COMMENTS

"IF IT SUFFICES TO ACCUSE":* *UNITED STATES v. WATTS* AND THE REASSESSMENT OF ACQUITTALS

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INTRODUCTION

At different historical moments, punishment has been explained differently: reinforcement of sovereign authority;[1] deterrence of the offender;[2] treatment of the deviant.[3] Rationales like these have been used to justify various strategies of response to criminal behavior. Each suggests distinct normative foundations for punishment, but they all reflect one common idea: Punishment is communicative. The criminal sanction is not simply the governmental apparatus that responds to crime and criminals. Through its classifications, judgments,

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* Coffin v. United States, 156 U.S. 432, 455 (1895) (quoting Rerum Gestarum, L. XVIII, c. 1.):

> Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of [the presumption of innocence] in the Roman law. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, "a passionate man," seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, "Oh, illustrious Caesar! If it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied, "If it suffices to accuse, what will become of the innocent?"

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1 See, e.g., Michel Foucault, Discipline and Punish: The Birth of the Prison 48 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978) ("The public execution [of 17th and 18th century Europe], then, has a juridico-political function. It is a ceremonial by which a momentarily injured sovereignty is reconstituted. It restores that sovereignty by manifesting it at its most spectacular.").

2 See, e.g., Jeremy Bentham, The Principles of the Penal Law, in Principled Sentencing 62, 63 (Andrew von Hirsch & Andrew Ashworth eds., 1992) ("General prevention ought to be the chief end of punishment, as it is its real justification.").

3 See, e.g., Andrew von Hirsch, Rehabilitation, in Principled Sentencing, supra note 2, at 1, 1 ("Rehabilitation is the idea of 'curing' an offender of his or her criminal tendencies.").

and terms, penal practices tell us about the kinds of ideas, beliefs, and representations that are valuable and legitimate.[4] Like all forms of law, practices of punishment do not happen in isolation from the rest of society.[5] Sensitive to shifts outside of the courtroom and the prison, penal practices often reflect the dominant social themes of the moment. At the same time, theories of punishment can help create meanings that are reinforced and disseminated beyond the institutions of the criminal justice system.

In the past thirty years, the American criminal justice system has undergone a series of quite dramatic changes. Perhaps the most radical shift has occurred in sentencing.[6] Recent innovations in sentencing such as "three strikes" laws[7] have captured the attention of the media and have become part of the popular dialogue. Indeed, the public feels quite strongly about this aspect of criminal law. Polls suggest that a majority of Americans support longer sentences for convicted criminals despite doubts by criminologists that these harsher measures are effective crime control methods.[8] In the realm of sen-

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[4] See David Garland, Punishment and Modern Society: A Study in Social Theory 251-52 (1990):

> Punishment is one of the many institutions which helps construct and support the social world by producing the shared categories and authoritative classifications through which individuals understand each other and themselves. . . .
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> . . . Penal signs and symbols . . . [t]hrough their judgments, condemnations, and classifications . . . teach us (and persuade us) how to judge, what to condemn, and how to classify, and they supply a set of languages, idioms, and vocabularies with which to do so.

[5] See, e.g., Roger Cotterrell, The Sociology of Law 21-22 (1992) (explaining expressive theory in which law represents not simply rules but cultural outlook of people or nation).

[6] See, e.g., Frank O. Bowman, III, The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines, 1996 Wis. L. Rev. 679, 679 (1996) (describing Sentencing Guidelines as most significant change in federal system since 1938 Federal Rules of Civil Procedure (citing José A. Cabranes, Sentencing Guidelines: A Dismal Failure, N.Y. L.J., Feb. 11, 1992, at 2)).

[7] See generally Franklin E. Zimring, Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California, 28 Pac. L.J. 243 (1996) (outlining popular public support that pushed three strikes laws through California government).

[8] See Sara Sun Beale, What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law, 1 Buff. Crim. L. Rev. 23, 25 n.8 (1997) (citing polls supporting harsher sentences). On the other hand, public opinion may not always be inclined to want more punishment. Anthony Bottoms suggests that "populist punitiveness"—a term reflecting the apparent popularity of harsh sentencing practices—is a phenomenon that does not represent public opinion on crime policy at all times. See Anthony Bottoms, The Philosophy and Politics of Punishment and Sentencing, in The Politics of Sentencing Reform 17, 40 (Chris Clarkson & Rod Morgan eds., 1995) ("[T]he term 'populist punitiveness' is intended to convey the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance.").

tencing laws, scholars have puzzled over the link between popular beliefs and sentencing practices.

Despite these sweeping changes, few courts or commentators have reflected upon the communicative effects of the United States Sentencing Guidelines. Enacted in 1984,[9] the Sentencing Guidelines represent the most significant modern alteration of federal sentencing. The extensive commentary on the Sentencing Guidelines tends to focus on the constitutional and political issues surrounding their implementation.[10] If punishment is constitutive of social beliefs, however, current sentencing practices merit examination. Though the Supreme Court's decisions have not been illuminating in this regard, a 1997 case that centered on a controversial Sentencing Guidelines practice provides a compelling opportunity to examine the intersection of sentencing and its communicative effects. *United States v. Watts*[11] decided whether federal judges should consider acquitted conduct under the Guidelines.[12] The *Watts* decision received little attention, and those who followed the development of the Sentencing Guidelines were probably not surprised by the outcome of the decision.[13] The lack of critical engagement is not, however, indicative of the decision's significance; *Watts* underscores the manner in which the communicative force of current sentencing practices is overlooked.

This Comment tries to extract *Watts* from the context of statutory and constitutional interpretation[14] and reread it as an inquiry into the

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9 More specifically, the federal legislation was passed in 1984, the United States Sentencing Commission's officers were appointed in 1985, and the Guidelines themselves took effect in 1987. See Michael Tonry, Sentencing Matters 29 (1996).

10 See infra note 14.

11 117 S. Ct. 633 (1997) (per curiam).

12 See id. at 638 (holding that conduct underlying acquitted charge may be considered at sentencing if proved by preponderance of evidence). The use of acquitted conduct in sentencing refers to the consideration of conduct of which a defendant has been acquitted at trial, in order to lengthen the defendant's sentence for a separate or subsequent conviction.

13 Some commentators had predicted that the Court, if faced with the issue, would not find the consideration of acquitted conduct unconstitutional. See, e.g., Kevin R. Reitz, Sentencing Facts: Travesties of Real-Offense Sentencing, 45 Stan. L. Rev. 523, 546 (1993) ("While the Supreme Court has not yet ruled on the constitutionality of [the consideration of acquitted conduct], it is nearly certain [that] . . . the Court would uphold the practice.").

14 For constitutional analyses of *Watts*, see generally Matthew MacKinnon Shors, Note, United States v. Watts: Unanswered Questions, Acquittal Enhancements, and the Future of Due Process and the American Criminal Jury, 50 Stan. L. Rev. 1349, 1352 (1998) (arguing that acquittal enhancements are unconstitutional under both Sixth Amendment and Due Process Clause of Fifth Amendment, and that *Watts* does not preclude this assertion); Steven C. Sparling, Note, Cutting the Gordian Knot: Resolution of the Sentencing Dispute over Dismissed Charges After *United States v. Watts*, 6 Geo. Mason L. Rev. 1073, 1075 (1998) (arguing that *Watts* precludes First, Eighth, and Ninth Circuits' arguments in dismissed charge debate); Sandra K. Wolkov, Casenote, Reasonable Doubt in Doubt: Sen-

meaning of acquittals in the current sentencing regime. Part I of this Comment places the enactment of the Guidelines into historical context and also looks at the limited ways in which the Supreme Court attempted to justify the practice sanctioned in *Watts*. Part II examines the legal justifications that might better explain the Court's decision. Part III argues that even the best justifications offered for the *Watts* decision overlook the communicative effects of acquittals. Penal practices inevitably contribute to a social dialogue beyond the courtroom and the prison. This Comment argues that we should demand some coherence between social beliefs and sentencing decisions. Ultimately, *Watts* is problematic because it renders the acquittal verdict incoherent in a sentencing regime that many scholars and activists already find deeply unjust.

I
THE ISSUES IN *UNITED STATES V. WATTS*

Embedded in the *Watts* decision is the tension between competing ideas of sentencing: the rehabilitative ideal and a newer, more punitive, model. In order to understand these complexities, it is necessary to discuss the historical background against which *Watts* was decided.

