

11-1-1996

If At First You Don't Succeed-Abolishing the Use of Acquitted Conduct in Guidelines Sentencing

Barry L. Johnson

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Barry L. Johnson, *If At First You Don't Succeed-Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153 (1996).Available at: <http://scholarship.law.unc.edu/nclr/vol75/iss1/5>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

IF AT FIRST YOU DON'T SUCCEED— ABOLISHING THE USE OF ACQUITTED CONDUCT IN GUIDELINES SENTENCING

BARRY L. JOHNSON*

Many non-lawyers probably would be surprised to learn that judges in federal courts are permitted to enhance an offender's sentence on the basis of conduct for which a jury found the defendant not guilty at trial. In this Article, Professor Johnson recommends that the United States Sentencing Commission correct this anomaly. After providing background information regarding acquitted conduct and the Sentencing Guidelines, Professor Johnson examines the acquitted conduct jurisprudence and the roots of the accepted view that judges may constitutionally use acquitted conduct to increase a defendant's sentence. Professor Johnson concludes that even though using acquitted conduct to increase an offender's punishment is constitutionally permissible under existing case law, the practice is poor sentencing policy. He argues that the current regime both offends the spirit of the Double Jeopardy Clause and diminishes the jury's important role as fact-finder in the criminal justice system. He further demonstrates that the Sentencing Commission is the appropriate body to reform the status quo. With these policies in mind, Professor Johnson addresses the principal objections to his position and proposes specific amendments to the Sentencing Guidelines. In short, he proposes that the United States Sentencing Commission eliminate the use of acquitted conduct to increase an offender's sentence.

Prior to the adoption of the United States Sentencing Guidelines ("Guidelines"), federal judges generally were permitted to consider, in sentencing an offender, conduct underlying charges for which that offender had been acquitted.¹ In promulgating the Guidelines, the

* Assistant Professor of Law, Oklahoma City University School of Law. J.D. University of Michigan, 1988. I am grateful to Dennis Arrow, Norwood Beveridge, Richard Coulson, Art LeFrancios, Suzanne Mitchell, Ilene Nagel, Andy Spiropolous, Ellen Spiropolous and Adam Thurschwell for commenting on drafts of this Article, or otherwise providing intellectual and/or moral support.

1. See, e.g., *United States v. Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985); *United States*

United States Sentencing Commission ("Commission") elected not to change this practice.² Eleven federal courts of appeals have upheld Guidelines sentence enhancement based on acquitted conduct.³ Only the United States Court of Appeals for the Ninth Circuit refuses to permit district courts to enhance sentences on this basis.⁴

That an offender's sentence may be enhanced, sometimes dramatically, on the basis of conduct for which he was acquitted strikes many as counterintuitive and inappropriate.⁵ Not surprisingly, some commentators recently have questioned both the fairness and the legality of permitting sentences to be enhanced on the basis of acquitted conduct.⁶ However, discussion of the use of acquitted con-

v. Ray, 683 F.2d 1116, 1121-22 (7th Cir. 1982); *United States v. Morgan*, 595 F.2d 1134, 1136-37 (9th Cir. 1979); *United States v. Sweig*, 454 F.2d 181, 184 (2d Cir. 1972); *see also* *United States v. Campbell*, 684 F.2d 141, 152 (D.C. Cir. 1982) (expressing reservations about use of acquitted conduct, but affirming such use in instant case).

Similarly, many state appellate courts permit consideration of acquitted conduct in sentencing. *See, e.g.*, *Egelak v. State*, 438 P.2d 712, 717-18 (Alaska 1968); *Fair v. State*, 268 S.E.2d 316, 320 (Ga. 1980); *People v. Jackson*, 599 N.E.2d 926, 930-31 (Ill. 1992); *People v. Ewing*, 458 N.W.2d 880, 883-84 (Mich. 1990); *State v. Baldwin*, 629 P.2d 222, 224 (Mont. 1981); *State v. Lipsky*, 639 P.2d 174, 176 (Utah 1981).

2. The Commission did not directly address the use of acquitted conduct in its Guidelines. However, courts generally have inferred from more general Guidelines provisions that the Commission intended to preserve the availability of acquitted conduct as a basis for sentence enhancement, and the Commission has acquiesced in this interpretation. *See infra* notes 41-50 and accompanying text.

3. *See, e.g.*, *United States v. Boney*, 977 F.2d 624, 635-37 (D.C. Cir. 1992); *United States v. Coleman*, 947 F.2d 1424, 1428-29 (10th Cir. 1991); *United States v. Rivera-Lopez*, 928 F.2d 372, 372-73 (11th Cir. 1991) (per curiam); *United States v. Fonner*, 920 F.2d 1330, 1332-33 (7th Cir. 1990); *United States v. Duncan*, 918 F.2d 647, 652 (6th Cir. 1990); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 180-81 (2d Cir. 1990); *United States v. Dawn*, 897 F.2d 1444, 1449-50 (8th Cir. 1990); *United States v. Mocchiola*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States v. Isom*, 886 F.2d 736, 738-39 (4th Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747, 748-49 (5th Cir. 1989); *United States v. Ryan*, 866 F.2d 604, 608-09 (3d Cir. 1989).

4. *See United States v. Pinkney*, 15 F.3d 825, 828-29 (9th Cir. 1994); *United States v. Brady*, 928 F.2d 844, 851-52 & n.14 (9th Cir. 1991).

5. As one commentator noted, "Most lawyers, as well as ordinary citizens unfamiliar with the daily procedures of criminal law administration, are astonished to learn that a person in this society may be sentenced to prison on the basis of conduct of which a jury has acquitted him." Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1714 (1992).

6. *See, e.g.*, 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, 350-54 (1992) (urging revision of sentencing procedures and suggesting that use of acquitted conduct evidence may violate double jeopardy or due process provisions); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1218-37 (1993) (arguing that use of acquitted conduct violates Constitution's due process, grand jury and jury trial guarantees); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 550-52 (1993) (urging legislatures and sentencing commissions to reject real-offense sentencing, including use of acquitted conduct); Benjamin E. Rosenberg, *Criminal*

duct in sentencing has tended to become lost in the cacophony of other complaints about the Guidelines.⁷ Even those commentators discussing the use of acquitted conduct evidence have tended to do so in the context of a broader critique.⁸

This issue has, however, not completely escaped the Commission's attention. For example, during the 1992-93 amendment cycle,⁹ the Commission considered, and rejected, two amendments which would have restricted use of acquitted conduct under the Guidelines.¹⁰ The Commission rejected a similar amendment¹¹ the next year

Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing, 23 SETON HALL L. REV. 459, 460-61 (1993) (arguing that sentence aggravation based on unconvicted conduct is unconstitutional); David Yellen, *Illusion, Illogic and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 433-45 (1993) (criticizing, on policy grounds, Sentencing Commission's inclusion in the Guidelines of real-offense sentencing characteristics); William J. Kirchner, Note, *Punishment Despite Acquittal: An Unconstitutional Aspect of the Federal Sentencing Guidelines?*, 34 ARIZ. L. REV. 799, 815-23 (1992) (arguing that use of acquitted conduct constitutes double jeopardy); Elizabeth A. Parsons, Note, *Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines*, 29 VAL. U. L. REV. 417, 457-68 (1994) (recommending amendment to Guidelines to restrict use of unadjudicated conduct). But see Joshua M. Webber, Note, *United States v. Brady: Should Sentencing Courts Reconsider Disputed Acquitted Conduct for Enhancement Purposes Under the Federal Sentencing Guidelines*, 46 ARK. L. REV. 457, 468-73 (1993) (criticizing *Brady* and defending the use of acquitted conduct in Guidelines sentencing).

7. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 939-49 (1991) (arguing that Guidelines are too mechanistic); Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 772-77 (1992) (arguing that Guidelines are too harsh and transfer discretion to prosecutors); Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 590-604 (1992) (suggesting that Guidelines are too complex); Stanley Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 99-103 (1988) (same); Jose Cabranes, *The Federal Sentencing Guidelines: A Dismal Failure*, Remarks at the University of Chicago Law School 13 (Jan. 15, 1992) (transcript on file with author) (arguing that Guidelines are too mechanistic).

8. See, e.g., Herman, *supra* note 6, at 350-54 (providing general critique of fairness of sentencing procedures and suggesting that current case law has been insufficiently attentive to serious due process and double jeopardy concerns); Lear, *supra* note 6, at 1218-37 (arguing that use of unconvicted conduct violates Constitution's due process, grand jury and jury trial guarantees); Reitz, *supra* note 6, at 558-65 (giving policy-based critique of real-offense sentencing). Few commentators have focused specifically on the issue of acquitted conduct. But see Kirchner, *supra* note 6, at 814-24 (arguing that use of acquitted conduct constitutes double jeopardy).

9. 28 U.S.C. § 994(p) requires the Commission to promulgate and forward to Congress no later than May 1st each year any new guidelines or amendments to the Guidelines it intends to take effect that year. See 28 U.S.C. § 994(p) (1994) These promulgated guidelines become effective the following November 1, unless Congress modifies or disapproves them. See *id.* The Commission's annual consideration of proposed amendments is structured around this schedule, and is referred to within the Commission as the amendment cycle.

10. Proposed Amendment 1 would have revised section 1B1.3 of the Sentencing Guidelines, the relevant conduct provision, to specify that "[c]onduct of which the defendant has been acquitted after trial shall not be considered under this section." 57 Fed. Reg.

as well.¹²

The principal thesis of this Article is that the Commission should reassess its position on the use of acquitted conduct evidence and amend the Guidelines to eliminate the use of such evidence as a basis for sentence enhancement. Part I of this Article provides background on the nature of acquitted conduct and the mechanics of its use in Guidelines sentencing. Next, Part II explores the acquitted conduct jurisprudence, both before and after adoption of the Guidelines, addressing the origins of the prevailing view that the Constitution permits punishment arising from acquitted conduct. Part III then argues that sentence enhancement under the Guidelines on the basis of acquitted conduct is inappropriate sentencing policy. It explains that, regardless of its constitutional status, the current rule (1) is inconsistent with important policies underlying the prohibition against double jeopardy; and (2) denigrates the central fact-finding role of the jury in the criminal justice system. Part III also demonstrates that the Commission is the appropriate body to enact reforms to address the problems created by use of acquitted conduct at sentencing. Finally, Part IV offers specific recommendations for amendments to the Guidelines to eliminate use of acquitted conduct. Part IV also outlines the principal objections to barring consideration

62,832, 62,832 (proposed Dec. 31, 1992). This proposed amendment also added an application note to the commentary explaining that acquitted conduct could, however, "provide a basis for an upward departure" in "an exceptional case." *Id.*

Proposed Amendment 35, published at the request of the Practitioner's Advisory Group, also would have revised section 1B1.3 to limit the use of acquitted conduct. It contained two options for comment, the first of which read: "Conduct of which a defendant has been acquitted after a court or jury trial shall not be considered under this section." *Id.* at 62,848. Option two read: "Conduct of which a defendant has been acquitted after a court or jury trial shall not be considered under this section unless the Government proves by clear and convincing evidence that the defendant has committed the conduct for which he/she has been acquitted." *Id.*

These amendments were two of sixty-six amendments published for public comment in the 1992-93 amendment cycle. The Commission rejected Proposed Amendments 1 and 35 by a vote of three to two. See Notes of Apr. 6, 1993, Sentencing Commission Meeting (on file with author) [hereinafter 1993 Commission Meeting].

11. Proposed Amendment 18 would have amended section 1B1.3 by inserting the following additional subsection: "(c) Conduct of which the defendant has been acquitted after a court or jury trial shall not be considered under this section. However, such conduct, if proven by a preponderance of the evidence, may provide the basis for an upward departure." 58 Fed. Reg. 67,522, 67,541 (proposed Dec. 21, 1993).

12. See Notes of Apr. 14, 1994, Sentencing Commission Meeting (on file with author). This vote was closer than the one taken the previous year, with three Commissioners voting in favor of the amendment, one against and one abstaining. See *id.* This fell short of the four votes necessary for Commission action, so the amendment failed. See Naftali Bendavid, *Sentencing Commission at the Brink*, LEGAL TIMES, Aug. 1, 1994, at A1 (describing Commission's inability to enact amendments on the basis of three votes).

of acquitted conduct and offers responses to these objections.

I. ACQUITTED CONDUCT AND GUIDELINES SENTENCING

A. *Defining the Problem: The Nature of Acquitted Conduct and Its Use in Sentencing*

This Article addresses the use of acquitted conduct in Guidelines sentencing. In this Article, the term “acquitted conduct” refers to acts for which the offender was criminally charged and formally adjudicated not guilty, typically by the finder of fact after trial.¹³ Any reliance on such acts by the sentencing judge as a basis for enhancing an offender’s sentence constitutes “use” of acquitted conduct.¹⁴

Acquitted conduct encompasses both criminal conduct alleged to have occurred contemporaneously with the charges of conviction¹⁵ and alleged prior criminal conduct.¹⁶ Consideration of contemporaneous conduct would occur, of course, only in cases in which the defendant is adjudicated guilty of some charges and not guilty of others.¹⁷

Acquitted conduct is distinct from unadjudicated conduct. The latter refers to conduct potentially characterized as criminal for which the offender’s legal guilt has not been formally adjudicated,

13. The term also encompasses conduct underlying charges dismissed upon a motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, which may be granted where “the evidence is insufficient to sustain a conviction.” See FED. R. CRIM. P. 29(a). Of course, it would be a rare case in which a judge would dismiss a count under Rule 29(a), but proceed to find for sentencing purposes that the defendant engaged in the conduct underlying the dismissed count.

14. Use of acquitted conduct at sentencing raises troubling questions because it is tantamount to a redetermination by the sentencing judge, implicit or explicit, of material facts resolved to the defendant’s benefit at trial. See *infra* notes 247-49 and accompanying text. Certainly it is not always easy to determine the precise scope of the fact finder’s verdict, because judgments of acquittal are typically based on general verdicts. The issue is analogous to that faced in assessing the scope of a prior acquittal for double jeopardy purposes. In that situation, the Supreme Court has held that courts must determine the scope of the prior verdict by “examin[ing] the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter,” to determine “whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). However, in most cases in which the issue of acquitted conduct is likely to arise, judges should be able to determine with little difficulty whether the jury resolved the issue in the defendant’s favor. See *infra* notes 267-71 and accompanying text.

15. See *infra* notes 75-80 and accompanying text.

16. See *infra* notes 81-87 and accompanying text.

17. For example, the jury may find the defendant guilty of drug trafficking, but not guilty of use of a firearm in relation to a drug trafficking offense. See *infra* notes 52-56 and accompanying text.

either through trial or guilty plea.¹⁸ Although some commentators have criticized the Guidelines' reliance on both acquitted and unadjudicated conduct,¹⁹ this Article argues that the use of acquitted conduct in sentencing raises unique policy considerations which distinguish its use from that of unadjudicated conduct, and which require special rules governing its use in the federal sentencing scheme.²⁰

B. The Mechanics of Guidelines Sentencing and the Role of Acquitted Conduct

Consideration of acquitted conduct in Guidelines sentence calculation typically occurs in one of two ways: (1) as part of the offender's "relevant conduct" used to calculate the Guidelines sentencing range, or "GSR"; or (2) as a basis for departure, or imposition of a sentence outside the GSR.

