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CRITICAL ANALYSIS OF ACQUITTED CONDUCT SENTENCING IN THE U.S.: "KAFKA-ESQUE," "REPUGNANT," "UNIQUELY MALEVOLENT" AND "PERNICIOUS"?

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INTRODUCTION

The use of acquitted conduct at sentencing is a highly contentious practice in sentencing theory, policy and practice. This Article provides a critical analysis of acquitted conduct sentencing under the relevant conduct provisions of the United States Sentencing Guidelines ("Guidelines") by tracing the constitutional and statutory arguments within the conceptual framework governing current sentencing practices in the United States. In federal court and many state courts[1] across the United States, once a defendant is convicted, judges are permitted to enhance a defendant's sentence based on relevant conduct, of which he was acquitted of at trial, if the alleged conduct can be established by a preponderance of the evidence at a sentencing hearing.[2]

The 2007 case of Robert Mercado in California offers a useful example.[3] Mercado was charged, tried by a jury, and subsequently

1. Enag Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 236–37 (2009) (surveying state cases) (citing Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 528 (1993) (noting that "[n]early every state allows sentencing courts to engage freely in real-offense sentencing as a matter of discretion.")); *but see* Danielle M. Hansen, *The Absentee Post-Conviction Constitutional Safeguards*, 28 TOURO L. REV. 563, 599 (2012) (noting that the First and Second Departments within New York State's Appellate Division prohibit a sentencing judge from considering acquitted conduct).

2. Megan Sterback, *Getting Time for an Acquitted Crime: The Unconstitutional Use of Acquitted Conduct at Sentencing and New York's Call for Change*, 26 TOURO L. REV. 1223, 1224–25 (2011) (internal citations omitted). *See also* Ngov, *supra* note 1, at 236–37 n.11; U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (2012).

3. James J. Bilsborrow, *Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 WM. MARY L. REV. 289, 290 (2007) (citing United States v. Mercado, 474 F.3d 654, 655, 658–59 (9th Cir. 2007)).

convicted on various counts of drug conspiracy.[4] Additionally, Mercado was charged and acquitted of participation in three murders, the commission of violent crimes in the aid of racketeering, and assault with a deadly weapon.[5] Based upon his drug convictions, the Guidelines recommended a punishment of thirty to thirty-seven months' imprisonment.[6] Yet at Mercado's sentencing, the sentencing judge set aside the jury's acquittals and considered the acquitted conduct per the relevant conduct provisions of the Guidelines and imposed a sentence of twenty-years, increasing the punishment recommended by the Guidelines—and the jury verdict—by over seventeen years.[7]

The term 'acquitted conduct sentencing' considers "acts for which the offender was criminally charged and formally adjudicated not guilty at trial"[8] and is exercised where there is "any reliance on such acts by the sentencing judge as a basis for enhancing an offender's sentence."[9] Acquitted conduct—which is characterized as 'relevant conduct' under the United States Sentencing Guideline regime—encompasses both criminal conduct alleged to have occurred contemporaneously with the charges of conviction and alleged prior criminal conduct.[10]

The hallmark of the American judicial process is the right to trial by jury[11] and the requirement of proof beyond a reasonable doubt to sustain a conviction.[12] The significance of this protection can be gleaned from its historical recognition as an "unassailable right" dating back to at least the signing of the Magna Carta in 1215.[13] The system

4. *Mercado,* 474 F.3d at 655.

5. *Id.* at 658–59.

6. *Id.* at 659.

7. *Id.*

8. Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guideline Sentencing*, 75 N.C. L. REV. 153, 157–58 (1996) (providing definition of acquitted conduct).

9. *Id.* at 157.

10. *Id*. *See also* Sterback, *supra* note 2, at 1230 ("While the pre-Guidelines approach allowed a judge to use unlimited discretion in sentencing, the Guidelines only allow the judge to consider factors of *relevant conduct*.") (emphasis added). This definition of acquitted conduct sentencing is adopted throughout this Article and, except where noted otherwise, is used in tandem with the term "relevant conduct" since relevant conduct includes acquitted conduct.

11. *See* U.S. CONST. art. III, § 2; U.S. CONST. amend. VI. *See also* Robert Alan Semones, *A Parade of Horribles: Uncharged Relevant Conduct, the Federal Prosecutorial Loophole, Tails Wagging Dogs in Federal Sentencing Law, and* United States v. Fitch, 46 U.C. DAVIS L. REV. 313, 315 (2013) ("One of the most impressive American judicial processes is the trial by jury.").

12. Sterback, *supra* note 2, at 1225 (citations omitted).

13. *See* Duncan v. Louisiana, 391 U.S. 145, 151–54 (1968) (detailing the fundamental

of jury fact-finding in colonial times was developed from the English system of criminal law,[14] where criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defense accordingly . . . and that there may be no doubt as to the judgment which should be given, if the defendant be convicted."[15] When Blackstone published his treatise in the 1760s, the English speaking people had enjoyed the right of trial by jury in criminal cases for more than 500 years, and common law lawyers and judges, from Bracton in 1250 to Lord Coke in 1620 to Blackstone,[16] had come to "revere their unique institution of liberty."[17] The fundamental role of the jury in the criminal arena played a vital role in the founding of the United States and is enshrined in the U.S. Constitution, Article III, §2 and its Sixth Amendment.[18]

Notwithstanding the historical origins of the jury, why is the use of acquitted conduct to enhance a defendant's sentence worth considering? The issue is important for three reasons. First, the use of acquitted conduct sentencing implicates the justifications for punishment by the state. Contemporary sentencing practices in the United States have made increasing use of imprisonment and have placed greater restrictions on non-custodial sentences.[19] Thus, the

right to a jury trial in the criminal context and the historical record of its origin in common-law England).

14. *See* HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATION ON THE WESTERN LEGAL TRADITION 226–28, 306–29 (2003) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *368–82).

15. Apprendi v. New Jersey, 530 U.S. 466, 478–79 (2000). *See* JOHN FREDERICK ARCHBOLD, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES 72 (John Jervis et al. eds., 23 ed. 1905); JOHN PRENTISS BISHOP, LAW OF CRIMINAL PROCEDURE: OR, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES 80 (2d ed. 1872).

16. *See* United States v. White, 551 F.3d 381, 388–97 (6th Cir. 2008) (en banc) (Merritt, J., dissenting).

17. *Id.* at 393 (quoting 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 386–87 (George E. Woodbine ed., 1968)).

18. *See* THURSTON GREENE, THE LANGUAGE OF THE CONSTITUTION: A SOURCEBOOK AND GUIDE TO THE IDEAS, TERMS, AND VOCABULARY USED BY THE FRAMERS OF THE UNITED STATES CONSTITUTION 860–67 (Stuart B. Flexner et al. eds., 1991); Bilsborrow, *supra* note 3, at 294–95.

19. ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 71–74 (5th ed. 2010) (distinguishing aims of the criminal justice system from the justifications of punishment). *See also Rough Justice in America: Too Many Laws, Too Many Prisoners*, ECONOMIST (July 22, 2010), http://www.economist.com/node /16636027 (noting that as of 2010 there were between 2.3 and 2.4 million Americans behind bars in the U.S).

imposition of state sanctioned punishment requires justification not only to counter the proposition that "anyone who commits any offence forfeits all rights, and may be dealt with by the state in whatever manner the courts decree,"[20] but also to preserve the communicative value of punishment. Second, the use of acquitted conduct at sentencing undermines the foundational principle of the American criminal justice system: "[T]hat it is far worse to convict an innocent man than to let a guilty man go free."[21] Third, the practical consequences of acquitted conduct sentencing has resulted in dramatic increases in the length of defendants' sentences—sometimes resulting in life imprisonment[22]—and has been criticized as "Kafka-esque,"[23] "repugnant,"[24] "uniquely malevolent,"[25] and "pernicious,"[26] leading one juror to openly complain to the judge having read news accounts depicting the jury's verdict having been ignored at sentencing.[27]

This Article argues that use of acquitted conduct at sentencing should be prohibited on both constitutional and normative grounds. To substantiate this claim, four particular aspects are explored: First, why is acquitted conduct considered relevant at sentencing? Second, what is the prevailing conceptual framework, if any, that underpins the

20. ASHWORTH, *supra* note 19, at 74.

21. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

22. *See* United States v. Lombard, 72 F.3d 170, 172 (1st Cir. 1995) ("At sentencing, under the Guidelines, the district court found by a preponderance of the evidence that Lombard had used his illegally possessed firearm to commit "another offense": the same murders of which he had been acquitted in the state court. The resulting Guidelines sentence was a mandatory term of life in prison, which Maine law would not have required even had defendant been convicted of the murders. Lombard thus received a life sentence based on the federal court's finding that it was more likely than not that Lombard had committed the murders of which he had been acquitted.").

23. Ngov, *supra* note 1, at 298; Farnaz Farkish, *Docking the Tail that Wags the Dog: Why Congress Should Abolish the Use of Acquitted Conduct at Sentencing and How Courts Should Treat Acquitted Conduct After* United States v. Booker, 20 REGENT U. L. REV. 101, 101 (2007); Bilsborrow, *supra* note 3, at 290 n.8; United States v. Ibanga, 454 F. Supp. 2d 532, 536 n.2 (E.D. Va. 2006) (comparing 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 particular offense) (citations omitted).

24. United States v. Watts, 519 U.S. 148, 169–70 (1997) (Stevens, J., dissenting); Eric Tirschwell & Michael Eisenkraft, *"Repugnant" and "Malevolent": The Use of Acquitted Conduct in Federal Sentencing*, N.Y. L.J. 4 (2009).

25. United States v. Canania, 532 F.3d 764, 776–77 (8th Cir. 2008) (Bright, J., concurring) (citations omitted).

26. United States v. Papakee, 573 F.3d 569, 578 (8th Cir. 2009) (Bright, J., concurring).

27. Jim McElhatton, *'Juror No. 6' Stirs Debate on Sentencing*, WASH. TIMES (May 3, 2009), http://www.washingtontimes.com/news/2009/may/3/juror-no-6-questions-rules-of-sentencing/?page=all.

American system of punishment, and moreover, where and how does the use of acquitted conduct at sentencing fit in the current prevailing sentencing ideology in the United States? Third, what are the issues and consequences emanating from the use of acquitted conduct under the relevant conduct provisions of the Guidelines? Fourth and finally, while it is outside the scope of this Article to offer a comprehensive solution or alternative to the use of acquitted conduct at sentencing, the key observation is that, since the common thread linking the constitutional and normative issues emanates from the fragmented nature of sentencing policy in the United States, the solution must start with re-conceptualizing the theories underlying sentencing.

A comprehensive analysis of acquitted conduct sentencing requires contextualizing the historical evolution of sentencing, penal policy, and the constitutional limitations on punishment. Part I begins with some preliminary issues, briefly recapitulating the development of modern sentencing philosophy which gave rise to the use of acquitted conduct at sentencing. In Part II the fragmented and muddled nature of the prevailing conceptual framework, which underpins contemporary sentencing policy, is set out as a basis for Part III's examination of the consequences of acquitted conduct sentencing. Finally, Part IV offers a conclusion and notes that the response to the problems arising from acquitted conduct sentencing must start with a re-conceptualization of sentencing itself to reflect a primary rationale or model.

I. INDETERMINATE SENTENCING VERSUS DETERMINATE SENTENCING UNDER THE GUIDELINES

The debate over determinate sentencing versus indeterminate sentencing has been characterized as a debate between proponents of the so-called medical or treatment model of corrections and those who favor the punitive model.[28] The Model Penal Code, an influential piece of draft legislation written during the early 1960s by the American Law Institute, clearly shows the significance of rehabilitative aims at the time: Courts were not to sentence offenders to imprisonment if, amongst other things, "the defendant is particularly likely to respond affirmatively to probationary treatment."[29] While the 1960s are often regarded as the "heyday of rehabilitationism,"[30] and the 1970s as the

28. *See* WILLIAM TAYLOR & MICHAEL BRASWELL, ISSUES IN POLICE AND CRIMINAL PSYCHOLOGY 19–21 (1978).

29. Francis A. Allen, *Rehabilitation*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 1 (Andrew Ashworth et al. eds., 3d ed. 2009) (quoting MODEL PENAL CODE § 7.01(2)(j), (k) (1962)).

30. *Id* (quoting MODEL PENAL CODE § 7.01(2) (1962)).

beginning of a "catastrophic decline" of the rehabilitative ideal, the rehabilitative aims or goals of imprisonment have nevertheless remained part of penal practice and penal theory to this day.[31]

However, before turning to a discussion of the historical evolution and shift from indeterminate to determinate sentencing, it is important to address the logically antecedent question of why the state has a right to punish in the first place. Similarly, what are the aims and purposes of punishment imposed by the state and why do they matter? While there are multiple justifications for state punishment, these justifications are intertwined with the *purpose* and *meaning* of punishment. The common thread that relates the problems of the indeterminate and determinate sentencing eras is the disruption to the justifications, purposes and meanings of punishment by the state.

