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Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines

Elizabeth A. Parsons

SHIFTING THE BALANCE OF POWER: PROSECUTORIAL DISCRETION UNDER THE FEDERAL SENTENCING GUIDELINES

If there is anything settled in the jurisprudence of . . . America, it is that no man can be twice lawfully punished for the same offence.[1]

I. INTRODUCTION

Imagine a case where a defendant has been indicted for several counts of federal mail fraud.[2] The jury has convicted the defendant on all counts, and the district court judge must sentence the defendant. Now picture the sentencing hearing and assume that the prosecutor brings an uncharged, new offense to the sentencing judge's attention.[3] The new offense is one that the prosecutor had

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1. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873).

2. The Federal Mail Fraud statute is found at 18 U.S.C.A. § 1341 (West Supp. 1993).

3. *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 1B1.3 (1994) [hereinafter MANUAL]. The prosecutor could introduce the new offense, consistent with the Federal Sentencing Guidelines (hereinafter Guidelines), under the relevant conduct provision of the MANUAL, § 1B1.3, which states:

> (a) *Chapters Two (Offense Conduct) and Three (Adjustments).*
> Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
>
> (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
>
> (4) any other information specified in the applicable guideline . . . .

Id.

> The purpose of this section is to ensure that a defendant receives a sentence that adequately

not previously raised, either to the grand jury or during the actual trial, and that the jury never considered in its verdict.[4] The prosecutor has introduced the new offense at the sentencing hearing solely to enhance the defendant's sentencing level.[5] The sentencing judge subsequently increases the defendant's

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represents the defendant's actual conduct, not just the conduct for which the defendant is charged. *See* United States v. Scroggins, 880 F.2d 1204, 1213 (11th Cir. 1989) (holding that "purposeful criminal conduct demands greater punishment, both to reflect society's desire for retribution and to ensure specific deterrence against future criminal conduct"), *cert. denied*, 494 U.S. 1083 (1990). However, many scholars and commentators have criticized the use of relevant conduct in sentencing. *See, e.g.*, Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179 (1993) (challenging the constitutionality of the use of nonadjudicated conduct at sentencing for enhancement purposes); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 65 (1993) (discussing the use of nonadjudicated conduct in the context of mandatory minimum sentences and arguing that it gives "prosecutors powerful bargaining leverage to force defendants [to give up] their constitutional right to trial"); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 524 (1993) (maintaining that "'sentencing facts' . . . can deviate from or override the factfinding at trial"); Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992) (arguing that the use of nonadjudicated conduct violates the defendant's due process and double jeopardy rights).

For judicial commentary, see Judge Joseph F. Weis, Jr., *The Federal Sentencing Guidelines—It's Time for a Reappraisal*, 29 AM. CRIM. L. REV. 823 (1992) (asserting that the Guidelines are being manipulated through sentencing); Judge Edward R. Becker, 3d. Cir., *Statement to the U.S. Sentencing Comm'n on Behalf of the Judicial Conference Comm. on Criminal Law and Probation Admin. (Feb. 1990)*, 2 FED. SENTENCING REP. 238 (1990) (criticizing many sections of the Guidelines, including § 1B1.3); *Letter from Judge Vincent L. Broderick, S.D.N.Y., to Judge Avern Cohn, E.D. Mich. (June 13, 1991)*, 4 FED. SENTENCING REP. 48, 49 (1991) (asserting that the Sentencing Commission needs to improve the departure process to give sentencing courts more discretion); Eugene D. Natali, *The Probation Officer, Bean Counting and Truth in Sentencing*, 4 FED. SENTENCING REP. 102 (1991) (lamenting that the Guidelines have turned probation officers and sentencing judges into "bean counters" who blindly adhere to the Guidelines without utilizing any of their experience).

But see Gerald B. Tjoflat, *The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel*, 55 FED. PROBATION 4 (Dec. 1991) (arguing that sentencing judges still have significant discretion to depart from the Guidelines); Andrew J. Kleinfeld, *The Sentencing Guidelines Promote Truth and Justice*, 55 FED. PROBATION 16, 17 (Dec. 1991) (maintaining that the problem with pre-Guidelines sentencing was that it focused on the defendant's future behavior rather than the defendant's past behavior).

4. *See* Lear, *supra* note 3, at 1229. Under the Guidelines, a prosecutor does not need to introduce all criminal conduct at the grand jury proceeding. *Id.* In fact, the prosecutor has the option of withholding the evidence until after trial "and offering it at the much more relaxed sentencing hearing." *Id.* Thus, there is ample temptation for the prosecutor to wait until the sentencing hearing to offer evidence for the first time. *Id.* For a discussion of the prosecutor's role in charging, see *infra* text accompanying notes 196-209.

5. For a discussion of the sentencing hearing procedures under the Guidelines, see *infra* text accompanying notes 230-237. The Federal Rules of Evidence do not apply at the sentencing hearing. FED. R. EVID. 1101(d)(3). The Guidelines, however, do provide procedures for dispute resolution at the sentencing hearing. *See* MANUAL, *supra* note 3, § 6A1.3(a), which provides:

> When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court

sentence based not only upon the jury's conviction, but also upon the prosecutor's new evidence.[6] Now, imagine that the prosecutor later decides to charge the defendant with the offense that was first introduced at sentencing as an unadjudicated charge, and a new jury convicts the defendant for that charge. Pursuant to the United States Sentencing Guidelines,[7] the defendant will receive

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> regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the 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.

Id.

While the Guidelines do not specifically provide a burden of proof standard at the hearing, the commentary section of § 6A1.3 suggests that the sentencing court should use a preponderance of the evidence standard. *Id.* at § 6A1.3 cmt. Therefore, under the Guidelines, the prosecutor only has to prove by a preponderance of the evidence that the defendant committed the new, uncharged offense. *But see* United States v. Kikumura, 918 F.2d 1084, 1101 (3d Cir. 1990), where the Third Circuit Court of Appeals held that the prosecutor must prove nonadjudicated conduct under the clear and convincing standard of proof. In *Kikumura*, the prosecutor deliberately deleted an attempted murder charge from an indictment that charged the defendant with interstate transportation of explosives. *Id.* However, at the sentencing hearing, the prosecutor introduced the attempted murder offense to persuade the court to impose a Guidelines sentence far more severe than the defendant would have received from the jury's conviction. *Id.* Because the prosecutor only had to prove by a preponderance of the evidence that the defendant had attempted murder, the prosecutor had a much lighter burden of proof than in the actual trial. However, on appeal, the Third Circuit Court of Appeals held that the prosecutor had to prove the nonconvicted conduct by clear and convincing evidence. *Id.* at 1103.

See also Richard Husseini, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387 (1990) (arguing that the prosecutor should have to prove relevant conduct by the stricter, clear and convincing evidence standard of proof at sentencing). However, some courts have held the prosecutor to an even higher burden of proof. *See* United States v. Davis, 715 F. Supp. 1473 (C.D. Cal. 1989) (holding that the prosecutor must prove beyond a reasonable doubt that the defendant committed the conduct at the sentencing hearing).

6. Pre-Guidelines judges also considered information about nonconviction offenses completely unrelated to the offense of conviction. *See, e.g.*, Williams v. New York, 337 U.S. 241, 244 (1949) (holding that the sentencing judge could consider part of a murder defendant's probation report to show that he had a "morbid sense of sexuality" for sentencing purposes). However, under the pre-Guidelines system, the sentencing judges had more discretion in their sentencing decisions, than do the post-Guidelines judges. *See* S. REP. NO. 225, 98th Cong., 2d Sess. 37 (1989), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3224.

7. MANUAL, *supra* note 3. This note will address only the Federal Sentencing Guidelines (hereinafter Guidelines) and will not analyze state sentencing systems. Further, although the federal statutory minimum sentences are also cited as a source of inequity in the sentencing system, this note will mainly discuss and critique the role of the Guidelines in criminal sentencing. Statutory minimum sentences require judges to impose sentences of not less than the number of years specified by Congress in the statute. *See* Weis, *supra* note 3, at 823. Mandatory minimum sentences are generally used in illegal drug trafficking cases. *Id.* Sentencing judges can impose mandatory minimum sentences *without* examining factors such as prior criminal history, age, health, degree of complicity, family responsibilities, mental capacity, and similar factors that courts take into account during sentencing. *Id.*

Like the Guidelines, mandatory minimum sentences have been the subject of controversy and

yet another sentence based on that offense.[8]

In October 1984, Congress passed the Sentencing Reform Act (SRA)[9] to eradicate dishonesty in sentencing,[10] to resolve the disparities in federal criminal sentencing,[11] to limit judicial discretion,[12] and to provide a uniform statutory scheme.[13] In the SRA, Congress abolished parole to make sentencing more "honest" by ensuring that the offender serves the full term of the sentence.[14] Pursuant to the SRA, Congress also created the United States

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debate. *Id.* at 824. In fact, the Federal Courts Study Committee has urged Congress to repeal mandatory minimum terms. *Id.* (citing JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 134 (Apr. 2, 1990)). Mandatory minimum sentences leave no discretion to the sentencing judge, while the Guidelines severely limit a sentencing judge's discretion. *Id.* For a current comprehensive article on mandatory minimums, see Don J. DeBenedictis, *How Long is Too Long?*, A.B.A. J., Oct. 1993, at 74. Most federal judges dislike mandatory minimums because "they rob the person who must impose [the] sentence of all discretion and treat all defendants as interchangeable." *Id.* at 75. The mandatory minimums take away the little discretion that federal judges have: the ability to use the Guidelines' adjustments and departures. *Id.* at 74. Moreover, mandatory minimums are even more extreme than the Guidelines "because they force judges to sentence crimes, not criminals." *Id.*

8. *See, e.g.*, United States v. Caceda, 990 F.2d 707, 704-10 (2d Cir. 1993) (holding that the sentencing judge does not have to consider the possible outcome of subsequent prosecutions when sentencing the defendant for nonadjudicated conduct).

9. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified in 18 U.S.C. §§ 3551-3566 (1988 & Supp. V 1993)). The SRA was part of the Comprehensive Crime Control Act of 1984. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended at 28 U.S.C. §§ 991-998 (1988 & Supp. V 1993)).

10. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 884 (1990). Congress wanted to make sentencing more "honest." Under the pre-Guidelines system, many convicted criminals never served the entire sentence imposed on them. *Id.* (citing 18 U.S.C. §§ 4163, 4164, 4205 (repealed 1984) (permitting good conduct credits and parole eligibility after serving one-third of the court-imposed sentence)).

11. *See generally* Judge William W. Wilkins, Jr., *Response to Judge Heaney*, 29 AM. CRIM. L. REV. 795 (1992). According to Judge Wilkins, who is the Chair of the Sentencing Commission, the pre-Guidelines system was a veritable nightmare of sentencing disparity and inconsistency. *Id.* In describing the pre-Guidelines sentencing system, Judge Wilkins stated: "The hundreds of federal district court judges . . . would sentence according to their own philosophies of punishment and views about the offense and offender involved . . . . The only constraints on a judge's sentencing decision were a statutory maximum penalty and occasionally a statutory floor." *Id.* at 797.

12. *See* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 3, 4 (1991) (stating that Congress created the Sentencing Commission to write Guidelines "that would direct and confine the discretion of judges").

13. S. REP. NO. 225, *supra* note 6, at 3220. *See also* Lowenthal, *supra* note 3, at 63. Congress enacted the SRA to ensure "proportional punishment for different offenses and consistent punishment for similar crimes." *Id.*

14. Steven Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988). Congress wanted to make sure that defendants serve their entire sentence. *Id.* According to Breyer, "[s]ince release by the Parole Commission . . . was likely, but not inevitable, this system sometimes fooled the judges, sometimes disappointed the

Sentencing Commission, a special body designed to enact reform legislation to reduce the tremendous sentencing disparity.[15] The President appointed seven individuals (including three federal judges) to the Sentencing Commission, and the Senate confirmed the appointees.[16] After Senate confirmation, the Sentencing Commission was required to write and produce guidelines by April 1987.[17] Accordingly, the Sentencing Commission promulgated federal sentencing guidelines[18] that became effective November 1, 1987.[19]

Following Congress' directive, the Sentencing Commission created a complex sentencing system that attempted to delineate what factors a district court judge could consider during the defendant's sentencing hearing.[20] In order to reduce individualized, inconsistent sentencing, the Sentencing Commission's guidelines focused mainly on the offense, not the offender.[21]

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offender, and often misled the public." *Id.* Notwithstanding this congressional abolition of parole, an offender can still receive a maximum of 54 days per year for good time towards the service of the sentence. 18 U.S.C.A. § 3624(b) (West Supp. 1994).

15. 28 U.S.C. §§ 991-998 (1988 & Supp. V 1993)

16. *Id.* § 991(a).

17. *Id.* § 994(c)-(n).