1. How the Guidelines Work

The Guidelines employ a matrix, with the applicable sentencing range derived from an intersection of the defendant's total "offense level" and "criminal history category."²¹ The offense level, represented by the vertical axis of the Sentencing Table, is calculated by first determining the defendant's "base offense level," which is based on the offense of conviction. Adjustments to that base offense level are then made to account for aggravating and mitigating facts or circumstances associated with the offender's conduct.²² The resulting

18. Acquitted conduct and unadjudicated conduct are similar in that both involve consideration of alleged criminal activity for which the defendant has not been convicted. In that sense, they are two branches of a broader category referred to in this Article as unconvicted offense conduct.

19. See, e.g., Lear, *supra* note 6, at 1208-37 (arguing that reliance on unconvicted offenses is unconstitutional); Reitz, *supra* note 6, at 547-65 (urging adoption of conviction-offense model of sentencing, precluding use of unconvicted conduct); Rosenberg, *supra* note 6, at 498-507 (arguing that sentence aggravation based on unconvicted conduct is inconsistent with due process foundations of reasonable doubt standard).

20. See *infra* notes 222-36 and accompanying text.

21. See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A tbl. (1995); see also *infra* Appendix I (depicting the sentencing table).

22. For example, a defendant convicted of bank robbery under 18 U.S.C. § 2113(a) has a base offense level of twenty under the applicable robbery guideline, U.S. SENTENCING GUIDELINES MANUAL § 2B3.1. The robbery guideline contains a number of specific offense characteristics which affect the total offense level. For instance, it provides for a two point enhancement if the robbery involves a financial institution. See *id.* § 2B3.1(b)(1). If, in the course of the offense, a firearm was brandished, displayed or possessed, the offense level is increased by five points. See *id.* § 2B3.1(b)(2). If any victim suffered bodily injury, the offense level is increased by two to six points, depending upon the extent of the injury. See *id.*

total offense level, expressed as a number between one and forty-three,²³ represents a numerical assessment of the seriousness of the offender's offense-related conduct. The horizontal axis of the Sentencing Table represents the offender's criminal history category, which is based on the number and seriousness of the defendant's sentences for prior convictions.²⁴

The applicable GSR is determined by the intersection of the total offense level and criminal history category on the Sentencing Table matrix. This point on the Sentencing Table yields a range expressed in months of imprisonment.²⁵ The sentencing judge must impose a sentence from within that range, unless aggravating or mitigating circumstances are present which are not adequately taken into account by the Commission in formulating the Guidelines, and the presence of these factors warrants a sentence outside the Guidelines range.²⁶

2. Relevant Conduct and Modified Real-Offense Sentencing under the Guidelines

An offender's sentence under the Guidelines is based not merely upon the acts constituting the offense of conviction, but also on "relevant conduct," or unlawful acts or omissions, other than those constituting the offense of conviction, that occurred in relation to the

§ 2B3.1(b)(3)(A)-(E). If the loss to the bank is greater than \$10,000 but less than \$50,000, another point is added. *See id.* § 2B3.1(b)(6).

In addition to the specific offense characteristics contained in the Chapter Two Guidelines provisions governing particular offenses, Chapter Three of the Guidelines Manual contains a number of generally applicable adjustments, dealing with such issues as the defendant's role in the offense, obstruction of justice, and acceptance of responsibility. *See id.* §§ 3A1.1-E1.1. For example, section 3B1.2 provides for offense level reductions of two, three, or four levels if the defendant's role in the offense is minimal or minor. *See id.* § 3B1.2. Section 3B1.3 provides for a two level upward adjustment if the defendant abused a position of public or private trust, or used a special skill in committing or concealing the offense. *See id.* § 3B1.3.

If the hypothetical bank robbery defendant described above brandished a firearm, punched a teller in the face causing minor injury, and fled with \$40,000, and no Chapter Three adjustments applied, the total offense level would be 30.

23. *See id.* ch. 5, pt. A tbl.; *see also infra* Appendix I (depicting the sentencing table).

24. Thus, if the bank robber described in note 22 had one prior bank robbery conviction which had resulted in a prison sentence of two years, he would receive three criminal history points, *see id.* § 4A1.1(a), placing him in the criminal history category of II. *See id.* ch. 5, pt. A tbl.; *see also infra* Appendix I (depicting the sentencing table).

25. In the bank robbery example described above, the defendant's total offense level of 30 and criminal history category of II results in a Guidelines sentence of 108 to 135 months imprisonment. *See id.* ch. 5, pt. A tbl.; *see also infra* Appendix I (depicting the sentencing table).

26. *See* 18 U.S.C. § 3553(b) (1994).

offense of conviction.²⁷ Relevant conduct includes a vast array of activity related to the offense of conviction and deemed pertinent to the offender's culpability, such as use of a firearm in commission of the underlying offense,²⁸ infliction of extreme psychological injury,²⁹ selection of an especially vulnerable victim,³⁰ or commission of similar offenses, including unadjudicated offenses, as part of the "same course of conduct or common scheme or plan as the offense of conviction."³¹

In choosing to incorporate relevant conduct into the calculation of the Guidelines sentence, the Commission rejected a "charge offense" system, in which the sentence would be based exclusively on the offense for which the offender was charged and convicted.³² The

27. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (1995). The Guideline provides in relevant part:

§ 1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

- (a) *Chapters Two (Offense Conduct) and Three (Adjustments)*. Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
(B) in the case of a jointly undertaken criminal activity... all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
- (2) ...all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts and omissions specified in subdivisions (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
- (4) any other information specified in the applicable guideline.

Id.

28. See, e.g., *id.* § 2B3.1(b)(2) (increasing sentence for possession or use of a firearm or dangerous weapon in connection with a robbery); *id.* § 2D1.1(b)(1) (increasing sentence for possession of a dangerous weapon in connection with a drug trafficking offense); *id.* § 5K2.6 (Policy Statement) (authorizing upward departure for use or possession of a weapon or dangerous instrumentality). For an example, see *infra* notes 52-56 and accompanying text.

29. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.3 (Policy Statement).

30. See *id.* § 3A1.1 (adjusting upward two offense levels for vulnerable victim).

31. *Id.* § 1B1.3.

32. Under a pure charge offense system, every individual charged and convicted under a particular statute would receive the same sentence, without regard to the particular facts of the individual cases. Mandatory minimum sentencing provisions have some of the charac-

Commission determined that the purposes of sentencing are best served if the sentence reflects the full panoply of the offender's harmful behavior.³³ It also expressed concern that a charge offense system would make Guidelines sentencing outcomes too dependent upon prosecutorial charging and plea bargaining decisions.³⁴

At the same time, the Commission expressly rejected a pure "real offense" system in which the offense of conviction would be largely irrelevant to sentencing outcome, determining that such a system would create major problems of workability and fairness.³⁵ It opted instead for "a system that 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."³⁶ This hybrid, characterized by former U.S. Sentencing Commissioner Nagel as a "*modified* real offense" approach,³⁷ begins with consideration of the offense(s) of conviction, used as the starting point in selecting the appropriate offense guideline from Chapter Two of the *Guidelines Manual*, and the accompanying base offense level. This base offense level is then modified in light of real-offense aggravating and mitigating factors relating to the offense and the offender.³⁸ Real-offense factors also are introduced into Guidelines sentence calculation through cross-references within the Guidelines,³⁹

teristics of a pure charge offense system because they require a certain minimum sentence for offenders convicted of violating certain statutes, regardless of the presence of potentially mitigating factors.

33. See, e.g., William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C.L. REV. 495, 504 (1990) (arguing that "the sentence imposed should also reflect conduct both preparatory and subsequent to the offense in order to be consistent with the purposes of sentencing"); see also Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 925 n.228 (1990) (explaining that real-offense approach permits a "judge to differentiate between seemingly alike offenders whose offense behavior is actually quite different").

34. See, e.g., Nagel, *supra* note 33, at 925-26 n.228 (noting that the modified real-offense system was adopted by the Commission because a pure charge offense system "inherently transfers sentencing discretion from judges to prosecutors"); see also U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS, ch. 1, pt. A (4)(A), at 1.6 (Apr. 13, 1987) [hereinafter U.S. SENTENCING COMM'N] (stating that a charge offense system has the "potential to turn over to the prosecutor the power to determine the sentence by increasing or decreasing the number (or content) of the counts in an indictment").

35. See U.S. SENTENCING COMM'N, *supra* note 34, ch. 1, pt. A (4)(A), at 1.5 (stating that Commission rejected 1986 draft based on pure real-offense sentencing scheme due to lack of practical means of implementation and inability to reconcile with need for fair adjudicatory procedure).

36. See Wilkins & Steer, *supra* note 33, at 497.

37. See Nagel, *supra* note 33, at 925.

38. See *supra* notes 27-31 and accompanying text.

39. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1) (1995) (providing that

and through rules for calculation of the base offense level, which incorporate conduct that is "part of the same course of conduct, or common scheme or plan as the offense or of conviction."⁴⁰

3. "Acquitted Conduct" As "Relevant Conduct"

The Guidelines, including the relevant conduct provisions, contain no specific language authorizing use of acquitted conduct evidence in sentencing.⁴¹ However, courts have construed the language and commentary of sections 1B1.3 and 1B1.4 as sufficiently broad to authorize the use of such evidence.⁴²

Section 1B1.3 permits consideration of three specified categories of relevant conduct, all of which are couched in terms sufficiently broad to embrace acquitted conduct: (1) "*all* acts and omissions committed" during the offense of conviction, its preparation, or in post-offense efforts in avoiding detection; (2) for certain types of offenses,⁴³ "*all* acts and omissions" that were "part of the same course of conduct or common scheme or plan"; and (3) "*all* harm" resulting from the acts and omissions specified in the first two relevant conduct categories.⁴⁴ Commentary to section 1B1.3 also specifies that the Commission intended some form of unconvicted offense conduct to be considered as relevant conduct under the Guidelines.⁴⁵

cross-references in Chapter Two shall be determined on the basis of "all acts and omissions committed, aided, abetted . . . by the defendant . . . that occurred during the commission of the offense of conviction"). For example, in *United States v. Masters*, 978 F.2d 281 (7th Cir. 1992), the Seventh Circuit held that the Guidelines section 2E1.1(a)(2) required the court to consider the murder of the defendant's wife, for which he was acquitted, in calculating the defendant's sentence for his racketeering conviction. *See id.* at 284-85; *see also* *United States v. Concepcion*, 983 F.2d 369, 390-91 (2d Cir. 1992) (requiring sentencing judge to consider acquitted drug trafficking activity in calculating defendant's sentence for illegal possession of a firearm).

40. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2) (1995). For an example of the operation of relevant conduct in determination of base offense levels in drug trafficking cases, *see infra* notes 57-63 and accompanying text.

41. *See, e.g.*, *United States v. Boney*, 977 F.2d 624, 644 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part) ("The Guidelines do not specifically mention acts underlying counts on which the defendant has been acquitted."); *see also* *Kirchner*, *supra* note 6, at 808 n.101 ("Indeed, the Guidelines themselves do not specifically mention acquitted conduct as a basis for enhancement.").

42. *See infra* notes 43-49 and accompanying text.

43. Specifically, those for which the base offense level is determined largely by quantity, such as drug trafficking offenses under Chapter 2D (drug quantity), or fraud offenses under Chapter 2F (dollar loss amount). *See* U.S. SENTENCING GUIDELINES MANUAL § 3D1.2(d) (1995) (specifying provisions for which "the offense level is determined largely on the basis of the total amount of harm or loss").

44. *See id.* § 1B1.3 (emphasis added).

45. The comment states: "Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sen-

Section 1B1.4 contains similarly broad language regarding the information that may be considered in calculating the GSR.⁴⁶ As with section 1B1.3, commentary to this provision establishes that the Commission contemplated the use of unconvicted offense conduct by sentencing judges.⁴⁷

These two provisions establish clearly that sentencing courts may take into account a broad range of conduct for which no conviction was obtained. There is no limiting language suggesting that the Commission intended to treat acquitted conduct differently than any other form of unconvicted conduct. Consequently, courts have interpreted the Commission's broad language referring generally to unconvicted offense conduct, together with its failure to treat acquitted conduct separately, as establishing the Commission's intent to permit courts to consider acquitted conduct at sentencing.⁴⁸ Further support for this interpretation of the Guidelines is provided by pre-Guidelines practice, which embraced real-offense sentencing, including use of acquitted conduct.⁴⁹ In effect, the courts have concluded that if the Commission intended to alter past practice by limiting the use of acquitted conduct evidence, it could have done so explicitly.

Whatever the merits of this argument as an interpretation of the Commission's original intent, the Commission's rejection of proposed amendments reflecting a contrary approach suggests that the Commission has adopted, by implication, this interpretation of its

tencing range." *Id.* § 1B1.3 cmt.

46. The section provides that "the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant." *Id.* § 1B1.4.

47. The commentary to section 1B1.4 provides:

A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range.

Id. § 1B1.4 cmt.

48. See, e.g., *United States v. Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992) (stating that the Guidelines' relevant conduct language "is certainly broad enough to include acts underlying offenses of which the defendant has been acquitted"); *United States v. Fonner*, 920 F.2d 1330, 1332 (7th Cir. 1990) (stating that nothing in the Guidelines "prevents a judge from taking account of conduct in which the defendant engaged, whether or not an acquittal prevents the imposition of criminal penalties directly on that conduct").

49. See *Boney*, 977 F.2d at 645 (Randolph, J., dissenting in part and concurring in part) (stating that the "widespread practice" of using acquitted conduct in Guidelines sentencing "comports generally with the system prevailing prior to the Guidelines"); see also Reitz, *supra* note 6, at 525 (noting that real-offense sentencing in some form has existed in the United States since colonial times).

Guidelines.⁵⁰ In any event, it is beyond question that sentence enhancement through acquitted conduct is an entrenched feature of the Guidelines.

4. Common Uses of Acquitted Conduct under the Guidelines

Acquitted conduct may be considered either as relevant conduct used to determine an offender's GSR, or as a basis for a decision to depart from the GSR and impose a more severe sentence.⁵¹ There are numerous examples in the case law of these uses of acquitted conduct, the most typical of which are described below.

a. Acquitted Conduct and Calculation of the GSR

Probably the most common use of acquitted conduct in setting the GSR is imposition of the two-level enhancement for firearm possession under section 2D1.1 after acquittal on related firearms charges. For example, in *United States v. Pineda*,⁵² the police arrested the defendant after executing a search warrant and discovering in a closet in his apartment building sixty-one grams of heroin, a balance scale, cash, and a red duffel bag containing two weapons.⁵³ Pineda was tried and convicted of drug trafficking, but was acquitted on the separate charge of using and carrying a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c).⁵⁴ Despite the acquittal on the § 924(c) count, in calculating Pineda's offense level, the sentencing court imposed a two-level enhancement for possession of a weapon in connection with a drug trafficking offense.⁵⁵ The United States Court of Appeals for the First Circuit upheld this enhancement.⁵⁶

Acquitted conduct may influence the GSR in other ways as well. For example, courts sometimes include as relevant conduct drug charges from counts of acquittal when calculating the drug quantities

50. See *supra* notes 9-12 and accompanying text (discussing Commission's rejection of proposed amendments to restrict use of acquitted conduct in Guidelines sentencing).