Towards this end, Part I.A. provides an outline for justifications of punishment by the state. Part I.B. provides a brief sketch of the various aims and purposes of punishment. Part I.C. discusses the foundational basis for indeterminate sentencing and explores the role of judicial fact finding during that period. This Section also identifies the problems that arose during the indeterminate sentencing regime leading to significant reforms in 1980s. Part I.D. presents the shift to determinate sentencing. Part I.E. outlines the structural and legal framework for consideration of acquitted conduct under the Guidelines' relevant conduct provisions.

A. Justifications for Punishment by the State

Criminal punishment is not merely the imposition of pain allowed by the law.[32] It is the most powerful and the most widely used device that the law has at its disposal.[33] It is also the "crudest and most frightening" device at the law's disposal.[34] Why does the state have a right to punish? In a related vein, when does the state acquire its right to punish? These questions implicate social contract theories,[35] or more pragmatically, the state's role in carrying out a displacement function that is essential to social co-operation.[36] "The justification of

31. *Id.*

32. HYMAN GROSS, CRIME AND PUNISHMENT: A CONCISE MORAL CRITIQUE 9 (2012).

33. *Id.*

34. *Id.*

35. *See* ASHWORTH, *supra* note 19, at 74–75; Neil MacCormick & David Garland, *Sovereign States and Vengeful Victims: The Problem of the Right to Punish*, *in* FUNDAMENTALS OF SENTENCING THEORY 18–20 (Andrew Ashworth & Martin Wasik eds., 1998).

36. *See id.*

punishment *tout court* is surrounded by satellite questions of justification that are of great importance in their own right":[37] Are we justified in making some particular item of conduct punishable?[38] By what standard are we to attach criminal liability?[39]

Then there is the question of what sentences to prescribe for those crimes.[40] Given the huge and complex debate surrounding these issues, they cannot be dealt with in-depth and are outside the scope of this Section. Suffice it to say that the importance of punishment being in the hands of state institutions rather than victims or other individuals resides both in a mixture of rule-of-law values and the need for the state to ensure peaceable cooperation.[41] Though many other important issues are involved in resolving these questions of justification, a settled view of what makes punishment right is essential. The most basic requirement for liability to criminal punishment is proof beyond a reasonable doubt of all the elements of the offence, as well as all factors that increase the range of penal sanctions.[42]

As noted by Justice Brennan:[43]

> [t]he requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest[s] of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. . . . There is always, in litigation, a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the fact-finder of his guilt.[44]

The "proof beyond a reasonable doubt" requirement is a

37. GROSS, *supra* note 32, at 8.
38. *Id.*
39. *See id.* at 9–10.
40. *See id.*
41. ASHWORTH, *supra* note 19, at 74–75.
42. GROSS, *supra* note 32, at 9.
43. *In re* Winship, 397 U.S. 358 (1970).
44. *Id*. at 363–64, *cited in* GROSS, *supra* note 32, at 9.

foundational principle of American criminal justice and traces its roots to Blackstone's eighteenth century principle that "it is better that ten guilty persons escape than one innocent suffer."[45]

B. Aims and Purposes of Punishment

Throughout history, several explanations have been used to explain the aims and purposes of punishment.[46] A citizen may demand:

> [f]irst, get them off the streets; keep them away from us. Make them suffer: they deserve it. Teach them a lesson they will not forget. And let their pain and sufferings be an example to others. Maybe then, having been punished, someday, somehow, these criminals will feel remorse, change their attitudes, and productively reintegrate into society.[47]

Drawing upon concepts and perspectives implicit in the Bible and the works of, amongst others, Plato, Hobbes, Beccaria, Kant, Bentham, and numerous contemporary commentators,[48] legal scholars have explained the aims of punishment as "reinforcement of sovereign authority,"[49] "incapacitation,"[50] "retribution,"[51] "deterrence,"[52] and "rehabilitation."[53] While each of these aims suggests a distinct normative foundation for punishment used to justify various strategies of response to criminal behavior, they all reflect one common justification: punishment is communicative.[54] Punishment communicates to the offender the censure or condemnation that they deserve for their crimes.[55] Therefore, the formal criminal sanction

45. Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550, 1566 (1981) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *27).

46. Elizabeth E. Joh, *"If it Suffices to Accuse":* United States v. Watts *and the Reassessment of Acquittals*, 74 N.Y.U. L. REV. 887, 887 (1999).

47. Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1150 (1990) (citations omitted).

48. *Id.*

49. Joh, *supra* note 46, at 887 (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISH 48 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977)).

50. A.E. Bottoms & Roger Brownsword, *Incapacitation and "Vivid Danger"*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 29, at 83–84.

51. R.A. Duff, *Punishment, Retribution and Communication*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 29, at 126–27.

52. Jeremy Bentham, *Punishment and Deterrence*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 29, at 53–56.

53. Allen, *supra* note 29, at 1–10. *See also* ASHWORTH, *supra* note 19, at 71–74 (distinguishing aims of the criminal justice system from the justifications of punishment).

54. ASHWORTH, *supra* note 19, at 90 (citations omitted); Joh, *supra* note 46, at 887–88.

55. *Id.*

imposed through sentencing is "not simply the governmental apparatus that responds to crime and criminals,"[56] but also "plays a powerful teaching function,"[57] which reflects the "dominant social themes of the moment."[58]

C. Indeterminate Sentencing

1. Indeterminate Sentencing and Judicial Fact Finding

The original Model Penal Code's embrace of rehabilitation as a main penal purpose represented an early twentieth-century view that rehabilitation was morally and scientifically superior to retribution in criminal sentencing.[59] The rehabilitative ideal—that sentences should seek to reform the criminal tendencies of offenders—was tied to a specific setting for treatment growing out of developments in clinical psychology.[60] As such, an indeterminate sentencing regime took hold.[61] In this period of indeterminate sentencing, each offender's unique characteristics were taken into account through individualized sentencing, thereby, emphasizing the rehabilitative goal of sentences.[62] The judge's role under this regime was therapeutic, likened to a physician: crime was a "moral disease," whose cure was entrusted to experts in the criminal justice field, one of whom was the judge.[63] As a consequence, different standards of proof and evidence evolved between the trial stage,[64] which required proof beyond a reasonable doubt,[65] and the sentencing stage,[66] which only required proof by a preponderance of the evidence.[67] The rationale for this approach was straightforward: to limit the kind of information that a judge should get at sentencing would prohibit them from exercising their "clinical"

56. Joh, *supra* note 46, at 887.

57. *Id.* at 902 (citations omitted).

58. *Id.* at 888.

59. Sarah Armstrong, *Bureaucracy, Private Prisons, and the Future of Penal Reform*, 7 BUFF. CRIM. L. REV. 275, 280 (2003) (citing Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53 (2000)); Allen, *supra* note 29, at 1.

60. Armstrong, *supra* note 59, at 280.

61. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM L. & CRIMINOLOGY 691, 695 (2010) (tracing the roots of indeterminate sentencing).

62. Donald W. Dowd, *The Sentencing Controversy: Punishment and Policy in the War Against Drugs*, 40 VILL. L. REV. 301, 302 (1995). *See* Allen, *supra* note 29, at 1–5.

63. Gertner, *supra* note 61, at 695 (citations omitted).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

role.[68]

In 1949, the U.S. Supreme Court constitutionally approved this philosophical and procedural approach in *Williams v. New York*.[69] The *Williams* court emphasized that "[r]eformation and rehabilitation of offenders have become important goals of criminal jurisprudence"[70] and, thus, having the fullest information possible concerning the defendant's previous life and characteristics was essential for "sentencing experts" to exercise their discretion.[71] For the *Williams* Court, the rehabilitative ideal not only justified entrusting judges and parole officials with enormous sentencing discretion, but also called for sentencing judges and, by extension, parole officers, to be "freed from any procedural rules that might limit the sound exercise of their discretion."[72] In 1970, Congress codified *Williams* in 18 U.S.C. § 3577. Congress provided a statutory footing for the discretionary consideration of relevant conduct, which includes both past and contemporaneous acquitted conduct, as well as un-adjudicated conduct at sentencing.[73]

2. Problems With Indeterminate Sentencing

During the indeterminate sentencing era, judges and parole authorities had the most power relative to other "sentencing players."[74] Each case was resolved on its own merits; any standards or rules evolved from the day-to-day experience of individual judges and confined to his courtroom.[75] However, there were several problems with indeterminate sentencing, which sowed the seeds of an institutional shakeup.[76] Judges had no training in how to exercise their considerable discretion.[77] Sentencing was not taught in law schools; concepts such as deterrence and rehabilitation were not reflected in

68. *See, e.g.*, Williams v. New York, 337 U.S. 241 (1941). *See generally* Reitz, *supra* note 1, at 528–30 (providing a full discussion of the facts of *Williams*).

69. Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 4.

70. *Id.* at 4–5.

71. *Id.* at 5.

72. *Id.*

73. Erica K. Beutler, *A Look at the Use of Acquitted Conduct in Sentencing*, 88 J. CRIM. L. & CRIMINOLOGY 809, 814 (1998). Section 3577 was re-codified to 18 U.S.C. § 3661 after the sentencing reforms of the 1980s. *See infra* Part I.D.

74. Gertner, *supra* note 61, at 696.

75. *Id.*

76. *Id. See* Berman, *supra* note 69, at 8 & n.41. *See generally* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 3–34, 59–123 (1976) (discussing the failures of the rehabilitative model); JAMES Q. WILSON, THINKING ABOUT CRIME 162–82 (1975) (exploring the failings of the rehabilitative model).

77. Gertner, *supra* note 61, at 696–97.

judicial training.[78] Next, wide disparity in sentencing among both offenders and offences was the norm, leading the chief proponent of structured sentencing to describe this period as "unruly," "arbitrary" and "discriminatory."[79] Thus, so long as the federal substantive law was composed of "overlapping categories and muddled distinctions among offenses,"[80] federal sentencing was bound to seem "lawless."[81]

Beginning in the 1970s, the assumptions behind the consensus on individualized sentencing with its rehabilitative goal were under attack from all sides.[82] From the left, there was a growing mistrust of the "therapeutic state."[83] From the right, critics called for more and more mandatory sentences to punish and deter; exercising any discretion was considered, at best, a weak, Bennite solution.[84] Retribution was advocated not as revenge, but as "just deserts."[85] Nearly twenty-five years after the abandonment of the rehabilitative ideal and the implementation of a just deserts model of punishment, mass incarceration for significant periods of time appears to be the common theme in the United States. Justice is harsher in the United States than in any other developed country.[86] As of 2010, there were between 2.3 and 2.4 million Americans behind bars;[87] including parole, probation or supervised release, one adult in thirty-one is under "correctional" supervision in the United States.[88] And perhaps more troubling, the United States has the highest rate of prisoners (748) while Iceland (55) had the lowest.[89]

D. Determinate Sentencing Under the Guidelines: Structure and Application

Driven by the concerns with indeterminate sentencing, Congress

78. *Id.* (citing KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 23 (1998)).

79. *Id.* at 697 (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1972)).

80. *Id.*

81. *Id.* (citing Robert H. Joost, *Federal Criminal Code Reform: Is It Possible*, 1 BUFF. CRIM. L. REV. 195, 202 (1997)).

82. Dowd, *supra* note 62, at 302.

83. NICHOLAS N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCE THERAPY (1971).

84. Dowd, *supra* note 62, at 303.

85. *Id*. at 303. *See* Allen, *supra* note 29, at 29.

86. *Rough Justice in America: Too Many Laws, Too Many Prisoners*, ECONOMIST (July 22, 2010), http://www.economist.com/node/16636027.

87. *Id.* Note that this figure includes both state and federal prisoners.

88. *Id.*

89. *Id.*

enacted the Sentencing Reform Act of 1984 (SRA).[90] In an attempt to address the unpredictability of sentencing, the SRA created the United States Sentencing Commission (Commission) to provide "certainty and fairness in [congruence with] the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ."[91] Towards this end, the SRA attempted to introduce standardization, precision, and impartiality into federal sentencing decisions by establishing Guideline for sentencing.[92] Parole, a hallmark of the rehabilitative model, was also abolished.[93]

The centerpiece of the Guidelines was a grid containing 258 cells.[94] The Guideline grid's vertical axis consists of forty-three offense levels, reflecting a base severity score for the crime committed.[95] The Guideline grid's horizontal axis consists of six criminal history categories and provides adjustments based on the offender's past conviction record.[96] After a plea of guilt or conviction at trial, a pre-sentence investigation is conducted by a probation officer and a pre-sentence report ("PSR") is submitted to the Court to enable the judge to "meaningfully exercise its sentencing authority" under §3553 of the SRA."[97] The PSR provides a preliminary mathematical calculation of both the "offense level" and "criminal history."[98] In determining the defendant's offense level, the PSR guideline calculation reflects the base offense guideline level corresponding to the defendant's conviction or the relevant conduct underlying the conviction, whichever is higher, and then adjusts the offense level for specific offense characteristics and special instructions contained in the

90. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586 (2000), and 28 U.S.C. §§ 991–998 (2000)); Joh, *supra* note 46, at 892–93 ("In particular, the passage of the Sentencing Reform Act of 1984 responded to critiques of indeterminate sentencing with an attempt to introduce standardization, precision, and impartiality into federal sentencing decisions.") (citations omitted).

91. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 11 (Nov. 2004), *available at* http://www.lb7.uscourts.gov/documents/08-26221.pdf.

92. Joh, *supra* note 46, at 892.

93. *Id.* at 893.

94. Sherod Thaxton, *Determining "Reasonableness Without A Reason"? Federal Appellate Review Post-*Rita v United States, 75 U. CHI. L. REV. 1885, 1887 (2008) (citations omitted).

95. *Id.*

96. *Id.*

97. FED. R. CIV. P. 32(c).

98. FED. R. CIV. P. 32(d).

section.[99] After determining the offense level, the PSR determines the defendant's criminal history category.[100] The PSR then identifies the cell at which the factors intersect; the corresponding cell provides the recommended range within which the judge may sentence a defendant (the "Guideline Sentencing Range").[101] However, prior to sentencing of the defendant, both the Government and the Defendant may file their objections to the calculations or factual statements in the PSR.[102] At sentencing, the sentencing judge resolves any disputes or disagreements based on a "preponderance of the evidence" standard and imposes a sentence.[103]

E. Structural Framework for Acquitted Conduct Under the Guidelines' Relevant Conduct Provisions

1. Modified Real-Offense System

In developing the Guidelines, the Commission adopted a "modified real-offense" system, which "blends the constraints of the offense of conviction" with "the reality of the defendant's actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes."[104] This modified real offense system is premised on the consideration of all relevant conduct, regardless of the jury verdict and regardless of whether the relevant conduct was amongst the charged offences.[105] For instance, a defendant who is charged and convicted of fraud and money laundering offences may, without further charge or conviction, be sentenced using the base Guideline offence level for pre-meditated murder if the court finds by a preponderance of the evidence that a murder had taken place.[106] Similarly, a defendant who is charged with drug and firearm offences, but acquitted of the firearm offence may, nevertheless, be sentenced using the base

99. *Id.*
100. *Id.*
101. *Id.*
102. FED. R. CIV. P. 32(f).
103. *See* Thaxton, *supra* note 94, at 1887–88.
104. William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 497 (1990).
105. *See, e.g.*, *Criminal Law-Federal Sentencing-Ninth Circuit Affirms 262-Month Sentence Based on Uncharged Murder*, 125 Harv. L. Rev. 1860, 1861–62 (2012). For a thorough, yet not entirely convincing defense of the 'modified real offense' system, *see* Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342 (1997).
106. *See, e.g.*, United States v. Fitch, 659 F.3d 788, 790 (9th Cir. 2011) (providing an example of this factual scenario), *discussed in* Semones, *supra* note 11.

Guideline offence level for firearm related offences.[107] The consideration of "real conduct" at sentencing operates through the relevant conduct provisions of the U.S. Sentencing Guideline Manual[108] and the "no limitation" language of 18 U.S.C. § 3661, which provides that there shall be no limitation placed on the type of information the Court may consider at sentencing.[109]

Acquitted conduct sentencing continued after the enactment of the Guidelines for four reasons. First, as discussed in Part II *infra*, the SRA fails to conceptualize any coherent sentencing theory. The SRA simply made the application of the Guidelines mandatory without any guidance to judges on how the various purposes listed in 18 U.S.C. § 3553(a) were incorporated into the relevant Guideline ranges. Second, the holdings of *Williams*, discussed above, were re-codified by Congress with the exact same language as before with the passage of the SRA without any regard to the new philosophy rooted in retribution and incapacitation.[110]

Third, a mere two years after the SRA and the shift in penal philosophy on the federal level, the Supreme Court decided *McMillan v. Pennsylvania*,[111] originally a state court case, which coined the term "sentencing factor."[112] Per *McMillan*, a "sentencing factor" is a fact not found by a jury, but found by a judge by a preponderance of the evidence at sentencing, which affects the sentencing range.[113] In *McMillan*, the Court rejected a Sixth Amendment challenge concluding that a sentencing factor does not constitute additional punishment; it merely limits a judge's sentencing discretion.[114]

107. *See, e.g.*, United States v. White, 551 F.3d 381 (6th Cir. 2008) (providing an example of this factual scenario).

108. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3–.4 (2012).

109. Sterback, *supra* note 2, at 1232–33; Gerald Leonard & Christine Dieter, *Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing*, 17 BERKELEY J. CRIM. L. 260, 273–74 (2012) (citation omitted). *See* Berman, *supra* note 69, at 17–23.

110. Beutler, *supra* note 73, at 827–28; 18 U.S.C. § 3661 (2012).

111. McMillan v. Pennsylvania, 477 U.S. 79 (1986). For federal counterpart *see Harris v. United States*, 536 U.S. 545 (2002).

112. Alleyne v. United States, 133 S. Ct. 2151, 2154 (2013).

113. *Id.*

114. 477 U.S. 79. In *McMillan*, a Pennsylvania state court convicted the defendants of various felonies covered by the Pennsylvania Mandatory Minimum Sentencing Act. *Id.* at 82. The Act provided in relevant part that a person convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the felony. PA. CONS. STAT. § 9712 (1982). Following the defendants' conviction, the Commonwealth of Pennsylvania gave notice that it would proceed under the Act at sentencing; however, the sentencing judges found the Act unconstitutional and imposed lesser sentences than those required by the statute. *McMillan,*

McMillan was delivered in the midst of a complex and ever-changing due process analysis and represented the Supreme Court's broader effort to limit the scope of its decisions in *In re Winship* and *Mullaney v. Wilbur*[115] and, consequently, the applicability of the due process clause to the criminal law.[116] In *In re Winship*, the Supreme Court decided that the due process clause required "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged"[117] in an adjudication to determine juvenile delinquency.[118] In *Mullaney v. Wilbur*, the Supreme Court concluded that the reasonable doubt standard applied to all factors that, if present, could affect the defendant's interests in liberty and reputation.[119] However, the Supreme Court subsequently decided in *Patterson v. New York*[120] to limit the rule of *In re Winship* only to those factors defined by statute as elements of a crime. Justice Rehnquist, writing for a plurality of the Court in *McMillan*, stated that its holding was "controlled by *Patterson* . . . rather than by *Mullaney*"[121] and justified increasing severity in punishment through a "convenient yet dangerous fiction . . . of the punishment-enhancement distinction."[122]

Fourth, after the Guidelines came into force, the Supreme Court re-affirmed the principles of *Williams* in *United States v. Watts* and rejected a double jeopardy challenge[123] against the use of acquitted conduct at sentencing.[124] In order to overcome any constitutional

477 U.S. at 82. The cases were appealed to the Supreme Court of Pennsylvania, which consolidated the Commonwealth's appeals, and rejected the appellees contentions and found that the Act was consistent with In re *Winship*, *Mullaney* and *Patterson* insofar as it did not create a presumption with respect to any fact constituting an element of the crimes in question. *Id*. at 83. The court then vacated the appellees' sentences and remanded for sentencing pursuant to the Act. *Id*. at 83–86. The United States Supreme Court granted a writ of certiorari and affirmed the opinion of the Supreme Court of Pennsylvania. *Id.* at 93. For a detailed discussion, *see* Anthony J. Dennis, *Fifth Amendment-Due Process Rights at Sentencing*, 77 J. CRIM. L. & CRIMINOLOGY 646 (1986).

115. Mullaney v. Wilbur, 421 U.S. 684 (1975).

116. Dennis, *supra* note 114, at 646–53.

117. *In re* Winship, 379 U.S. 358, 364.

118. Dennis, *supra* note 114, at 652.

119. *Id.* at 651.

120. Patterson v. New York, 432 U.S. 197 (1977).

121. *McMillan*, 477 U.S. at 86.

122. *See* Elizabeth T. Lear, *Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent-Prosecution Dilemma*, 60 BROOK. L. REV. 725, 726 (1994); Bilsborrow, *supra* note 3, at 289, 308. *See also* Alleyne v. United States, 133 S. Ct. 2151, 2158 (2013) (citing United States v. O'Brien, 560 U.S. 218 (2010)) ("The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense.").

123. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .").

124. United States v. Watts, 519 U.S. 148, 151, 157 (1997). *See also* Berman, *supra* note

objections and to preserve the historic role of sentencing judges as experts, the Court simply sought validation in pre-Guideline precedent.[125] The Court first turned to the language of 18 U.S.C. § 3661, which prohibited any limitation on the types of evidence a sentencing judge may hear, thus, confirming that the wide discretion inherent in the statute survived the enactment of the Guidelines.[126] Next, the Court relied on its decision in *Witte v. United States*,[127] which itself had relied on the pre-Guideline era case of *Williams*. In *Witte*, the Court had held that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted."[128] Thus, the Court's decision in *Watts* confirmed that the use of acquitted conduct at sentencing had survived the enactment of the Guidelines.[129] However, while judges in the indeterminate sentencing era occasionally considered acquitted conduct, with its indeterminate consequences, under the Guidelines, it was mandatory, with determinate consequences.[130]

2. Sixth Amendment Jurisprudence Post-Booker

A mere three years after *Watts*, the Court's Sixth Amendment jurisprudence took a new turn, which was fundamentally at odds with both *Watts* and its prior sentencing decisions.[131] However, given the complex and highly debated shift in the Court's Sixth Amendment jurisprudence, only a brief sketch is provided below to show that the use of acquitted conduct sentencing persists.[132]

69, at 17–23 (discussing cases prior *Watts* and noting that the Supreme Court failed to respond to the changes ushered in by the Guidelines); Sterback, *supra* note 2, at 1232–33 (discussing the background and justification of the *Watts* decision).

125. *See* Sterback, *supra* note 2, at 1225–31.

126. *Id.* at 1231–32.

127. Witte v. United States, 515 U.S. 389, 408 (1995).

128. *Id.* at 401.

129. *Watts*, 519 U.S. at 151–52.

130. *See* Bilsborrow, *supra* note 3, at 308–09 & n. 147; Gertner, *supra* note 61, at 702.

131. Bilsborrow, *supra* note 3, at 308–09.

132. Many sources have discussed *Booker* and its progeny. *See, e.g.*, Frank O. Bowman, III, *Nothing is Not Enough: Fix the Absurd Post*-Booker *Federal Sentencing System*, 24 FED. SENT'G REP. 356 (2012), Bilsborrow, *supra* note 3; Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After* Kimbrough, 93 MARQ. L. REV. 717 (2009); Casey McTigue, *The Impact of Post*-Cunningham *Judicial Review: The Impact of* Gall, Kimbrough *and Senate Bill 40 on California Sentencing*, 13 BERKELEY J. CRIM. L. 199 (2008); Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631 (2012); Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker 1–6, 18–24 (Aug. 2006) (unpublished manuscript), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/struggle_for_constitutional_sentencing_after_booker.rev.8.16.06.doc.

The Supreme Court's line of cases beginning with *Apprendi v. New Jersey*,[133] *Harris v. United States*,[134] *Blakely v. Washington*[135] and *United States v. Booker*,[136] dramatically altered the sentencing landscape.[137] Under these cases, any sentencing fact that has the effect of increasing the *statutory maximum* punishment,[138] beyond the prescribed statutory maximum for an offense,[139] but not any applicable mandatory minimum sentence,[140] must be found by a jury beyond a reasonable doubt unless admitted by the defendant.[141] Some commentators proclaimed that these cases were evidence of how "the Court got its Sixth Amendment groove back" and concluded that the Court had finally "beg[un] to push back, crafting what would eventually become a powerful new Sixth Amendment jurisprudence."[142]

However, such claims proved to be premature. For example, while the *Booker* court found constitutional fault with a regime that excessively delegated determinate fact-finding decisions to the judge at the expense of the jury,[143] the majority splintered in deciding a proper remedy.[144] Rather than requiring Congress to completely overhaul the Guidelines, the *Booker* court's remedial opinion simply excised the language from the SRA, which required mandatory application of the Guidelines, rendering the Guidelines merely advisory.[145] Consequently, the real-offense components of the Guidelines, which permit consideration of relevant conduct, including acquitted conduct, remain highly influential, since judges are still required to initially calculate the Guidelines range as they had done so before and "consider" the resulting range before deciding whether to "depart" from the Guidelines or impose a non-Guideline sentence.[146]

133. Apprendi v. New Jersey, 530 U.S. 466 (2000). The Court's ruling in *Apprendi* was foreshadowed the year before in *Jones v. United States*, 526 U.S. 227 (1999).

134. Harris v. United States, 536 U.S. 545 (2002).

135. Blakely v. Washington, 542 U.S. 296 (2004).

136. United States v. Booker, 543 U.S. 220 (2005).

137. *See* Bilsborrow, *supra* note 3, at 309–10.

138. *Id.* at 310.

139. *See id.*

140. *See id.*

141. *Id.* at 309–15

142. *Id.* at 309.

143. Bilsborrow, *supra* note 3, at 313.

144. *See* Baron-Evans, *supra* note 132, at 18–24 (criticizing the Court's two majority opinions as inconsistent since the Court remedied the problem of mandatory judicial fact finding with even more judicial fact finding).

145. Bilsborrow, *supra* note 3, at 313 (citing United States v. Booker, 543 U.S. 220, 245 (2005)).

146. *Id.* (citing *Booker*, 543 U.S. at 259–60).

