, J., dissenting).

151. Pernell, *supra* note 73, at 414 n.117 (citing ANONYMOUS, *TEN YEARS A POLICE JUDGE* 207 (1884)).

152. *Id.* at 393 (quoting 4 W. BLACKSTONE COMMENTARIES 358 (1969)).

153. See Sundby, *supra* note 135, at 459-61. See also Barton L. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to*

One of the reasons for the disparity between the rhetoric and the reality of innocence, is that the symbolic and pragmatic implications of the presumption of innocence fluctuate in the face of different justifications for punishment. Title 18 U.S.C. § 3553(a)(2) lists a series of factors to be considered in imposing a sentence. These include:

(2) The need for the sentence imposed—

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

(B) to afford adequate *deterrence* to criminal conduct;

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

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

....

(7) the need to provide *restitution* to any victims of the offense.¹⁵⁴

These factors correspond with both utilitarian and retributory justifications for imprisonment: punishment, deterrence, incapacitation, and rehabilitation. However, to the extent that utilitarianism is concerned with the maintenance of law and order through deterrence and its incapacitation,¹⁵⁵ its efficacy depends on the system's increased capacity to catch offenders. Moreover, it depends on how those offenders view that capacity; in other words, whether offenders think they will get caught. Assuming, for deterrence purposes, that criminals are rational actors who weigh the costs and benefits of their actions, it is unlikely that criminals who have been through the criminal justice system already, will be any more deterred from breaking the law by the abstract possibility that *if* they do get caught, they risk a stiffer sentence because of a past acquittal.¹⁵⁶ Similarly, incapacitation is most effective if individuals who commit the most crimes are put away longer than individuals who commit fewer crimes, because this would reduce the overall amount of crime. Using acquitted conduct to sentence defendants to longer prison terms does not serve this purpose because "individuals committing the most crimes" implicates "individuals *convicted* of the most crimes"—not individuals *accused* of the most crimes.¹⁵⁷

O'Reilly, 86 J. CRIM. L. & CRIMINOLOGY 559, 595 n.43 ("the Blackstone ratio works out to a calculation that the subjective level of probability of guilt in the juror's mind must exceed 91% certainty.").

154. 18 U.S.C. § 3553(a)(2) (1994) (emphasis added).

155. *See id.* Subsections (A) and (B) of 18 U.S.C. § 3553(a)(2) refer to the maintenance of law and order through respect for the law and deterrence; (C) refers to incapacitation. *See id.*

156. *But see* Johnson, *supra* note 21, at 199 (arguing that the rational defendant is unlikely to opt for trial over plea-bargaining on the remote possibility of a partial acquittal and subsequent sentence enhancement based on acquitted conduct).

157. *See also* Coffin v. United States, 156 U.S. 432, 455 (1894) ("If it suffices to accuse, what will become of the innocent?").

Furthermore, to the extent that retribution, namely rehabilitation and punishment, are still factors in sentencing,¹⁵⁸ the question once again becomes that of due process: in the same way that we decline to punish innocent people in order to deter others,¹⁵⁹ shouldn't we decline to punish based solely on a moralistic hunch that the defendant is "generally guilty"? In other words, do we punish a person for Crime A, of which he is innocent, simply because he is guilty of Crime B and deserves all the punishment we can give him? Moreover, for purposes of rehabilitation, what, other than disrespect and distrust of our criminal justice system, do we teach a criminal defendant when we use acquitted conduct, of which he is *factually* innocent, against him at sentencing?¹⁶⁰

In the final analysis, many jurists lament the fact that "from a constitutional standpoint, the presumption of innocence has been relegated to an evidentiary rule barely distinguishable from the prosecution's burden of proving guilt beyond a reasonable doubt."¹⁶¹ On the other hand, some suggest that innocence is not a constitutionally defined value in itself, even though the procedures protecting innocence are constitutionally guaranteed.¹⁶² Ultimately, it is interesting to speculate whether the presumption of innocence is simply a collage of the reasonable doubt rule and our judicial system's ostensible liberty safeguards, or whether "innocence" itself has some intrinsic value. One might also ask whether the presumption of innocence and the reasonable doubt rule are constitutionally guaranteed or merely complementary.¹⁶³

Nevertheless, it is axiomatic, in theory at least, that our criminal justice system allocates the burden of production and proof beyond a reasonable doubt to the state, to protect the individual's liberty interest from the state's unwarranted trampling for criminal convictions.¹⁶⁴ This burden allocation reflects the democratic consensus that, without sub-

158. See 18 U.S.C. § 3551(a)(2) (1994). Subsection (A) refers to providing just punishment; Subsection (D) refers to rehabilitation. See *id.* However, 28 U.S.C. § 994(k) directs the Commission to insure that the Guidelines reflect the inappropriateness of imprisonment for purposes of rehabilitation. See 28 U.S.C. § 994(k) (1994).