51. See *infra* notes 52-87 and accompanying text.

52. 981 F.2d 569 (1st Cir. 1992).

53. See *id.* at 571.

54. See *id.*; see also 18 U.S.C. § 924(c)(1) (1994) ("Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime, . . . be sentenced to imprisonment for five years . . .").

55. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (1995) (providing for two-level enhancement to base offense level "[i]f a dangerous weapon (including a firearm) was possessed").

56. See *Pineda*, 981 F.2d at 572-74.

upon which Guidelines drug sentences are based.⁵⁷ *United States v. Boney*⁵⁸ is a prime example. In *Boney*, two co-defendants, Boney and Holloman, were each convicted of distribution of 0.199 grams of crack cocaine.⁵⁹ Boney was also convicted on a second count of possessing with intent to distribute an additional 12.72 grams of crack cocaine.⁶⁰ Holloman was acquitted on the latter charge.⁶¹ Nevertheless, the sentencing judge calculated Holloman's sentence not merely on the basis of the 0.199 grams of crack involved in his offense of conviction, but on the basis of the full 12.919 grams used to calculate co-defendant Boney's sentence.⁶² The Court of Appeals for the District of Columbia Circuit upheld this as a permissible application of the "same course of conduct or common scheme or plan" language in section 1B1.3.⁶³

b. Acquitted Conduct and Departure

Acquitted conduct also is permitted as a basis for a "departure"—that is, the imposition of a sentence outside the presumptively applicable Guidelines range.⁶⁴ The Sentencing Reform Act permits sentencing judges to depart from the Guidelines range if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."⁶⁵ Courts have analyzed the permissibility of acquittal-based departures in much the same way as they have analyzed acquittal-based relevant conduct,⁶⁶ holding that the Commission's use of broad, inclusive language, together with the absence of an exception for acquitted conduct, warrants the conclusion that acquitted conduct is a permissible basis for upward departure.⁶⁷

The general departure language of section 5K2.0 indicates that a

57. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a)(3), (c) tbl. (1995).

58. 977 F.2d 624 (D.C. Cir. 1992).

59. See *id.* at 627-28.

60. See *id.*

61. See *id.* A third defendant, Marks, was acquitted on all charges. See *id.*

62. See *id.* at 635. As a result, the court calculated Holloman's sentencing range as 63 to 78 months, rather than the 10 to 16 month range that would have applied had the court used only the 0.199 grams associated with the offense of conviction. See *id.*

63. *Id.* at 635-36; see U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (1995).

64. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0.

65. 18 U.S.C. § 3553(b) (1994).

66. See *supra* notes 52-63 and accompanying text.

67. See *infra* notes 68-74 and accompanying text.

wide array of factors may warrant departure.⁶⁸ The Commission also explained that, with a few specific exceptions, it did not intend to limit the kinds of factors that constitute grounds for departure.⁶⁹ The breadth of information that may serve as a basis for departure is further supported by the "no limitations" language of section 1B1.4⁷⁰ and commentary to section 1B1.3 which establishes that "[t]he range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined."⁷¹ Federal courts looking to these provisions have concluded that acquitted conduct may serve as a basis for departure.⁷² The use of acquitted conduct as a basis for departure may involve either offense-based departure arising from acquitted conduct contemporaneous with the charged offense,⁷³ or from criminal history-based departure arising from consideration of acquittal on previously adjudicated charges.⁷⁴

*United States v. Ryan*⁷⁵ is a good example of the use of "related charge acquittal" evidence. Ryan was tried on one count of possession of crack cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).⁷⁶ The jury acquitted him on that charge, but convicted him of the lesser included offense of simple possession.⁷⁷ Citing the amount and purity of the drugs and the defendant's manner of packaging them, the sentencing judge departed upward from

68. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0.

69. See *id.* ch. 1, pt. A(4)(b). The Commission recognized that the circumstances which might necessitate departure from the GSR were sufficiently numerous and varied that they cannot, by their very nature, be comprehensively listed and analyzed in advance. See *id.* Moreover, when the Commission has intended to bar certain grounds for departure, it has not hesitated to do so in clear language. See, e.g., *id.* § 5H1.10 (providing that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence"); *id.* § 5H1.12 (providing that lack of guidance as a youth and similar factors "are not relevant grounds for imposing a sentence outside the applicable guideline range").

70. See *id.* § 1B1.4 (providing that "the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant").

71. *Id.* § 1B1.3 cmt. at 23.

72. See, e.g., *United States v. Fonner*, 920 F.2d 1330, 1332-33 (7th Cir. 1990); *United States v. Ryan*, 866 F.2d 604, 608-09 (3d Cir. 1989). But see *United States v. Brady*, 928 F.2d 844, 850-52 (9th Cir. 1991) (holding that acquitted conduct may not serve as a basis for upward departure).

73. This may be termed a "related charge acquittal." For an example, see *infra* notes 75-80 and accompanying text.

74. This might be termed a "prior charge acquittal." For an example, see *infra* notes 81-87 and accompanying text.

75. 866 F.2d 604 (3d Cir. 1989).

76. See *id.* at 605.

77. See *id.*

the prescribed GSR of zero to six months, imposing a ten month sentence.⁷⁸ Thus, Ryan's sentence was four months higher than the maximum Guidelines sentence for the count of conviction alone.⁷⁹ This four month differential can be explained only by reference to the acquitted conduct.⁸⁰

*United States v. Fonner*⁸¹ is an example of a departure based on a prior charge acquittal. Fonner was convicted of mailing death threats to a police officer and a judge in violation of 18 U.S.C. § 876.⁸² The sentencing judge calculated Fonner's GSR at thirty to thirty-seven months, but elected to depart to the statutory maximum of 120 months.⁸³ The judge cited as one ground for departure Guidelines section 4A1.3, the inadequacy of Fonner's criminal history category,⁸⁴ explaining that Fonner's prior acquittal of a 1972 killing of a police officer caused Fonner's criminal history score to reflect inadequately the extent of his prior transgressions and propensity to commit further violent crimes.⁸⁵ The Court of Appeals for the Seventh Circuit vacated the sentence and remanded for re-sentencing on the ground that the district court did not adequately justify the *extent* of the departure.⁸⁶ However, it held specifically that the district judge did not err in considering the 1972 killing in assessing the adequacy of Fon-

78. *See id.*

79. *See id.*

80. One of the arresting officers testified that Ryan possessed 33 individual packages of crack. *See id.* He opined that this packaging suggested that the crack was for distribution, not for personal use. *See id.* The court's reliance on packaging when departing up to a 10 month sentence suggests an implicit rejection of the jury's verdict on the distribution charge. The Third Circuit's analysis indicates that it viewed the lower court's departure in this manner. *See id.* at 609 (holding that a sentencing judge is permitted to consider evidence on counts of which the defendant was acquitted in departing upward from the Guidelines range).

81. 920 F.2d 1330 (7th Cir. 1991).

82. *See id.* at 1331.

83. *See id.*

84. This section permits a judge to depart upward "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (1995).

85. *See Fonner*, 920 F.2d at 1331. The district judge cited three other grounds for upward departure, which were both based on inadequacy of Fonner's criminal history category. First, he noted that Fonner had eight convictions for unrelated charges which were not included in the criminal history score because they were more than 10 years old. *See id.* Second, he found that Fonner's mental instability rendered him more likely than most to commit additional offenses. *See id.* Third, the defendant previously received a 10-year sentence for the prior threats and the judge felt a lesser sentence than the earlier one would be disparate. *See id.*

86. *See id.* at 1332.

ner's criminal history score, despite his acquittal on murder charges arising from that killing.⁸⁷

II. THE ABSENCE OF CONSTITUTIONAL CONSTRAINTS ON THE USE OF ACQUITTED CONDUCT

A long line of pre-Guidelines case law affirmed the constitutionality of considering acquitted conduct at sentencing.⁸⁸ This case law has been quite influential in the appellate courts' rejection of constitutional challenges to the use of acquitted conduct under the Guidelines.⁸⁹ Courts addressing constitutional challenges to the Guidelines' use of acquitted conduct also have been influenced by related jurisprudential developments, both before and after implementation of the Guidelines, which have reinforced the hostility of contemporary constitutional jurisprudence toward challenges to use of acquitted conduct. This section explores how the courts have come to reject constitutional challenges to the use of acquitted conduct, a rejection which necessitates action by Congress or the Commission to alter current Guidelines sentencing practices.

A. *Pre-Guidelines Case Law on Acquitted Conduct*

In order to understand the pre-Guidelines acquitted conduct jurisprudence, it is necessary to recall the then-prevailing federal sentencing practices, which formed the background against which those cases were decided. Prior to adoption of the Guidelines, federal sentencing judges possessed virtually unlimited discretion to impose any sentence within the (typically broad) statutory range applicable to the offense of conviction.⁹⁰ Formal factual findings were not required.⁹¹ Indeed, sentencing judges were not required to articulate in any manner the factors that influenced the chosen sentence.⁹² Furthermore, appellate review of sentencing was virtually non-existent.⁹³ Thus, district judges could (and usually did) impose

87. See *id.* at 1332-33.

88. See *supra* note 1 (listing cases in which judges were permitted to use acquitted conduct prior to the Guidelines).

89. See *infra* notes 101-16 and accompanying text.

90. See *United States v. Tucker*, 404 U.S. 443, 447 (1972) (stating that "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review").

91. See Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 6 (1972).

92. See, e.g., *United States v. Castillo-Roman*, 774 F.2d 1280, 1283 (5th Cir. 1985) ("[A] sentencing court is not required to enunciate the reasons underlying its decision.").

93. See *Tucker*, 404 U.S. at 447.

sentences without articulating either the particular facts influencing their sentencing decisions or the quantitative impact of these factors on the resulting sentences.⁹⁴

This broad discretion of sentencing judges was grounded in the prevailing penal philosophy of the time, which emphasized indeterminate sentencing and rehabilitation of the offender.⁹⁵ Consistent with this philosophy and the nearly unfettered discretion in sentence selection associated with it, judges were encouraged to consider a vast array of facts relevant to the conduct and character of the defendant, including facts that would be inadmissible at trial.⁹⁶ As the Supreme Court explained in *Williams v. New York*,⁹⁷ selection of the appropriate sentence requires "possession of the fullest information possible concerning the defendant's life and characteristics."⁹⁸ The information relevant to sentencing might include inadmissible hearsay, illegally seized evidence, and evidence of uncharged conduct, as well as evidence relating to charges of which the defendant was acquitted by a jury.⁹⁹ Because the goal of sentencing was rehabilitation, and rehabilitation requires adequate information, the usual limitations on sources of evidence and standards of proof were deemed

94. See Frankel, *supra* note 91, at 6 n.17 ("Most sentences are passed without articulated reasons, probably without reasons the judge articulates with much precision even to himself.").

95. Justice Black, writing for the majority in *Williams v. New York*, explained:

Undoubtedly the New York statutes [under which the defendant was found guilty and sentenced] emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.

....

Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments.

337 U.S. 241, 247, 248-49 (1949) (citations omitted).

For a discussion of rehabilitation-based indeterminate sentencing and the problems associated with it, see FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1968); see also S. REP. NO. 98-225, at 37-38 (1983), *reprinted in* 1984 U.S.C.A.N. 3182, 3220-21 (criticizing use of incarceration as means to achieve rehabilitation of criminal offenders).

96. See, e.g., *Williams*, 337 U.S. at 246-47. The *Williams* holding was codified in 1970, in a provision which specified that "[n]o limitation shall be placed on the information concerning the background, character and conduct of a person" being sentenced. See 18 U.S.C. § 3661 (1994).

97. 337 U.S. 241 (1949).

98. *Id.* at 247.

99. See *United States v. Sweig*, 454 F.2d 181 (2d Cir. 1972).

legally irrelevant.¹⁰⁰

The leading pre-Guidelines case on the use of acquitted conduct in sentencing, *United States v. Sweig*,¹⁰¹ demonstrates the influence of the then-prevailing rehabilitative ethos and the judicial discretion associated with it. *Sweig* involved an appeal from a sentence of thirty months, imposed on a senior congressional staffer convicted of one count of perjury on a total of fifteen counts alleged at trial.¹⁰² In the course of a lengthy statement at the sentencing proceeding, Judge Marvin E. Frankel, Jr. stated that he based Sweig's sentence in part on evidence presented at trial relating to the counts for which Sweig had been acquitted.¹⁰³ This evidence tended to show that Sweig was, according to Judge Frankel, part of "a picture of corruption of a very profound kind."¹⁰⁴

Sweig appealed, contending that the sentence violated his rights because he was, in effect, being punished for crimes of which the jury had acquitted him.¹⁰⁵ In rejecting Sweig's claims, the court did not articulate an affirmative policy justification for enhancing a sentence on the basis of acquitted conduct. Rather, the court noted initially that "[a] sentencing judge has very broad discretion in imposing any sentence within the statutory limits, and in exercising that discretion he may and should consider matters that would not be admissible at

100. See Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence,"* 35 WM. & MARY L. REV. 147, 157 (1993) ("The absence of procedural protections [such as the reasonable doubt standard or the opportunity to confront witnesses] may well have been reasonable when sentencing was not a truly legal decision [but was] a discretionary [decision] dominated by at least a rhetoric of rehabilitation."); Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED. SENTENCING REP. 96, 96 (1992) ("Non-observance of evidentiary restrictions made perfect sense in a system that stressed rehabilitation and expected the judge to assess all available information in order to choose a sanction appropriate to the particular defendant.").

101. 454 F.2d 181, 183-84 (2d Cir. 1972).

102. See *id.* at 181-82. Along with the perjury count on which Sweig was convicted, the prosecution charged him with illegal influence peddling, misuse of government facilities, abuse of government trust, and additional perjury counts. See *id.* at 181-83.

103. See *id.* at 182 n.2.

104. *Id.* at 182. In addressing Sweig, Judge Frankel stated:

"[T]here was substantial evidence at the trial which indicated gross irregularities, misuse of government facilities, abuse of government trust, and whatever [your attorney] has said about the counts on which you were acquitted, I think it is appropriate, and I state for the record the view that I [sic] not ignore those things in considering this delicate question of [s]entence."

Id. at 182 n.2.

105. See *id.* at 182-83. The specific constitutional grounds for Sweig's objection to use of acquitted conduct are not clear from the Second Circuit's opinion. Thus, it is uncertain which constitutional challenges the court rejected.

trial.”¹⁰⁶ The court further reasoned that acquitted conduct evidence was analogous to other types of evidence that may be used at sentencing, but not at trial, such as illegally seized evidence, inadmissible hearsay, and unadjudicated conduct.¹⁰⁷ It was unpersuaded by the argument that acquitted conduct is materially different because it involves relitigation of previously decided issues.¹⁰⁸ According to the *Sweig* court, acquittal “does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant . . . [because] the jury may have believed all such evidence to be true, but have found that some essential element of the charge was not proved.”¹⁰⁹

Other courts adopted the holding in *Sweig*, although many of these cases involved slightly different fact situations, such as consideration of prior acquittals as part of an assessment of the defendant’s criminal history,¹¹⁰ or consideration of prior convictions overturned on appeal.¹¹¹ In addition, the *Sweig* rule was cited favorably in dicta in a number of cases in which the sentencing court was deemed not to have relied upon acquitted conduct to enhance the defendant’s sentence.¹¹²

Most of the courts following *Sweig* did not articulate an affirmative rationale to justify permitting use of acquitted conduct evidence at sentencing. For example, in *United States v. Bernard*,¹¹³ the Fourth Circuit permitted the district court to consider acquitted conduct

106. *Id.* at 183-84.