II. CONCEPTUAL FRAMEWORK GOVERNING THE SRA

Building on the Part I's discussion of the legal framework governing the Guidelines and consideration of acquitted conduct under its relevant conduct provisions, Part II.A focuses on the various rationales of punishment listed in the SRA to determine whether there is a primary rationale or dominant philosophy of punishment. It will be argued that there is no explicit guidance in the SRA on what weight to give the various rationales or theories of punishment reflected in the "factors to be considered for sentencing" in the SRA.[147] This discussion is set out as the basis for Part II.B and Part II.C's examination of the conceptual tension between the two overarching theories of punishment in the SRA—retributivism and utilitarianism.[148] Part II.B considers whether retributive theories can justify punishment of acquitted conduct. Part II.C determines whether the utilitarian and consequentialist theories can justify punishment of acquitted conduct. While offering a full defense of either retributive theories or utilitarian theories of punishment is outside the scope of this Article, Part II.D will argue that neither retributive nor utilitarian theories of punishment provide a firm, coherent or stable foundation for considering acquitted conduct at sentencing.

A. Does the SRA Specify a Primary Rationale or Philosophy?

While the drafters and text of the SRA expressed a fundamental concern with principled sentencing,[149] the SRA did not, as a statutory matter, adopt a particular punishment philosophy.[150] Consequently, various commentators and the lower courts have struggled to apply a consistent philosophy of punishment and reached conflicting conclusions.[151] The conceptual and procedural struggles of the federal sentencing system have been criticized as a "conceptual anti-movement"[152] because they were motivated less by an express pursuit of a new sentencing theory and more a rejection of the rehabilitative ideal to eliminate sentencing disparities that resulted from discretionary

147. 18 U.S.C. § 3553(a) (2012) (listing "factors to be considered").

148. Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 87 (2011).

149. Berman, *supra* note 69, at 11 & n.54 (citing Daniel J. Freed & Marc Miller, *Taking Purposes Seriously: The Neglected Requirement of Guideline Sentencing*, 3 FED. SENT'G REP. 295, 295 (1991) (noting Congress made one principle clear: the "purposes of sentencing" listed in § 3553 were to play a central role)).

150. *Id.* at 11.

151. *Id.* at 11–12.

152. *Id.* at 11.

sentencing practices.[153]

18 U.S.C. § 3553(a) lists all of the traditional justifications of punishment and invites inconsistency,[154] by requiring judges to consider a variety of different purposes and then, presumably, to give priority to one.[155] As noted by Professor Andrew Ashworth, this "pick-and-mix" approach appears to have some political popularity as similar methods are now followed in England and Wales, Canada, New Zealand and Australia, "despite the low value that it assigns to the rule of law."[156]

As noted by Professor Michael Tonry, whether a sentencing system or practice can be said to work depends on "what it is supposed to do, and how well it does that."[157] Examination of the purposes of punishment refers to the "normative rationales such as retribution or crime prevention through deterrence, incapacitation, rehabilitation, and moral education."[158] "Normative purposes provide the ultimate criteria by which the justness of a punishment system is assessed."[159] According to Kenneth R. Feinberg,[160] Congress was ambivalent about clearly defining the role and priority of sentencing purposes and thus largely "fudged the issue in drafting" the SRA.[161] Scholars such as Andrew von Hirsch,[162] Aaron J. Rappaport[163] and Paul H. Robinson[164] have questioned whether the sentencing guidelines provide any principled guidance about the purpose of punishment.[165]

Ultimately, Stephen Breyer, who worked on the original Commission and now serves as Associate U.S. Supreme Court Justice,

153. *Id.*

154. *Id.* at 11–12; 18 U.S.C. § 3553(a) (2012).

155. *See* ASHWORTH, *supra* note 19, at 77.

156. *Id* at 77–78.

157. Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 6 (2006).

158. *Id.*

159. *Id.* at 13.

160. Kenneth Feinberg is an attorney in Washington, formerly Special Counsel to the Senate Judiciary Committee and Consultant to the United States Sentencing Commission. He is a primary author of the federal legislation creating the United States Sentencing Commission.

161. Berman, *supra* note 69, at 12 n.57 (citing Kenneth R. Feingberg, *The Federal Sentencing Guidelines and the Underlying Purposes of Sentencing*, 3 FED. SENT'G REP. 326, 326 (1991)).

162. Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367 (1989).

163. Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043 (2003).

164. Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987).

165. *See* Berman, *supra* note 69, at 12.

confirmed that while the Sentencing Commission initially considered adopting a primary rationale or specific purpose of punishment, it eventually chose not to do so.[166] More recent studies, such as Paul J. Hofer and Mark H. Allenbaugh's study,[167]concluded that the philosophy underlying the Guidelines is one of "modified just deserts,"[168] a form of Norval Morris'[169] "limiting retributivism."[170] This approach places "primary emphasis on punishment proportionate to the seriousness of the crime and, within the broad parameters of this retributivism, lengthier incarceration for offenders who are most likely to recidivate."[171] However, while limiting retributivism as a rationale for punishment simply sets upper "deserved" or "undeserved" limits, it does not necessarily satisfy the demands of distributive justice or provide a workable structure. In other words, limiting retributivism does not say much about the Guideline as "most penal codes are . . . constructed on lines consistent with limiting retributivism, providing maximum sentences which set the upper limit to severity without obliging the court to impose the maximum"[172] and is more properly characterized as a limiting principle rather than a rationale.[173]

Next, Rappaport's[174] rational reconstruction of the Guidelines suggested that the underlying philosophy was a utilitarian theory of punishment.[175] However, since the Supreme Court's *Booker* decision, there is a growing appreciation and consensus on the fragmented and muddled nature of sentencing policy in the United States.[176] Berman has argued that the SRA was focused more on a rejection of "the old

166. *Id.* (citing Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15–18 (1988)).

167. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003).

168. *Id.* at 51–52.

169. Professor Norval Morris was Dean of the University of Chicago Law School, a criminologist, and a vocal advocate of criminal justice and mental health reform. Morris's theory of "limiting retributivism" supports a retributivist system of punishment, but with attempts to appeal to certain utilitarian concerns. For a detailed discussion, see Matthew Haist, *Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable In A World of "Limiting Retributivism"*?, 99 J. CRIM. L. & CRIMINOLOGY 789, 792 (2009) and Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME AND JUST. 363 (1997).

170. U.S. SENTENCING COMM'N, *supra* note 91, at 14 (citations omitted).

171. *Id.*

172. CHARLES K.B. BARTON, GETTING EVEN: REVENGE AS A FORM OF JUSTICE 46 (1999) (citations omitted).

173. *See id.*; Haist, *supra* note 169, at 802–03.

174. Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557 (2003).

175. *Id*. at 561.

176. Tonry, *supra* note 157, at 1–2.

conceptual sentencing model"[177] than developing a new one.[178] In the same vein, Tonry has suggested that "[t]here is no overriding theory or model . . . . [N]o widely shared understandings about what sentencing can or should accomplish or about [the] conceptions of justice it should incorporate or reflect."[179] Drawing on this continuing academic debate, the Commission's own statements, and the Supreme Court's post-*Booker* sentencing jurisprudence, the conclusive conceptual philosophy of the SRA appears to be that there would be no conceptual philosophy.[180]

B. Does Retributivism in the SRA Justify Acquitted Conduct Sentencing?

At the top of the list of the § 3553(a)(2) factors is retribution: "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment."[181] Retributivism is often understood as "backward looking, focusing primarily on primarily on the criminal and the crime committed,"[182] as opposed to deterrence, discussed *infra*, "which looks forward to the future gains that flow from punishment (while neglecting the actual crime committed)."[183] However, retributivism is not only one theory, but rather several theories.[184] For retributivists, "[i]n terms of the three main issues in the justifications of punishment—Why punish? Whom to punish? How much to punish?—desert theorists agree in principle about the second and third."[185]

As to the first question, Legal Philosopher and Professor H.L. Hart has suggested that "deterrence is why we punish, but retributivism governs how and whom we punish"[186] or cast in Kantian terms "[a retributive system of punishment would be] 'deterrence in its threat,

177. Berman, *supra* note 69, at 15.

178. *Id.*

179. Tonry, *supra* note 157, at 1.

180. *See* Berman, *supra* note 69, at 15.

181. 18 U.S.C. § 3553(a)(2)(A) (2012).

182. Mark D. White, *Retributivism in a World of Scarcity*, *in* THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 254 (Mark D. White ed., 2009).

183. *Id.* (citations omitted).

184. For concise summaries of retributivism and deterrence, *see* Anthony Duff, *Legal Punishment*, STAN. ENCYCLOPEDIA OF PHIL. (May 13, 2013), http:// http://plato.stanford.edu/entries/legal-punishment.

185. *Desert*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 29, at 102.

186. WHITE, *supra* note 182, at 256 (citing H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968)).

retribution in its execution.'"[187] As noted by Mark D. White,[188] this hybrid theory amounts to the standard deterrence approach limited by negative retributivism, which prohibits intentional punishment of the innocent, as well as disproportionate penalties.[189] However, the fundamental premise of this hybrid theory has been criticized since the "ethical foundations of deterrence and retributivism are mutually exclusive, and any combination thereof will compromise them both."[190] Michael Moore[191] argues that those who commit crimes deserve to be punished for the same reason as those who commit civil wrongs.[192]

More recently, Andrew von Hirsch and Andrew Ashworth's[193] answer to this question centers on the communicative force of punishment as a justification for the imposition of punishment.[194] Desert theory is a modern form of retributive philosophy and, like retributivism, comes in various forms.[195] Just desert theory, as developed by von Hirsh and Ashworth[196] has two intertwined justifications.[197] Desert is "an integral part of everyday judgments and blame"[198] and state punishment institutionalizes this censuring function.[199] Thus, sentences communicate official censure or blame:[200] punishments are different from taxes or quarantines because of their special communicative function[201] to the offender, the victim and society.[202] To this normative reason, this model adds a prudential or

187. *Id.* (citing B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 LAW & PHIL. 151–200 (1989)).

188. *See, e.g.*, *id.* at 257; Mark D. White, *A Kantian Critique of Neoclassical Law & Economics*, 18 REV. POL. ECON. 235–52 (2004).

189. WHITE, *supra* note 182, at 257.

190. *Id.* (citing JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 166–68 (1990) and Alan H. Goldman, *The Paradox of Punishment*, 9 PHIL. & PUB. AFF. 42, 42–58 (1979)).

191. *See* Michael S. Moore, *The Moral Worth of Retribution*, *in* PLACING BLAME: A THEORY OF CRIMINAL LAW (2010). Michael S. Moore, University of Illinois, College of Law Charles R. Walgreen, Jr. Chair, Co-Director, Program in Law and Philosophy.

192. WHITE, *supra* note 182, at 256.

193. *See generally* Malcolm Thorburn & Allan Manson, *The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning*, 10 NEW CRIM. L. REV. 278 (2007) (discussing ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005)).

194. *See id.* at 281.

195. ASHWORTH, *supra* note 19, at 88.

196. *Id.* at 88 n. 90.

197. *Id.* at 88.

198. *Id.* (citations omitted).

199. *Id.*

200. *Id.*

201. Thorburn & Manson, *supra* note 193, at 282–83.

202. ASHWORTH, *supra* note 19, at 88.

consequentialist rationale:[203] hard treatment.[204] This preventative element is designed to add incentive to obey the law and act as deterrence.[205] This preventative or consequentialist element is characterized by Ashworth as a "contingent foundation"[206] for the sentencing system, subject to the requirements that it be "imposed only on those who have actually done wrong and only in proportion to their wrong."[207] Proportionality, in its two senses, is the touchstone of the punishment rationale underlying just desert theory: ordinal proportionality concerns the relative seriousness of the offense; and cardinal proportionality relates the original ranking to a scale of punishments, and requires that the penalty should not be out of proportion to the gravity of the crime involved.[208] Von Hirsch suggests that sentencing policy makers can rank the seriousness of various crimes ordinally, that is, relative to each other, but that the cardinal or absolute severity of the scale of punishment required by just desert is indeterminable.[209]

However, retribution has been criticized since it equates criminal wrongdoing with morality even though not all crimes are immoral, and not all moral failings are typically punished.[210] Thus, retributive justice may treat innocent and guilty parties alike, despite the fact that one party lacks culpability.[211] Additionally, retributive sentencing lacks uniformity allowing an innocent party to receive a harsher penalty than a similarly situated innocent party.[212] However, eliminating punishment would have the same distorting effect on the comparative account of desert.[213] In other words, the guilty person is treated equally with the innocent even though, on a comparative basis, he deserves to be treated worse.[214] Drawing from Moore's discussion of coherence theories of justification in ethics,[215] moral desert can be justified in comparison to utilitarian theories of punishment, "by showing that it

203. *Id.* at 89.
204. Thorburn & Manson, *supra* note 193, at 283.
205. *Id*.
206. ASHWORTH, *supra* note 19, at 89.
207. Thorburn & Manson, *supra* note 193, at 283.
208. ASHWORTH, *supra* note 19, at 89.
209. Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55 (1992).
210. *See* White, *supra* note 188.
211. *See id.*
212. Larry Alexander, *Retributivism and the Inadvertent Punishment of the Innocent*, 2 L. & PHIL. 233, 238 (1983)
213. *Id.*
214. *Id.*
215. Michael S. Moore, *The Moral Worth of Retribution*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 29, at 111.

best accounts for those of our more particular judgments that we also believe to be true."[216] Retribution best accounts for our "more particular judgments" by absolutely forbidding the punishment of the innocent; utilitarian theories of punishment "may sometimes require the punishment of an innocent person or the excessive punishment of an offender" to achieve fear of punishment in other persons.[217] Further, as illustrated by Professor Ronald Dworkin's example, a mistaken conviction involves a moral harm (an undeserved stigma), in addition to bare harm (loss of liberty), and, thus, it is morally worse than the equivalent bare harm (loss of liberty) suffered at the hands of an un-deterred criminal.[218]

Retributivist theories rely on the fundamental proposition that punishment should only be "imposed only on those who have . . . [been convicted] . . . and only in proportion to their wrong."[219] This limitation implicates "Hart's famous distinction between the general justifying aims of a system of punishment and the principles of distribution that operate within such a system."[220] Ashworth and von Hirsch argue that "[o]nce the state has undertaken to institute a system of punishment . . . the distribution of punishment is subject to the demands of distributive justice, and the appropriate criterion for distribution is individual desert."[221] For example, Henry Lombard, Jr. was charged with two counts of murder in Superior Court in the State of Maine.[222] After a week and half long trial, the state jury acquitted Mr. Lombard on both counts.[223] However, just a year after his acquittal on state charges of murder, a federal jury convicted him of one count of illegal possession of a firearm.[224] Since the firearm was the alleged murder weapon in the earlier state case, the federal judge was able to consider the murders for which Lombard was acquitted and using the relevant conduct provision of the Guidelines apply the base offense level for murder.[225] The sentencing judge imposed a sentence of life imprisonment on Lombard, the statutory maximum on the

216. *Id.*

217. *Deterrence*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 29, at 42.