18. *See* Breyer, *supra* note 14, at 3. The Sentencing Commission derived its power to create sentencing guidelines and policies from the language of 28 U.S.C § 991(b) and § 994(a)(1)-(2) (1988). *Id.* The Sentencing Commission wrote guidelines to cover over 688 federal crimes. *Id.*

19. The Guidelines became effective without specific congressional approval. *See* 28 U.S.C. § 994 (1988 & Supp. V 1993). This Act created the Sentencing Commission to promulgate the Guidelines, and provided that the proposed Guidelines would go into effect six months after they were submitted by the Sentencing Commission, unless Congress modified or disapproved of them. *Id.* § 994(p). *See also* Herman, *supra* note 3, at 298 n.41. The Guidelines were scheduled to go into effect on November 1, 1987, barring congressional disapproval or amendments. *Id.* Because Congress delegated the authority to the Sentencing Commission to revise the criminal sentencing system and did not disapprove of the Commission's guidelines by that date, the Guidelines became law. *Id.*

20. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1688 (1992). Prior to the Guidelines, sentencing judges had wide ranges within which to sentence defendants. *Id.* Judges did not have to explain their sentencing decisions, and there were very few guiding opinions from the courts. *Id.* Furthermore, sentences were usually unreviewable. *Id.* Judges based their sentencing decisions on subjective and objective factors, including the future possibility of parole for the defendant. *Id.*

21. The Sentencing Commission combined elements of two sentencing models, the real offense system and the charge offense system, to create the Guidelines. MANUAL, *supra* note 3, ch. 1 pt. A, at 6. Under a real offense system, a sentencing judge would base a defendant's sentence on the defendant's actual conduct, regardless of the offenses for which the defendant was indicted or convicted. *Id.* at 5. Conversely, under a charge offense system, a sentencing judge would determine the sentence based on the defendant's convicted crimes and offenses. *Id.* Under the Guidelines, the two models overlap, particularly in the relevant conduct section, § 1B1.3. *Id.* at 6. Under this section, the judge may consider the conduct that the defendant is convicted of or pleads guilty to, and the judge may consider any other relevant conduct. *Id.*

See also Freed, *supra* note 20, at 1694. When Congress created the SRA, it "envisioned an interactive guidelines process" comprised of federal judges, the Department of Justice, the probation

However, the sentencing judge could also review other circumstances of the defendant's case under section 1B1.3, the relevant conduct provision.[22] The Commission's theory was that if judges followed rational guidelines for formulating sentences, the sentencing disparity would decrease.[23] However, the sentencing reform has effectively delegated discretion to prosecutors.[24] The Commission stated that the prosecutor's new substantial discretion could, "[i]f abused and unchecked, . . . create the disparities that sentencing reform was intended to prevent."[25]

Moreover, the Commission recognized that the new sentencing system increased a prosecutor's power because it enabled prosecutors to influence sentence determinations.[26] Under the new system, a prosecutor could easily influence sentence lengths by increasing or decreasing the number of counts either in an initial charging decision or a plea agreement.[27] Conversely, while prosecutors gained power under the Guidelines, sentencing judges lost much of

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system, the Bureau of Prisons, and the Federal Public Defenders. *Id.* Congress wanted the Sentencing Commission to research past sentencing practices and consult with the district courts to determine how sentencing worked. *Id.*

See also David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 404-09 (1993). The Sentencing Commission wanted a charge offense system that adequately distinguished defendants on their culpability and shifted the sentencing discretion to the prosecutors. *Id.* at 404. A charge offense system bases its sentencing decisions on the offense of conviction, while a pure, real offense system considers the defendant's entire life circumstances. *Id.* at 406-07.

22. *See supra* note 3 for the language of § 1B1.3. *See also* Freed, *supra* note 20, at 1714 (stating that the Sentencing Commission created § 1B1.3 to allow a sentencing court "to consider information about certain kinds of alleged misconduct going beyond issues presented to the jury, [or] acknowledged in the defendant's guilty plea").

23. *Id.* at 1689.

24. *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 503 (1992). Nagel and Schulhofer have tracked and monitored the Guidelines since their inception. *Id.* Nagel and Schulhofer contend that the Guidelines have brought consistency to the sentencing process in cases resolved by guilty pleas. *Id.* However, the Guidelines have increased prosecutors' power in the plea bargaining process. *Id.* Even if a prosecutor agrees to dismiss or not pursue a charge in the plea agreement, the prosecutor can still introduce that offense during sentencing as relevant conduct to enhance the defendant's sentence. MANUAL, *supra* note 3, § 6B1.2(a).

25. Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 232 (1989) (analyzing the interconnections between sentencing and the negotiated plea process within the context of the Guidelines' sentencing system).

26. *See* MANUAL, *supra* note 3, ch. 1 pt. A, at 6.

27. *Id.* at 6-7.

their discretionary power.[28] In the post-Guidelines system, the sentencing judge no longer has unfettered discretion to prescribe a sentence outside of a statute or the Guidelines.[29] Further, if a sentencing judge decides not to follow the Guidelines in the sentencing decision, the judge has to clearly state the reasons for departing[30] from the Guidelines.[31]

Under section 1B1.3 of the Guidelines, a prosecutor has the power to directly encroach upon an individual's constitutional rights[32] as guaranteed by the Due Process Clause of the Fourteenth Amendment[33] and the Double Jeopardy Clause of the Fifth Amendment.[34] Moreover, under the Guidelines,

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28. *See* Freed, *supra* note 20, at 1712-13 (noting that § 5K1.1 of the Guidelines delegates discretion to the prosecutor, a nonneutral party, to decide whether to move the sentencing judge to reduce a sentence based on the defendant's assistance).

29. *See* Weis, *supra* note 3, at 828 (arguing that the Guidelines have reduced judicial discretion to a "bare minimum"); *see also* Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 774 (1992) [hereinafter Heaney, *Revisiting*] (contending that the Guidelines have "sharply curtailed district court discretion and placed unparalleled power over sentencing issues in the hands of prosecutors"). *But see* Wilkins, *supra* note 11, at 803 (refuting Judge Heaney's argument, arguing that the Guidelines protect against prosecutors' undue influence at the sentencing hearing).

30. *See* Freed, *supra* note 20, at 1721 (explaining that "departure" means not adhering to the Guidelines).

31. Wilkins, *supra* note 11, at 798 n.12 (citing 18 U.S.C. § 3551 (1991)). To promote uniformity, § 3551 requires judges to defer to the Guidelines. *Id.*

32. Many commentators and members of the judiciary contend that the Guidelines' system abrogates a defendant's right to due process at sentencing and the right to avoid reprosecution for the same offense. *See generally supra* note 3. Moreover, many federal judges, scholars, and commentators argue that the Guidelines bestow more power to the prosecutors, to the detriment of the defendant. *See Letter from Judge Lawrence K. Karlton, E.D. Cal., to Editors, Federal Sentencing Reporter* (Nov. 20, 1991), 4 FED. SENTENCING REP. 186 (1991) (arguing that the system established by the Guidelines works so ineffectively that there must be an affirmative effort by the judiciary and academia to change it); William W. Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENTENCING REP. 339 (1991) (asserting that the Guidelines' system unwisely transfers sentencing discretion to the prosecutors and unfairly "denigrates and distrusts . . . judges"); *Statement of William W. Schwarzer, U.S. District Judge, N.D. Cal., Concerning Mandatory Minimum Sentences*, 2 FED. SENTENCING REP. 186 (1989-1990) (Jan. 29, 1990) (describing the judge's role in the downward departure process under both the Guidelines and the mandatory minimum sentence statutes); *Public Hearing on Proposed Amendments to the Sentencing Guidelines* (Mar. 5, 1991), 3 FED. SENTENCING REP. 287 (1991) (criticizing the ambiguity of the Guidelines).

33. Section 1 of the Fourteenth Amendment states in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

34. The Double Jeopardy Clause of the Fifth Amendment states: "[No person shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. Furthermore, the Supreme Court has stated: "[T]he Fifth Amendment guarantee against double jeopardy . . . consist[s] of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711 (1969) (citations omitted), *quoted in* JOSHUA DRESSLER,

sentencing judges do not have enough control over the process to check prosecutorial abuse in the charging decision or plea bargaining because of their limited ability to depart from the Guidelines.[35] Consequently, a prosecutor's use of acquittal conduct[36] and nonadjudicated offenses[37] to enhance a defendant's sentence following plea negotiations or a jury trial, subverts these constitutional guarantees.[38] Further, the prosecutor also impinges on the jury's crucial role in the criminal justice system when the prosecutor presents this conduct for sentence enhancement purposes.[39]

The enactment of the Guidelines provoked an outcry from the district and appellate federal court judges.[40] These judges had generally disregarded the Guidelines[41] until the Supreme Court upheld the constitutionality of both the Sentencing Commission and the Guidelines in *United States v. Mistretta*.[42] However, the *Mistretta* Court merely held that Congress had not violated either the separation of powers doctrine or the nondelegation doctrine when it created

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UNDERSTANDING CRIMINAL PROCEDURE § 199, at 431 (1991). For a discussion of the interplay between the Double Jeopardy Clause and sentence enhancement, see *infra* parts IV and V of this note.

35. *See infra* text accompanying notes 159-89.

36. Acquittal conduct is conduct for which a defendant has been charged and acquitted in a previous proceeding. Under § 1B1.3 of the MANUAL, a sentencing court may consider acquittal conduct at the sentencing hearing to enhance the defendant's sentence. *See* William J. Kirchner, *Punishment Despite Acquittal: An Unconstitutional Aspect of the Federal Sentencing Guidelines?*, 34 ARIZ. L. REV. 799 (1992) (asserting that preclusive effect should be given at the sentencing hearing to those facts that were decided in the defendant's favor). *But see* Joshua M. Webber, United States v. Brady: *Should Sentencing Courts Reconsider Disputed Acquitted Conduct for Enhancement Purposes Under the Federal Sentencing Guidelines?*, 46 ARK. L. REV. 457, 473 (1993) (arguing that judges should not be precluded from considering acquittal conduct at sentencing).

37. The term "nonadjudicated offense" refers to offenses or crimes that have been charged but not yet adjudicated or convicted. Lear, *supra* note 3, at 1181 n.4. It describes conduct which is criminal by statute even though it has not been the subject of conviction. *Id.*

38. *Id.* (maintaining that a defendant's protections under the Fourteenth and the Fifth Amendments dissolve during the sentencing process).

39. *See* Lear, *supra* note 3, at 1223. Lear emphatically asserts: "The prevailing approach emasculates the jury's ability to protect the citizen from government overreaching, thereby undermining the jury's crucial balancing role in the criminal justice system . . . . Treating conviction as irrelevant to the right to punish criminal behavior renders the jury powerless to control government recourse to the criminal sanction." *Id.*

40. For a list of commentators, see *supra* notes 3 and 32.

41. *See* Lear, *supra* note 3, at 1179 n.2. In 1989, within one year of its implementation, 200 judges proclaimed the Guidelines unconstitutional. *Id.* (citing U.S. SENTENCING COMM'N, 1989 ANNUAL REPORT 11 (1990)).

42. 488 U.S. 361, 374, 384 (1989) (holding that the Sentencing Guidelines were constitutional and did not violate the separation of powers doctrine). For further discussion of the *Mistretta* decision, see *infra* notes 113-19 and accompanying text.

the Sentencing Commission.[43] The *Mistretta* Court did not consider the substance of the Guidelines; rather, it only considered the constitutionality of the Sentencing Commission.[44] Indeed, the Supreme Court has never addressed the constitutionality of using acquittal conduct or nonadjudicated offenses under section 1B1.3 as sentencing factors to enhance a defendant's sentence.[45]

This Note examines the constitutional implications of the Guidelines as applied to an individual in the context of acquittal conduct and nonadjudicated offenses.[46] This Note argues that the prosecutor's role is too discretionary in the sentencing proceedings and that the potential for the abuse is, accordingly, great.[47] Consequently, both the individual defendant[48] and the American public[49] suffer from the flaws in the current system. Additionally, sentencing

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43. *See generally* Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581 (1992) (discussing the *Mistretta* decision and its separation of powers ramifications); Dennis E. Curtis, Mistretta *and Metaphor*, 66 S. CAL. L. REV. 607, 617 (1992) (contending that *Mistretta* was "primarily a political statement to serve notice on Congress that the Court was concerned about the distribution of power within the sentencing process"); Jeffrey S. Parker and Michael K. Block, *The Sentencing Commission, P.M. (Post* Mistretta*): Sunshine or Sunset*, 27 AM. CRIM. L. REV. 289 (1989) (discussing the inception of the Guidelines and the effects of the *Mistretta* decision on their future).

44. Curtis, *supra* note 43, at 614-15. The Court did not rule on the substance of the Guidelines. *Id.* The Court only considered the following issues: "(a) the propriety of locating the Sentencing Commission in the judicial branch; (b) whether the composition of the Commission impermissibly required judges to share their power with nonjudges; and (c) whether the presidential power to appoint judges to the Sentencing Commission intruded too much upon judicial independence." *Id.* (citing *Mistretta*, 488 U.S. at 384-411).

45. Kirchner, *supra* note 36, at 804. However, in Dowling v. United States, 493 U.S. 342 (1990), the Supreme Court upheld the use of acquittal conduct as evidence "in a subsequent trial of the same defendant on a different charge" against a double jeopardy challenge. *Id.* In his dissent, Justice Brennan argued that the lower courts would apply the same reasoning to the sentencing hearing. *Id.* at 363 (Brennan, J., dissenting). Therefore, by applying the majority's reasoning, courts would consider evidence underlying a prior acquittal to enhance a defendant's sentence. *Id.*

46. *See infra* text accompanying notes 238-398.

47. *See generally* Lear, *supra* note 3 (noting that the prosecutor's broad discretion enables the prosecutor to subvert the jury's verdicts).

48. *Id.* at 1184-85. The defendant suffers two-fold when the prosecutor introduces nonconvicted offenses because of the prosecutor's lighter burden of proof and the possibility of a subsequent prosecution and sentence for the new offense. *Id.* *See also supra* note 5 (discussing the prosecutor's burden of proof at the sentencing hearing).

49. One of the most important components of the American legal system is the jury. *See* SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW 34 (1990) (asserting that the jury is the "fundamental guarantor of individual liberty" in the American criminal justice system). When a prosecutor decides to withhold an alleged offense in the initial charging decision, and then later introduces it at sentencing, the prosecutor effectively robs the jury of its chance to participate in the legal system. *See* Lear, *supra* note 3, at 1184-85. The prosecutor's use of nonconvicted offenses in sentencing essentially takes the decision away from the jury. *Id.* Also, the prosecutor's use of acquittal conduct to enhance the defendant's sentence unduly burdens the defendant. *Id.*

See also Herman, *supra* note 3, at 304. One may argue that the Guidelines' system protects

decisions that adhere to the Guidelines are generally not reviewable, because most circuits deny review on jurisdictional grounds.[50] Accordingly, this Note concludes that Congress needs to amend the Guidelines to check and limit the prosecutor's discretion in the sentencing process.[51]

Part II of this Note first examines the pre-Guidelines sentencing system.[52] Then Part II explores how the Guidelines are actually used in sentencing,[53] the initial judicial reaction to the Guidelines,[54] and the current judicial and prosecutorial discretion under the Guidelines.[55] Part III scrutinizes the prosecutor's current role under the Guidelines by examining the prosecutor's burden of proof,[56] ability to plea bargain,[57] and discretion under the Guidelines at the sentencing hearing.[58] Part IV then investigates the use of acquittal conduct in sentencing, the standard of proof used, and the constitutional implications of using acquittal conduct to determine an individual's sentence.[59] Part IV also focuses on the role of nonadjudicated offenses in the sentencing process under the Guidelines and the problematic results of this role.[60] Part V provides an amendment to section 1B1.3[61] of the Guidelines.[62] Also in Part V, the amendment is applied to show how it would affect the hypotheticals already raised in this Note. The amendment takes into account the interplay between the sentencing court, the prosecutor, and the jury[63] in the sentencing process. This Note concludes that the use of acquittal and nonadjudicated conduct in sentencing can result in tremendous abuse and constitutional violations, absent specific prosecutorial controls to prevent deprivation of both the defendant's due process guarantees and the defendant's right to be free from

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the sentencing process because it removes the sentencing decision from the jury's control. *Id.* (citing United States v. Pena, 930 F.2d 1486, 1492 (10th Cir. 1991)). However, this argument does not comport with the constitutional guarantee of a right to a jury trial. *Id.* Indeed, it reflects a disturbing mistrust of the jury system in the American judicial system. *Id.* The jury system is invaluable because it ensures public participation in the criminal justice system. *Id.*

50. *See* Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 633 (1992) (contending that 42 U.S.C. § 3742 does not provide jurisdiction for appealing a district court's refusal to depart).