A. Shifts in Sentencing

Though the interaction between competing theories of punishment and their effects on penal decisionmakers can be quite complex, the rehabilitative ideal unquestionably was influential upon sentencing. In American courts, the rehabilitative ideal dominated penal practices for much of the twentieth century.[15] As a theory, the rehabilitative ideal viewed punishment as an instrument of reform, therapeutic treatment, and paternalism. In practice, the treatment orientation of rehabilitation was embodied in indeterminate sentencing. The indeterminate sentencing model sought the most appropriate sanction for an individual offender, given his biographical information and clinical assessment, often revealed in the narrative of his presentence report.[16] This assessment in turn was considered by the

tencing and the Supreme Court in United States v. Watts, 52 U. Miami L. Rev. 661, 662 (1998) (analyzing Court's decision in *Watts*).

[15] See generally Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose 5 (1981) (discussing dominance of rehabilitative ideal in much of twentieth century and explaining its subsequent decline).

[16] See, e.g., Deborah Young, Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules, 79 Cornell L. Rev. 299, 307-08 (1994) ("[Courts] increasingly considered a defendant's character, personal relationships, and individual abilities or disabili-

judge, who used his expertise to consider the information and to tailor a sentence to meet the individual defendant's social and psychological needs. The sentence was individualized and prospective, and embodied the state's desire to return the reformed offender to society.[17]

In the 1970s, the rehabilitative model came under attack from both the academy and the bench.[18] It was unclear whether most offenders could be reformed, and indeterminate sentences seemed to result in disparate treatment, not individualized assessment. The rehabilitative model envisioned as its object the "delinquent," a misguided soul who needed assistance to return to the social fold. The rejection of the rehabilitative model resulted in the abandonment of its terms as well, and new ways of thinking about the criminal offender were created. The most recent classifications of this decade include the "high-rate offender"[19] and the "super-predator."[20] Sentencing at both the state and federal level began to reflect a more detached, formal perspective and a high degree of skepticism about therapeutic models of offender treatment.[21] Representing less interest in the motives and root causes of criminal behavior, determinate sentencing meted out punishments that primarily reflected the severity of the offense. The forty-three level sentencing grid[22] has emerged as the most important determinant of the sentence in the federal system today;[23] it

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ties in determining sentences. Courts obtained information about defendants from prosecutors, defense attorneys, and probation officers."). For a critical review of rehabilitative practices, see American Friends Serv. Comm., Struggle for Justice 36-40 (1971) (describing role of expertise, treatment, and humanitarian intent in rehabilitative sentencing).

17 See Allen, supra note 15, at 2 (describing rehabilitative ideal).

18 See, e.g., id. at 24-31 (describing social forces which undermined presumptions of rehabilitative model). Judge Marvin Frankel's 1972 book was enormously influential on modern sentencing practices. Not only did he critique the indeterminate sentencing model, but he also proposed the adoption of an administrative agency: the sentencing commission. See generally Marvin E. Frankel, Criminal Sentences: Law Without Order (1972).

19 See Todd R. Clear & Patricia L. Hardyman, Intensive Supervision Probation: How and for Whom?, in Principled Sentencing, supra note 2, at 355, 356 ("The term 'high-risk' offender refers to a person whose characteristics, including the length and diversity of criminal record, indicate that he or she has a high probability of some future, serious law violation.").

20 See John J. DiIulio, Jr., Moral Poverty: The Coming of the Super-Predators Should Scare Us into Wanting to Get to the Root Causes of Crime a Lot Faster, Chi. Trib., Dec. 15, 1995, at A31, available in 1995 WL 13111020 (coining term "super-predator").

21 See, e.g., Mistretta v. United States, 488 U.S. 361, 365 (1989) ("Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases."). *Mistretta* upheld the constitutionality of the Sentencing Guidelines and the authority of the Sentencing Commission. See id. at 412.

22 See infra note 29 and accompanying text.

23 See, e.g., Tonry, supra note 9, at 11-15 (describing how modern sentencing "reform" has placed "all-but-exclusive emphasis" on guideline grids).

more resembles a tax form than the narrative presentence report relied upon by the rehabilitative model.

Both models of punishment present us not only with a method of dealing with marginal members of society but also represent the "suggestion of a social vision."[24] The rehabilitative model made two key assumptions about human behavior and society: first, that the human character is essentially malleable; and second, that broad social consensus can be reached about the traits of a desirable citizen.[25] On the other hand, the strategies used in contemporary penal practices appear to assume much less about the ability, and perhaps desire, to inquire into the past motivations of and future possibilities for the offender. Instead, current practices tend to treat offenders as equally situated, rational, responsible actors or aggregates of statistical information.[26] To be sure, these observations are gross generalizations, and they do not exclusively represent the theories of punishment for any period. However, they do offer insights into the prevailing ideas about subjectivity and social relations that penal practices communicate to offenders, those within the criminal justice system, and society.

In particular, the passage of the Sentencing Reform Act of 1984[27] responded to critiques of indeterminate sentencing with an attempt to introduce standardization, precision, and impartiality into federal sentencing decisions.[28] The Sentencing Guidelines significantly altered the practices of sentencing at the federal level. Sentencing determinations are now made on worksheets, the results of which are then mapped onto a forty-three-level sentencing grid.[29] While sentences are still adjusted for individual offenders, the Sentencing Guidelines generally prohibit consideration of any factors that characterize the offender but not the offense, such as age, education, or a disadvantaged upbringing—the same factors that were essential to the judge's

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24 Garland, supra note 4, at 276; see also Allen, supra note 15, at 5 ("Twentieth-century expressions of the rehabilitative ideal, for example, may be seen as part of a modern faith in therapeutic interventions, often with purposes extending far beyond penological treatment and encompassing the health and happiness of society generally.").

25 Cf. Allen, supra note 15, at 11 (noting that rehabilitative ideal presupposed confidence in standards of good behavior for all citizens).

26 See, e.g., Malcolm M. Feeley and Jonathan Simon, The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications, 30 Criminology 449, 452 (1992) ("A central feature [of the new trends in penology] is the replacement of a moral or clinical description of the individual with an actuarial language of probabilistic calculations and statistical distributions applied to populations.").

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

28 See Tonry, supra note 9, at 9 (discussing origins of sentencing reform).

29 See U.S. Sentencing Guidelines Manual ch. 5, pt. A (1998).

determination when the rehabilitative model was dominant.[30] Parole, another hallmark of the rehabilitative model, was also largely eliminated from the Guidelines.[31]

B. *The* Watts *Decision*

In *United States v. Watts*[32], the Court considered whether a sentencing authority can take into account criminal conduct of which a defendant has been acquitted, in order to lengthen a sentence for a conviction on a different charge, as long as such conduct is proven by a preponderance of the evidence standard. Relying primarily on a pre-Guidelines sentencing case and statutory authority regarding judicial discretion, the majority, in a per curiam opinion,[33] held that neither the double jeopardy provision of the Constitution nor statutory mandates prohibited consideration of acquitted conduct.[34] The main dissent,[35] by Justice Stevens, questioned the majority's use of case law that predated the adoption of the Sentencing Guidelines and its overly generous reading of the applicable statutes.[36] Justice Stevens also contended that the use of the preponderance of the evidence standard to reexamine issues that had not been successfully

30 See id. § 5H1.1 (generally prohibiting consideration of age of offender); id. § 5H1.2 (generally prohibiting consideration of education and vocational skills); id. § 5H1.3 (generally prohibiting consideration of mental and emotional conditions); id. § 5H1.4 (generally prohibiting consideration of offender's physical condition, including alcohol or drug dependence); id. § 5H1.5 (generally prohibiting consideration of offender's employment record); id. § 5H1.6 (generally prohibiting consideration of offender's family ties and responsibilities and community ties); id. § 5H1.11 (generally prohibiting consideration of offender's military, civic, charitable, or public service); id. § 5H1.12 (prohibiting consideration of offender's lack of guidance as youth or disadvantaged upbringing). Compare these provisions with Lewis B. Schwellenbach, Information vs. Intuition in the Imposition of Sentence, 27 J. Am. Jud. Soc. 52 (1943) ("The knowledge of the life of a man, his background and his family, is the only proper basis for the determination as to his treatment."), quoted in Williams v. New York, 337 U.S. 241, 249-50 n.14 (1949).

31 See U.S. Sentencing Guidelines Manual ch. 1, pt. A (1998) ("Honesty [in sentencing] is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior.").