218. Alexander, *supra* note 212, at 238.

219. Thorburn & Manson, *supra* note 193, at 283.

220. *Id.* (citing H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (2d ed. 2008)).

221. *Id*.

222. United States v. Lombard, 72 F.3d 172 (1st Cir. 1995). *See also* Ngov, *supra* note 1, at 236–39 (summarizing facts of *Lombard* case).

223. *Lombard*, 72 F.3d at 173.

224. *Id.* at 173.

225. *Id.* at 172.

firearm charge.[226]

The use of acquitted conduct to impose a *de facto* sentence for murder on Lombard, without conviction for murder, cannot be justified by retributivist theories of punishment since retributivists do not support the notion of sentencing on character. Thus, the use of acquitted conduct fatally undermines the foundational premise of retributivist theories of punishment and the state's justification of 'why we punish.'[227]

C. Utilitarian or Mixed Theories of Punishment

Proponents of forward-looking utilitarian theories of punishment, such as deterrence, incapacitation and rehabilitation,[228] typically view both offense conduct and offender characteristics as central considerations when seeking to predict and prevent future criminal behavior.[229] The aims of deterrence, incapacitation, and rehabilitation all support punishment relative to its crime-preventative consequences, which are advanced within a utilitarian framework.[230] Under this framework, the justification for punishment and the measure of punishment are found in a "calculation of its utility compared with the attendant disutilities."[231]

Deterrence—specific and general—"is one of a number of consequentialist aims which share the goal of preventing crime."[232] It has a consequentialist rationale in the sense that it looks to the preventative consequences of sentences.[233] Under deterrence theory, three factors affect a sanction's deterrent value: severity, certainty and celerity.[234] A sentencing system based on special deterrence would need to ensure that courts have detailed information on the character, circumstances and previous record of a particular offender, and would then require courts to calculate the sentence necessary to induce the

226. *Id.* at 179.

227. *See* Richard S. Frase, *Prior-Conviction Sentencing Enhancement: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVE 122 (Julian V. Roberts & Andrew von Hirsh eds., 2010).

228. *Deterrence*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 29, at 39; Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 289 (2005).

229. Berman, *supra* note 228, at 289.

230. *Deterrence*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 29, at 39.

231. *Id.*

232. *Id.*

233. ASHWORTH, *supra* note 19, at 78.

234. Hofer & Allenbaugh, *supra* note 167, at 61.

particular offender to comply.[235] However, punishments might have to be increased substantially for persistent offenders, at the risk of the parsimony principle,[236] and at the risk of unwarranted sentencing disparities between similarly situated offenders since each sentence would be specially calculated so as to influence the specific offender before the court.[237]

The objection to general deterrence theories have often been expressed in the Kantian maxim, "a person should always be treated as an end in himself [or herself], and never only as a means."[238] Since general deterrence theory's distinctive aim and method is to create fear of punishment in other persons, it may sometimes require the punishment of an innocent person or the excessive punishment of an offender in order to achieve this "greater social effect."[239] This approach regards citizens merely as numbers to be aggregated in an overall social calculation and shows no respect for the moral worth and autonomy of each individual. Furthermore, citizens should not be used merely as a means to an end.[240] While punishment is a means to an end, punishment of any given individual cannot and should not be justified solely by reference to wider social benefits.[241]

Although deterrence is plainly listed as a factor in § 3553(a)[242] the Commission has held that deterrence is not the primary rationale of the Guideline.[243] Both specific and general deterrence figures prominently as a goal in the SRA; however, their utility in drafting specific guideline provisions and ranges is dependent upon empirical data regarding "the likelihood of detection, prosecution, and conviction" for a particular type of crime.[244] This is so that severity levels can be adjusted.[245] Research on deterrence has not yielded any findings to inform the design of specific guideline provisions, leading most academic research to agree that deterrence cannot be the Guideline's primary rationale.[246]

235. *Deterrence*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 29, at 41–42.
236. *Id.*
237. *Id.*
238. ASHWORTH, *supra* note 19, at 78.
239. *Deterrence*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 29, at 41–42 (citations omitted).
240. *Id.*
241. *Id.*
242. 18 U.S.C. § 3553(a)(2)(B) (2012).
243. Hofer & Allenbaugh, *supra* note 167, at 61.
244. *Id.*
245. *Id.*
246. *Id.* at 61–62.

Incapacitation is, in essence, a way to deal with offenders in such a way as to "make them incapable of offending for substantial periods of time."[247] The SRA presents incapacitation in terms that Ashworth has framed in its "popular form of public protection."[248] The significant concern with incapacitation is displayed in the Guidelines and related commentary where it directs the Commission's attention to offender's' "criminal history . . . and . . . degree of dependence upon criminal activity for a livelihood,"[249] and it mandates sentences "near the maximum term authorized" for repeat drug and violent offenders[250] and a "substantial term of imprisonment" for certain other categories of repeat and high-risk offenders.[251]

In his rational reconstruction approach to the Guidelines, Rappaport argued "utilitarianism, offers the best reconstruction of the four critical guideline provisions under analysis;"[252] however, he fails to overcome both empirical and principled objections.[253] Richard Singer, a strict desert theorist, has argued that predictions should have no place in sentencing and that sentences should be based solely on the seriousness of the current offense.[254] Andrew von Hirsch has argued that sentences for first time offenders and increasing relative sentences for repeat offenders can be justified within the strictures of the desert theory by the increased culpability of someone who re-offends after having already been warned and punished.[255] For strict utilitarians, preventative detention can be justified if the harm prevented through incarceration is greater than the harm of incarceration itself.[256] Incapacitation has drawn empirical criticism for drawing into its net more 'non-dangerous' than 'dangerous' offenders, with a high rate of false positives.[257] The principled objections parallel the objection to deterrent sentencing: "individuals are being punished, over and above what they deserve, in the hope of protecting future victims from

247. ASHWORTH, *supra* note 19, at 84.

248. *Id.*

249. Hofer & Allenbaugh, *supra* note 167, at 57 (citing 28 U.S.C. § 994(d)(11) (2002)).

250. *Id.* (citing 28 U.S.C. § 994(h)).

251. *Id.* (citing 28 U.S.C. § 994(i)).

252. Rappaport, *supra* note 174, at 642. *See* Hofer & Allenbaugh, *supra* note 167, at 61–62.

253. *See* Rappaport, *supra* note 174; Berman, *supra* note 69.

254. Hofer & Allenbaugh, *supra* note 167, at 57 (citing RICHARD SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY & DESERT (1979)).

255. *Id.* (citing ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 77–78, 131–32 (1986)).

256. *Id.* (citation omitted).

257. ASHWORTH, *supra* note 19, at 84.

harm."[258] However, while hypothetical examples involving high-risk offenders are appealing, at present there is no empirical data to "sacrific[e] one offender's liberty in the hope of increasing the future safety of others."[259]

The rehabilitative rationale seeks to justify compulsory measures as a means of achieving the prevention of crime, through rehabilitation of the offender.[260] However, in the context of the SRA, while the SRA requires that the Guidelines accommodate the statutory purposes of rehabilitation, its role is limited, as Congress has specifically stated that "imprisonment is not an appropriate means of promoting correction and rehabilitation."[261]

D. Do Either Retributive or Utilitarian Theories Justify the Use of Acquitted Conduct?

Recalling that acquitted conduct was permitted during the indeterminate sentencing era when the rehabilitative ideal prevailed, utilitarian theories of punishment—deterrence, incapacitation and, to a lesser degree, rehabilitation—continue to, at least in part, underpin its use today. As noted in Part I.E *supra*, courts have gotten around the possibility that they may inadvertently punish innocent offenders by re-characterizing elements of a separate (uncharged or acquitted) criminal offence as sentencing factors,[262] without regard to their identical impact on the defendant: increased punishment. Whatever the merits of this semantic flip-flop in the Court's jurisprudence, the gravitational pull of acquitted conduct sentencing invariably increases the possible sentence and, necessarily, the risk of punishment of innocent individuals.[263] While a jury verdict of "not guilty" does not necessarily always equate to "innocent,"[264] this reliance upon 'facts' often leads to "moral slippage in that the so-called facts often become the moral qualities relied upon by the retributionist."[265] Next, the failure of utilitarian approaches to encompass the notion of desert leads to difficulties in

258. *Id.* at 85.

259. *Id.*

260. *Id.* at 86.

261. 18 U.S.C. § 3582(a) (2012). *See generally* 28 U.S.C. § 994(k) (describing duties of the commission).

262. *See* discussion *supra* Part I.E.

263. *See* Ngov, *supra* note 1; Bilsborrow, *supra* note 3; Semones, *supra* note 11; Gertner, *supra* note 61.

264. Mark T. Doerr, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 243, 261–62 (2009) (citations omitted).

265. ROMAN TOMASIC & IAN DOBINSON, THE FAILURE OF IMPRISONMENT: AN AUSTRALIAN PERSPECTIVE 18 (1979).

accounting for the concept of individual responsibility.[266] Recalling the Kantian injunction above, the use of acquitted conduct also fails to satisfy the Hartian command that "a theory of punishment should include a link with both the general social justification for the institution of punishment and the principles of distribution which restrict its imposition to properly convicted offenders and which place limits on the amount of punishment."[267]

Like retributivism, utilitarianism and its related theories are not well suited to provide a coherent and consistent foundation for acquitted conduct sentencing. This is because utilitarianism is not limited to criminal law.[268] Utilitarians seek to maximize social welfare and permit deviations only if doing so maximizes social welfare.[269] Because they are guaranteed by the Constitution, the right to due process, and the right to a jury trial must rest on utilitarian grounds since they are meant to maximize social welfare.[270] Accordingly, permitting the use of acquitted conduct through the relevant conduct provisions of the Guidelines real offense sentencing system does not reflect the purposes and significance of the these fundamental rights. Further, even if such rights have no utilitarian grounds, these rights should trump utilitarian values.[271] This is not to say that rights should always trump utilitarian values—constitutional rights must yield when the societal costs of absolute enforcement would be too high—as Justice Jackson stated, the Constitution is not a "suicide pact."[272]

Consequently, while the drafters and text of the SRA expressed a

266. *Id.*

267. *Deterrence*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 29, at 43.

268. Hessick & Hessisk, *supra* note 148, at 88.

269. *Id.*

270. *Id* at 88–89.

271. *Id.*

272. *Id*. at 90 (citing Terminiello v. City of Chicago, 337 U.S. 1, 36–37 (1949) (Jackson, J., dissenting) and RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 41 (2006)). Justice Jackson's dissent in *Terminiello* is most famous for its final paragraph:

> This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Terminiello, 337 U.S. at 37. *See also* Patricia R. Stembridge, *Adjusting Absolutism: First Amendment Protections for the Fringe*, 80 B.U. L. REV. 907, 915 (2000) (noting that even Justice Black, who took an absolutist stance in interpreting the First Amendment, refused to extend First Amendment protections to all speech).

fundamental concern with principled sentencing, by omitting a primary rationale or cohesive purpose of punishment, they undermined the normative justifications and purposes of punishment by the state. While at the time the SRA was enacted this was a defensible approach since the Guidelines were mandatory and judges had very little discretion to sentence outside the Guidelines,[273] since the Guidelines have been rendered advisory by the Supreme Court's *Booker* decision,[274] the unprincipled nature of sentencing practice has been thrown into sharp relief. The lack of direction is a "cafeteria system" of sentencing,[275] a "prescription for sentencing anarchy,"[276] and "licence to judges to pursue their own penal philosophies."[277] Yet, even if the SRA had specified a primary rationale or specific purpose of punishment, as shown above, the use of any form of acquitted conduct under the relevant conduct provisions of the Guidelines cannot be justified by either retributive or utilitarian theories of punishment without undermining the very purposes and justifications of punishment by the state.