51. *See, e.g.*, Herman, *supra* note 3, at 352; Reitz, *supra* note 3, at 552.

52. *See infra* text accompanying notes 72-83.

53. *See infra* text accompanying notes 120-58.

54. *See infra* text accompanying notes 107-14.

55. *See infra* text accompanying notes 83, 100-06, 129-31, 153-237.

56. *See infra* text accompanying notes 153-54, 207-09, 230-37, 283-96, 346.

57. *See infra* text accompanying notes 126-32, 173-79, 211-23.

58. *See infra* text accompanying notes 230-37.

59. *See infra* text accompanying notes 258-63, 268-336.

60. *See infra* text accompanying notes 337-98.

61. *See supra* note 3.

62. *See infra* part V.

63. This note will consider the effects of the use of relevant conduct in sentencing on both the grand and petit juries.

reprosecution.[64]

II. UNITED STATES SENTENCING GUIDELINES

In the eighteenth and nineteenth centuries, criminal sentencing was not a distinctly separate procedural phase in either England or the American colonies.[65] A jury would decide the facts upon which the sentencing was based directly after it rendered a conviction in the trial.[66] Sentencing was simply a ministerial task that the jury performed.[67] However, sentencing procedures changed near the end of the eighteenth century when American jurisdictions began to use incarceration as a sanction for criminal offenses.[68]

From the latter part of the nineteenth century through the early 1980s, trial judges determined criminal sentences by using an offender-oriented, indeterminate system.[69] This system delegated tremendous discretion to the sentencing

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64. *See infra* text accompanying notes 325-98.

65. Herman, *supra* note 3, at 302. For a brief historical overview of sentencing in America and other countries, see Nagel, *supra* note 10, at 887. According to Nagel, societies have historically accepted four purposes of sentencing: punishment, deterrence, incapacitation, and rehabilitation. *Id.* (citing Robert McKay, *It's Time to Rehabilitate the Sentencing Process*, 60 JUDICATURE 223, 225-26 (1976)). Throughout history, societies have ranked these four goals in different orders in accordance with the prevailing beliefs and views of their time. *Id.* Accordingly, the degree of judicial discretion in sentencing has depended on which goal was dominant at that time and which methods were believed consistent with the stated goal. *Id.*

66. Herman, *supra* note 3, at 302 (citing 1 JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 457 (London, MacMillan 1883)).

67. *See* Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968). Criminal sentencing was historically "a ceremonial rather than a decision making process." *Id.* at 821. Once the jury reached a verdict, the court imposed a sentence without further proceedings. *Id.* at 822. The sentencing judge would simply sentence the defendant in accordance with the statutory penalty. *Id.*

68. Herman, *supra* note 3, at 302-03 n.55. Pennsylvania built the first jail in 1773, and it became a penitentiary in 1789. *See generally* SOL RUBIN, THE LAW OF CRIMINAL CORRECTION 29 (2d ed. 1973). *See also* GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM OF THE UNITED STATES AND ITS APPLICATION IN FRANCE, 80-81 (S. Ill. U. Press. 1964) (1833) (writing that the Quakers believed that a penitentiary provided a place for a convict to repent his sins as well as suffer punishment for them); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 231 (J.P. Mayer & Max Lerner eds. & George Lawrence trans., Harper & Row 1966) (1835) (describing the American penitentiary as an example of "the first time the idea of reforming offenders as well as punishing them penetrated into prisons").

See also Note, *supra* note 67, at 822. The use of incarceration to sanction offenders steadily increased during the 19th century and gave rise to the rehabilitative indeterminate sentencing system. *Id.* New York created the first indeterminate sentencing program in 1877. *Id.* at 822 n.8.

69. *See* Nagel, *supra* note 10, at 894. The United States Sentencing Commissioner, Ilene H. Nagel, asserts that indeterminate sentencing originated in the United States when the 1870 Declaration of Principles by the National Congress of Prisons adopted reform as the paramount goal of prison discipline. *Id.* at 893. *See also* Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980). Schulhofer defines the "indeterminate" system as a system in which

court to prescribe a sentence within the statutory parameters for the prosecuted conduct.[70] Sentencing became a separate and independent proceeding in which the sentencing judge attempted to determine the rehabilitative potential of defendants and to sentence them appropriately.[71]

A. Indeterminate Sentencing

Under the indeterminate system, a sentencing judge shared the sentencing power with a prosecutor and a parole board.[72] Prosecutors limited an individual's potential sentence in their initial charging decision.[73] The sentencing judge focused on the individual and could consider and evaluate all of the particular circumstances and characteristics of the defendant and the offense.[74] The sentencing judge then evaluated the convicted person for

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> [c]rucial decisions are made by prosecutors, judges, and parole officials . . . [and] [i]n each instance the decisionmaker's power is broad and unstructured, and although the effect of a sentencing decision by one kind of official may be tempered by the decisions of others, the decision itself is not subject to any form of appeal. [T]he sentence is not only indeterminate in terms of legal standards and controls but also indeterminate in time.

Id. at 736-37.

However, Schulhofer cites several pre-Guidelines cases that contradicted the notion of sentences' general acceptance: Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975) (holding that either the prosecutor or the defense attorney can appeal a sentence that imposed cruel and unusual punishment); Woosley v. United States, 478 F.2d 139, 143-44 (8th Cir. 1973) (holding that either party can appeal a sentence that did not adequately consider the defendant's character or the circumstances of the offense). Schulhofer, *supra*, at 736 n.7.

Schulhofer compares determinate and indeterminate sentencing schemes. According to Schulhofer, under the indeterminate scheme, the trial judge did not have to follow formal criteria or explain his sentencing decision. *Id.* at 735-36. This decision was seldom appealed. *Id.* at 736. After the defendant had served most of the minimum sentence, a parole board determined whether the defendant could be released without a hearing. *Id.*

70. *See* S. REP. NO. 225, *supra* note 6, at 3221 (discussing judicial discretion and the resulting sentencing disparity under the indeterminate sentencing system).

71. Herman, *supra* note 3, at 302 n.55 (citing Alan Dershowitz, Report to the Twentieth Century Fund Task Force on Criminal Sentencing, *in* FAIR AND CERTAIN PUNISHMENT 81-82 (1976)).

72. For a thorough discussion of indeterminate sentencing, see Lear, *supra* note 3, at 1186-92. The indeterminate sentencing system originated with the 1870 Declaration of Principles by the National Congress of Prisons, which adopted reform as the "guiding principle of prison discipline." *Id.* at 1186 n.18. Congress later adopted the indeterminate system in 1910 in response to an increase in crime, seeking to purge America of this "moral disease." *Id.* at 1186.

See also Lowenthal, *supra* note 3. Under the indeterminate system, legislatures established broad parameters of permissible punishment for each offense category. *Id.* at 61 n.1. Judges would then set the maximum terms of individual sentences, and parole boards would set the actual periods of confinement within the judicially determined maximum. *Id.* at 62 n.1.

73. *See* Schulhofer, *supra* note 69, at 735.

74. Weis, *supra* note 3, at 827.

rehabilitative potential and sentenced the individual accordingly.[75] Probation officers also supplied the judge with any criminal records to aid in the sentencing decision.[76] The flaws in the indeterminate system became readily apparent as judges exercised their broad discretion, resulting in wildly disparate sentences.[77] Under the indeterminate system, judges imposed dramatically

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75. *Id.*

76. Rule 32 of the Federal Rules of Criminal Procedure governs the probation officer's presentence investigation report. Rule 32 specifies that a presentence report may include:

> (A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant; (B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances; (C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(2); (D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed; (E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and (F) such other information as may be required by the court.

FED. R. CRIM. P. 32(c)(2)

See also Keith A. Findley & Meredith J. Ross, Comment, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under Julian and the Sentencing Guidelines*, 1989 WIS. L. REV. 837 (contending that presentence investigation reports are so integral to the sentencing process that judges should be required to make either a factual resolution or expunge the information from the report if there is a dispute). For a discussion of the use of presentence reports in sentencing, see *infra* text accompanying notes 134-39, 224-29.

77. *See* Lear, *supra* note 3, at 1188-1189. According to Lear, a study in the Second Circuit showed that defendants convicted of extortion with identical criminal histories would receive a sentence ranging from three to twenty years depending on the sentencing court. *Id.* (citing ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES (1974)). *See also* Edward M. Kennedy, *Symposium on Sentencing, Part I*, 7 HOFSTRA L. REV. 1 (1978). According to Senator Kennedy, the indeterminate system "bre[d] massive injustice" because "judges [were] free to roam at will, dispensing ad hoc justice in ways that defy both reason and fairness." *Id.* Judges rendered disparate sentences because they had no guidance in the Federal Criminal Code. *Id.* Accordingly, the sentencing system "invite[d] injustice by conferring unlimited discretion on judges to impose sentences within vast statutory limits." *Id.* at 1-2. *But see* Edward M. Kennedy, *Foreword, Federal Sentencing Guidelines Symposium*, 29 AM. CRIM. L. REV. at ix (1992). Twelve years later, Senator Kennedy asserted that the infusion of mandatory minimum sentencing statutes in the sentencing process hampered the use of the Guidelines in sentencing. *Id.* at x.

different sentences on similarly situated defendants.[78] Consequently, the American public questioned the sentencing inconsistencies and demanded change.[79]

Americans lost faith in the indeterminate, rehabilitative sentencing scheme[80] because the scheme was so discretionary and judges were not required to explain their sentencing decisions. Congress then intervened to improve the ambiguous scheme through legislative reform.[81] In the latter part

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78. Weis, *supra* note 3, at 827. The pre-Guidelines judges injected emotion and subjectivity into their sentencing decisions. *Id.* A compassionate judge would grant a lighter sentence while a biased judge would impose a stricter sentence. *Id.* Because the pre-Guidelines judges were not constrained in their decision-making, their sentences were diversified. *Id.*

79. *See* S. REP. NO. 225, *supra* note 6, at 3232 (describing the public's concern for uniform sentencing). For a discussion of indeterminate sentencing problems in the federal courts in the pre-Guidelines era, see Harold R. Tyler, Jr., *Control of Discretion in Federal Sentencing*, 7 HOFSTRA L. REV. 11, 12 (1978) (stating that by the 1970s, most American jurisdictions had grown disenchanted with the idea that incarceration could reform and rehabilitate individuals).

80. Many notable scholars, including Judge Marvin Frankel, criticized the indeterminate sentencing system for its resulting unfettered judicial discretion and its "rehabilitative" objective. According to Frankel:

> [The courts] dump into our generally huge prisons unsorted varieties of prisoners—the few who may need treatment we know how to supply, the many we don't know how to treat, whatever they may need . . . . This is the macabre but not astonishing culmination of the indeterminate-sentencing process that rests mainly upon fiction and absentmindedness.

MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 92-93 (1973).

The indeterminate sentencing system was not only lambasted for failing to satisfy its goal of criminal rehabilitation, but it was also criticized for its disparity in individual sentences. Several sources were identified as contributing to the disparity:

> (1) lack of clearly defined and accepted sentencing goals, priorities, and criteria; (2) substantial discretion exercised by sentencing judges and paroling authorities in the absence of such goals and criteria; and (3) the procedures under which this discretion is customarily exercised.

Peter B. Hoffman & Michael A. Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 96 (1978).

Prison officials, prisoners, and criminal defenders criticized the system for its lack of uniformity. Attorney Alan Dershowitz wrote:

> [I]t seems that the day of the indeterminate sentence is passing—and with few regrets. While law-and-order conservatives remain persuaded that indeterminate sentencing is just one more form of coddling criminals, prisoners and their defenders outside the walls are complaining that it has resulted in too much power for parole boards and longer stays in prison. Prison officials blame the system for overcrowding . . . . In short, a surprising consensus is emerging around the idea that it is time to return to uniformity in sentencing.

Alan Dershowitz, *Let the Punishment Fit the Crime*, N.Y. TIMES, Dec. 28, 1975, Magazine Section, at 7.

81. *See* Joe B. Brown, *The Sentencing Guidelines are Reducing Disparity*, 29 AM. CRIM. L. REV. 875 (1992) (asserting that the widespread sentence disparities inspired Congress to pass the SRA).

of the 1970s, the sentencing system began to shift to a determinate system.[82] Under the determinate system, sentencing judges, corrections administrators, and parole officers no longer had broad discretion in the sentencing process.[83]

B. Real Offense Sentencing

As crime increased, Americans wanted tougher sanctions for criminals.[84] Because of the growing number of repeat offenders, the public no longer believed in the rehabilitative process.[85] Americans thought the solution to escalating crime was to send offenders to jail for a long time, rather than to rehabilitate them.[86] Accordingly, state governments responded to their constituencies' demands in the form of new sentencing systems.[87]

In the 1970s and early 1980s, several state legislatures crafted sentencing guidelines to provide uniformity in the state court systems.[88] Following the

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82. Schulhofer, *supra* note 69, at 737 (predicting the shift to a determinate sentencing model that abolished parole and created "flat-time," rigid sentences).