107. *See id.* at 184.

108. *See id.*

109. *Id.* The court explained that acquitted conduct evidence “may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn” because of the availability of cross-examination and the judge’s opportunity to view the demeanor of the witnesses. *See id.* This reference to factual reliability is the closest thing to a policy argument in favor of acquitted conduct articulated by the *Sweig* court.

110. *See, e.g., United States v. Campbell*, 684 F.2d 141, 152 n.19 (D.C. Cir. 1982) (surveying case law and noting that the acquitted conduct issue “usually concerns whether the sentencing judge may consider a defendant’s acquittal in a *prior* trial, rather than the evidence introduced in the same trial going to counts on which the defendant is acquitted”).

111. *See, e.g., United States v. Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977); *United States v. Atkins*, 480 F.2d 1223, 1224 (9th Cir. 1973).

112. *See, e.g., United States v. Ray*, 683 F.2d 1116, 1121 (7th Cir. 1982) (suggesting that the trial court’s consideration of defendant’s acquittal on bank robbery charges was not used to enhance the sentence it imposed for a criminal contempt charge); *United States v. Morgan*, 595 F.2d 1134, 1137 (9th Cir. 1979) (noting that consideration of prior acquittal may have been considered a mitigating, rather than an aggravating factor); *United States v. Cardi*, 519 F.2d 309, 312-13 (7th Cir. 1975) (concluding that despite ambiguity in the record, the sentencing court apparently had not relied on invalid convictions in sentencing).

113. 757 F.2d 1439 (4th Cir. 1985).

without engaging in any independent legal analysis.¹¹⁴ The court merely noted that *Sweig* had been approved in every circuit where it had been considered, and stated that it found *Sweig* "to be persuasive," therefore "adopt[ing] its reasoning as the law" of the Fourth Circuit.¹¹⁵ Like most of the cases adopting *Sweig*, the *Bernard* court did, however, allude to the broad discretion afforded sentencing judges.¹¹⁶

This broad discretion possessed by sentencing judges influenced acquitted conduct case law for practical reasons as much as for policy reasons. Courts of the pre-Guidelines era recognized that, as a practical matter, it would have been extraordinarily difficult, if not impossible, to prevent sentencing judges from relying on acquitted conduct and similar sources of information because of the absence of a requirement that the judge explain the sentence.¹¹⁷ This undoubtedly contributed to the "let-it-all-in" philosophy characteristic of the pre-Guidelines regime. In the words of one judge: "Reviewing courts [prior to the Guidelines] believed that a judge inevitably would be influenced by evidence he has heard already anyway. It seemed a better practice not to reverse a judge so influenced for candidly disclosing the reasons for the sentence."¹¹⁸

This phenomenon was demonstrated in the related context of unadjudicated conduct in *United States v. Grayson*,¹¹⁹ in which the Su-

114. The facts in *Bernard* were quite similar to those in *United States v. Ryan*, 866 F.2d 604 (3d Cir. 1989). See *supra* notes 75-80 and accompanying text (discussing holding in *Ryan*). In *Bernard*, the defendant was charged with one count of possession with intent to distribute marijuana under 21 U.S.C. § 841(a). See 757 F.2d at 1442. The jury convicted him of the lesser included offense of simple possession under 21 U.S.C. § 844(a). See *id.* The sentencing judge imposed the statutory maximum sentence of one year on the simple possession count, in the process indicating his view that the defendant had intended to distribute the marijuana he was convicted of possessing. See *id.* at 1444.

115. See *Bernard*, 757 F.2d at 1444.

116. See *id.* ("Generally a sentence, if within the statutory limits, is not subject to review."); see also *Ray*, 683 F.2d at 1120 (explaining that "[a] sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972))).

117. See, e.g., *United States v. Campbell*, 684 F.2d 141, 154 (D.C. Cir. 1982) (quoting *United States v. Grayson*, 438 U.S. 41, 55 n.1 (1978) (Stewart, J., dissenting)). In affirming a sentence which was based, in part, on acquitted conduct, the court in *Campbell* explained: "We should not adopt an unrealistic view of the sentencing process that can only deter trial judges from articulating their reasons fully Judges ought not be reprimanded for acknowledging the impact of the evidence presented during the trial unless the weighing in of such evidence confounds a just result." *Id.*

118. *United States v. Boney*, 977 F.2d 624, 645 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part).

119. 438 U.S. 41 (1978).

preme Court upheld a sentencing judge's reliance on an uncharged perjury offense in sentencing a defendant guilty of escape from prison.¹²⁰ Though it recognized the "impermissibility" of the practice of "incarcerating for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution,"¹²¹ the Court upheld the lower court's consideration of the truthfulness of the defendant's testimony as part of the assessment of the defendant's prospects for rehabilitation.¹²² The Court emphasized not only the need for maximum access to information for assessing rehabilitation prospects, but the practical inability to control the use of such considerations.¹²³ In the Court's own words, "[n]o rule of law, even one garbed in constitutional terms, can prevent improper use of first-hand observations of perjury."¹²⁴ The same limitations on appellate review prevented *Sweig*-era courts from limiting the use of acquitted conduct evidence at sentencing.

In short, *Sweig* and its progeny offer little in the way of explicit policy justifications favoring use of acquitted conduct in sentencing.¹²⁵ These cases instead reflect the structural limitations to appellate review that no longer exist under the Guidelines scheme. Now that sentencing judges are required to impose a sentence from within the relatively narrow Guidelines range, or articulate permissible and adequate reasons for departing from that range,¹²⁶ the time has come to reevaluate the role of acquitted conduct in criminal sentencing. As the next section demonstrates, however, constitutional challenges through the courts are unlikely to provide a satisfactory mechanism for reform.

B. The Rejection of Constitutional Challenges to Acquitted Conduct under the Guidelines

Defendants have raised constitutional challenges to use of acquitted conduct in Guidelines sentencing under both the Due Process

120. The sentencing judge, in a rare written opinion explaining his imposition of a two year sentence, characterized the defendant's testimony in his own defense as a "complete fabrication." See *id.* at 44.

121. *Id.* at 53.

122. See *id.* at 55.

123. See *id.* at 54.

124. *Id.*

125. Any policy justifications underlying the use of acquitted conduct that can be gleaned from these cases reflect a then-prevailing model of indeterminate, rehabilitation-based sentencing which was repudiated by the Sentencing Reform Act. See *infra* notes 239-42 and accompanying text.

126. See 18 U.S.C. § 3553(b) (1994).

and Double Jeopardy Clauses.¹²⁷ Taking their cue from the pre-Guidelines acquitted conduct case law, as well as related Supreme Court case law, federal appellate courts consistently have rejected these claims.¹²⁸

1. Acquitted Conduct and the Supreme Court

The United States Supreme Court has yet to address directly the constitutionality of sentence enhancement on the basis of acquitted conduct.¹²⁹ Nevertheless, the Court's decisions in related areas strongly support the current consensus of the United States courts of appeals that such enhancement is constitutionally permissible.¹³⁰

Due process challenges to use of acquitted conduct in Guidelines sentencing are effectively foreclosed by *McMillan v. Pennsylvania*.¹³¹ In *McMillan*, the Supreme Court upheld a provision in Pennsylvania's Mandatory Minimum Sentencing Act (MMSA) which subjected defendants convicted of certain enumerated felonies to a five-year mandatory minimum sentence if the defendants were found, by a preponderance of the evidence, to have "visibly possessed a firearm" during the commission of the offense.¹³²

The defendants in *McMillan* mounted two due process challenges to the statute. First, they argued that the Pennsylvania legislature, by relegating proof of firearm possession to sentencing, and requiring proof by a mere preponderance of the evidence, violated the due process-based constitutional requirement that criminal conduct be proven beyond a reasonable doubt.¹³³ The Court rejected this argument, characterizing as virtually absolute a legislature's discretion to determine what conduct is an essential element of the offense and what conduct is merely a factor to be addressed at sentencing.¹³⁴ Under the Court's analysis, the MMSA did not violate the "reasonable doubt" standard because the firearm enhancement was

127. See *infra* notes 131-50 and accompanying text.

128. See *supra* note 3 and accompanying text.

129. The Court has denied certiorari on this issue on several occasions. See, e.g., *United States v. Billops*, 43 F.3d 281 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1389 (1995); *United States v. Coleman*, 947 F.2d 1424, 1428-29 (10th Cir. 1991) (*per curiam*), *cert. denied*, 503 U.S. 972 (1992).

130. See *supra* note 3 and accompanying text.

131. 477 U.S. 79 (1986).

132. See *id.* at 81.

133. See *id.* at 83. Proof beyond a reasonable doubt of each element of a criminal offense was established as a constitutional requirement in *In re Winship*, 397 U.S. 358 (1970) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

134. See *McMillan*, 477 U.S. at 86-90.

possible only "after a defendant has been duly convicted of the crime for which he is to be punished."¹³⁵ In other words, under the MMSA, due process was satisfied by requiring the state to prove the defendant's guilt of the underlying criminal behavior under the reasonable doubt standard; the Court viewed the standard of proof needed to establish additional facts relevant to sentencing as a different question entirely.¹³⁶

The defendants' second due process challenge focused on this latter issue—he argued that the use of the preponderance of the evidence standard in resolving facts used in sentencing violates due process.¹³⁷ Citing *Williams v. New York*, the Court responded that courts traditionally have made similar sentencing decisions without any due process limitations on burdens of proof.¹³⁸ In effect, the *McMillan* Court reaffirmed the permissive approach to resolution of sentencing facts embodied in *Williams*, extending that approach to the context of determinate sentencing.¹³⁹ Together, *Williams* and *McMillan* suggest that due process challenges to real-offense sentencing are doomed to failure.¹⁴⁰

The Court's jurisprudence suggests that double jeopardy challenges to the use of acquitted conduct evidence are also foreclosed. In *Dowling v. United States*,¹⁴¹ the Court held that testimony relating to an alleged crime of which the defendant had previously been acquitted could be introduced as "other crimes" evidence under Rule 404(b) of the Federal Rules of Evidence¹⁴² at a different trial.¹⁴³ The

135. *Id.* at 87.

136. *See id.*

137. *See id.* at 91.

138. *See id.* at 92.

139. *See id.* ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance.").

140. *See Reitz, supra* note 6, at 546 ("Those who think that *Williams* will be relegated to the dustbin along with reform-based [sentencing] theory have not, I think, been listening carefully to the current Court."); Michael Tonry & John C. Coffee, Jr., *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 142, 152-63 (Andrew von Hirsch et al. eds., 1987) ("The broad thrust of *McMillan* . . . can give very little solace to those who look to the courts for constraints on real-offense sentencing.").

141. 493 U.S. 342 (1990).

142. Rule 404(b) provides that evidence of "other crimes, wrongs or acts" may be admitted to prove, among other things, identity, but not "to prove the character of the person in order to show action in conformity therewith." FED. R. EVID. 404(b).

143. *See Dowling*, 493 U.S. at 344. Dowling was charged with robbing a Virgin Islands bank while wearing a ski mask and carrying a small pistol. *See id.* at 344. The Government attempted to introduce victim testimony identifying Dowling as the individual who, two

Court rejected Dowling's contention that admission of this evidence violated the Double Jeopardy Clause,¹⁴⁴ relying primarily on the different standards of proof applicable to Dowling's first criminal trial and to the basis for introduction of the other crimes evidence under Rule 404(b).¹⁴⁵ The Court further noted that its decision was "consistent with other cases where [the Court] held that an acquittal in a criminal case does not preclude the government from relitigating an issue where it is presented in a subsequent action governed by a lower standard of proof."¹⁴⁶

Dowling suggests clearly that the use of acquitted conduct evidence in a subsequent proceeding does not violate the constitutional bar against double jeopardy, as long as the standard of proof applicable in the second proceeding is less than the "reasonable doubt" standard.¹⁴⁷ Because application of the preponderance standard to sentencing decisions is now settled law,¹⁴⁸ *Dowling* appears to pre-

weeks after the bank robbery, robbed her in her home while wearing a similar mask and carrying a similar small handgun. See *id.* at 345. Dowling had, however, already been acquitted of this latter robbery charge. See *id.*

144. 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 . . ."). The Double Jeopardy Clause's protection of defendants against multiple prosecutions for the same offense is grounded in the need to protect citizens against the superior resources of the state, which may be brought to bear in an abusive or overzealous manner. See *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

145. See *Dowling*, 493 U.S. at 348-49. The Court explained that because a jury might reasonably conclude that Dowling was the masked man who entered the victim's home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial, the collateral estoppel component of the Double Jeopardy Clause was inapposite. See *id.*

146. *Id.*; see, e.g., *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361-62 (1984) (holding that a gun owner's acquittal on criminal firearms charge did not preclude in rem forfeiture proceeding against those firearms because the latter is governed by preponderance standard).

147. Justice Brennan's dissent postulated that the *Dowling* rule could be extended to permit use of acquitted conduct evidence. See *id.* at 363 (Brennan, J., dissenting) ("The Court's reasoning could apply even more broadly to justify the introduction of evidence of a prior offense for which the defendant had been acquitted in order to enhance a defendant's sentence."). Justice Brennan's prediction of *Dowling's* implications for acquitted conduct has proved to be correct. See, e.g., *United States v. Masters*, 978 F.2d 281, 286 (7th Cir. 1992) (citing *Dowling* in support of permitting sentence enhancement on the basis of acquitted conduct).

148. The courts of appeals are unanimous in holding that the preponderance standard is applicable in Guidelines sentencing proceedings. See *United States v. St. Julian*, 922 F.2d 563, 569 n.1 (10th Cir. 1990); *United States v. Malbrough*, 922 F.2d 458, 464 n.6 (8th Cir. 1990); *United States v. Fonner*, 920 F.2d 1330, 1333 (7th Cir. 1990); *United States v. Duncan*, 918 F.2d 647, 652 (6th Cir. 1990); *United States v. Castellanos*, 904 F.2d 1490, 1494-95 (11th Cir. 1990); *United States v. Restrepo*, 903 F.2d 648, 654 (9th Cir. 1990), *modified*, 946 F.2d 654 (9th Cir. 1991) (en banc); *United States v. Reynolds*, 900 F.2d 1000, 1003 (7th Cir. 1990);

clude a successful double jeopardy challenge to the use of acquitted conduct evidence in Guidelines sentence calculation. Moreover, more recent decisions in related areas merely strengthen this view of *Dowling*.¹⁴⁹

In short, although the Supreme Court has never addressed the constitutionality of sentence enhancement on the basis of acquitted conduct, related case law strongly suggests that constitutional challenges under both the Due Process and Double Jeopardy Clauses would be unsuccessful. The reasoning underlying these cases has been instrumental in the appellate courts' virtually universal rejection of constitutional challenges to use of acquitted conduct.¹⁵⁰

2. Guidelines Case Law

Due process challenges to the use of acquitted conduct under the Guidelines have been doomed by the United States courts of appeals' characterization of a jury's "not guilty" verdict merely as the government's failure to establish the charged conduct *beyond a reasonable doubt*. Under *McMillan*,¹⁵¹ this failure does not bar an inconsistent finding by the sentencing judge under the lower preponderance standard.¹⁵²

United States v. Blanco, 888 F.2d 907, 909 (1st Cir. 1989); United States v. Burke, 888 F.2d 862, 869 (D.C. Cir. 1989); United States v. McDowell, 888 F.2d 285, 290-91 (3d Cir. 1989); United States v. Guerra, 888 F.2d 247, 250 (2d Cir. 1989); United States v. Powell, 886 F.2d 81, 85 (4th Cir. 1989).