III. PRACTICAL AND CONSTITUTIONAL CONSEQUENCES OF ACQUITTED CONDUCT SENTENCING

The practical consequence of using acquitted conduct under the relevant conduct provisions of the Guidelines are *significantly* longer prison sentences with a *disproportionate* impact on the prison terms of minorities. The increased prison terms have ranged from a number of

273. Berman, *supra* note 69, at 11–12.

274. Since *Booker*, the Supreme Court in a series of cases has re-affirmed that the Guidelines are now "truly advisory" and that the touchstone of sentencing are the "factors to be considered in imposing a sentence" listed in § 3553(a). For discussion of post-*Booker* developments see Gertner, *supra* note 61, at 704–07 (providing an in-depth discussion of post-*Booker* case law); Bilsborrow, *supra* note 3, at 314–15 (citing statistics which reveal that post-*Booker*, approximately 85.9% of offenders receive sentences adhering to the Guideline range compared with 90.6% prior to *Booker*) (citations omitted); Peter Erlinder, *"Doing Time" . . . After the Jury Acquits: Resolving the Post-*Booker *"Acquitted Conduct" Sentencing Dilemma*, 18 S. CAL. REV. L. & SOC. JUST. 79 (2008); David C. Hollman, *Death By A Thousand Cases: After* Booker*,* Rita *and* Gall*, The Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267 (2008); Anne E. Zygadlo, *Circuit Circus: What Is the Correct Standard of Review Applicable to Supervised Release Appeals After* United States v. Booker?, 46 VAL. U. L. REV. 311 (2011); D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After* Booker, 49 DUQ. L. REV. 641 (2011); Nicholas A. Deuschle, *Fun With Numbers: Gall's Mixed Message Regarding Variance Calculations*, 80 U. CHI. L. REV. 1309 (2013).

275. ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 331 (2d ed. 1995).

276. Andrew Ashworth, *Criminal Justice and Deserved Sentences*, CRIM. L. REV. 340, 350 (1989).

277. ASHWORTH, *supra* note 275, at 63.

months to life imprisonment based solely on acquitted conduct. When the practical considerations are considered along with the constitutional and normative concerns, it becomes clear that acquitted conduct sentencing and the relevant conduct provisions of the guidelines "undermines the importance of the substantive criminal law, nullifies the law of evidence, and is irreconcilable with the notion that punishment can be imposed only in respect of offenses admitted or proven."[278] Nevertheless, acquitted conduct sentencing remains entirely permissible and is, in fact, required in the first step of sentencing under the now advisory sentencing guidelines.[279] Judges must still initially calculate the applicable sentencing guideline range for defendants, taking into account any uncharged, acquitted, and/or unrelated conduct, which may affect a particular defendant's sentencing range, before deciding to depart from the applicable sentencing guideline range or impose a non-guideline sentence.[280] But, how could this practice have survived the *Blakely-Apprendi* line of cases? The Supreme Court's *Blakely* opinion made it clear that the Sixth Amendment right to jury-found facts was not *necessarily* limited to the imposition of sentences above the statutory maximum.[281] Writing for the majority in *Blakely*, Justice Scalia made it clear that both *Apprendi* and *Blakely* were based upon much more fundamental considerations than properly allocating factual decision-making in sentencing and were constitutionally grounded in the abstract question of:[282]

> the need to give intelligible content to the right of a jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the

278. Tonry, *supra* note 45, at 1564.

279. *See* GEN. COUNSEL, U.S. SENTENCING COMM'N, *DEPARTURE AND VARIANCE PRIMER* 1–2 (June 2013), *available at* http://www.ussc.gov/Legal/Primers/Primer_Departure_and_Variance.pdf (noting that after *Gall v. United States*, 552 U.S. 38 (2007), the sentencing court must follow a three-step process by "properly determin[ing] the guideline range . . . Determin[ing] whether to apply any of the guidelines' departure policy statements to adjust the guideline range . . . [Finally,] consider[ing] all the factors set forth in 18 U.S.C. [§] 3553(a) as a whole, including whether a variance—a sentence outside the advisory guideline system—is warranted.") (citations omitted).

280. *See, e.g.*, Gall v. United States, 552 U.S. 38, 49 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable guideline range . . . [T]o secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark"). *See also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)–(c) (2012) (listing appropriate application instructions).

281. Erlinder, *supra* note 274, at 93.

282. *Id.*

> judiciary . . . . *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framer's intended.[283]

However, the *Booker* majority's remedial opinion, in throwing out mandatory guideline sentencing in favor of the "uniformity" achieved by "real conduct" sentencing on the basis of PSRs prepared by probation officers, paradoxically resulted in the Court "remedying" the judicial fact-finding at issue in *Apprendi* and *Blakely* with judicial fact-finding.[284]

On one hand, the five justices in the majority in *Blakely*[285] and in the constitutional majority in *Booker*[286] were deeply disturbed by the guidelines requiring an equivalent of a conviction for "uncharged, dismissed and acquitted crimes without the fundamental components the adversary system the Framers intended, *i.e.*, notice, jury trial, and proof beyond a reasonable doubt."[287] These justices held that "real conduct" sentencing and the related relevant conduct provisions of the guidelines are an "assault" on the Sixth Amendment's "fundamental reservation of power" in the people within "our constitutional structure."[288] They noted that "[t]he jury could not function as circuit breaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the

283. *Id.* (quoting Blakely v. Washington, 542 U.S. 296, 305–06 (2004)).

284. Baron-Evans, *supra* note 132, at 20 (citing Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665 (2006)); David J. D'Addio, *Sentencing After* Booker*: The Impact of Appellate Review on Defendants' Rights*, 24 YALE L. & POL'Y REV. 173 (2006); Frank O. Bowman, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL F. 149, 182; M.K.B. Darmer, *The Federal Sentencing Guidelines After* Blakely *and* Booker*: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 564 (2005); United States v. Kandirakis, 441 F. Supp. 2d 282, 288–301 (D. Mass. 2006). *See* Bilsborrow, *supra* note 3.

285. Baron-Evans, *supra* note 132, at 21.

286. *Id.* at 21–22 (noting the distinction between the constitutional majority and the remedial majority). In *Booker*, Justice Stevens wrote the majority opinion answering the question of whether the application of the Guidelines violated the Sixth Amendment under the *Apprendi* line of cases, while Justice Breyer wrote the majority opinion answering the question of how to remedy the Sixth Amendment violation identified by the Court. *Id.*

287. *Id.* at 21 (citing *Blakely*, 542 U.S. at 306–07) (noting that not even *Apprendi*'s critics can support the "absurd result" of a man being sentenced "for committing murder, even if the jury convicted him only of possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene" and noting that Blakely was sentenced based on the "very charge" that was dismissed pursuant to his guilty plea). *See also* United States v. Booker, 543 U.S. 220, 273 (2005) (noting that Booker was sentenced based on uncharged crimes).

288. *Id.* (citing *Blakely*, 542 U.S. at 305–08, 313).

crime the State *actually* seeks to punish."[289] Perhaps, more importantly, these justices noted that had the Sixth Amendment issue been raised in *Witte* and *Watts*, they would have decided those cases differently.[290] In short, these justices were aware that the "facts" of uncharged, dismissed, and acquitted offenses are determined unfairly and unreliably—without notice by indictment or plea, and based on "hearsay-riddled presentence reports" prepared by probation officers who the judge thinks "more likely got it right than got it wrong."[291]

On the other hand, Justice Breyer described as "stunningly uninformed by actual practice"[292] by Amy Baron-Evans,[293] portrayed "real conduct" sentencing as merely the "way in which" the offense was committed based on "factual information . . . uncovered after trial" contained in the "presentence report," which is determined "fairly" by probation officers.[294] Despite Justice Breyer's fanciful view of sentencing in practice, Justice Ginsburg inexplicably signed on to this description in the *Booker* remedy opinion.[295] However, Justice Breyer's utopian description of the real conduct sentencing provisions is no more than "wishful policy theories that can easily be discredited."[296]

Part III.A briefly highlights the racial disparities in sentencing under the Guidelines' real conduct and related relevant conduct provisions and provides examples of cases where defendants have been sentenced to substantially longer prison sentences. Part III.B explores how the use of acquitted conduct sentencing undermines the justifications for punishment and weakens the rule of law. Part III.C discusses how the use of acquitted conduct and the relevant conduct provisions of the Guidelines can cause disproportionate severity and unwarranted uniformity in sentencing and undermine the substantive criminal law. Part III.D focuses on the impact of acquitted conduct at sentencing on the burden of proof and law of evidence. Part III.E

289. *Blakely*, 542 U.S. at 306–07.

290. Baron-Evans, *supra* note 132, at 21. *See Booker*, 543 U.S. at 240.

291. *Booker*, 543 U.S. at 304. *See also* Ngov, *supra* note 1, at 239 ("Hearsay, double hearsay, and even triple hearsay is permissible as long as there is an 'indicia of reliability.'") (citations omitted).

292. Baron-Evans, *supra* note 132, at 22.

293. Amy Baron-Evans serves as a Sentencing Resource Counsel for the Federal Public and Community Defenders.

294. Baron-Evans, *supra* note 132, at 22; *Booker*, 543 U.S. at 250–57, 326–29.

295. Baron-Evans, *supra* note 132, at 22 (noting that in her dissent in Washington v. Recuenco, 548 U.S. 212, 224 (2006) (Ginsburg, J., dissenting), Justice Ginsburg noted that her position on "real conduct" sentencing under a *de facto* mandatory guideline system had not changed.)

296. *Id.*

highlights how acquitted conduct sentencing undermines the role of the jury. Finally, Part III.F comments on the Supreme Court's recent decision in *Alleyne v. United States*.[297]

A. Acquitted Conduct Sentencing Contributes to Longer Prison Sentences and With a Disproportionate Impact on Racial and Ethnic Minorities

The relevant conduct provisions of the sentencing guidelines, which permit the use of acquitted conduct, results in unwarranted sentencing disparity. In practice, the use of acquitted conduct at sentencing under the broad relevant conduct provisions of the Guidelines is not consistently applied because of "ambiguity in the language of the rule, discomfort with the role of law enforcement in establishing relevant conduct, and discomfort with the severity of sentences that often result."[298] Research by the Federal Judicial Center showed that probation officers applying the relevant conduct rules sentenced three defendants in widely divergent ranges, "ranging from 57 to 136 months for one defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant."[299]

Further, in federal prison, people of color and ethnic minorities make up more than seventy-five percent of the prison population, although they constitute only twenty-five percent of the U.S. population.[300] Put another way, the federal rate of incarceration is 412 per 100,000 residents for whites, 742 per 100,000 residents for Hispanics, and 2,290 per 100,000 residents for African-Americans according to statistics from the Bureau of Justice in 2006 and 2008 U.S. Census.[301] How about the length of their sentences?[302] As noted by U.S. District Judge Lynn Adelman and his law clerk Jon Dietrich, the average sentence for an African-American offender is about twenty-five percent longer than for a white offender.[303] Simply stated, more black and ethnic minority defendants have acquitted conduct used

297. Alleyne v. United States, 133 S.Ct. 2151 (2013).

298. Baron-Evans, *supra* note 132, at 24 (citing U.S. SENTENCING COMM'N, *supra* note 91, at 87).

299. *Id.* at 25.

300. Carol A. Brook, *Racial Disparity Under the Federal Sentencing Guidelines*, 35 LITIG. 15, 15 (2008) (citing statistics from Bureau of Justice). *See also* RICHARD S. FRASE, JUST SENTENCING: PRINCIPLE AND PROCEDURES FOR A WORKABLE SYSTEM xiv (2013) (noting that punitive shifts and racial disparity will be recurring problems).

301. Brook, *supra* note 300, at 15.

302. *Id.*

303. *Id.* (citing Lynn Adelman & Jon Deitrich, Rita*, District Court Discretion, and Fairness in Federal Sentencing*, 85 DENV. U. L. REV. 51, 57 (2007)).

against them under the broad relevant conduct provisions of the Guidelines than white defendants; as a result, acquitted conduct may be used as an unintended proxy for racial disparagement. While sentencing scholars disagree on the reasons for this disparity,[304] they do agree on the impact of acquitted conduct sentencing under the relevant conduct provisions of the Guidelines: longer prison terms for offenders. By requiring longer prison terms, acquitted conduct sentencing also heightens inherent racial disparities under the federal Guidelines.