159. This would be pure utilitarianism at its unconstitutional extreme.

160. In the same way that it is "impossible for the government to confine [Fourth Amendment] searches to the guilty and thereby protect only the innocent," Colb, *supra* note 72, at 1480, we must ask ourselves to what extent we are prepared to sacrifice the "truly" innocent in order to punish the "guilty."

161. Pernell, *supra* note 73, at 414; see also Laufer, *supra* note 71, at 347, 388, 403, 343-51; Sundby, *supra* note 135, at 510 n.17 (historical analysis of the presumption of innocence and the reasonable doubt rule). All three authors argue that the presumption of innocence and the reasonable doubt rule are distinct, even though they are often indistinguishable in the actual practice of law.

162. See Sundby, *supra* note 135, at 487.

163. See Laufer, *supra* note 71, at 388 ("Innocence, as a burden-allocating presumption, serves what some consider to be a complementary role with the reasonable doubt rule.").

164. See generally Laufer, *supra* note 71, at 332-34 (concluding that the reasonable doubt rule

stance, the due process rights encompassed within the Constitution "is a hollow symbol of our collective commitment to an impartial accusatory system."¹⁶⁵ In this narrow sense, the reasonable doubt rule gives vitality to the presumption of innocence¹⁶⁶ and the criminal defendant's right to a fair trial.¹⁶⁷ Ultimately, even if the *Watts* Court's interpretation of the Guidelines was correct based on a literal reading of the current Guidelines, its decision erodes fundamental due process guarantees encompassed symbolically and pragmatically in the presumption of innocence. In essence, the Court sought to impose a form of strict liability for criminal behavior, whereby guilt attaches generally to the person and not only to the specific act for which he was found "guilty."¹⁶⁸

VII. THE PRAGMATIC IMPLICATION OF HANDING OVER FACT-FINDING DISCRETION TO PROSECUTORS AND JUDGES UNDER THE GUISE OF "SENTENCING"

Despite the Supreme Court *Watts* majority's careful defense that using acquitted conduct in sentencing does not constitute punishment for those acquitted charges, the import of the majority's decision is that criminal defendants can effectively be punished for acquitted conduct if they are convicted of other conduct.¹⁶⁹ In sum, the Court's *Watts* decision moves the criminal justice system away from adjudication of guilt beyond a reasonable doubt based on review of admissible evidence at trial, to adjudication of guilt by a preponderance of the evidence based on review of a trial record.¹⁷⁰ In this sense, it moves the judicial system

gives the presumption of innocence constitutional meaning); Sundby, *supra* note 135, at 458 (same).

165. Laufer, *supra* note 71, at 374.

166. See Sundby, *supra* note 135, at 458. "The presumption of innocence guards against extra-legal suspicion and unwarranted inference," subsumed by the Sixth Amendment's right to an impartial jury, and the Fourteenth Amendment's due process and equal protection clauses. Laufer, *supra* note 71, at 404.

167. "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Other manifestations of the presumption of innocence include: the privilege against self-incrimination, the state's duty to disclose exculpatory or compulsory evidence, the right to confront adverse witnesses, the right to effective counsel, and the right to remain silent while in police custody and during trial. See Laufer, *supra* note 71, at 334.

168. Strict liability statutes reflect a policy decision that the state's interest in deterrence outweighs any unfairness in negating the element of intent. See *United States v. Balint*, 258 U.S. 250, 254 (1922).

169. See Delao, *supra* note 126, at 1050 (admission of prior acquitted conduct results in retrying the defendant for the earlier crime, regardless of the purpose for which the evidence is admitted).