149. See, e.g., *Witte v. United States*, 115 S. Ct. 2199, 2204-07 (1995) (rejecting Double Jeopardy Clause challenge to an indictment based on conduct previously used to enhance defendant's sentence in a prior case); *Nichols v. United States*, 114 S. Ct. 1921, 1925-28 (1994) (rebuffing a Sixth Amendment challenge to the use of a prior, uncounseled misdemeanor offense as a basis for sentence enhancement, reasoning that this is analogous to sentence enhancement based on conduct for which the defendant has not been convicted). *Witte*, in particular, supports the conclusion that the Court would not view sentence enhancement based on acquitted conduct as a Double Jeopardy Clause violation. The Court reasoned that sentence enhancement in prosecution 1 for conduct which also serves as the basis for prosecution 2 is not a violation of the Double Jeopardy Clause because no jeopardy attached in prosecution 1; the offender was not punished "for" the enhancement conduct in prosecution 1, but rather "for" the offense of conviction in that case. *Witte*, 115 S. Ct. at 2205-07 (citing *Williams v. Oklahoma*, 368 U.S. 576 (1959) and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)). The analogy to the Guidelines is clear. Use of acquitted conduct does not violate the Double Jeopardy Clause because the punishment (for double jeopardy purposes) is not "for" the acquitted conduct, but "for" the offense of conviction. See *infra* notes 153-54 and accompanying text.

150. See *infra* notes 151-54 and accompanying text.

151. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); see *supra* notes 131-40 and accompanying text.

152. See, e.g., *United States v. Boney*, 977 F.2d 624, 636 (D.C. Cir. 1992) ("[I]t is well established that 'due process is satisfied so long as facts necessary for sentencing are proved by a preponderance of the evidence.'") (quoting *United States v. Burke*, 888 F.2d 862, 869

In addition, the acquitted conduct jurisprudence embraces the notion that the defendant whose sentence is increased due to reliance on acquitted conduct is not being punished for the conduct of which he has been acquitted. Rather, the sentencing judge is imposing a heavier sentence for the counts of conviction, based on facts found by the court and deemed relevant to the defendant's culpability for sentencing.¹⁵³ Under this view, as long as the punishment imposed is within the statutory maximum for the offense of conviction, the defendant's right to be free from double jeopardy has not been infringed.¹⁵⁴

Some commentators have objected to the courts' extension of the reasoning of pre-Guidelines cases to the Guidelines scheme, arguing that the latter's finely graduated, fact-based determinate sentencing has rendered use of acquitted conduct constitutionally unacceptable.¹⁵⁵ For the most part, the courts have not grappled with this issue, simply adopting the reasoning of pre-Guidelines cases without much discussion. Although the constitutional arguments of

(D.C. Cir. 1989)); *United States v. Allibhai*, 939 F.2d 244, 254 (5th Cir. 1991) ("Because the government need only establish facts for use in sentencing by a mere preponderance of the evidence . . . the sentencing court may rely on facts underlying an acquitted count if the preponderance standard is satisfied."); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 181-82 (2d Cir. 1990) ("On the record before us, the district court could properly have found by a preponderance of the evidence that [the defendant] possessed a firearm . . ."); *United States v. Isom*, 886 F.2d 736, 738 (4th Cir. 1989) ("A verdict of acquittal demonstrates only a lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant's innocence.").

153. See, e.g., *United States v. Talbott*, 902 F.2d 1129, 1133 (4th Cir. 1990); *Rodriguez-Gonzalez*, 899 F.2d at 180-81; *United States v. Mocchiola*, 891 F.2d 13, 17 (1st Cir. 1989). The Supreme Court has employed a somewhat similar analysis in upholding the constitutionality of a Guidelines sentence enhancement for obstruction of justice, based on the defendant's uncharged perjury. See *Dunnigan v. United States*, 507 U.S. 87, 97 (1993) (stating that sentence enhancement based on perjury is "more than a mere surrogate for a perjury prosecution," furthering "legitimate sentencing goals relating to the principal crime" (emphasis added)). This reasoning also was employed in *Witte*, 115 S. Ct. at 2204-07.

154. See *Rodriguez-Gonzalez*, 899 F.2d at 180 (citing *United States v. Sweig*, 454 F.2d 181, 184 (2d Cir. 1972)).

155. See, e.g., Herman, *supra* note 6, at 316-25 (arguing that *Williams* and *McMillan* are of limited applicability to federal Guidelines sentencing); see also Heaney, *supra* note 7, at 215-20 (arguing that *Williams* and *McMillan* were based, in part, on the minor effects of considering uncharged conduct, but that this is no longer true under the Guidelines); Kirchner, *supra* note 6, at 816-18 (arguing that *McMillan* does not apply to Guidelines cases and that the purpose of statutory maximums has changed with the Guidelines). Others have taken a slightly different approach, arguing that the *Williams/McMillan* line of cases were wrongly decided in the first place. See Lear, *supra* note 6, at 1218 ("The Supreme Court's due process analysis must be reconsidered, not in response to the change in sentencing structure [caused by the Guidelines], but because the approach was wrong in the first instance."). Regardless of their approaches, however, these commentators agree that sentence enhancement on the basis of acquitted conduct violates the Constitution.

those commentators are powerful, this Article argues that seeking changes through the political process is a more realistic means to address the acquitted conduct problem. Advocates of the constitutional infirmity of real-offense sentencing are unlikely soon to convince the courts that the advent of the Guidelines renders unconstitutional the use of acquitted conduct. Indeed, *McMillan* itself was decided in the context of a determinate sentencing scheme, upholding the imposition of a mandatory minimum sentence enhancement triggered by a preponderance-based sentencing finding.¹⁵⁶ The Court's recent decisions in *Nichols* and *Witte*, both of which involved challenges to Guidelines sentences, further suggest the continuing vitality of *McMillan* in the Guidelines era.¹⁵⁷ As a practical matter, opponents of acquitted conduct at sentencing are well advised to seek a non-judicial forum for their arguments.¹⁵⁸

However, even if one concedes, for purposes of argument, that the changes wrought by the Guidelines have not altered the *constitutional* landscape of federal criminal sentencing, it cannot be denied that those changes have been profound. Sentencing judges no longer possess the virtually unfettered discretion to impose any sentence within the broad range permitted by statute, for any reason and without explanation.¹⁵⁹ Under the determinate Guidelines sentencing scheme now in effect, a specific, identifiable quantum of punishment is associated with each material factual finding made by the sentencing judge.¹⁶⁰ The parties have the right to appeal an improperly calculated sentence, or a sentence that departs from the range specified by the Guidelines.¹⁶¹ In short, under the Guidelines, there is a heightened sensitivity to the interests of both the defendant and society in the severity of the sentence imposed. The Guidelines also have opened up the sentencing process, providing the opportunity to identify the specific factors used in sentencing, and evaluate whether use

156. See *supra* notes 131-39 and accompanying text.

157. See *supra* note 149.

158. See *supra* note 140 and accompanying text. In effect, this Article adopts an agnostic view of the merits of the constitutional arguments raised by Lear and other commentators, accepting as an existing constraint current constitutional doctrine as it relates to permissibility of use of acquitted conduct. Under this view, the inquiry becomes whether a sound case can be made on policy grounds for changing the current approach to use of acquitted conduct. This Article asserts that such a case can be made.

159. See 18 U.S.C. § 3553(b) (1994) (requiring sentencing judge to impose a sentence from within the applicable Guidelines range in the absence of exceptional circumstances).

160. See *supra* notes 21-26 and accompanying text (describing mechanics of Guidelines sentence calculation).

161. See 18 U.S.C. § 3742(a), (b) (1994).

of those factors is appropriate.¹⁶²

As the next section demonstrates, when the use of acquitted conduct evidence is evaluated in light of the Guidelines, it becomes clear that strong policy considerations militate against its continued use in Guidelines sentencing.

III. THE CASE FOR COMMISSION ACTION TO ELIMINATE THE USE OF ACQUITTED CONDUCT

The propriety of using acquitted conduct in Guidelines sentencing is not only a matter of constitutional law; it is also a matter of policy. Judicial rejection of constitutional challenges to the use of acquitted conduct does not preclude the Sentencing Commission from examining the policy implications of using acquitted conduct in Guidelines sentencing and amending the Guidelines in light of relevant policy considerations. This section argues that permitting Guidelines sentence enhancement on the basis of acquitted conduct is inconsistent with important policies underlying our criminal justice system, and that amendment of the Guidelines is an appropriate solution to the problems created by use of acquitted conduct.

A. *The Guidelines' Use of Acquitted Conduct Is Bad Sentencing Policy*

Permitting sentencing judges to enhance sentences on the basis of acquitted conduct does violence to important policies underlying the criminal justice system. First, it undermines the defendant's fundamental interest in verdict finality, exposing the defendant to a second mini-trial on conduct underlying the count of acquittal in contravention of principles underlying the Fifth and Sixth Amendments.¹⁶³ Second, it denigrates the role of the jury, diminishing the jury's ability to function as a source of community participation in the justice system, and possibly reducing the effectiveness of the norm-reinforcing function of the criminal law.¹⁶⁴

162. See *United States v. Quintero*, 937 F.2d 95, 97 (2d Cir. 1991) ("For all the criticism the guidelines have attracted, one of their virtues is the illumination of practices and policies that were applicable in the pre-guidelines era, but that received less attention when sentences were only a generalized aggregation of various factors, many of which were frequently unarticulated.").

163. See *infra* notes 165-85 and accompanying text.

164. See *infra* notes 186-98 and accompanying text.

1. Use of Acquitted Conduct Undermines Defendants' Interest in Verdict Finality

It has long been settled that the Fifth Amendment's prohibition against double jeopardy protects defendants against multiple prosecutions for the same offense—whether subsequent prosecution follows acquittal or conviction.¹⁶⁵ The protections offered by the Double Jeopardy Clause reflect the need for some check on the superior resources of the State, which may be brought to bear in an overzealous or abusive manner.¹⁶⁶ No aspect of the prohibition against double jeopardy is more central than the rule against relitigation of charges following an acquittal.¹⁶⁷ As the Supreme Court has noted, "the law attaches particular significance to an acquittal."¹⁶⁸ In fact, the Court has held consistently that acquittal is an absolute bar to further prosecution,¹⁶⁹ even if the acquittal is based on an "egregiously erroneous foundation."¹⁷⁰ This absolute double jeopardy bar against relitigation of acquittal charges reflects "both an institutional interest in preserving the finality of judgments, and a strong public interest in protecting individuals against government overreaching."¹⁷¹

A defendant's fundamental interest in the finality of his acquittal is grounded as well in the Sixth Amendment right to trial by jury and the jury's power of nullification implicit in that provision.¹⁷² Although the right of the jury to decline to convict regardless of the evidence has long been the subject of much debate,¹⁷³ its authority to

165. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

166. See *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980).

167. The rule that a defendant may not be retried following an acquittal is said to be "the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

168. *United States v. Scott*, 437 U.S. 82, 91 (1978).

169. See *Dowling v. United States*, 493 U.S. 342, 355 (1990) (Brennan, J., dissenting).

170. See *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (*per curiam*); *accord Sanabria v. United States*, 437 U.S. 54, 68-69 (1978).

171. *Dowling*, 493 U.S. at 355 (Brennan, J., dissenting).

172. See *United States v. DiFrancesco*, 449 U.S. 117, 130 n.11 (1980). Some commentators have linked the Sixth Amendment right to a jury trial to the double jeopardy provisions, arguing that preservation of the jury's power to nullify is the principal rationale of the absolute double jeopardy bar against relitigation of counts of acquittal. See Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 122-55.

173. See *Sparf & Hansen v. United States*, 156 U.S. 51, 60-64 (1895) (suggesting that history offers no authority for a jury's right to disregard the judge's instructions on the applicable law); see also Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 207-23 (1972) (discussing resistance of federal courts to instructions informing the

do so is beyond dispute.¹⁷⁴ The jury's power of nullification may be traced back to the origins of the Bill of Rights, when the jury was viewed as an essential impediment to the use of the criminal law as an instrument of oppression.¹⁷⁵ The Sixth Amendment and the implied power of nullification underlie the prohibition against directed guilty verdicts and judgments of conviction notwithstanding a verdict.¹⁷⁶ The Sixth Amendment similarly prevents the taking of an appeal from a verdict of not guilty.¹⁷⁷

Although the use of acquitted conduct in sentencing *technically* may not violate the Fifth and Sixth Amendments,¹⁷⁸ the important and long-recognized policies underlying these amendments are clearly undermined by permitting sentence enhancement under the Guidelines.¹⁷⁹ For example, the defendant's interests in finality of the jury's verdict and freedom from governmental overreaching are subverted by the use of acquitted conduct evidence. The government's pursuit of sentence enhancement on the basis of conduct for which it failed to obtain a conviction places the defendant's liberty at risk a second time, just as would a successive trial.¹⁸⁰ As in the case of a successive trial, the defendant faced with a Guidelines sentencing proceeding at which acquitted conduct is considered suffers the additional anxiety of being made once again to run the gauntlet. In effect, the government, having failed to meet its burden of proof at trial, is

jury of its power to nullify); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 512-16 (1976) (discussing disadvantages of jury nullification); Chaya Weinberg-Brodth, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 829 (1990) ("The jury's power to nullify is a universally acknowledged, though not a universally approved, part of our criminal procedure.").

174. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (noting that even the decision of a "lawless" decision-maker is not subject to review).

175. See SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW* 34 (1990); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190-91 (1991).

176. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408 (1947); *Sparf & Hansen*, 156 U.S. at 105-06.

177. See *Martin Linen Supply Co.*, 430 U.S. at 570-71 (noting that the Double Jeopardy Clause prohibits review of a verdict of acquittal).

178. See *supra* notes 147-50 and accompanying text.

179. Even cases rejecting constitutional challenges to the Guidelines' use of acquitted conduct have acknowledged that the distinctions underlying their conclusions are quite technical and do not address the underlying fairness of the use of acquitted conduct. See, e.g., *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 181 (2d Cir. 1990) ("Of course, from the point of view of a defendant receiving added prison time because of the presence of a gun, the distinction [between a conviction, which triggers double jeopardy analysis, and a sentence enhancement, which does not] may be academic.").

180. See *supra* note 144 (stating the Supreme Court's interpretation of the rationale for the Double Jeopardy Clause).

permitted a second bite at the apple, a chance to make its case before an alternative decisionmaker, the sentencing judge.