For example, in 2007 Antwuan Ball, a 37-year-old African-American resident of the District of Columbia was charged with multiple drug offenses, racketeering, murder, conspiracy and dozens of other charges.[305] The jury acquitted him on all charges except a single $600 drug transaction.[306] This sole count of conviction corresponded to an advisory Guideline range of approximately three years imprisonment with a statutory maximum of forty years;[307] however, he was sentenced to 18 years imprisonment based on the acquitted conduct.[308]

Similarly, in 2009 Gary Williams, an African-American resident of the State of Maryland, was convicted on federal charges of cocaine distribution and one count of distributing fifty grams or more of cocaine base.[309] However, at sentencing the judge found Williams responsible for the first-degree murder of an intended prosecution witness.[310] Williams was neither charged with a murder nor was he ever convicted of murder.[311] Nevertheless, Williams was sentenced to life imprisonment on the drug conviction based on the relevant conduct provisions of the Guidelines, which required cross-referencing the base offense level for first-degree murder, which called for a life sentence.[312] The sentence was affirmed on appeal because the statutory maximum for the drug charges was life-imprisonment.[313]

304. *Id.*

305. McElhatton, *supra* note 27 (detailing facts of case).

306. *Id.*

307. *Id.*

308. Jim McElhatton, *D.C. Man Gets 18 Years for $600 Drug Deal*, WASH. TIMES (Mar. 17, 2011), http://www.washingtontimes.com/news/2011/mar/17/dc-man-get-18-years-in-600-drug-deal/?page=all. The D.C. Circuit Court of Appeals affirmed the lower court's ruling. United States v. Johnson, No. 08-3033, 2014 WL 982870, at *5–6 (D.C. Cir. 2014).

309. Leonard & Dieter, *supra* note 109, at 292 (citing United States v. Williams, 343 Fed. App'x 912–13 (4th Cir. 2009)).

310. *Id.* (citing *Williams,* 343 Fed. App'x at 913).

311. *Id.*

312. *Id.* at 292–93.

313. *Id.* at 293.

B. Acquitted Conduct Sentencing Undermines the Justifications for Punishment by the State

Given the historical and philosophical commitment to liberty of the Anglo-American system of criminal law, the imposition of criminal sanctions is justified only on individuals whose acts violate the criminal law and who have admitted their unlawful acts or have been convicted at trial on the basis of proof beyond a reasonable doubt.[314] The criminal conviction standard of "proof beyond a reasonable doubt" as required by the Fifth Amendment Due Process Clause serves as a foundational principle of American criminal justice—to protect against factual error whenever a potential loss of liberty is at stake, regardless of the identity of the fact-finder or whether the finding results in "conviction" of a "crime" or is merely treated as a sentencing factor. As explained by Justice Brennan:[315]

> There is always, in litigation, a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . convincing the fact-finder of his guilt.[316]

Therefore, the jury determines "legal guilt . . . by the highest standard of proof we know, beyond a reasonable doubt. And when a jury acquit[s] a defendant based on that standard, one . . . [expects] no additional criminal punishment would follow."[317] Since under both a retributive or utilitarian model of punishment the offender is only to be punished after formal conviction, punishment of defendants on the basis of acquitted conduct, no matter how convincing the evidence put forth by the state (especially for conduct for which the jury returned a verdict of "not guilty"), challenges the "historic link between verdict and judgment"[318] that justifies the imposition of punishment by the state in the first place.[319]

The relevant conduct provisions in the sentencing guidelines essentially facilitate conviction for bad character, which is not permitted under either a retributive or utilitarian model of

314. Tonry, *supra* note 45, at 1564.

315. In re Winship, 397 U.S. 358, 358–68 (1970).

316. *Id.* at 364 (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)).

317. Nancy Gertner, *Circumventing Juries, Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 433 (1999).

318. Apprendi v. New Jersey, 530 U.S. 466, 482–83 (2000) (citation omitted).

319. *See id.*

punishment.[320] More crucially, acquitted conduct sentencing encourages convictions that may often be "based on facts that often are not real at all."[321] As observed by the Commission, "'research [has] suggested significant disparities in how [the relevant conduct] rules were applied', and 'questions remain about how consistently it can be applied'. . . [since] . . . 'disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators.'"[322] Moreover, "[m]ost probation officers incorporate the prosecutor's written version of events verbatim into the PSR."[323] More troubling, perhaps, is the fact that the mere inclusion of factual allegations in a PSR in several circuits transforms them *ipse dixit* into "evidence," which "relieves the government of introducing actual evidence and shifts the burden to the defendant to disprove it."[324]

Simply stated, this process results in "punishment for acts not constitutionally proven."[325] Rather, the system "relies on 'findings' that rest on 'a mishmash of data[,] including blatantly self-serving hearsay largely served up by the Department [of Justice].'"[326] Thus, the *Booker* remedy "continues to provide safe harbor for the imaginative fantasies of what really occurred under the rubric of real [relevant] conduct."[327]

C. Subversion of the Substantive Criminal Law

The stakes at sentencing are high—deprivation of liberty and property—and the courts and legislatures generally attempt to specify the elements of offenses and defenses with tedious detail.[328] Why? Conviction and the resulting public labeling, denunciation, and possible

320. Frase, *supra* note 227, at 122.

321. Baron-Evans, *supra* note 132, at 23.

322. *Id.* (citing U.S. SENTENCING COMM'N, *supra* note 91, at 50). *See also* David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 222 (2004) ("The resulting slew of petty, small time dealers being charged in federal court particularly outraged some judges who felt federal court should be reserved for weighty matters of national concern.").

323. *Id*. (citing U.S. SENTENCING COMM'N, *supra* note 91, at 84, 86); Letter from Jon M. Sands, Federal Public Defender, to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Commission 21 (July 19, 2006), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/defender_letter_to_ussc_71906.pdf.

324. Baron-Evans, *supra* note 132, at 23–24, 24 n. 106 (citing to relevant cases).

325. *Id* at 24.

326. *Id.*

327. *Id.* (quoting Dan Markel, *The Indispensable Berman on* Booker, PRAWFSBLAWG (June 26, 2006), http://prawfsblawg.blogs.com/prawfsblawg/2006/06/the_indispensab.html).

328. Tonry, *supra* note 45, at 1565.

deprivation of liberty are too important to tolerate ambiguities.[329] The substantial burden of proof in criminal cases is a testament to the importance of the interests and values implicated by the substantive criminal law.[330] However, acquitted conduct sentencing under the relevant conduct provisions of the Guidelines is predicated on a primary characterization of the criminal offense[331]—an example of the "tail wagging the dog."[332] As observed by one commentator,

> Nelson Guerrero served four years in prison for crimes of which he was never convicted. Robert Mercado was sentenced to seventeen years in prison for committing several violent crimes, even though a jury had acquitted him of those crimes
>
> . . .
>
> One might think that [these] individuals . . . live in a totalitarian regime without the protection of basic individual rights. But they live (or have lived) in the United States, and their sentences were handed down by American trial courts and subsequently affirmed by appellate courts
>
> . . .
>
> American courts routinely increase sentences for reasons that seem to conflict with constitutional protections . . . .[333]

To sum it up, the offense admitted by the defendant, or which was proven to a judge or jury's satisfaction beyond a reasonable doubt, is not a limiting factor in sentencing, but simply a starting point for determining the base offense level in calculating the applicable Guideline range.[334] As a consequence, the offense proven beyond a reasonable doubt is a nullity; the modified real offense approach, which incorporates relevant conduct and mandates consideration of acquitted conduct, determines the end sentence.[335] As observed by Judge Oakes, "[t]his is jurisprudence reminiscent of *Alice in Wonderland*. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"[336]

D. Subversion of the Burden of Proof and Law of Evidence

As noted above in Part I.E, the Supreme Court in *United States v.*

329. *Id.*
330. *Id.*
331. *Id.*
332. Semones, *supra* note 11; Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992)
333. Hessick & Hessick, *supra* note 148, at 48 (citations omitted).
334. Tonry, *supra* note 45, at 1564 n.48.
335. *Id.*
336. United States v. Frias, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring).

Watts ruled that application of the preponderance standard to such evidence is appropriate when considering evidence at sentencing.[337] However, there are no constraints on the types of evidence that may be considered, provided that it can be proven by a mere preponderance of the evidence. The language in § 3661 provides that "[n]o limitation shall be placed" on the evidence that a judge may consider at sentencing and the real offense sentencing.[338] It follows that such evidence may include inadmissible hearsay;[339] acquitted conduct;[340] and even evidence obtained by unconstitutional means, including coercion or torture.[341] Exacerbating the situation, real offense sentencing has shifted sentencing power from the judiciary to prosecutors.[342] The relevant conduct rules and cross-references were based on concerns that a pure charge system would transfer power to prosecutors and thereby increase disparities; however, since prosecutors control "facts" disclosed to probation officers in preparing the PSR, the rules "are not working as intended," and "tend to work in one direction, *i.e.*, to the disadvantage of defendants."[343]

For instance, where acquitted conduct is involved, "[prosecutors can] affect an end-run around the exclusionary rule by presenting evidence at sentencing that would be inadmissible at trial."[344] Conversely, where charges were not brought or dropped, the same charges "can be 'proved' in a presentence report."[345] When there are disputes regarding the "factual" statements in the PSR, the Government need not produce the purported source of the information in court.[346] More troubling, perhaps, if the defendant contests the allegations, he or she may lose an acceptance of responsibility reduction[347] and even receive an enhancement for obstruction of justice.[348]

337. United States v. Watts, 519 U.S. 148, 151, 157 (1997).

338. Doerr, *supra* note 264, at 249 (quoting 18 U.S.C. § 3661 (2006)).

339. *Id.* at 250 (citations omitted); Ngov, *supra* note 1, at 239 (citations omitted).

340. Doerr, *supra* note 264, at 250 (citations omitted).

341. *Id.* ("[E]vidence obtained by a police officer by unconstitutional means, including evidence obtained via coercion or torture, can be considered at sentencing. The consequences is that a judge is unfettered in her consideration of the evidence at sentencing so long as the judge and the judge alone determines that such evidence was proved by a preponderance.") (citations omitted).

342. *See id.*

343. Baron-Evans, *supra* note 132, at 25 (citations omitted).

344. Doerr, *supra* note 264, at 250.

345. Baron-Evans, *supra* note 132, at 25.

346. *Id.*

347. The Guidelines instruct the sentencing court to decrease a defendant's offense level by two levels if he "clearly demonstrates acceptance of responsibility for his offense." U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2012).

348. The Guidelines instruct the sentencing court to increase a defendant's offense level

In short, the relevant conduct provisions permits "prosecutors to obtain, or threaten to obtain, the equivalent of a conviction on charges that cannot be proved with competent evidence but are impossible to challenge."[349] This is tantamount to lowering the overall burden of proof at trial.[350] This creates a "winner take all"[351] system: the conviction on one-count of a multi-count indictment is sufficient to trigger a Guideline range that is identical in terms of the penal consequences to a defendant as if he was convicted on the basis of allegations not proved, or even alleged in the trial phase.[352] With such awesome power in the hand of the prosecutors, "[t]he inducement to plead guilty may be irresistible even to a defendant with a strong defense or who is actually innocent."[353]

E. The Use of Acquitted Conduct at Sentencing Undermines the Role of the Jury

Acquitted conduct sentencing under the relevant conduct provisions of the Guidelines undermines the hallmark of the American judicial process: the right to trial by jury.[354] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[355] However, the consideration of acquitted conduct at sentencing under the relevant conduct provisions of the Guidelines renders this right wholly illusory for three reasons. First, while the jury is charged exclusively with

by two levels if he "wilfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction" U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2012). For further discussion *see* Baron-Evans, *supra* note 132, at 25 (citing Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425 (2004)).

349. Baron-Evans, *supra* note 132, at 25.

350. *See id.*

351. *See id.*

352. *See id.*

353. *Id.* at 26 (citing *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1463, 1492–93 (2001); David Yallen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 449 (1993); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 274 (1989)).

354. *See* sources cited *supra* note 11.

355. U.S. CONST. amend. VI. *See* also Doerr, *supra* note 264 at 252 ("To the layperson, the Sixth Amendment means that if there is the potential that one may be subjected to penalty for a criminal offense, any verdict must be rendered by a jury, unless otherwise waived.").

deciding questions of fact, its fact-finding role is eviscerated by the Guidelines' requirement that a district court must enhance a defendant's sentence based on acquitted conduct.[356] For example, consider the following colloquy between defense counsel and a sentencing judge:

> The Court: The jury could not have made—the jury could not have listened to the instructions . . . .
>
> . . .
>
> [The Court:] The testimony was so strong. The Gun was even in the apartment. That's all they needed. There was no dispute of that fact. . .
>
> Mr. Barroso: They perhaps didn't believe it was being used in association with drug-[Counsel]related activity, your Honor.
>
> The Court: Well, I'll tell you something: I have been disappointed in jury verdicts before this firearm was used . . . .
>
> . . .
>
> [The Court:] They [the jury] had to absolutely disregard the testimony of a government agent for no reason—no reason.
>
> Mr. Barroso: Perhaps they considered the testimony of the other agent who testified that he [Counsel] couldn't be sure, your Honor.
>
> The Court: Well, you can take it up with an appellate court, because I've made my findings on the record.[357]

Fundamentally, such action allows the judge to usurp the role of the jury.[358] As Judge Gertner has noted, "[t]o tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense—as a matter of law or logic."[359]

Second, disregarding the "not guilty" verdict of the jury is "quintessential unauthorized punishment."[360] Every state constitution written between 1776 and 1787 unanimously guaranteed only one right: the right of trial by jury in criminal cases.[361] Contravening a

356. *See* Semones, *supra* note 11, at 315.

