St. John's Law Review

Volume 84, Fall 2010, Number 4 Article 4

Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing

Claire McCusker Murray

HARD CASES MAKE GOOD LAW: THE INTELLECTUAL HISTORY OF PRIOR ACQUITTAL SENTENCING

CLAIRE MCCUSKER MURRAY†

† Law Clerk to Hon. Brett M. Kavanaugh, U.S. Court of Appeals for the D.C. Circuit, 2009–2010; J.D., Yale Law School, 2009; M. Phil., Classics, Trinity College, University of Cambridge, 2006; Diplôme d'Etudes Approfondies, Etudes Politiques, L'Ecole des Hautes Etudes en Sciences Sociales, 2005; A.B., Government, Harvard University, 2004. With thanks for helpful comments on previous drafts to Judge Nancy Gertner and Professors Kate Stith, Reva Siegel, and Robert Post, as well as to the Advanced Topics in Constitutional Law Workshop and the Sentencing Seminar at Yale Law School. The views expressed are the author's own.

INTRODUCTION

The Supreme Court's 1997 decision in *United States v. Watts*, which held that sentencing judges may consider conduct of which a defendant has previously been acquitted,[1] evidenced a curious set of dissonances. On the one hand, the Court represented its holding as a foregone conclusion, foreshadowed by the unified agreement of "[e]very other Court of Appeals [excepting the Ninth]," and dictated by the "clear implications of 18 U.S.C. § 3661, the Sentencing Guidelines, and this Court's decisions."[2] Indeed, so sure was the Court of *Watts*'s outcome that it decided the case without full briefing or oral argument.[3] On the other hand, when *Watts* was decided, the legitimacy of considering prior acquitted conduct in sentencing was hardly a venerable or entrenched institution. Indeed, *Watts* placed the Court's imprimatur on a sentencing practice that courts had approved only with carefully nuanced restraints merely twenty-five years before.[4]

Likewise, on the one hand, the *Watts* opinion was released to "virtually no attention."[5] On the other hand, the practice legitimated by the decision was controversial. Before the

---

[1] United States v. Watts, 519 U.S. 148, 149 (1997) (per curiam).

[2] *Id.*

[3] *See id.* at 171 (Kennedy, J., dissenting).

[4] *See, e.g.*, United States v. Sweig, 454 F.2d 181 (2d Cir. 1972).

[5] Elizabeth E. Joh, Comment, *"If It Suffices To Accuse":* United States v. Watts *and the Reassessment of Acquittals*, 74 N.Y.U. L. REV. 887, 913 (1998).

decision came down, the U.S. Sentencing Commission had listed "developing options to *limit* the use of acquitted conduct at sentencing" as one of its "[p]riority issues for the 1996–97 amendment cycle."[6] Moreover, the defense bar later reported "a growing chorus of outrage by judges across the nation at a sentencing system that treats alike conviction or acquittal, calling it 'bizarre,' 'dangerous,' and a 'blatant injustice.' "[7] The scholarly consensus, too, was universally skeptical of the practice's prudence. While *Watts* would receive little analysis, and most of that in the course of scholarly works on related topics,[8] all the analysis it did receive was negative.[9]

How did the Court come to nonchalantly ratify a relatively novel sentencing practice universally regarded by onlookers with opprobrium?[10] The mystery extends beyond the four corners of

---

[6] Sentencing Guidelines for United States Courts, 61 Fed. Reg. 34,465 (July 2, 1996).

[7] Amy Baron-Evans, *Supreme Court OKs Acquitted Conduct, Sentencing Commission Invites Comment on Alternatives*, CHAMPION, Mar. 1997, at 62, 62.

[8] *See, e.g.*, Marguerite A. Driessen, *Challenging the Irrelevant Acquittal*, 11 GEO. MASON L. REV. 331, 333 (2002) (using *Watts* as a case-study, proving the new irrelevance of acquittals in the criminal justice system); Peter Erlinder, *"Doing Time" . . . After the Jury Acquits: Resolving the Post-*Booker *"Acquitted Conduct" Sentencing Dilemma*, 18 S. CAL. REV. L. & SOC. JUST. 79, 100 (2008) (arguing that *Watts* draws the line between admissible and inadmissible relevant conduct in the wrong place); Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 422 (1999) (criticizing *Watts* as a jury-undermining aspect of the Sentencing Guidelines); Amy D. Ronner, *Punishment Meted Out for Acquittals: An Antitherapeutic Jurisprudence Atrocity*, 41 ARIZ. L. REV. 459 (1999).

[9] As an under-studied Supreme Court case, *Watts* spawned a small cottage industry of student notes. These, too, were uniformly negative on the merits of sentencing a defendant on the basis of charges for which he had previously been acquitted. For a representative sample, see, for example, Joh, *supra* note 5, at 890 (criticizing *Watts* for failing to take into account the proper expressive meaning of acquittals); Jeff Nicodemus, Note, Watts v. United States*: The Misguided Approval of a Sentencing Court's Authority To Consider Acquitted Conduct During Sentencing*, 25 AM. J. CRIM. L. 437, 470 (1998) (arguing that treating an acquittal like a conviction is "unconscionable"); Marvin Sprouse, Note, *A Sentence for Acquittal: The Supreme Court Holds That Sentences May Be Enhanced for "Conduct" for Which Persons Have Been Tried and Acquitted:* United States v. Watts, *117 S. Ct. 633 (1997)*, 28 TEX. TECH L. REV. 963, 997 (1997) (characterizing *Watts* as "legal sophistry"); Sandra K. Wolkov, Note, *Reasonable Doubt in Doubt: Sentencing and the Supreme Court in* United States v. Watts, 52 U. MIAMI L. REV. 661, 680 (1998) (arguing that *Watts* fosters a "presumption of guilt").

[10] Unlike those cases in which the approval of an unpopular practice is traced by some to ideology, *Watts* was a per curiam 7-2 decision, with one member of each ideological "wing" of the court penning a dissent. *See* Watts v. United States, 519

the *Watts* decision to the virtual unanimity of the courts of appeals—relied upon by the *Watts* Court—in favor of the use of prior acquitted conduct at sentencing.[11] To what do we attribute this confluence of the circuits in favor of a practice characterized both by its novelty and, according to the scholarly consensus, its imprudence?

This Article attempts to answer those questions both historically and theoretically. On a historical level, it traces the heretofore unexamined course of the congressional, judicial, and administrative actions leading from a pre-1970s sentencing regime that viewed any use of extra-trial evidence in sentencing as constitutionally suspect to the 1997 case that embraced prior acquittal sentencing as a foregone conclusion. On a more theoretical level, the Article traces the justification for prior acquittal sentencing to two doctrinal tensions: the differing goals of trials and sentencing and the semiotic gap between acquittal and innocence. As outside forces exerted pressure on those two tensions, the case for prior acquittal sentencing grew more compelling. In response, Congress twice chose to modify the statutory regime governing prior acquittal sentencing, codifying it in more categorical terms. Each codification encouraged judges to mechanize their use of prior acquitted conduct at sentencing, at times leading to instances of prior acquittal sentencing blatantly at odds with the regime's underlying logic. The Sentencing Guidelines continued that mechanization, effectively rendering the use of prior acquitted conduct at sentencing automatic.

In the wake of *Booker* and *Watts*, however, judges have a new opportunity to reassert discretion in the area of prior acquittal sentencing. This Article concludes by exhorting

---

U.S. 148 (1997) (per curiam); *id.* at 159 (Stevens, J., dissenting); *id.* at 170 (Kennedy, J., dissenting).

[11] *Id.* at 149 n.1 (majority opinion) (citing United States v. Boney, 977 F.2d 624, 635–36 (D.C. Cir. 1992)); United States v. Milton, 27 F.3d 203, 208–09 (6th Cir. 1994); United States v. Coleman, 947 F.2d 1424, 1428–29 (10th Cir. 1991); United Sates v. Averi, 992 F.2d 765, 765–66 (11th Cir. 1991); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 180–82 (2d Cir. 1990); United States v. Fonner, 920 F.2d 1330, 1332–33 (7th Cir. 1990); United States v. Dawn, 897 F.2d 1444, 1449–50 (8th Cir. 1990); United States v. Mocciola, 891 F.2d 13, 16–17 (1st Cir. 1989); United States v. Ryan, 866 F.2d 604, 608–09 (3d 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).

sentencing judges to do so actively by: (1) scrutinizing evidence of prior acquitted conduct for indicia of reliability and (2) balancing the good of accuracy in sentencing with the compelling public policy reasons weighing against any introduction of prior acquitted conduct at sentencing.

In so arguing, the Article proceeds as follows: Part I begins the history of prior acquittal sentencing at the *Watts* decision's clearest progenitor, *Williams v. New York*,[12] the first American case to hold that extra-trial evidence may be used at sentencing. The *Williams* decision is notable in two respects. First, *Williams* reveals the underlying logic justifying prior acquittal sentencing: because sentencing's aims require broad truth-seeking, prior acquittal sentencing is defensible in the narrow set of cases where a prior acquittal indicates not innocence but merely a failure by the prosecution to meet an exacting burden of proof. Second, *Williams* provides one potential model on which a prior acquittal sentencing regime could be patterned. That is, *Williams* held that extra-trial evidence is not per se excluded at sentencing, but did not extend blanket approval to all uses of prior acquitted conduct at sentencing. The minimalism of that holding had the dual effect of: (1) emphasizing the existence of judicial discretion *not* to consider prior acquitted conduct at sentencing and (2) leaving later sentencing courts open to as-applied challenges of their use of prior acquitted conduct in sentencing. In so doing, it indirectly forced courts to consider the logical justifications for prior acquittal sentencing and encouraged them to scrutinize external indicia of reliability.

Part II examines the first of the changes that altered the *Williams* baseline: the passage of 18 U.S.C. § 3577, the 1970 statute affirming the use of prior acquitted conduct in sentencing, on which the *Watts* Court based much of its decision. Through a detailed analysis of the heretofore unexamined legislative and enaction history of § 3577, Part II identifies the passage of § 3577 as a congressional backlash against the use of the rules of evidence for purposes other than ensuring the reliability of evidence presented in court. This backlash was stimulated, the legislative history will show, both by the corruption of the legal system by organized crime and by the new evidentiary rules formulated by the Warren Court during its

[12] 337 U.S. 241 (1949).

"criminal procedure revolution"—particularly the Exclusionary Rule incorporated against the states by *Mapp v. Ohio*.[13] Both stimuli served to enlarge the class of cases in which acquittal indicated something other than innocence. Congress's response was 18 U.S.C. § 3577, a statute that codified *Williams*'s result without the benefit of its reasoning. Section 3577 differed markedly from *Williams* in: (1) emphasizing the absence of limits on the admission of prior acquitted conduct at sentencing and (2) providing a safe harbor to lower courts against reversal for improper prior acquittal sentencing.

Part III contrasts the differing effects of *Williams* and of § 3577 on the decisions of lower courts by examining a naturally occurring controlled experiment. In the wake of § 3577's passage, several courts of appeals reviewed decisions that had relied on prior acquitted conduct as a sentencing factor. While some of those cases viewed the issue as governed by § 3577, others deemed *Williams* to be the controlling authority. Comparison of the two lines of cases is revealing: Those cases governed by § 3577 betray a mechanized application of a text whose import and underlying justifications they fail to grasp, while those cases following *Williams* demonstrate a thoughtful consideration of the logic underlying prior acquittal sentencing, combined with an attentive scrutiny of the underlying factual evidence for indicia of reliability.

Part IV examines the next major development in prior acquittal sentencing: the promulgation of the Federal Sentencing Guidelines ("the Guidelines"). By incorporating § 3557 and instructing judges to consider all relevant conduct, the Guidelines effectively transformed § 3557 from a statute permitting prior acquittal sentencing to one mandating prior acquittal sentencing. The effect was immediate. In the wake of the Guidelines' promulgation, a sharp uptick in the number of prior acquittal sentencings rendered under § 3557 occurred. These cases partook of the mechanization widely identified as inherent to Guidelines-based sentencing. Post-Guidelines prior acquittal sentencing exhibited a strong tendency to decide cases through statutory interpretation of § 3557, rather than by considering the goals of sentencing and the underlying justifications of prior acquittal sentencing.

---

[13] 367 U.S. 643 (1961).

Part V turns to the *Watts* decision with which this Article opened. By Part V, the decision will seem a foregone conclusion, dictated by the triple-threat of *Williams*, § 3577, and the Guidelines. The formulation of the *Watts* holding is significant in two respects, however. First, its framing is more akin to *Williams*'s holding than it is to § 3577. By its negative phrasing as the denial of any per se prohibition on the use of prior acquitted conduct at sentencing, *Watts* both leaves room for as-applied challenges to particular uses of prior acquitted conduct and encourages sentencing judges to exercise discretion when deciding whether or not to engage in prior acquittal sentencing. Second, *Watts*'s holding specifically incorporates a standard for evidentiary reliability into its test for the admissibility of prior acquitted conduct at sentencing.

Part VI addresses the future of prior acquittal sentencing after *Booker*. In a post-Guidelines regime, judges have great discretion as a matter of law with respect to prior acquittal sentencing. Part VI argues that they should reassert that discretion, at the very least scrutinizing prior acquitted conduct for indicia of reliability prior to admission. Moreover, it argues that certain policy considerations weigh against the use of prior acquitted conduct as a sentencing factor even in the narrow class of cases where that use is justified by the logic of sentencing. Even in that class of cases, Part VI posits, judges should weigh those policy consideration against the good of accuracy in sentencing when exercising their discretion.

I. *WILLIAMS V. NEW YORK*: EXTRA-TRIAL EVIDENCE AT SENTENCING

The use of prior unconvicted conduct as a sentencing factor first came before the Supreme Court in the 1949 case, *Williams v. New York*. In that case, the Court held that the Due Process Clause did not prohibit a sentencing judge from relying on a presentence report containing information about the defendant's prior uncharged crimes that would not have been admissible at trial.[14]

As the federal government's first foray into the issue of using extra-trial evidence at sentencing, *Williams* serves as the point of departure for analysis of prior acquittal sentencing. *Williams*'s

[14] Williams v. New York, 337 U.S. 241, 250–51 (1949).

approach to the logically prior question of uncharged conduct in sentencing is consistent with the later *Watts* Court's reasoning with respect to prior acquittal sentencing. Nonetheless, the two decisions also demonstrate important differences. One of this Articles's central tasks is to trace and explain prior acquittal sentencing's journey from *Williams* to *Watts*, before evaluating that transformation normatively and suggesting a course of action for the future.