Moreover, the use of acquitted conduct at sentencing arguably entails even greater risk to the defendant's liberty interests than subsequent prosecutions because the protections of the reasonable doubt standard and the rules of evidence do not apply.¹⁸¹ In addition, with the dry run of the trial presentation completed, "the prosecution may perfect" the presentation of its case and thus "gain an unfair advantage in meeting its [lower] burden of proof in the second proceeding."¹⁸² Viewed from a slightly different perspective, allowing sentence enhancement for acquitted conduct is tantamount to permitting the judge to enter, for sentencing purposes, a judgment of guilt notwithstanding the verdict on the counts of acquittal, an action which is barred as inconsistent with the Sixth Amendment right to trial by jury.¹⁸³ In each case, the judge is substituting her judgment of the evidence on a count of conviction for that of the jury. As the Ninth Circuit suggested in *United States v. Brady*,¹⁸⁴ this weakens the power of the jury as a check on prosecutorial overreaching and increases the risk of an inappropriate deprivation of the defendant's liberty.¹⁸⁵

2. The Guidelines' Use of Acquitted Conduct Undermines the Symbolic Functions of Jury Participation in the Criminal Justice System

Jury participation in the criminal justice system serves several important values. One such value is to ensure the "substantive

181. See, e.g., Herman, *supra* note 6, at 351 (citing concerns about double jeopardy and the defendant's "additional anxiety from being made to run the gauntlet a second time").

182. *Id.*; cf. *Ashe v. Swenson*, 397 U.S. 436, 447 (1970) ("In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution . . . [T]his is precisely what the constitutional guarantee [against double jeopardy] forbids.").

183. Moreover, as Professor Kevin Reitz has pointed out, even "if we were to abolish the jury trial guarantee to allow judgments n.o.v. of guilt, we still presumably would require judges to find that no reasonable jury" could acquit on the evidence presented, a standard vastly different from the preponderance of evidence standard currently employed. See Reitz, *supra* note 6, at 551.

184. 928 F.2d 844 (9th Cir. 1991).

185. See *id.* at 851-52. In the *Brady* court's words, "We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." *Id.* at 851; cf. *Green v. United States*, 355 U.S. 184, 188 (1957) (explaining that double jeopardy provisions are designed in part to protect against superior resources of the state wearing down a defendant and "enhancing the possibility that even though innocent he may be found guilty").

criminal law's objective of only punishing those defendants who are morally culpable in the community's eyes."¹⁸⁶ This defendant-protective function of jury participation is reflected in the Fifth and Sixth Amendment protections discussed in the previous section.¹⁸⁷

However, jury participation also serves important process values that go beyond the interests of defendants. Jury participation serves the dual purposes of reinforcing democratic norms by encouraging citizen participation in administration of the criminal justice system, and increasing public confidence in that system.¹⁸⁸ In addition, the public jury trial promotes the criminal law's important moralizing and educative functions, complementing the law's deterrent effect.¹⁸⁹ The criminal trial is more than a truth-seeking process concerned with justice to the parties; "it is also a drama that the public attends and from which it assimilates behavioral messages."¹⁹⁰ In other words, the substantive legal norms that shape social behavior are derived, in part, from the judicial process.¹⁹¹

186. Peter Aranella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 216 (1983).

187. See *supra* notes 165-85 and accompanying text.

188. The Court has long recognized the importance of the jury in ensuring the community participation in the criminal justice system that is crucial to public confidence in that system. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975) ("[S]haring in the administration of justice [through jury service] is a phase of civic responsibility."); *id.* at 530 ("Community participation in the administration of the criminal law [is] consistent with our democratic heritage [and is] critical to public confidence in the fairness of the criminal justice system.").

189. The moralizing function of the criminal law has been cited as a crucial component of the deterrence that the criminal law is designed to promote. See, e.g., Johannes Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L. & CRIMINOLOGY 176, 179 (1952) ("The idea is that punishment as a concrete expression of a society's disapproval of an act helps us to form and to strengthen the public's moral code . . .").

190. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1360 (1985).

191. Professor Nesson acknowledges that effective general deterrence depends on the public's acceptance of the verdict as a statement about the litigated events. See *id.* at 1360-61. He suggests that such acceptance is facilitated in the context of criminal trials by the secrecy of the jury's deliberations and the use of general verdicts. See *id.* at 1365 ("[T]he general public will rarely learn whether the jury regarded its judgment as a statement about the evidence or a statement about the event."). This precondition to the use of the litigation process to advance the moralizing function of the law may well be significantly weakened in an era in which jurors from the O.J. Simpson case publish books about the trial and make appearances on the Today Show to justify their verdict. Even a brief perusal of the voluminous O.J.-related media analysis suggests that the general public is being exposed to an ever greater extent to the notion of the "reasonable doubt" standard, and the possible divergence between a jury verdict and the "true" facts underlying the litigated events. See, e.g., James M. Kramon, *O.J.'s Jury Did the Right Thing*, BALTIMORE SUN, Dec. 3, 1995, at 1J. To the extent that Court TV and other forums publicize evidence presented at trials, permitting the viewing public to attempt to judge the evidence independently, members of the public are

The use of acquitted conduct in sentencing undermines each of these important interests. First, sentence enhancement on the basis of acquitted conduct, in effect, tells the jury (and the public in general) that the jury's efforts in assessing the evidence and weighing the different charges were of limited importance, overridden by the contrary opinion of one judge. This inevitably detracts from the jury's ability to function as a conduit for community conscience in culpability assessment, diminishing the democratic nature of the criminal justice system, and driving a wedge between the community's sense of appropriate punishment and the criminal sanction actually inflicted. Such a divergence disserves important goals of the criminal justice system.¹⁹² In addition, use of acquitted conduct undermines the civic value of participation in the jury trial process, as well as the public confidence in the system that such participation fosters.¹⁹³ The message that a defendant may permissibly be punished for conduct for which a jury found him not guilty is so counterintuitive to ordinary citizens, that it cannot help but have a negative impact on public confidence in the criminal justice system.¹⁹⁴

In addition, the burden of proof-based rationalization for permitting sentence enhancement on the basis of acquitted conduct¹⁹⁵ is inconsistent with the norm-reinforcing goals of traditional criminal law. Professor Nesson suggests that these substantive legal norms are not assimilated properly unless the public views verdicts as statements about what actually happened, rather than merely as a statement about the proof rule.¹⁹⁶ He explains:

Courts use the ambiguity of the [general] jury verdict to project the verdict as a statement about what happened. Regardless of the thought processes by which jurors arrive at their verdicts, judges in both criminal and civil cases treat jury verdicts as statements about

more likely to draw their own conclusions about the litigated events, robbing the jury verdict of some of its lesson-inculcating authority. See Gail Diane Cox, *Lights! Camera! Justice?* NAT'L L.J., Jan. 29, 1996, at 1, 21 (speculating that acquittals may mean less when viewing public has opportunity to view the evidence in televised cases). Nevertheless, it may be premature to abandon completely the role of the impaneled jury as fact finder, even in the court of public opinion.

192. See *supra* notes 186-91 and accompanying text.

193. See *supra* note 188 and accompanying text.

194. See FRANCIS ALLEN, LAW, INTELLECT, AND EDUCATION 105 (1979) ("Any operating system of law . . . requires the articulation of principles that are . . . comprehensible [to persons subject to the law] not only in the sense of being capable of rational application, but also of appealing to almost instinctual feelings of fitness and propriety.").

195. See *supra* notes 144-46 and accompanying text.

196. See Nesson, *supra* note 190, at 1361.

the litigated events. This institutional acceptance of the verdict justifies the imposition of a sanction on the defendant and furthers the inculcation of the applicable legal rule.¹⁹⁷

To the extent Nesson is correct about this assimilation process,¹⁹⁸ it may be undermined by the law's current approach to treatment of acquitted conduct. Permitting the judge to, in effect, ignore the jury's verdict and impose punishment on the basis of acquitted conduct is inconsistent with a treatment of the jury's finding as a surrogate for discoverable truth. It highlights both the inconclusiveness of the jury's verdict as a statement about the events underlying the prosecution, and the technical distinction between the standards of proof applicable at trial and at sentencing. This approach risks undermining the projection of the substantive norms of the criminal law to the general public. In any event, it clearly casts doubt on the legitimacy of the sentences imposed.

B. The Commission Is the Proper Forum for Addressing Use of Acquitted Conduct Evidence

If the conclusions of the preceding section of this Article are correct, the question becomes, what is to be done about it? Although both Congress and the federal courts clearly have the authority to redress the problems caused by use of acquitted conduct, the Commission is best suited to adopt necessary reforms. The Commission was specifically designed to monitor Guidelines application and promulgate amendments to address policy concerns.¹⁹⁹ Moreover, neither Congress nor the courts have shown any inclination to reconsider the current approach to use of acquitted conduct.²⁰⁰

The Commission's authority to bar consideration of acquitted conduct is beyond serious dispute. Congress delegated to the Commission substantial authority to structure the sentencing discretion of judges, including the authority to restrict judges' reliance on many of the offender characteristics traditionally used in sentencing.²⁰¹ Fun-

197. *Id.* at 1366.

198. *But see supra* note 191 (pointing out some problems with Nesson's analysis).

199. See 28 U.S.C. § 994(o) (1994) (providing that the Commission "periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section").

200. See *supra* notes 129 and accompanying text (citing the Supreme Court's denials of certiorari to cases in which sentences were enhanced on the basis of acquitted conduct); *infra* note 207.

201. See, e.g., *United States v. Brady*, 928 F.2d 844, 851 n.12 (9th Cir. 1991) (discarding "facts that have been rejected by a jury's not guilty verdict"). Thus, the Commission has

damental sentencing policy choices, such as the decision to use a modified real-offense model of sentencing, were delegated to the Commission.²⁰² The Commission could have adopted an offense-of-conviction sentencing model, effectively barring consideration of acquitted conduct in the same way that it has barred or restricted consideration of certain offender characteristics.²⁰³ The Commission clearly has the power to bar consideration of acquitted conduct under the modified real-offense model as well.

The Commission's authority to bar use of acquitted conduct is the best hope for immediate change, given the dearth of practical alternatives to Guideline amendment. The federal appellate courts are essentially unanimous in rejecting constitutional challenges to acquitted conduct evidence,²⁰⁴ and the Supreme Court has given no indication of any intention to weigh in on this issue.²⁰⁵ Moreover, several of the Court's rulings are hostile to such challenges, and the Court does not appear likely to overrule these cases in the near future.²⁰⁶

Congress is an equally unlikely forum for change. The politically inspired need to appear tough on crime, the press of other legislative matters, and the relative obscurity of this issue combine to render it an unlikely candidate for legislative attention in the near future.²⁰⁷ The appropriateness of the use of acquitted conduct in sentencing seems precisely the type of issue Congress empowered the Commis-

restricted consideration of such factors as the defendant's youth (§ 5H1.1), drug or alcohol abuse (§ 5H1.4), past military service (§ 5H1.1), and prior arrest record (§ 4A1.3).

202. See 28 U.S.C. § 994 (1994) (setting out in detail the duties of the Commission, but failing to specify whether the Guidelines should be based on the offense of conviction, real-offense factors or some other model).

203. See *id.*; see also *Lear*, *supra* note 6, at 1192-93 (decrying use of "real-offense" system as expansive).

204. See *supra* note 3 and accompanying text (citing cases where federal appellate courts have rejected constitutional challenges to acquitted conduct evidence). The Ninth Circuit's decision in *Brady* is not to the contrary. The court eschewed a constitutionally based rationale for its holding, basing it instead on a combination of policy concerns and Guidelines interpretation. See 928 F.2d at 852 n.14 (declining to address *Brady*'s constitutional arguments because the court "decide[d] this issue on statutory grounds").

205. Indeed, the Court has exhibited some hesitancy in resolving circuit conflicts in Guidelines interpretation, leaving such resolution to the Commission in most cases. See *Braxton v. United States*, 500 U.S. 344, 348-49 (1991) (suggesting that Commission's authority to revise the Guidelines reduces the need for the Court to resolve conflicts).

206. See *supra* note 149 and accompanying text.

207. See generally Don Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused*, 44 SYRACUSE L. REV. 1079 (1993) (using public choice theory to explain why legislative bodies are generally unwilling or unable to enact provisions protecting the rights of criminal defendants).

sion to address. The Commission should do so.

Finally, Commission action to bar the use of acquitted conduct as a basis for sentence enhancement would further the Commission's statutory mission to reduce unwarranted disparity by eliminating the long-standing split over the permissibility of using acquitted conduct between the courts of the Ninth Circuit and those of every other circuit.²⁰⁸ Currently, similarly situated defendants are treated differently solely on the basis of geographic location, a situation at odds with Congress's intent in creating the Commission.²⁰⁹ Moreover, there is little solace in the fact that only one circuit is in the minority on this issue, given that the Ninth Circuit accounts for more than one of six defendants sentenced under the Guidelines.²¹⁰ Congress explicitly delegated to the Commission the "duty to review and revise the Guidelines" to avoid such inter-circuit variation in sentencing practices.²¹¹

It is appropriate to note here that the Commission's previous rejection of Guidelines amendments designed to curtail use of acquitted conduct imposes no institutional constraint on future action. The Commission has reconsidered its positions on numerous issues, often passing amendments similar to those previously rejected.²¹² Moreover, with President Clinton's appointment of four Commissioners, the

208. See *supra* notes 3-4 and accompanying text. Admittedly, the inter-circuit split in itself is not a justification for barring use of acquitted conduct. The Supreme Court could resolve the split by overruling the Ninth Circuit case law; alternatively, the Commission could resolve the split by clarifying the Guidelines to authorize specifically the use of acquitted conduct. However, in light of the policy arguments against the use of acquitted conduct, the proposal offered in the following pages reflects the best resolution of the current split.

209. See S. REP. NO. 98-225, at 41-46 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3224-29 (criticizing disparity created when similarly situated defendants in different circuits or districts receive disparate sentences). Although similar disparities may result from any of the myriad circuit splits in Guidelines interpretation, this disparity seems especially pernicious because of the fundamental nature of the question involved. See *supra* notes 163-98 and accompanying text.

210. In Fiscal Year 1994, districts within the Ninth Circuit accounted for 18.6% of dispositions under the Guidelines. See U.S. SENTENCING COMM'N, ANNUAL REPORT 1994 [hereinafter 1994 ANNUAL REPORT], at 50 tbl. 18 (listing 7,427 Ninth Circuit dispositions and 39,896 total dispositions).

211. See *Braxton v. United States*, 500 U.S. 344, 348-49 (1991).

212. For example, the 1993 amendments to the money laundering guidelines were similar to a set of amendments proposed, but not adopted, in the previous amendment cycle. See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 490 (1995). Similarly, in 1993 the Commission amended the notes to section 2D1.1 to provide a minor window for downward departure when drug quantities involved in an offense result in a sentence which overstates the defendant's culpability. See *id.* app. C, amend. 485. In earlier years, the Commission had considered and rejected a number of proposed amendments designed to redress this problem.

membership of the Commission has changed dramatically since 1993, providing an excellent opportunity for reexamination of the acquitted conduct issue.²¹³

IV. THE COMMISSION SHOULD AMEND THE GUIDELINES TO PROHIBIT SENTENCE ENHANCEMENT ON THE BASIS OF ACQUITTED CONDUCT

In order to address the distortions and inequities caused by the use of acquitted conduct to enhance offenders' sentences, the Sentencing Commission should amend the Guidelines and accompanying Commentary to specify that sentence enhancement on the basis of acquitted conduct is impermissible. The following sections contain some proposed language, the principal anticipated objections to the proposal, and responses to these objections.