170. See Poulin, *supra* note 133, at 953 (citing a Supreme Court of Israel case in which the prosecutor was able to seek appellate review to reverse a trial court's acquittal of four rape defendants. The Supreme Court of Israel's reversal was based on a mere review of the trial record).

from bright line definitions of guilt and innocence to *ad hoc* graduated definitions balancing the individual's right to liberty with society's right to punish. In short, the Court's decision allows the government to bypass an obstacle course of legal protections and safeguards in place before, during, and after trial,¹⁷¹ by allowing the government to travel a less circuitous road of lowered burdens and open doors. This road aptly characterizes the conveyor belt image associated with the effort towards crime control.¹⁷²

The crime control model views the repression of criminal conduct as the criminal process' main objective. As such, the crime control model views the initial pre-trial stages of adjudication, including arrest, arraignment, and plea-bargaining, to be indicators of guilt.¹⁷³ On the opposite end of the spectrum, the due process model rejects informal fact-finding and insists on formal adjudicative, adversary processes.¹⁷⁴ Although the presumption of innocence, legal or factual, tends to be implicit in the due process model, the presumption seems, inescapably, to be rejected by the crime control model.¹⁷⁵ This is despite the fact that, on average, only about three per cent of national felony arrests are adjudicated at trial, and only about one per cent of felony arrests are acquitted at trial.¹⁷⁶ Ultimately, it is with Orwellian irony that the Sentencing Guidelines were created under the auspices of the Crime Control Act of 1984.

It is often easy to envision cases which lend themselves to a crime control interpretation of the Guidelines. For example, in *United States v. Otto*, a defendant, who was convicted of possessing an unregistered fire-arm, stalked and terrorized his former girlfriend and her children over an eighteen-month period.¹⁷⁷ The court held that a six-level upward departure from the guidelines sentence was proper in light of the fact that the defendant inflicted severe psychological injury, terror, sleeplessness, weight loss, and other trauma on his victims, even though the behavior was not taken into account in the guidelines sentence for possessing an

171. See Laufer, *supra* note 71, at 352.

172. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 159 (1968).

173. See *id.* at 158.

174. See *id.* at 163-64.

175. See Laufer, *supra* note 71, at 421 nn.94 & 97. "Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiments that obstructs, delays, and defeats the prosecution of crime." *United States v. Garrison*, 291 F. 646, 649 (S.D.N.Y. 1923).

176. See Laufer, *supra* note 71, at 421 nn.208-11 (citing BARBARA BOLAND ET AL., *THE PROSECUTION OF FELONY ARRESTS* 1988 (1992)).

177. See *United States v. Otto*, 64 F.3d 367, 367 (8th Cir. 1995).

unregistered firearm.¹⁷⁸ In *United States v. Hill*, a pre-Guidelines decision, a state supreme court held that information in a presentence report of prior criminal activities by the defendant for which he had never been arrested, indicted, or convicted, was highly relevant to sentencing him.¹⁷⁹ The Court's *Watts* decision endorses such outcomes in order to get "results." In essence, the decision encourages judges and prosecutors to bypass judicial processes and undermines sentencing as a "critical stage" of criminal proceedings.¹⁸⁰ It widens the open door for prosecutors and judges to use evidence which is inadmissible at trial¹⁸¹ to retry defendants without a jury on a preponderance of the evidence standard, all under the guise of "sentencing."

Cases with frightening facts, like *Otto*, make it tempting to replace absolutes of innocence with a balancing between the government's interest in criminal punishment and the individual's Fourteenth Amendment liberty interest.¹⁸² However, it is axiomatic to our justice system that "the safeguards of liberty are frequently forged in controversies involving not very nice people."¹⁸³ Rather than destroying the presumption of innocence and its concomitant protections for us all,¹⁸⁴ our frustration with the efficacy of the criminal justice system should lead us to revamp, not the presumption of innocence, but the Sentencing Guidelines themselves. For example, the difficulty with not allowing sentenc-

178. *See id.* at 371.

179. *See United States v. Hill*, 688 F.2d 18, 20 (8th Cir. 1982).

180. *See Memphis v. Rhay*, 389 U.S. 128, 134 (1967) (finding sentencing to be a critical stage of the criminal justice process requiring assistance of appointed counsel).