83. The real offense system is basically a determinate sentencing system. *See generally* Lowenthal, *supra* note 3. Determinate sentencing schemes restrict the range of available punishments to sentencing judges. *Id.* at 61. When the Sentencing Commission wrote the Guidelines, it combined elements and characteristics of both the indeterminate scheme and the determinate scheme to create the real offense system. *See also supra* note 21 and accompanying text.

84. *See* S. REP. NO. 225, *supra* note 6, at 3232.

85. *Id.* at 3221.

86. *Id.*

87. *Id.*

88. Minnesota was the first state to create a sentencing commission to establish guidelines. *See* MINN. STAT. ANN. § 244 app. (West 1992); Act of April 5, 1978, ch. 723, art. 1, § 9, 1978 Minn. Laws 761, 765-767 (codified as amended at MINN. STAT. ANN. § 244.09 (West 1992)). Other states used Minnesota's guidelines to craft their own sentencing commissions and guidelines. *See, e.g.*, WASH. REV. CODE ANN. § 9.94A.040 (West 1988 & Supp. 1994); 204 PA. CODE §§ 2151-2155 (1981 & Supp. 1994). There are presently at least 13 states that have adopted guideline schemes or have created sentencing commissions to enact guidelines. *See* Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 681 (1992) (discussing the implementation of guideline sentencing schemes in Florida, Kansas, Louisiana, Michigan, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, and Washington).

For a discussion of state court reactions to the new sentencing system, see Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, 75 MINN. L. REV. 727 (1991) (discussing Minnesota's sentencing guidelines, which abolished parole and created presumptive sentences); John M. Junker, *Guidelines Sentencing: The Washington Experience*, 25 U.C. DAVIS L. REV. 715 (1992); Laird C. Kirkpatrick, *Mandatory Federal Sentencing Guidelines: The Oregon Model*, 25 U.C. DAVIS L. REV. 695 (1992).

Also, for a discussion of indeterminate sentencing problems in the federal courts in the pre-Guidelines era, see Harold R. Tyler, Jr., *Sentencing Guidelines: Control of Discretion in Federal Sentencing*, 7 HOFSTRA L. REV. 11, 12 (1978) (stating that by the 1970s, most American

state legislatures' lead, Congress reacted to the public concern for sentencing uniformity, abandoned the rehabilitative model,[89] and established the Federal Sentencing Commission to cure the ailments of the system and dictate cogent guidelines for the federal judiciary to follow.[90] Specifically, Congress wanted to reduce the unjustified disparity among defendants convicted of similar offenses,[91] appease public concern regarding sentencing lengths,[92] and make the sentences proportional to the crimes committed.[93]

The Sentencing Commission, an independent agency of the judicial branch, rejected rehabilitation as the ultimate goal in its Guidelines and created a system that was more retributive in nature.[94] The Sentencing Commission wanted the

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jurisdictions had grown disenchanted with the idea that incarceration could reform and rehabilitate individuals).

89. *See* S. REP. NO. 225, *supra* note 6, at 3220. Indeed, the language of the Comprehensive Crime Control Act of 1984 emphasizes Congress' disfavor of the rehabilitative, indeterminate sentencing system. The General Statement of the Senate Report states:

> [A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing.

Id.

90. *See* Lowenthal, *supra* note 3, at 63. Most jurisdictions abandoned rehabilitation, the central goal of the indeterminate system, as the principal end of punishment. *Id.* The current sentencing system instead focuses on retributive justice and is offense-oriented. *Id. See also* Nagel, *supra* note 10, at 915-16 (explaining that Congress wanted to combine a crime control model with a "just punishment for the offense" model to create the new sentencing scheme).

91. *See* S. REP. NO. 225, *supra* note 6, at 3221.

92. MANUAL, *supra* note 3, ch. 1, pt. A, at 2.

93. *Id. See* Freed, *supra* note 20, at 1704. The Commission adopted a statistical approach to the proportionality question. *Id.* The Commission's theory was that cases occupying the higher ranges of its mathematical grid were consistently more serious than those in the lower ranges. *Id.* However, the Commission's proportionality approach was not compatible with the real world of sentencing, because it failed to take into account the human element. *Id.* In other words, judges and probation officers would more intuitively know what sentence to impose after they evaluated the cases. *Id.* Accordingly, the Guidelines' complex, mechanical process could not replace conventional human wisdom regarding the hierarchy of offenses. *Id.*

94. *See* Lear, *supra* note 3, at 1190-1191. The Guidelines "reflect[ed] the general inappropriateness of considering" incarceration for the purpose of rehabilitation. *Id.* at 1191 n.43 (citing 28 U.S.C. § 994(e) (1988)). *See also* Breyer, *supra* note 14. Commissioner (now Supreme Court Justice) Breyer, one of the architects of the Guidelines, discusses the inception of the Guidelines. According to Breyer, the Commission also rejected a "just deserts" approach because it would be too difficult to objectively rank different harms. *Id.* at 15. The Commission next rejected a "crime control" model which combined deterrence objectives and incapacitation values because there was no evidence demonstrating that the model would have any deterrent effect. *Id.* at 17. Finally, the Commission attempted to compromise between the systems and chose an offender-oriented model that was offense, not charge, based. *Id.* at 19. *See also supra* note 21 and accompanying text.

punishment to be commensurate with the seriousness of each type of offense.[95] Also, the Sentencing Commission sought consistency and attempted to create tangible guidelines for the judiciary to follow in sentencing decisions.[96] The goals of the determinate system were punishment, deterrence, guidance, and incapacitation, not rehabilitation.[97] Accordingly, an offender was not rewarded for any jail-time good behavior and was required to serve the full length of the sentence.[98] Consequently, the Sentencing Commission abolished the United States Parole Commission and the concept of parole.[99]

Where the indeterminate system focused on the crime of conviction, the determinate, real offense system allows the sentencing court to consider other factors[100] in addition to the original crime.[101] However, prior to the Guidelines, sentencing courts did consider a broad spectrum of information

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95. Lowenthal, *supra* note 3, at 63.

96. Freed, *supra* note 20, at 1700.

97. *See* United States v. Scroggins, 880 F.2d 1204, 1208 (11th Cir. 1989) (discussing Congress' principle aims regarding the new sentencing system), *cert. denied*, 494 U.S. 1083 (1990). *See also* 28 U.S.C.A. § 994(k) (West 1993). This section states in part that "[t]he Commission shall insure that the guidelines . . . reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." *Id.*

However, rehabilitation is still a part of the determinate sentencing process. *See* S. REP. NO. 225, *supra* note 6, at 3233. The Senate Report lists rehabilitation as the fourth goal of the Sentencing Reform Act. *Id.* Moreover, prisons offer voluntary rehabilitative programs for offenders. Further, a sentencing judge may consider a defendant's need for rehabilitation when prescribing the conditions of probation or supervised release. *See also* 18 U.S.C.A. § 3563(b) (West 1985 & Supp. 1993) (allowing rehabilitation-oriented conditions of probation); *id.* § 3583(d) (allowing rehabilitative-oriented conditions of a term of supervised release).

98. *Scroggins*, 880 F.2d at 1208. However, an offender can still earn good time credits against the sentence at a rate of fifty-four days per year. *Id.* at 1208 n.9 (citing 18 U.S.C.A. § 3624(b) (West 1989)).

99. *Id.* at 1208. At least one commentator has argued that the pre-Guidelines system vested much discretion and power in parole officers. *See* Wilkins, *supra* note 11, at 798. According to Judge Wilkins, parole officers diluted sentencing judges' discretion under the old system because they could change the term of an offender's confinement and essentially "resentence" the offender. *Id.*

See also Freed, *supra* note 20, at 1689 n.34. Freed emphasizes the importance of the parole officer in the former indeterminate system. The new determinate system did not provide a role for parole officers because the system did not attempt to rehabilitate the defendant. *Id.* Freed states: "When that optimistic theory [of rehabilitation] lost credibility, it became evident that a system of uncertain sentences that [both] left prisoners in limbo and deceived the public served no useful purpose." *Id.*

100. *See infra* text accompanying note 105. *See also infra* note 159 and accompanying text.

101. *See* Lear, *supra* note 3, at 1187 (stating that judges could now factor in all circumstances surrounding the crime and the offender). Prior to the enactment of the Guidelines, judges could consider all relevant information in determining a defendant's sentence, including acquittal conduct. Kirchner, *supra* note 36, at 803-04 (citing United States v. Rodriguez-Gonzalez, 899 F.2d 177, 182 (2d Cir. 1990)).

concerning the defendant and any prior crimes,[102] and the Sentencing Commission incorporated this practice into section 1B1.3 of its Guidelines.[103] This section allows a sentencing court to consider information about other alleged offenses "beyond issues presented to the jury, acknowledged in the defendant's guilty plea, or stipulated to under Guideline section 1B1.2."[104]

Accordingly, a post-Guidelines court can base its decision not only on the crime of conviction, but also on the following factors: (1) the circumstances surrounding the current conviction; (2) nonconviction offenses committed contemporaneously with the conviction offense; (3) prior convictions; (4) nonconvictions; and even (5) acquittal conduct.[105] Moreover, the Sentencing Commission created section 1B1.3 to ensure that the sentencing judge includes all relevant conduct in the decision, even conduct that the Commission never contemplated in its Guidelines.[106]

Although section 1B1.3 provides some leeway, most federal judges have reacted with general disfavor towards the Guidelines because they severely limit the judges' ability to exercise their sentencing discretion.[107] The Guidelines require judicial adherence or, alternately, a very good explanation for nonadherence.[108] Many federal district judges expressed their opposition to the Guidelines in hearings before the Sentencing Commission in 1987.[109] Critics of the Sentencing Commission and the Guidelines formed a "Study Committee" that polled district judges to determine what defects they perceived

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102. *See* Williams v. New York, 337 U.S. 241 (1949) (holding that a defendant's due process rights were not violated where the sentencing judge considered the defendant's prior criminal record without allowing the defendant to confront witnesses).

103. *See* MANUAL, *supra* note 3, § 1B1.3.

104. Freed, *supra* note 20, at 1714.

105. Lear, *supra* note 3, at 1193.

106. *See* Kirchner, *supra* note 36, at 805 (asserting that the "Guidelines allow a judge to impose a sentence outside the [statutory] range if circumstances unforeseen by the Sentencing Commission exist").

107. *See* Weis, *supra* note 3, at 824. According to Judge Weis: "The Guidelines simply cannot catalogue all facets of a defendant's total personality and the multitude of details of an offense that a trial judge may feel strongly should affect an appropriate sentence." *Id.* at 828.

108. *See infra* text accompanying notes 159-68, 180-89.

109. *See* Weis, *supra* note 3, at 825. Judge Weis stated: "'The federal sentencing guidelines are not working. According to the legislative history, the goal of the guidelines was honesty, uniformity, and proportionality in sentencing. The guidelines are failing miserably in achieving any of these goals.'" *Id.* (quoting Judge Judith Keep from the JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 134, 141 (Apr. 2, 1990)).

in the new system.[110] While many judges and judicial commentators criticized the model Guidelines, they nevertheless became law in 1987 because Congress did not act within six months of receiving the Sentencing Commission's guidelines.[111]

Most courts refused to use the Guidelines after they went into effect.[112] Although the Guidelines became law in 1987, it was not until after the 1989 Supreme Court decision in *Mistretta v. United States*[113] that the Commission and the Guidelines acquired any credibility with the federal district judges.[114] In *Mistretta,* the Supreme Court upheld both the Commission's power and the legitimacy of the Guidelines against a constitutional challenge in which the defendant asserted that Congress violated the separation of powers doctrine when it created the Sentencing Commission.[115] The defendant also argued that Congress had delegated an unacceptable amount of authority to the Sentencing Commission.[116]

The *Mistretta* Court rejected both of these arguments and held that it was clearly within Congress' power to determine the most effective sentencing

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110. *Id.* The judges listed the following defects: increase in the time required for pleas and sentencing; rigidity in the sentence creation; decrease in the incentives to enter guilty pleas; decrease in plea bargaining; shift of discretion from the courts to the prosecutor; and a change in the role of probation officers. *Id.*

111. 28 U.S.C. §§ 994 (1988 & Supp. V 1993). *See supra* note 19 and accompanying text.

112. Some courts actually held that the Sentencing Reform Act was unconstitutional. *See, e.g.,* United States v. Lopez-Barron, 685 F. Supp. 725, 727 (S.D. Cal. 1988) (holding that the Sentencing Commission was unconstitutional and violative of the separation of powers doctrine); United States v. Horton, 685 F. Supp. 1479 (D. Minn. 1988) (upholding a constitutional challenge against the Sentencing Commission and the Guidelines).

113. 488 U.S. 361 (1989). In *Mistretta,* two defendants were indicted for the sale and distribution of cocaine in a federal district court in Missouri. *Id.* at 370. One of the defendants, John Mistretta, moved the district court to declare the Guidelines unconstitutional. *Id.*

114. The *Mistretta* Court emphasized the power of Congress to create the Commission and to place it within the judicial branch of government. *Id.* at 385. The *Mistretta* Court tried to appeal almost psychologically to the "ken of judges" to work together and to assume their delegated duty to apply the Sentencing Guidelines. *Id.* at 412. *See also* Wright, *supra* note 12, at 24. The Supreme Court upheld Congress's creation without thoroughly considering the Commission's role in the government. *Id.* Wright criticized the Court's decision in *Mistretta,* stating:

> The *Mistretta* decision merely followed a tradition as old as the American administrative state. Under this tradition, the Court first listens carefully to the compelling constitutional arguments against the structure of the agency. Then the Court ignores those arguments, bows to necessities brought about by changing times, changing institutions, and changing functions of government, and upholds the delegation of power to the agency. According to the tradition, reckoning with the constitutional problems should . . . occur later rather than earlier.

Id.

115. *Mistretta,* 488 U.S. at 371.