32 117 S. Ct. 633 (1997) (per curiam).

33 See id. at 634. It is worth considering why the decision was unsigned. Professors Hertz and Liebman have noted the increasing judicial indifference to the plight of criminal defendants. The Burger and Rehnquist Courts have exhibited a distinctive pattern of summarily reversing lower court decisions that ruled in favor of the defendant. See 2 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 39.2d, at 1531 & n.44 (3d ed. 1998).

34 See *Watts*, 117 S. Ct. at 635-38.

35 Justice Kennedy also filed a dissenting opinion criticizing the Court on procedural grounds for deciding *Watts* without full briefing and consideration of oral argument. See id. at 644 (Kennedy, J., dissenting).

36 See id. at 641-44 (Stevens, J., dissenting).

proven at trial was repugnant to traditional doctrines of criminal law.[37]

Specifically, the conduct at issue in *Watts* involved multiple count indictments that resulted in convictions for only some of the counts. The cases of Vernon Watts and Cheryl Ann Putra typified the kind of drug charges seen by federal courts every day. Juries found Watts and Putra guilty of a drug charge, but acquitted each of several charges listed in their indictments.[38] In each case, the district court enhanced the defendant's sentence based on information from the acquitted charges.[39] The sentencing judge held Putra responsible for six ounces of cocaine described in her indictment, not for the single ounce for which she was convicted.[40] Similarly, the sentencing judge held Watts responsible for firearms possession, though he had been acquitted of the same charge at trial.[41] On appeal, the Ninth Circuit remanded both cases for resentencing, though it acknowledged that it broke with other circuits by disapproving of the consideration of acquitted conduct.[42] The government appealed, and the Supreme Court consolidated the cases for argument.[43]

At sentencing, conduct of which both Watts and Putra had been acquitted was reconsidered through the relevant conduct provisions of the Sentencing Guidelines in order to adjust the length of the imposed sentence.[44] The relevant conduct provisions, considered the "back-

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[37] See id. at 643-44 (Stevens, J., dissenting). For further discussion about burdens of proof in sentencing, see generally Boyce F. Martin, Jr., The Cornerstone Has No Foundation: Relevant Conduct in Sentencing and the Requirements of Due Process, 3 Seton Hall Const. L.J. 25, 53 (1993) (arguing that Constitution requires higher standard of proof of relevant conduct than Guidelines allow).

[38] Watts's indictment charged him with possessing cocaine base with intent to distribute and for using a firearm in relation to a drug offense. See United States v. Watts, 67 F.3d 790, 793 (9th Cir. 1996). Putra's indictment charged her with aiding and abetting possession with intent to distribute one ounce of cocaine on May 8, 1992, aiding and abetting possession with intent to distribute five ounces of cocaine on May 9, 1992, and conspiring knowingly and intentionally to distribute a quantity of cocaine in excess of 500 grams. See United States v. Putra, 78 F.3d 1386, 1387 (9th Cir. 1996).

[39] A jury convicted Watts of the drug charge only. See *Watts*, 67 F.3d at 793. A jury convicted Putra of the May 8 drug possession charge only. See *Putra*, 78 F.3d at 1387.

[40] See *Putra*, 78 F.3d at 1387.

[41] See *Watts*, 67 F.3d at 793, 796.

[42] See *Watts*, 67 F.3d at 798 n.3 ("We recognize that several circuits have held that a defendant's acquittal [of a firearms charge] does not preclude a sentencing enhancement . . . ."); see also *Watts*, 117 S. Ct. at 634 ("Every other Court of Appeals [besides the Ninth Circuit] has held that a sentencing court may [consider acquitted conduct], if the Government establishes that conduct by a preponderance of the evidence.").

[43] See *Watts*, 117 S. Ct. at 634 (granting Government's single petition for review of both cases).

[44] See id. at 634, 635. See generally U.S. Sentencing Guidelines Manual § 1B1.3 (1998). In order to follow the discussion, some basic understanding of how the federal courts calculate sentences under the Guidelines is helpful. First, the sentencing court determines a

bone" of Sentencing Guidelines policy,[45] characterize the decision of the United States Sentencing Commission to shift from a "charge-offense" system to a "real-offense" system,[46] a choice unique among American jurisdictions that have considered it[47] and western legal systems outside of the United States.[48] In theory, the sentencing judge in a real-offense system considers not only the conviction offense but also the "real" criminal conduct of the offender in order to determine appropriate punishment.[49] Under the Sentencing Guidelines, these factors include acts related to the crime but not biographical informa-

base offense level, according to the conviction offense. The court makes adjustments according to victim, role, and obstruction of justice; the offense level can go upwards or downwards, but almost always is adjusted upwards. The court then calculates the defendant's criminal history. Finally, a guideline range is determined according to the intersection of the base offense level and the appropriate criminal history category on a two dimensional grid. The sentencing authority is then authorized to determine a sentence within that range, with some limited ability to authorize departures. See id. § 1B1.1; see also Tonry, supra note 9, at 42 (discussing sentence calculation procedures). In *Watts*, the defendants' acquitted conduct was used to add points to the base offense level. See *Watts*, 117 S. Ct. at 634-35.

45 See, e.g., William W. Wilkins, Jr. & John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495, 496 (1990) (citing adoption of relevant conduct as key policy choice of Sentencing Commission).

46 See, e.g., U.S. Sentencing Guidelines Manual ch. 1, pt. A (1998):

> One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense' sentencing) .... A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offense of which the defendant was convicted.

47 See Tonry, supra note 9, at 94 (listing states). But see Elizabeth T. Lear, Is Conviction Irrelevant?, 40 UCLA L. Rev. 1179, 1193 (1993) (contending that "majority of the states and the federal system operate under *some version* of a real offense model" (emphasis added)).

48 See Tonry, supra note 9, at 93-94:

> The single feature of the federal sentencing guidelines that state officials and judges and judicial administrators outside the United States find most astonishing ... [are the 'relevant conduct' provisions]. More than once when describing the relevant conduct system to government officials and judges outside the United States, I have been accused of misreporting or exaggerating. People unfamiliar with the federal guidelines have difficulty accepting that any western legal system would require judges to take conduct into account at sentencing that was the subject of charges of which a defendant was acquitted.

49 See id. at 42-43 (noting that Federal Guidelines "are based not on the offense to which the defendant pled guilty or of which he was convicted at trial, but on 'actual offense behavior,' which the commission calls 'relevant conduct'"). The Federal Guidelines are more precisely characterized as a modified real-offense system. A pure real-offense system would consider in theory a limitless set of facts related to a crime and the offender, an impossible task in practice. See David Yellen, Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403, 408 (1993).

tion.[50] Moreover, the relevant conduct provision in question, section 1B1.3, is not discretionary; those factors considered part of relevant conduct *must* be taken into account when a sentencing decision is made.[51]

According to the majority in *Watts*, the relevant conduct provisions of the Sentencing Guidelines were linked to longstanding traditions whereby sentencing authorities possessed the discretion to determine appropriate sentences.[52] The crux of the majority's argument turned on the nature and meaning of "discretion."[53] By determining that the main issue in *Watts* centered around discretion and not acquitted conduct specifically, the majority expanded its discussion to include any conduct potentially relevant to the sentencing of an offender. The majority was thus able to cite support in cases that addressed information other than acquitted conduct and that also predated the implementation of the Sentencing Guidelines.[54] One of the key cases on which the majority relied, *Williams v. New York*,[55] involved a judge's use of uncharged crimes in determining the sentence of a defendant.[56] The Court's reliance on this case—which had nothing to do with acquitted conduct—suggested that *Watts* represented a challenge to sentencing discretion generally and not the narrower issue of acquitted conduct.

Linking the issue of acquitted conduct to other types of sentencing information allowed the majority to reach two important positions. First, by assuming that acquitted conduct was like other types

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50 See supra note 30 and accompanying text (noting prohibited factors).

51 The relevant conduct provisions, perhaps the most controversial aspect of the Sentencing Guidelines, require consideration of any and all conduct underlying the offense of conviction. See, e.g., Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 Am. Crim. L. Rev. 161, 216 (1991) (noting that Guidelines require consideration of relevant conduct); cf. Tonry, supra note 9, at 94 (noting that in indeterminate sentencing model, judges "*may* take account of nonconviction behavior, [while the Sentencing] commission says they *must*"). Aside from acquitted conduct, this provision has also been widely interpreted to encompass uncharged conduct and previous convictions. United States v. Ebbole, 917 F.2d 1495 (7th Cir. 1990), is illustrative. The defendant, Ebbole, pleaded guilty to distributing one gram of cocaine, which alone should have resulted in a sentencing range of 27-33 months. The presentence report, however, cited evidence that Ebbole purchased 1.7 kilograms of cocaine within a three month period encompassing the single drug sale for which he was convicted. As a result, the evidence relating to additional purchases was included at the sentencing stage under section 1B1.3, and Ebbole's sentencing range was tripled to 92-115 months. He was ultimately sentenced to seven years and eight months. See id. at 1495-96.

