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# The Absentee Post-Conviction Constitutional Safeguards – People v. Zowaski

**Cover Page Footnote**

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**THE ABSENTEE POST-CONVICTION CONSTITUTIONAL  
SAFEGUARDS**

**CITY COURT, CITY OF MIDDLETOWN  
NEW YORK**

People v. Zowaski<sup>1</sup>  
(decided January 24, 2011)

**I. FACTUAL BACKGROUND**

As a result of the court's adherence to strict evidentiary procedural rules, defendant was acquitted of two misdemeanors stemming from charges imperiling the welfare of law-abiding citizens.<sup>2</sup> However, the sentencing judge, in considering the arguments proposed by the parties, found adequate reason to enhance defendant's sentence based upon facts related, but collateral to the convicted offense.<sup>3</sup> Observing that the purpose of a criminal conviction is "to dispense proportionate and fair punishment,"<sup>4</sup> the court in *Zowaski* reconciled its discretionary authority in this regard with the societal need to eradicate crime.<sup>5</sup>

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<sup>1</sup> 916 N.Y.S.2d 909 (City Ct. 2011).

<sup>2</sup> *Id.* at 912. Despite confirmation from a chemical test that defendant was in fact intoxicated, his arguments persuaded the court to suppress these results. *Id.*

<sup>3</sup> *Id.* at 916-17 (noting that the facts considered at sentencing included evidence that was not received by the jury).

<sup>4</sup> *Id.* at 913 (quoting *People v. Day*, 535 N.E.2d 1325, 1329 (N.Y. 1989)).

<sup>5</sup> *Zowaski*, 916 N.Y.S.2d at 913 ("[C]onduct of a defendant may be considered [in sentencing] even if that conduct has not resulted in a criminal conviction." (citing *People v. Felix*, 446 N.E.2d 757, 765 (N.Y. 1983))); *see also* *People v. Suite*, 455 N.Y.S.2d 675, 678 (App. Div. 2d Dep't 1982) ("The most difficult problem confronting the sentencing judge is determination of the priority and relationship between the objectives of punishment, a matter of considerable and continuing debate."). For a further examination of how the changing needs in a contemporary society have affected sentencing decisions *see* MARTHA A. MYERS AND SUSETTE M. TALARICO, *THE SOCIAL CONTEXTS OF CRIMINAL SENTENCING* 41 (Springer-Verlag New York Inc. 1987) (noting the erratic but direct relationship between "urbaniza-

The circumstances of defendant's arrest indicated a high-level of intoxication; he committed traffic infractions and thereafter declined to submit to either a field sobriety test or a chemical-alcohol test.<sup>6</sup> While admitting to suffering from alcoholism, defendant denied all charges.<sup>7</sup> However, a certified copy of post-arrest medical records "received in evidence without objection from defendant" revealed otherwise, confirming an illegal blood-alcohol level of .209 percent.<sup>8</sup> Defendant moved to suppress the tests from evidence, alleging that "because the blood sample was taken without his consent and without statutory authorization, the alcohol results were inad-

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tion, economic conditions, and crime" and judicial sentencing determinations). The authors propose that in sentencing, "judges give greater weight to factors that can explicitly be construed as legally relevant," but further acknowledge that "social background attributes do affect outcomes." *Id.*; see also ANDREW ASHWORTH, SENTENCING AND PENAL POLICY 109 (George Weidenfeld & Nicolson Ltd 1983) (stating that "[t]he link between penal policy and sentencing policy should be neither overestimated nor minimized"). In turn, this principle has guided legislatures to enact laws which facilitate a degree of judicial discretion in deciding the appropriate penal sanctions for individual offenders; nevertheless, the judiciary and legislature have distinct, but interrelated roles in affecting sentencing procedure, as it is suggested that:

Many penal policies or criminal justice policies cannot be put into practice without cooperation from the courts at the sentencing stage, but on the other hand the ability of the courts to respond to the crises of resources and facilities within the penal system is limited, and the question whether this ought to be the principal determinant of their sentencing policy is debatable.

*Id.* at 109-10.

<sup>6</sup> *Zowaski*, 916 N.Y.S.2d at 911 (noting that police officers testified as to defendant's aggressive behavior and poor physical condition, confirming "alcohol on his breath . . . glassy eyes . . . impaired speech and motor coordination").

<sup>7</sup> *Id.* (observing that it is unclear whether the court in fact weighed this point, as the decision does not explicitly mention that defendant failed to accept responsibility for his conduct). See generally U.S. Sentencing Guidelines Manual § 3E1.1(a) (2010) (*codified in* 18 U.S.C. § 3E1.1) (noting that federal courts may consider a defendant's "acceptance of responsibility," as a mitigating factor to "decrease the offense by 2 levels"). But see *United States v. Detwiler*, 338 F. Supp. 2d 1166, 1182 (D. Or. 2004) (holding this provision unconstitutional and rejecting its use); *United States v. Jones*, 143 F. App'x 230, 233 (11th Cir. 2005) (rejecting the Court's reasoning in *Detwiler*, and in contrast, stating that "[t]he district court did not commit constitutional error under *Booker* when it applied the career offender enhancement based on [defendant's] previous convictions").

<sup>8</sup> *Zowaski*, 916 N.Y.S.2d at 911-12. See generally N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 2009) (providing that "[n]o person shall operate a motor vehicle while such person has .08 of one per centum or more by weight or alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva").

missible and should be redacted.”<sup>9</sup> The court, reluctantly persuaded, excluded the tests from evidence.<sup>10</sup> Perceiving a reasonable doubt as to defendant’s guilt for both the misdemeanor for driving while intoxicated<sup>11</sup> and traffic infractions, the jury acquitted defendant on these charges, but convicted him of resisting arrest.<sup>12</sup>

Upon holding a pre-sentence hearing and investigation, the prosecution urged the judge to consider nonconviction conduct, specifically, facts pertaining to “defendant’s prior criminal history of four alcohol-related driving convictions and his acquittal on the DWI charge.”<sup>13</sup> Defendant exercised his right to challenge the proposed sentencing considerations, as secured by the Due Process Clause under the state and federal constitutions.<sup>14</sup> There was no objection raised to evidence of prior convictions because section 400.40 of New York Criminal Procedure Law authorizes increased punishment upon “a previous judgment of conviction for an offense.”<sup>15</sup> Rather, the defense mainly disputed the reliability of the blood-alcohol test, an argument that the court ultimately found unconvincing.<sup>16</sup>

Defendant also claimed that an acquittal had a preclusive effect on the judge’s sentencing considerations.<sup>17</sup> This position is

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<sup>9</sup> *Zowaski*, 916 N.Y.S.2d at 912 (noting that the prosecutor appeared unprepared or unfamiliar with the law, offering no rebuttal to defendant’s claim that the results were unauthorized). First, the court infers that testimony of medical personnel as to standard testing procedures might have preserved the results in evidence. *Id.* Further, because the arresting officer did testify to justify the grounds for defendant’s arrest, the test results were arguably admissible under state law. *Id.* See, e.g., N.Y. VEH. & TRAF. LAW § 1194(2)(a)(1) (McKinney 2010) (noting that if police have “reasonable grounds” to suspect a violation of this section, “[a]ny person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test . . . for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer”).

<sup>10</sup> *Zowaski*, 916 N.Y.S.2d at 912 (observing that “[p]rior to the contents of the medical records being disclosed to the jury,” the evidence was suppressed).

<sup>11</sup> *Id.* at 911 (noting that defendant was initially “charged with the felony of driving while intoxicated” and the charge was later reduced on grounds not specified within the opinion).

<sup>12</sup> *Id.* at 912 (observing that the court was compelled to suppress the chemical test from evidence, as the prosecution failed to establish a proper evidentiary foundation).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> N.Y. CRIM. PROC. § 400.40(1) (McKinney 2011).

<sup>16</sup> *Zowaski*, 916 N.Y.S.2d at 912 (noting that the defense sought to establish that the chemical test did not belong to defendant by arguing that “the prosecution had failed to show a chain of custody for the [blood-alcohol] sample”).

<sup>17</sup> *Id.*

rooted in Appellate Division case law in the First and Second Departments, barring reliance on facts underlying acquittals to impose an enhanced sentence.<sup>18</sup> However, the judge declined to yield to this precedent because the case law offered “no extended analysis on the issue of conduct related to an acquitted charge.”<sup>19</sup> Instead, recognizing that “the apparent constitutional underpinnings of these Appellate Division cases have been rejected by the United States Supreme Court,” the court remarked that “the validity of these decisions may be in doubt.”<sup>20</sup>

## II. A PROGRESSIVE APPROACH TO SENTENCING—CONSIDERING ACQUITTAL CONDUCT

The court in *Zowaski* premised its decision on three pertinent observations. First, the court established that notwithstanding critical changes in judicial sentencing, traditional policies of “punishment, deterrence, the rehabilitation and reintegration of offenders into society, and the protection of the community” remain inherent in the system.<sup>21</sup> The court noted that a sentencing determination confined to the narrow issue of guilt frustrates such policy.<sup>22</sup> Thus, considering defendant’s prior criminal history and the redundant nature of the present charges,<sup>23</sup> the court enhanced the sentence imposed in order to achieve the necessary deterrent effect.<sup>24</sup>

The court next observed that in *United States v. Watts*,<sup>25</sup> the United States Supreme Court specifically addressed the constitutional

<sup>18</sup> *Id.* at 914.

<sup>19</sup> *Id.* at 915.

<sup>20</sup> *Id.*

<sup>21</sup> *Zowaski*, 916 N.Y.S.2d at 912. See generally N.Y. PENAL LAW § 1.05(4)-(6) (McKinney 2006) (observing that “the deterrent influence of the sentences” presents an adequate incentive for courts “[t]o provide an appropriate public response to particular offenses,” as deemed necessary to safeguard the general public); accord MYERS, ET AL., *supra* note 5, at 79 (“Most notably, as countries face more serious crime problems, violent and drug offenders experience significantly greater than average increases in their risk of being imprisoned.”).

<sup>22</sup> *Zowaski*, 916 N.Y.S.2d at 916.

<sup>23</sup> *Id.* (supporting the policy adopted by the federal courts to provide “sentencing judges with all reliable and relevant information regarding the defendant’s background and the crime of conviction”).

<sup>24</sup> *Id.* at 915.

<sup>25</sup> 519 U.S. 148 (1997).

ramifications of a judge's reliance on acquittal conduct to enhance a sentence.<sup>26</sup> First, the Supreme Court clarified that a preponderance of evidence is the standard by which sentencing factors are properly weighed.<sup>27</sup> Further, it established that an acquittal does not bar a sentencing judge from using related conduct, nor does this consideration violate either of the Due Process Clauses under the Fifth or Fourteenth Amendments.<sup>28</sup>

Finally, the court in *Zowaski* recognized that in New York, state courts are "split on the issue" of whether a judge may elect harsher punishment than that which is statutorily prescribed for a conviction.<sup>29</sup> However, the New York State Legislature has yet to restrict the judiciary's function in sentencing determinations, and thus, the court construed this shortfall as justification for its broad discretion.<sup>30</sup> The court explained that absent the adoption of a statutory rule barring reliance on acquittal conduct, it had no reason to sentence defendant "willfully blind to relevant evidence the jury was not asked to review."<sup>31</sup>

Adopting the federal precedent, the court held that a preponderance of evidence is sufficient to adjust the sentence rendered in a criminal conviction.<sup>32</sup> Indeed, the judge viewed the underlying facts of defendant's acquittal as established by a preponderance of evidence,<sup>33</sup> recognizing that the United States Supreme Court upheld

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<sup>26</sup> *Zowaski*, 916 N.Y.S.2d at 913.

<sup>27</sup> *Watts*, 519 U.S. at 157 (holding that a sentencing court may consider facts or information underlying acquitted charges, but established by a preponderance of evidence, to impose an enhanced sentence).

<sup>28</sup> *Id.* at 156.

<sup>29</sup> *Zowaski*, 916 N.Y.S.2d at 914. The court recognized that while the First and Second Departments of New York State's Appellate Division prohibit consideration of conduct underlying acquitted charges in sentencing, the Third Department has unequivocally rejected this position and adopted the approach set forth in *Watts*. *Id.* at 914-15.

<sup>30</sup> *Id.* at 915.

<sup>31</sup> *Id.* at 916.

<sup>32</sup> *Id.* at 914.

<sup>33</sup> *Zowaski*, 916 N.Y.S.2d at 912 (finding defendant's acquittal conduct shown by a preponderance of evidence under New York Civil Practice Law and Rule 4518(c), the business records exception, defining "certified hospital records [as] 'prima facie evidence' of the truth of the facts contained therein"). See generally N.Y. C.P.L.R. 4518(c) (McKinney 2007); see also *People v. Ortega*, 942 N.E.2d 210, 213 (N.Y. 2010) (holding that "it was a proper exercise of discretion for the court to allow [into evidence] limited references in medical records and testimony to the effect that [the record's demonstrated that patient] was diagnosed").

this standard in *Watts*.<sup>34</sup> Thus, because “consideration of such evidence is not prohibited by statute and is permissible under the federal constitution as interpreted by the United States Supreme Court,” the court imposed an enhanced sentence on these grounds.<sup>35</sup> The court justified its ruling by relying on federal law, which permits enhanced sentencing under the Due Process Clauses.<sup>36</sup> Because defendant contested evidentiary facts at a pre-sentence hearing, the court theorized that a more severe sentence based on related non-conviction conduct was constitutionally permissible.<sup>37</sup> In doing so, the sentencing judge conveyed a message that criminal misconduct will not be tolerated within his courtroom.<sup>38</sup>

### III. LEGISLATIVE AND JUDICIAL HISTORY—THE CHANGING CLIMATE OF JUDICIAL SENTENCING

A comprehensive analysis of the holding in *Zowaski* requires an understanding of the historical evolution of sentencing, penal policy, and the constitutional limitations on punishment. Foremost, it is well settled at the federal and state levels that a guilty verdict, especially in a criminal context, is “hedged in by strict evidentiary procedural limitations.”<sup>39</sup> Moreover, the Sixth Amendment bestows a fun-

<sup>34</sup> *Watts*, 519 U.S. at 156.

<sup>35</sup> *Zowaski*, 916 N.Y.S.2d at 916. While the court made clear that several factors were used to decide upon a sentence, the opinion focused on the use of conduct underlying acquitted charges. *Id.* at 917 (“In the instant case, the evidence of the defendant’s blood alcohol level shortly after his arrest was highly relevant to the imposition of an appropriate sentence.”).

<sup>36</sup> *Id.* at 913-14.

<sup>37</sup> *Id.* at 912-13 (noting that in compliance with both of the Due Process Clauses and N.Y.C.P.L. § 380.50, defendant exercised “the right to make a statement personally in his [] own behalf and before [the Court] pronounc[ed] [his] sentence” (citing N.Y. CRIM. PROC. § 380.50(1) (McKinney 2011))).

<sup>38</sup> *Id.* at 917 (concluding that “the blood alcohol evidence was relevant in determining the defendant’s success in addressing his alcohol addiction, and in determining the level of danger he posed to the community” in light of defendant’s acquittal conduct, testimony admitting to suffering from alcoholism, and prior related convictions). However, because Middletown, New York falls within the Orange County jurisdiction of the Second Department of the Appellate Division, if defendant had appealed this ruling, the enhanced sentence would have ultimately been overturned. *See Zowaski*, 916 N.Y.S.2d at 914.

<sup>39</sup> *Cf. Williams v. New York*, 337 U.S. 241, 246 n.4 (1949) (noting that historically, “[c]ourts have treated the rules of evidence applicable to the trial procedure and the sentencing process differently”); *see also* N.Y.S. EXECUTIVE ADVISORY COMMITTEE ON SENTENCING, CRIME AND PUNISHMENT IN NEW YORK: AN INQUIRY INTO SENTENCING AND THE CRIMINAL



damental constitutional right to a fair trial by an impartial jury to return a verdict, enabling the court to impose punishment deserving of the crime.<sup>40</sup> In addition, the accused has a right to receive notice and be heard on any and all evidence raised against him, as secured by each of the Due Process Clauses.<sup>41</sup> Thus, there is no doubt that safeguards exist to protect an innocent defendant from a wrongful conviction.<sup>42</sup> However, as recent decisional law illustrates, enhanced sentencing upon non-conviction conduct presents clear due process problems for defendants.<sup>43</sup> Hence, progressive improvements to the framework of judicial sentencing seek to accommodate these concerns, as related to individual constitutional rights and societal needs.