A. Background and Holding

Nearly half a century before the *Watts* decision, Samuel Titto Williams was convicted of first-degree murder for a killing that occurred during a robbery. The jury, which was not presented, per the Rules of Evidence,[15] with evidence of Williams's alleged prior misdeeds, recommended life imprisonment.[16] Five weeks later, after a statutory pre-sentence investigation report had been filed with the judge, a sentencing hearing was held. The presentence report included "accusations, based on hearsay unsworn statements of various persons with whom appellant was not confronted and as to whom he was afforded no opportunity for cross examination or rebuttal, that appellant had been guilty of other crimes."[17] These allegations reflected alleged conduct with which Williams had never been charged; as such, they were untried in any court of law.

The defendant protested his innocence, but the sentencing judge imposed the death penalty on him.[18] In a departure from typical practice, the sentencing judge chronicled his reasons for the upward departure from the jury's sentence in great detail. From the presentence report, the judge had apparently "learned" that the defendant had committed nearly thirty earlier burglaries, none of which had resulted in convictions, but to many of which he had confessed or been identified as the perpetrator.[19] The report also contained certain first-hand accounts, including one by a seven year-old girl alleging that she

---

[15] FED. R. EVID. 404 (excluding character evidence of other crimes, wrongs, acts, or habits unless subject to various exceptions).

[16] *Williams*, 337 U.S. at 242.

[17] Brief for Appellant-Defendant at 4, *Williams*, 337 U.S. 241 (No. 671).

[18] *Williams*, 337 U.S. at 244.

[19] *Id.*

was sexually assaulted by the defendant,[20] leading the sentencing judge to conclude that Williams "possessed a 'morbid sexuality' " and to "classif[y] him as a 'menace to society.' "[21]

B. Underlying Rationales: Trial and Sentencing Distinguished

An examination of the *Williams* decision reveals that it rests—at times implicitly—on two related rationales: (1) the differing epistemological goals of trials and sentencing and (2) the relationship between the goals of trials and the evidentiary restrictions imposed thereon. It is argued below that these two rationales plausibly lay the groundwork to justify prior acquittal sentencing—but only in the narrow set of cases where defendants' acquittals result from the evidentiary restraints imposed on trials rather than their actual innocence. Before addressing prior acquittal sentencing, however, these two rationales and their interrelation must be considered.

The evidentiary gap between trial and sentencing occurs precisely because the goals of trials differ from those of sentencing hearings. That is, trials aim not to convict the guilty and acquit the innocent, but rather only to achieve the more modest goal of convicting those defendants whose guilt with respect to a given crime has been proven beyond a reasonable doubt: "Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged."[22] Sentencing, on the other hand, has the more ambitious aim of "individualizing punishment[ ]"[23] to the individual character of a given offender. To encompass sentencing's broad goals, a sentencing judge must, above all, strive to see a defendant as he really is[24]: "Highly relevant—if not essential—to [the sentencing

---

[20] Brief for Appellant-Defendant at 8–9, *Williams*, 337 U.S. 241 (No. 671).

[21] *Williams*, 337 U.S. at 244.

[22] *Id.* at 246–47; *see also In re* Winship, 397 U.S. 358, 364, 372 (1970) ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. . . . [W]e do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.").

[23] *Williams*, 337 U.S. at 249.

[24] This goal of "seeing the defendant as he really is" is embodied in the Guidelines' adoption of elements of "real-offense sentencing" as opposed to "charge-offense sentencing." For a critical overview, see David Yellen, *Illusion, Illogic, and*

judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."[25] This aim of seeing the defendant as he truly is is best served, in the Court's view, by allowing as much information as possible to be available to the sentencing judge: "[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."[26]

Here, then, is the purest account of the Court's decision to allow extra-trial evidence at sentencing: To determine whether or not a presumptively innocent man should face the stigma of criminal conviction, trials employ rules of evidence that allocate most of the risk of error onto the prosecution—often forgoing potentially probative evidence in order to avoid the risk bias to the defendant.[27] Many of the rules of evidence applicable at trial, from the heightened burden of criminal proof at trials to the exclusion of hearsay and character evidence, can be justified by this rationale.[28] Once that high threshold has been cleared and a defendant has been convicted, however, the state is no longer willing to forgo potentially probative evidence before it. The allocation of error changes as the state's role shifts from protector of the innocent to seeker of truth.

Once a defendant is convicted, the state has a weighty responsibility both to the defendant and to the rest of society to evaluate the defendant as accurately as it can in order to impose upon him the sentence most likely to rehabilitate him, to deter others from crime, to incapacitate him if he is a danger to himself or others, and to do justice in making up for his crime.[29] Each of

---

Injustice: Real-Offense Sentence and the Federal Sentencing Guidelines, 78 MINN. L. REV. 403 (1993).

[25] *Williams*, 337 U.S. at 247.

[26] *Id.*

[27] ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 1 (2005) (The Rules of Evidence were "designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct."); *accord Williams*, 337 U.S. at 247.

[28] *See* STEIN, *supra* note 27, at 183–97.

[29] *See Williams*, 337 U.S. at 248 n.10 (sentencing judge must have full information in order to sentence so as to bring about rehabilitation of the defendant); *accord* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2010) (detailing the goals of

these tasks requires that the sentencing judge form as accurate a picture as possible of the character of the defendant being sentenced. To do these tasks well, the *Williams* Court reasons, the sentencing judge's hands cannot be tied by the full panoply of restrictions found in the Rules of Evidence. Rather it is "necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."[30] Indeed, the Court finds knowledge of prior offenses, charged or uncharged, to be particularly important to understanding the defendant's character due to the "sharp distinction[ ] . . . between first and repeated offenders."[31]

Moreover, although *Williams* dealt with uncharged conduct rather than prior acquitted conduct, the foregoing analysis carries within it all the elements necessary to justify the admission of prior acquitted conduct at sentencing. *Williams*'s focus on the need for the sentencing judge to truly understand the defendant's character,[32] coupled with its special emphasis on the importance of recidivism as a telling feature of a defendant's psyche,[33] leads logically to the conclusion that there are cases in which prior acquitted conduct would be relevant to sentencing. That is, acquittal in a criminal case does not always track innocence. Rather, as a doctrinal matter, acquittal merely indicates that the prosecution failed to prove at least one element of the crime to the satisfaction of a factfinder beyond a reasonable doubt.[34] In some cases, that failure will be attributable to the innocence of the defendant. In others, however, a guilty defendant could be acquitted based on prosecutorial misstep, a sympathetic jury, or the restrictions imposed by the rules of evidence. In each of these latter cases, a judge could—and, under *Williams*'s logic, perhaps should—

---

sentencing under the Guidelines, including deterrence, retribution, and incapacitation). While rehabilitation is not one of the purposes of sentencing under the Guidelines, it was a strong consideration in pre-Guidelines sentencing and, by all evidence, continued to influence judicial decisionmaking both during the Guidelines period and afterwards.

[30] *Williams*, 337 U.S. at 247.

[31] *Id.* at 248.

[32] *See id.* at 247.

[33] *See id.* at 248.

[34] *See, e.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984).

consider prior conduct of which the defendant was acquitted. A recidivist acquitted after prosecution by an inept prosecutor has character no different from that of the recidivist convicted by a skilled prosecutor.

C. One Potential Model of Extra-Trial Sentencing

Two additional aspects of *Williams*'s holding, which differ from later models of extra-trial sentencing, are worthy of note. First, in arriving at its decision, the *Williams* Court employed a "totality of the circumstances" decisionmaking process that balanced a multiplicity of factors. The Court's decision was predicated not only on the different theoretical purposes of sentencing and trial and their concomitant abstract evidentiary needs, but also on a variety of concrete indicia of reliability particular to the case at hand. The Court noted, for example, that Williams had been represented by counsel at his sentencing hearing and that the highest court of the state had reviewed the court's factual findings—among them, the fact that the defendant had confessed to many of the relevant prior uncharged crimes and that he had not challenged their veracity at trial[35]—for an abuse of discretion.[36] The Court allowed the introduction of prior uncharged conduct, then, not simply because sentencing is properly a truth-seeking exercise, but also because the admitted evidence was itself reliable. Accordingly, the need to apply those laws of evidence designed to ensure reliability was mitigated.[37]

Second, *Williams*'s holding is framed negatively, leaving room for as-applied challenges. Rather than holding that extra-trial evidence is per se admissible, the *Williams* Court proffered a much more limited holding: "We cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."[38] By

---

[35] *See Williams*, 337 U.S. at 244.

[36] *Id.* at 252.

[37] Some evidentiary rules, such as the hearsay rule, are ordered primarily toward ensuring the reliability of evidence presented at trial. *See* Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1985 (2008) ("Of course, the purpose of some common admissibility rules, such as the hearsay rule or the original documents rule, is also to account for the reliability of evidence.").

[38] *Williams*, 337 U.S. at 252.

holding only that the Due Process Clause does not per se prohibit the use of out-of-court information at sentencing, the *Williams* Court ensured that any subsequent court seeking to rely on extra-trial evidence would be compelled to justify its actions. One obvious way to do so would be to engage in individualized factual considerations like those the *Williams* Court included in its multi-factor evaluation of Samuel Titto Williams's situation. Moreover, *Williams*'s narrow holding reflected a minimalism that left ample room for later courts to interpret and add to its "test," should they so choose. As discussed below, some courts of appeals would choose to accept that offer.

Notwithstanding any logical groundwork that may have been laid by the *Williams* Court, in the two decades following *Williams* no court is recorded as sentencing any offender based even partly based on conduct for which he had already been acquitted.[39] That is not to say, of course, that no court sentenced any offender using his prior acquitted conduct as a sentencing factor based on *Williams* during this time. Sentencing appeals prior to the advent of the Federal Sentencing Guidelines were fewer than they are today; because judges were not required to make public their reasoning for sentencing, objections could only be made to their methods in the few cases in which they did happen to idiosyncratically reveal their methods.[40] Nonetheless, an examination of law review and trade publications of the time reveals that, if such was occurring, the trend was so diffuse as to escape the notice of both the scholarly community and the ever-vigilant defense bar.

---

[39] *See infra* Appendix. The one potential exception is United States v. Castaldi, 338 F.2d 883 (2d Cir. 1964), *vacated*, 384 U.S. 886 (1966). However, this case has a very unusual fact pattern wherein the defendant was actually sentenced for contempt for refusing to testify about a prior acquittal in front of a grand jury. *Castaldi*, 338 F.2d at 884. Since the case involves another offense—contempt—it does not fit the mold for a paradigmatic prior acquittal as sentencing factor case.

[40] Indeed, prior to the Guidelines, "[g]enerally, federal sentences [were] not reviewable." United States v. Powell, 487 F.2d 325, 328 (4th Cir. 1973); *see also* Gore v. United States, 357 U.S. 386, 393 (1958) ("First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. This Court has no such power."). In the *Williams* case, the judge idiosyncratically revealed his methods allowed. *See* Brief for Appellant-Defendant at 5, *Williams*, 337 U.S. 241 (No. 671).

II. A BLUNT INSTRUMENT: § 3577 AND CONGRESSIONALLY-MANDATED TRUTH-SEEKING

The eventual trend toward prior acquittal sentencing found its catalyst in the 1970 passage of 18 U.S.C. § 3577. Later incorporated into the Guidelines by the Sentencing Reform Act of 1984 as 18 U.S.C. § 3661,[41] the statute would be the point of departure and a decisive factor in the *Watts* decision.[42] The text of 18 U.S.C. § 3661 provides in full: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[43]

Although the statute served as the backbone for both the *Watts* Court's analysis and many of the lower court opinions upon whose consensus the *Watts* opinion depended,[44] discussion of its origins in the sentencing literature is minimal.[45] Analysis reveals, however, that the passage of § 3661 was a turning point in the history of prior acquitted sentencing. Moreover, § 3557's passage was motivated by considerations already familiar to us from their role in the *Williams* decision: sentencing's goal of seeing a defendant as he really is and the inadequacy of the rules of evidence in achieving that goal. Indeed, Congress explicitly chose to intervene in the sentencing process via § 3661 because of its concern that the gap between acquittal and innocence was widening as a result of both the manipulations of organized crime and the evidentiary reforms of the Warren Court. As discussed

---

[41] *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1976, 1987. For purposes of this Article, "§ 3577" and "§ 3661" will be used interchangeably, unless used in reference to a particular time period.

[42] United States v. Watts, 519 U.S. 148, 151 (1997) (per curiam) ("We begin our analysis with 18 U.S.C. § 3661 . . . .").

[43] 18 U.S.C. § 3661 (2006).

[44] *See, e.g.*, United States v. Boney, 977 F.2d 624, 636 (D.C. Cir. 1992).

[45] Indeed, the only analysis of the origins of 18 U.S.C. § 3661 found in the literature on *Watts* and on the use of prior convictions in sentencing comes in the form of fleeting analysis of the provision's inclusion in the Federal Sentencing Guidelines in 1984. *See, e.g.*, Joshua M. Weber, Note, United States v. Brady*: Should Sentencing Courts Reconsider Disputed Acquitted Conduct for Enhancement Purposes Under the Federal Sentencing Guidelines?*, 46 ARK. L. REV. 467, 471 (1993) ("In fact, pre-guidelines statutory language in 18 U.S.C. § 3577 was transferred, without change, into 18 U.S.C. § 3661 of the Sentencing Reform Act of 1984, thus evincing strong legislative intent that the information a judge should consider is extensive, provided it is relevant to the offender's characteristics or offense circumstances.").

below, Congress's response to that widening gap was far more categorical than was the *Williams* Court's. Framed affirmatively and devoid of any suggestion of multi-factor balancing,

Congress's response to what it saw as the evidentiary challenges of La Cosa Nostra and the Warren Court would have significant ramifications for prior acquittal sentencing.

A. Combating Manipulation of Evidentiary Rules by Organized Crime

What is now known as 18 U.S.C. § 3661 was first passed on October 15, 1970 as 18 U.S.C. § 3577, Title X of the Organized Crime Control Act of 1970.[46] The Organized Crime Control Act of 1970 is most famous for its Title IX, which addresses "Racketeer Influenced and Corrupt Organizations."[47] The RICO statute has been tremendously influential in both law enforcement and popular culture.[48] While the other titles in the statute are less high-profile, consideration of the statute as a whole and of its legislative history can shed light on the pressures that came to bear in moving the country from agonizing over the jurisprudence of *Williams* to easily deciding the *Watts* case. Most notably, the bill's text, history, and structure reveal a desire to curb manipulation of evidentiary rules by sophisticated criminals.

The Organized Crime Control Act of 1970 was passed in response to congressional findings that "organized crime in the United States . . . annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."[49] More saliently for this Article's purposes, the Act was passed to address the additional congressional finding that prosecution of organized crime was being hindered by evidentiary burdens:

> [O]rganized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the

---

[46] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922.

[47] § 901, 84 Stat. at 941.