52 See United States v. Watts, 117 S. Ct. 633, 635 (1997) (per curiam).

53 See id. at 635-36 (discussing scope of sentencing court's discretion under Guidelines).

54 See id. at 635 (citing Williams v. New York, 337 U.S. 241 (1949)).

55 337 U.S. 241 (1949).

56 *See Watts*, 117 S. Ct. at 635 (discussing need for possession of fullest information possible in regard to defendant's life and characteristics).

of sentencing information, the majority avoided having to consider whether or not acquittals constituted a category of sentencing information distinguishable from others, such as uncharged or unconvicted conduct. Second, by enlarging the scope of the discussion from discretion regarding acquitted conduct to discretion more generally, the majority transformed the argument for prohibiting the consideration of acquitted conduct into a more general threat of a "blanket prohibition" against consideration of any information at sentencing.[57]

Adopting the terms of the majority's argument, Justice Stevens's dissent also turned on the general breadth of sentencing discretion. Judicial discretion, according to Stevens, was radically transformed through the enactment of the Sentencing Guidelines, and therefore the majority's reliance upon cases which predated the Sentencing Guidelines was misplaced.[58] Judges were no longer free either to determine an individualized sentence with the aid of a wide range of information particular to the offender and the crime or to discount evidence that might otherwise suggest harsher punishment. Accordingly, that the majority could find no statutory prohibition against the consideration of acquitted conduct did not translate into the conclusion that such consideration was permitted by Congress or the Constitution.[59] Stevens's disagreement with the majority was ultimately a highly technical one. Under the Sentencing Guidelines, Stevens argued, while judges were permitted to use discretion in the determination of a sentence within a given range, they did not share the same freedom in choosing *which* range was appropriate—a crucial distinction that increased, for example, the sentencing range for one of the *Watts* defendants from 15-21 months to 27-33 months.[60]

Both the majority opinion and Stevens's dissent reflect an unwillingness or inability to distinguish acquitted conduct from other types of sentencing information. In other words, the whole Court accepted that any type of conduct—uncharged, acquitted, or otherwise—that has not been the subject of the verdict is the same for the purpose of sentencing. Nor did the opinion comment on the propriety of factoring yet another category of sentencing facts into the official Guidelines protocol; after *Watts*, judges were officially required to consider acquitted conduct. The major conflict between the majority and the dissent centered on the extent to which the Sentencing Guidelines altered discretion in sentencing and whether the relevant conduct provisions accounted for this change.

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57 See id.

58 See id. at 642 (Stevens, J., dissenting).

59 See id. at 639-40 (Stevens, J., dissenting).

60 See id. at 640 (Stevens, J., dissenting).

Yet, legal activity outside of the Court's decision suggested that acquitted conduct should have been considered differently from other types of sentencing information. Close to the time of the *Watts* decision, the United States Sentencing Commission announced that one of its priorities for new amendment research and consideration was the use of acquitted conduct.[61] Amendment options included the consideration of acquitted conduct only if the conduct was established independently of evidence introduced at the trial stage; the consideration of acquitted conduct using a "clear and convincing" evidentiary standard rather than a "preponderance of the evidence" standard; and a balancing approach which used acquitted conduct but allowed a discretionary downward departure to account for issues of "fundamental fairness."[62] Despite these proposals, and the *Watts* decision itself, no word about acquitted conduct appeared in the Sentencing Commission's proposed amendments to Congress in May 1997.[63]

Whether viewed as an unwillingness on the part of the Court to approach a controversial issue in depth or a lack of initiative on the part of the Sentencing Commission, the result for defendants in the federal criminal system is that their acquitted conduct must be considered in a sentencing determination. *Watts* did not give rise to great controversy or public scrutiny; in fact, the nature of the opinion itself suggests that the Court "perhaps hoped to minimize the attention paid to *Watts*."[64] Before exploring why the issue of acquitted conduct deserves greater analysis, it is important to explain how the regime upheld in *Watts* could be justified as a sentencing practice.

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[61] See Priority Areas for Commission Research and Amendment Consideration, 61 Fed. Reg. 34,465 (1996) ("Priority issues for the 1996-97 amendment cycle include . . . developing options to limit the use of acquitted conduct at sentencing."), reprinted in U.S.S.C. Initiatives, 9 Fed. Sentencing Rep. 78, 79 (1996); see also Proposed 1993 Amendments, 5 Fed. Sentencing Rep. 235, 236 (1993) (proposing to prohibit use of acquitted conduct in determining offense level under Guidelines).

[62] Respondent Watts' Brief in Opposition at 5-6, United States v. Watts, 117 S. Ct. 633 (1997) (per curiam) (No. 95-1906) (on file with author) (discussing options considered by Commission during July 1, 1996 meeting).

[63] See, e.g., Reflections on *Koon*, *Watts* and a Low Profile Commission, 9 Fed. Sentencing Rep. 278 (1997) (noting that proposed amendments sent to Congress in 1997 failed to mention significant amendment proposals).

[64] Douglas A. Berman, A Year in the Life of the Guidelines: The Supreme Court Speaks, the Commission is Quiet, and Federal Sentencing Continues Largely Unchanged, 9 Fed. Sentencing Rep. 280, 281 (1997) (noting that *Watts* may have been deliberately underemphasized, despite its potential importance).

II

THE ROLE OF SENTENCING

For those who would agree with the *Watts* decision, the consideration of acquitted conduct is not surprising because sentencing traditionally has been a process with goals fundamentally different from those accompanying the trial process. The trial establishes legal guilt. The sentencing process is not a determination of guilt or innocence, but rather is an autonomous process in which one particular sentence is chosen from within a range of possible sentences. The opinion in *Williams v. New York*,[65] cited by the Court in *Watts*, summarizes this position:

> A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.[66]

By this reasoning, claims of procedural injustice and, indeed, claims which support more colloquial ideas of "justice" normally acceptable at the trial stage resonate less fully in the sentencing phase. The two processes ask two qualitatively different questions. The trial asks whether the defendant is guilty, while the sentencing phase asks whether the defendant is "good" or "bad." Consideration of information that would be barred at trial reflects the wide discretion that has always been within the authority of the sentencing decisionmaker. In order to arrive at the correct decision, it makes sense to have as much information as possible. While the enactment of the Sentencing Guidelines curtailed judicial discretion, courts retained enough limited discretion for this proposition to remain valid.[67] Thus, consideration of acquitted conduct, like consideration of prior convictions, is helpful to the sentencing authority to determine the most appropriate punishment.

The argument which justifies *Watts* suffers, however, from a fundamental misunderstanding of current sentencing practices. Many of the penological assumptions that explained the sentencing judge's need for full information are no longer true. The Sentencing Reform

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[65] 337 U.S. 241 (1949).

[66] Id. at 247.

[67] See, e.g., U.S. Sentencing Guidelines Manual ch. 5, pt. K (1998) (specifying types of departures judges may use in sentencing determinations).

Act of 1984 explicitly rejected rehabilitation as a penological goal.[68] Factors that were once permitted in sentencing considerations, including the offender's psychological constitution, family background, and employment record, allowed the judge to determine not only what the offender "deserved" as a sanction, but also what he required in order to reintegrate himself into society. The decline of the rehabilitative model in penological thinking resulted in a greatly diminished interest in the offender himself: his personality, his capacities, and his future. Now that the dominant thinking in penal practices has steered away from the rehabilitative model, federal judges are expressly prohibited from considering many of the factors that were used to restore offenders to "complete freedom and useful citizenship."[69] Under the Sentencing Guidelines, "the future is not particularly relevant."[70]

Thus the bifurcated inquiry that distinguished the trial from sentencing is no longer the neat division that was justifiable at the height of indeterminate sentencing. Instead, it really becomes one question: What punishment within the range provided does the defendant's conduct deserve?[71] The inquiry under the Sentencing Guidelines focuses primarily on the offense and less so on the offender. This is not to say that sentencing authorities are unconcerned with the offender; rather, the Sentencing Guidelines and other contemporary penal practices indicate that while the offender must "pay for" and be responsible for his conduct, attempts at reforming the offender will be of secondary or of no importance.