Modern sentencing jurisprudence presumes a defendant's innocence absent a conviction,<sup>44</sup> which poses a conflict with a paramount common law principle.<sup>45</sup> That principle affords a judge "wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."<sup>46</sup> In so doing, a judge might use non-conviction

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JUSTICE SYSTEM 21 (1979) (observing that "[t]he prosecutor, like the policeman, is often constrained in the performance of his duties by circumstances largely beyond his control"). Further examining the prosecutorial obstacles presented in a criminal trial, the authors explain that: "[j]ust as the police are able to solve only a relatively small percentage of crimes because of evidence and witness-related problems, prosecutors obtain convictions for only a fraction of arrests—for precisely the same reasons." *Id.*

<sup>40</sup> U.S. CONST. amend. VI.

<sup>41</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV.

<sup>42</sup> N.Y. CRIM. PROC. § 300.10(2) (McKinney 2011) (observing that prior to charging a defendant, jurors are advised to consider "the presumption of the defendant's innocence, the requirement that guilt be proved beyond a reasonable doubt and that the jury may not, in determining the issue of guilt or innocence, consider or speculate concerning matters relating to sentence or punishment").

<sup>43</sup> *Zowaski*, 916 N.Y.S.2d at 914 (noting that the First and Second Departments within New York State's Appellate Division prohibit a sentencing judge from considering nonconviction conduct); *see, e.g.*, *People v. Harvey*, 905 N.Y.S.2d 514, 515 (App. Div. 2d Dep't 2010) (vacating the enhanced sentence because the court had "improperly considered a crime of which the defendant was acquitted").

<sup>44</sup> *Corella v. Ricks*, No. 02 CV 698 (JG), 2004 WL 377654, \*1, \*8 (E.D.N.Y. Mar. 1, 2004) ("[A]ll persons charged with a crime and brought to trial are presumed [] innocent unless proved guilty beyond a reasonable doubt.").

<sup>45</sup> *Williams*, 337 U.S. at 247.

<sup>46</sup> *Id.* at 246. For a controversial discussion of how ambiguous statutory laws and uninhibited sentencing discretion circumvent fairness and disparately oppress criminal offenders, see MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 21 (Hill and Wang New York 1972) (noting that Judge Frankel's ideas contributed to the legislative enactment of the Sentencing Reform Act of 1984 and the reform that several states pursued thereafter).

conduct to impose a harsher punishment, resulting in disparate sentences for identical convictions.<sup>47</sup> In 1984, Congress sought to redress the clear constitutional implications of judicial discretion by passing the Sentencing Reform Act,<sup>48</sup> which employed the United States Sentencing Commission to strategically define the Federal Sentencing Guidelines.<sup>49</sup>

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Prior to the adoption of the Federal Sentencing Guidelines, Judge Frankel remarked that “a statute which either forbids or requires the doing of act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of the law.” *Id.* at 5 (quoting *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926)). *But see* *Brennan v. Occupational Safety & Health Review Comm’n*, 505 F.2d 869, 873 (10th Cir. 1974) (advocating that the use of ambiguous statutory or regulatory language is “[a] standard designed to protect workers by provision for prompt treatment of injuries require[ing] flexibility rather than specificity”). However, Judge Frankel recognized that “while that standard is generally implemented with respect to the laws’ definition of crimes, it is generally ignored in the portions of the same laws prescribing the range of permissible punishments . . . leav[ing] to the sentencing judge a range of choice that should be unthinkable.” FRANKEL, *supra*, at 5.

<sup>47</sup> Ryan Scott Reynolds, *Equal Justice Under Law: Post-Booker, Should Federal Judges Be Able to Depart from the Federal Sentencing Guidelines to Remedy Disparity Between Codefendants’ Sentences?*, 109 COLUM. L. REV. 538, 539 (2009) (advising that the federal sentencing under the Guidelines was intended to minimize disparate treatment of convicted offenders with the congressional intent to achieve a “goal of nationwide uniformity”); *see* ASHWORTH, *supra* note 5, at 230 (1983) (observing that “[i]t has been argued that there is in general insufficient justification for adopting a cumulative approach to the sentencing of persistent offenders, and that the leading approach should be tied to the concept of proportionality”). Nevertheless, the author advised that although that “is the general principle, there may be certain classes of persistent offenders[,] *i.e.*, dangerous offenders, professional criminals and petty persistent offenders[,] “who are thought to justify special sentencing measures for the protection of society, and other classes who are thought more suitable for a different approach.” *Id.*

<sup>48</sup> 18 U.S.C. § 3553 (2006) (promulgating structured guidelines to reduce sentencing disparity); 18 U.S.C. § 3551(a) (2006) (advising that defendants convicted in federal court “shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case”); *see also* CASSIA SPOHN, *HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT* 231 (SAGE Publications, Inc. 2009) (“Determinate sentencing was seen as a way to restrain judicial discretion and thus to reduce disparity and (at least in the minds of conservative reformers) preclude judges from imposing overly lenient sentences.”).

<sup>49</sup> 28 U.S.C. § 994 (2006) (“(a) The Commission, by affirmative vote . . . and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States . . . (1) guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case.”); 28 U.S.C. § 991(b)(1)(B) (2006) (recognizing that the United States Sentencing Commission was employed to “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to

The Guidelines prescribe the statutorily permissible range of punishment for a convicted offense and authorize a degree of discretion to deviate from the prescribed sentencing range.<sup>50</sup> Hence, because these provisions do not bind the states, there is a gap between state and federal sentencing schemes. Indeed, the court in *Zowaski* viewed the federal sentencing approach as superior to that of the Appellate Division within its jurisdiction.<sup>51</sup> Yet, the opinion obscured the extent to which the court enhanced defendant's sentence, complicating the issue of whether the judge abused his authorized discretion.<sup>52</sup> More importantly, the court in *Zowaski* was misguided in its reliance on "the clear status of federal law permitting consideration of conduct related to an acquitted charge."<sup>53</sup> That is, the court overlooked the pertinent fact that the Supreme Court's ruling, as related to sentencing upon acquittal conduct, entrusted *federal* courts with a degree of discretion, defining the privilege as exercisable within the margins of the Guidelines.<sup>54</sup>

Thus, the sentencing determination in *Zowaski* was a product of arbitrary and capricious discretion. While a review of decisional law summarily discussed herein illustrates that judicial discretion yields benefits in practice, recurring "due process versus crime control considerations" create a predicament for "constitutional criminal procedure remedial jurisprudence."<sup>55</sup> This case note examines both the implicit and controversially disputed ramifications of an unstruc-

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permit individualized sentences when warranted").

<sup>50</sup> *Watts*, 519 U.S. at 154 (observing that the federal system did not entirely eradicate the sentencing flexibility of its pre-Guidelines regime, as the Guidelines are not "cast in restrictive or exclusive terms" (citing *United States v. Ebbole*, 917 F.2d 1495, 1501 (7th Cir. 1990))). For a discussion of the subsequent modifications to the Guidelines see *United States v. Booker*, 543 U.S. 220, 248 (2005) (observing that the United States Supreme Court eventually declared the Guidelines advisory, but preserved their constitutional provisions, as opposed to commending "the total invalidation of the statute").

<sup>51</sup> *Zowaski*, 916 N.Y.S.2d at 915.

<sup>52</sup> *Id.* at 917 (noting that the holding merely labels the enhanced sentence "appropriate" without further justification).

<sup>53</sup> *Id.* at 914.

<sup>54</sup> *Cf.* 18 U.S.C. § 3553(b) (noting that federal courts maintain express authority to deviate from fixed sentences by weighing aggravating and/or mitigating factors, even if these factors are not explicitly identified within the statute). *But see* *United States v. Taylor*, 648 F.3d 417, 434 (6th Cir. 2011) (rejecting the constitutionality of certain provisions of the Guidelines, but "declin[ing] to address [defendant's] substantive challenge to his sentence").

<sup>55</sup> David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 ILL. L. REV. 1199, 1244-45 (2005).

tured sentencing system, advocating a dire need for state legislation and improved procedural rules to diminish New York State's disparate treatment of convicted offenders.

#### IV. FEDERAL PRECEDENT—CONSTITUTIONAL LIMITATIONS ON PUNISHMENT

##### A. The Pre-Guidelines Sentencing Era

In holding that judicial sentencing is most effective by using all streams of information “highly relevant to the imposition of an appropriate sentence,”<sup>56</sup> the court in *Zowaski* relied on the Supreme Court precedent set by *Williams v. New York*.<sup>57</sup> In *Williams*, the Court upheld “sound practical reasons” for enhancing a sentence upon consideration of facts established at a lower standard of proof than required for a criminal conviction.<sup>58</sup> Further, the Court affirmed that the sentencing judge has the duty to elect “the type and extent of punishment after the issue of guilt” is resolved by the jury.<sup>59</sup> In light of this posture, the Court justified using facts suppressed from evidence, stating that “modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied the opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.”<sup>60</sup> Hence, this decision initiated the common, but innately controversial practice, of sentencing determinations rendered upon nonconviction conduct.

Despite carefully aligning the federal government's “progres-

<sup>56</sup> *Zowaski*, 916 N.Y.S.2d at 917.

<sup>57</sup> 337 U.S. 241, 247 (1949) (“Highly relevant—if not essential—to the selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.”).

<sup>58</sup> *Id.* (noting that the rules of trial evidence are purposefully tailored to a question of guilt or innocence, as necessary to “prevent a time-consuming and confusing trial of collateral issues”); accord FED. R. EVID. 102 (“These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”).

<sup>59</sup> *Williams*, 337 U.S. at 247.

<sup>60</sup> *Id.*

sive efforts to improve the administration of criminal justice” with a sentencing judge’s authorized discretion, the Court duly noted that discretionary sentencing may yield future due process conflicts.<sup>61</sup> Further, while ruling that suppressed evidence was permissibly used in the sentencing determination, the Court did not redress the prospective conflicts with a defendant’s jury trial guarantee under the Sixth Amendment.<sup>62</sup> Accordingly, Justice Murphy dissented, questioning the sentencing judge’s uninhibited “reliance on material made available to him in a probation report, which vastly reflected evidence that would have certainly been inadmissible at the trial.”<sup>63</sup>

### B. *Watts* and Its Progeny—Discretion Circumscribed By The Guidelines

The Supreme Court resolved some of these issues in *United States v. Watts*,<sup>64</sup> clarifying that those facts, which are independent of or collateral to the convicted offense, but subsequently used to lengthen a prescribed sentence, require a preponderance of evidence.<sup>65</sup> The Court also redefined the value and meaning of a not guilty verdict, instructing that an “acquittal on criminal charges does not prove that the defendant was innocent.”<sup>66</sup> Rather, because “it is impossible to know exactly why a jury found a defendant not guilty on a certain charge,” the Court said that an acquittal of charges should not be construed as an “explicit rejection” of facts, as it merely elicits a degree of uncertainty as to defendant’s guilt.<sup>67</sup>

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<sup>61</sup> *Id.* at 252 n.18 (“What we have said is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause.”).

<sup>62</sup> *Id.* at 253 (Murphy, J., dissenting) (observing that “[i]n our criminal courts the jury sits as the representative of the community; its voice is that of the society against which the crime was committed”).

<sup>63</sup> *Id.*

<sup>64</sup> 519 U.S. 148 (1997).

<sup>65</sup> *Id.* at 156 (noting that courts interpret U.S.S.G § 6A1.3, as endorsing a preponderance standard as “appropriate” in sentencing proceedings). See generally U.S. Sentencing Guidelines Manual § 6A1.3(a) (“[T]he court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.”).

<sup>66</sup> *Watts*, 519 U.S. at 155 (citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984)).

<sup>67</sup> *Id.* (observing that “the jury cannot be said to have ‘necessarily rejected’ any facts when it returns a general verdict of not guilty”).

In *Watts*, the Court reviewed the sentences of two defendants from unrelated cases; both cases involved a multiple count drug possession indictment, a reduced conviction, and a sentence enhanced by acquittal conduct.<sup>68</sup> Likewise, each defendant contended that the sentencing judge had reconsidered acquitted charges in violation of the Double Jeopardy Clause.<sup>69</sup> Reviewing this matter in light of the relevant conduct provision of the United States Code, section 3661, the Supreme Court upheld the use of facts related to the crime, but not elements required to sustain the conviction, in a sentencing determination.<sup>70</sup> Unsurprisingly, the relevant conduct provision neither mentioned, nor conveyed explicit authority to sentence upon acquittal conduct.<sup>71</sup>

However, the Court reasoned that acquittal conduct used to enhance defendant's sentence did not impose unjust punishment for an unproven crime, but rather, it reflected consequences proportionate to "the manner in which he committed the crime of conviction."<sup>72</sup> Thus, despite the Court's liberal reading of the relevant conduct provision, *Watts* marked an important shift in federal sentencing, permitting judicial reliance on an "entire range of conduct, regardless of the number of counts alleged or upon which [evidence] a convic-

<sup>68</sup> *Id.* at 149-51. For the underlying facts in each of these cases, see *United States v. Watts*, 67 F.3d 790 (9th Cir. 1995) and *United States v. Putra*, 78 F.3d 1386 (9th Cir. 1996).

<sup>69</sup> *Watts*, 519 U.S. at 149 (observing that both Court of Appeals panels were erroneously persuaded by defendants' objections, which the Supreme Court rejected).

<sup>70</sup> *Id.* at 152.

<sup>71</sup> *Id.* at 153 (noting that the commentary notes on the relevant conduct provision provide that collateral "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range," but does not authorize use of acquittal conduct). See generally U.S. Sentencing Guidelines Manual § 1B1.3 (West 2010).

<sup>72</sup> *Watts*, 519 U.S. at 155 (stressing that a defendant is not punished for the acquittal conduct, but rather is "punished only for the fact that the present offense was carried out in a manner that warrants increased punishment" (citing *Witte v. United States*, 515 U.S. 389, 401 (1995))); cf. ASHWORTH, *supra* note 5, at 16-18 (suggesting that "[t]he general justifying aim of sentencing is probably a modified version of what might be termed *modern retributivism*: punishment of those who break the criminal law is justified so as to restore the balance which the offen[s]e disturbed"). That is, under a "modified version of modern retributivism, punishment is justified not merely because it is deserved but also because it contributes towards crime control." *Id.* at 18. Thus, while a sentence adjusted by the criminal conduct underlying the indictment is said "to 'cancel out' the advantage gained" by a defendant, the author further suggested that "punitive measures against those who have broken the law" are necessary, as a matter of fairness to law-abiding citizens. *Id.*

tion is obtained.”<sup>73</sup>

Although the Court stated that a “preponderance standard at sentencing generally satisfies due process,” it also implied that its use may be subject to abuse.<sup>74</sup> In fact, the Court cautioned that when a sentencing factor is tightly knit to substantive elements of an offense, enhancing a sentence on this basis might violate due process.<sup>75</sup> Thus, *Watts*’ progeny narrowed its precedential impact, recognizing that certain collateral sentencing factors unjustly deprived the accused of inherent constitutional guarantees.<sup>76</sup>

Further, Justices Scalia and Breyer, concurring in *Watts*, shared reservations that the judiciary lacked adequate resources to resolve the vast ambiguities in federal sentencing law.<sup>77</sup> Justice Scalia emphatically argued, “neither the Commission nor the courts have the authority to decree that information which would otherwise justify

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<sup>73</sup> *Watts*, 519 U.S. at 153.

<sup>74</sup> *Id.* at 156 (noting that circuit courts have raised the issue of whether the preponderance standard shall suffice in “extreme circumstances,” suggesting that when relevant conduct considerations “dramatically increase the sentence [it] must be based on clear and convincing evidence”).

<sup>75</sup> *Id.* at 156-57 n.2 (supporting the use of a preponderance standard as long as the sentencing enhancement was [not] ‘a tail which wags the dog of the substantive offense’ ” (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986))).

<sup>76</sup> *See, e.g., Booker*, 543 U.S. at 232-33 (questioning the constitutional validity, and in turn, limiting the application of the Guidelines’ relevant conduct provision). To further juxtapose the rationale set forth by the Court in *Watts* for considering acquittal conduct with the counterview that “acquitted-conduct sentencing, cannot justify its unfettered use during the sentencing phase of criminal trials,” see Mark T. Doerr, *Not Guilty? Go To Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 236 (2009). Although the cardinal justifications reflect societal costs and general deterrence, the author contends that:

Enhanced sentencing, and acquitted-conduct sentencing in particular, directly affects the one part of a sentence the defendant cares about most—how much time he will have to spend behind bars. This demands that courts and legislatures tread lightly when dealing with enhanced sentences, and any enhanced sentence must be moored in solid, constitutionally permissible grounds.