A. *The Proposal*

The precise form of an amendment to bar acquitted conduct in Guidelines sentencing is less important than its clarity and scope of coverage. The amendment should ensure that conduct for which the defendant has been acquitted may not, under any circumstances, be counted as relevant conduct under the Guidelines, nor be used as a basis for upward departure. The Commission also should consider amending the language of certain specific offense characteristic enhancements to eliminate possible disputes regarding the scope of acquittals and to ensure consistent application of the new ban on use of acquitted conduct. An application note addressing the scope of the preclusive effect of verdicts, and possibly some illustrations of the effect of the amendment, might also be helpful.

The proposed amendment to the relevant conduct provisions might look something like this:

§ 1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

(c) Conduct of which the defendant has been acquitted shall not be considered under this section.

Commentary

Application Notes:

213. No formal proposal to address acquitted conduct was considered by the Commission in the 1994-95 amendment cycle.

11. Subsection (c) provides that conduct of which the defendant has been acquitted shall not be considered in determining the offense level under this section. Note, however, that a verdict of acquittal will not, in itself, foreclose in every case application of a Guidelines provision that is based upon conduct similar to the conduct involved in a count of which the defendant was acquitted. It is the intent of this subsection to preclude the court from reconsidering at sentencing only those facts that the court determines must have been resolved in the defendant's favor in an acquittal, the defendant having the burden of persuasion as the proponent of exclusion.

The Commission also should amend the language of section 5K2.0²¹⁴ to specify that acquitted conduct cannot be a basis for departure. This amendment could consist of the following sentence, to be added to the end of the first paragraph of the policy statement:

§ 5K2.0 Grounds for Departure (Policy Statement)

....

The court may not, however, depart on the basis of conduct of which the defendant has been acquitted.

Finally, the Commission will need to consider the effect of the language of certain offense characteristics which differs subtly from that of a corresponding offense. The most notable example is section 2D1.1(b)(1), which provides for an enhancement to a drug trafficking sentence "[i]f a dangerous weapon (including a firearm) was possessed."²¹⁵ This language and the accompanying commentary, which specifies that the enhancement should be applied "if the weapon was *present*, unless it is clearly improbable that the weapon was connected with the offense,"²¹⁶ arguably cover a slightly broader range of conduct than the corresponding statutory provision.²¹⁷ Section

214. See *supra* notes 64-68 and accompanying text.

215. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b) (1995).

216. *Id.* § 2D1.1, application note 3 (emphasis added).

217. See 18 U.S.C. § 924(c) (1994) (enhancing punishment for the defendant who "uses or carries" a firearm "in relation to" a drug trafficking crime or crime of violence); see also *Bailey v. United States*, 116 S. Ct. 501, 505 (1995) (holding that "use" of firearm requires some sort of active employment of the firearm by the defendant; presence of the weapon alone is not a violation of § 924(c)).

2D1.1(b)(1) and similar provisions should be modified to ensure an identity between the Guidelines enhancement and 18 U.S.C. § 924(c), its corresponding statutory provision. Failure to do so, or otherwise to specify that acquittal on a § 924(c) charge prohibits imposition of a firearm enhancement, could lead to disputes about the scope of the jury's acquittal and might diminish the effectiveness of the proposal by permitting judges in some cases to impose the enhancement for presence of the weapon despite the jury's acquittal.

The proposal advocated in this Article is somewhat broader than the proposed amendments rejected in April 1993 and 1994.²¹⁸ In contrast to those proposed amendments, this proposal is not limited to prohibiting use of acquitted conduct as relevant conduct in calculating the applicable Guidelines offense level, but expressly prohibits acquittal-based upward departure as well. In addition, this proposal alters the standards for applying the firearms enhancement to make it consonant with § 924(c). These steps are necessary to fully effectuate the policies outlined in Part III(A) of this Article.²¹⁹

B. Objections to the Proposal and Responses

The Department of Justice (DOJ) opposed, and in April 1993 the Commission rejected, proposed amendments to limit the use of acquitted conduct under the Guidelines' relevant conduct provisions.²²⁰ This section outlines the principal objections articulated by DOJ and the Commissioners and attempts to demonstrate that they are insufficiently weighty to justify retaining existing rules on the use of acquitted conduct.²²¹

218. See *supra* notes 9-12 and accompanying text.

219. As explained above, some modification of the language of current weapons enhancements is necessary to ensure the full collateral estoppel effect of acquittals. See *supra* notes 215-17 and accompanying text. Moreover, it is difficult to conceive of a case in which permitting an acquittal-based upward departure would not violate the interests in acquittal finality and integrity of jury verdicts outlined in Part III(A).

220. DOJ's opposition was outlined in the Statement of Roger A. Pauley, Ex Officio Member to the U.S. Sentencing Commission 3-7 (Mar. 22, 1993) (on file with author) [hereinafter Pauley Statement]. See *supra* note 10 and accompanying text (discussing Commission's rejection of proposed acquitted conduct amendments).

221. This Article addresses these objections not as a criticism of DOJ or the Commissioners, but because these objections constitute the most complete publicly articulated defense of the use of acquitted conduct. As explained earlier, the courts upholding the constitutionality of use of such evidence did not articulate an affirmative policy rationale for its use. In addition, there is little academic defense of use of acquitted conduct evidence. But see Webber, *supra* note 6, at 468-73 (defending use of acquitted conduct).

1. The Slippery Slope to Abolition of Relevant Conduct

One possible objection to any proposal to bar use of acquitted conduct is that it is not sufficiently distinguishable from unadjudicated conduct to warrant special treatment. In other words, why prohibit sentencing judges from enhancing sentences on the basis of acquitted conduct when they can enhance sentences on the basis of the same conduct if it is not charged by the prosecutor? This concern seemed to cause some Commissioners to view adoption of the proposed acquitted conduct amendments as the first step down a slippery slope toward inevitable abolition of relevant conduct in favor of an offense-of-conviction system of punishment.²²² In my view, this perceived link between acquitted conduct and all unadjudicated conduct was central to the Commission's rejection of the proposed amendments.²²³ Unless a reasonable argument can be made that there is a principled distinction between acquitted conduct and unadjudicated conduct, it will be difficult to muster the votes on the Commission to adopt the proposal; the unfairness of use of acquitted conduct in a limited number of cases will be viewed as insufficient to warrant significant modification of the current system.²²⁴

It is understandable that some Commissioners perceived a link between acquitted conduct and unadjudicated relevant conduct. In each case, the defendant receives a higher sentence than otherwise would be imposed, on the basis of conduct for which he was never convicted. Moreover, the ABA Criminal Justice Section, which supported the proposed acquitted conduct amendments, linked them together in urging the Commission to substitute a "conviction offense" approach,²²⁵ thereby highlighting the similarities between acquitted conduct and unadjudicated relevant conduct.²²⁶ Neverthe-

222. Both Chairman Wilkins and Commissioner Carnes raised this issue during the April 6th meeting. See 1993 Commission Meeting, *supra* note 10.

223. I have no documentary evidence of this. However, the general tenor of the Commission's debate over acquitted conduct suggests that this concern underlay much of the opposition to the proposed amendment.

224. Recall that the former Chairman of the Commission and its General Counsel referred to the modified real-offense sentencing policies reflected in the relevant conduct provisions as the "cornerstone" of the Guidelines scheme. See Wilkins & Steer, *supra* note 33, at 495-96. Abandonment of this approach in favor of a pure conviction offense sentencing scheme would require a major overhaul of the entire Guidelines system, a "revolution" in Guidelines sentencing that the Commission understandably would be reluctant to undertake.

225. See *supra* notes 32-34 and accompanying text (documenting the Commission's consideration of a "charge offense" system, under which the sentence is based exclusively on the offense for which the defendant is charged and convicted).

226. See Statement of Steven Salky, Chairman, American Bar Association Section on

less, a principled distinction can be made between acquitted conduct and unadjudicated conduct, and the Commission could rationally draw the line at use of acquitted conduct.

First, the Commission should recognize that acquittal, as a formal exoneration of criminal culpability, is simply unique. Use of acquitted conduct differs from use of unadjudicated conduct in that the former represents repudiation of a formal, legally conclusive confirmation of the accused's legal innocence of the adjudicated charges.²²⁷ Because the jury's verdict represents a formal certification of the defendant's legal innocence, its finality is perceived as a fundamental principle of fairness. As one court explained, "the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime."²²⁸

The special significance of acquittals is further exemplified by the oft-stated desire of criminal suspects to receive a trial in order to achieve exoneration. Typical is a 1993 news story about a male university student who, after being investigated by university disciplinary authorities for an alleged sexual assault, went to the police and demanded that he be charged with rape so he could clear his name.²²⁹

Several state courts have recognized the elevated status of acquittal in the context of sentencing, holding that acquitted conduct, unlike unadjudicated conduct, may not be used in sentencing.²³⁰ This

Criminal Justice, Committee on the U.S. SENTENCING GUIDELINES MANUAL 10 (Mar. 15, 1993) (on file with author). It stated:

We endorse this amendment because it is consistent with the Third Edition of the ABA Standards for Sentencing Alternatives and Procedures [which] provides that the severity of sentences imposed and the types of sanctions imposed should be determined with reference to offense(s) of conviction and not upon the so-called "real offense."

Id.

227. Indeed, *Black's Law Dictionary* defines an acquittal as the "legal and formal certification of the innocence of a person who has been charged with crime." BLACK'S LAW DICTIONARY 24 (6th ed. 1990). Of course, it is widely recognized that "legal" innocence and "factual" innocence are not the same. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-73 (1968) (discussing the distinction); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 707 (1981) (same).

228. *State v. Wakefield*, 278 N.W.2d 307, 308 (Minn. 1979); see also *McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979) ("A not guilty judgment is more than a presumption of innocence; it is a finding of innocence and the courts of this state, including this Court, must give exonerative effect to a not guilty verdict if anyone is to respect and honor the judgments coming out of our criminal justice system.").

229. See Eugene Robinson, *Date Rape in the Kingdom of Victoria*, WASH. POST, Nov. 3, 1993, at C12-13.

230. See e.g., *In re Llewallen*, 590 P.2d 383, 388 n.3 (Cal. 1979); *McNew*, 391 N.E.2d at

view of the nature of acquittal is more consistent with both public perception of the meaning of acquittal, and the usual institutional treatment of verdicts as statements about the litigated events,²³¹ than is the case law describing acquittal as mere absence of proof beyond a reasonable doubt.²³² The bottom line is that acquittal carries a message about the defendant's legal innocence that mere absence of a conviction does not. The public's expectations about acquittal and the policies outlined in Part III(A) are implicated by use of acquitted conduct in a way in which they are not by use of unadjudicated conduct. Differential treatment of acquitted conduct is appropriate on this basis alone.

In addition, practical problems are associated with eliminating from consideration all unadjudicated conduct—problems which this Article's acquitted conduct proposal does not create. First, barring use of acquitted conduct is much less likely than a broader ban on use of unadjudicated conduct to increase the risk of sentencing disparity through the exercise of prosecutorial discretion. Both Congress and the Commission were concerned that charge bargaining could undermine the goals of the Guidelines system by creating disparity between similarly situated defendants.²³³ The Commission's adoption of the modified real-offense sentencing approach embodied in the relevant conduct provisions was designed to limit the impact of prosecutorial discretion on sentencing outcomes.²³⁴ The effectiveness

612; *State v. Cote*, 530 A.2d 775, 783-85 (N.H. 1987); *State v. Marley*, 364 S.E.2d 133, 138-39 (N.C. 1988).

231. See *supra* text accompanying notes 196-97.

232. Professor Albert Alschuler articulated a similar view in the slightly different context of exploring public discomfort with the plea bargaining system, noting:

The compromise of a criminal case suggests that a defendant can be half-guilty and can properly receive half the penalty that he would receive if he were really guilty. Most people probably adhere to the simpler view that the defendant either committed the crime or did not. If he did, he deserves the penalty that an honest-to-God criminal should receive. If he did not (or, more accurately, if his guilt cannot be proven beyond a reasonable doubt), he should not be punished at all. If the criminal law is to serve its purposes, it may be well that most folks-in-the-street adhere to this moralistic view of punishment, rather than to the alternative view that guilt is relative

Alschuler, *supra* note 227, at 706.

233. See Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 505 (1992) [hereinafter Nagel & Schulhofer, *Charging and Bargaining Practices*]; Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 235-52 (1989) [hereinafter Schulhofer & Nagel, *Negotiated Pleas*].

234. See Lear, *supra* note 6, at 1204-05; see also *supra* notes 32-40 and accompanying text (discussing the Commission's actions).

of this approach in restraining widespread charge bargaining and resulting disparities is subject to dispute, and is beyond the scope of this Article.²³⁵ Nevertheless, a substantial risk exists that complete abandonment of real-offense sentencing would create a direct link between the prosecutor's charging decision and the Guidelines sentence, a link the Commission tried to avoid by adopting its modified real-offense system. Such concerns simply are not implicated by limiting reform to elimination of use of acquitted conduct.

Second, elimination of all unadjudicated conduct from sentencing consideration would result in unwarranted sentencing parity. All persons convicted of, for example, drug trafficking are not equally culpable. Some are leaders or organizers, others are mere couriers; some traffic in large quantities, others do not; some pose an added threat to the community from violence, others do not. Unless these culpability factors are written into the statute as elements for offense grading purposes (which, for most federal offenses, they are not), they are not elements of the offense of conviction, and could not be taken into account in a pure conviction offense sentencing scheme. This would reduce the ability of judges to make the graduated culpability assessments necessary to a rational sentencing scheme.²³⁶

2. Departure from Traditional Practice

Another objection, articulated by DOJ and each of the Commissioners voting to reject the 1993 amendment, is that eliminating use of acquitted conduct is a major departure from the long-settled past practice of sentencing judges.²³⁷ One Commissioner characterized such a change as undoing two hundred years of jurisprudence.²³⁸

This objection is not well founded. Merely because the courts have long viewed the use of acquitted conduct as constitutionally

235. Some argue that relevant conduct *increases* the power of prosecutors. See, e.g., Freed, *supra* note 5, at 1714; Heaney, *supra* note 7, at 774.

236. See, e.g., Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9 (1988). As now-Justice Breyer explained: "A bank robber, for example, might, or might not, use a gun; he might take a little, or a lot, of money; he might, or might not, injure the teller. The typical armed robbery statute, however, does not distinguish among these different ways of committing the crime." *Id.*

237. See, e.g., Pauley Statement, *supra* note 220, at 4 (arguing that the proposed amendment would "constitute a dramatic departure from the constitutional standards courts have historically applied to both pre-guideline and guidelines cases and would reverse a long line of well-settled appellate decisions which permit judges to rely on [acquitted conduct] evidence").