Moreover, what has changed about judicial discretion in sentencing is not only its extent, but its very nature. Besides limiting certain kinds of information appropriate to a sentencing decision,[72] the Sentencing Guidelines also prevent judges from discounting or ignoring other information deemed necessary to determine a sentence.[73] One need not be supportive or critical of the Guidelines to acknowledge

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[68] See 28 U.S.C. § 994(k) (1994) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . . .").

[69] *Williams*, 337 U.S. at 248-49.

[70] Susan N. Herman, The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process, 66 S. Cal. L. Rev. 289, 318 (1992) (explaining why *Williams*, based on rehabilitative model, is improperly used in modern federal sentencing).

[71] See id. at 309.

[72] See supra notes 24-28 and accompanying text.

[73] See Heaney, supra note 51, at 166 ("In the preguidelines period, a sentencing court was permitted, but not required, to consider 'relevant conduct' and to weigh this conduct against mitigating factors. Additionally, any sentence enhancement arising from uncharged or unadmitted conduct was minimized by the possibility of parole and graduated good-time credits.").

the difference. The result of eliminating biographical information while requiring certain types of offense-related information is that adjustments for "accurate" punishment almost never result in a lower sentence. It is, as one commentator puts it, "a one-way adjustment—up."[74] Judges who do not conform to these standards are subject to reversal upon appeal.[75]

Finally, to argue that wide discretion has traditionally been a part of sentencing is to skew the very close link between judicial discretion and rehabilitative thinking. Before the rehabilitative model became the dominant penological philosophy in the United States, judges did not presume to exercise unfettered discretion. In the early history of the United States and of England, most punishments were fixed, and judges had little authority to reduce or enhance a sentence.[76] Most felonies were capital crimes.[77] Only with the rise of individualized sentencing, social science approaches to criminality, and the adoption of probation and parole—all hallmarks of the rehabilitative era in the twentieth century[78]—did the need for judicial discretion arise and did sentencing develop into its own distinct procedure.[79]

III

REREADING *WATTS*

Examining flaws in the reasoning that best explains *Watts* does not provide an adequate basis for understanding the wider social impact of the decision. Specifically, the decision in *Watts* ignores the communicative function of acquittals.[80] *Watts* misses the fact that punishment functions not only as a response to criminal behavior, but also as a site of social and cultural meaning.

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74 Lear, supra note 47, at 1205.

75 See U.S. Sentencing Guidelines Manual ch. 1, pt. A (1998).

76 See Lear, supra note 47, at 1209-10 (noting bulk of criminal punishments were legislatively fixed).

77 See Herman, supra note 70, at 302 n.53.

78 See Allen, supra note 15, at 6 (explaining that all of innovations in criminal justice system of this century, including juvenile court, probation, and parole, are reflections of rehabilitative ideal).

79 See Herman, supra note 70, at 302.

80 Justice Kennedy's dissent arguably made reference to the disconnect between the use of acquitted conduct and the perception of acquittals: "If there is no clear answer but to acknowledge a theoretical contradiction from which we cannot escape because of overriding practical considerations, at least we ought to say so." United States v. Watts, 117 S. Ct. 633, 644 (1997) (per curiam) (Kennedy, J., dissenting).

A. *The Significance of Acquittals*

The ways in which we punish, as David Garland suggests,[81] are not simply necessary functions at the margins of society, but reflective[82] and constitutive processes that inform wider understandings of our society and ourselves. Punishment plays a powerful teaching function.[83] Through the establishment of terms and customs, penal practices affirm those forms of power, authority, and social relations that are normal and legitimate. Thus, those who administer and justify sentences are "inextricably connected with developments in modern societies," and these have an influence, however indirectly, on the structures and the content of sentencing decisions.[84] Moreover, as public consciousness of crime issues has become an unremarkable fact of modern American life,[85] penal practices arguably have greater connections to societal values than in the past. This is not to suggest that sentencing practices always embody one particular theory, or even that a particular theory will generate one practical interpretation. The same sentencing theory may have different impacts across cultures, political climates, and systems of government.[86] Rather, practices of punishment establish and reinforce the framework through which we incorporate knowledge about our particular society and its social rela-

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[81] See supra note 4 and accompanying text.

[82] Joel Feinberg articulates an expressive function of punishment, which justifies the criminal sanction as a vehicle for demonstrating public anger. See Joel Feinberg, The Expressive Function of Punishment, in A Reader on Punishment 73 (Anthony Duff & David Garland eds., 1995). Feinberg argues that the guilty verdict both morally condemns the offender and communicates to the public judgments of disapproval and reprobation. However, Feinberg's model is limited to an explanation of punishment which is reflexive, and ultimately limiting, for punishment does not simply mirror normative judgments about crime, but also constitutes meanings, determinations, and accounts of non-deviant social relations.

[83] Cf. Lawrence M. Friedman, Crime and Punishment in American History 10 (1993) ("The teaching function of criminal justice, its boundary-marking function, is exceedingly important. Criminal justice is a kind of social drama, a living theater; all of us are the audience; we learn morals and morality, right from wrong, wrong from right, through watching, hearing, and absorbing.").

[84] Bottoms, supra note 8, at 49.

[85] See, e.g., Beale, supra note 8, at 40-41 (noting that crime did not become national political issue until 1960s, with Barry Goldwater as first presidential candidate to focus on crime as part of political platform); Mike Davis, City of Quartz: Excavating the Future in Los Angeles 223-63 (1992) (describing Los Angeles culture as highly conscious of crime and security); David Garland, The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society, 36 Brit. J. of Criminology 445, 450-51 (1996) (describing "criminologies of everyday life," in which crime consciousness becomes part of social routines).

[86] See Bottoms, supra note 8, at 49 (suggesting that sentencing theories "make their impact very unevenly in different societies, owing to differing cultural histories and contexts, differing political frameworks, and different political and legal actors in particular jurisdictions").

tions. If punishment both reflects and constitutes social knowledge, then practices of punishment ought to be interpreted as representations and reflections of social values.

Accordingly, the public perception of acquittals merits critical examination not because of its "imprecision," but because it provides insight into how acquittals produce meaning outside of strictly legal discourse. The verdict of "not guilty" is very often represented and recognized as a declaration of innocence. Just as the guilty verdict is considered a formal finding of guilt, an acquittal is perceived by many as a truth claim as to a defendant's lack of legal guilt, which is translated into innocence. Certainly not all defendants who are acquitted of criminal charges are factually innocent, but the popular understanding of acquittal tends to treat them as if they are.

When widely publicized recent criminal trials resulted in acquittals, the news media frequently reported that public opinion equated acquittal with innocence, as in the O.J. Simpson trial,[87] the William Kennedy Smith trial,[88] the Rodney King (Stacey Koon) trial,[89] and the Ruby Ridge trial,[90] to name a few. That this equation of acquittal with innocence appears in media reports of many publicized criminal trials suggests that it is not the isolated understanding of any single trial, but a broader interpretive phenomenon.[91] To dismiss this inter-

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[87] See, e.g., Morning Edition: No Double Jeopardy (NPR radio broadcast, Feb. 14, 1997), available in Lexis, News Library, NPR File, Transcript No. 97021412-210 ("There's not supposed to be double jeopardy, but the fact that he was judged innocent in the criminal trial, the next way to get him was through the civil. And they went after him and they got him." (quoting one reaction to Simpson civil trial)); CNN News: Simpson TV Showing Changes Mood Surrounding Deposition (CNN television broadcast, Jan. 25, 1996), available in Lexis, News Library, CNN File, Transcript No. 1119-1 ("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)).

[88] See, e.g., Anne Simpson, The Herald (Glasgow), May 13, 1997, at 17, available in Lexis, World Library, Gherld File ("[William Kennedy] Smith was found innocent . . . .").

[89] See, e.g., Talk Back Live (CNN television broadcast, Jan. 23, 1996), available in Lexis, News Library, CNN File, Transcript No. 322 ("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] . . . .").

[90] See, e.g., John K. Wiley, FBI Sniper, Weaver Friend Face Ruby Ridge Charges, Las Vegas Review-Journal, Aug. 22, 1997, at 1A, available in Lexis, News Library, Lvrjnl File ("Weaver and Harris [two white separatists involved in the Ruby Ridge incident] were tried in federal court in 1993 on murder, conspiracy and other charges. They were found innocent of the most serious charges . . . .").