*Id.*

<sup>77</sup> *Watts*, 519 U.S. at 158-59 (Scalia, J., Breyer, J., concurring). *Cf. supra* note 5, ASHWORTH, at 61 (proposing that “principle questions of social policy, such as are inevitably involved in sentencing policy, ought to be primarily for the legislature to resolve”). The author further observed that “[e]ven if it is correct in principle that the legislature should prescribe the policies and the courts should implement them when dealing with individual cases, it might be found that this is not the most effective means of achieving certain policies.” *Id.*

enhancement of a sentence or upward departure of the Guidelines.”<sup>78</sup> However, as the legislature purposefully created the Commission to define, interpret, and offer adjustments to the sentencing guidelines, Justice Breyer separately posited that the powers to resolve sentencing matters resided in the Commission.<sup>79</sup> Moreover, recognizing that the Commission is well attuned to the unique “role that juries and acquittals play in our system,” Justice Breyer noted that it had previously drafted an amendment, proposing the enactment of “a specific exception to their ordinary ‘relevant conduct’ rules” to prohibit the use of acquitted conduct to enhance a sentence.<sup>80</sup>

Justice Stevens agreed with Justice Breyer’s view that Congress explicitly authorized the Commission to incorporate factors independent of a conviction into the Guidelines.<sup>81</sup> However, Justice

<sup>78</sup> *Watts*, 519 U.S. at 158 (Scalia, J., concurring) (restricting the authority of the Court to that expressly granted, Justice Scalia proposed that in the event that the Commission were to conclude that “the rules of evidence and proof established by the Constitution and laws are inadequate, it may of course recommend changes to the Congress”).

<sup>79</sup> *Id.* at 159 (Breyer, J., concurring).

<sup>80</sup> *Id.* (recognizing that the Commission understood the rationale for excluding acquitted conduct from its presumed inclusion under the relevant conduct provision and proposed amending the statute to incorporate such exclusionary language); see U.S. Sentencing Guidelines Manual, 57 Fed. Reg. 62832-01 (1992) (Proposed U.S.S.G § 1B1.3(c)) (noting as the proposal expressly states that “[c]onduct of which the defendant has been acquitted after trial shall not be considered under this section” that the adoption of this rule would presumably overturn the holding in *Watts*).

<sup>81</sup> *Watts*, 519 U.S. at 169 n.5 (Stevens, J., dissenting) (referring to statutory language “that direct[s] courts and the Commission to consider the ‘nature and circumstances of the offense’ in determining the appropriate sentence”); see 28 U.S.C. § 994 (2006) (observing that the establishment of appropriate sentencing considerations, including the type and duration of a sentence to be imposed, is explicitly defined within the official duties congressionally assigned to the Commission). For example, the statute authorizes the Commission to adopt:

[G]eneral policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—(A) the sanctions . . . (B) the conditions of probation . . . (C) the sentence modification . . . (D) the fine imposition . . . (E) the authority granted . . . to accept or reject a plea agreement . . . [and] (F) the temporary release provisions.

*Id.* Thus, lacking restrictive language, it seems especially doubtful that one could interpret this provision to direct the Commission to define guidelines based exclusively on the crime of conviction. See *id.* Rather, it is reasonably inferable that the statute warrants, or alternatively, allows for the Court’s broad interpretation that acquittal conduct, vastly depicting “the circumstances under which the [convicted] offense was committed” is relevant to a sentencing determination. *Id.*



Stevens dissented, raising four arguments against the majority opinion.<sup>82</sup> First, Justice Stevens advised “that the inclusion of the qualifier ‘among others’ ” amid enumerated sentencing factors directed only that the list was not exhaustive.<sup>83</sup> Thus, the majority seemed to misconstrue this qualification as allowing the Court “to include anything it felt was relevant to the sentencing decision,”<sup>84</sup> which facilitates arbitrarily imposed penalties.<sup>85</sup> Second, he described the holding in *Watts* as “repugnant” to Sixth Amendment guarantees, stripping defendant of the constitutional right to a jury trial and criminal conviction upon “proof beyond a reasonable doubt.”<sup>86</sup>

Moreover, the dissent perceived the logical presumption that in enacting the Guidelines, Congress envisioned courts’ continued adherence to the “longstanding procedural requirements enshrined in our constitutional jurisprudence.”<sup>87</sup> Thus, applying a lower evidentiary standard in post-conviction processes appeared to defy legislative intent and violate a defendant’s right to due process.<sup>88</sup> Indeed, Justice Stevens emphasized that the Guidelines were devised to “cabin the discretion of all judges—those who were too harsh as well as

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<sup>82</sup> *Watts*, 519 U.S. at 159-69 (rejecting the Court’s holding as unsound, Justice Stevens reasoned that “[t]he goals of rehabilitation and fairness served by individualized sentencing that formerly justified vesting judges with virtually unreviewable sentencing discretion have been replaced by the impersonal interest in uniformity and retribution”).

<sup>83</sup> *Id.* at 169 n.5.

<sup>84</sup> *Id.* at 169 (suggesting that the list of sentencing factors is illustrative, but it does not grant uninhibited authority to interpret the statute as authorizing a sentencing judge to consider any and all factors he/she might deem relevant).

<sup>85</sup> *Id.* at 167-68 (explaining that “[w]hat is at issue in these cases is not whether a defendant is being twice punished or prosecuted for the same conduct, but whether his or her initial punishment has been imposed pursuant to rules that are authorized by the statute and consistent with the Constitution”).

<sup>86</sup> *Id.* at 170. Justice Stevens observed that the Court’s holding was narrowly limited in its application because while it established that “courts may sometimes ‘consider conduct of the defendants underlying charges of which they had been acquitted,’ it sheds no light on whether the district judges’ application of the Guidelines in the manner presented was authorized by Congress, or is allowed by the Constitution.” *Watts*, 519 U.S. at 161. Ironically, in *Williams*, the Court similarly avoided answering this question. *See Williams*, 337 U.S. at 247 (observing that the Court did not adequately define the constitutional contours of sentence enhancements, but merely remarked that “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”).

<sup>87</sup> *Watts*, 519 U.S. at 169.

<sup>88</sup> *Id.*

those who were too lenient.”<sup>89</sup> Finally, as the Court relied on case law and policy notions of a pre-Guidelines regime, the dissent recognized that it ignored that “the Guidelines wrought a dramatic change in sentencing.”<sup>90</sup>

In *Apprendi v. New Jersey*,<sup>91</sup> the Supreme Court clarified some of the uncertainties that remained after *Watts*.<sup>92</sup> It overturned a state court decision, finding that a sentence enhancement deprived defendant of vital trial and conviction-related rights guaranteed by the Constitution.<sup>93</sup> On writ of certiorari, the Supreme Court held that post-conviction processes are not exempt from “due process and associated jury protections.”<sup>94</sup> The Court further advised that “the judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law.”<sup>95</sup> In accord with the traditional principles mandating “certainty and precision” in criminal litigation, the Court demonstrated that its tolerance of the reduced sentencing standard established by *Watts* was limited.<sup>96</sup>

The enhanced sentence in *Apprendi* attracted scrutiny for two reasons.<sup>97</sup> First, the Court “increased—indeed, it doubled—the maximum range within which the judge could exercise his discretion,” imposing a sentence disproportionate to the conviction.<sup>98</sup> Moreover,

<sup>89</sup> *Id.* at 161.

<sup>90</sup> *Id.* at 165 (stating that the post-Guidelines sentencing scheme “replac[ed] the very system that justified *Williams* with a rigid system which ‘for most defendants in the federal courts, sentencing is what the case is really about’ ” (quoting *United States v. Wise*, 976 F.2d 393, 409 (8th Cir. 1992))).

<sup>91</sup> 530 U.S. 466 (2000).

<sup>92</sup> *Id.* at 475-76 (considering whether the federal constitution affords criminal defendants an explicit “right to have a jury find [all factors used to adjust the sentence imposed] on the basis of proof beyond a reasonable doubt”).

<sup>93</sup> *Id.* at 476 (reiterating the constitutional liberties enjoyed by every criminal defendant, such as the right to receive notice, due process, and a jury trial).

<sup>94</sup> *Id.* at 484 (noting that protections guaranteed under the United States Constitution “extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his sentence’ ” (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting))).

<sup>95</sup> *Id.* at 479-80 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*396).

<sup>96</sup> *Apprendi*, 530 U.S. at 480.

<sup>97</sup> *Id.* at 472 (noting that the Supreme Court would redress a narrow constitutional question, which was neglected by the trial court in its convoluted justification for the sentence enhancement).

<sup>98</sup> *Id.* at 474. Petitioner faced “a 23-count indictment” after his arrest related to shots fired

relying on the state legislative classification delineating “motive” as a sentencing factor,<sup>99</sup> the Court evaded the procedural obstacles enshrined in the Fifth, Sixth, and Fourteenth Amendments.<sup>100</sup> Thus, while affirming the principle “that not all facts affecting punishment need to go to the jury,” the Court established that facts used in sentencing, which “expose a defendant to a punishment greater than otherwise legally prescribed were by definition ‘elements’ of a separate legal offense.”<sup>101</sup>

Hence, although legislatures may define judicial sentencing options, enabling state courts to “exercise discretion—taking into consideration various factors relating both to offense and offender,”<sup>102</sup> the Court professed that statutory rules do not circumvent constitutional rights.<sup>103</sup> The Court in *Apprendi* thereby premised its ruling upon “[t]he historic link between verdict and judgment,”<sup>104</sup> interpreting the Framers’ intent as to ensure the cardinal guarantee of presumed innocence to every accused defendant.<sup>105</sup>

While affirming the preponderance standard to weigh non-conviction conduct within the realm of sentencing, the Court refined the precedent set by *Watts*.<sup>106</sup> Observing fundamental flaws with the

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into an African-American family’s home situated within “a previously all-white neighborhood.” *Id.* at 469. During a subsequent interrogation the petitioner “made a statement—which he later retracted—that even though he did not know the occupants of the house personally, ‘because they are black in color he does not want them in the neighborhood.’” *Id.* (quoting *State v. Apprendi*, 731 A.2d 485, 486 (N.J. Sup. Ct. 1999)), *rev’d*, *Apprendi*, 530 U.S. 466. However, the judge enhanced defendant’s sentence, viewing this statement and corroborating police testimony, as sufficient evidence to show that racial bias had provoked the underlying crime. *Apprendi*, 530 U.S. at 471. *But see id.* (noting that the sentence seemed particularly harsh after the defense strategically presented “seven character witnesses who testified that [defendant] did not have a reputation for racial bias” and defendant testified “that the incident was an unintended consequence of overindulgence in alcohol”).

<sup>99</sup> *Id.* at 471-72.

<sup>100</sup> *Id.* at 477 (“Taken together, these rights indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’”). The Court advised that “[m]erely using the label ‘sentence enhancement’ ” was an insufficient ground for the prosecutor to bypass “procedural safeguards designed to protect [defendant] from unwarranted pains.” *Id.* at 476.

<sup>101</sup> *Apprendi*, 530 U.S. at 482-83 n.10.

<sup>102</sup> *Id.* at 481-82.

<sup>103</sup> *Id.* at 484-85.

<sup>104</sup> *Id.* at 482.

<sup>105</sup> *Id.* at 483-84 (observing that the question of a criminal defendant’s guilt is a question of fact for the jury).

<sup>106</sup> *Apprendi*, 530 U.S. at 490.

holding in *Watts*,<sup>107</sup> the Court made two final points. First, the Court advised that punishment is “not to exceed the limits fixed” for the crime that is alleged and supported by the verdict.<sup>108</sup> In addition, the Court provided that no court may adjust sentences beyond statutory limits, unless its post-conviction findings are submitted to a jury and thereafter proven beyond a reasonable doubt in order to satisfy the requirements of due process.<sup>109</sup>

Building upon the emergent modern regime of guidelines sentencing, the United States Supreme Court granted certiorari in *United States v. Booker*.<sup>110</sup> The case involved two federal circuit decisions,<sup>111</sup> in which factual findings at sentencing provoked the judge to impose harsher punishment than either of the convictions warranted.<sup>112</sup> Upon review, the Court ruled that the Guidelines’ obligatory nature appeared to conflict with the precedent set by *Apprendi*.<sup>113</sup> Because “the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing,” the Court concluded that mandating re-

<sup>107</sup> *Watts*, 519 U.S. at 160 (Stevens, J., dissenting) (“While the products of the Sentencing Commission’s labors have been given the modest name ‘Guidelines’ . . . they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed.”). Justice Stevens also observed that the Court’s analysis “sheds no light on whether the district judges’ application of the Guidelines in the manner presented . . . was authorized by Congress, or is allowed by the Constitution.” *Id.* at 161.

<sup>108</sup> *Apprendi*, 530 U.S. at 482-83 n.9.

<sup>109</sup> *Id.* at 490 (noting an exception that a preponderance standard is proper to weigh evidence of a prior conviction).

<sup>110</sup> 543 U.S. 220, 226 (2005) (overturning the binding aspect of the Federal Sentencing Guidelines on the ground that it violates the Sixth Amendment).

<sup>111</sup> *United States v. Booker*, 149 Fed. App. 517 (7th Cir. 2005); *United States v. Fanfan*, 468 F.3d 7 (5th Cir. 2006).

<sup>112</sup> *Booker*, 543 U.S. at 226 (reaffirming the application of the Sixth Amendment to the Sentencing Guidelines).

<sup>113</sup> *Id.* at 232 (observing that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant” (citing *Blakely v. Washington*, 542 U.S. 296, 303 (2004))). It is noteworthy, however, that the judge in *Blakely* considered only “the provisions of the Guidelines that did not implicate the Sixth Amendment.” *Id.* at 229; *see also* Brief for Petitioner at 4, *United States v. Booker*, 2004 WL 2190496 (1st Cir. 2004) (No. 04-104, 04-105) (stating “that facts that increase a Guidelines offense level are materially different from sentence-enhancing facts under the pre-Guidelines regime—which all agree could be found by judges without infringing the Sixth Amendment—because facts found under the pre-Guidelines regime did ‘not pertain to whether the defendant has a legal *right* to a lesser sentence’ ”).

quisite penalties was inconsistent with the Legislature's intent.<sup>114</sup> It was more difficult however, for the Court to establish a remedy.<sup>115</sup>

The majority began by observing that constitutional rights "rooted in the common law" formed the traditional underpinnings of "modern criminal statutes and sentencing procedures."<sup>116</sup> The Court emphasized that "these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof."<sup>117</sup> While recognizing that the Guidelines were meant to preserve the rights of accused criminals, the Court noted that a determinate sentencing scheme served to confine, not to rescind, judicial discretion.<sup>118</sup> Thus, although permissible departures were "not available in every case, and in fact [w]ere unavailable in most,"<sup>119</sup> the Court realized that sentence "enhancements became very serious indeed."<sup>120</sup>

In effect, the Court observed that sentences reflecting facts arbitrarily weighed by a judge could potentially erode the critical role of the jury in a criminal conviction.<sup>121</sup> Moreover, while binding federal courts to adhere to the Guidelines would prove convenient and efficient,<sup>122</sup> the dramatically enhanced sentences on review illustrated that the system was subject to abuse.<sup>123</sup> Thus, reaffirming *Apprendi*,

<sup>114</sup> *Booker*, 543 U.S. at 245-47.

<sup>115</sup> *Id.* at 248 (noting that upon ascertaining "that the constitutional jury trial requirement [wa]s not compatible with the Act as written, the Court faced the more intricate question, concerning whether and how to properly sever the Guidelines). The Court recognized at the outset that "reasonable minds can, and do, differ about the outcome." *Id.* at 248-49.

<sup>116</sup> *Id.* at 230 (observing that the federal constitution "gives a criminal defendant the right to demand a jury find him guilty of all the elements of the crime which he is charged" (quoting *United States v. Gaudin*, 515 U.S. 506, 511 (1995)) *overruled by* *United States v. Arnold*, No. 1:06-CR-71, 2008 WL 346368 (E.D. Tex. Feb. 6, 2008)).

<sup>117</sup> *Id.* at 242 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

<sup>118</sup> *Booker*, 543 U.S. at 233 (remarking that "[i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment").

<sup>119</sup> *Id.* at 234.

<sup>120</sup> *Id.* at 236.

<sup>121</sup> *Id.* at 236 ("The effect of the increasing emphasis on facts that enhanced sentencing ranges [] was to increase the judge's power and diminish that of the jury.").

<sup>122</sup> *Id.* at 244.

<sup>123</sup> *Booker*, 543 U.S. at 236 ("Provisions for such enhancements of the permissible sentencing range reflected growing and wholly justified legislative concern."); *see also Fanfan*, 468 F.3d at 13 (noting that defendant alleged "his constitutional right to a jury trial was trammelled," as additional facts found by a preponderance of evidence during sentencing required a term that was ten years longer than that permissible based upon the jury verdict).

the Court in *Booker* held that sentences must bear punishment that is either “authorized by the facts established by a plea of guilty or a jury verdict.”<sup>124</sup> The Court stated that “the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.”<sup>125</sup>

In a remedial opinion, Justice Breyer reconciled the holding in *Booker* with congressional intent.<sup>126</sup> Observing that the Guidelines were enacted to revamp the federal sentencing scheme within a framework to achieve broad statutory purpose, Justice Breyer identified the primary aim as ensuring equal treatment to convicted offenders.<sup>127</sup> Justice Breyer explained that “a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon [] the real conduct that underlies the crime of conviction.”<sup>128</sup> Indeed, the Court in *Booker* limited the scope of cases warranting departures from a fixed sentence, but it did not obviate the judicial fact-finding function.<sup>129</sup>

Rather, the Court maintained the effective provisions and severed those inconsistent with the Sixth Amendment.<sup>130</sup> The Court held that the Guidelines remain in effect as advisory rules that a court must consider, but clarified that it may freely “tailor the sentence in light of other statutory concerns.”<sup>131</sup> Although the federal circuit

<sup>124</sup> *Booker*, 543 U.S. at 244.