181. *See* SENTENCING GUIDELINES, *supra* note 8, at § 6A1.3(a) ("In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."). *See also* *United States v. Inigo*, 925 F.2d 641, 660 (3d Cir. 1991) (holding hearsay admissible at sentencing); *United States v. Murillo*, 902 F.2d 1169, 1172 (5th Cir. 1990) (holding that a district court acted within its discretion in relying solely on information contained in a presentencing report when departing upward from the Sentencing Guidelines); *United States v. McCrory*, 930 F.2d 63, 68 (D.C. Cir. 1991) (holding that evidence seized from an illegal warrantless search was admissible at sentencing). Additionally, the Court is supported by the Commission: "The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." SENTENCING GUIDELINES, *supra* note 8, at § 6A1.3 commentary, at 319.

182. *Cf. Pernell*, *supra* note 73, at 393 (arguing that since the 1970's, courts have eroded the presumption of innocence in the face of society's belief that it is made safer by massive deprivations of liberty).

183. *Florida v. Riley*, 488 U.S. 445, 463-64 (1989) (Brennan, J., dissenting) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter J., dissenting)).

184. *See* Matthew S. Sullivan, Note, *The Admissibility of Prior Acquittal Evidence—Has North Carolina Adopted the "Minority View"?—The Effect of State v. Scott*, 16 CAMPBELL L. REV. 231, 231 (1994) (Society has a stake both in "preserving the finality of judgments and in protecting individuals against governmental overreaching.").

ing courts to use acquitted rape conduct is that rape, and sexual assault in general, is so rarely and unsuccessfully prosecuted.¹⁸⁵ However, rather than seeking the admission of acquitted conduct at sentencing, we should address head on the unwillingness of the system to prosecute so-called "sex" crimes and the difficulty of obtaining convictions in the first place. Thus, we are better off seeking the admission of acquitted sexual assault conduct at trial,¹⁸⁶ where it is subject to the usual due process safeguards. Examples of other due process-crime control options include changing statutory offense definitions,¹⁸⁷ and increasing the use of victim impact statements.¹⁸⁸

The alternative is to risk future trials being increasingly overhauled by the infusion of a preponderance of evidence standard at sentencing. This could ultimately make trials mere formalities, or gateways, to get to the "real" issues at a lower standard of proof. The outcome would be to enable the state to use the first trial in which the defendant was acquitted as a "dry run" before going to trial again.¹⁸⁹ In drafting the Guidelines and moving toward a hybrid real-offense and charge-offense system, the Commission acknowledged such risks and sought to reduce the potential for prosecutors to influence sentences by increasing or decreasing the number of counts in indictments.¹⁹⁰

In very real terms, the admission of prior acquittals serves as a floodgate for the admission of societal prejudices which the presumption of innocence operates to exclude. The structural implications of opening that floodgate, like poisoning an inkwell, is that "innocent" acquitted people will be punished for offenses they did not commit simply because society customarily assumes that acquittal is synonymous with a "bad

185. See Katherine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 584 (1997).

186. See, e.g., FED. R. EVID. 404(b) (under certain circumstances, prior acquittals are admissible at trial).

187. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1099-1100 (1986) (arguing that considering consent from the defendant's perspective benefits rape victims, because it "substantially undermines the relevance of the woman's sexual history where it was unknown to the man," and relieves the victim from having to "prove" she was raped). See *id.* at 1099-1100. See also Herman, *supra* note 115, at 294-95 ("Why should most of the factors listed in the *Guidelines Manual* be treated as sentencing factors at all rather than elements of the relevant offenses?").

188. See, e.g., *United States v. Serhant*, 740 F.2d 548, 552 (7th Cir. 1984) (holding proper the sentencing court's consideration of victim impact statements made by some twenty-seven investors who lost money in the defendant's mail fraud scheme, where such statements were made in a dignified, non-inflammatory manner, subject to the defendant's ample opportunity to cross-examine live witnesses and rebut written statements).

189. See Cynthia L. Randall, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquired Act Evidence*, 141 U. PA. L. REV. 283, 284 (1992). See also Herman, *supra* note 115, at 289.