[91] The equation of acquittal with innocence can be found in the reports on trials of lesser notoriety as well. See, e.g., Tim Bryant, Jurors Agonized over Killing at Fish Fry, St. Louis Post-Dispatch, Mar. 5, 1994, at 1B (stating that "[a juror] sobbed after returning the verdicts of *innocent*" (emphasis added)); Tom Demoretcky, Man Guilty in Death During Auto Incident, Newsday (New York), Mar. 23, 1994, at A31, available in Lexis, News Library, Newsdy File (stating that "Ray's attorney Martin Efman said he felt the jury's verdict—*innocent* of manslaughter and guilty of assault—indicated that the jury felt Ray

pretation of acquittals as legally "incorrect" is to ignore the broader creation of meaning that results from social perceptions of the law. Even careful attempts by journalists to instruct the public on legal standards do not appear to alter significantly the popular understanding of acquittals.[92] In fact, such didactic attempts are often interpreted as legal sophistry.[93]

Many politicians and legislators are acutely aware of this rupture between legal determinations and popular beliefs. One member of the California legislature, Quentin Kopp, attempted in 1996 to change acquittal verdicts in the California criminal justice system from "not guilty" to "not proven guilty."[94] According to Senator Kopp, "the confusion comes from the mistaken assumption of untrained people that 'not guilty' means 'innocent.'"[95]

Acknowledgment of this tension was made with regard to the issue in *Watts* as well. Senators Orrin Hatch and Spencer Abraham of the Senate Judiciary Committee wrote a letter to Michael Goldsmith,

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perceived the danger of serious injury" (emphasis added)); George Varga, Jackson's Actions Won't Buy Back the Public's Trust, San Diego Union-Tribune, Jan. 30, 1994, at E-3 (stating that "[o]nly by receiving a verdict of *innocent* could this self-acknowledged drug abuser have fully vindicated himself and silenced the easily titillated tabloid media" (emphasis added)).

92 See, e.g., E.R. Shipp, Using Names Is Not Always the Answer, Daily News (New York), Feb. 23, 1997, at 2 ("As everyone knows from the O.J. Simpson saga, an acquittal is not the equivalent of a declaration that the accused is innocent."). With regard to the O.J. Simpson trial, a more thorough discussion would require an inquiry into why beliefs about Simpson's culpability were divided among racial lines. For our purposes here, it is sufficient to note that a substantial portion of the public did believe that his acquittal was a vindication of his innocence. For more interpretations of the Rodney King incident, see Kimberlé Crenshaw & Gary Peller, Reel Time/Real Justice, in Reading Rodney King: Reading Urban Uprising 56, 63 (Robert Gooding-Williams ed., 1993) ("Rather than see the jury acquittal as an aberration by some low-down, Simi Valley redneck consciousness, consider it the reigning ideological paradigm of how to identify illegitimate racial power, vivid precisely because of the extremity of the conclusion that only 'reasonable force' had been used on Rodney King."); Patricia J. Williams, The Rules of the Game, in Reading Rodney King: Reading Urban Uprising, supra, at 51, 54 ("By finding the officers innocent, and, in effect, Rodney King guilty, the jurors were honoring the noble efforts of the Los Angeles Police Department to continue its long and well-documented tradition of keeping at bay 'the likes of Rodney King' . . . .").

93 See Rivera Live: Fifth Installment of the Special Weeklong Review of O.J. Simpson Trial (CNBC television broadcast, Dec. 22, 1995), available in 1995 WL 13491981 (quoting guest program host Steve Gendel: "Innocent until proven guilty. Now [O.J. Simpson is] not proven guilty, and then you say he's not innocent. You know that the English language doesn't work that way except in the hands of lawyers.").

94 See California Seeks Change in Verdict Terms, UPI, Jan. 23, 1996, available in Lexis, News Library, UPI File (discussing Senator Kopp's proposal).

95 Id.; see also Cal. Penal Code § 851.8 (b), (e) (West 1985 & Supp. 1999) (providing that on judgment of acquittal, judge may formally find defendant "factually innocent," resulting in destruction of all records of arrest and prosecution).

Vice Chair of the United States Sentencing Commission. The letter, dated a month before the *Watts* decision, stated:

> We understand that some people who are not familiar with the law governing sentencing believe that there is, *to use the vernacular, "something un-American"* about using against a defendant conduct underlying an acquittal. . . . We would . . . be most surprised and also would be deeply concerned if an expert body, such as the Sentencing Commission, succumbed to *the untutored reactions of such persons* by modifying the Guidelines to limit the use of conduct underlying an acquittal.[96]

To dismiss the popular interpretation of acquittals, as Hatch and Abraham did here, as the gross misunderstandings of a refined legal concept reveals an inadequate and overly simplistic judgment of people and society. What is suggested by this view is that if people only knew better, they would stop thinking of acquittals this way. Yet, this seems a difficult and suspicious position to offer in a highly legalistic society such as ours, imbued with talk of rights, courts, and laws.[97] A better explanation may be that the popular equation of acquittal with innocence reflects how many in society *want* to treat persons who have been acquitted of criminal charges, even with the knowledge that at least some will have been factually guilty.

Despite the public perception of verdicts, legal scholarship, like the views of many politicians, tends to ignore or dismiss these interpretations as "common sense," "emotional," or simply erroneous.[98] Much of conventional legal commentary on sentencing falls prey to the assumption that punishment, and the law more generally, have little to do with the construction of social meanings outside of legal discourse. Two interpretations of acquittals are commonly given. First, the reasonable doubt standard is explained as a policy decision that places a greater risk of error on the state in a criminal trial be-

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[96] Letter from Senators Orrin Hatch & Spencer Abraham to Michael Goldsmith, Commissioner, United States Sentencing Commission (Dec. 13, 1996) [hereinafter Hatch-Abraham Letter] (emphasis added), reprinted in 9 Fed. Sentencing Rep. 310, 312 (1997).

[97] Indeed, there is an entire field of criticism engaged with the idea that Americans are too concerned with legal rights. See, e.g., Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 4, 15, 76 (1991) (decrying increasing tendency to view controversies as clashes of rights while ignoring concurrent responsibilities and recommending refinement of rhetoric of rights).

[98] See, e.g., William J. Kirchner, Note, Punishment Despite Acquittal: An Unconstitutional Aspect of the Federal Sentencing Guidelines?, 34 Ariz. L. Rev. 799, 811, 814-15 (1992) ("The argument against allowing a sentencing court to consider acquitted conduct is more emotionally charged. This is because it springs from a common-sense recognition of the 'unfairness' involved rather than from the legal fine points of precedent and statutory construction.").

cause of the substantial liberty interests at stake. Justice Brennan stated in *In re Winship*:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. . . .
>
> . . . The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.[99]

Thus, because the consequences of civil trials are generally less stigmatizing, lesser burdens are used to determine judgments—preponderance of the evidence and clear and convincing evidence. There is nothing inherent in the term "reasonable doubt" that renders it a more appropriate standard for criminal trials. Rather, the Anglo-American system has determined a point on a continuum of legal certainty in order to consistently judge criminal defendants. From this point of view, "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt."[100]

Second, acquittals are also commonly explained in legal commentary as a result of institutional failure: the failure of the prosecution to muster enough probative evidence to convict the defendant.[101] As a judge opined in one of the lower courts' decisions in *Watts*: "First, it is undisputably [sic] true that an acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt."[102] Note that neither legal explanation of acquittal requires any corollary justification of a defendant's innocence.[103]

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[99] 397 U.S. 358, 363 (1970); see also Addington v. Texas, 441 U.S. 418, 423 (1979) ("The standard [of proof] serves to allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decision.").

[100] United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984).

[101] See, e.g., Hatch-Abraham Letter, supra note 96, at 311 ("Since an acquittal establishes only that the prosecution did not prove its charges against the accused beyond a reasonable doubt, an acquittal does not mean that a sentencing court authority is barred from considering the same evidence under the lower standard of proof applicable at sentencing."); see also United States v. Lombard, 72 F.3d 170 (1st Cir. 1995). In *Lombard*, the defendant's convictions for federal firearms violations resulted in a life sentence because of evidence from state murder charges of which the defendant had been acquitted. The First Circuit, in vacating the sentence, framed the acquittal as a prosecutorial failure: "Through the post-trial adjudication of the murders under a lesser standard of proof, the federal prosecution obtained precisely the result that the Maine state prosecutors attempted, but failed, to obtain. The federal prosecution may well have done better." Id. at 179.