238. See 1993 Commission Meeting, *supra* note 10, at 3 (Statement of Commissioner Julie E. Carnes).

permissible does not mean that it is sound sentencing policy. If changing circumstances have rendered past practice inappropriate, that past practice should be changed. The Guidelines have altered the sentencing process in a manner and to an extent requiring reconsideration of past practice on use of acquitted conduct. The use of acquitted conduct proliferated in the context of a rehabilitative system, in which judicial discretion was nearly unbridled, and a premium was placed on availability of the greatest possible range of information for use in fashioning a sentence to fit the offender.²³⁹ Congress clearly rejected the rehabilitative model of sentencing in adopting the SRA,²⁴⁰ substituting a system emphasizing the dual goals of proportionate punishment and crime control through deterrence and incapacitation. Under the Guidelines system, a discrete and identifiable quantum of punishment associated with specific findings is present, made on the record, and subject to appellate review.²⁴¹ Thus, the Guidelines system has eliminated many of the practical difficulties in controlling sentencing judges' use of acquitted conduct associated with pre-Guidelines practice.²⁴² Both the defendant and the appellate court can clearly determine when a sentence has been enhanced on the basis of acquitted conduct. Therefore, its use can now be identified and eliminated.

3. Inconsistent or Irrational Verdicts

Another possible objection to this proposal is that it would give effect to verdicts that are inconsistent, mistaken, or even irrational.²⁴³ Clearly, juries reach verdicts in some cases that may strike observers, including the presiding judge, as incorrect. However, our system of criminal justice requires that we live with such verdicts.²⁴⁴ The inviolability of "not guilty" verdicts, even those embodying outright nullification, serves important interests. The jury acts as a restraining influence on governmental authority by acting as a check on overzealous prosecution and arbitrary judicial decisionmaking.²⁴⁵ The

239. See *supra* notes 90-126 and accompanying text.

240. See S. REP. NO. 98-225, at 38 (1983), reprinted in 1984 U.S.C.C.A.N 3182, 3221 ("In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. . . . [A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting. . . .").

241. See *supra* notes 21-26 and accompanying text.

242. See *supra* notes 125-26 and accompanying text.

243. See, e.g., 1993 Commission Meeting, *supra* note 10 (Statement of Commissioner Julie E. Carnes).

244. See *supra* notes 172-76 and accompanying text (discussing jury nullification).

245. See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (describing the jury as an

jury also represents both the actual and symbolic participation of citizens in the criminal justice system, a participation central to the legitimacy of that system.²⁴⁶

The difficulties inherent in this “bad verdicts” objection are apparent by looking at the sentencing court’s analysis in *United States v. Juarez-Ortega*,²⁴⁷ a case in which the Fifth Circuit upheld a sentence enhancement despite an acquittal for violation of 18 U.S.C. § 924(c).²⁴⁸ The Fifth Circuit’s decision contains an excerpt of the sentencing transcript which reveals that the sentencing judge simply disagreed with the jury’s not guilty verdict:

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

[COUNSEL]: Your Honor,—

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

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

THE COURT: Well, I’ll tell you something: I have been disappointed in jury verdicts before, but that’s one of the most important ones, because what it did, it set up a disparity in result between the two defendants. Your client was consistently selling cocaine from his apartment and using a firearm. The fact is that the officers came in and testified that it was in your client’s waistband and described, had an officer on the stand, a man who is an ATF agent, who is capable and knows what a firearm looks like, telling them, “This is what I saw.”

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

“inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge”).

246. See *supra* notes 186-98 and accompanying text.

247. 866 F.2d 747 (5th Cir. 1989) (*per curiam*).

248. See *id.* at 749.

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

THE COURT: Well, you can take it up with an appellate court, because I've made my findings on the record.²⁴⁹

From the record reproduced in the appellate opinion, it is difficult to say whose view of the facts is "correct"—the judge's or the jury's. The Fifth Circuit's affirmance was based on its conclusion that the sentencing judge did not abuse his discretion.²⁵⁰ What is clear, however, is the fact that the jury trial is designed to achieve an assessment of legal culpability in the face of factual uncertainty. The reader of the *Juarez-Ortega* opinion cannot know whether the defendant "really" possessed a weapon in connection with drug trafficking. Society, through the mechanism of the jury trial, attempts to make a considered judgment on the basis of the evidence that is available. The jury is the body assigned the task of assessing legal responsibility, which triggers the authority of the state to impose punishment. The ease and assurance with which the sentencing judge in *Juarez-Ortega* cast aside the jury's finding of no legal guilt is cause for no small amount of discomfort.²⁵¹ Had the weapons charge in *Juarez-Ortega* been the only charge before the jury, its verdict would have been conclusive.²⁵² What is the rationale for disregarding the jury's verdict where the defendant is adjudged guilty of related charges? The possibility of jury "error" provides no stronger justification for disregarding a verdict in the latter situation than in the former. Indeed, an "erroneous" acquittal in a one-count case permits the defendant to go free, while an erroneous partial acquittal would merely result in a reduced sentence under the proposal advanced in this Article.

In effect, the "bad verdict" objection represents an implicit conclusion that achievement of a "correct" sentencing outcome outweighs the process values represented by the jury system. This conclusion diminishes the value of the jury as a check on government power and as a source of community participation in the criminal jus-

249. *Id.* at 748-49.

250. *See id.* at 749.

251. *See* Alschuler, *supra* note 227, at 708. Professor Alschuler explains: "A prosecutor or other observer who asserts that a defendant is 'factually' guilty although this defendant might not be convicted at trial simply presumes his own superiority as a fact finder to the body that has been authorized by law to make this determination." *Id.* at 708-09.

252. *See supra* notes 129-36 and accompanying text.

time process.²⁵³ It is not a persuasive ground for permitting the continued use of acquitted conduct in sentencing.

4. Effect on Charging and Plea Practices

Another objection raised by DOJ in opposing the 1993 amendments is the potential impact on prosecutorial charging practices and in defendants' plea practices.²⁵⁴ This argument has two prongs. First, DOJ argues that defendants who currently plead guilty when faced with several counts of similar offenses would have the incentive to go to trial in an effort to defeat one or more of these multiple counts.²⁵⁵ This would increase the percentage of cases going to trial, placing additional burdens on an already strained justice system.²⁵⁶

Clearly, changes in sentencing practices can alter the dynamics of plea bargaining, sometimes in an unanticipated manner.²⁵⁷ Moreover, predicting the impact of proposed changes on litigant behavior is exceedingly difficult. Indeed, the explosion in criminal trials predicted as a result of the operation of the Guidelines did not materialize.²⁵⁸ However, DOJ's argument is facially implausible. It requires us to believe that defendants will be materially influenced in their decision to go to trial not by the strength of the evidence, the potential length of incarceration they face if convicted, or the discount in sentence they might expect to receive by pleading guilty,²⁵⁹ but by the remote possibility of a partial acquittal and ensuing sentence enhancement on the basis of acquitted conduct. This factor is simply too speculative to be a major consideration for a rational defendant. Moreover, limited empirical evidence currently available suggests that DOJ's concerns are overblown. The trial rate in the Ninth Circuit, the only circuit in which use of acquitted conduct is not

253. See *supra* notes 165-98 and accompanying text.

254. See Pauley Statement, *supra* note 220, at 6-7.

255. See *id.*

256. See *id.*

257. See Schulhofer & Nagel, *Negotiated Pleas*, *supra* note 233, at 271-86 (discussing changes in plea bargaining practices associated with the Guidelines).

258. For example, in Fiscal Year 1994, the guilty plea rate of 90.5% was several percentage points higher than the guilty plea rate prevailing in pre-Guidelines practice. See 1994 ANNUAL REPORT, *supra* note 210, at 47 fig. D).

259. See Breyer, *supra* note 236, at 28-29 (highlighting the fact that the Guidelines' two-level discount for "acceptance of responsibility" effectively amounts to a 20-30% sentence reduction for pleading guilty). But see U.S. SENTENCING GUIDELINES MANUAL § 3B1.1, appendix notes 2-3 (1995) (providing that acceptance of responsibility adjustment may sometimes apply to a defendant who goes to trial, and may sometimes be denied to a defendant who pleads guilty).

permitted, was only 6.4% in fiscal year 1994,²⁶⁰ nearly three percentage points below the national rate of 9.5%.²⁶¹

Second, DOJ contends that eliminating the availability of acquitted conduct evidence at sentencing might alter prosecutorial charging decisions, in its words, "creat[ing] a temptation for prosecutors to decline to bring charges that they fear could result in acquittal and wait to bring supporting facts to the court's attention at sentencing."²⁶² If true, this threat of prosecutorial sandbagging of defendants has troubling implications; it suggests a view of prosecutorial decision-making grounded primarily in raw tactical considerations, and which is beyond the control of DOJ officials in Washington. If this is, in fact, how federal prosecutors operate, systemic sentencing disparities may be arising from the exercise of prosecutorial discretion that neither the Commission, nor anyone else, is currently capable of addressing. Nevertheless, this objection, like DOJ's fear of a reduction in guilty pleas, is rather implausible. It suggests that prosecutors who believe evidence of criminal activity is strong enough to convince a judge to impose criminal sanctions would forego the opportunity for a conviction, merely for tactical sentencing purposes. This view of prosecutorial decision-making is inconsistent with a recent study of plea practices under the Guidelines which suggests: (1) that prosecutors focus primarily on conviction rather than sentencing;²⁶³ and (2) that to the extent prosecutors focus on Guidelines sentencing, they generally act in concert with defense attorneys to minimize sentencing exposure.²⁶⁴ In other words, while it theoretically would be possible for prosecutors to sandbag defendants in the manner suggested by DOJ, studies of their actual behavior suggest that they will be unlikely to do so.

Moreover, even if DOJ is correct, this argument does not coun-

260. See 1994 ANNUAL REPORT, *supra* note 210, at 50 tbl.18.

261. See *id.* at 47 fig. D. Of course, this simple comparison does not control for a host of other factors that might influence guilty plea rates. It suggests, however, that a prohibition on use of acquitted conduct is unlikely to provoke an avalanche of trials.

262. Pauley Statement, *supra* note 220, at 7.

263. Nagel & Schulhofer, *Charging and Bargaining Practices*, *supra* note 233, at 535, 546-48. Nagel and Schulhofer found that prosecutors often reduce sentencing exposure to induce pleas, and that many prosecutors exhibit a lack of familiarity with the details of the Guidelines, which results in reduced sentence exposure. See *id.* Both the willingness to trade available sentence exposure for a quick plea, and the lack of familiarity with the Guidelines suggest that prosecutors are focused principally on obtaining conviction, and only secondarily (if at all) on obtaining maximum sentence exposure.

264. See *id.* at 535, 557. Nagel and Schulhofer found that Guideline circumvention was primarily a "covert vehicle for downward departure," and resulted from the desire to avoid what prosecutors in particular cases perceived as unfair Guidelines sentences. See *id.* at 557.

sel against elimination of acquitted conduct evidence in sentencing. Although the behavior described by DOJ raises serious questions of fairness and possible disparity in sentencing, it does not implicate the central double jeopardy or jury integrity interests undermined by use of acquitted conduct.²⁶⁵ Moreover, if significant unfairness arising from prosecutorial charge manipulation does occur, the best response would be to address it directly, rather than simply to acquiesce to a flawed status quo. If the proposal advanced here is adopted, the Commission will be able to monitor closely the impact of elimination of acquitted conduct on prosecutorial practices. If the sandbagging feared by DOJ does occur, the Commission could then consider amending the Guidelines to prohibit sentence enhancement on the basis of conduct for which federal criminal charges could have been brought.²⁶⁶ The need for such remedial action is unlikely.

5. Litigation over Verdict Scope

A final major objection to the proposal is that it might result in uncertainties regarding the scope of the jury's verdict, generating litigation over the preclusive scope of acquittals and increasing the administrative burdens of the sentencing process.²⁶⁷ Although the preclusive scope of acquittal is not necessarily always readily apparent, this objection is insufficiently weighty to carry the day. The cases in which acquitted conduct is potentially at issue are relatively few.²⁶⁸ In most of these cases, the preclusive effect of the jury's result will be clear.²⁶⁹ If the defendant is convicted on one count of selling five grams of crack and acquitted on two other counts, the weight of the drugs alleged to have been sold in the two acquittal counts is not considered for relevant conduct purposes. This is straightforward. The

265. See *supra* notes 163-98 and accompanying text.

266. This is essentially the "infield fly rule" position advocated by Professor Berger. See *supra* note 100. This Article does not advocate that position, in part because, as a practical matter, the Commission is not ready to reexamine that broad a spectrum of real-offense sentencing, and, in part, because of concerns about the workability of the proposal. Nevertheless, if DOJ is right about prosecutorial manipulation, this is a possible solution. In any event, the threat of this solution may deter serious manipulation of the rules by prosecutors.

267. See Pauley Statement, *supra* note 220, at 5-7.

268. See 1993 Commission Meeting, *supra* note 10 (statement of Chairman Wilkins) (stating that in his experience, acquitted conduct issues rarely arise). Unfortunately, the Commission's data does not specifically track use of acquitted conduct, so exact figures on the number of cases affected by this Article's proposal are unavailable. See generally 1994 ANNUAL REPORT, *supra* note 210.

269. See, e.g., *United States v. Pineda*, 981 F.2d 569, 571 (1st Cir. 1992); *United States v. Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992); see also *supra* notes 52-63 (discussing the *Pineda* and *Boney* decisions).

likelihood of confusion is further reduced by altering the specific offense characteristics of provisions such as section 2D1.1 to conform with their statutory counterparts.²⁷⁰ It may further be reduced by the use of supplemental special verdict forms in cases where such confusion may arise.²⁷¹ In short, litigation over the scope of acquittal-based preclusion is likely to be limited. To the extent it does occur, it seems a small price to pay for the benefits outlined in Part III(A) of this Article.

CONCLUSION

Some might argue that this proposal, which does not address such issues as use of real-offense sentencing and evidentiary standards at sentencing, does not go far enough to solve the perceived procedural deficiencies in Guidelines sentencing. Admittedly, eliminating the use of acquitted conduct in Guidelines sentencing is a relatively minor change that would affect a small percentage of cases decided under the Guidelines. Nevertheless, its importance should not be underestimated. Use of acquitted conduct creates an obvious and easily understood appearance of injustice that cries out to be redressed. The problems inherent in its use can be solved easily by a Commission that is likely to be unwilling at this time to entertain the possibility of broader procedural reform and the greater administrative costs and other tradeoffs associated with such reform. Although the Commission has rejected this limited reform once, it should realize, upon further reflection, that use of acquitted conduct is a relic of the pre-Guidelines era that disserves important interests. Its elimination is a painless way to improve the administration of justice and to help fulfill the Guidelines' promise of illuminating and reforming pre-Guidelines sentencing policies and practices.

270. See *supra* notes 215-17 and accompanying text.

271. See Colleen P. Murphy, *Jury Factfinding of Offense-Related Sentencing Factors*, 5 FED. SENTENCING REP. 41, 42-43 (1992) (urging use of special jury findings for material sentencing facts).

APPENDIX I: SENTENCING TABLE—in months of imprisonment

	Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10,11,12)	VI (13 +)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone D	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