116. *Id.*

scheme.[117] The Court, in support of the new sentencing scheme, noted that the former rehabilitative, indeterminate sentencing system was actually a cause of the disparity and uncertainty in the sentencing process.[118] Accordingly, after the *Mistretta* decision, the federal courts finally abandoned the indeterminate approach and used the Guidelines to determine criminal sentences.[119]

1. Sentence Determination Under the Guidelines

Criminal sentencing under the Guidelines is a complex, time-consuming process that begins after the defendant's arraignment.[120] Following the arraignment, the defense attorney interviews the defendant to attempt to ascertain the defendant's possible sentencing range for the charged offense.[121] The defendant's counsel may then contact the United States Attorney's office to obtain any information about the charged offense that the prosecutor agrees to release[122] and to determine the prosecutor's position regarding a plea bargain.[123] However, the defendant's attorney may not be able to get any information from the prosecutor regarding the defendant's case, either because of its unavailability or due to a specific district policy.[124] Consequently, the defense attorney may have to enter a plea on behalf of the defendant without reading the defendant's file or determining the prosecutor's perspective of the case.[125]

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117. *Id.* Regarding the separation of powers argument, the Court asserted that while the Sentencing Commission "unquestionably is a peculiar institution within the framework of our Government," its existence as a separate entity within the judicial branch did not violate any separation of powers principles. *Id.* at 384. The Court also reasoned that Congress had the requisite power under Article III to create any rules which were necessary to "'carry . . . into execution all the judgments which the judicial department has [the] power to pronounce . . . .'" *Id.* at 388 (quoting Wayman v. Southard, 23 U.S. 253, 258, 10 Wheat. 1, 22 (1825).

118. Mistretta v. United States, 488 U.S. 361, 366 (1989).

119. *See generally* Tushnet, *supra* note 43.

120. *See* Gerald W. Heaney, *The Reality of the Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 169 (1991) [hereinafter Heaney, *Reality*].

121. *Id.*

122. *Id.* Defense attorneys may encounter difficulties in their pursuit of information. *Id.* Some districts use an open-file policy while other districts determine on a case-by-case basis what information will be available. *Id.* However, in some instances, the investigating agency may actually have all of the pertinent files, but the defense attorneys are still unable to get the information before they enter a plea on behalf of their client. *Id.* at 169-70.

123. *Id.* at 170.

124. *Id.* at 169 (stating that most of the studied districts—District of Minnesota, Eastern District of Missouri, Western District of Missouri, and Eastern District of Arkansas—generally determine on a case-by-case basis what information to make available).

125. *Id.*

Plea bargaining still exists under the Guidelines.[126] Indeed, the Sentencing Commission stated that its initial guidelines generally would not make any significant changes in plea negotiation practices.[127] Although the Guidelines do impose limitations on plea bargaining, the limitations are ambiguous.[128] Further, while the Guidelines limit a sentencing judge's power in the plea bargaining process, prosecutors and defense attorneys still enjoy sentencing discretion.[129]

Under sections 6B1.2 and 1B1.3 of the Guidelines, the prosecutor may still present conduct outside the plea agreement at the sentencing hearing.[130] Even if the plea agreement includes dismissal of a charge or an agreement not to pursue a charge, the prosecutor may still introduce the conduct underlying that charge, as it relates to the crime of conviction, for sentence enhancement.[131] As a result, a large number of defendants plead guilty during the plea bargaining process even though they risk a sentence enhancement for relevant conduct under the Guidelines.[132]

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126. *See* Memorandum from Attorney General Richard Thornburgh to Federal Prosecutors (Mar. 13, 1989), *reprinted in* 1 FED. SENTENCING. REP. 421 (1989) [hereinafter Thornburgh Memorandum]. The Thornburgh Memorandum to the federal prosecutors outlined the Department of Justice's policies on plea bargaining under the Sentencing Reform Act. *Id.* The Thornburgh Memorandum covers pre-indictment and post-indictment charge bargaining, sentence bargaining, readily provable charges, departures, substantial assistance motions, and written plea agreements. *Id.* The Memorandum mandates strict compliance with the Guidelines and orders prosecutors to charge the "most serious, readily provable offense or offenses consistent with the defendant's conduct." *Id.* Further, the Memorandum orders prosecutors to accurately and fairly charge the defendant, and not to "exert leverage to induce a plea." *Id.* Finally, the Memorandum explicitly prohibits fact bargaining. *Id.*

Indeed, many defendants still plea bargain under the Guidelines. *See* Zipperstein, *supra* note 50, at 646 (asserting that the Guidelines are "structured to encourage guilty pleas by offering the prospect of receiving a downward adjustment in exchange for acceptance of responsibility").

127. MANUAL, *supra* note 3, ch. 1, at 7. Plea bargaining is authorized by Rule 11 of the Federal Rules of Criminal Procedure and §§ 6B1.1-4 of the Guidelines. *Id.* ch. 6B, intro. cmt. According to the MANUAL, Congress expected judges "to examine plea agreements to make certain that prosecutors [had] not used plea bargaining to undermine the sentencing guidelines." *Id.*

128. *See* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 926 n.87 (1991) (arguing that the standards are "'so open-ended that they may leave no basis for effective review'") (quoting Schulhofer & Nagel, *supra* note 25, at 234).

129. *Id.* at 926. *But see* Lowenthal, *supra* note 3, at 76 (asserting that federal prosecutors have less discretion in the plea bargaining process under the real offense, Guidelines system). Under the Guidelines, federal prosecutors cannot offer sentencing concessions on such matters as the defendant's prior convictions or the victim's age to induce a guilty plea. *Id.*

130. MANUAL, *supra* note 3, § 6B1.2(a).

131. *Id.*

132. Heaney, *Reality*, *supra* note 120, at 170. *See also* Dan Freed & Marc Miller, *Plea Bargained Sentences, Disparity and "Guideline Justice,"* 3 FED. SENTENCING REP. 175 (1991) (contending that defendants continue to plea bargain because they "sense an opportunity to undercut

In the first step of the sentencing process, the probation officer interviews the defendant after a plea is entered and accepted.[133] The probation officer then prepares the defendant's presentence investigation report (PSI).[134] Again, the probation officer must rely primarily on the information in the prosecutor's files because probation offices usually have neither the personnel nor the resources to conduct an independent investigation.[135] Consequently, the prosecutor ultimately controls the PSI fact-finding process by controlling the proffered information.[136]

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the normal sentence").

133. Heaney, *Reality*, *supra* note 120, at 172.

134. *Id.* at 168. *See also* United States v. Scroggins, 880 F.2d 1204, 1209 n.11 (11th Cir. 1989) (noting that the "[PSI] prepared by the court's probation service serves the purpose of a pretrial stipulation in a civil case").

See also ARTHUR W. CAMPBELL, LAW OF SENTENCING 380 (2d ed. 1991). Official presentence reports and studies are very important in the sentencing process. *Id.* Since a large percentage of cases never go to trial, the PSI provides most of the information upon which the sentencing judge will rely. *Id.* For a discussion of what comprises the PSI, see *supra* note 76 and accompanying text.

135. Pre-Guidelines probation officers devoted considerable time to conducting their own investigation to gather information regarding a defendant's individual case. *See* Freed, *supra* note 20, at 1722. These probation officers believed in individual assessments, not the Guidelines' matrix. *Id.* at 1722-23. However, according to Judge Heaney, most probation officers now stop investigating after they review the government's files and interview any investigating agents. *See* Heaney, *Revisiting*, *supra* note 29, at 777. Probation officers do not have the necessary resources to investigate their cases; therefore, prosecutors ultimately control the dissemination of information for the PSI. *Id.* Accordingly, prosecutors are encouraged to hand down indictments for less serious, provable offenses and then expand the offense through the probation office and its PSI. *Id.* (citing United States v. Miller, 910 F.2d 1321, 1332 (6th Cir. 1990) (Merritt, C.J., dissenting), *cert. denied*, 489 U.S. 1094 (1991)).

Judge Heaney describes a case in which a defendant is indicted for "50 or more grams" of cocaine with the intent to distribute. *Id.* The offender's sentence length depends on the precise amount of drugs involved in the offense. *Id.* Someone has to determine this amount prior to sentencing. *Id.* Under the Guidelines, the probation officer must determine the amount. *Id.* Judge Heaney asserts that the probation officer would rely solely on the information in the prosecutor's files and would not conduct an independent investigation. *Id.* If the probation officer determined from the prosecutor's files that the defendant possessed one kilogram of cocaine, the sentencing court would have to sentence the defendant for 63 to 78 months under the Guidelines. *Id.* However, if the defendant were sentenced for the offense of conviction, 50 grams of cocaine, the defendant would only receive 21 to 27 months. *Id.* In this case, the probation officer's findings from the prosecutor's files results in a sentence increase of 42 to 51 months above the sentence required by the offense of conviction. *Id.*

136. Heaney, *Reality*, *supra* note 120, at 173. Moreover, many probation officers believe that "they ha[ve] no choice but to rely upon the government-provided facts." *Id.* One probation officer succinctly stated that they "basically rely on what the prosecutors and investigators give [them]" to compile the PSI. *Id.*

However, the probation officer's interview with the defendant can dramatically affect the contents of the PSI. *See* Lowenthal, *supra* note 3, at 101-02. Lowenthal asserts that it is problematic when the sentencing judge relies heavily on the PSI for sentence enhancement because of the power it vests in the probation officer. *Id.* at 101. He argues that the probation officer can

After examining the prosecutor's files, the probation officer meets with the defendant to inform the defendant of the information that the officer has obtained and the officer's conclusions.[137] The defendant has an opportunity to rebut the probation officer's conclusions and to give a different version of the case.[138] The probation officer then considers the defendant's remarks and modifies the PSI if necessary.[139]

Next, the probation officer calculates the defendant's sentence.[140] The officer generally starts with the "base offense level"[141] score for the offense of conviction to calculate a sentence under the Guidelines.[142] After determining the base level score, a probation officer will add or subtract levels, depending on the presence of aggravating or mitigating factors[143] and any "relevant conduct,"[144] to determine the "combined offense level."[145] The probation officer then examines the convicted offender's past criminal record to

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easily prepare a biased report to influence the sentencing judge's decision. *Id.* at 102. Furthermore, if the defendant confesses to a different offense during the interview, the probation officer may include the confession in the PSI, and the defendant may accordingly receive a more severe sentence. *Id.* at 101 (citing United States v. Colon, 905 F.2d 580, 588 (2d Cir. 1990) (holding that the defendant's confession to the probation officer could be considered relevant conduct to enhance his sentence)); United States v. Perdomo, 927 F.2d 111, 115, 117 (2d Cir. 1991) (holding that the probation officer could factor in hearsay to enhance the defendant's sentence).

137. Heaney, *Reality*, *supra* note 120, at 173.

138. *See* Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 359 (1992) (arguing that the defendant's rights are well protected in the pre-sentencing phase because the defendant has the right to notice of the prosecutor's contentions and the opportunity to rebut the probation officer's contentions). *But see* Herman, *supra* note 3, at 291-92 (arguing that the defendant's procedural rights "fade away" during sentencing).

139. Heaney, *Reality*, *supra* note 120, at 173.

140. *Id.* The probation officer now basically has to make a value judgment regarding what facts go into the PSI. *Id.* One probation officer stated: "'We don't do an independent evaluation . . . . We don't have the personnel or the resources to do an investigation, at least most times. We also interview the defendant. If there are differences, we try to resolve them. We make a value judgment . . . .'" *Id.* at n.40.

141. MANUAL, *supra* note 3, § 1B1.1(b).

142. Lear, *supra* note 3, at 1191.

143. *Id.* at 1191-92. These factors may include the following: the defendant's role in the offense (§ 3B1.1(a)-(c)), the weight of the drugs sold or attempted to be sold (§ 2D1.1(a)(3)), the vulnerability of the victim (§ 3A1.1), or the use of a firearm (§ 2A4.1(b)(3)). *Id.* at 1192.

144. *See* MANUAL, *supra* note 3, § 1B1.3. *See supra* note 3 for the text of § 1B1.3. Under § 1B1.3, the sentencing judge has to consider the relevance of a person's criminal characteristics. *See* Freed, *supra* note 20, at 1717. However, it is not clear exactly what "relevant" means. *Id.* Sentencing judges have determined that relevant conduct may include acquittal conduct, nonadjudicated conduct, criminal history (§§ 4A1.1-4A1.3), criminal livelihood (§§ 4B1.1-4B1.4) and the role in the offense (§§ 3B1.1-3B1.2). *Id.* For further discussion on the use of several types of relevant conduct in sentencing, see *infra* text accompanying notes 238-405.

145. MANUAL, *supra* note 3, § 3D1.4.

calculate the "criminal history points."[146] The probation officer next consults the sentencing grid to determine the appropriate sentencing range.[147]

The probation office must distribute copies of the PSI to the defendant, the defendant's attorney, and the prosecutor for comment at least ten days before the sentencing hearing.[148] The parties have the opportunity to object to any part of the completed PSI, including the factual recitations and Guideline applications.[149] After the waiting period and any subsequent changes to the PSI, the probation office sends the court the completed PSI for review.[150] The sentencing judge[151] can then hold a hearing to make factual determinations.[152]

At the hearing, both the prosecutor and the defense may argue against the probation officer's sentencing determination. Although the prosecutor has to present some evidence of criminal behavior to persuade the judge to enhance the defendant's sentence for relevant conduct, the prosecutor does not carry the same burden of proof as that required at trial.[153] To enhance the sentence, the prosecutor only has to prove to the sentencing judge by a preponderance of the

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146. Heaney, *Revisiting*, *supra* note 29, at 781. Criminal history points represent the defendant's prior criminal convictions. *Id.* The defendant's criminal history can be determined by assigning points to each prior sentence imposed on the defendant even if the sentence was stayed or suspended. *See also* MANUAL, *supra* note 3, § 4A1.1.

147. MANUAL, *supra* note 3, ch. 5, pt. A.

148. 18 U.S.C. § 3552(d) (1988 & Supp. 1993).

149. Heaney, *Reality*, *supra* note 120, at 173. Heaney explains that the defense commonly objects on the basis that the prosecutors cannot support the relevant conduct included in their files. *Id.* Consequently, the probation officer either verifies that the government can support the claims or the officer amends the PSI. *Id.*

150. *See generally* Probation Division, Administrative Office of the United States Courts, Presentence Investigation Reports Under the Sentencing Reform Act of 1984 (1987). If either party objects to the PSI, the probation officer will make any necessary changes and then summarize the objections that remain. *Id.* The sentencing court must resolve these disputed factual and legal issues at the hearing. *Id.*

See Heaney, *Reality*, *supra* note 120, at 174. The court usually accepts the PSI and "'[u]nless the government objects, whatever the probation officer writes down generally is adopted by the court.'" *Id.* (quoting a federal public defender).