<sup>125</sup> *Id.* (agreeing that “all arbitrary powers, well executed, are the most convenient,” but premising its decision on a more pertinent observation that the value forsake in convenience and expedience is “fundamentally opposite to the spirit of our constitution” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*344)).

<sup>126</sup> *Id.* at 246 (majority remedial opinion).

<sup>127</sup> *Id.* (noting that the Guidelines were established to promote “increased uniformity of sentencing”).

<sup>128</sup> *Id.* at 250-51 (noting that because federal crimes “encompass a vast range of very different kinds of underlying conduct,” it is practical to sentence offenders in accord with their underlying conduct and degree of criminality).

<sup>129</sup> *Booker*, 543 U.S. at 251 (“[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.” (citing 18 U.S.C. § 3661) (2006)).

<sup>130</sup> *Id.* at 248 (concluding that “in light of the Act’s language, its history, and its basic purposes,” it was proper to sever 18 U.S.C. § 3553(b)(1) and declare the Guidelines advisory to preserve the substantive and procedural law).

<sup>131</sup> *Id.* at 245 (observing that “the provision of the federal sentencing statute that ma[de]

courts have liberally construed the remedial opinion in *Booker* to justify sentences enhanced upon acquittal conduct,<sup>132</sup> the Court left several questions unsettled, giving rise to a venerable dissent in the legal community.<sup>133</sup>

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the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), [was] incompatible with today's constitutional holding").

<sup>132</sup> See, e.g., *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005). In *Mykytiuk*, the court remarked that:

The Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country. "The Sentencing Commission will continue to collect and study [district court] and appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices." The best way to express the new balance, in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness. This is a deferential standard, as our many post-*Booker* orders already have reflected.

*Id.* at 608 (quoting *Booker*, 543 U.S. at 262); see also *United States v. Culver*, 598 F.3d 740, 752-53 (11th Cir. 2010) (holding that "[i]t is well-settled that a sentencing court may consider conduct for which defendant has been acquitted if the government proves the conduct in question by a preponderance of evidence"); accord *United States v. No Neck*, 472 F.3d 1048 (8th Cir. 2007); *United States v. Jiminez*, 513 F.3d 62 (3d Cir. 2008).

<sup>133</sup> See *United States v. White*, 551 F.3d 381, 389 (6th Cir. 2008) (Merritt, J., dissenting) ("Whether the Court's solution in *Booker* actually resolved the Sixth Amendment problem posed by the Sentencing Guidelines is debatable. But it is clear that the post-*Booker* development of reasonableness review has opened the door for Sixth Amendment challenges to sentences within the statutory range authorized by the jury's verdict."). For further analysis of the alleged implications of rendering the Guidelines advisory, see the dissent in *Booker*, 543 U.S. at 272 (Stevens, J., dissenting) (contending that "the law does not authorize the Court's creative remedy, [] the reasons [the majority] advances in support of its decision are unpersuasive, and . . . the violation of the Sixth Amendment that occurred in *Booker*'s case could readily have been avoided without making any change in the Guidelines"). Likewise, Justice Stevens criticized the majority's rationale that advisory guidelines will effectively reduce disparity, explaining that:

The notion that Congress had any confidence that judges would reduce sentencing disparities by considering relevant conduct—an idea that is championed by the Court, *id.* at 253, either ignores or misreads the political environment in which the SRA passes. It is true that the SRA instructs sentencing judges to consider real offense and offender characteristics, 28 U.S.C. § 994 (2006), but Congress only wanted judges to consider those characteristics within the limits of a mandatory system. The Senate Report on which the Court relies, *id.* at 249-50, clearly concluded that the existence of sentencing disparities "can be traced directly to the unfettered discretion the law confers on those judges . . . responsible for imposing and implementing the sentence."

*Id.* at 296 (quoting S. REP. NO. 98-225, at 38 (1983)).

In *United States v. White*,<sup>134</sup> the Sixth Circuit reviewed a sentence enhancement. In turn, the court upheld the enhanced sentence, observing that defendant committed “‘one of the most egregious bank robberies’ it had ever seen.”<sup>135</sup> Therefore, upon assessing whether the imposed sentence was unconstitutional, the court reasonably considered that defendant was armed with and used a lethal weapon, risking the lives of multiple bank tellers and recklessly engaging in a high-speed chase while shooting at pursuing officers.<sup>136</sup> Given the societal threat of defendant’s conduct, the court remarked that imposing a harsh penalty would effectively “promote respect for the law” and provide atonement for the victims’ suffering.<sup>137</sup>

Judge Merritt dissented, refuting “the reasonableness—and thus legality” of the holding in *White*, because it “violates both our common law heritage and common sense.”<sup>138</sup> Further, the dissent remarked that the most basic error “lies in the distinction between offense conduct, which must be found by the jury or admitted by defendant, and offender characteristics, which may be found by the sentencing judge.”<sup>139</sup> While realizing the benefits of “individually tailored sentences,” the dissent expressed reservations about weighing acquitted charges at sentencing.<sup>140</sup>

Judge Merritt found defendant’s sentence grossly unjust, stemming “from the additional ten-level increase found by the sentencing judge.”<sup>141</sup> Moreover, he contended that reliance on “acquitted conduct at sentencing also eviscerates the jury’s longstanding

<sup>134</sup> 551 F.3d 381, 382 (6th Cir. 2008) (noting that “[w]hen a jury convicted [defendant] of two counts, but acquitted him of others, the district court looked to conduct underlying the acquitted counts to enhance [defendant’s] offense level under the Sentencing Guidelines”).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (“When addressing the 18 U.S.C. § 3553(a) factors, the court also noted how the use of firearms in the bank and during flight” imperiled the lives of innocent bystanders).

<sup>137</sup> *Id.* (holding that because “the lives of the folks that were inside that bank have been forever changed,” the pain caused by defendant’s unlawful conduct was properly factored into the district court’s sentencing determination).

<sup>138</sup> *Id.* at 386-87 (Merritt, J., dissenting).

<sup>139</sup> *White*, 551 F.3d at 387.

<sup>140</sup> *Id.* (advising that consideration of acquittal conduct at sentencing poses “unique constitutional problems and must be avoided”).

<sup>141</sup> *Id.* at 388 (observing that upon separating the penalty reflecting exclusively the crime of conviction from that received based upon nonconviction conduct and related circumstances, the “adjustments for acquitted charges account for approximately 14 years of the 22-year sentence”).



power of mitigation.”<sup>142</sup> In other words, because the government empowered a jury of laypersons to inhibit the “potential or inevitable severity of sentences,” Judge Merritt concluded that severing a verdict from the resultant sentence deprives a defendant of constitutionally guaranteed protections.<sup>143</sup>

The Second Circuit redressed a sentencing court’s misinterpretation and application of the Guidelines in *United States v. Potes-Castillo*.<sup>144</sup> After the jury found defendant “guilty of conspiracy to distribute a controlled substance,” the sentencing judge calculated “three criminal history points,” enhancing the permitted term of punishment.<sup>145</sup> Reviewing defendant’s sentence *de novo*, the court examined the Guidelines’ criminal history category and identified ambiguity in the “somewhat strangely worded” language within U.S.S.G., section 4A1.2(c).<sup>146</sup> The court used the “language of Application Note 5” to ascertain the statutory meaning, as “interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the Guidelines should be applied.”<sup>147</sup>

The appeal concerned a prior non-felony conviction for driving while ability impaired, which defendant argued was precluded, but erroneously considered by the sentencing court.<sup>148</sup> Although rejecting the instant claim, the court agreed with defendant that a federal court must treat crimes of this nature “like any other misdemeanor or petty offense, except that they cannot be exempted under section

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<sup>142</sup> *Id.* at 394 (citing *Jones*, 526 U.S. at 245). Justice Merritt observed that “[a] jury cannot mitigate the harshness of a sentence it deems excessive if a sentencing judge may use acquitted conduct to sentence the defendant as though he had been convicted of the more severe offense.” *See id.*

<sup>143</sup> *Id.* (noting that the jury’s “power to mitigate or nullify the law in an individual case is no accident. It is part of the constitutional design—and has remained part of that design since the Nation’s founding” (quoting Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 PENN. ST. L. REV. 33, 36 (2003))).

<sup>144</sup> 638 F.3d 106 (2d Cir. 2011).

<sup>145</sup> *Id.* at 108-09.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 111 (explaining that while commentary notes are “not ‘binding in all instances,’ ” the parties’ arguments required the court to consider supplemental language to determine the intended meaning of the statutory text (citing *Stinson v. United States*, 508 U.S. 36, 43-45 (1993))).

<sup>148</sup> *Id.* at 110.

4A1.2(c)(2).”<sup>149</sup> In light of its decree, the Court of Appeals remanded the case, instructing the district court to determine whether defendant’s prior conviction was “ ‘categorically more serious than’ care-less or reckless driving[.]” due to his impaired ability.<sup>150</sup>

Accordingly, the court in *Potes-Castillo* established that the weight given to criminal history at sentencing varies by classification, emphasizing that the gravity of an offense and culpability of an offender are pertinent factors.<sup>151</sup> The court stated that “the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct[.]” is relevant at sentencing, inferring that an enhancement is proper to deter unlawful acts of repeat offenders.<sup>152</sup> The court in *Zowaski* presumably agreed, as it aligned defendant’s enhanced sentence with his outstanding “prior criminal history of four alcohol-related driving convictions and his acquittal on the DWI charge.”<sup>153</sup>

## V. SENTENCING IN NEW YORK STATE—TIME FOR A CHANGE

The precedent of *Watts* and its progeny makes clear that the state legislature prescribes its judiciary’s sentencing considerations.<sup>154</sup> While New York defines “conviction” and “sentence” in Criminal Procedural Law, section 1.20, the statute fails to explain the relationship between these processes.<sup>155</sup> Moreover, concerning state

<sup>149</sup> *Potes-Castillo*, 638 F.3d at 113-14 (holding that “[s]uch sentences are counted in the criminal history calculation unless section 4A1.2(c)(1) operates to exclude the particular sentence at issue”).

<sup>150</sup> *Id.* at 113 (quoting *United States v. DeJesus-Concepcion*, 607 F.3d 303, 305 (2d Cir. 2010)). In determining “whether [defendant’s] sentence should be counted or excluded under section 4A1.2(c)(1),” the Court of Appeals’ ruling left the district court with moderate discretion” in its judgment. *Id.* at 114.

<sup>151</sup> *Id.* at 113.

<sup>152</sup> *Id.* (quoting *DeJesus-Concepcion*, 607 F.3d at 305) (observing where evidence is raised that defendant has committed similar crimes on multiple occasions, federal courts may use these prior convictions to enhance the sentence for the current charges).

<sup>153</sup> *Zowaski*, 916 N.Y.S.2d at 912.

<sup>154</sup> *Apprendi*, 530 U.S. at 482 (“[T]he 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range [ . . . ] has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature.”).

<sup>155</sup> N.Y. CRIM. PROC. § 1.20(13) (McKinney 2007) (defining conviction as “the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint, or to one or more counts of such instrument”); N.Y. CRIM. PROC. § 1.20(14)

procedural rules, section 400.40 permits courts to impose sentences, not otherwise authorized, upon prior conviction evidence and a filed statement of the charges.<sup>156</sup> However, no state law speaks to the use of acquittal conduct at sentencing and although a reasonable inference would preclude courts from doing so, New York courts seem to disagree.<sup>157</sup> Because the New York Court of Appeals has yet to decide upon the narrow issue of acquittal conduct raised at sentencing, lower courts have free rein to creatively sentence criminal defendants on a circumstantial basis.

### A. The Traditional Approach to Discretionary Sentencing

In *People v. Felix*,<sup>158</sup> the court established that Penal Law, section 70.02, “bear[ing] upon the manner in which the crime was committed” did not require, but rather permit consideration of mitigating sentencing factors.<sup>159</sup> Although all litigants may “present relevant information to assist the court in making a determination,”<sup>160</sup> the

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(McKinney 2007) (referring to “the imposition and entry of sentence upon a conviction”).

<sup>156</sup> N.Y. CRIM. PROC. § 400.40(2) (McKinney 2011) (“If it appears that the defendant has a previous judgment of conviction and if the court is required, or in its discretion desires, to impose a sentence that would not be authorized in the absence of such previous judgment, a statement must be filed after conviction and before sentence setting forth the date and place of the previous judgment . . . .”); U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”). See, e.g., *United States v. Moore*, 208 F.3d 411, 414 (2d Cir. 2000) (“It is settled that due process requires that a defendant have notice and an opportunity to contest the validity or applicability of the prior convictions upon which a statutory sentencing enhancement is based.”).

<sup>157</sup> *Apprendi*, 530 U.S. at 523-24 (Kennedy, J., dissenting) (criticizing the majority opinion “for its failure to explain the origins, contours, or consequences of its purported constitutional principle; for the inconsistency of that principle with our prior cases; and for the serious doubt that the holding cast on sentencing systems employed by the Federal Government and States alike.”).

<sup>158</sup> 446 N.E.2d 757 (N.Y. 1983).

<sup>159</sup> *Id.* at 758-59. The court premised its decision upon the language of N.Y. Penal Law § 70.02(b), providing in pertinent part: “the court may impose a sentence other than an indeterminate sentence of imprisonment . . . if it finds that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant’s participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the defendant’s commission of an armed felony.” *Id.* at 758 n.1 (noting that the statute was advisory, as it did not compel the court to consider any of the enumerated factors in its determination).

<sup>160</sup> *Felix*, 446 N.E.2d at 758 n.1 (citing N.Y. PENAL LAW § 70.02(2)(c) (McKinney 2011))

judge has discretion to impose “greater responsibility for an armed violent felony through stiffer sentencing provisions.”<sup>161</sup> Defendant argued, however, that the enhanced sentence violated due process by reflecting “the unproven charge that he was ‘armed’ within the meaning of the ‘armed felony’ definition.”<sup>162</sup>

In rejecting this assertion, the court explained that since adjudication is less formal than trial proceedings, a “sentence does not depend solely on accusation.”<sup>163</sup> Thus, the court in *Felix* clarified that “an indictment may not be given preclusive effect as to an unadmitted charge.”<sup>164</sup> Because defendant was aware that accepting the plea would expose him to punishment, due process was provided, as the court explained that “the due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure.”<sup>165</sup>

As New York acknowledged after *Felix* that “the problem of legislative classifications is a perennial one,”<sup>166</sup> the New York Court of Appeals, in *People v. Outley*,<sup>167</sup> created its own indicia to justify sentencing in light of nonconviction conduct. The court held that a sentencing court “must assure itself that the information upon which it bases the sentence is reliable and accurate.”<sup>168</sup> Such a condition

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(noting that a judge has discretion, but is not required by law to “conduct a hearing with respect to any issue bearing upon such [sentencing] determination.”).

<sup>161</sup> *Id.* at 760 (observing that the Legislature purposefully enacted the sentencing provisions defined by Penal Law, section 70.02 “to combat violent crime”).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 760-61.

<sup>164</sup> *Id.* at 761 (stating that a conviction “can give rise to ancillary consequences beyond the formal notification and delineation of the charges” (quoting *People v. Brian R.*, 356 N.Y.S.2d 1006, 1009 (Sup. Ct. 1974)), *aff’d sub nom.*, *People v. Brian R.*, 365 N.Y.S.2d 998 (App. Div. 2d Dep’t 1975) and *disapproved by* *People v. Drayton*, 367 N.Y.S.2d 506, 515 n.1 (App. Div. 2d Dep’t 1975) (“The restriction or classification based upon the charge made in the indictment rather than the charge proven in court is utterly capricious and irrational.”).

<sup>165</sup> *Felix*, 446 N.E.2d at 762 (recognizing that defendant was “accorded the right to deny or explain [the charges stated in the plea] which due process requires,” satisfying both state and federal constitutional requirements).

<sup>166</sup> *Drayton*, 367 N.Y.S.2d 506, 513 (“Evils in the same field may be of different dimensions and proportions, requiring different remedies.”).

<sup>167</sup> 610 N.E.2d 356 (N.Y. 1993).