[48] *See, e.g.*, *The Sopranos: 46 Long* (HBO television broadcast Jan. 17, 1999) (referencing the "Golden Age" as the days before RICO).

[49] 84 Stat. at 922.

> unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.[50]

This preamble does not appear to have been mere cheap talk. Rather, it was a bone of contention that attracted criticism from some of the Act's critics. Representative Conyers, for example, the congressman from Michigan who spoke against the bill during the House debates on its passage, targeted this preamble's focus on the courts in his critiques thereof:

> [T]he statement of the findings and purpose embody a very disturbing notion to me . . . [quotes the above two passages] . . . .
> . . . .
> Now I think with a bit of reflection the Members will begin to perceive that this whole bill is based on the idea that somehow the courts have been preventing the effective prosecution of criminal activities in this country and that by some means or other there are defects in the evidence-gathering processes which this bill has sought to remedy.
>
> I, as one Member, want to make clear a very distinct disagreement with the primary motivation that is stated in the purpose behind this bill. The courts have not been the major culprits in the fight against crime. The judges have not been the ones who have been making it difficult for prosecuting attorneys to bring criminals in the organized syndicates to trial.
>
> The rules of evidence, and the criminal law, have not been derelict or weak or soft or in any way supportive of the criminal elements once we get them into court. I think, in a nutshell, nothing will clearly reveal the incorrect theory on which this entire bill is based than that section that I have cited to you in the statements of finding and purpose.[51]

No one rose to rebut Representative Conyers's interpretation of the Act or its preamble. Rather, the only response he received was a subdued and acquiescing, "I thank the gentleman for his very important contribution," from Representative Bingham of New York, a fellow opponent of the Act.[52]

Mr. Conyers seems to have been correct to worry that the Act as a whole was in part an assault on, and a reformation of, the

---

[50] *Id.* at 923.
[51] 116 CONG. REC. 35,214 (1970) (statement of Rep. Conyers).
[52] *Id.* (statement of Rep. Bingham).

rules of evidence. Indeed, the stated purpose of the Act specifically linked the former weakness in the "evidence-gathering process" with "enhanced sanctions and new remedies"[53]:

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.[54]

Even apart from § 3577, many aspects of the Organized Crime Control Act of 1970 are addressed to evidentiary issues. As discussed below, both the statute's text and its legislative history reflect Congress's frustration that organized crime bosses, when prosecuted, frequently managed to escape conviction through their corruption and manipulation of the criminal justice system, and, in particular, of the evidentiary protections that system affords defendants.

1. The Provisions of the Organized Crime Act of 1970

The first seven titles of the Organized Crime Act of 1970 have a particularly evidentiary focus and are seemingly geared towards the prevention of mob manipulation of the evidentiary protections of trial or of evidentiary limitations hindering the prosecution of mob bosses.[55] Title I of the Act, for example,

---

[53] 84 Stat. at 923.

[54] *Id.*

[55] As Representative Rodino explained:

> Law enforcement officials know who the racket leaders are, and they know the organizational hierarchy of the different "families" of organized crime. This information, in fact, is freely available to the public: the most recent organization charts of the underworld are published in the Senate hearings on S. 30, pages 124 to 128. However, under current laws and procedures, the men at the top are virtually untouchable because they seldom commit crimes for which they can successfully be prosecuted. Further, they are buffered from the law by lawyers of subordinates and flunkies to the point where the numbers runners and narcotics pushers frequently don't know for whom they're really working, and those who do know also know what happens to "informers." The brutality recorded in "The Godfather" pales in comparison with some stories in the police files.

allowed for the calling of "Special Grand Juries" to be convened for eighteen-month periods "[i]n addition to such other grand juries as shall be called from time to time" in large cities when the Attorney General's office decides that "a special grand jury is necessary because of criminal activity in the district."[56] It easily evoked the worry, substantiated by past experience, that organized crime families might be able to taint, threaten, or otherwise overwhelm the existing grand jury system.[57]

Title II provided both a carrot and a stick to prosecutors seeking to encourage low-level mobsters to cooperate with federal prosecutions. As a stick, it forced witnesses to testify before federal courts, grand juries, U.S. agencies, and Congress and removed any right they might have had to remain silent to avoid self-incrimination. As a carrot, it immunized such witnesses from prosecution for their testimony.[58] Armed with Title II, prosecutors could encourage low-level members of organized crime organizations to "flip," testifying against their old bosses. In the process, prosecutors would not be haunted by the specter of low-level mobsters seeking to proect their bosses through extensive invocation of evidentiary privileges—as had been known to occur before the passage of Title II.[59]

Title III allowed for contempt proceedings to be brought against "recalcitrant witnesses,"[60] adding another stick to the bundle given to prosecutors by Title II to use against witnesses scared of mob repercussions for their testimony. Along similar lines, Title IV provided extra fines for those who perjure themselves before federal courts and grand juries.[61] In an effort

---

> The major purpose of the legislation under consideration today is to provide the criminal justice system with the necessary legal tools to get at organized crime.

116 CONG. REC. 35,200 (1970) (statement of Rep. Rodino).

[56] § 101, 84 Stat. at 923.

[57] For an account of La Cosa Nostra's attempted tampering with juries, see ROBERT F. KENNEDY, THE ENEMY WITHIN 62 (1960) ("When the case was retried in the spring of 1958, Mr. Hoffa was acquitted. During this trial an attempt was made—unsuccessfully—to influence one of the jurors.").

[58] § 201, 84 Stat. at 927.

[59] *See, e.g.*, KENNEDY, *supra* note 57, at 210 ("On the witness stand Raddock, on grounds of self-incrimination, would not tell us whether he knew the Gary Teamster leader, Sawochka, or whether he had tried to fix the case for Hutcheson or the other Carpenter officials. Sawochka also took the Fifth Amendment.").

[60] § 301, 84 Stat. at 932.

[61] § 401, 84 Stat. at 932.

to protect those cooperating witnesses who did "flip,"[62] Title V provided for protected facilities for housing government witnesses.[63]

To preserve the testimony of witnesses imbued with temporary courage who might be subject to later mob pressure to change their recollection of a course of events, Title VI provided prosecutors with the ability to take depositions to preserve the testimony of witnesses.[64] Title VII tackled the evidentiary question directly, limiting the use of the Exclusionary Rule and other evidentiary restrictions on "claim[s] by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act"[65] by placing stringent time and disclosure limits on when such a claim must be invoked. Notably for this Article's purposes, that provision is offered in direct response to "special findings" by Congress that "claims that evidence offered in proceedings was obtained by the exploitation of unlawful acts, and is therefore inadmissible in evidence" are often difficult to prove reliably, especially when there is a significant time lag between offense and trial.[66] Thus, Congress sought to protect the government from spurious, but difficult to disprove, evidentiary allegations by La Cosa Nostra.

Titles VIII through XI propose more substantive changes to the criminal law. These include strengthening the criminalization of illegal gambling, criminalizing the obstruction of law enforcement with respect to gambling, and establishing a commission to review national policy toward gambling (Title VIII),[67] outlawing racketeering and setting in place procedures

---

[62] Government was, of course, already working to guard mafia informants. Joe Valachi, who testified before the Senate in 1963, for example, was "guarded night and day." PETER MAAS, THE VALACHI PAPERS 55 (1968). The congressmen voting on the Organized Crime Control Bill of 1970 would have watched Valachi's testimony nightly. Jay Mader, *Dancer the Testament of Joseph Valachi, October–November 1963 Chapter 320*, DAILY NEWS (N.Y.), Apr. 11, 2001, at 27.

[63] §§ 501–02, 84 Stat. at 933.

[64] § 601, 84 Stat. at 934–35.

[65] § 702, 84 Stat. at 935.

[66] § 701, 84 Stat. at 935.

[67] §§ 801–04, 84 Stat. at 936–40.

for the prosecution thereof (Title IX),[68] setting forth provisions for dangerous special offender sentencing (Title X),[69] and adding additional regulation of explosives (Title XI).[70]

As in the evidentiary section of the bill, each substantive provision in the Act is a near-direct response to some action taken by organized crime organizations in the months and years leading up to the passage of the Organized Crime Control Act of 1970. In the case of Title XI, for example, Congress's floor discussion of the bill specifically connected the anti-explosive legislation with "the relatively recent but extremely grave problem of bombing incidents that have plagued the Nation"[71] and "the recent rash of bombings."[72] Title IX, too, was responsive to recent news—in his advocacy of the new racketeering regulation, Representative Rodino of New Jersey discussed recent events:

> Time [sic] magazine reported last year that profits from the rackets are—and I quote—"as big as United States Steel, the American Telephone & Telegraph Co., General Motors, Standard Oil of New Jersey, General Electric, Ford Motor Co., IBM, Chrysler, and RCA put together"—and most of this, of course is untaxed.[73]

Thus, the provisions of the Organized Crime Control Act of 1970 are the work of a Congress concerned with manipulation of the criminal justice system—and, more specifically, of the evidentiary safeguards surrounding defendants—by organized crime. The Act represents an attempt to combat that manipulation by tightening evidentiary rules and arming prosecutors with additional tools to use against mob manipulation of the criminal justice system.

2. Section 3577 in the Context of the Organized Crime Control

---

[68] § 901, 84 Stat. at 941–48.

[69] § 1001, 84 Stat. at 948–52.

[70] § 1101, 84 Stat. at 952–60.

[71] 116 CONG. REC. 35,199 (1970) (statement of Rep. Rodino).

[72] *Id.* at 35,197 (statement of Rep. McCulloch).

[73] *Id.* at 35,199 (statement of Rep. Rodino) (quoting *Nation: The Conglomerate of Crime*, TIME, Aug. 22, 1969, *available at* http://www.time.com/time/magazine/article/0,0171,898525,00.html).

Act of 1970

Section 3577, the progenitor of 18 U.S.C. § 3661, is contained within Title X's enactment of a "Dangerous Special Offender Sentencing" provision.[74] Just as its general placement within the context of the Organized Crime Control Act of 1970 was telling, so too is Section 3577's location within Title X. Section 3577 serves Title X's larger goal of tailoring sentences to the character of offenders, and, thus, of increasing the sentences of career offenders like mafia members.

Title X's overall purpose is to increase the sentences of certain organized crime heads deemed "dangerous special offender[s]."[75] Representative Poff, one of the bill's sponsors, strove to explain "the full context of each title of this bill,"[76] describing the background to Title X as the tendency of organized crime heads to escape the harsh sentencing necessary to protect society from their machinations:

> A staff study made by the Criminal Laws Subcommittee of the Senate Judiciary Committee a year ago, based upon FBI sentencing data, indicated that two-thirds of the La Cosa Nostra members included in the study and indicted by the Government since 1960 have maximum jail terms of 5 years or less. Fewer than one-fourth received maximum jail terms for the offenses of which they were convicted. Twelve percent did not go to jail at all. The sentences for the majority of these organized criminals averaged only 40 to 50 percent of the maximums which were authorized by law.[77]

Representative Poff coupled this reminder of the crime problem with the now-familiar plea for individualized sentencing:

> One difficulty with our sentencing law has been that, for a given crime, every offender has been exposed to the single maximum punishment authorized by the Congress. The emphasis has been entirely upon the bare element of the crime which the defendant has committed, and not upon the kind of person the defendant is and the overall context in which the offense was committed—the circumstances of aggravation of the offense. Yet modern penologists believe that, in sentencing, the court should have broad leeway to consider the criminal and the

---

[74] § 1001, 84 Stat. at 948–51.
[75] *Id.* at 948.
[76] 116 CONG. REC. 35,290 (statement of Rep. Poff).
[77] *Id.* at 35,296.

> circumstances surrounding the commission of the offense, as well as the crime.[78]

To combat these two problems, Representative Poff's 1970 Act proposed a new way of sentencing these "hard-core offenders"[79]: the four subsections of Title X. The first subsection, § 3575, established an elaborate—and constitutionally dubious[80]—system whereby prosecutors submitted notice to the court specifying that the defendant at hand qualified, in their view, as a "special offender" and detailing the reasons for that judgment.[81] Then, upon conviction, a special presentence hearing would be held to determine whether the defendant did in fact qualify as a "dangerous special offender" based on his previous convictions, the fact that his felony was committed as a pattern of conduct, or his participation in a conspiracy.[82] If he was found to fit those criteria, he could be sentenced "for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony."[83] Section 3576 established an equally elaborate system of review of sentences imposed in this unorthodox

---

[78] *Id.*

[79] *Id.*

[80] Indeed, several of the Act's opponents questioned the constitutionality of Title X. *See, e.g.*, *id.* at 35,289 (statement of Rep. Podell) ("Title X of the bill seems to be a violation of the due process of law. It says: 'If it appears by a *preponderance of evidence* that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed 25 years.' This is using a lesser standard of evidence, a civil standard, in a criminal proceeding."); *id.* at 35,217 (statement of Rep. Eckhardt) ("I am most concerned, as I think some of my colleagues have observed, about what is called the dangerous special offender provisions of this bill and of the drug bill. It is found in this bill at title X. I would like to say a little about it because we have to know what it means to know precisely how it removes from the consideration of the jury a very serious element of what you may either call crime, as I prefer to call it, or you may call a status with respect to the nature of the dangerous special offender, as the gentleman from Virginia (Mr. Poff) prefers to call it."); *id.* at 35,208 (statement of Rep. Ryan) ("Title X, concerned with the sentencing of so-called dangerous special offenders, is probably the grossest refutation of due process which this bill contains.").

[81] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001, 84 Stat. at 948 (codified as 18 U.S.C. § 3575(e) (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(1)–(2), 98 Stat. 1837, *as amended by* Sentencing Act of 1987, Pub. L. No. 100-182, § 2, 101 Stat. 1266).

[82] *Id.* (detailing the characteristics of a dangerous special offender).

[83] § 1001, 84 Stat. at 949.

fashion, whereby either the defendant or the government could appeal.[84]

Tucked away after these two major and lengthy provisions were § 3577 and § 3578. The latter established a repository for records of convictions and determination of the validity of such convictions for use, presumably, in dangerous special offender sentencing.[85] Section 3577, the salient provision for this Article's purposes, rejects any limitation on the information sentencing judges may consider.

Section 3577's placement within Title X is perfectly logical. Dangerous special offender sentencing, as proposed in § 3575, calls for the consideration of extra-trial information in the form of a presentence report—some of which it allowed to be withheld from the defendant's consideration[86]—as well as the filing of a notice with the court ex parte by the prosecutor of the justifications for the prosecutor's opinion that the defendant deserves a special sentence.[87] Without a specific congressional authorization of these sources, any of them could have been subject to a due process challenge, notwithstanding the weak denial of a categorical due process bar on extra-trial information used at sentencing announced by the *Williams* Court.