151. The sentencing judge does not have to be the same judge who presided over the trial. Kirchner, *supra* note 36, at 802 n.34. Consequently, the sentencing judge may only be able to rely upon the PSI and the prosecutor's files to render a sentence if the judge did not conduct the trial. *Id.* Accordingly, the sentencing judge can disrupt the jury's verdict based only on the PSI by considering either acquittal or nonadjudicated conduct. *Id.*

152. MANUAL, *supra* note 3, § 6A1.3(a). However, the sentencing judge does not have to hold a complete evidentiary hearing. United States v. Prescott, 920 F.2d 139, 144 (2d Cir. 1990). *See also* Heaney, *Reality*, *supra* note 120, at 174 (noting that sentencing courts rarely hold evidentiary hearings to rectify factual disputes between the parties).

153. For a discussion of the prosecutor's burden of proof at the sentencing hearing, see *infra* text accompanying notes 230-37.

evidence that the defendant committed additional offenses.[154] Furthermore, although the defendant may dispute certain allegations, the defendant is not entitled to a full evidentiary hearing to resolve the disputes.[155]

If the sentencing judge determines that certain factors exist that the Sentencing Commission failed to take into account when it promulgated the Guidelines, the sentencing judge may depart from the Guidelines pursuant to section 4A1.3 or section 5K1.[156] However, a prosecutor can usually successfully challenge the judge's departure decision through the appeal process.[157] In fact, prosecutors challenge most district court departures from the Guidelines.[158]

2. Judicial Departure

In certain cases, sentencing judges have the power and flexibility to depart from the mechanistic Guidelines to account for factors[159] that the Sentencing

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154. Herman, *supra* note 3, at 307. The defendant's constitutional protections abate at the sentencing hearing. *Id.* To hold the prosecutor to only a preponderance of the evidence standard at the hearing "assumes that there is a material difference between conviction . . . and sentencing." *Id.* at 307-08.

155. Lear, *supra* note 3, at 1203. Under § 6A1.3(a), the defendant only has an "adequate opportunity to present evidence to the court regarding [any] disputed sentencing factors." *Id.* at 1203 n.117. Sentencing judges have more discretion at the hearing regarding any evidentiary problems that they may or may not choose to exercise. *Id.* *See also supra* note 152.

156. MANUAL, *supra* note 3, § 4A1.3. This section provides in part:

> If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range . . . . [Also,] [t]here may be cases where the court concludes that a defendant's criminal history category significantly overrepresents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes . . . . [T]herefore [the court may] consider a downward departure from the guidelines.

Id. *See also infra* note 159 and accompanying text.

157. Curtis, *supra* note 43, at 612 (stating that the prosecutor can easily challenge the judge's decision to depart); *see* Zipperstein, *supra* note 50, at 633.

158. Conversely, defendants may also challenge sentencing judges' decisions to depart. Indeed, a defendant may challenge an upward departure. Zipperstein, *supra* note 50, at 633. However, defendants usually cannot successfully challenge sentencing judges' decisions to adhere to the Guidelines. *Id.*

159. MANUAL, *supra* note 3, ch. 5. These factors may include the following: (1) substantial assistance to authorities (§ 5K1.1); (2) refusal to assist (§ 5K1.2); (3) death of a victim (§ 5K2.1); (4) physical injury to a victim (§ 5K2.2); (5) extreme psychological injury to a victim (§ 5K2.3); (6) abduction or unlawful restraint of a victim (§ 5K2.4); (7) property damage or loss (§ 5K2.5); (8) the use of weapons and dangerous instrumentalities (§ 5K2.6); (9) disruption of a governmental function (§ 5K2.7); (10) the defendant's extreme conduct (§ 5K2.8); (11) the defendant's criminal purpose (§ 5K2.9); (12) the victim's conduct (§ 5K2.10); (13) lesser harms by the defendant (§ 5K2.11); (14) coercion and duress (§ 5K2.12); (15) the defendant's diminished capacity (§ 5K2.13);

Commission never considered when it promulgated the Guidelines.[160] Indeed, when Congress wrote the SRA, it contemplated judicial departure in cases where blind adherence to the Guidelines would result in unjust individual sentences.[161] Therefore, while the Guidelines do effectively strip a district court judge of most of the sentencing discretion, a safety valve exists in section 4A1.3(e) of the Guidelines for judicial discretion and upward departure for prior, nonconvicted criminal conduct.[162] The sentencing judge must prove that the Sentencing Commission did not adequately consider certain "aggravating and mitigating circumstances" in order to properly depart from the Guidelines.[163]

However, Congress intended that sentencing courts generally adhere to,

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(16) endangerment to public welfare (§ 5K2.14); (17) terrorism by the defendant (§ 5K2.15); and (18) the defendant's voluntary disclosure of the offense (§ 5K2.16). *Id.*

Further, under § 5K2.0, the sentencing judge has latitude, pursuant to 18 U.S.C. § 3553(b), to consider other factors that are not listed in the MANUAL. *Id.* § 5K2.0. However, the MANUAL does not delineate what these factors are. *Id.* This section of the Guidelines grants power to the sentencing judge to determine if special factors warrant departure. Also, § 5K2.0 requires the sentencing judge to clearly state the reason for departure so that a reviewing appellate court can determine if departure was warranted. *Id.*

160. Schulhofer, *supra* note 69, at 789-90.

161. 28 U.S.C.S. § 991(b)(1)(B) (1988 & Supp. V 1993). This section states that the main purpose of the Sentencing Commission is to create sentencing policies that "[avoid] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices . . . ." *Id.*

See also 18 U.S.C. § 3553(b) (1988). This section grants a sentencing court the power to depart if "[t]he court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *Id.*

162. MANUAL, *supra* note 3, § 4A1.3(e). This section provides that a sentencing judge may depart in instances where the defendant's criminal history "does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." *Id.* § 4A1.3. The judge may consider any "prior similar adult criminal conduct not resulting in a criminal conviction." *Id.* § 4A1.3(e). Accordingly, the sentencing judge may depart upward or downward, depending on the nature of the defendant's criminal history.

163. 18 U.S.C. § 3553(b) (1988). If a judge grants a sentence that differs from the one prescribed under the Guidelines, the sentencing judge must state the specific reasons for sentencing outside of the Guidelines. *Id.* § 3553(c)(2). *See also* Freed, *supra* note 20, at 1699. To depart from the Guidelines, the sentencing judge must prove that the Commission inadequately considered certain factors when it formulated its Guidelines. *Id.*

However, the Guidelines do prohibit departure on certain grounds. A sentencing judge cannot depart based on race, sex, national origin, creed, religion, or socio-economic status. MANUAL, *supra* note 3, § 5H1.10. A judge cannot depart based on the defendant's drug dependence or alcohol abuse. *Id.* § 5H1.4. Further, pursuant to § 4A1.3, a sentencing judge cannot depart based on the defendant's prior arrest record. *Id.* Finally, a judge cannot depart based on the defendant's personal financial difficulties and economic pressures upon a trade or business. *Id.* § 5K2.12.

rather than depart from, the Guidelines.[164] Accordingly, judicial departures are regarded as "highly suspect" and a "sign of disloyalty to the Guidelines or some flaw in their implementation."[165] Indeed, the United States Code does not specifically provide jurisdiction to appeal a sentencing court's refusal to depart from the Guidelines.[166] However, the United States Code does provide jurisdiction to appeal a sentencing court's decision to depart.[167] Therefore, most appellate courts will only scrutinize those sentencing decisions that depart from the Guidelines.[168]

Prosecutors can also effectuate departure under section 5K1.1 of the Guidelines.[169] Pursuant to this section, prosecutors have the power to move the court to depart downward[170] if they believe that the defendant substantially assisted in the investigation or prosecution of another.[171] Because section 5K1.1(a) grants broad, uncircumscribed, and arguably subjective power to all federal prosecutors without defining what constitutes "substantial assistance,"

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164. S. REP. NO. 225, *supra* note 6, at 3333.

165. Weis, *supra* note 3, at 825. There is no concrete evidence of this attitude, but there is an assumption in the courts, the Department of Justice, and the Commission itself that departures threaten the system. *Id.* However, "[t]he truth is just the reverse: departures are essential for the vitality of the Guidelines system." *Id.*

166. Zipperstein, *supra* note 50, at 633.

167. *See supra* notes 160-62 and accompanying text.

168. *See generally* Zipperstein, *supra* note 50 (reviewing the different standards that appellate courts use to review sentencing decisions).

169. MANUAL, *supra* note 3, § 5K1.1. This section provides in part: "*Upon motion of the government* stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." *Id.* § 5K1.1(a) (emphasis added).

But see Wade v. United States, 112 S. Ct. 1840 (1992). In *Wade*, the Supreme Court held that the courts "have the authority to review the Government's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive," such as "race or religion." *Id.* at 1844. However, if the defendant merely claims that he or she provided substantial assistance, the defendant is not automatically entitled to a remedy, discovery, or even an evidentiary hearing. *Id.* Accordingly, the courts may not override a prosecutor's refusal if the prosecutor rationally assessed the costs and benefits before refusing to motion the court. *Id.*

Since the *Wade* decision, the lower federal courts have continued to defer to the government's refusal to motion. *See, e.g.*, United States v. Mercedes-Amparo, 980 F.2d 17 (1st Cir. 1992) (upholding the prosecutor's right to refuse to motion the court to depart downward for substantial assistance); United States v. Smith, 953 F.2d 1060 (7th Cir. 1992) (refusing to review whether prosecutor acted in bad faith in refusing to move for downward departure for the defendant's substantial assistance claim).

170. *See supra* note 30.

171. *But see* Thomas E. Zeno, *A Prosecutor's View of the Sentencing Guidelines*, 55 FED. PROBATION 31, 35 (December 1991). In Washington, D.C., prosecutors are not allowed to motion the court without the approval by the Departure Committee. *Id.* Further, the Justice Department recommends that only supervisors or a senior prosecutor should have the power under § 5K1.1 to file a substantial assistance motion. *Id.* However, the Guidelines have not been amended to clarify exactly who has the power, and the confusion persists. *Id.*

disparity results.[172] Thus, under section 5K1.1(a), prosecutors have more power to depart under the Guidelines than do sentencing judges.

Moreover, under section 3E1.1 of the Guidelines,[173] a prosecutor has the power to move the court to depart after the plea bargaining negotiations.[174] Section 3E1.1 allows the sentencing judge to depart downward two offense levels if the defendant accepts responsibility for the offense by pleading guilty.[175] However, the defendant's guilty plea does not automatically warrant a departure for acceptance of responsibility.[176] The prosecutor ultimately decides if the defendant has accepted responsibility before moving the court to depart.[177] Further, a reviewing appellate court does not have to defer to the sentencing court's decision to depart based on acceptance of responsibility.[178] Therefore, because the language of section 3E1.1 is ambiguous, defendants may plead guilty and give up their right to a jury trial without receiving any points for acceptance of responsibility.[179]

If the sentencing judge departs from the Guidelines, the prosecutor can easily challenge the departure.[180] If the prosecutor chooses to challenge the

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172. *Id.* Zeno argues that sentencing judges can easily rectify any abuse of discretion because they ultimately decide whether to grant the motion. *Id. But see* Freed, *supra* note 20, at 1712. A number of district judges have argued that Congress did not authorize a prosecutorial motion requirement for substantial assistance departures under 28 U.S.C. § 994(n) (1988). *Id.* (citing the Sentencing Institute of the Second and Eighth Circuits in Lexington, Kentucky, on March 1-4, 1992). Moreover, the judges argued that § 5K1.1 "reversed prior practice under which district judges, not U.S. Attorneys, exercised discretion to decide whether or not to reduce a sentence based on . . . assistance." *Id.*

173. MANUAL, *supra* note 3, § 3E1.1.

174. *Id. See also* Freed & Miller, *supra* note 132, at 178 (asserting that § 3E1.1 "is the Commission's version of a guilty plea discount, though not in so many words").

175. MANUAL, *supra* note 3, cmt. at 294. The commentary lists several factors to determine whether the defendant accepted responsibility for the offense or offenses. Basically, if the defendant candidly and truthfully admits the offense comprising the conviction and any relevant conduct, the defendant satisfies the burden and receives a two level decrease. *Id.*

Some commentators and judges have criticized this Guidelines provision because it entices guilty pleas in exchange for offense level reductions. *See, e.g.*, Freed & Miller, *supra* note 132, at 179 (stating that the prosecutor will attempt to get the defendant to plead guilty to avoid the high burden of proof standard at trial); United States v. Escobar-Mejia, 915 F.2d 1152, 1153 (7th Cir. 1990) (Easterbrook, J.) (arguing that "'acceptance of responsibility' is in most cases a thinly disguised reduction for pleading guilty, a lure the prosecutor and the court may dangle for saving them the time and risk of trial").

176. Freed & Miller, *supra* note 132, at 179.

177. *Id.*

178. *Id.* (noting that the Commission amended the Guidelines' language in 1990 to delete the sentence instructing appellate courts that "the determination of the sentencing judge is entitled to great deference on review and should not be disturbed unless it is without foundation").