<sup>168</sup> *Id.* at 360 (recognizing “that sentencing is a critical stage of the criminal proceeding,” and thus, sentencing considerations must reflect “reliable and accurate” information to comply with the requirements of due process).

precedent is not statutorily defined; however, state courts have affirmed this rule to comply with due process.<sup>169</sup> In *Outley*, defendant's enhanced sentence was triggered by an arrest in breach of a plea agreement.<sup>170</sup> Recognizing that "the mere fact of the arrest, without more, is not enough," the court stated that an enhancement requires a sufficient inquiry, showing "a legitimate basis for the arrest" on the subsequent charge.<sup>171</sup>

While recognizing defendant's constitutional right to hear and discredit the nonconviction evidence, the court clarified that a full hearing is not required.<sup>172</sup> The court in *Outley* considered, but rejected "the proposed evidentiary hearing rule," reasoning that such a rule "would have the undesirable consequence of requiring, in effect, 'a minitrial.'" <sup>173</sup> Thus, because defendant had an adequate chance "to explain his arrest," it was within the court's discretion to enhance

<sup>169</sup> *Id.* at 360-61; *see also* *Zowaski*, 916 N.Y.S.2d at 916 (permitting a sentencing court to consider "all reliable and relevant information regarding the defendant's background and the crime of conviction").

<sup>170</sup> *Outley*, 610 N.E.2d at 359 (enhancing defendant's sentence after the prosecutor "advised that defendant had been arrested [two months prior] on an indictment charging him with the commission of a burglary and related crimes"). Upon confirming the accuracy of these charges, the court "properly imposed the more severe sentence." *Id.* at 360.

<sup>171</sup> *Id.* at 361 (analogizing the preliminary evidentiary inquiry to the preponderance of evidence standard adopted at sentencing); *accord* *People v. Valencia*, 819 N.E.2d 990, 991 (N.Y. 2004) (requiring validation of defendant's subsequent arrest by a preponderance in order to use at sentencing, "speculation and uncorroborated statements" are inadequate for an enhancement). *But see* N.Y. EXEC. LAW § 259-c(2) (McKinney 2010) (noting that in New York where defendant is found guilty and released, suspending the sentencing determination, the state board of parole "ha[s] the power and duty of determining the conditions of release . . . under an indeterminate or determinate sentence of imprisonment"). Interestingly, neither the court in *Outley*, nor the court in *Valencia* referred to the "minimum periods of imprisonment or ranges thereof for different categories of offenders," which the parole board defines and the statute "require[s] by law." N.Y. EXEC. LAW § 259-c(4) (McKinney 2010).

<sup>172</sup> *Outley*, 610 N.E.2d at 361 ("The nature and the extent of the inquiry—whether through a summary hearing pursuant to CPL 400.10 or some other fair means—is within the court's discretion."); *see generally* N.Y.C.P.L.R. 400.10 (McKinney 2011) ("[T]he court, in its discretion, may hold one or more pre-sentence conferences in open court or in chambers in order to (a) resolve any discrepancies between the pre-sentence report, or other information the court has received . . . or (b) assist the court in its consideration of any matter relevant to the sentence to be pronounced."). *But see* *People v. Banks*, 557 N.Y.S.2d 529, 531 (App. Div. 3d Dep't 1990) (vacating the enhanced sentence on the ground that the "County Court deprived defendant of his right to a meaningful opportunity to refute the single, aggravating factor which influenced the court in increasing defendant's punishment").

<sup>173</sup> *Outley*, 610 N.E.2d at 361 (recognizing that no authority or persuasive reasoning "in the decisions of our State courts or of the Federal courts calls for such an onerous rule").

the agreed upon sentence without violating due process.<sup>174</sup>

### B. Linking a Verdict To Judgment—Due Process Secured in Sentencing

The Court of Appeals, despite adopting the federal sentencing precedent, recognized that “structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose every defendant convicted of [an offense] to a maximum sentence exceeding that which is, in the legislature’s judgment, generally proportional to the crime.”<sup>175</sup> Thus, state courts are advised to execute sentences reflecting “the substantive content of its criminal laws,” as the due process corollary of enhanced sentencing is not discounted by vested judicial discretion.<sup>176</sup>

However, New York’s Appellate Division remains split on the issue of acquittal conduct used to enhance a prescribed sentence.<sup>177</sup> The Third and Fourth Departments variably adhere to the precedent of *Watts* and its progeny, adopting contemporary sentencing considerations related to nonconviction conduct.<sup>178</sup> In contrast,

<sup>174</sup> *Id.* at 360 (noting further that the Appellate Division unanimously affirmed the enhanced sentence).

<sup>175</sup> *People v. Quinones*, 906 N.E.2d 1033, 1036 n.3 (N.Y. 2009), *cert. denied*, 130 S. Ct. 104 (2009) (quoting *Apprendi*, 530 U.S. at 490 n.16) (emphasis and alteration in original); *see also* *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (“If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it [as a sentencing factor or element of a criminal offense]—must be found by a jury beyond a reasonable doubt.”). *But see* *Zowaski*, *supra* note 13, at 912 and *Watts*, *supra* note 64, at 156 (holding to the contrary of this proposition).

<sup>176</sup> *Id.* at n.3 (quoting *Apprendi*, 530 U.S. at 490 n.16).

<sup>177</sup> *Zowaski*, 916 N.Y.S.2d at 914.

<sup>178</sup> *See, e.g.*, *People v. Storelli*, 629 N.Y.S.2d 353, 354 (App. Div. 4th Dep’t 1995) (affirming unanimously the judgment upon finding, “[t]he court’s remarks were insufficient to establish that the court was punishing defendant for crimes other than those for which he was convicted”). In *Storelli*, defendant’s sentence was harsher than the conviction predicated; however, the court reasoned that the enhancement was not premised upon “its belief that he was guilty of rape in the first degree, despite the jury’s finding that he was innocent of that charge.” *Id.*; *see also* *People v. Ayen*, 864 N.Y.S.2d 591, 592 (App. Div. 4th Dep’t 2008) (affirming an enhanced sentence, as the record reflected that defendant’s initial sentence was contingent upon an unambiguous good conduct provision, which was intended, but failed, to deter him from engaging in potentially criminal conduct). In *Ayen*, defendant violated the warning issued during plea proceedings, and thus, it was within the court’s discretion to enhance his sentence to reflect such related nonconviction conduct. *Id.* *But cf.* *People v. Durand*, 880 N.Y.S.2d 409, 412 (App. Div. 4th Dep’t 2009) (ruling that the lower court erred in

the First and Second Departments remain reluctant to do so,<sup>179</sup> maintaining that uninhibited judicial fact-finding obviates the decision-making power reserved for the jury.<sup>180</sup> Therefore, these latter courts strictly mandate that criminal penalties wholly reflect the facts underlying the conviction.<sup>181</sup>

Notwithstanding clear constitutional concerns, sentencing courts are inclined to augment punishment of offenders posing a threat to society, failing to rehabilitate, or committing acts of moral turpitude.<sup>182</sup> To illustrate, the trial court considered nonconviction

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relying on counts “of which defendant was acquitted” and vacating the sentence). However, in *Zowaski*, the court stressed that it did not consider acquitted charges to enhance defendant’s sentence, but rather, relied on merely the conduct *underlying* the acquittal. *Zowaski*, 916 N.Y.S.2d at 914. For an illustration of how the Third Department of the Appellate Division is more consistent in considering nonconviction conduct to enhance a sentence, see *People v. Coleman*, 705 N.Y.S.2d 422, 423 (App. Div. 3d Dep’t 2000) (“Contrary to defendant’s contention, County Court was not required to conduct an evidentiary hearing prior to imposing the enhanced sentence since the court gave defendant an opportunity to demonstrate the alleged mitigating circumstances surrounding her nonappearance [at the scheduled sentencing date] and was ultimately satisfied that defendant’s claim had no legitimate basis.”); see also *People v. Davis*, 817 N.Y.S.2d 752, 753 (App. Div. 3d Dep’t 2006) (rejecting defendant’s contention that “the sentence could not be enhanced unless and until [the collateral sentencing considerations] w[ere] established beyond a reasonable doubt”).

<sup>179</sup> *People v. Schrader*, 806 N.Y.S.2d 613, 614 (App. Div. 2d Dep’t 2005) (remitting the case for resentencing, “as a matter of discretion in the interest of justice” because the sentencing court improperly considered acquitted charges in its determination); accord *People v. Reeder*, 748 N.Y.S.2d 275 (App. Div. 2d Dep’t 2002).

<sup>180</sup> *Quinones*, 906 N.E.2d at 1036, n.4 (explaining that “when a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment’ . . . and the judge exceeds his proper authority” (quoting *Blakely*, 542 U.S. at 304) (alteration in original)).

<sup>181</sup> *Schrader*, 806 N.Y.S.2d at 614; *Reeder*, 748 N.Y.S.2d at 276; see also *Watts*, 519 U.S. at 163 n.3 (Stevens, J., dissenting) (“[D]efendant’s Fifth and Sixth Amendment right to have a jury determine his guilt beyond a reasonable doubt is trampled when he is imprisoned (for any length of time) on the basis of conduct of which a jury has necessarily acquitted him.” (quoting *United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995))), abrogated by *Watts*, 519 U.S. 148 (1997); see also *Apprendi*, 530 U.S. at 529 (O’Connor, J., dissenting) (stating that while the state-court opinions upon which Justice Thomas relies might offer “marginal assistance in determining the original understanding of the Fifth and Sixth Amendments,” these opinions do not redress “the federal constitutional question,” regarding how enhanced sentencing burdens a criminal defendant’s rights in post-conviction processes (emphasis in original)).

<sup>182</sup> Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 974 (2003) (observing that although “deterrence often comes at the expense of justice,” there are in fact “legal formulations [] truly grounded upon deterrence analysis and [] designed to produce punishment results with maximum deterrent effect”). Moreover, “[a]dvocates for a deterrence-based distribution [system] argue not that doing justice has no value but that crime re-

conduct to enhance defendant's sentence in *People v. Grant*.<sup>183</sup> Defendant was indicted on multiple first and second degree counts of rape, sodomy, and sexual abuse.<sup>184</sup> The charges reflected three incidents of sexual misconduct, one that involved "endangering the welfare of two children."<sup>185</sup>

Yet, since the jury did not find guilt beyond a reasonable doubt on each charge, defendant was convicted on a single rape count and acquitted of all further charges.<sup>186</sup> Considering the startling circumstances of the conviction and evidence eliciting "many acts of intercourse," the court imposed a harsher punishment than the conviction required.<sup>187</sup> However, overturning the sentence on appellate review, the court held that a sentence enhancement based upon acquitted charges violated the Double Jeopardy Clause.<sup>188</sup>

In *People v. Black*,<sup>189</sup> defendant was indicted in connection with a shooting that resulted in a homicide.<sup>190</sup> Defendant faced multiple murder and attempted murder counts, alongside charges for third-degree unlawful weapon possession, and first-degree reckless endangerment.<sup>191</sup> An onlooker testified as to the preceding circumstances, corroborating that defendant acted with complete "indifference to human life."<sup>192</sup> Defendant opposed this testimony, alleging that use of "deadly physical force was necessary to defend" himself upon realizing the imminent danger.<sup>193</sup> The jury accepted the justification defense, acquitting defendant on all murder-related charges.<sup>194</sup> Despite the verdict, the court enhanced defendant's sentence, con-

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duction through precisely adjusted deterrent punishments has a greater value." *Id.* at 980.

<sup>183</sup> 595 N.Y.S.2d 38 (App. Div. 1st Dep't 1993).

<sup>184</sup> *Id.* at 39.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Grant*, 595 N.Y.S.2d at 39 ("The prohibition against double jeopardy found in both the U.S. Constitution (5th Amendment), and the N.Y. Constitution (article I, §6), [] requires re-sentence here.").

<sup>189</sup> 821 N.Y.S.2d 593 (App. Div. 1st Dep't 2006).

<sup>190</sup> *Id.* at 594 (observing that the victim intervened in a dispute between defendant and an ex-business partner and was thereafter shot by defendant three times).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 594-95 (observing that defendant testified that he fired shots only after shots were fired at him).

<sup>194</sup> *Black*, 821 N.Y.S.2d at 594.



struing the acquittal conduct as “intimately related [to] and intertwined” with the convicted offenses.<sup>195</sup> Thus, acknowledging the resultant death, the court explained that it “must take into consideration there was at least one life that was lost on that day.”<sup>196</sup>

The appellate court, however, flatly rejected its decision, reiterating that a court “may not base its sentence on crimes of which defendant was acquitted.”<sup>197</sup> This is not to say defendant was not deserving of the imposed punishment, as a preponderance of evidence demonstrated that he willingly exposed himself to the situation<sup>198</sup> and voluntarily engaged in “lawless behavior.”<sup>199</sup> However, the court recognized what “the jury verdict made clear”<sup>200</sup> and while avoiding a ruling on constitutional grounds, the decision in *Black* is construed as one which seeks to preserve an accused criminal defendant’s right to a jury trial, as guaranteed by both the federal constitution<sup>201</sup> and the New York State Constitution.<sup>202</sup>

While holding that imposing enhanced sentences in these particular cases was improper, neither *Grant* nor *Black* articulated a clear policy or constitutional premise to prevent sentencing courts from considering nonconviction conduct.<sup>203</sup> Furthermore, because

<sup>195</sup> *Id.* at 596.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* (“Since the jury believed defendant’s conduct was justified, it [w]as irrelevant that he committed those ‘acts’ by a preponderance of the evidence.”).

<sup>198</sup> *Id.* at 593-94 (noting that the underlying dispute arose because of “a souring business relationship” and defendant presumably accepted the challenge to fight by leaving his apartment with a gun).

<sup>199</sup> *Black*, 821 N.Y.S.2d at 596 (observing that there was no dispute that “firing a loaded weapon on a street where people were present” is not the type of conduct that the law should dismiss lightly).

<sup>200</sup> *Id.* at 597 (observing that the jury determined that “defendant’s acts of shooting at people who were threatening him with deadly force [ . . . ] were justified under law”). The fact that the court in *Black* immediately rejected the claim “that defendant failed to preserve [a sentencing objection] for appellate review further demonstrates that the court was determined to revive a criminal defendant’s constitutional rights. *Id.* at 596 (noting that the alternative would have been a repudiation of the jury’s acceptance of the justification defense).

<sup>201</sup> U.S. CONST. amend. V; U.S. CONST. amend. VI.

<sup>202</sup> N.Y. CONST. art. 1, §6 (McKinney 2002).

<sup>203</sup> *Grant*, 595 N.Y.S.2d at 39 (proposing a double jeopardy argument, which the United States Supreme Court has since invalidated); see *Watts*, 519 U.S. at 154-55 (holding that consideration of acquittal conduct in sentencing does not invoke double jeopardy); *Black*, 821 N.Y.S.2d at 597 (merely arguing that justified conduct is precluded from a sentencing determination without offering support for this position).

the Legislature has yet to restrict the scope of sentencing discretion, the trial courts have attempted to defy the Appellate Division precedent.<sup>204</sup> Indeed, these courts validate that when a precedential conflict emerges between state and federal law on a constitutional issue, courts must observe “the United States Supreme Court’s interpretations.”<sup>205</sup>

Likewise, in *People v. Murray*,<sup>206</sup> considering the preponderance of evidence underlying an acquitted felony-murder charge, the court justified enhancing defendant’s sentence on both constitutional and procedural grounds.<sup>207</sup> First, the court said, “Due Process is complied with when the sentencing court enhances a sentence upon ‘reliable and accurate information.’”<sup>208</sup> Further, the court clarified that “the rules of evidence do not apply to sentencing procedure.”<sup>209</sup> However, the decision was ultimately remitted for resentencing, as the appellate court denied the constitutionality of considering non-conviction conduct to impose an enhanced sentence.<sup>210</sup>

<sup>204</sup> Compare *Zowaski*, 916 N.Y.S.2d at 916 (noting that the city court followed the United States Supreme Court precedent, considering acquittal conduct in its sentencing determination), with *Black*, 821 N.Y.S.2d at 596 (rejecting the “seven-year maximum sentence [as] inappropriate based on conduct for which defendant was acquitted”). Indeed, because the city court in *Zowaski* was located in Orange County, New York, if defendant appealed, the Second Department of the Appellate Division would have likely overturned the sentence. *Zowaski*, 916 N.Y.S.2d at 914.

<sup>205</sup> *People v. Murray*, 709 N.Y.S.2d 806, 812 (Sup. Ct. 2000), *aff’d as modified and re-manded*, 723 N.Y.S.2d 196 (App. Div. 2d Dep’t 2001) (citing *People v. Kin Kan*, 574 N.E.2d 1042, 1045 (N.Y. 1991)).

<sup>206</sup> 709 N.Y.S.2d 806 (Sup. Ct. 2000).