Thus, § 3577, one of the main bulwarks of the *Watts* decision, was passed in part to counteract the widening gap Congress feared between acquittal and innocence in the case of mobsters, sophisticated criminals well-able to manipulate the evidentiary rules established to guard the rights of less sophisticated defendants.

---

[84] *Id.* at 950–51.

[85] *Id.* at 951–52. The provisions of § 3578 do not specify that the records contained in the new repository must be used only for dangerous special offender sentencing. On the contrary, like § 3577, § 3578 does not mention dangerous special offender sentencing. Moreover, § 3578 specifies situations other than dangerous special offender sentencing in which the repository may be accessed, explicitly indicating that it has a use quite apart from dangerous special offender sentencing. *Id.*

[86] In potential tension with Federal Rule of Criminal Procedure 32(e)(2).

[87] *See* § 1001, 84 Stat. at 948–51.

B. The Gap Widens Further: The Warren Court's Exclusionary Rule

La Cosa Nostra's was not the only evidentiary manipulation Congress wished to counteract through § 3577. Indeed, nowhere did the text of § 3577 limit its reach to dangerous special offender sentencing. Rather, § 3577 spoke in broad language. "[N]o limitation" was to be placed on the information available to a court sentencing any person "convicted of an offense" in a "court of the United States."[88]

This sweeping language was a feature, rather than a bug, of the provision. Representative Poff, the driving force behind § 3577, billed it as of "importance not only to trials or organized crime figures, but of criminal defendants generally."[89] The Act's opponents, too, seized on this fact as part of their criticism of Title X: "Were mobsters the only victims of this assault on the Constitution, we would still object. The fact that all defendants are the prey of its provisions makes the title even more indefensible."[90]

> Indeed, Mr. Poff explicitly framed § 3577 as having a broader-than-mob scope, describing it as a codification of the holding of *Williams*: "Title X preserves, in short, the traditional principle, approved by the Supreme Court in *Williams v. New York*, that sentencing proceedings are exempt from the rules of evidence constitutionally required at trial. The Williams case . . . held that a sentencing court, unlike a trial court, can consider hearsay allegations not tested for reliability by the constitutional procedures of confrontation and cross-examination."[91]

In extolling the virtue of the *Williams* case, and thus of § 3577, Poff stressed the need for full knowledge of a defendant in order to make an accurate sentencing judgment, quoting Justice Black's majority opinion from *Williams*:

---

[88] *See id.* at 951.

[89] 116 CONG. REC. 35,298 (1970) (statement of Rep. Poff).

[90] *Id.* at 34,872 (statement of Rep. Ryan) (quoting the "[d]issenting [v]iews of Representative John Conyers, Jr., Representative Abner Mikva, Representative William F. Ryan, on the Organized Crime Control Act").

[91] *Id.* at 35,194 (statement of Rep. Poff) (citations omitted) (citing Williams v. New York, 337 U.S. 241 (1949); *see also* Specht v. Patterson, 386 U.S. 605, 606 (1967).

> Highly relevant—if not essential—to [the sentencing judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.[92]

And yet, the language of § 3577 goes further than that of *Williams*. The *Williams* Court framed its holding negatively, as a refusal to find that the Due Process Clause barred the use of extra-trial information at sentencing: "The considerations we have set out admonish us against treating the due-process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence."[93] Section 3577, on the other hand, was written both affirmatively and more categorically than the *Williams* holding: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[94]

While the *Williams* formulation, embodying a certain judicial minimalism, easily left room for as-applied challenges that a particular use of extra-trial information at sentencing violated the Due Process Clause, the language of § 3577[95] effectively provided a safe harbor to any sentencing judge who decided to introduce extra-trial information as a sentencing factor. How

---

[92] 116 CONG. REC. 35,194 (statement of Rep. Poff) (quoting *Williams*, 337 U.S. at 247).

[93] *Williams*, 337 U.S. at 250–51.

[94] Pub. L. No. 91-452, § 1001, 84 Stat. 922, 951 (1970) (codified as 18 U.S.C. § 3577 (1970), *renumbered as* 18 U.S.C. § 3561 (2006) by Sentencing Reform Act of 1984, 98 Stat. 1987).

[95] The language of § 3577 may reflect that of a post-*Williams* case. *See* Gregg v. United States, 394 U.S. 489, 492 (1969) ("There are no formal limitations on [presentence reports'] contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged.").

could such a decision be overturned when clear statutory authority prohibited the imposition of any limitation on the information available at sentencing? Moreover, § 3577 bore no trace of the *Williams* Court's careful focus on indicia of reliability. Instead, the crystal-clear text proclaimed that *no* limitation should be imposed on the evidence admissible at sentencing.[96]

Nor does this alteration seem to have been accidental. The legislative history reveals Representative Poff to have beem a knowing architect of the change. The congressman, himself an attorney who had originally been tapped by Nixon for Justice Rehnquist's seat on the Supreme Court,[97] explicitly addressed the rationale behind passing § 3577 in the course of the congressional debates. On October 7, 1970, in the midst of congressional debate, Poff offered a summary and defense of the Act as a whole. He described the provision in now-familiar terms, linking it to *Williams*: "Its purpose is to assure that a sentencing court will be able to obtain all pertinent information about the background and prior behavior of the defendant in all Federal criminal cases."[98]

Then, however, Poff's analysis of the provision departed from the *Williams* analysis, targeting one particular evidentiary rule as part of the impetus for § 3577: "The exclusionary rules developed for trial on the issue of guilt are not to be applied."[99] Poff went on to cite two particular appellate cases as overruled

---

[96] § 1001, 84 Stat. at 951.

[97] Jeffrey Rosen, *Renchburg's the One!*, N.Y. TIMES, Nov. 4, 2001, at 15 ("Initially, Nixon wanted to replace Justice Black with Representative Richard Poff, a moderate conservative from Virginia, whom Dean, then White House counsel, respected. But Poff took himself out of the running because he feared the ensuing publicity would force him to tell his son, then 12, that he had been adopted. (A few weeks after Poff withdrew, a muckraking Jack Anderson column forced him to tell the boy anyway.)").

[98] 116 CONG. REC. 35,298 (1970) (statement of Rep. Poff).

[99] *Id.* (citation omitted) (citing 18 U.S.C. § 3146(f) (1966), *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, codified as amended at 18 U.S.C. §§ 3141–56 (2006)). The statute referenced has since been repealed. Then § 3146(f) allowed the use of all information without evidentiary restrictions in release hearings in non-capital cases prior to trial (bail hearings): "Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law." Pub. L. No. 89-465, § 2, 80 Stat. 214, 215 (1966) (codified as 18 U.S.C. § 3146(f), *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, codified as amended at 18 U.S.C. §§ 3141–56).

by the new § 3577. "The result which was obtained in *Verdugo v. United States*, and the approach used in *Armpriester v. United States*, are no longer to obtain."[100]

Poff's citation to *Verdugo*[101] and *Armpriester*[102] sheds significant light on his reasons for expanding *Williams*'s holding into the text of § 3577. The portions of the two cases he cites are parallel in their reasoning. Both hold that evidence obtained illegally and suppressed at trial under the Exclusionary Rule should also be excluded from sentencing.

In *Armpriester*, for example, the Fourth Circuit rejected a motion filed by pro se defendant Howard Armpriester to vacate both the judgment against him and his sentence for altering and uttering post office money orders.[103] Armpriester's argument called for the Exclusionary Rule to be applied to sentencing. He claimed that his confession had been obtained illegally due to unnecessary delay in taking him before the nearest available commissioner.[104] As such, he argued, it was inadmissible at sentencing.[105] Moreover, the confession's introduction at trial had led him to give up any hope of an acquittal and to plead guilty.[106] The Fourth Circuit rejected Armpriester's claim on the factual grounds that the plea had almost certainly been based *not* on the illegal confession, but on "the availability of the swindled persons as witnesses and the certainty of overwhelming proof of guilt."[107] Nonetheless, in the section of the case cited by Representative Poff, the court indulged in extensive dicta on the hypothetical question of what its holding would have been had Armpriester's factual claims held water: "If there were any basis for a reasonable apprehension that the plea resulted from a confession illegally obtained, the defendant might be entitled to have the plea and the sentence stricken and a new trial

---

[100] 116 CONG. REC. 35,298 (statement of Rep. Poff) (citations omitted) (citing Verdugo v. United States, 402 F.2d 599, 608–13 (9th Cir. 1968); Armpriester v. United States, 256 F.2d 294, 296–97 (4th Cir. 1958)).

[101] 402 F.2d at 608–13.

[102] 256 F.2d at 296–97.

[103] *Id.* at 295.

[104] *Id.*

[105] *Id.* at 296.

[106] *Id.*

[107] *Id.*

granted."[108] The *Armpriester* court then clarified that *Williams*'s holding did not extend far enough to allow the inclusion of evidence suppressed by the Exclusionary Rule at sentencing:

> A confession obtained in the circumstances alleged would certainly not be admissible in a trial upon a plea of not guilty. . . . It is recognized that a court has wider latitude of inquiry in fixing the sentence than during a contest to decide an issue of guilt. Nevertheless, we would not condone the use of evidence obtained in breach of the law, even for the limited purpose of determining the sentence. The rationale of the Mallory case is that judicial proceedings shall stand or fall independently of evidence obtained in violation of Rule 5(a).[109]

Thus, the Fourth Circuit made clear that, given the appropriate case or controversy, it would hold that the Exclusionary Rule applied to sentencing hearings, thereby hindering the truth-seeking function of sentencing judges.

Verdugo, a 1968 Ninth Circuit case, relied on and extended *Armpriester*, making the application of the Exclusionary Rule to sentencing the law of the Ninth Circuit. In that case, defendant José Verdugo filed for resentencing on grounds that his presentence report contained information obtained from his home in the course of an illegal search and seizure. The court excluded the evidence both from sentencing and trial: "Verdugo's second claim of error relating to the presentence report is that the inclusion in the report and consideration by the sentencing judge of information obtained from his home by unconstitutional search and seizure violated his rights under both the Fourth and Fifth Amendments."[110] Relying on *Armpriester*, the *Verdugo* Court stated:

> Ours would seem like an a fortiori case, for the evidence considered in sentencing Verdugo was obtained in violation of a constitutional prohibition, not merely a rule of procedure. Moreover, the exclusionary rule with which we are concerned is a part of the constitutional right, not merely a rule of evidence adopted in the exercise of a supervisory power.[111]

The Ninth Circuit then balanced the "strong public interest in the imposition of a proper sentence—one based upon an

---

[108] *Id.*
[109] *Id.* at 296–97 (citations omitted).
[110] Verdugo v. United States, 402 F.2d 599, 609 (9th Cir. 1968).
[111] *Id.* at 610–11 (citations omitted) (citing Mapp v. Ohio, 367 U.S. 643 (1961)).

accurate evaluation of the particular offender and designed to aid in his personal rehabilitation"[112] with the need to extend the reach of the Exclusionary Rule in order to "insur[e] observance of Fourth Amendment restraints by law enforcement officers."[113] It finally concluded that "where, as here, the use of illegally seized evidence at sentencing would provide a substantial incentive for unconstitutional searches and seizures, that evidence should be disregarded by the sentencing judge."[114]

The danger Representative Poff sought to avoid, then, is clear. With the advent of new evidentiary rules like the *Mallory* Rule and the Exclusionary Rule, Poff was concerned that the holding of *Williams* would not be extended to cover these rules. Rather, Poff worried that the need to deter police abuse, a rationale underlying the Exclusionary Rule, would be allowed to limit sentencing judges in the information available to them at sentencing just as juries were limited. The Exclusionary Rule introduced into trials a significant non-truth-seeking aim. In so doing, it widened the gap between the aims of trial and the aims of sentencing—and, concomitantly, the gap between acquittal and innocence—even more. Representative Poff, and ultimately Congress, reacted to the specter of an extension of the Exclusionary Rule's non-truth-seeking principle into sentencing in part by passing § 3577. This statute embodied a novel approach to the use of out-of-court evidence at sentencing—one whose categorical, affirmative language contrasted sharply with the previously regnant holding of the *Williams* Court.

C. A Second Model of Prior Acquittal Sentencing

A few brief remarks suffice to manifest the salient differences between the prior acquittal sentencing regime established by § 3577 and that of the *Williams* Court. First, as discussed above, *Williams*'s holding merely indicated that prior acquittal sentencing *could* be constitutional, leaving open the possibility of as-applied challenges to certain instances of prior acquittal sentencing on due process grounds. Section 3577, by contrast, affirmatively granted sentencing judges the power to

---

[112] *Id.* at 611.
[113] *Id.* at 611–12.
[114] *Id.* at 613.

employ prior acquitted conduct at sentencing. Indeed, § 3577's direction that limits not be placed on trial judges' ability to use such conduct at sentencing rendered the statute a sort of safe harbor for sentencing judges. Statutorily, they should never be reversed on appeal for their use of prior acquitted conduct at sentencing.

Second, § 3577's categorical language—"no limitation"—made no mention of any requirement that prior acquitted conduct be verified as reliable. Rather, § 3577 seemed to provide textually for judicial discretion of extremely broad scope, with no requirement that any external factors be considered by a judge in deciding whether or not to admit prior acquitted conduct as evidence at sentencing. As illustrated below through their application to case law in the next Part, these differences between *Williams*'s holding and § 3577 would have a dramatic effect on any sentencing decisions governed by them.

III. A NATURAL CONTROLLED EXPERIMENT: CASE LAW AFTER § 3577

Courts of appeals have relied on § 3577 to approve the use as sentencing factors of hearsay evidence,[115] illegally obtained evidence,[116] and alleged criminal activity for which the defendant had not been prosecuted.[117] With these precursors, the consideration of prior acquitted conduct as a sentencing factor seemed all but inevitable. And indeed, in sharp contrast with the two post-*Williams* decades, which lacked any sign of sentencing based on prior acquitted conduct, in the seventeen years between the passage of the Organized Crime Control Act of 1970's Section 3577 and the November 1, 1987, implementation of the Federal Sentencing Guidelines, nine cases were appealed because of the use of prior acquitted conduct as a sentencing factor—a marked increase.[118]

---

[115] *See* United States v. Garcia, 544 F.2d 681, 684 (3d Cir. 1976).

[116] *See* United States v. Lee, 540 F.2d 1205, 1211–12 (4th Cir. 1976).

[117] *See* Smith v. United States, 551 F.2d 1193, 1195–96 (10th Cir. 1977).