190. See SENTENCING GUIDELINES, *supra* note 8, at ch. 1, pt. A. § 4(a). But see Herman, *supra* note 115, at 311-14 (critiquing the Commissioner's modified real-offense system).

verdict.”¹⁹¹ Thus, acquittal comes to serve as a negative mark against the defendant, instead of a meaningless zero.¹⁹² In this sense, the danger of admitting acquitted conduct is that its admission, in itself, signifies relevance and becomes an imprimatur of guilt.¹⁹³ The classic example of this is the admission of prior acquitted rape conduct: “If jurors come to expect prior act evidence, jurors may start to view the absence of prior acts as evidence cutting against the likelihood that the accused is a ‘rapist.’”¹⁹⁴ Similarly, sentencing judges may view the absence of prior sexual assault acts as evidence that the accused does not fit a so-called “rapist” profile. This prejudice is likely to benefit rape defendants with no past acquittals or convictions. As Professor Katharine Baker puts it: “There is little doubt that many men have benefitted from a background myth of good character (‘nice boys don’t rape’).”¹⁹⁵

In the same vein, increased judicial discretion and the use of acquitted conduct at sentencing implicates racial concerns. Professor Baker cites Michael Tonry for the proposition that, “when [the] criminal justice system ignores the foreseeable racially disparate impact of crime-control measures,” it is abrogating moral responsibility to its own detriment—or: “The text may be crime. The subtext is race.”¹⁹⁶ Statistics indicate that crime by blacks is not increasing, while disproportionate punish-

191. Johnson, *supra* note 21, at 198 (“The ‘bad verdict’ objection represents an implicit conclusion that achievement of a ‘correct’ sentencing outcome outweighs the process values represented by the jury system.”). “Bad verdicts” supposedly occur due to “technicalities,” or even jury racial bias: “The justice system at times functions as a vehicle for paybacks for the gross inequities in our society—for example, trading off Simpson and Reginald Denny acquittal verdicts for Rodney King defendant acquittals.” Bryan Morgan, *The Jury’s View*, 67 U. COLO. L. REV. 983, 988 (1996).

192. Pernell makes use of an apt metaphor from Lewis Carroll’s *Alice’s Adventure in Wonderland*: “[T]here’s the King’s Messenger. He’s in prison now, being punished: and the trial doesn’t even begin till next Wednesday: and of course the crime comes last of all.” Pernell, *supra* note 73, at 415.

193. “Justice Brennan ultimately concluded [in *Dowling v. United States*, 493 U.S. 342 (1990)] that whenever evidence from a prior acquittal is introduced and the defendant must relitigate its underlying facts, an unacceptable risk exists for the jury to conclude erroneously that he is actually guilty of that prior offense.” Ronald A. Goldstein, Note, *Double Jeopardy, Due Process, and Evidence from Prior Acquittals*: *Dowling v. United States*, 110 S. Ct. 668 (1990), 13 HARV. J.L. & PUB. POL’Y 1027, 1033-34 (1990). *But see* Weber, *supra* note 14, at 470 (arguing that admission of acquitted conduct may in fact be more reliable than prior uncharged conduct in that “facts from prior acquittals are given under oath, are subject to cross-examination, may originate from a disinterested witness, and are espoused under the watchful eye of a judge who can observe the witnesses’ manner and demeanor.”).

194. Baker, *supra* note 185, at 568. Professor Baker’s article is in response to the addition of Rule 413 to the Federal Rules of Evidence: Rule 413 makes prior sexual assault acts by rape defendants admissible in criminal sexual assault trials. *See* FED. R. EVID. 413.

195. Baker, *supra* note 185, at 591.

196. *Id.* at 596-97 (quoting MICHAEL H. TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995)).

ment of blacks is.¹⁹⁷ At the same time, acquittal itself is being painted as race motivated:

In 1993, the national acquittal rate for all defendants in criminal jury trials was 17%. In the Bronx, where juries are 80% Black and Hispanic, the acquittal rate for Black defendants was 48%, and the acquittal rate for Hispanic defendants was 38%. In Washington, D.C., where juries are 70% Black and criminal defendants are 95% Black, the acquittal rate was 29%. In Detroit, where Blacks are the predominant members of juries, the acquittal rate was 30%.¹⁹⁸

In a racialized society where criminal defendants are disproportionately black, perhaps it is no coincidence that the rhetoric of innocence in the criminal arena has been replaced by a rhetoric of guilt—a rhetoric of “other.”