<sup>207</sup> *Id.* at 811-12 (noting that an acquittal does not factually prove defendant’s innocence on the accused charges) (citing *Watts*, 519 U.S. at 155).

<sup>208</sup> *Id.* at 812 (affirming the evidentiary indicia of “clear and reliable information” upheld by the Court of Appeals).

<sup>209</sup> *Id.* (observing that a sentencing court “may consider hearsay and suppressed evidence”); see *People v. Mancini*, 658 N.Y.S.2d 37, 38 (App. Div. 3d Dep’t 1997) (affirming a sentence imposed in light of a statement suppressed from evidence); accord *People v. Brown*, 728 N.Y.S.2d 100, 102 (App. Div. 3d Dep’t 2001) (authorizing use of “defendant’s suppressed confession to [a present charge of] arson as well as another in a college dormitory” in the court’s sentencing determination).

<sup>210</sup> *Murray II*, 723 N.Y.S.2d at 196.

### C. Discretion without Guidelines—Sentencing beyond Statutory Maximums

In *People v. La Veglia*,<sup>211</sup> the Appellate Division, Third Department, recognized that enhanced sentencing in light of acquittal conduct is constitutionally permissible upon a proviso that the penalty fits the crime.<sup>212</sup> The court held that “all of the relevant facts and circumstances” related to defendant’s arson conviction were pertinent considerations at sentencing.<sup>213</sup> The court rejected the notion that any evidence “directly or indirectly related to” acquitted charges was exempt from its determination.<sup>214</sup> Instead, the court emphasized that the facts adduced at trial sufficiently proved that defendant committed arson with cruel intent and motive “to destroy all evidence which might connect him to the murders” of three innocent persons.<sup>215</sup>

Significantly, the court examined the manner in which defendant committed the crime of conviction.<sup>216</sup> The court in *La Veglia* pointed out that due to the severity and abhorrence of these killings,<sup>217</sup> occurring within a fire that defendant never denied setting, the enhanced sentence was not harsh or excessive, but rather it was proportionate to defendant’s culpability.<sup>218</sup>

The reasoning in *La Veglia* also supports the holding in *People v. Hamlin*,<sup>219</sup> reiterating that a sentencing court is obliged to consider supplemental facts beyond those partially restricted to the

<sup>211</sup> 626 N.Y.S.2d 314 (App. Div. 3d Dep’t 1995).

<sup>212</sup> *Id.* at 314-15 (holding that the court did not abuse its discretion, as the sentence was not harsh and excessive, but appropriate in light of the underlying circumstances).

<sup>213</sup> *Id.* at 315 (explaining that the court “did not sentence defendant for crimes of which he was acquitted,” rather the facts underlying the acquittals were merely factored into its determination).

<sup>214</sup> *Id.* at 314-15 (noting that “defendant was acquitted of three separate counts of murder in the second degree charged in the indictment”).

<sup>215</sup> *Id.* at 315 (“[T]here is no doubt that defendant set fire to the house to prevent or hinder the authorities from obtaining evidence of thee vicious murders.”).

<sup>216</sup> *La Veglia*, 626 N.Y.S.2d at 314.

<sup>217</sup> *Id.* (observing that the first murder count related to a killing whereby the victim was “beaten about the head with a hammer” in the solitude of his own home and the second and third counts reflected the killings of two victims, “who were shot in the head in the same premises”).

<sup>218</sup> *Compare id.* at 315, with *Potes-Castillo*, 638 F.3d at 113, (noting that both state and federal courts have upheld culpability as a pertinent sentencing factor).

<sup>219</sup> 800 N.Y.S.2d 255 (App. Div. 3d Dep’t 2005).

finding of guilt.<sup>220</sup> Likewise, the court sought to justify the enhancement by stressing that “the circumstances of defendant’s crime included a death.”<sup>221</sup> While convicted of driving while intoxicated, defendant was acquitted of a separate count for criminally negligent homicide.<sup>222</sup> The court advised that its discretion was reserved within the explicit terms of New York Penal Law, section 65.00(1)(a), holding that “the nature and circumstances of the crime and . . . the history, character and condition of the defendant” are relevant to a sentencing determination.<sup>223</sup>

This statute enumerates sentencing factors, which impliedly authorize deviation from the penalties prescribed by law where: (i) more institutional confinement is warranted to safeguard the public; (ii) “guidance, training, or other assistance” is available and supervision of defendant is needed; or (iii) enhanced punishment is compliant “with the ends of justice.”<sup>224</sup> Yet, because the statute is designated “Sentence of probation,”<sup>225</sup> it is plausible that the court in *Hamlin* misconstrued and misapplied its provisions.<sup>226</sup> However, it seems only logical and practical that the statute afford tantamount discretion to courts to “modify or enlarge the conditions”<sup>227</sup> of the

<sup>220</sup> *Id.* at 256 (“Manifestly, a sentencing court must consider all circumstances relating to the crime and the defendant when imposing a sentence following conviction.”).

<sup>221</sup> *Id.* The court made clear that because “a young man’s life was tragically extinguished,” the enhanced sentence “was not harsh or excessive” as a matter of law and justice. *Id.*

<sup>222</sup> *Id.* (noting that despite “uncontradicted proof [presented] at trial that defendant had a .13% blood alcohol content at the time of the accident,” the jury found reasonable doubt as to his guilt in consequently striking and killing a pedestrian with his motor vehicle).

<sup>223</sup> N.Y. PENAL LAW § 65.00(1)(b) (McKinney 2009).

<sup>224</sup> *Id.* (articulating the factors provided for setting down a sentence post-conviction).

<sup>225</sup> *Id.* (observing that the statute is not titled “sentencing,” which would most certainly authorize said discretion).

<sup>226</sup> *Hamlin*, 800 N.Y.S.2d at 256 (noting that defendant did not receive probation, but a one-year term in prison).

<sup>227</sup> N.Y. PENAL LAW § 65.00(2) (McKinney 2009). The statute provides that “[t]he court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time.” *Id.* (noting that while authorizing a court, in its discretion, to enhance the fixed penalty, the statute does not mandate any specific requirements to lawfully execute an enhancement). Ironically, sections 65.00(2) and 65.05(2) are interpreted in commentary, as directing courts to “make the sentence more meaningful to the defendant.” N.Y. PENAL LAW § 65.00 (McKinney 2009), *construed in* Staff Notes of the Commission on Revision of the Penal Law at 263, *proposed* N.Y. PENAL LAW (McKinney spec. pamph. 1964).

sentence despite the type of punishment imposed.<sup>228</sup>

New York courts addressed a slightly different matter in *People v. Ruff*,<sup>229</sup> clarifying that defendant's acquittal "did not foreclose the posthearing finding that he violated conditions of his probation, given the differing charges and standards of proof."<sup>230</sup> The opinion is relevant to the present inquiry for two reasons, enunciating the Third Department's valuation of acquittals.<sup>231</sup> First, the court exercised its discretion to revoke defendant's probation and sentence him to a term of imprisonment upon a preponderance of evidence affirming his subsequent misconduct.<sup>232</sup> Second, the court in *Ruff* made clear that enhancements need not reflect a finding that "the acts constitute a crime," but that the circumstances related to acquittal conduct necessitate greater punishment than that prescribed for a conviction.<sup>233</sup> In sum, the court ruled that the jury's acquittal does not bar a sentencing court's consideration of the underlying conduct.<sup>234</sup>

In *People v. Janick*,<sup>235</sup> the Third Department revisited the issue of acquittal conduct as a contemporary sentencing consideration, enabling judges to treat each case in detail and adjust the level and type of punishment accordingly.<sup>236</sup> *Janick* involved a plea agreement, offering a minor prison term of two to four years.<sup>237</sup> However, the "promised sentence was conditioned upon" certain requisites that the court memorialized in writing and orally explained to ensure defendant understood the terms.<sup>238</sup> The writing also reserved a right to

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<sup>228</sup> *Hamlin*, 800 N.Y.S.2d at 256 (observing that the factors listed under N.Y. PENAL LAW § 65.00(1)(a) are wholly applicable to the facts of this case, whereby "defendant drank several beers and made an egregious error in judgment by choosing to drive after doing so").

<sup>229</sup> 854 N.Y.S.2d 787 (App. Div. 3d Dep't 2008).

<sup>230</sup> *Id.* at 788 (noting that defendant was acquitted of first-degree counts of rape and criminal sexual misconduct).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 788-89 (establishing that the court was justified in revoking defendant's probation because he violated the conditional terms prescribed by the court).

<sup>233</sup> *Id.* (affirming the enhanced sentence, as the trial court adjusted defendant's punishment upon its "express determination to credit the victim's account at the [post]hearing of forcible rape").

<sup>234</sup> *Ruff*, 854 N.Y.S.2d at 788-89.

<sup>235</sup> 713 N.Y.S.2d 838 (N.Y. Sup. Ct. 2000).

<sup>236</sup> *Id.* at 843 (holding that "there is no statutory bar to consideration of conduct underlying an acquittal").

<sup>237</sup> *Id.* at 839.

<sup>238</sup> *Id.* at 839-40 (observing that the court "would not be bound by its promised term of

withdraw the plea and enhance the sentence “should the defendant ‘violate the law’ prior to sentencing.”<sup>239</sup>

Despite the incentive manifested, defendant was subsequently arrested and charged with fourth-degree grand larceny and second-degree criminal impersonation.<sup>240</sup> Recognizing a pattern of delinquent criminal behavior, the court enhanced defendant’s incarceration term to “seven and one-half to fifteen years.”<sup>241</sup> Defendant challenged the sentence as unconstitutional on two grounds.<sup>242</sup> Primarily, defense counsel argued that the plea agreement was ambiguous, urging that it contained “a ‘no misconduct,’ as opposed to a ‘no arrest’ enhancement provision.”<sup>243</sup>

If that were the case, the burden is heightened with a no misconduct clause, requiring the prosecution to show “preponderant evidence of guilt of the underlying charge.”<sup>244</sup> The writing itself purported to include a no misconduct clause; however, in its oral colloquy, the court stated that the sentence was subject to enhancement upon arrest.<sup>245</sup> Thus, resolving all doubts in defendant’s favor, the court held that the enhancement provision required satisfaction of the preponderance standard.<sup>246</sup> However, considering “the nature and quality of proof” underlying the subsequent arrest, the court determined that the prosecution had met its burden, substantiating its dis-

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incarceration, and could elect to sentence the defendant” in light of his conduct and related circumstances prior to the date set for sentencing).

<sup>239</sup> *Id.* at 840 (noting that in an effort to avoid confusion, the court clarified the terms of the written plea agreement, verbally explaining to defendant “that the sentence would be enhanced to the maximum of 10-20 years if, prior to sentencing, [he] were to ‘get arrested’”).

<sup>240</sup> *Janick*, 713 N.Y.S.2d at 841-42.

<sup>241</sup> *Id.* at 840. Although the court determined that an enhanced sentence was appropriate, as defendant breached the plea agreement, the court did not abuse its discretion by imposing an unduly harsh sentence. *Compare id.* (noting that the court did not enforce the ten to twenty year maximum sentence previously stipulated, but instead, reasonably enhanced the sentence in light of the circumstances), with *Potes-Castillo*, 638 F.3d at 113 (observing that the state court in *Janick* and the Court of Appeals in *Potes-Castillo* both relied on recurring criminal conduct at sentencing).

<sup>242</sup> *Janick*, 713 N.Y.S.2d at 840.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 841-42.

<sup>245</sup> *Id.* at 841.

<sup>246</sup> *Id.* (“In construing the promises made in return for the plea, a court must look to what the parties reasonably understood the terms to mean, and resolve any ambiguity in the agreement in favor of the defendant.” (quoting *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 167 (2d Cir. 2000))).

cretion to enhance the presupposed sentence.<sup>247</sup>

The defense further contested the constitutionality of the sentence enhancement, alleging that because “the Grand Jury ultimately failed to indict him after his arrest on the new charges,” evidence of his nonconviction conduct was precluded in a sentencing determination.<sup>248</sup> While observing that the First and Second Departments of New York’s Appellate Division barred their courts from using acquittal conduct in sentencing,<sup>249</sup> the court in *Janick* rejected their rationale as both unpersuasive and unsupported.<sup>250</sup> Instead, observing that New York’s Criminal Procedural Law “contains no such prohibition,” the court considered the value derived from using conviction-related facts to elect and impose a proper sentence for an individual offender.<sup>251</sup> Furthermore, the court established that because the appellate decisions conflict with the United States Supreme Court precedent from *Watts*, there is no lawful authority governing its sentencing discretion.<sup>252</sup>

## VI. STRUCTURED SENTENCING—THE DIVERGENT STATE APPROACHES

### A. The Legislature’s Remedial Role in Sentencing Procedure

The lack of post-conviction statutory safeguards in New York State contrasts with the practice in most states which perceived

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<sup>247</sup> *Janick*, 713 N.Y.S.2d at 841-42 (holding that the prosecution had exceeded the requisite burden, as the record “yield[ed] the ready conclusion that there was clear and convincing evidence of guilt” despite the Grand Jury’s acquittal of the charges).

<sup>248</sup> *Id.* at 840 (challenging that “following the ‘no bill,’ all records of those new charges were ordered sealed”).

<sup>249</sup> *Id.* at 842 (observing, but refusing to follow the “number of state cases which clearly assume that a sentencing court’s consideration of conduct which is the subject of an acquittal voids the sentence”); see, e.g., *Murray II*, 723 N.Y.S.2d at 196 (remitting the case for resentencing, as the court improperly enhanced defendant’s sentence in light of his criminal misconduct).

<sup>250</sup> *Janick*, 713 N.Y.S.2d at 842 (noting that although these appellate courts are overturning sentences enhanced upon acquittals, these decisions fail to elucidate any such precedent in statutory or constitutional law).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 843.

the benefits of the federal approach and adopted determinate sentencing guidelines.<sup>253</sup> Hence, there is no excuse for New York's lethargic reformative efforts, as the state is well aware that its "ad hoc approach to amending its sentencing and penal statutes over the past four decades has resulted in a sentencing structure that lacks clarity and cohesiveness."<sup>254</sup> To further illustrate its failures in this regard, New York State assembled a Committee on Sentencing Guidelines ("COSG") in 1985, but it has dodged the task of instituting a state sentencing scheme.<sup>255</sup> Because "different perspectives proved irreconcilable when the COSG tried to agree on grid ranges, departure policy," and other statutory changes, the Legislature received, but never enacted the initial sentencing bill.<sup>256</sup>

After the COSG poorly performed for ten years, the Sentenc-

<sup>253</sup> See, e.g., 42 PA. CONST. STAT. ANN. § 9711 (West 2011); OR. REV. STAT. ANN. § 137.669 (West 2011); see also *State v. Miller*, 855 P.2d 1093, 1095 (Or. Sup. Ct. 1993) (noting that "[t]he legislature has designated the guidelines as the source of authority for maximum consecutive sentences"); see generally MARTIN WASIK AND KEN PEASE, SENTENCING REFORM, GUIDANCE OR GUIDELINES? 22 (Manchester University Press 1987) (noting that "American sentencing reform initiatives since 1975 have taken a variety of forms—sentencing commissions, sentencing guidelines, parole guidelines, parole abolition, mandatory sentencing laws, statutory determinate sentencing, plea-bargaining bans and rules, and appellate sentence review").

<sup>254</sup> N.Y.S. COMM. ON SENTENCING REFORM, THE FUTURE OF SENTENCING IN NEW YORK STATE: RECOMMENDATIONS FOR REFORM 65 (2009); see also WASIK, *supra* note 253, at 22 (stressing that "[a] considerable number of states now have, or have had, sentencing commissions," but New York is among the states that "tried but failed" inexcusably).

<sup>255</sup> See RECOMMENDATIONS FOR REFORM, *supra* note 254, at 17 (noting that several "problems surfaced in trying to write specific language to convert the indeterminate structure to a determinate structure with the goal of achieving proportionality and 'truth-in-sentencing'").

<sup>256</sup> *Id.* at 18 ("Eight of the 14 members issued dissents to various parts of the report [reflecting proposed statutory changes]. Judges said the proposal took away their power; prosecutors said it gave judges too much power. The State's mayors and sheriffs were concerned about shifting the burden of housing more offenders to local jails."); see WASIK, *supra* note 253, at 17.

In the course of working with parole boards and, later, judges and producing systems of guidelines, some of which have survived and others of which have fallen prey to political intervention, many value choices have had to be made. The social scientist cannot avoid becoming involved in policy decisions, and it may be well to make the position obvious rather than to claim scientific objectivity.