179. *Id.*

180. Freed, *supra* note 20, at 1736.

district court's departure, the appellate court may reverse the sentencing decision on the policy grounds that the Guidelines are a statutory remedy to the national sentencing disparity.[181] Also, if the sentencing court departs, the appellate court defers to the sentencing court's fact-finding unless it is clearly erroneous.[182] Although the clearly erroneous standard is deferential, the sentencing court's fact-finding is generally based upon the PSI, which the probation officer almost always compiles solely from the prosecutor's information.[183] Moreover, if the court departs from the Guidelines, the appellate court will review the decision under an abuse of discretion standard.[184] However, some appellate courts will review a sentencing court's decision under a de novo standard.[185]

Congress intended that appellate courts would play a key role in decreasing disparity in the sentencing process.[186] According to the Sentencing Commission, appellate courts could enforce the correct application of the Guidelines, control judicial departure, and develop precedent to guide district courts in dictating consistent sentences.[187] However, the Sentencing Commission never clarified the appellate procedure for reviewing a sentencing court's decision not to depart from the Guidelines.[188] Indeed, if a sentencing court does not depart, most appellate courts will not assume jurisdiction and will

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181. *Id.* at 1737. Freed laments that appellate courts may reverse sentencing departures even when the district court departed to ensure that codefendants received the same sentence where strict adherence to the Guidelines would produce different results. *Id.* To support his view, Freed cites to the following cases: United States v. Wogan, 938 F.2d 1446, 1447-48 (1st Cir.) (reversing the district court's departure from the Guidelines), *cert. denied*, 112 S. Ct. 441 (1991); United States v. Carr, 932 F.2d 67, 73 (1st Cir. 1991) (reversing the district court's departure from the Guidelines because the lower court did not adequately prove its reasons for departure).

182. Freed, *supra* note 20, at 1698 (contending that a more intrusive standard of review would undermine the Sentencing Commission's goals). *See also* Zipperstein, *supra* note 50, at 634 (asserting that the appellate courts should give ample discretion to the sentencing courts' findings).

183. *See supra* notes 135-36 and accompanying text.

184. Zipperstein, *supra* note 50, at 638. The abuse of discretion standard gives the appellate courts control over the sentencing courts' decision to guarantee compliance with the Guidelines. *Id.*

185. *See, e.g.*, United States v. Inigo, 925 F.2d 641 (3d Cir. 1991) (using a de novo standard to review the sentencing court's decision to use a certain guideline in the decision); United States v. Ballard, 919 F.2d 255 (5th Cir. 1990) (applying a de novo standard to grouping rules under the multiple-count adjustment); United States v. Gross, 897 F.2d 414 (9th Cir. 1990) (reviewing de novo whether a defendant's prior conviction could be counted as criminal history). *But see* United States v. Mejia-Orosco, 867 F.2d 216 (5th Cir. 1989), *modified*, 868 F.2d 807 (5th Cir. 1989) (holding that Congress intended that the appellate courts would defer to the sentencing courts' departure determinations).

186. Zipperstein, *supra* note 50, at 626.

187. *Id.*

188. *Id.*

deny review of the district court's decision.[189] Accordingly, while a prosecutor can easily challenge a sentencing court's departure, a defendant cannot challenge the court's adherence to the Guidelines.

III. THE PROSECUTOR'S ROLE IN THE SENTENCING PROCEEDINGS

While the Sentencing Commission focused more on judges as the source of sentencing disparity, this Note argues that federal prosecutors also perpetuate disparity in the sentencing system, because of both the large amount of discretion they wield and their role in the sentencing process.[190] Although the Sentencing Commission intended to eradicate disparity in sentencing when it limited sentencing judges' discretion,[191] the Commission's Guidelines have actually perpetuated the problem by shifting that discretion to prosecutors.[192]

Because the prosecutor is the government's advocate in the sentencing hearing, it is more dangerous for the prosecutor to have this discretion than the neutral sentencing judge. Further, regarding the use of acquittal conduct and nonadjudicated conduct, the prosecutor has essentially assumed the judge's role in sentence determinations.[193] Under section 1B1.3, the prosecutor has tremendous discretion to present this conduct solely for sentence enhancement, only to later reprosecute the defendant for the same conduct.[194] In contrast, the judge has limited ability to depart from the Guidelines.[195] Consequently, the prosecutor has become the predominant figure in sentencing because the

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189. *See, e.g.*, United States v. Porter, 924 F.2d 395 (1st Cir. 1991); United States v. Davis, 919 F.2d 1181 (6th Cir. 1990); United States v. Dean, 908 F.2d 215 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2801 (1991); United States v. Tillem, 906 F.2d 814 (2d Cir. 1990).

190. *See generally* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 7.1 (1993). A prosecutor has traditionally exercised tremendous power over the plea bargaining process. *Id.* at § 7-2. Under the Guidelines, the prosecutor's power is enhanced during the plea bargaining process because of the extreme inflexibility of the Guidelines. *Id.* at § 7-3. *See also* Alschuler, *supra* note 128 (arguing that the Guidelines shifted the locus of discretion from the judges to the prosecutors).

191. However, under the Guidelines, the executive branch controls prosecutorial discretion, while the Sentencing Commission is an agency of the judicial branch. Nagel, *supra* note 10, at 936. Therefore, the Sentencing Commission cannot order a United States Attorney to charge certain counts, because prosecution is exclusively an executive function. *Id.* at 936 n.277. A federal prosecutor can circumvent the Guidelines, and the Sentencing Commission cannot do anything to stop it. *Id.*

192. GERSHMAN, *supra* note 190, §§ 12-16.2 (citing United States v. Greener, 979 F.2d 517 (7th Cir. 1992)). Gershman notes that the Guidelines have reshaped the federal criminal process in such areas as plea bargaining, timeliness, and sentencing. *Id.*

193. *Id.* *See also infra* notes 268-398 and accompanying text (discussing the use of acquittal conduct and nonadjudicated conduct).

194. *See* United States v. Caceda, 990 F.2d 707, 709 (2d Cir. 1993) (holding that the sentencing judge should not consider the possible outcome of subsequent prosecutions for nonadjudicated conduct used for sentence enhancement).

195. *See supra* text accompanying notes 108, 156-68, 180-89.

prosecutor can influence a defendant's sentence through the following interrelated functions: (1) the charging decision; (2) the plea bargaining process; (3) the PSI; and (4) the sentencing hearing.

A. The Charging Decision

Prosecutors have traditionally decided "whether and when to prosecute, which offenses to charge, and whether to offer a plea bargain,"[196] while judges decided on the sentences. However, under the Guidelines, the Sentencing Commission, in its pursuit of uniformity, essentially emasculated judges' sentencing power by severely reducing their sentencing discretion.[197] Moreover, the prosecutors' discretion and power over sentencing issues increased.[198] The prosecutor can now undermine the grand jury's role in the charging decision.[199] While the United States Attorney General's office has directed federal prosecutors to charge a defendant with the most serious, provable offense or offenses,[200] prosecutors may still manipulate the system through the charging decision.[201]

Specifically, the prosecutor can undermine the grand jury's role in the proceeding under the real offense system by not allowing the grand jury the opportunity to listen to and investigate all of the defendant's conduct in the pre-indictment proceedings.[202] Indeed, under the Guidelines, the prosecutor will deliberately reserve evidence and not pursue an indictment from the grand jury for additional charges.[203] Pursuant to section 1B1.3 of the Guidelines, the prosecutor can later offer the same evidence at the sentencing hearing to enhance

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196. Heaney, *Revisiting*, *supra* note 29, at 774.

197. *Id.*

198. *Id.* Heaney asserts that prosecutors exert their power "behind closed doors" with neither "public scrutiny nor judicial review." *Id.* *See also* Zeno, *supra* note 171, at 32 (noting that prosecutors have discretion in charging decisions and may "introduc[e] unwarranted disparity into the system by charging one defendant less severely than another, for reasons decided upon solely by the prosecutor").

199. *See* Lear, *supra* note 3, at 1229 n.240 (contending that the prosecutor can bypass grand jury review by the initial charging decision).

200. *See* Thornburgh Memorandum, *supra* note 126.

201. *See* Lear, *supra* note 3, at 1229.

202. *Id.* Lear describes the grand jury as the "shield" between the government and the defendant because it can refuse to indict if the government does not provide sufficient or just evidence. *Id.* The grand jury also acts like a "sword" because it operates as an investigatory body in the case. *Id.* at 1229 n.240 (citing WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 21.1, 246 (student ed. 1985)).

203. *Id.* at 1229.

the defendant's sentence.[204] The prosecutor not only deprives the grand jury of the chance to investigate the evidence, but the prosecutor also prevents the petit jury from ruling on it during the trial.[205] Also, the indictment does not adequately inform the defendant of what criminal activity may be relevant for trial and sentencing purposes.[206]

The prosecutor will initially charge minor, easily provable offenses, even if the defendant has committed more serious offenses, in order to escape any burden of proof problems at trial.[207] Under section 1B1.3, the prosecutor can then introduce the more serious offenses during the sentencing hearing without having to prove the defendant's guilt to the jury beyond a reasonable doubt.[208] Alternately, if the parties engage in plea bargaining, the prosecutor may either charge lesser offenses or offer to dismiss charges in order to induce the defendant to plead guilty.[209]

B. The Plea Bargaining Process

The real offense system is vulnerable to manipulative plea bargaining because of the tension between plea bargaining and the Guidelines.[210] The Guidelines have augmented prosecutors' power and immunized plea bargaining in the sentencing process.[211]

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204. *Id.* The grand jury may have granted an indictment for these reserved charges if the prosecutor had presented them. *Id.* Conversely, the grand jury may have declined to indict the defendant. *Id.* In that case, the Guidelines do not prevent the prosecutor from raising conduct under § 1B1.3, for which the grand jury originally declined to indict the defendant. *Id.*

205. Lear, *supra* note 3, at 1229.

206. *Id.*

207. *Cf.* Zeno, *supra* note 171, at 34 (noting that this is an exaggerated fear and thus is unlikely to occur).

208. *See* MANUAL, *supra* note 3, § 6B1.2(a).

209. *Id.*

210. *See* Yellen, *supra* note 21, at 419. Yellen explains that the parties who engage in plea bargaining obviously do not share the sentencing reformers' goal of reducing unwarranted sentence disparity. *Id.* A defendant wants to be considered individually in order to receive a lighter sentence than a similarly situated offender. *Id.* at 420. *See also* Schulhofer & Nagel, *supra* note 25, at 238 (asserting that prosecutors have sometimes agreed to manipulate the Guidelines through plea bargaining because they want to maximize their conviction rate, but not necessarily maximize the severity of the sentences that they obtain).

211. Alschuler, *supra* note 128, at 926. Alschuler maintains:

> Sentencing guidelines masquerade as the sentencing commission's determination of appropriate penalties. In reality, the guidelines are bargaining weapons—armaments that enable prosecutors, not the sentencing commission, to determine sentences in most cases. In operation, the guidelines do not set sentences; they simply augment the power of the prosecutors to do so.

Id.

> At least one federal judge has held that plea bargaining under the Guidelines violates a

In the plea bargaining process, the defendant wants to be considered individually and will enter into a plea agreement only if properly induced.[212] The prosecutor can manipulate the system as early as the preindictment phase by plea bargaining before there is even a formal indictment.[213] In fact, prosecutors in several districts contend that they have "almost complete autonomy at the preindictment charging stage; approval is not sought until the indictment is returned."[214] It is difficult to ascertain what goes on at this stage because the conviction charges may be completely different from the indictment charges.[215] Accordingly, some defendants delay entering a guilty plea until they receive the indictment.[216]

Further, under the Guidelines, defendants are more reluctant to enter into a plea agreement with the prosecutor because the presumptive sentence may not be significantly altered by dismissing one of the counts.[217] Defendants are

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defendant's rights under the Fifth Amendment's Due Process Clause. United States v. Redondo-Lemos, 754 F. Supp. 1401, 1403 (D. Ariz. 1990) (Marquez, J.). The court reasoned that prosecutors enjoy "unfettered discretion" under the Guidelines while judges have much less discretion. *Id.* at 1406. Further, the court noted the disparity engendered by the current plea bargaining process, whereby defendants plead guilty for vastly different charges involving relatively the same conduct. *Id.* at 1403.

212. For a comparison of plea bargaining to the "good cop, bad cop" police interrogation practice, see Alschuler, *supra* note 128, at 928. While the Guidelines mandate "tough" sentences, plea bargaining is unconstrained. *Id.* According to Alschuler, the Sentencing Commission is the "bad cop," while the prosecutor is the "good cop." *Id.* The Sentencing Commission threatens the defendant with severe punishment under the Guidelines, while the prosecutor agrees to protect the defendant from punishment. *Id.* However, the prosecutor's price is the defendant's agreement to abandon the right to trial. *Id.* Therefore, "[s]ubstantial sentencing discretion remains except for those defendants who claim the right to their day in court." *Id.*

213. Nagel & Schulhofer, *supra* note 24, at 516.

214. *Id.*

215. *Id.* *But see* MANUAL, *supra* note 3, at Highlights of the 1993 Amendments. Amendment 495 to § 6B1.2 adds to the commentary of § 6B1.2 a provision that requires prosecutors "to disclose to the defendant 'the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines." *Id.* However, the Sentencing Commission "expressly disclaim[ed] that this language confers any right upon the defendant.'" *Id.*

216. Zeno, *supra* note 171, at 34.

217. Yellen, *supra* note 21, at 420. In the indeterminate, charge-offense system, the offense of conviction determined the defendant's sentence. *Id.* The prosecutor could offer to drop certain charges in exchange for the defendant's guilty plea to the convicted offense. *Id.* Accordingly, the defendant would receive a significant reduction in the sentence, equal to the difference between the sentence for the dropped charge and that for the convicted offense. *Id.* The prosecutor could encourage the defendant to plead guilty because the prosecutor could determine the ultimate sentence by reducing or dropping charges. *Id.* at 420.

See U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 48 (1987). Before the Guidelines, defendants who pled guilty received sentences 30-40% lower than defendants who were convicted at trial. *Id.* *But see* MANUAL, *supra* note 3, § 6B1.2(a). Under § 6B1.2(a) and § 1B1.3 of the Guidelines, the

hesitant to plead guilty in exchange for the prosecutor's agreement to drop a count in the indictment because the prosecutor can still introduce the count as relevant conduct at sentencing.[218] Because the Guidelines provide a rigid point and offense-level matrix for sentence determination, the sentencing judge does not automatically evaluate the defendant's individual circumstances on a case-by-case basis.[219] Additionally, under the Guidelines, the judge's departure powers are limited.[220] Moreover, under section 1B1.3 of the Guidelines, the prosecutor can later persuade the sentencing judge to enhance the defendant's sentence based on a dismissed or dropped charge.[221] For example, the defendant may enter into a plea agreement with the prosecutor to drop a charge, then the prosecutor may later introduce the charge as relevant conduct.[222] Finally, if the parties agree to a particular offense level in the plea agreement, the defendant may not revoke the plea later even if the sentencing court would impose a much lower level sentence absent the agreement.[223]

C. *The PSI*

The prosecutor is the gatekeeper of the information that ultimately comprises the PSI because probation officers generally do not conduct independent research.[224] Therefore, the PSI reflects what the prosecutor has

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prosecutor is almost encouraged to introduce these dropped or dismissed counts to enhance the defendant's sentence. Accordingly, defendants who plead guilty under the Guidelines do not get the same sentence reductions as their pre-Guidelines counterparts.