[118] *See infra* Appendix. The nine cases are: Walker v. Endell, 850 F.2d 470, 477 (9th Cir. 1987); United States v. Bernard, 757 F.2d 1439, 1444 (4th Cir. 1985); United States v. Campbell, 684 F.2d 141, 152 (D.C. Cir. 1982); United States v. Lowe, 654 F.2d 562, 566 (9th Cir. 1981); United States v. Plisek, 657 F.2d 920, 928 (7th Cir. 1981); United States v. Morgan, 595 F.2d 1134, 1135 (9th Cir. 1979); United States v. Atkins, 480 F.2d 1223, 1224 (9th Cir. 1973); United States v. Sweig,

Perhaps because § 3577 failed to specifically address the use of prior acquitted conduct as a sentencing factor, however, a curious dichotomy is apparent in the post-§ 3577 case law. That is, while a small subset of those cases based their rulings explicitly on the statutory authority of § 3577, a substantial majority ruled to admit prior acquitted conduct as a sentencing factor based purely on the precedential authority of *Williams* and of the then-recent cases admitting hearsay and other evidence excludable at trial in sentencing.

The dichotomy between the two lines of cases forms a natural experiment of sorts. The two lines of cases afford parallel snapshots of both prior acquittal sentencing as governed by § 3577 and of the same doctrine as it likely would have developed in the absence of § 3577. A comparison of the two allows certain conclusions to be drawn about the effects of § 3577 on prior acquittal sentencing.

A. Reliance on § 3577: United States v. Plisek

Of the nine prior acquittal sentencing cases decided between the 1970 passage of the Organized Crime Control Act and the 1987 implementation of the Federal Sentencing Guidelines, only two seem to view § 3577 as determinative in their decisionmaking: the Seventh Circuit case *United States v. Plisek*,[119] and the D.C. Circuit case *United States v. Campbell*.[120] *Plisek*, the first prior acquittal case decided based on § 3577, is the better model of the two for § 3577-reliant jurisprudence.[121]

In *Plisek*, the Seventh Circuit was asked to decide whether a lower court's use of a presentence report describing a defendant's prior acquittal on a murder charge warranted resentencing. The court turned first to § 3577:

> 18 U.S.C § 3577 (1976) provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The broad scope

454 F.2d 181, 182–83 (2d Cir. 1972); United States v. Avery, 473 F. Supp. 980, 982 (S.D. Fla. 1979).

[119] 657 F.2d 920.

[120] 684 F.2d 141 (D.C. Cir. 1982).

[121] *Campbell*'s reference to § 3577 is so fleeting that it effectively typifies a *Williams* and progeny based case more than a § 3577-based case.

> granted by § 3577 has been held to authorize trial judges to rely on a wide range of information, including, for example, alleged criminal activity for which the defendant has not been prosecuted, illegally obtained evidence, and hearsay evidence.[122]

Plisek's Judge Pell saw no need even to nod in the direction of the discretion § 3577's text – which merely forbade limitation on what the court "*may* receive and consider"—left him. Rather, he reasoned that the statute and its precedents made clear that he was not bound to exclude any evidence from his consideration—unless that evidence fit one of two narrow due process exceptions. Moreover, the court relied on the legislative history of the provision, arguing that it was intended to be read broadly: "A broad interpretation of this language finds support in the legislative history of § 3577, which makes it clear that the section was intended to 'maximize sources of sentencing information, [and] to guard against the unnecessary formalization of sentencing procedures.' "[123] Thus, in *Plisek*, questions of statutory interpretation—"Did § 3577's text cover the case at hand?" "Was it intended to be read broadly?"—all but replaced the *Williams* Court's focus on out-of-court evidence's indicia of reliability.

More troublingly, the Seventh Circuit affirmed the trial court's admission of prior acquitted conduct as a sentencing factor precisely because the sentencing judge explicitly *denied* doubting that the defendant's prior acquittal indicated innocence. In arguing that the *Plisek* trial judge had not placed undue emphasis on the acquitted conduct, the Seventh Circuit's Judge Pell noted approvingly:

> Furthermore, additional comments of the court make it clear that he did not impose or enhance the sentence on the basis of his evaluation of the merits of the prior acquittal. For example he remarked, "I, of course, can't say that merely being indicted for a crime is a reason for putting someone in jail for some other crime," and later, "I can't try that (the murder) case. He was found not guilty. I really can't go into the merits of it."[124]

An examination of the trial transcript confirms Judge Pell's account. The trial judge repeatedly denied any doubt as to the defendant's innocence of the murder of which he had previously

---

[122] *Plisek*, 657 F.2d at 925 (citations omitted).
[123] *Id.* at 927 (quoting S. REP. NO. 91-617, at 90 (1969)).
[124] *Id.* at 927–28.

been acquitted. Nonetheless, in an example of truly twisted reasoning, he decided to take the conduct into account anyway because, "[e]ven though [defense counsel was] able to successfully defend him in the [prior] murder charge, the fact that a person even gets into the situation, I think, is some evidence that he has some instability if not some proclivity to commit crimes."[125]

The real harm of *Williams*'s replacement by § 3577's becomes visible. Unlike *Williams*'s minimalist holding, which required judges to reason through the logic underlying prior acquittal sentencing, the mechanical implementation of the clear, categorical, affirmative language of § 3577 permitted sentencing judges to use prior acquitted conduct without ruminating on its justifications. As a result, sentencing judges and those reviewing them on appeal were permitted to lose sight of the overarching theoretical justification for the institution of prior acquitted sentencing: Some acquittals do not indicate innocence and, in those cases, sentencing judges will impose better, more accurate sentences if they know that the offender before them is a recidivist. To divorce prior acquittal sentencing from that logic is to allow judges like the *Plisek* trial judge to sentence based on stereotypes about the "proclivities" of defendants who have previously been indicted.[126]

---

[125] *Id.* at 926 n.2.

[126] The trial transcript equally supports the alternate interpretation that the trial judge simply doubted that Plisek's previous acquittal indicated exoneration. Consider the choice snippet: "Well, I am not thoroughly satisfied that that is complete exoneration [based on self-defense] when a person is stabbed repeatedly about the face and body during a fight. Maybe it is. I can't try that case. He was found not guilty. I really can't go into the merits of it." *Id.* However, if such is the case, the havoc wreaked on the regime of prior acquitted sentencing by the mechanistic application of § 3577 to prior acquitted sentencing is even more severe than under the previous interpretation.

That is, under such an interpretation, the trial judge dissembled by (ineptly) hiding his doubt about the veracity of Plisek's previous acquittal. In doing so, he thereby indicated his ignorance of the fact that (1) a prior acquittal not indicating exoneration is a permissible sentencing factor and (2) assigning "proclivities" to a class of innocent defendants is more likely to be reversible error than using unreliable prior acquittals as a sentencing factor. What's worse, Pell, a judge on the Seventh Circuit Court of Appeals, shared that ignorance, "defending" the judge on grounds that he in no way used prior acquitted conduct as a sentencing factor, a case he made through nearly incomprehensible prose:

> [A]dditional comments of the court make it clear that he did not impose or enhance the sentence on the basis of his evaluation of the merits of the prior acquittal. . . . These remarks clarify the context in which the allegedly improper concerns were voiced: they reveal that the judge did no more than

B. In the Absence of § 3577: United States v. Sweig

Of the nine prior acquittal cases decided between § 3577's passage and the implementation of the Federal Sentencing Guidelines, however, seven failed to invoke § 3577 entirely. Of these, *United States v. Sweig*,[127] the first prior acquittal case decided post-§ 3577—and, indeed, the first clear prior acquittal case decided post-*Williams*—is representative.

In *Sweig*, the Second Circuit rejected a defendant's contention that his sentence was invalid because the sentencing judge—ironically, Judge Frankel of the Southern District of New York—went out of his way to verbally express his reliance on prior acquitted conduct in making his sentencing determination. In rejecting the defendant's claim, the Second Circuit held that Judge Frankel had not relied on acquitted conduct.[128] If he had, however, the court maintained in dictum that that action would not have been impermissible—"[a] sentencing judge has very broad discretion in imposing any sentence within the statutory limits . . . ."[129] Without the benefit of § 3577 as a bulwark, the court analyzed the nature of the acquittal in the *Williams* style, arguing that

> [a]cquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant. For all that appears in the record of the present case, the jury may have believed all such evidence to be true, but have found that some essential element of the charge was not proved.[130]

The court then went on to analogize the use of prior acquitted conduct to hearsay, a form of evidence admissible in sentencing, with respect to its reliability as evidence:

> examine and evaluate the presentence report and afford counsel a full opportunity to respond to any prejudicial inferences which might have been drawn from that section of the report.

Id. at 927–28. It is unclear what Judge Pell took the sentencing judge to have done with the evidence of Plisek's prior acquitted conduct or on what reasoning he affirmed the judge's choice to do so. What is clear, however, is that mechanistically applying the text of § 3577, rather than prior acquittal sentencing's underlying logic, potentially did a grave disservice to Karel Plisek, who was sentenced based on the "proclivity" to violence indicated by the fact that he had previously been acquitted of murder.

[127] 454 F.2d 181 (2d Cir. 1972).

[128] *Id.* at 181–84.

[129] *Id.* at 183.

[130] *Id.* at 184.

> In fact the kind of evidence here objected to may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn, since unlike hearsay, the evidence involved here was given under oath and was subject to cross-examination and the judge had the opportunity for personal observation of the witnesses.[131]

Once again, two points are worthy of note. First, without the benefit of a text categorically allowing the admission of evidence, the court was willing—and, indeed, seems to have felt compelled to—analyze the facts of the case and its doctrines in terms of their underlying meanings and import. Thus, the court in *Sweig*, unlike the court in *Plisek*, engaged in extended analysis of the true significance of acquittal, grounding its analysis in whether a potential disjunction between acquittal and innocence had occurred. Moreover, to evaluate the degree to which acquittal and innocence were coterminous in the case at hand, the *Sweig* Court looked to independent indicia of reliability like the fact that evidence had been given under oath, that the evidence had been subject to cross-examination, and that the judge had the opportunity for observation of the witnesses.

Second, although *Sweig* used the admissibility of hearsay at sentencing as a point of comparison—much as *Plisek* had done—the two courts used the example of hearsay's admissibility in different ways. The *Plisek* Court used it as a benchmark in statutory interpretation: If hearsay and illegally obtained evidence are included under "no limitation," so too should prior acquittals be admitted. The *Sweig* Court, on the other hand, used hearsay as a point of analogy: If evidence based on hearsay, which is excluded because of concerns about its reliability, was allowed at sentencing, why should prior acquitted conduct—which, in many cases, may be more reliable than hearsay, since the prior court will have done extensive fact-finding—not be used? The *Sweig* Court's analysis was deeper, more judicious, and, ironically, more concerned with the underlying truth at stake in the sentencing process than was the case following the

---

[131] *Id.*

path designed by Congress to emphasize the importance sentencing's truth-seeking function.

C. The Two Lines of Cases Compared

The controlled experiment yields nicely contrasting results. The *Plisek* Court, seeing its decisionmaking as controlled by the categorical, affirmative language of § 3577, made its decision without any consideration of the logic underlying prior acquittal sentencing. Indeed, the *Plisek* Court did not see fit even to mention either the evidentiary gap and difference in aims between trial and sentencing or the true meaning of acquittal. Moreover, the *Plisek* Court's reasoning demonstrated that it had not internalized the justifications on which the *Williams* Court rested its holding. Under § 3577, the mechanized application of a bright-line rule replaced the thoughtful consideration necessary for just prior acquittal sentencing.

By contrast, the *Sweig* Court, seeing itself as governed by *Williams*'s example as much as by its sparse holding, proceeded more thoughtfully. In making its ruling, the *Sweig* Court was forced by the lack of direct guidance from above to reconsider the major rationales in favor of prior acquittal sentencing—the different aims of trial and sentencing and the potential disconnect between acquittal and sentencing—as well as the presence or absence of outside indicia of the evidence's reliability. The result was a ruling that walked a careful line, admitting prior acquitted conduct only in the class of circumstances in which it was actually justifiable.

IV. PRIOR ACQUITTAL SENTENCING UNDER THE SENTENCING GUIDELINES

While prior acquittal sentencing arose and increased markedly after the passage of § 3577, not until the promulgation of the Federal Sentencing Guidelines did the number of appeals for prior acquittal sentencing explode. In the ten years between the November 1, 1987, implementation of the Federal Sentencing Guidelines and the January 6, 1997, handing down of the *Watts* decision, ninety-four appeals from federal cases in which prior acquitted conduct was used as a sentencing factor would be filed,

with cases filed in every circuit.[132] Because much has been written on the Guidelines and their tendency to render judges less judicious,[133] and because the Guidelines' impact on prior acquitted sentencing does not differ substantially from its impact on other areas of sentencing, the Guidelines' substantial impact on prior acquittal sentencing will be addressed somewhat more briefly.

A. The Guidelines

In 1987, sentencing in the American criminal justice system changed dramatically with the implementation of the Federal Sentencing Guidelines. Congress enacted the Sentencing Reform Act of 1984 as part of the Comprehensive Crime Control Act of 1984. The new Sentencing Guidelines had the purpose of "minimizing judge-created disparities" in sentencing,[134] which were becoming a national scandal.[135] Marvin Frankel's solution[136] to the problem of radical disparities in sentencing was to reduce judicial discretion. He attributed the disparities to "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences,"[137] recommending instead, "concrete agreement on concrete factors capable of being stated, discussed, and thought about in the style of a legal system for rational people rather than a lottery."[138]

The Sentencing Commission, led by now-Justice Breyer, took up the gauntlet thrown by Judge Frankel and drafted the Federal Guidelines, an elaborate formulaic system of rational sentencing. The Guidelines proceeded based on a

> mathematical equation that begins with an offense level depending on its seriousness. . . . That offense level is then reduced or increased depending on factors such as the

---

[132] *See infra* Appendix. As noted above, this trend occurred in part because the Guidelines required increased reporting by judges on the rationale underlying their sentencing, allowing for more frequent appeals.

[133] *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING (1998).

[134] David Robinson, Jr., *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U. L.Q. 881, 884 (1996).

[135] *See generally* MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

[136] *See generally id.*

[137] *Id.* at 5.

[138] *Id.* at 115.

> defendant's criminal history, level of cooperation, use of a deadly weapon and role in the offense. . . . The sum of the factors leads to a box on a grid that suggests a sentencing range such as 0 to 6 months at the low end of 292 to 265 months at the high end.[139]

Until the 2005 *Booker* decision,[140] the Guidelines were mandatory on all federal courts.[141]

The Sentencing Reform Act of 1984 adopted the former 18 U.S.C. § 3577 as its own provision 18 U.S.C. § 3661.[142] Moreover, the provision was incorporated into the Guidelines themselves

> 1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines): In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.[143]

In so doing, the Commission effectively transformed § 3661 from a statute that might or might be applied in a given case—think, for example, of *Sweig*—into a part of the formula necessarily applied by judges in every sentencing. The effect was heightened by Guideline section 1B1.3, which instructed courts to take account of "relevant conduct" in sentencing.[144] Since prior acquitted conduct was "relevant" under the Guidelines, judges were suddenly not only *allowed* to take prior acquitted conduct into account, but were actually *instructed* to do so by Guidelines with the force of law. The impact of the Guidelines on the use of prior acquitted conduct in sentencing was immediate and dramatic. In the ten years prior to the implementation of the Guidelines, eight cases had dealt with the role of prior acquitted conduct in sentencing. In the ten years following the Guidelines arrival, ninety-three were heard.[145] While there was an eleven-

---

[139] Deborah Pines, *After Five Years, No One Loves the Federal Sentencing Guidelines*, N.Y.L.J., Nov. 5, 1992, at 3.