*Id.* Nevertheless, while political views may inevitably trigger disagreement with regard to the overall effectiveness of sentencing reforms, "[r]eformers on both sides of the political spectrum agree[] that the changes were designed to curb discretion and reduce unwarranted sentencing disparity." SPOHN, *supra* note 48, at 299.



ing Reform Act of 1995 was adopted.<sup>257</sup> While defining determinate sentences for violent felonies, the Act did not alleviate the prime conundrum, as New York remained without a comprehensive sentencing scheme.<sup>258</sup> Rather, epitomizing purely retributive rules of law, the Act served to enhance the minimum and maximum sentences imposed upon those accused of crimes of this nature.<sup>259</sup> However, the Act's narrow application was not equipped "to limit the discretion of prosecutors or judges or to provide guidance for limiting unwarranted disparities."<sup>260</sup>

### B. Nonconviction Conduct Authorized by Determinate Sentencing Schemes

Nevertheless, other states have modeled statutory rules on those integrated within the Federal Sentencing Guidelines.<sup>261</sup> Within this context, the states have variably defined: both requisite and permissible sentencing factors, the duration and type of penalties for convictions, including plea bargained charges distinct from the indictment, and special cases that merit exceptions to depart from the black letter law.<sup>262</sup> In turn, it remains arguable that odds are against

<sup>257</sup> RECOMMENDATIONS FOR REFORM, *supra* note 254, at 20.

<sup>258</sup> *Id.* (observing that even the sentencing ranges prescribed by the Act "left prosecutors with wide discretion in plea bargaining [and] in cases where a guilty verdict was rendered after trial, judges selected a specific 'determinate' sentence from the broad range" authorized by law).

<sup>259</sup> *Id.* (requiring violent felony offenders to serve at least 85% of an imposed sentence, abolishing the option of parole, and doubling the minimum sentences for persistent offenders).

<sup>260</sup> *Id.*; *cf.* ASHWORTH, *supra* note 5, at 95 ("[T]he post-conviction hearing should have no less concern with accurate fact-finding and with fairness to the defendant than the criminal trial. The consequences for the defendant may be considerable, and he should be given the same protection as at the criminal trial.").

<sup>261</sup> *See, e.g.,* State v. Clark, 197 S.W.3d 598, 601 (Mo. Sup. Ct. 2006) (observing that its sentencing rules resemble those of the United States Code, permitting reliance on nonconviction "evidence supporting or mitigating punishment" (citing *Watts*, 519 U.S. at 151)). In *Clark*, while adopting the precedent from *Watts* and affirming the use of acquittal conduct at sentencing, the court's exercise of discretion was statutorily authorized. *Id.* at 601-02 (noting however, that while "[t]he statute specifies a minimum sentence of three years [it] does not state a maximum penalty"). However, it is critical to recognize at the outset that "the degree to which the reforms constrain discretion varies" between the states. SPOHN, *supra* note 48, at 231 (noting, *i.e.*, "the presumptive range of confine[d] [judicial discretion] established by the legislature is narrow in California but wide in Illinois").

<sup>262</sup> Compare 18 U.S.C. § 3661 (2006), with MO. ANN. STAT. § 557.036 (West 2011) ("(1

an accused abstaining from misconduct merely by appreciating the legal consequences of a criminal act.<sup>263</sup> However, a criminal defendant maintains a constitutional right to due process of law, as a matter of justice, notwithstanding the deterrent effect.<sup>264</sup> Although neither the states nor the federal government has entirely resolved the complications embodied in systematic sentencing, clear statutory rules help limit the gross epidemic of due process violations.<sup>265</sup> Thus, the contemplated enactment of state sentencing guidelines would provide, at the very least, an upgrade from the vast post-verdict discretion that New York State still tolerates.

Illinois adopted a determinate sentencing system, incorporating a sentencing grid and a corresponding offense severity reference table to fairly restrict the discretion of its courts.<sup>266</sup> Realizing critical

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Upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly.”)

<sup>263</sup> *But see* ROBINSON, *supra* note 182, at 981-82, considering that:

Evidence suggests that both social influence and internalized norms are powerful forces governing individual conduct, even more powerful than the threat of official conviction and punishment by the criminal justice system. One might argue that the social influence forces are also triggered by criminal conviction, thus adding to the deterrent effect of official sanction.

Likewise, the sentencing laws that several states have adopted, appear motivated by the common presumption that “crime reduction is achieved only by the potential criminal’s awareness of the punishments that would follow the commission of the crime, th[us] there can be no alternative to a justice system that relies on making precise adjustments in criminal punishments to achieve deterrent effects.” *Id.* at 981.

<sup>264</sup> U.S. CONST. amend. XIV; *see* FRANKEL, *supra* note 46, at 3 (“[I]n a just legal order, the laws should be knowable and intelligible so that, to the fullest extent possible, a person meaning to obey the law may know his obligations and predict within decent limits the legal consequences of his conduct.”).

<sup>265</sup> *See, e.g.*, *State v. Witmer*, 10 A.3d 728, 733 (Me. 2011) (noting that when statutory rules explicitly authorize a court to “consult a spectrum of factors in making a sentence determination,” there is less chance that defendant will assert and prevail on a due process violation). In *Witmer*, the court lawfully enhanced defendant’s sentence under a state statute, directing that “the particular nature and seriousness of the offense as committed by the offender” is an appropriate consideration at sentencing. *Id.*

<sup>266</sup> ILL. COMP. STAT. 730 § 5-5-3.2 (West 2011) (defining an illustrative list of aggravating factors to “be accorded weight in favor if imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe sentence”). Despite the lack of a specific provision authorizing the use of conduct underlying an acquittal, the broad statutory language flexibly permit inclusion of acquittal conduct as a sentencing factor. *Id.* (observing, *i.e.*, acquittal conduct may categorically fall under “(a)(7) the sentence is necessary to

distinctions that exist between individual defendants' characteristics and the circumstances underlying the charges, Illinois requires that post-conviction penalties reflect "the seriousness of the offense and [] the objective of restoring the offender to useful citizenship."<sup>267</sup> For instance, in *People v. Robinson*,<sup>268</sup> the appellate court upheld the use of conduct underlying acquitted murder charges to enhance defendant's sentence, explaining that the acquittal "hardly established his innocence of the crime."<sup>269</sup> Rather, observing that the record provided "sufficient evidence of defendant's complicity in the killing," the court established that reliance on these facts to impose the maximum prison term was "permitted by law."<sup>270</sup>

Pennsylvania also pursued a modern sentencing scheme, when its legislature assembled the Pennsylvania Commission in Sentencing to devise presumptive guidelines to restrict judicial discretion.<sup>271</sup> In Pennsylvania, a judge must "disclose in open court" the justification for the sentence elected and "provide a contemporaneous written statement of the reason" in the event that a defendant is sentenced "outside the guidelines."<sup>272</sup> While dictating minimum sentences and defining the degree of proof for aggravating and mitigating penalties, the state's statutory law preserves the independent discretionary authority of a court.<sup>273</sup> Thus, although case law exem-

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deter others from committing the same crime"). For an extensive review of determinate sentencing schemes, see SPOHN, *supra* note 48, at 231 ("Under this system, the state legislature established a presumptive range of confinement for various categories of offenses. The judge imposed a fixed number of years from within this range, and the offender would serve this term minus time off for good behavior.").

<sup>267</sup> ILL. CONST. art. I, § 11 (circumscribing the degree of judicial discretion involved in a sentencing determination).

<sup>268</sup> 676 N.E.2d 1369 (Ill. App. Ct. 1997).

<sup>269</sup> *Id.* at 1373; *see also* *People v. Jackson*, 599 N.E.2d 926, 930 (Ill. App. Ct. 1992) (noting in dicta that the majority of jurisdictions allow pertinent evidence of acquittal conduct in sentencing considerations).

<sup>270</sup> *Robinson*, 676 N.E.2d at 1373 (affirming the enhanced sentence upon acquitted murder charges, "considering he was convicted of attempt (armed robbery) during the course of which a murder occurred").

<sup>271</sup> 42 PA. STAT. ANN. § 2154 (West 2010).

<sup>272</sup> 42 PA. STAT. ANN. § 9721 (West 2011) (requiring a court to explain its reason to depart from the guidelines "[i]n every case in which the court imposes a sentence for a felony or misdemeanor, modifies a sentence, resents an offender following revocation of probation, county intermediate punishment or State intermediate punishment or resents following remand").

<sup>273</sup> *See, e.g.*, 42 PA. CONST. STAT. ANN. § 9712 (West 2011) (noting that while the statute

plifies that a judge may “consider unprosecuted criminal conduct” at sentencing,<sup>274</sup> such discretion is lawfully embodied in Pennsylvania’s guidelines system.<sup>275</sup>

In fact, the guidelines “essentially mandate such consideration when a prior record score inadequately reflects defendant’s criminal background.”<sup>276</sup> Likewise, when a sentencing judge is dissatisfied with the sentence prescribed for a conviction, Pennsylvania authorizes its courts to consider related evidence of “criminal activity or preparation for crimes as factors in sentencing even though no arrest or conviction resulted.”<sup>277</sup> In doing so, state courts may adjust defendant’s “score” to enhance the lawful range of punishment.<sup>278</sup> These observations may cause uneasiness; however, Pennsylvania justifies its sentencing practice on policy grounds.<sup>279</sup> That is, the statute requires sentences be “consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defen-

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defines sentencing law governing present and prior firearms offenses and mandates a minimum sentence, it authorizes its courts to enhance a sentence beyond the prescribed minimum).

<sup>274</sup> Commonwealth v. P.L.S., 894 A.2d 120, 131 (Pa. Super. Ct. 2006).

<sup>275</sup> 42 PA. STAT. ANN. § 9721 (West 2011).

<sup>276</sup> P.L.S., 894 A.2d at 131; *see generally* tit. 204 PA. CODE § 303.5(d) (2011); *see also* SPOHN, *supra* note 48, at 234 (observing that a “common feature of state guidelines is that the presumptive sentence [be] based on two factors: the severity of the offense and the seriousness of the offender’s prior criminal record”).

<sup>277</sup> P.L.S., 894 A.2d at 131.

<sup>278</sup> tit. 204 PA. CODE § 303.5(d) (2011).

<sup>279</sup> 42 PA. CONS. STAT. ANN. § 9271(b) (West 2010); *see also* WASIK, *supra* note 253, at 18 (explaining the critical distinction between policy-incorporated and elemental sentencing guidelines). The author stated that “[e]ngineered into the structure of the system must be an information feed-back component to provide an incentive for change or a continuing challenge to accepted policy.” *Id.* Furthermore, observing the various means by which sentencing rules are promulgated to restrain post-verdict judicial discretion, the author proposed that:

The method of construction should recogni[z]e the distinction between ‘policy’ and ‘case’ elements in the decisions and accommodate there by providing *Decision Rules* (vehicles for policy functions) and *Procedures*. The latter are to be applied in cases where a decision-maker considers that policy constraints should be set aside (or precedent departed from). There should always remain a significant proportion of cases of reasoned departure from the indicated guideline decision.

*Id.*

dant.”<sup>280</sup>

Finally, the California Uniform Determinate Sentencing Law requires judges “to choose one of three specified sentences for people convicted of particular offenses,” compelling use of “the middle term unless there are aggravating or mitigating circumstances that justify imposing the higher or lower term.”<sup>281</sup> In *People v. Towne*,<sup>282</sup> the Supreme Court of California affirmed a court’s reliance on acquittal conduct at sentencing, simultaneously observing that defendant’s probation report warranted an elevated incarceration term.<sup>283</sup> Rejecting defendant’s purported Sixth Amendment violation, the court in *Towne* found that the jury trial guarantee is inapplicable to its evaluation of factors, which serve merely to aggravate or mitigate the sentence imposed.<sup>284</sup> Moreover, given the extensive criminal record of

<sup>280</sup> *Id.* (noting that while the guidelines allow flexible discretion, the statute mandates that “[f]ailure to comply [with its clear requirements] shall be grounds for vacating the sentence or resentence or resentencing the defendant”). Thus, because Pennsylvania courts are authorized by statute to enhance a sentence, the Legislature seems to have resolved the broad sentencing issue, relating to lawfulness. *Id.* However, two questions remain open for discussion—whether statutory justifications truly inhibit the scope of judicial discretion at sentencing or effectively eradicate the post-conviction constitutional impediment of sentence enhancements. *See, e.g.*, *Commonwealth v. Jarowecki*, 985 A.2d 955, 961 (Pa. Sup. Ct. 2009) (“The courts of this Commonwealth have repeatedly recognized that the general purpose of graduated sentencing laws ‘is to punish more severely offenders who have persevered in criminal activity despite the theoretically beneficial effects of penal discipline.’”); *accord* *Commonwealth v. Shiffler*, 879 A.2d 185, 195 (Pa. Sup. Ct. 2005) (“The offender is deemed incorrigible not so much because he or she has sinned more than once, but because the offender has demonstrated, through persistent criminal behavior, that he or she is not susceptible to the reforming influence of the conviction process.” (quoting Cynthia L. Sletto, J.D., *Chronological or Procedural Sequence of Former Convictions as Affecting Enhancement of Penalty Under Habitual Offender Statutes*, 7 A.L.R. 5ED. 263, § 2(a) (1992)). *But compare* *Commonwealth v. Vasquez*, 753 A.2d 807, 809 (interpreting tit. 18 PA. CONS. STAT. ANN. § 7508 (West 2003) as directing the judge to consider “defendant’s prior ‘convictions’ at the time of sentencing [] and mak[ing] no distinction between convictions that arise from a multiple count complaint, or a separate complaint”), *with Jarowecki*, 985 A.2d at 958 (reversing and remanding the enhanced sentence because of the trial court’s erroneous interpretation of tit. 18 PA. CONS. STAT. ANN. § 6312(d)(2) (West 201), as “the grading increase for a ‘second or subsequent offense’ did ‘not allow for a conviction within a multiple count complaint to serve as a grading enhancement for another conviction contained within the same complaint’”).

<sup>281</sup> SPOHN, *supra* note 48, at 231.

<sup>282</sup> 186 P.3d 10 (Cal. Sup. Ct. 2008).

<sup>283</sup> *Id.* at 14 (noting the factors authorized to aggravate a fixed sentence, as enumerated within California’s Court Rule 4.421(b), such as “a pattern of violent conduct, indicating [defendant] posed a serious danger to society”).

<sup>284</sup> *Id.* at 15.

unlawful misconduct, it was within the court's discretion to find defendant "eligible for the upper-term" sentence.<sup>285</sup>

### C. Trampling Constitutional Guarantees—Unjust Sentencing upon Acquittal Conduct

In *State v. Koons*,<sup>286</sup> the Supreme Court of Vermont conducted a plain-error analysis to determine whether the trial court's reliance on acquittal conduct at sentencing "would result in a miscarriage of justice."<sup>287</sup> As the pre-sentencing report revealed an extensive criminal history, the court imposed a severe sentence, observing "defendant's failure to take responsibility for his current crimes."<sup>288</sup> Despite acquitting defendant on a prior sexual assault charge, the court noted that both offenses involved a minor and "clear and convincing evidence" implicated defendant in the facts underlying the acquittal.<sup>289</sup> Thus, the judge reasoned that an enhanced sentence was vital to achieve "double deterrence."<sup>290</sup> That is, the court sought to discourage defendant from further "lewd or lascivious con-

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[S]o long as a defendant is eligible for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury.

*Id.* at 15-16 (quoting *People v. Black*, 161 P.3d 1130 (Cal. Sup. Ct. 2007)).

<sup>285</sup> *Id.* at 23.

<sup>286</sup> 20 A.3d 662 (Vt. Sup. Ct. 2011).

<sup>287</sup> *Id.* at 665-666 (noting that defendant did not object to evidentiary considerations during his sentencing hearing). Thus, the court's review was limited to scrutiny of the lower decision for "glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." *Id.* at 666 (quoting *State v. Yoh*, 910 A.2d 853, 872 (Vt. Sup. Ct. 2006)).

<sup>288</sup> *Id.* at 664 (noting that defendant faced up to 25 years in prison because "[t]he PSI disclosed an extensive criminal record, including convictions for aggravated domestic assault, DUI, simple assault, unlawful mischief, and several probation violations").

<sup>289</sup> *Id.* at 665 (observing the heightened evidentiary standard applied by the court in *Koons*, requiring that conduct underlying an acquittal be proven by a clear and convincing evidence).