357. United States v. Juarez-Ortega, 866 F.2d 747, 748–49 (5th Cir. 1989) (per curiam) (upholding lower court's sentence enhancement for conduct of which the defendant was acquitted). *See also* Gertner, *supra* note 317, at 434 ("At sentencing, the Court pronounced identical prison terms for both defendants: seventy-six months. While the Guideline range for DeLuna was 76 months, because he *had* been convicted of the weapons charge, it was less for Juarez-Ortega, who had been acquitted on that charge." (citing *Juarez-Ortega*, 866 F.2d at 748)).

358. Semones, *supra* note 11, at 315.

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

360. Bilsborrow, *supra* note 3, at 321–23.

361. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183

jury's verdict of guilt or innocence undermines the jury from fulfilling its key role: "protect[ing] ordinary individuals against governmental overreach[]."[362]

Third, to the layperson, the right to trial by jury is one of the very few complicated legal issues with which the general public is familiar, and faith in the jury system is of vital importance to the legitimacy of the entire Anglo-American legal system.[363] The jury, as an institution, also provides an opportunity for lay citizens to become both pupils of and participants in the legal and political system.[364] Tocqueville commented that the jury "may be regarded as a gratuitous public school, ever open, in which every juror learns his rights."[365] For example, consider the following letter from a juror to a defendant's sentencing judge:

> We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice . . . . What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight.[366]

Thus, a sentence that repudiates the jury's verdict undermines the juror's role as both a pupil and participant in civic affairs and is the "type of deviation from the public's understanding of a defendant's right to a jury trial that could undermine public confidence in the criminal justice system."[367]

F. Alleyne and the Continuing Fiction of the Punishment-Enhancement Distinction

More recently, the Supreme Court was provided another opportunity to put an end to acquitted conduct sentencing in *Stroud v. United States*,[368] yet, it denied certiorari.[369] Nevertheless, it granted certiorari on a narrower issue involving judge-found facts, which

(1991).

362. *Id.*

363. Doerr, *supra* note 264, at 252. *See also* Theodore Dalrymple, *Trial by Human Beings: the Jury System and Its Discontents,* NAT'L REV., Apr. 25, 2005, at 30.

364. ALBERT W. DZUR, PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY 13 (2012).

365. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 128 (Richard D. Heffner ed., 1956). *See* Amar, *supra* note 361, at 1186; Johnson, *supra* note 8, at 185.

366. Doerr, *supra* note 264, at 252 (quoting Letter from Juror #6 in *United States v. Ball,* to Hon. Richard W. Roberts, D.C. Circuit Court of Appeals (May 16, 2008)). *See* McElhatton, *supra* note 27.

367. Doerr, *supra* note 264, at 252. *See* DZUR, *supra* note 364, at 68–69.

368. United States v. Stroud, 673 F.3d 854 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 1581 (2013).

369. *Id.*

increased the mandatory minimum, in *Alleyne v. United States*.[370] In *Alleyne*, the trial court imposed a seven-year sentence on a defendant for having "brandished" a firearm while "using or carrying [it] during and in relation to a crime of violence."[371] At trial, the jury had found only that the defendant used or carried the firearm, which carried a five-year mandatory minimum sentence.[372] However, the judge, relying on *Harris,* found that the defendant had "brandished" the firearm, and thereby increased the defendant's mandatory minimum sentence to seven years.[373] The Supreme Court held that the defendant's seven-year mandatory minimum sentence violated his Sixth Amendment right to trial by jury because the question of brandishing was never submitted to the jury.[374] The Court's opinion overruled *Harris* and explicitly held that there is no basis in principle or logic to distinguish facts that raise the statutory maximum, such as in *Apprendi*, from those that increase the statutory minimum.[375] In other words, the Court clarified that *Apprendi* requires a jury to find all facts that fix the penalty range of a crime: the mandatory minimum is just as important to the statutory range as is the statutory maximum.[376]

However, more importantly, the Court made clear that its holding was not designed to limit the discretion of the trial judge in imposing sentences within the range defined by the statutory maximum and mandatory minimum. In fact, the Court reaffirmed that its ruling does not mean that *any* fact that influences judicial discretion must be found by a jury.[377] Thus, the use of acquitted conduct under the relevant conduct provisions of the Guidelines remains entirely permissible, *provided, however,* that it does not increase the statutory maximum sentence *or* any applicable mandatory minimum sentence.[378]

So, what happens when a Court seeks to punish defendants upon the insistence of prosecutors under the now *advisory* Guideline regime when a jury finds the proof wanting? Just as before, the same old story plays out. While sentencing judges post-*Booker* and its progeny now have the discretion to disagree with the Guidelines, the starting point at sentencing is still to calculate the appropriate Guideline range under the

370. *See* Alleyne v. United States, 133 S. Ct. 2151, 2156–64 (2013).
371. *Id.* at 2156.
372. *Id.*
373. *Id.*
374. *Id.* at 2163–64.
375. *Id*. at 2163.
376. *See id.*
377. *Id.*
378. *See, e.g.*, Dillon v. United States, 560 U.S. 817 (2010).

"modified-real offense" approach to sentencing.[379] Many sentencing judges now serving in the federal judiciary were appointed in the post-Guideline era; all they have known is Guideline Sentencing.[380] Further, post-*Booker* era empirical research has shown that downward departures from the applicable Guideline range, in the absence of Government sponsored substantial assistance motions, still remains the exception, not the rule, in federal court.[381] Fundamentally, the *status quo* has not noticeably changed. This blind adherence to the Guidelines, what Judge Gertner terms as "anchoring,"[382] continues to derogate "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the laws to the facts."[383]

Why didn't the Court go further? As explained by Justice Breyer, the crucial fifth vote in *Alleyne*, the fiction . . . of the punishment enhancement distinction" provides the answer:[384]

> there is a traditional distinction between elements of a crime (facts constituting the crime typically for the jury to determine) and sentencing facts (facts affecting the sentence, often concerning, *e.g.*, the manner in which the offender committed the crime, and typically for the judge to determine).
>
> . . .
>
> The early historical references that this Court's opinions have set forth . . . refer to offense elements, not to sentencing facts. Thus, when Justice Story wrote that the Sixth Amendment's guarantee of trial by jury offered 'securit[y] against the prejudice of judges,' he was likely referring to elements of a crime; and the best answer to Justice Scalia's implicit question in *Apprendi*—what, exactly, does the 'right to trial by jury' guarantee?—is that it guarantees a jury's

379. Lynn S. Adelman et al., *Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges*, 75 FORDHAM. L. REV. 1, 15–20 (2006).

380. *See, e.g.*, *id.* at 4, 12.

381. *A Year After* Booker*: Most Sentences Still Within Guidelines*, THIRD BRANCH (Feb. 2006), http://www.uscourts.gov/news/TheThirdBranch/06-02-01/A_Year_After_Booker_Most_Sentences_Still_Within_Guidelines.aspx. For statistics after the Supreme Court's post *Gall v. United States*, 552 U.S. 38 (2007) and *Kimbrough v. United States*, 552 U.S. 85 (2007), *see* U.S. SENTENCING COMM'N, POST-*KIMBROUGH/GALL* DATA REPORT tbl. 1 (2008), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Kimbrough_Gall/USSC_Kimbrough_Gall_Report_Final_FY2008.pdf (noting a slight uptick from 12.2% to 13.8% in non-government sponsored downward departures in sentencing).

382. Adelman, *supra* note 379, at 17.

383. United States v. Gaudin, 515 U.S. 506, 513 (1995).

384. *See* Brief for Appellate at 18, United States v. Johnson (D.C. Cir. 2014) (No. 08-3033), 2014 WL 982870 at *18 (citing *Alleyne*, 133 S. Ct. at 2165–167 (Breyer, J., concurring)).

determination of facts that constitutes the elements of a crime.[385]

In contrast, in a dissenting opinion in *Oregon v. Ice*,[386] in which Chief Justice Roberts and Justices Souter and Thomas joined, Justice Scalia emphasized that the right to jury trial guarantee, "turns upon the penal consequences attached to the fact, and not its formal definition as an element of the crime."[387] However, while the *Ice* dissent stirred up hope for a unique grouping of Justices to grant a writ of certiorari and decide the acquitted conduct sentencing issue,[388] *Stroud* and *Alleyne* have proved that the time has not yet come.

CONCLUSION

This Article demonstrated that the practice of acquitted conduct sentencing under the relevant conduct provisions of the Guidelines cannot be justified by the two overarching theories of punishment: retributivism or utilitarianism. Further, punishment for acquitted or uncharged conduct cannot be justified on the basis of bad character alone without upending the legitimacy of the criminal process. There are increasing calls from numerous sentencing courts, appellate courts, and even Supreme Court justices echoing the academic commentary of the past two decades, urging the end of judicial consideration of acquitted conduct at sentencing within the relevant conduct provisions of the Sentencing Guidelines.[389]

Fundamentally, acquitted conduct sentencing undermines the justifications for punishment by the state. It impairs the substantive criminal law by weakening the foundational principle of the American criminal justice system. It results in substantially longer sentences than would otherwise be warranted and accentuates inherent racial disparities under the federal sentencing guidelines. Furthermore, it weakens the criminal burden of proof and law of evidence. In addition, it attacks and weakens the jury as an institution by devaluing its role, function and purpose. These observations not only lead to adverse empirical consequences for defendants, but they also reflect bad policy. Despite these complaints, the Supreme Court's *Stroud* and *Alleyne* decisions demonstrate that it is far from ready to meaningfully limit

385. *Id.* (citing *Alleyne*, 133 S. Ct. at 2165–67 (Breyer, J., concurring)).

386. Oregon v. Ice, 555 U.S. 160 (2009). For a detailed discussion *see* Doerr, *supra* note 264, at 247–49.

387. *Ice,* 555 U.S. at 173 (Scalia, J., dissenting) (citations omitted).

388. Doerr, *supra* note 264, at 249.

389. *See, e.g.*, U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl. 13 (June 2010), *available at* http://www.ussc.gov/Research_and_Statistics/Research_Projects/Surveys/20100608_Judge_Survey.pdf.

judicial fact-finding where it impacts the measure of penal consequences to a defendant, not just the "range" of penal sanctions, especially since it has underpinned more than three decades of its post-SRA sentencing case law.

However, more importantly, on a legislative and policy level, simply prohibiting the use of acquitted conduct under the relevant conduct provisions of the Guidelines without addressing the conflicting philosophies and rationales of punishment in the SRA would miss the wood for the trees. After almost three decades of sentencing under the SRA, sentencing policy in the federal system is fragmented: there is no overarching model, theory, or rationale.[390] Under both the previously mandatory and the current (advisory system) of Guideline sentencing, courts have struggled to reconcile the SRA with its mutually competing and conflicting goals with a defendant's constitutional rights. Thus, in the absence of an overriding theory or model of the purposes of punishment, with a primary rationale, the door would be left wide open for clever sentencing judges, anchored in decades of Guideline sentencing, to pick and choose from the § 3553(a) factors to return to the *status quo ante*.

Judges are not "sentencing experts,"[391] and relying on the individual whims of sentencing judges can serve to perpetuate and compound the problem and increase sentencing disparities. Sentencing judges need guidance to structure their discretion when imposing sentence on a defendant. The lack of clear direction on the purposes of punishment in the present system of plural aims, would not only continue the current "cafeteria" system[392] of sentencing—permitting judges "a freedom to determine [penal] policy, rather than freedom to respond to an unusual combination of facts"[393] and maintaining "sentencing anarchy,"[394]—but also give the system an unfortunate and illusory cloak of constitutionality. Instead, since the Constitutional concerns are directly related to the purposes of punishment, the constitutional and normative concerns should be simultaneously addressed through an overarching aim for sentencing or a primary

390. Tonry, *supra* note 157, at 1.

391. Judge Gertner has written extensively on this issue. *See* Gertner, *supra* note 61, at 696; Gertner, *supra* note 317, at 421–22. It is also important to note that most law schools in the United States do not even require a course in criminology or criminological theories as a part of the J.D. program. Rather it is a second year elective that most law students, in the rush to secure lucrative jobs, probably avoid.

392. GERALDINE MACKENZIE, HOW JUDGES SENTENCE 85 (2005) (citing ASHWORTH, *supra* note 275, at 63).

393. *Id.* (quoting ASHWORTH, *supra* note 275, at 63).

394. *Id.* (quoting Ashworth, *supra* note 276, at 350).

rationale or model that incorporates robust evidentiary and procedural protections for the defendant. For instance, such reforms could include a prescription that "just deserts should be an overarching aim" or that "deterrent sentences" must be given to housebreakers, white collar offenders, or drug offenders, limited by the principle of parsimony, and requiring any relevant conduct evidence to be presented to the jury in a sentencing phase, or using special verdict forms at trial and structuring sentencers' discretion and opportunity to circumvent the purposes of sentencing.[395]

395. MACKENZIE, *supra* note 392, at 85.