[140] United States v. Booker, 543 U.S. 220 (2005).

[141] *Id.* at 245; *see also* 18 U.S.C. § 3553(b)(1) (2006).

[142] Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1987.

[143] U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2010).

[144] *Id.* § 1B1.3.

[145] *See infra* Appendix.

year lag between the 1970 passage of § 3577 and its first citation in a prior acquittal case, the implementation of Sentencing Guideline section 1B1.4 and its companion, section 1B1.3, into caselaw took a little over a year.[146]

B. From Permission to Mandate: United States v. Mocciola

In 1989, the First Circuit decided *United States v. Mocciola*,[147] a prior-acquittal-as-sentencing-factor case in which a sentencing judge made use of a gun charge, of which the defendant had been acquitted, in sentencing him for a drug charge, of which he had been convicted. *Mocciola*'s analysis of the role of prior acquittals in sentencing is standard for a post-Guidelines case. Rather than engaging in a lengthy inquiry into the purpose of sentencing and the underlying meaning of acquittal, the court instead engaged in statutory interpretation. After citing recent cases allowing the use of prior acquitted conduct in sentencing, the court quoted extensively from the Guidelines and from other cases interpreting Guideline section 1B1.3.[148] The legal inquiry being thus summarily concluded, the court inquired briefly into the reliability of the evidence considered by the sentencing judge before affirming the sentence: "[I]t is not clearly improbable that Mocciola's pistol was connected with the drug possession offense."[149]

More saliently for the history of prior acquittal sentencing, however, was the gloss the cases *Mocciola* cited put on the Guidelines requirements vis-à-vis prior acquitted conduct. *Mocciola* relied on other courts' interpretation of the Guidelines as

> requir[ing] courts to take account of "relevant conduct"—conduct that, very roughly speaking, corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment. Past practice, and authoritative case law, indicates that the Constitution does not, as a general matter, forbid such consideration.[150]

---

[146] *See infra* Appendix.
[147] 891 F.2d 13 (1st Cir. 1989).
[148] *Id.* at 16.
[149] *Id.* at 17.
[150] *Id.* at 16. The court continues:

In the view of the *Mocciola* Court, then, the Guidelines had transformed prior acquittal sentencing. Prior acquitted conduct was no longer merely permitted. Sentencing judges now saw themselves as obligated to admit prior acquitted conduct into sentencing hearings with only minimal consideration of the reliability of the evidence supporting that conduct.[151]

Within three years, every circuit but the Ninth would follow suit.[152] By the time ten years had passed from the promulgation of the Guidelines, courts of appeals were able to dispense with appeals for use of prior acquitted conduct at sentencing in a few paragraphs by briefly gesturing at section 1B1.3 of the Guidelines and at a small fraction of the large body of relevant case law.[153]

Prior acquittal sentencing had come a long way from its ancestry in *Williams v. New York*. No longer a difficult issue requiring the consideration of the aims and limits of complex legal doctrines, the admission of prior acquitted conduct at sentencing was now *de rigeur*, a question to be decided automatically in the course of a few paragraphs with the help of a manual.

The new regime was troubling in two respects. First, the presumptive reliance on prior acquitted conduct mandated by the Guidelines differed dramatically from the use of such conduct to sentence the narrow class of defendants whose criminal history

---

> The Guidelines establish both the reason for the weapons enhancement and the circumstances in which it should be applied: "The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, an enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet."

Id. at 17 (citing U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) cmt. n.3 (2009)).

[151] Indeed, *Mocciola* gave somewhat more consideration to the purposes of sentencing and the reliability of the evidence underlying Mocciola's acquitted conduct than would other courts under the Guidelines regime. *See* United States v. Slow Bear, 943 F.2d 836, 838 (8th Cir. 1991) ("Conduct which is the subject of an acquittal may be used to enhance a sentence under the Guidelines . . . . The district court's enhancement of Slow Bear's offense level for serious bodily injury was supported by the evidence and was not clearly erroneous.").

[152] *See supra* text accompanying note 8.

[153] For a textbook example of this approach, see United States v. Clayton, No. 96-4300, 1997 U.S. App. LEXIS 116 (4th Cir. Jan. 6, 1997).

included particularly unreliable acquittals, which latter use Part I suggested was justified. The Guidelines' mechanistic imposition of a sentence predicated on prior acquitted conduct is the antithesis of the case-by-case approach exemplified by *Williams*. The *Williams* Court carefully inspected every facet of Williams's circumstances in assessing whether or not to include his prior acquittals in the determination of his sentence. Courts in cases like *Mocciola*, by contrast, simply applied the Guidelines rule that acquitted conduct is "relevant conduct" and, thus, applicable as a sentencing factor if it more plausibly than not took place. Those courts did not consider the totality of the defendant's circumstances or the rationale underlying prior acquittal sentencing.

Second, with the Guidelines came an unsurprising uptick in the number of sentencings relying on prior acquitted conduct,[154] even in comparison to the post-*Watts* era. While it is plausible that this uptick was in some way related to an increased number of doubtful acquittals—indeed, Representative Poff predicted such an uptick as a result of the Warren Court's evidentiary reforms—such factors can not wholly explain away the increase, given its magnitude. More likely, in taking the Guidelines as their starting point in sentencing defendants, judges were led by section 1B1.4 to a presumption of the consideration of prior acquittals—a factor they might otherwise have viewed more skeptically. Notwithstanding its permissive language, once § 3661 was incorporated into the Guidelines and combined with the Guidelines' requirement that relevant conduct be considered in sentencing, it was transformed into one of a host of factors through which the court marched mechanistically in every sentencing to which it was relevant.

V. *WATTS*: THE SUPREME COURT IMPOSES A UNIFIED STANDARD

Against this backdrop, the Supreme Court's decision in *Watts* is anything but mysterious. As a matter of precedent, *Williams* had already held that out-of-court conduct could be a valid and useful sentencing factor. Of course, the *Williams* Court merely *demonstrated* the virtues of the "totality of the circumstances" approach it embodied, rather than explicitly holding that such examination be undertaken by all later courts.

---

[154] *See infra* Appendix.

Nonetheless, the legislative imposition, by both Congress and the Sentencing Commission, of bright-line rules codifying *Williams*'s result without its method rendered *Watts*'s decision both easy and inevitable.

Thirty-eight years after the trial of Samuel Titto Williams, the tale of prior acquitted sentencing achieved partial closure in the wake of the trial of Vernon Watts. When police tracked Watts, a probationer, to his girlfriend's home, they found cocaine base in her kitchen cabinets and two loaded guns with ammunition in a bedroom closet.[155] At trial, Watts was acquitted on the firearm count. Nonetheless, in sentencing him for the drug offense, the district court judge found by a preponderance of the evidence that Watts had possessed the two guns in connection with his drug offense.[156] Two points were thus added to Watts' base offense level under the Sentencing Guidelines.[157] With the addition of the two base offense level points, Watts was sentenced to 262 months of incarceration and sixty months of supervised release.[158] When Watts appealed on due process grounds, the Ninth Circuit vacated his sentence, holding that a sentencing judge does not have the power " 'under *any* standard of proof,' [to] rely on facts of which the defendant was acquitted."[159]

The government petitioned for certiorari, and the Court "GVRed." That is, in its grant of certiorari, the Court also vacated the Ninth Circuit's ruling and remanded to the lower court with directions to apply a different rule of law, all without the benefit of oral argument or merits briefing.[160] The new rule, set forth by the Supreme Court as the law of the land, held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence."[161]

In some sense, the Court's decision was a foregone conclusion, given the occupation of the field by a congressional

---

[155] United States v. Watts, 67 F.3d 790, 793 (9th Cir. 1995).
[156] *Id.*
[157] *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2009).
[158] *Watts*, 67 F.3d at 793.
[159] *Id*. at 797 (emphasis in original).
[160] United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam).
[161] *Id.*

statute, the Guidelines, and the Court's own prior precedent. And, indeed, the *Watts* Court predicated its holding explicitly on 18 U.S.C. § 3661's[162] provision that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[163] This provision gained strength, the Court argued, from being incorporated into the Guidelines as section 1B1.4: "In determining the sentence to impose within the guidelines range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."[164] These two provisions, the Court continued, were part and parcel with a series of Supreme Court cases holding that sentencing courts were permitted to consider extra-trial facts during sentencing, most saliently the 1949 Supreme Court case *Williams v. New York*.[165]

While the *Watts* decision should certainly be taken as a broad ratification of the use of prior acquitted conduct at sentencing, two aspects of the *Watts* holding give rise to a more nuanced evaluation of the Court's handiwork. First, the language of *Watts*'s holding stakes out a middle way between the restrained ambiguity of *Williams* and the categorical language of § 3661, as incorporated into the Guidelines. That is, the *Watts* Court's holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge"[166] is akin to *Williams*'s holding in its negative formulation; it merely establishes that the bare fact that conduct underlies an acquitted charge does not render it per se inadmissible in sentencing. That holding is a far cry from § 3661's affirmation that "no limitation" may be put on the evidence that a court may consider. Indeed, *Watts*'s language both leaves room for as-applied challenges and succeeds in placing more emphasis on the permissive nature of the holding. The provision begins not with the absence of limitation on the

---

[162] *Id.* at 151.
[163] 18 U.S.C. § 3661 (2006).
[164] U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2010).
[165] *Watts*, 519 U.S. at 165.
[166] *Id.* at 157.

admitted evidence but rather on the fact that the sentencing court is *not prevented* from using the evidence—but not required to do so either.

Second, the *Watts* Court, for the first time, introduced an explicit reliability component into the test for admissibility of prior acquitted conduct. The Court's holding stated quite explicitly that prior acquitted conduct would be introduced only when it was "proved by a preponderance of the evidence."[167] That evidentiary standard contrasted sharply both with § 3661, whose "no limitation" standard acknowledged no explicit caveat for reliability, and with the holding of *Williams*, which analyzed indicia of reliability without enshrining the need to do so in its holding.[168] Notable, too, is the fact that the reliability standard imposed by the *Watts* Court textually constitutes a floor, not a ceiling. That is, no prior acquitted conduct may be admitted under *Watts* that is proved by less than a preponderance of the evidence. No textual portion of *Watts*, however, prohibits a sentencing judge from subjecting prior acquitted conduct to a *higher* standard, up to and including the "proof beyond a reasonable doubt" standard used at trial.

VI. PRIOR ACQUITTAL SENTENCING IN A POST-*BOOKER* WORLD

For the first few years after the *Watts* case, its holding coexisted with the mandatory Guidelines. However, since the Court's holding in the 2005 *Booker*[169] decision, the Guidelines are now merely advisory, leaving *Watts* as the main authority governing prior acquittal sentencing.[170] More broadly, the *Booker* decision moves the dominant sentencing regime closer, as a doctrinal matter, to a pre-Guidelines regime of discretion in sentencing. The question of how the prior acquittal sentencing landscape will change under this new regime is as yet

---

[167] *Id.* at 156.

[168] As a doctrinal matter, courts had imposed extra-textual due process limitations on § 3577, including an exclusion of felony convictions obtained unconstitutionally due to a deprivation of counsel, United States v. Tucker, 404 U.S. 443 (1972), and an exclusion of misinformation submitted by the prosecution when an uncounseled defendant had no opportunity to prevent the court from being misled, Townsend v. Burke, 334 U.S. 736, 740–41 (1948).

[169] United States v. Booker, 543 U.S. 220 (2005).

[170] Section 3661 is, of course, still in force. However, *Watts*, as the dominant interpretation thereof with respect to prior acquittal sentencing, is the law of the land in this area.

unanswered, however. As in many other aspects of sentencing, it is not fully clear how the reintroduction of discretion into a system governed by mechanization for over a decade will be embraced by sentencing judges.

This Part seeks to demonstrate that, as a doctrinal matter, judges have the discretion to limit their use of prior acquitted conduct in sentencing. Further, it argues that to do so would be wise as a policy matter.

A. Judicial Discretion

Although judges have not always seen fit to employ it, the language in both *Watts* and § 3577 grant sentencing judges a large degree of discretion in deciding whether or not to consider prior acquitted conduct at sentencing. Indeed, both texts are decidedly permissive, rather than mandatory. *Watts*, for example, provides that "a jury's verdict of acquittal *does not prevent* the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[171] Nothing in either text *orders* judges to consider prior acquitted conduct in sentencing or even hints at threatening them with reversal if they fail to do so. Indeed, even the less-permissive text of § 3661 provides merely that "[n]o limitation" be placed on the information "a court of the United States *may receive and consider* for the purpose of imposing an appropriate sentence."[172] Again, a careful reading of the statute indicates that it merely allows judges to consider prior acquitted conduct in sentencing, without mandating that they do so.

Nor did the Guidelines change the text of § 3661 when incorporating it into section 1B1.4 of the Guidelines; the provisions continued in its original permissive formulation. Moreover, even accepting a strong reading of the Guidelines' requirements,[173] the Supreme Court has repeatedly stressed the

---

[171] *Watts*, 519 U.S. at 156 (emphasis added).

[172] 18 U.S.C. § 3661 (2006).

[173] *See, e.g.*, United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989) (accepting as binding the fact that "Guideline § 1B1.3 requires courts to take account of 'relevant conduct' "). *Wright* was later relied upon in *Mocciola*. United States v. Mocciola, 891 F.2d 13, 16 (1st Cir. 1989).

advisory nature of the Guidelines, post-*Booker*. Indeed, in the face of judicial hesitancy to depart from the Guidelines, the Court has stressed this discretion over and over again, holding *three times* over the last three terms that judges are free to use their discretion to depart from the Guidelines, even for policy-based reasons.[174] In the face of this repeated affirmation of their discretion by the Supreme Court, it is unquestionable that judges have the discretion to choose not to admit evidence of prior acquitted conduct, should they so wish.

B. Policy Considerations

In many cases, exercising such restraint would be in accordance with sound public policy. As discussed above, prior acquittal sentencing is justified by the truth-seeking function of sentencing only in the narrow class of cases in which acquittal does not indicate innocence. It stands to reason, then, that judges should take special care to avoid using prior acquitted conduct as a sentencing factor in cases outside that narrow class. To do so, judges may wish to require independent indicia of reliability for all prior acquitted conduct they use at sentencing or hold that conduct to a higher standard of proof than the "preponderance of the evidence standard" floor required by *Watts*.