In many ways, the Court’s decision in *Watts* paves the way for a two-tiered trial system.¹⁹⁹ Such a system is not too far from the purview of section 6A1.3 of the Sentencing Guidelines, to wit: “More formality is . . . unavoidable if the sentencing process is to be accurate and fair[,] [a]lthough lengthy sentencing hearings should seldom be necessary.” The outcome of a two-tiered system would affect the whole judicial system. It could lead to pronged jury verdicts at different levels of proof, and, in turn, could eradicate relitigation of criminal cases for civil damages. Thus, for example, in a case where the government failed to prove its case beyond a reasonable doubt, a jury could acquit a criminal defendant, but at the same time, issue a preponderance of the evidence verdict holding him civilly liable.

Alternatively, as some writers have suggested, sentencing courts could admit evidence that does not contradict a prior jury’s finding. Thus, collateral estoppel would apply only to ultimate facts which the prior jury’s acquittal necessarily rejected.²⁰⁰ Admitting, at sentencing, evidence that is in sync with a prior judge’s findings might prevent the erosion of public confidence in the criminal justice system while promoting respect for jury verdicts.²⁰¹ The problem with admitting such evidence is that it would displace the state’s burden of production onto the defendant. Moreover, it is often unclear why juries acquit, and as with past acquittals, sentencing judges would be limited to forming a

197. Baker, *supra* note 185, at 597 (citing TONRY, *supra* note 196, at 4). For further discussion of the criminal system’s disproportionate impact on black defendants, see generally TONRY, *supra* note 196, at 4.

198. Morgan, *supra* note 191, at 984.

199. See Forde, *supra* note 14, at 386-88 (describing how, to some extent, sentencing has become a second trial in itself, minus the safeguards: “This phenomenon, by which Guidelines sentencing often overshadows trials, has been compared by some to ‘the tail wagging the dog.’”).

200. See, e.g., Delao, *supra* note 126, at 1052; Kirchner, *supra* note 14, at 824.

201. See Kirchner, *supra* note 14, at 823-24; Johnson, *supra* note 21, at 183-86.

reasonable inference from the record in light of the verdict.²⁰² Even when the reasons for acquittal are clear, those reasons may serve an important purpose which would be undermined by introduction at sentencing.²⁰³ For example, acquittal may be the result of the exclusion of illegally obtained evidence that is considered fruit of the poisonous tree under the Fourth Amendment.²⁰⁴ As one writer recently pointed out, the effectiveness of the Fourth Amendment exclusionary rule as a deterrent to illegal searches is undermined if judges do not apply the rule at sentencing.²⁰⁵ By the same token, the effectiveness of the presumption of innocence as a safeguard of the individual's right to a fair trial is undermined if the presumption is discarded with respect to acquitted conduct at sentencing.

VIII. CONCLUSION

In his concurrence in *Watts*, Justice Breyer suggested that even if the Supreme Court majority's interpretation of the Guidelines was correct, based on a literal reading of the current Guidelines, the Commission should revisit the matter and make an ultimate determination on the use of acquittal in sentencing, in light of the centrality of acquittals to our criminal system.²⁰⁶ By the same token, I would urge jurists to consider seriously the outcome being guarded against by the presumption of innocence.²⁰⁷ Admittedly, the real-life implications of using acquitted conduct at sentencing seem remote. Nevertheless, the presumption of guilt, which underlies its use, is closer than comfort. It sends the message that accusations alone import guilt; that no one can remain innocent.²⁰⁸ Ultimately, our judicial system must overcome its prejudices and acknowledge the sanctity of acquittal verdicts: "The criminal goes free if he must, but it is the law that sets him free."²⁰⁹

SANDRA K. WOLKOV

202. Even those who are present during the jury deliberations may never know, with absolute certainty, the basis for the jury's verdict.

203. See generally Forde, *supra* note 14 (arguing that excluding illegally seized evidence from trial, but permitting its use at sentencing, decreases the deterrent effect of the Fourth Amendment's exclusionary rule on police and prosecutors).

204. See *Wong-Sun v. United States*, 371 U.S. 471 (1963).

205. See Forde, *supra* note 14, at 481.

206. See *United States v. Watts*, 117 S. Ct 633, 638-39 (1997) (Breyer, J., concurring); see also Johnson, *supra* note 21, at 155 (espousing his principal thesis that the Commission should amend the Guidelines to eliminate the use of acquitted conduct at sentencing); Kirchner, *supra* note 14, at 810-23 (analyzing the policies for and against using acquitted conduct in sentencing).

207. See Forde, *supra* note 14, at 488.

208. This message trickles down into the civil arena, where cases settle and leave an indelible smear on the accused.

209. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).