[102] United States v. Putra, 78 F.3d 1386, 1394 (1st Cir. 1996) (Wallace, C.J., dissenting).

[103] Of course, there is a third explanation of the acquittal verdict, less likely to be discussed in legal opinions: the acquittal as jury nullification. Jury nullification itself can be a

Rather, the fact of a defendant's commission of a crime remains possible, and perhaps even probable. In fact, some argue that the reasonable doubt standard actually prevents juries from an affirmative declaration of a defendant's innocence.[104]

Of course, not all legal commentators are unaware of the communicative effects of verdicts outside of the realm of lawyers, judges, and law professors. In a recent criminal case, the Second Circuit remanded a case for sentencing because the trial judge, rather than announce a guilty verdict in open court, had sent notice of the defendant's conviction through the mail. In explaining its decision to remand only to have the defendant's verdict read aloud in court, the panel offered the following rationale:

> While we do not equate the district court's decision to mail [the defendant's] verdict to the actions of the Court in Kafka's The Trial, we hesitate to excuse even such a minor violation of the public trial right. The . . . violation is perhaps more easily understood in a situation where the accused is mailed a decision acquitting him of all charges after being publicly charged and tried. In such a case, the public pronouncement serves to vindicate the defendant's *innocence* and, at least to some extent, alleviate the damage done to his reputation wrought in the earlier public proceedings.[105]

The Second Circuit's decision suggests that even within the law, purely legal definitions of acquittal may not be enough to justify procedures that might not satisfy public perceptions of the criminal proceeding. Some judges are willing to be more explicit in acknowledging this observation. In *McNew v. State*,[106] the judge declared that:

> [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

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statement of popular beliefs about injustices in the criminal justice system. A meaningful exploration of jury nullification merits much more discussion, however, and is beyond the scope of this Comment.

104 See Reitz, supra note 13, at 551-52 ("It is fallacious to assume in every case that an acquittal reflects minimal reasonable doubt.").

105 United States v. Canady, 126 F.3d 352, 363 (2d Cir. 1997).

106 391 N.E.2d 607 (Ind. 1979). One can find innocence language in other cases as well. See, e.g., United States v. Young Bros., 728 F.2d 682, 686 (5th Cir. 1984) (stating that "[t]he jury returned verdicts of innocent on all counts with respect to defendants Miller and Young, and guilty on all counts with respect to appellant"); Santoli v. City of New York, 612 F. Supp. 938, 939 (S.D.N.Y. 1985) (stating that "[i]t was urged that Santoli's reversal amounted to a verdict of innocent"); Neville v. United States, 462 F. Supp. 614, 618 (E.D. Mo. 1978) (stating that "the Court has carefully considered [defendant's] allegations and determines that even if true they would not have likely resulted in a verdict of innocent"); Gonzalez v. State, 455 So. 2d 1131, 1132 (Fla. Dist. Ct. App. 1984) (stating that "[t]he jury returned a verdict of innocent as to the trafficking charge against the defendant, but guilty of the charge of conspiring to traffic in cocaine").

> 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.[107]

But perhaps nothing exemplifies the conflict (and frustration) between the legal understanding of acquittals and the popular one better than the cynical opinion of Chief Justice Hug of the Ninth Circuit when the *Watts* cases were remanded for sentencing:

> I can envision the difficulty of a defense counsel explaining to his client, "The jury convicted you of one count, but acquitted you of the other[;] however, under the Sentencing Guidelines the judge has sentenced you as though you were convicted of both." A likely reply, "But doesn't the judge have to respect the jury's determination?" The attorney explains, "Oh no, you see the judge views the facts under a different burden of proof." The defendant: "Then for all practical purposes the jury's acquittal had no effect at all; I thought I had the right to a jury finding me guilty of the crime before I got sentenced for committing it." Attorney: "No, you don't seem to understand; the judge doesn't have to pay any attention to what the jury did, because he operates under a different burden of proof. We lawyers and judges understand that sort of thing, even though it may not make common sense to you."[108]

Such judicial attention to the tensions between the communicative effects of acquittals plays a secondary role, however, to accounts explaining the significance of acquittals in the self-referential terms of the law. In *Watts*, the Supreme Court did not acknowledge the conflict at all. Thus, the Court's prevailing interpretations of acquittals do not provide a full account of the ways in which acquittals are understood by the public and by those within the criminal justice system who appreciate the interactive relationship between punishment and social beliefs.

B. The Necessity of Coherent Sentencing

That even the best legal justifications of *Watts* suffer from serious flaws may suggest that the problem lies with current federal sentencing practices generally. While this may be true—and certainly is true according to many studying the Guidelines[109]—the heart of the matter in *Watts* is the debate over the use of acquitted conduct. What sets the

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107 *McNew*, 391 N.E.2d at 612.

108 United States v. Putra, 110 F.3d 705, 706 (9th Cir. 1997) (Hug, C.J., concurring).

109 See, e.g., Tonry, supra note 9, at 11:

> Few outside the federal commission would disagree that the federal guidelines have been a disaster. . . . Second Circuit Court of Appeals judge José Cabranes . . . wrote, "The sentencing guidelines system is a failure—a dismal failure, a fact well known and fully understood by virtually everyone who is

consideration of acquitted conduct apart from other practices in contemporary federal sentencing is that, by sanctioning its use, *Watts* renders the acquittal verdict incoherent.

Because a court's use of acquitted conduct at sentencing involves the reevaluation of a judgment made at trial, it raises the question of what the trial must do.[110] In a *Watts*-like case, the sentencing authority reexamines the central question of the trial, whether the defendant is guilty. If proven by a preponderance of the evidence, what results is exactly what an additional guilty verdict would have allowed: more punishment. Is the trial then only a rough estimate, a determination of "little more than raw guilt or innocence"?[111] Perhaps so, and thus the reassessment of conduct which did not meet the reasonable doubt standard should be reevaluated for accuracy. This echoes the justification for real-offense sentencing: Sentencing should reflect the "real harm" that has been done, rather than the verdict reached at the trial, which is itself based on a limited set of information. But, as Kevin Reitz points out, the insistence that sentences completely respond to "reality" can never be satisfied, and therefore, "no process-based system will ever do."[112] If we are not sure what the trial should do, or perhaps what it can do, in terms of reaching an accurate judgment about criminal conduct, why displace these problems to the sentencing phase? That the sentencing phase provides a more convenient arena to get around these problems because of its more relaxed procedures[113] is a weak justification, at best.

Moreover, the use of conduct underlying an acquittal to increase punishment seriously undermines the condemnatory aspect of the guilty verdict as well. A guilty verdict is not only a technical decision of legal guilt, but is also the point at which the moral force of the criminal law is brought to bear upon the offender. The sentence is

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associated with the federal judicial system." . . . Forty percent of appellate judges and 50 percent of trial judges wanted the guidelines eliminated entirely.

110 See, e.g., William T. Pizzi, *Watts*: The Decline of the Jury, 9 Fed. Sentencing Rep. 303, 303 (1997) ("[W]e have left largely undecided what are to be the priorities at trial. . . . [W]e are wonderfully vague about what the other goals are, or where truth ranks compared to the trial system's other priorities.").