Other considerations, however, argue in favor of judges exercising restraint in their use of prior acquitted conduct even in the narrow class of cases where they know that a prior acquittal does not indicate innocence. Some of these considerations are discussed below.

The Power of the Probation Officer. To allow evidence of acquitted conduct to be considered "relevant" for purposes of sentencing is to give extraordinary power to the person who sets down in writing the details of what occurred during the prior incident leading to trial and acquittal. This person, the probation officer who assembles the presentence report ("PSR"), will often be the only source of information the sentencing judge has before him when trying to determine whether the previous acquittal is in fact an acquittal on account of innocence or is an

---

[174] *See, e.g.*, Nelson v. United States, 129 S. Ct. 890, 892 (2009); Spears v. United States, 129 S. Ct. 840, 843 (2009); United States v. Kimbrough, 552 U.S. 85, 109–10 (2007).

acquittal based on insufficient evidence to convict the defendant of a serious crime, the committing of which speaks to his character, his ability to be rehabilitated, and his potential dangerousness.[175]

While probation officers are criminal justice professionals, they are also closely involved in the lives of offenders and their communities.[176] This connection to the community is beneficial in many contexts: It both allows probation officers to be a positive force in offenders' lives and to obtain more accurate information on the offenders and communities their reports concern. Nonetheless, it also engenders the specter of bias born of the mixing of personal and professional relationships.

In addition, the position of probation officer does not require the same level of training and educational attainment that our society expects from an Article III judge. In most states and jurisdictions, the only educational requirement to work as a probation officer is a "bachelor's degree in social work, criminal justice, psychology, or a related field."[177] Undoubtedly, many—if not most—probation officers are dedicated and experienced professionals. Nevertheless, if we are truly given pause by the idea of discretionary sentencing by judges who possess graduate degrees and years of experience in sentencing, delegating much of that discretionary power to overtaxed officials with less training should perhaps give us additional pause.

The Risk of Unfettered Judicial Discretion. The Sentencing Guidelines were first enacted primarily to counter the problem of judicial sentencing discretion so unfettered it was "terrifying and intolerable for a society that professes devotion to the rule of

---

[175] This "problem" is mitigated by the procedural safeguard surrounding presentence reports. See Federal Rule of Criminal Procedure 32, under which the court is permitted to treat the PSR as its finding of fact, *except in the case of material subject to the parties' unresolved objections*. These procedural safeguards, however, require diligence on the part of the defendant's attorney.

[176] BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2010–2011 EDITION: PROBATION OFFICERS AND CORRECTIONAL TREATMENT SPECIALISTS (2009), *available at* http://www.bls.gov/oco/ocos265.htm#training ("Probation and parole officers supervise offenders on probation or parole through personal contact with the offenders and their families. Instead of requiring offenders to come to them, many officers meet offenders in their homes and at their places of employment or therapy. Probation and parole agencies also seek the assistance of community organizations, such as religious institutions, neighborhood groups, and local residents, to monitor the behavior of many offenders.").

[177] *Id.*

law."[178] Marvin Frankel's definitive work on the topic, *Criminal Sentences: Law Without Order*,[179] effectively argued that affording unrestrained sentencing discretion to judges resulted in both arbitrary sentencing and a wide disparity of sentences being imposed on similarly situated defendants. While allowing judges the discretion to decide whether or not to use prior acquitted conduct as a sentencing factor would afford them much less discretion than that granted to them pre-Guidelines, introducing any amount of additional discretion into sentencing potentially allows for arbitrary determinations by judges and disparities between similarly-situated defendants.[180] Indeed, the more broadly courts rely on prior acquitted conduct in sentencing, the more discretion they have.

Due Process Concerns. While sentencing hearings are not afforded the full due process protections required at trials,[181] there is nonetheless a strong argument to be made that in an era when more than ninety percent of criminal cases end in plea bargains[182] and when a defendant's primary day in court, as well as the day that determines his fate, is his sentencing hearing, due process values should at least guide those hearings. While this concern does not necessary dictate the application of the full panoply of due process rights accorded to defendants at trial, it may lead judges to consider refraining from the use of prior acquitted conduct at sentencing.

---

[178] FRANKEL, *supra* note 135, at 5.

[179] *See generally id.*

[180] This problem may have the effect of disproportionately widening racial disparities in sentencing. *See generally* Larry Michael Fehr, *Racial and Ethnic Disparities in Prosecution and Sentencing: Empirical Research of the Washington State Minority and Justice Commission*, 32 GONZ. L. REV. 577 (1996); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001); Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781 (1993); Douglas Smith, *Narrowing Racial Disparities in Sentencing Through a System of Mandatory Downward Departures*, 2 AM. U. MOD. AM. 32 (2006).

[181] *See* Williams v. New York, 337 U.S. 241, 251–52 (1949) (allowing extra-trial evidence in sentencing hearings); *see also* United States v. Malouf, 466 F.3d 21, 25 (1st Cir. 2006) (holding that sentencing factors need only be proved by a "preponderance of the evidence" (quoting McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986))).

[182] *See* Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 700 (2001) ("Despite the fact that there is no right to a negotiated plea, most—if not virtually all—criminal cases result in a guilty plea.").

Expressive Meaning of Acquittal. As discussed above, the prior acquittal sentencing regime derives justification from the fact that acquittal is not coterminous with a determination of innocence. While this is certainly true as a matter of doctrine,[183] it would come as a surprise to most laymen. Indeed, there is a widely-held public perception that an acquitted defendant has been "found innocent," an opinion that is widely reflected in media reporting of trials.[184] Challenging a widely held, erroneous public perception is certainly not problematic per se; indeed, if the *Watts* decision had encouraged Americans to learn about the criminal justice system, it could have constituted a teaching moment in American civic literacy. However, as the public perception of acquittal seems not to have changed in the wake of the *Watts* decision,[185] the effect of *Watts* is merely to create cognitive dissonance among the American people.

Insofar as the public is aware of prior acquittal sentencing, however, this cognitive dissonance could potentially have several deleterious effects on the criminal justice system. First, by allowing a seeming injustice—sentencing a defendant for conduct of which he was "innocent"—to be part of the fabric of the law, the *Watts* decision's admission of prior acquittals in sentencing undermines the claim of the criminal justice system to be doing justice, and thus its broader legitimacy. That is, if an onlooker sees a defendant sentenced in part for acquitted conduct that the onlooker codes as "conduct of which the defendant was innocent," he will assume the criminal justice system is unjust and cease to put faith therein.

Second, this potential cognitive dissonance undermines the degree to which an acquittal may have an effect analogous to that of "clearing title" in property law. Because the American

---

[183] *See* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984); *see also* United States v. Putra, 78 F.3d 1386, 1394 (9th Cir. 1996) (Wallace, J., dissenting).

[184] *See* Joh, *supra* note 5, at 903 n.87 ("In our system, not only are you presumed innocent, but when a jury returns a verdict of not-guilty you are, in fact, innocent." (quoting Peter Neufeld, defense attorney in Simpson trial)); *id.* at 903 n.88 ("[William Kennedy] Smith was found innocent . . . ." (quoting Anne Simpson, HERALD (Glasgow), May 13, 1997, at 17)); *id.* at 903 n.89 ("We know that we had the trial with Stacy Coons [sic] in the Rodney King incident. And he was found innocent the first trial [sic] . . . ." (quoting from the transcript of the Rodney King (Stacy Koons) trial)).

[185] *See id.* at 903 n.87 (citing post-*Watts* news reports).

system has only two verdicts—guilt proved beyond a reasonable doubt and guilt not proved beyond a reasonable doubt—both the innocent and the guilty whom the prosecution lacked the evidence to convict receive the same sentence: acquittal. Although some have suggested establishing such an institution,[186] at present there is no verdict whereby a criminal defendant may definitively prove his innocence and have that innocence be certified by the state. Thus, acquittals must be used as a proxy for declarations of innocence, lest criminal defendants be subject to the stigma of criminality merely by being charged with a crime. Indeed, many courts have gone out of their way to stress the degree to which acquittals, whatever the legal standard necessary to achieve them, *ought* to be considered declarations of innocence:

> 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.[187]

Given, then, that acquittals are the sole manner of "proving" innocence in our system, we should pause before blurring the innocence-denoting function of acquittals by allow prior acquitted conduct to be used in sentencing on the theory that acquittal and innocence routinely diverge.

Undermining General Deterrence as a Rationale for Punishment. In sussing out the *Williams* Court's justification for its holding, this Article noted above that seeing a defendant clearly in his actual behavior and character is necessary for three of the purposes of sentencing: rehabilitation, incapacitation, and retribution. In each case, the ability to properly sentence any defendant is predicated on the ability to correctly assess the defendant's character and conduct, a necessity that weighs in favor of allowing the consideration of some prior acquitted conduct. It is worth noting, however, that in the case of another

---

[186] *See generally* Samuel Bray, Comment, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299 (2005). *Cf. California Seeks Change in Verdict Terms*, UNITED PRESS INT'L (Sacramento), Jan. 23, 1996 (discussing Senator Quentin Kopp's attempt in 1996 to change acquittal verdicts in California from "not guilty" to "not proven guilty" in order to alleviate "confusion").

[187] McNew v. State, 391 N.E.2d 607, 612 (Ind. 1979).

of the Guidelines' stated goals, deterrence of future crime,[188] additional information about the defendant is not always useful useful. Rather, sentencing a defendant in accord with additional information in the form of prior acquitted conduct may actually be counter-productive.

General deterrence differs from the other rationales for punishment in that it is ordered not toward how an offender is, but toward how he *seems*. That is, deterrence works not on defendants themselves but on third parties observing them. The theory of deterrence posits that punishing criminals allows them to serve as a warning to other criminals, thereby deterring other criminals from committing potential crimes.[189] In setting punishments, deterrence theory invokes a law and economics style approach, with analysis mirroring the punitive damages analysis used in torts. That approach presupposes—undoubtedly correctly—that the majority of those who commit any given crime are not caught. It argues that this is a problem because, from a criminal's point of view, the expected "value" of committing a crime may be higher than that of not committing a crime. Say, for example, that a thief steals cars, the average value of which is $10,000, and that it is worth $10,000 to him not to go to jail for one year. If thieves were caught every time they stole, the proper deterrent "value" of his sentence would be one year in jail for each car he stole. The deterrence theory of punishment, however, posits that the thief will be caught not every time he steals, but rather every five times he steals. As such, it would set the punishment for stealing cars at five years in jail, so that it would not be "rational" for a thief to steal cars, given the penalty he might face if he did.

The key difference between the deterrence approach to punishment and the rehabilitative, retributive, and incapacitative theories of punishment is that deterrence is not primarily ordered toward or focused on the offender at hand. On

---

[188] Sentencing Guidelines for United States Courts, 73 Fed. Reg. 26,924 (May 9, 2008) ("The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: Deterrence, incapacitation, just punishment, and rehabilitation.").

[189] Throughout this Subsection, see generally Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535 (2005); Samuel Kramer, Comment, *An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions*, 81 J. CRIM. L. & CRIMINOLOGY 398 (1991).

the rehabilitative model, a defendant is punished with the hope of curing him of his deviancy. On the retributive model, punishment serves to make the defendant pay for what he has done. When sentencing with an eye towards incapacitation, a judge hopes to keep a dangerous defendant from hurting others. On the deterrence theory of punishment, by contrast, the judge hopes to deter both the defendant *and other members of his community who know of his punishment* from committing crimes in the future. Punishment is ordered toward changing not only the defendant's behavior, but the behavior of those around him.

To change a defendant's behavior, you must understand him; you must know how bad he really is. To change the behavior of those around him, you must know how bad he *seems*. Thus, for the deterrent message to be properly conveyed and received, it must be clear for what act the defendant is being punished. If he is punished excessively for some secret fact unknown to the outside world, or if his sentence is lessened due to some secret aspect of his life the average onlooker could not detect, the value of the message conveyed by the deterrence is not only diluted but perverted. The message received by the onlooker will be that punishment for the crime at hand is either more or less than it really is.

Due to the popular perception that acquittals are a sure indicator of innocence, reliance on prior acquitted conduct as a sentencing factor could have the same effect on the deterrent value of sentencing that sentencing based on a secret factor would. It would distort the message received by those meant to be deterred, encouraging them to think that certain crimes were awarded much higher punishments than they actually were.

This problem, however, is likely not as serious as some of the others considered above. In torts and contract, it is important to set the deterrent value carefully so that it neither *under-deters*, allowing undesirable tort-causing and contract-breaching to occur, nor *over-deters*, allowing sensitive plaintiffs to put the kibosh on nuisances that are benign in society's eyes or preventing efficient breach.[190] By contrast, in the context of the

[190] Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970) ("Repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered."). *See generally* Charles G. Goetz & Robert E. Scott, *Liquidated Damages,*

criminal law, it seems that there is no such thing as over-deterring crime; crime is both per se bad for society as well as inefficient. It is certainly possible to over-punish an offender by meting out to him more punishment than he deserves in justice. It is not, on the other hand, possible to over-deter onlookers by making punishment *seem* too disproportionate—within reason.[191] Moreover, unlike tort or contract scenarios, where it is easy to put a price tag on the imposition of a nuisance or the breach of a contract, in the criminal sphere there is, in most cases, no one-size-fits-all equation between offenses and the severity of punishment imposed for them. Consider for example, the extreme sentencing disparities for the same crime between the United States and Europe.[192] As such, the worry about over-deterrence of crime seems to mistake how finely tuned the matching of punishments to deterrence of crime in fact is.

While such considerations must be carefully balanced against the advantages of prior acquittal sentencing in cases where acquittal does not indicate innocence—namely, the good of sentencing offenders accurately in accordance with their true character—they are nonetheless worthy of consideration in any judge's decision of how to exercise discretion most wisely in the wake of *Booker*.

CONCLUSION

This Article has traced the history of prior acquittal sentencing from its foreshadowing in the 1949 *Williams* decision through the two legislative interventions of § 3577 and the Sentencing Guidelines to its ultimate legitimization as permissible practice in the 1997 *Watts* decision. From that history, several themes and conclusions have emerged.

First, sometimes less is more. The *Williams* decision's minimalist holding provided that the use of extra-trial

---

Penalties, and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 COLUM. L. REV. 554 (1977).

[191] Certainly, if the populace perceived that brutally harsh punishments were meted out for minor infractions, the expressive value of that punishment could produce barbarism—or revolt.