<sup>290</sup> *Koons*, 20 A.3d at 665 (observing that the judge seemed displeased with defendant's unlawful engagements with young girls and discredited the competence of defendant's testimony and asserted defenses).

duct” with underage girls and from lying under oath.<sup>291</sup>

The Vermont Supreme Court overturned the sentence, remarking that it “derived from the court’s reliance on improper or inaccurate information.”<sup>292</sup> However, the court did not reject the substantive use of acquittal conduct, but vacated the ruling because Vermont law requires prior disclosure of sentencing factors for defendant’s review.<sup>293</sup> Thus, since the prosecution failed to give defendant “advance notice” of the intent to raise criminal history at sentencing, defendant was denied due process.<sup>294</sup> The court raised in dicta that “the integrity of the judicial process” rests on the court’s compliance with both state procedural rules and constitutional rights.<sup>295</sup>

In contrast, the Court of Appeals of Michigan affirmed the use of acquitted charges to enhance defendant’s sentence in *People v. Rose*.<sup>296</sup> Interestingly, however, in arbitrarily denying “application for leave to appeal,” the Supreme Court of Michigan offered no sound rationale for refusing review.<sup>297</sup> Justice Kelly dissented, suggesting that sentencing upon acquittal evidence is a product of discretionary abuse, ignoring the presumption of innocence and “prior exoneration of guilt,” both of which are deeply rooted in constitutional criminal jurisprudence.<sup>298</sup> Thus, the discussion turned on “logical and legal inconsistencies” in modern sentencing procedures that permit acquittal-related facts to authorize enhancements.<sup>299</sup>

The dissent observed that other states, such as New Hamp-

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* (quoting *State v. Ingerson*, 852 A.2d 567, 572 (Vt. Sup. Ct. 2004)).

<sup>293</sup> *Id.* at 667; *see generally* VT. STAT. ANN. tit. 32, § (c)(3) (West 2010).

<sup>294</sup> *Koons*, 20 A.3d at 667.

<sup>295</sup> *Id.* at 668.

<sup>296</sup> No. 284241, 2009 WL 1361914, at \*1, \*2 (Mich. Ct. App. May 12, 2009) *appeal denied*, 776 N.W.2d 888 (Mich. Sup. Ct. 2010) (noting that the trial court justified its “depart[ure] upwards from the guidelines [ . . . ] [by] the egregiousness of the crime, finding that the guideline for a crime ‘against a child like this’ was not proportionate to the crime”).

<sup>297</sup> 776 N.W.2d 888 (Mich. Sup. Ct. 2010) (emphasizing that the court merely stated that it was “not persuaded that the questions presented should be reviewed by the Court”).

<sup>298</sup> *Id.* at 890-91 (Kelly, C.J., dissenting) (“[T]he presumption of innocence is as much ensconced in our due process as the right to counsel, and that a criminal defendant [ . . . ] is entitled to its full benefit. This benefit is denied when a sentencing court may have used charges that have resulted in acquittals to punish the defendant.”).

<sup>299</sup> *Id.* at 890.

shire, have rejected the use of acquittal conduct at sentencing.<sup>300</sup> Justice Kelly noted that the views of these states resemble those conveyed in federal dissenting opinions.<sup>301</sup> He further stressed that post-*Booker*, federal courts have “cast doubt on whether *Watts* governs Sixth Amendment challenges.”<sup>302</sup> That is, because the majority in *Watts* was intimately focused on reconciling alleged due process and double jeopardy violations, in effect, “there was no ‘contention that the sentence enhancement had exceeded the sentence authorized by the jury verdict.’”<sup>303</sup>

Finally, the dissent recognized an inevitable corollary in a system that permits judges to resurrect and rehash acquitted charges in post-conviction processes.<sup>304</sup> Justice Kelly cleverly remarked that an acquittal is clearly defined by law as “a matter which has been definitively resolved and disposed.”<sup>305</sup> Thus, Justice Kelly concluded that factoring nonconviction conduct into the sentencing equation exposes a criminal defendant to the “eminent danger” of unjust punishment due to “improperly drawn inferences of wrongful conduct.”<sup>306</sup>

## VII. RECOMMENDING A SENTENCING FRAMEWORK FOR NEW YORK STATE

The romantic image that a jury will virtuously convict every guilty defendant and liberate those who are wrongfully accused is unsound. Furthermore, the prosecution’s inability to bypass heightened evidentiary hurdles in a criminal conviction does not positively establish innocence. Thus, judicial review is a task of vital importance, which is conceivably the legislative logic behind entrusting judges

<sup>300</sup> *Id.*

<sup>301</sup> *Rose II*, 776 N.W.2d at 890 (noting that “[t]hese courts cite many of the same reasons mentioned by the federal judges who have objected to the practice” of enhanced sentence upon acquittal conduct).

<sup>302</sup> *Id.* at 889.

<sup>303</sup> *Id.* at 889 n.9 (observing that *Watts* did not resolve the narrow question of whether sentencing enhancements violate a criminal defendant’s Sixth Amendment rights (quoting *Booker*, 543 U.S. at 240) (citing *White*, 551 F.3d at 392)).

<sup>304</sup> *Id.* at 890-91 (reaffirming similar concerns to those previously raised in *People v. Ewing*, 458 N.W.2d 880, 885 (Mich. Sup. Ct. 1990) (Archer, J., concurring/dissenting)).

<sup>305</sup> *Id.* at 891.

<sup>306</sup> *Rose II*, 776 N.W.2d at 891 (quoting *Ewing*, 458 N.W.2d at 886 (Archer, J., concurring/dissenting)).



with refined discretion and final authority to decide legal matters. Nevertheless, the shrewd proposition stands true—“[w]hat happens to an offender after conviction is the least understood, the most fraught with irrational discrepancies, and the most in need of improvement of any phase in our criminal justice system.”<sup>307</sup>

Moreover, the United States Supreme Court understood the rising tension at the interface of disparate sentences and constitutional guarantees. Given the variant circumstances underlying convictions, the Court devised a determinate sentencing scheme, tolerant of flexible discretion.<sup>308</sup>

Although the degree of authorized discretion remains unclear at both the state and federal levels, the prevalent approach to sentencing advocates post-conviction fact-finding. However, the vast distinctions among sentencing systems cannot be discounted in assessing and determining which approach embodies the policies and characteristics that New York State should strive to attain.<sup>309</sup>

<sup>307</sup> United States v. Waters, 437 F.2d 722, 723 (D.C. Cir. 1970).

<sup>308</sup> 28 U.S.C. § 991 (2006); see also SPOHN, *supra* note 48, at 2 (recognizing the alternative, and consequently, subjective rationale supporting the goals of sentencing and the range of feasible and arguably fair penal sanctions). The author observed that:

Answers to questions about the type and amount of punishment that should be imposed—which ultimately depend on the answer to the question, “Why punish?”—are similarly varied. For example, the death penalty was once viewed as an appropriate penalty for a variety of crimes other than murder; today its use for even the most heinous crimes has been called into question. Controversy also surrounds the use of incarceration, with some scholars contending that only those who commit the most serious crimes or who pose the greatest danger to society should be imprisoned—and then only for short periods of time—and others claiming that lengthy incarceration is an appropriate penalty for all but the least serious offenders.

*Id.* Because from a practical standpoint, even “[l]egislators, who determine the penalties associated with particular crimes or categories of crimes, cannot make these determinations in the absence of beliefs about the justification of punishment,” it appears that the federal sentencing system was justifiably designed to authorize judicial discretion. See *id.* (noting that judges, who face the onerous task to “decide what to do with particular offenders, are similarly constrained by their views about the purpose of punishment”).

<sup>309</sup> For a discussion of the implications of the present indeterminate sentencing system in New York State see N.Y.S. EXECUTIVE ADVISORY COMMITTEE ON SENTENCING, *supra* note 39, at 15.

[U]nder our present system, judges exercise vast and unstructured discretion in imposing sentence—with the inevitable result that similar offenders committing similar crimes often receive widely dissimilar sentences, depending upon the person predilections of the sentencing judge. In ad-

Consistent with and in furtherance of individual constitutional rights attached to criminal sentencing, the State of Illinois implemented statutory and constitutional sentencing laws.<sup>310</sup> In turn, the alternative modes of punishment available to the presiding judge are neatly tailored to recognize the context in which charges ensued and the diverse characteristics of the offenders.<sup>311</sup> Legalizing the use of material evidence raised at trial reserves an appropriate degree of judicial discretion to accord nonconviction conduct in a sentencing determination.<sup>312</sup>

Furthermore, the legislature incorporated sentencing provisions to directly address violent and vehicular crimes, mandating that the pre-sentencing report be filed and subsequently made available for public record.<sup>313</sup> Given the societal impact of these crimes, a sentence enhancement in either context serves a tri-fold purpose—it reflects the seriousness of an offense, regards the culpability of the individual offender, and serves as a protective measure to the public.

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dition to being a source of inequity, such disparities are also seen to undermine the deterrent effect of criminal sanctions. Thus, critics argue that our present system is both unjust and ineffective.

*Id.* Among the obstacles impeding the efforts of the sentencing commission to remediate the disparate treatment of convicted offenders is that “our sentencing laws have become a patchwork of indeterminate sentences sometimes combined with legislatively prescribed mandatory minimum terms of varying length depending on the type of offense or offender.” *Id.* at 33. Nevertheless, the purported framework that New York State relies on in sentencing exists without a logical and cohesive foundation.

<sup>310</sup> See *supra* notes 266 and 267.

<sup>311</sup> ILL. COMP. STAT. 730 § 5-5-4.1 (West 2011) (noting, *i.e.*, that section (a)(4.5) authorizes the sentencing court to “consider substance abuse treatment, eligibility screening, and an assessment, if any, of the defendant by an agent designated by the State of Illinois to provide assessment services for the Illinois courts”). Furthermore, the statute expressly authorizes the imposition of sentences “by the judge based upon his independent assessment.” *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> Compare *id.* (“[T]he trial judge shall specify on the record the particular evidence, information, factors in mitigation and aggravation of other reasons that led to his sentencing determination. The full verbatim of the sentencing hearing shall be filed with the clear of the court and shall be a public record.”), with *Legal Aid Bureau of Buffalo, Inc. v. Armer*, 425 N.Y.S.2d 707, 707 (App. Div. 4th Dep’t 1980) (noting that in an “article 78 proceeding in the nature of mandamus” may be required in New York State in which the proponent must show an interest and legal right to disclosure of pre-sentencing records); see also *People v. Butler*, 387 N.Y.S.2d 180, 182 (App. Div. 4th Dep’t 1976) (“While fundamental fairness and indeed the appearance of fairness, may best be accomplished by disclosure of presentence reports, certain material which is confidential, destructive of rehabilitation, or inconsequential may properly be withheld” in subsequent litigation.” (quoting *People v. Perry*, 324 N.E.2d 878, 880-81 (1975))).

Also as expected, a strategic course of action for sentencing multiple offenders is integrated in Illinois' sentencing model.<sup>314</sup> Hence, observing the facts underlying the indictment and the individual offender characteristics in *Zowaski*, an enhanced sentence imposed under comparable law would have been defensible.<sup>315</sup>

Of debatable interest, however, is the *resentencing* statute which the Illinois Legislature enacted, requiring that “the trier of fact at trial [] determine beyond a reasonable doubt the existence of a fact (other than a prior conviction) necessary to increase the punishment for the offense beyond the statutory minimum.”<sup>316</sup> Because this par-

<sup>314</sup> See generally ILL. COMP. STAT. 730 § 5-5-5.3 (West 2011) (authorizing consideration of separate transactions that fall within the scope of defined offense categories at sentencing, *i.e.*, organized crime or gang activity, vehicular hijacking, aggravated assault, reckless homicide). Moreover, section 5-5-5.3 (2)(F) of the code mandates the imposition of a minimum sentence enhanced by a prior “state or federal conviction for an offense that contained, at the time it was committed, the same elements as an offense now.” *Id.*; *People v. Smart*, 723 N.E.2d 1246, 1248 (Ill. App. Ct. 4th D. 2000) (noting that the court broadly construed the section 5-5.3 (c)(8), as requiring “an enhanced term of imprisonment and an enhanced term of mandatory supervised release”); see also MYERS, *supra* note 5, at 67 (recognizing that “several groups of offenders—the more serious, violent, and unmarried—are singled out for disproportionately harsh treatment).

<sup>315</sup> *Zowaski*, 916 N.Y.S.2d at 912 (observing that the sentence was aggravated by “defendant’s prior criminal history of four alcohol-related driving convictions and his acquittal on the DWI charge”); accord N.Y.S. EXECUTIVE ADVISORY COMMITTEE ON SENTENCING, *supra* note 39, at 15 (explaining that “an examination of the criminal justice process—from the time that a crime is committed through the imposition of a punishment—is necessary before the need for or likely impact of any scheme for sentencing reform can properly be assessed”).

<sup>316</sup> ILL. COMP. STAT. 730 § 5-5.4 (reviewing the resentencing options available to Illinois courts, the court may either sentence defendant within the statutory guidelines, the State may submit a notice of intention seeking an enhanced sentence, or alternatively, “defendant shall be afforded a new trial”). How this provision actually operates is beyond the scope of this case note. However, interestingly, the sentencing process in New York State also incorporates a resentencing scheme, which is wholly unrelated to that employed by Illinois. See N.Y.S. EXECUTIVE ADVISORY COMMITTEE ON SENTENCING, *supra* note 39, at 33, for an analysis of this figurative resentencing issue.

[U]nder our present sentencing arrangements, the sentence imposed by the judge simply does not mean what it says. The sentencing judge only sets a broad range of time which an offender *could* serve; it is the Parole Board, an administrative agency, which determines the time that the offender actually *will* serve. In effect, the Parole Board repeats the initial sentencing process and resentsences an offender largely on the basis of the same information known to the judge—but its decision is reached behind closed doors and without important procedural safeguards required in a court of law.

*Id.* Furthermore, the state sentencing committee in New York State has recognized, and thus proposed, that enacting “sentencing guidelines would achieve the goals of determinate sen-

ticular provision is dissonant with the sentencing jurisprudence supported herein, it is recommended that New York State adopt a modified rule, mandating that sentencing factors be proven by a preponderance of evidence. Both the clear and convincing standard previously discussed<sup>317</sup> and the heightened standard required by Illinois<sup>318</sup> would impose an onerous burden on the courts to consider nonconviction conduct at sentencing.

Aside from this departure, necessary to safeguard the efficiency and effectiveness of the judicial process, it is proposed that New York State adopt a determinate sentencing scheme—a hybrid of the policy underlying and the pragmatic effects of Illinois’ statutory sentencing scheme and the Federal Sentencing Guidelines.<sup>319</sup> The use of nonconviction conduct at sentencing, which is established by a preponderance of evidence, does not usurp the traditional fact-finding function of the jury. Rather, this approach lawfully incorporates a post-conviction fact-finding role of the judiciary to ensure that the penalty is appropriate for both the criminal conduct and the individual offender. The enactment of statutory sentencing guidelines would reasonably inhibit the court’s discretion and guarantee compliance with constitutional mandates.

### VIII. CONCLUSION

Indeed, as shown in *Zowaski*, the use of nonconviction conduct in sentencing enables a judge to adjust punishment according to an individual offender’s culpability and dangerous propensities.<sup>320</sup> However, no statutory or constitutional law in New York State expressly or implicitly authorizes the use of acquittal conduct in sen-

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tencing—limiting sentence disparity and increasing the certainty of punishment—while avoiding the rigidity (and hence the unfairness) that mar[k] other schemes.” *Id.* (observing that sentencing guidelines would enable “a judge to take into account the unusual nature of a case” while limiting the ability of the Court to abuse its discretion). Notwithstanding its recognition of the foregoing, the New York Legislature has yet to take action.

<sup>317</sup> See *supra* note 289 (noting that the clear and convincing standard imposes a heightened evidentiary burden upon the sentencing court in considering nonconviction conduct).

<sup>318</sup> See *supra* note 316.

<sup>319</sup> SPOHN, *supra* note 48, at 232-33 (emphasizing that judges have generous, but appropriately restricted discretion in sentencing, *i.e.*, as “[f]elonies are divided into six classifications, and the range of penalties is wide, especially for the more serious offenses”).

<sup>320</sup> *Zowaski*, 916 N.Y.S.2d at 916 (adopting the federal precedent and preponderance of evidence standard of *Watts*).

tencing, and thus, the ruling in *Zowaski* presents serious due process implications. While “arbitrary cruelties perpetuated daily under our existing sentencing practices are not easy to reconcile with the cardinal principles of our Constitution,”<sup>321</sup> sentencing reforms relax, but impart, post-conviction procedural rights in the criminal sentencing process. Accordingly, it is time for the state legislature to remediate the sentencing conundrum in New York State.

Although neither the states nor federal legislative restrictions expressly address acquittal conduct used in sentencing, they at least provide a mechanism to circumvent the independent discretion of the judiciary. The controversy of acquittal conduct raised at sentencing will likely require resolution by the New York Court of Appeals unless the state legislature is first to address this narrow issue. While recognizing the significant role that nonconviction conduct plays in a sentencing determination, the court in *Zowaski* considered federal precedent, which the United States Supreme Court has held inapplicable to the states. Thus, absent the incorporation of pre-fixed guidelines to inhibit arbitrarily and capriciously enhanced sentences, state courts should not rely on the precedent of *Watts* and its progeny.

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<sup>321</sup> FRANKEL, *supra* note 46, at 103.

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