111 Reitz, supra note 13, at 551.

112 Id. at 554 (contending that need for more information is not sufficient justification for real-offense sentencing).

113 In federal sentencing, neither the rules of evidence, the Confrontation Clause, nor the hearsay rule is enforced. See U.S. Sentencing Guidelines Manual § 6A1.3(a) (1998); United States v. Silverman, 976 F.2d 1502, 1519 (6th Cir. 1992) (holding that Confrontation Clause does not apply at sentencing); United States v. Wise, 976 F.2d 393, 405 (8th Cir. 1992) (holding that hearsay rule does not apply at sentencing); see also United States v. Kikumura, 918 F.2d 1084, 1099-1102 (3d Cir. 1990) (noting that rules of evidence generally do not apply at sentencing).

literally enacted on the offender; he is, as Elaine Scarry notes, "verdicted."[114] The condemnatory aspect of a guilty verdict results in practical consequences: e.g., incarceration, a criminal record, and resulting social stigma. But what reinforces the moral force behind the guilty verdict is that it operates in a system where a defendant can also be freed from condemnation. Put another way, the popular view of acquittals may reflect a belief that mere participation in the criminal justice system should not itself be stigmatizing; this is yet another important function of the acquittal. This view of acquittals need not result from legal naïveté, nor from the notion that all acquitted defendants are factually innocent. Instead, this belief might reflect a view of how acquittals ought to function in a just system: the quite sensible judgment that a fair system "cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal."[115]

That *Watts* tends to muddy the meaning of guilty verdicts also points to a deeper problem. Though the Supreme Court was quick to point out what the use of acquitted conduct is not—neither a rejection of the jury nor a double jeopardy problem—what it failed to address is that the consideration of acquitted conduct also poses problems about the legitimacy of a criminal sentence.[116] The bifurcated system of trial and sentencing does not mean that the two phases are wholly independent of one another; the verdict produced by trial is the necessary antecedent to the sentence. As Elizabeth Lear points out, the citizen "does not need to prove his innocence to protect himself from criminal punishment; the government needs authorization through conviction to legitimize his incarceration."[117] Guilty verdicts provide a measure of protection against potential abuses of power over the individual defendant. Even when sentencing practices claim to focus on "real" criminal conduct, this justification evades rather than ad-

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[114] See Elaine Scarry, Speech Acts in Criminal Cases, in Law's Stories 165, 166-67 (Peter Brooks & Paul Gewirtz eds., 1996):

> Each major speech act by the state in a criminal case comes to define the defendant. Each becomes a verb that acts on the defendant. An accusation is made and the defendant becomes the accused. A verdict is reached and the defendant becomes the verdicted, or, as we more often say, the convicted. . . . To be sentenced, to be physically punished, is to be directly acted on by a verbal sentence, a connection that calls to mind the etymological kinship between 'sentence' and 'sentience.' The sentence is inscribed into the defendant's body.

[115] United States v. Concepcion, 983 F.2d 369, 396 (2d Cir. 1992) (Newman, J., dissenting from denial of rehearing en banc).

[116] See Lear, supra note 47, at 1222 (arguing that incarceration must be authorized and legitimated through conviction).

[117] Id.

dresses the problem of legitimacy. Of course, the argument can be made that the issue of legitimacy applies equally to other types of information used at sentencing but not sanctioned by the trial process, such as uncharged conduct. Acquittals pose an extreme case, though, for here the sentencing process *directly* conflicts with a judgment made at trial.

The importance of legitimating punishment through guilty verdicts can be viewed another way. A hypothetical criminal justice system, completely accurate in its determination of criminal conduct, would still not fulfill all of its aims. Trials and punishments are constitutive of our sense of justice:

> The aim of a criminal trial is not merely to reach an accurate judgment *on* the defendant's past conduct; it is to communicate and justify that judgment—to demonstrate its justice—*to* him and to others. In this context at least, if justice is not both seen and shown to be done, it is not and cannot be done at all.[118]

Simply put, fulfilling pragmatic goals (identifying all criminal conduct) or legal ones (satisfying burdens of proof and constitutional protections) is only a partial description of what punishment does. Perhaps it is society that ought to change *its* thinking about what acquittals mean, but this seems the wrong end of the inquiry. A societal interpretation of acquittals that may not be legally accurate, despite the wide availability of and interest in legal information, suggests that this is the role acquittals *should* play in the trial and sentencing phases. Penal practices play an important part in shaping social beliefs, but the relationship is an interactive one as well.

For the skeptical, none of these justifications for reevaluating the role of acquittals in sentencing may be entirely convincing. After all, *Watts* did not introduce the consideration of acquitted conduct; the decision merely sanctioned the practice. Why question acquitted conduct now? One answer lies in the shift in thinking about punishment. Whatever one labels the new penological trends, it seems safe to say that the end of the rehabilitative ideal has resulted in increased emphasis on the offender as a rational, responsible actor, subject to retribution and hard treatment.[119] Even if acquittals were considered in sentencing before the Guidelines, any seemingly unfair results imposed by their use were greatly outweighed by several mitigating factors: the ability of the judge to ignore or discount the information, the possibility of parole and good time credits, and the prevailing view

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118 R.A. Duff, Trials and Punishments 115 (1986).

119 See, e.g., Tonry, supra note 9, at 13-24 (describing how combination of just deserts theories and "psychology of two-dimensional grids" has "reified defendants" into abstractions).

that the "careful study of the lives and personalities"[120] of offenders would result in sentences designed to return to society law-abiding, productive citizens. With these presumptions eliminated, the consideration of acquittals, now required by the Sentencing Guidelines, is more problematic then ever. The use of acquitted conduct imparts the message that convicted offenders enjoy fewer protections than ordinary citizens—indeed very limited basic rights. At its core, rehabilitation requires a presumption that society has a relatively coherent set of norms and expectations for all of its members.[121] As penal practices have responded to the conceptualization of an "underclass"[122] as its target, however, the tacit acknowledgment that today's prisons house a permanently marginalized population may have eroded the middle class social will for the necessity of rehabilitative norms.[123] But these pessimistic considerations do not suggest that in sentencing, "anything goes." If new thinking in penology warns that we cannot or should not try to reform offenders, at a minimum, sentencing should be rational, coherent, and fair.

While *Watts* proved that there were no constitutional barriers to the use of acquitted conduct, the practice is still open to debate as a policy choice. The concurring opinions of Justices Scalia and Breyer suggested that either the legislature or the Sentencing Commission had authority to prohibit or modify what had become a de facto Guidelines practice in the federal criminal system.[124] Some state courts had already explicitly prohibited the use of acquitted conduct well before *Watts* was decided.[125] The Sentencing Commission's decision not to propose to Congress modifications to the use of acquitted conduct may have been due to a lack of institutional leadership rather

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120 Williams v. New York, 337 U.S. 241, 248-49 (1949).

121 See Feeley & Simon, supra note 26, at 468 (outlining normative basis for rehabilitation).

122 See id. at 467:

> The term *underclass* is used today to characterize a segment of society that is viewed as permanently excluded from social mobility and economic integration[:] . . . a largely black and Hispanic population living in concentrated zones of poverty in central cities, separated physically and institutionally from the suburban locus of mainstream social and economic life in America.

123 See id. at 468 (explaining that social will of middle class was necessary for rehabilitative ideal to flourish within criminal justice system).

124 See United States v. Watts, 117 S. Ct. 633, 639 (1997) (Breyer, J., concurring) ("Given the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future. For this reason, I think it important to specify that . . . the power to accept or reject such a proposal remains in the Commission's hands.").

125 See Reitz, supra note 13, at 533 n.63 (citing cases in Indiana, New Hampshire, and North Carolina); cf. Yellen, supra note 49, at 433 (noting that all states with Sentencing Guidelines systems have opted for more charge-offense, rather than real-offense, orientation).

than the result of informed internal debate.[126] Clearly, the use of acquitted conduct warrants additional debate and public comment.

CONCLUSION

The *Watts* decision was handed down with virtually no attention. Indeed, it would be easy to dismiss it as a "Guidelines" decision: an opinion deciding a highly technical issue in a complex sentencing system. However, *Watts* is also a case which interprets acquittals in a manner that ignores or overlooks the ways in which they communicate meaning outside of the courtroom. Discussion of punishment only within the context of legal and constitutional standards assumes that penal practices have little to do with the rest of society. But punishment is a social institution, as well as a governmental function, and to ignore its wider effects and influences on social beliefs is to miss an important arena in which cultural meaning is shaped. Viewed outside of its "purely" legal dimensions, the consideration of acquitted conduct undermines necessary links between trial and sentencing, and ultimately makes federal sentencing a less coherent practice.

While the Court's decision in *Watts* stated that acquitted conduct could be considered in determining criminal sentences, it is not clear why it should. The arguments against this practice far outweigh supposed advantages in accuracy and judgment. When penal practices run against the grain of widely held societal beliefs, serious questions should be raised about the resulting tension. When our reasons for punishment change, the effects of such changes should be evaluated in light of how they alter or problematize existing practices. Dismissing social beliefs as untutored and incorrect eliminates opportunities to engage in thoughtful conversation about why and how we should punish criminal conduct. *Watts* still provides such an opportunity.

126 See Berman, supra note 64, at 282-83 (noting "the Commission's failure to assume a leadership role" and arguing that "why the Commission has seemingly receded from the guideline scene is a topic that merits study. In the meantime, the Commission's low profile is not without its costs and certainly does not indicate that the guidelines need no further revisions.").