[192] *See, e.g.*, Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, at A1 ("Americans are locked up for crimes—from writing bad checks to using drugs—that would rarely produce prison sentences in other countries. And in particular they are kept incarcerated far longer than prisoners in other nations.").

information at sentencing was not a per se violation of the Due Process Clause. The limited guidance offered by that holding, combined with the example offered by the Court in its own decisionmaking process, engendered progeny like *United States v. Sweig*. *Sweig* carefully reasoned that prior acquittal sentencing should be permitted only in the narrow class of cases where acquittal does not indicate innocence and, thus, where prior acquitted conduct reveals elements of the defendant's character useful to the sentencing judge. Following *Williams*'s example, the *Sweig* court considered various indicia of reliability in deciding whether prior acquitted conduct should be used at sentencing.

Section 3577 provided a useful foil to the *Williams* Court's minimalism, mandating that no limitation be put on the information a sentencing judge was allowed to consider. Motivated by concern for the manner in which trials had been driven away from truth-seeking by mafia manipulation and the criminal procedure reforms of the Warren Court, Congress intervened in categorical language. In doing so, it effectively insulated judges from reversal for sentencing defendants based on their prior acquitted conduct. As prior acquittal sentencing cases decided under § 3577 demonstrate, providing judges with a bright-line resolution to a complicated issue sometimes engenders mechanization without understanding. Indeed, in cases like *United States v. Plisek*, courts would have benefited from the deliberation-forcing aspect of *Williams*'s ambiguity. Performing the intellectual heavy-lifting of thinking through the justifications for prior acquittal sentencing would have forced the *Plisek* court to understand the boundaries of the narrow class of cases in which prior acquittal sentencing was justified.

That mechanization was later systematized and universalized with the promulgation of the Sentencing Guidelines, which incorporated § 3577, thereby placing prior acquitted conduct in the category of "relevant information" judges were bound to consider at sentencing. Guidelines cases would betray a mechanical application of § 3577's admission of prior acquitted conduct with very little exercise of discretion.

With the Supreme Court's recent decisions in *Booker* and *Watts*, however, discretion is again at the fore. Under *Booker*, the Guidelines are no longer mandatory on judges. Under *Watts*, prior acquittal sentencing is permitted but not mandated, and a

hard floor of reliability is established in the form of the requirement that prior acquitted conduct be proved to a preponderance of the evidence. The degree to which that discretion is exercised by judges now accustomed to minimally discretionary Guidelines sentencing remains to be seen.

Second, while prior acquittal sentencing is logically justified in a narrow class of cases, it may be imprudent even in those cases. Consideration of prior acquittal sentencing's history allows us to formulate a recommendation on how best to exercise that discretion. As we have seen, decisions like *Williams*, *Sweig*, and *Watts* provide the makings of a strong logical argument in favor of the use of prior acquitted conduct as a sentencing factor in certain cases. Those cases argue compellingly that sentencing's goals differ from those of trials. Unlike trials, sentencings must strive above all for clarity. The sentencing judge must see the defendant as he truly is in order to sentence him justly in accordance with the gravity of his crime and in order to know whether and to what degree incapacitation is necessary. To the degree a sentencing judge is *sub silentio* relying on a defendant's potential for rehabilitation, accurate knowledge of his character is equally necessary. Because acquittal indicates not innocence but an inability by the prosecution to prove each element of the case against the defendant, there exists a narrow class of cases in which a convicted defendant was previously acquitted of a crime he had actually committed. In that narrow class of cases, consideration of prior acquitted conduct will allow that defendant to be sentenced more accurately, particularly given the high probative value recidivism holds in demonstrating a defendant's character.

However, winnowing the class of defendants with prior acquittals down to those previously convicted of a crime they actually committed is a difficult task. To accomplish that task, courts should, at the very least, exercise the discretion granted them by law to require external indicia of reliability before relying on evidence of prior acquitted conduct. Further, they should consider requiring a more stringent level of proof than a mere preponderance of the evidence. Finally, before admitting evidence of prior acquitted conduct even in that narrow class of cases, courts should think seriously about the compelling public policy reasons for not engaging in prior acquittal sentencing. Those include the risk of undermining the expressive meaning of

acquittal, of spoiling the deterrence function of sentencing, or of according too much power and discretion to probation officers and judges. While not necessarily determinative, those factors should be taken into account by judges in deciding how best to reassert their rediscovered discretion.

APPENDIX

CASES ADDRESSING THE PERMISSIBILITY OF PRIOR ACQUITTAL SENTENCING

* Court found for defendant, excluding prior acquitted conduct at sentencing

~ Case too idiosyncratic or vague to reliably include in statistics

Cases Decided Before October 14, 1970 (Prior to § 3577)	
1	~United States v. Castaldi, 338 F.2d 883 (2d Cir. 1964).

Cases Decided October 14, 1970–November 1, 1987 (Post-§ 3577, Pre-Guidelines)	
1	United States v. Sweig, 454 F.2d 181 (2d Cir. 1972).
2	United States v. Atkins, 480 F.2d 1223 (9th Cir. 1973).
3	~United States v. Avery, 473 F. Supp. 980 (S.D. Fla. 1979).
4	United States v. Morgan, 595 F.2d 1134 (9th Cir. 1979).
5	~United States v. Lowe, 654 F.2d 562 (9th Cir. 1981).
6	United States v. Plisek, 657 F.2d 920 (7th Cir. 1981).
7	United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982).
8	United States v. Bernard, 757 F.2d 1439 (4th Cir. 1985).
9	Walker v. Endell, 850 F.2d 470 (9th Cir. 1987).

Cases Decided November 1, 1987–January 6, 1997 (Post-Guidelines, Pre-*Watts*)	
1	United States v. Perez, 858 F.2d 1272 (7th Cir. 1988).
2	United States v. Ryan, 866 F.2d 604 (3d Cir. 1989).
3	United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989).
4	United States v. Isom, 886 F.2d 736 (4th Cir. 1989).
5	United States v. Ford, 889 F.2d 1570 (6th Cir. 1989).
6	Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989).
7	United States v. Mocciola, 891 F.2d 13 (1st Cir. 1989).
8	United States v. Funt, 896 F.2d 1288 (11th Cir. 1990).
9	United States v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir. 1990).
10	United States v. Vandervelden, No. 89-1345, 1990 WL 51380 (6th Cir. Apr. 23, 1990).
11	United States v. Duncan, 918 F.2d 647 (6th Cir. 1990).
12	Stewart v. Roland, No. 89-15936, 1990 U.S. App. LEXIS 22101 (9th Cir. Dec. 18, 1990).
13	United States v. Bertucci, 730 F. Supp. 1483 (E.D. Wis. 1990).
14	United States v. Averi, 922 F.2d 765 (11th Cir. 1991).
15	*United States v. Brady, 928 F.2d 844 (9th Cir. 1991).
16	United States v. Rivera-Lopez, 928 F.2d 372 (11th Cir. 1991).
17	United States v. Lawrence, 934 F.2d 868 (7th Cir. 1991).
18	United States v. Lynch, 934 F.2d 1226 (11th Cir. 1991).
19	United States v. Slow Bear, 943 F.2d 836 (8th Cir. 1991).

20	Moreno v. United States, No. 91-1572, 1991 U.S. App. LEXIS 22705 (6th Cir. Sept. 23, 1991).
21	United States v. Romulus, 949 F.2d 713 (4th Cir. 1991).
22	United States v. Ailemen, No. 90-10375, 1991 U.S. App. LEXIS 30312 (9th Cir. Dec. 17, 1991).
24	United States v. Blyden, 964 F.2d 1375 (3d Cir. 1992).
25	United States v. Vineyard, Nos. 91-5173, 5174, 1992 U.S. App. LEXIS 14737 (4th Cir. June 24, 1992).
26	United States v. Fields, No. 91-1910, 1992 U.S. App. LEXIS 8770 (1st Cir. Feb. 26, 1992).
27	United States v. Martin, No. 91-4076, 1992 U.S. App. LEXIS 18516 (6th Cir. July 28, 1992).
28	United States v. Hasting, Nos. 91-6234, 6311, 1992 U.S. App. LEXIS 21595 (6th Cir. Sept. 1, 1992).
29	United States v. Neris, No. 91-5391, 1992 U.S. App. LEXIS 22188 (4th Cir. Sept. 11, 1992).
30	United States v. Silverman, 976 F.2d 1502 (6th Cir. 1992).
31	United States v. Martin, No. 91-4076, 1992 U.S. App. LEXIS 26283 (6th Cir. Oct. 7, 1992).
32	United States v. Boney, 977 F.2d 624 (D.C. Cir. 1992).
33	United States v. Cheatham, Nos. 91-5195, 5199, 1992 U.S. App. LEXIS 30857 (4th Cir. Nov. 23, 1992).
34	United States v. August, 984 F.2d 705 (6th Cir. 1992).
35	United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992).
36	United States v. McIntosh, Nos. 91-6236, 6284, 6283, 6282, 6240, 1992 U.S. App. LEXIS 34839 (6th Cir. Dec. 29, 1992).
37	United States v. Smith, No. 92-5005, 1992 U.S. App. LEXIS 33988 (4th Cir. Dec. 30, 1992).

38	United States *ex rel.* Jackson v. Roth, No. 93 C 2281, 1993 U.S. Dist. LEXIS 11852 (N.D. Ill. Aug. 26, 1993).
39	United States v. Bennett, 984 F.2d 597 (4th Cir. 1993).
40	*United States v. Walsh, No. 92-10118, 1993 U.S. App. LEXIS 1689 (9th Cir. Jan. 25, 1993).
41	United States v. Kelly, 1 F.3d 1137 (10th Cir. 1993).
42	United States v. Eliason, 3 F.3d 1149 (7th Cir. 1993).
43	United States v. Nelson, 6 F.3d 1049 (4th Cir. 1993).
44	DeWitt v. Ventetoulo, 6 F.3d 32 (1st Cir. 1993).
45	United States v. Garcia, 987 F.2d 1459 (10th Cir. 1993).
46	United States v. Spencer, No. 93-5112, 1993 U.S. App. LEXIS 28854 (4th Cir. Nov. 5, 1993).
47	United States v. Nyhuis, 8 F.3d 731 (11th Cir. 1993).
48	United States v. Stanley, 12 F.3d 17 (2d Cir. 1993).
49	United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994).
50	United States v. Pinkney, 15 F.3d 825 (9th Cir. 1994).
51	United States v. Emerson, No. 93-6064, 1994 U.S. App. LEXIS 1692 (10th Cir. Feb. 3, 1994).
52	United States v. Parham, 16 F.3d 844 (8th Cir. 1994).
53	United States v. Hunter, 19 F.3d 895 (4th Cir. 1994).
54	United States v. Fankhauser, No. 93-5288, 1994 U.S. App. LEXIS 3521 (4th Cir. Mar. 1, 1994).
55	United States v. Foster, 19 F.3d 1452 (D.C. Cir. 1994).
56	United States v. Estevez, No. 93-3763, 1994 U.S. App. LEXIS 11751 (6th Cir. May 18, 1994).
57	United States v. Roper, No. 93-3592, 1994 U.S. App. LEXIS 14346 (6th Cir. June 7, 1994).

58	United States v. Milton, 27 F.3d 203 (6th Cir. 1994).
59	United States v. Stanley, 24 F.3d 1314 (11th Cir. 1994).
60	United States v. Roach, 28 F.3d 729 (8th Cir. 1994).
61	United States v. Thai, 29 F.3d 785 (2d Cir. 1994).
62	United States v. Silkowski, 32 F.3d 682 (2d Cir. 1994).
63	United States v. Gonzalez-Vazquez, 34 F.3d 19 (1st Cir. 1994).
64	United States v. Ovalle-Márquez, 36 F.3d 212 (1st Cir. 1994).
65	United States v. Frias, 39 F.3d 391 (2d Cir. 1994).
66	United States v. Strobridge, No. 93-5916, 1994 U.S. App. LEXIS 34599 (4th Cir. Dec. 12, 1994).
67	United States v. Powell, 487 F.2d 325 (4th Cir. 1973).
68	United States v. Spears, 49 F.3d 1136 (6th Cir. 1995).
69	United States v. Cannon, 41 F.3d 1462 (11th Cir. 1995).
70	United States v. Karterman, 60 F.3d 576 (9th Cir. 1995).
71	Ahmed v. United States, No. 94-1796, 1995 U.S. App. LEXIS 2158 (6th Cir. Feb. 1, 1995).
72	United States v. Sines, No. 95-3003, 1995 U.S. App. LEXIS 8654 (6th Cir. Apr. 11, 1995).
73	Lyles v. United States, No. 94-3445, 1995 U.S. App. LEXIS 8679 (6th Cir. Apr. 12, 1995).
74	United States v. Hudson, No. 93-2601, 1995 U.S. App. LEXIS 9477 (6th Cir. Apr. 20, 1995).
75	United States v. Mull, No. 94-5833, 1995 U.S. App. LEXIS 9925 (6th Cir. Apr. 27, 1995).
76	United States v. Williams, 51 F.3d 1004 (11th Cir. 1995).
77	Seeley v. United States, No. 95-1043, 1995 U.S. App. LEXIS 15119 (1st Cir. June 8, 1995).

78	United States v. Hoffman, No. 95-3445, 1995 U.S. App. LEXIS 23143 (6th Cir. Aug. 4, 1995).
79	United States v. Kidder, No. 95-1248, 1995 U.S. App. LEXIS 39878 (2d Cir. Nov. 9, 1995).
80	United States v. Sinis, No. 95-1268, 1995 U.S. App. LEXIS 39846 (2d Cir. Nov. 21, 1995).
81	United States v. Lanoue, 71 F.3d 966 (1st Cir. 1995).
82	United States v. Melvin, No. 95-5286, 1996 U.S. App. LEXIS 177 (4th Cir. Jan. 5, 1996).
83	*United States v. Putra, 78 F.3d 1386 (9th Cir. 1996).
84	*United States v. Watts, 79 F.3d 768 (9th Cir. 1996).
85	United States v. Shenberg, 89 F.3d 1461 (11th Cir. 1996).
86	United States v. Frazier, 89 F.3d 1501 (11th Cir. 1996).
87	United States v. Hoy, No. 95-3698, 1996 U.S. App. LEXIS 22256 (6th Cir. Aug. 13, 1996).
88	United States v. Comer, 93 F.3d 1271 (6th Cir. 1996).
89	United States v. Gigante, 94 F.3d 53 (2d Cir. 1996).
90	United States v. Baylor, 97 F.3d 542 (D.C. Cir. 1996).
91	United States v. Olbres, 99 F.3d 28 (1st Cir. 1996).
92	United States v. Ruggiero, 100 F.3d 284 (2d Cir. 1996).
93	United States v. Lombard, 102 F.3d 1 (1st Cir. 1996).
94	United States v. Clayton, No. 96-4300, 1997 U.S. App. LEXIS 116 (4th Cir. Jan. 6, 1997).