218. *See* MANUAL, *supra* note 3, § 6B1.2(a).

219. *But see* MANUAL, *supra* note 3, § 5K1.1 (providing that the prosecutor evaluates the defendant's individual case to determine if the defendant substantially assisted in the prosecution to warrant a downward departure); *see also* § 3E1.1 (stating that the prosecutor can analyze the defendant's case to determine whether to motion the court to depart downward on the ground of acceptance of responsibility).

220. *See supra* text accompanying notes 159-68, 180-89.

221. *See, e.g.*, United States v. Pimentel, 932 F.2d 1029 (2d Cir. 1991); People v. Farrar, 419 N.E.2d 864 (N.Y. Ct. App. 1981). *But see* State v. Warren, 558 A.2d 1312 (N.J. 1989) (holding that the prosecutor may not withdraw from a plea agreement if the court imposes a sentence more lenient than the one the prosecutor agreed to recommend).

222. *See, e.g.*, United States v. Scroggins, 880 F.2d 1204, 1213 (11th Cir. 1989) (holding that a defendant may be sentenced for charges that the prosecutor dropped in exchange for a plea agreement under § 1B1.3), *cert. denied*, 494 U.S. 1083 (1990).

223. Nagel & Schulhofer, *supra* note 24, at 518. *See also* Yellen, *supra* note 21, at 403 (acknowledging that defendants who plead guilty lose the supposed benefit of their bargain due to both the operation of the guidelines and strict limitations on the withdrawal of guilty pleas); David N. Yellen, *Should Judges Take Seriously the Sentencing Commission's Standards for Accepting Plea Agreements?*, 3 FED. SENTENCING REP. 216 (1991) (asserting that defendants do not receive what they bargain for under the Guidelines because of manipulative plea bargaining).

224. *See supra* notes 135-39 and accompanying text for a discussion of the presentence investigation report.

in the government's files.[225] If the prosecutor and the defendant reach an agreement during the plea bargaining process, the agreement should reflect the seriousness of the offense.[226] Further, under section 6B1.1(c) of the Guidelines, the sentencing judge is supposed to review the PSI before accepting the plea agreement to make sure that the report comports with the agreement.[227] However, many judges do not comply with these procedures and may never read the PSI before the parties finalize the agreement.[228] Moreover, the defendant cannot withdraw the plea even if the judge later determines that the defendant deserved a much shorter sentence.[229]

D. The Sentencing Hearing

In section 6A1.3, the Sentencing Commission states that prosecutors can prove, by a preponderance of the evidence, any of the defendant's alleged conduct at the sentencing hearing without violating the defendant's due process rights.[230] Indeed, most of the circuits have agreed that the prosecutor only has to prove section 1B1.3 relevant conduct by a preponderance of the evidence.[231] The preponderance of the evidence standard for acquittal conduct and uncharged offenses permits a prosecutor to easily persuade the sentencing judge to enhance the defendant's sentence.[232]

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225. Heaney, *Reality*, *supra* note 120, at 168-69.

226. *See generally* Yellen, *supra* note 21.

227. MANUAL, *supra* note 3, § 6B1.1(c) ("The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1.").

228. *See* Heaney, *Reality*, *supra* note 120, at 174.

229. *See Id.*

230. MANUAL, *supra* note 3, § 6A1.3, cmt. at 373.

231. *See infra* note 232 and accompanying text.

232. *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986), where the Supreme Court held that the Pennsylvania state legislature could pass a mandatory minimum sentencing act to supplement its indeterminate sentencing scheme. *Id.* at 91. The Act required a sentencing judge to impose a mandatory minimum sentence of five years on any defendant whom the judge found, by a preponderance of the evidence, to have possessed a gun during the commission of any one of a list of enumerated felonies. *Id.* at 81-82 & n.1. The *McMillan* Court then held that the state statutory provision allowing findings at the sentencing phase, to be made using the preponderance of the evidence standard, was constitutionally acceptable. *Id.* at 91. However, the *McMillan* decision addressed the burden of proof standard in the context of a state indeterminate sentencing scheme. *See* Herman, *supra* note 3, at 337.

While the Supreme Court has never ruled on the standard of proof under the Guidelines, many lower federal courts have upheld the *McMillan* preponderance of the evidence standard at sentencing hearings. *See, e.g.*, United States v. Manor, 936 F.2d 1238 (11th Cir. 1991); United States v. Salmon, 948 F.2d 776 (D.C. Cir. 1991); United States v. Macklin, 927 F.2d 1272 (2d Cir.), *cert. denied*, 112 S. Ct. 146 (1991); United States v. Smith, 918 F.2d 664 (6th Cir. 1990), *cert. denied*, 498 U.S. 1125 (1991); United States v. Dyer, 910 F.2d 530 (8th Cir.), *cert. denied*, 111 S. Ct. 276 (1990); United States v. Restrepo, 903 F.2d 648 (9th Cir. 1990); United States v. Reid, 911 F.2d

Again, to avoid any potential burden of proof problems at trial, prosecutors will initially charge minor, easily provable offenses.[233] The prosecutor can then introduce additional, more serious offenses during the sentencing hearing without having to prove guilt beyond a reasonable doubt.[234] Accordingly, a defendant may ultimately serve an additional sentence despite never having been convicted by the jury for the unadjudicated conduct or, in the case of acquittal conduct, for conduct that was found nonviolative of the law.[235] While some circuit courts hold that the prosecutor should have to prove the relevant conduct under a clear and convincing standard of proof to satisfy due process,[236] the use of the preponderance of the evidence standard continues causing many defendants to suffer.[237]

IV. REAL OFFENSE SENTENCING

Under the Guidelines, the lynchpin of the real offense system is section 1B1.3, the relevant conduct provision.[238] Prosecutors use section 1B1.3 to introduce both acquittal and nonadjudicated conduct as related offenses at the sentencing hearing.[239] However, the prosecutors' use of section 1B1.3 implicates serious due process issues, including the following: (1) adequate notice of the charges by indictment or information; (2) the standard of proof employed with respect to uncharged conduct; and (3) the right to a jury trial with respect to uncharged conduct.[240] Finally, severe constitutional violations may also occur when the prosecutor attempts to reprosecute the defendant for conduct that the prosecutor introduced, exclusively for enhancement purposes, at a previous sentencing hearing.

1456 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 990 (1991); United States v. Wright, 873 F.2d 437 (1st Cir. 1989); United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989). However, at least one court has recommended that the prosecutor prove by a clear and convincing standard of proof that the defendant committed the new, unadjudicated offense. *See* United States v. Kikumura, 918 F.2d 1084, 1101 (3d. Cir. 1990).

233. *Cf.* Zeno, *supra* note 171, at 34.

234. *Id.*

235. Kirchner, *supra* note 36, at 804-05.

236. Moreover, many commentators argue that the prosecutor should have to prove the defendant's guilt by clear and convincing evidence. *See* Heaney, *Reality*, *supra* note 120. However, some argue that the prosecutor should be held to the higher standard of proof beyond a reasonable doubt. *See* Herman, *supra* note 3, at 289 (contending that the defendant has the right under the Due Process Clause to demand that the prosecutor prove the defendant's guilt beyond a reasonable doubt) (citing *In re* Winship, 397 U.S. 358 (1970)).

237. *See* Lear, *supra* note 3; Reitz, *supra* note 3.

238. Heaney, *Reality*, *supra* note 120, at 210-11 (citing William W. Wilkens & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 497 (1990)).

239. *Id.* at 210.

240. *Id.* at 208.

Under the real offense sentencing system, sentencing judges replace the jury as the ultimate "fact-finder."[241] At the sentencing hearing, the sentencing judge not only considers the convicted crime, but also must determine additional punishment for unadjudicated charges, acquittal charges, and any other relevant conduct that the prosecutor decides to introduce.[242] Moreover, the prosecutor only has to prove by a preponderance of the evidence that the defendant is guilty of the other charges.[243] Thus, the originally convicted crime can be transmuted into a more serious offense, and the sentencing judge will impose a more severe sentence than the defendant would have received based on either the jury's conviction or a previous plea agreement.[244]

Proponents of the Guidelines have argued that the Guidelines have infused uniformity in federal sentencing.[245] However, under section 1B1.3, the Sentencing Commission has perpetuated, rather than eliminated, sentencing disparity.[246] For example, assume that two defendants, *X* and *Y*, are on trial for the same type of offense, a child kidnapping.[247] The prosecutor only charged each for kidnapping in the initial charging decision. The petit jury subsequently finds that the defendants each committed the kidnapping beyond a reasonable doubt. However, during *X*'s sentencing hearing, the prosecution proves by a preponderance of the evidence that *X* also assaulted the child during

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241. Lear, *supra* note 3 (stating that the jury's role as fact-finder is subverted in the sentencing hearing).

242. Reitz, *supra* note 3, at 524 (asserting that the sentencing judge imposes a sentence for everything, including nonconvicted offenses and acquittal conduct).

243. *See supra* note 232 and accompanying text.

244. Reitz, *supra* note 3, at 524.

245. *See* Tjoflat, *supra* note 3, at 4 (contending that the Guidelines provide uniformity and consistency); Kleinfeld, *supra* note 3, at 17 (maintaining that the Guidelines allow a judge to sentence predictably); Wilkins, *supra* note 11, at 795 (arguing that the Guidelines have eradicated the disparity that existed under the indeterminate scheme).

246. Several commentators criticize the Sentencing Commission's decisions to limit judicial discretion and place so much emphasis on the offense rather than the actual offender. *See* Freed, *supra* note 20; Heaney, *Revisiting*, *supra* note 29.

For a good example of the inequities produced under the Guidelines in federal drug cases, see Heaney, *Revisiting*, *supra* note 29, at 778-79. Judge Heaney explains how the Guidelines place more emphasis on the weight of the mixture or substance with which the drug is combined, rather than on the actual controlled substance involved in the offense. *Id.* For example, LSD is not sold in pure form. *Id.* at 779. LSD can come in gelatin capsules, blotter paper, or sugar cubes. *Id.* Under the Guidelines, a first offender could receive between 10 to 16 months imprisonment for selling 100 grams of pure LSD. *Id.* If the defendant uses gelatin capsules for a medium, the defendant could receive 27 to 33 months imprisonment because of the additional weight. *Id.* If the defendant uses blotter paper, the sentencing range is 63 to 78 months. *Id.* Finally, if the defendant uses sugar cubes, the sentencing range increases dramatically to 188 to 235 months. *Id.* Therefore, two different defendants with identical criminal histories could receive Guidelines sentences which differ by 18 years, depending on the carrier medium. *Id.*

247. MANUAL, *supra* note 3, § 2A4.1(b)(6) (pertaining to child kidnapping).

the kidnapping.[248] Consequently, *X* receives a greater sentence than *Y* even though *X* was never convicted by the jury for assault.[249] Although the jury found both *X* and *Y* guilty of the same crime, the prosecution was able to introduce nonadjudicated conduct,[250] as relevant conduct under section 1B1.3, to substantially increase *X*'s sentence without having to prove beyond a reasonable doubt that *X* assaulted the victim.[251]

Under section 1B1.3, the real offense sentencing system authorizes practices that encroach upon both a defendant's right against reprosecution or multiple prosecution and the defendant's right to due process at the sentencing hearing.[252] Because of the complex, mechanical sentencing guidelines, an individual may suffer the loss of some due process rights.[253] Under the Guidelines' relevant conduct provisions,[254] judges are required to include uncharged or nonconvicted offenses in addition to the convicted offenses to calculate an individual's sentence.[255] Moreover, most sentencing judges do not

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248. *See supra* notes 5, 232 and accompanying text.

249. In several instances, the Guidelines add levels to a base offense score for the force used during a crime. *See, e.g.*, § 2A4.1 (b)(3) (kidnapping, abduction, unlawful restraint—two levels added for use of a dangerous weapon).

250. *See generally* Husseini, *supra* note 5. At a sentencing hearing, a prosecutor must only prove conduct by a preponderance of the evidence.

251. Although the prosecutor had to prove the kidnapping charge beyond a reasonable doubt to the jury, the burden is lighter at the sentencing hearing. MANUAL, *supra* note 3, § 6A1.3, cmt. at 373. *See supra* note 232 for case examples.

See also MANUAL, *supra* note 3, § 3D1.2 (explaining that the sentencing court may aggregate the assault and kidnapping charges for sentencing). Section 3D1.2 provides that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." *Id.* The defined subset of crimes includes counts that are grouped together if the offense level is determined "on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm . . . ." *Id.* § 3D1.2(d).

Further, if the defendant's crime qualifies for aggregation under § 3D1.2, the sentencing court may consider all the actions as part of the same course of conduct for § 1B1.3 relevant conduct purposes. *See* Husseini, *supra* note 5, at 1390-91. The reasoning behind this provision is that the offenses are so interrelated that they constitute a single harm. *Id.* at 1391. Therefore, it is inequitable to sentence the defendant separately for each offense. Id.

252. Herman, *supra* note 3, at 352-53 (contending that the use of acquittal conduct at sentencing violates the defendant's double jeopardy and due process rights).

253. *Id.* at 315. According to Herman, "Because so much is happening at sentencing and because procedure is expensive and time-consuming, the decisions required by the Guidelines are likely to be unfair to defendants unless the courts are scrupulous in their attention to the defendants' procedural claims." *Id.*

254. MANUAL, *supra* note 3, § 1B1.3.

255. *See, e.g.*, United States v. Wright, 873 F.2d 437 (1st Cir. 1989) (holding that § 1B1.3 permits consideration of uncharged conduct); United States v. Perdomo, 927 F.2d 111 (2d Cir. 1991) (holding that a sentencing court may use relevant uncharged conduct to determine a defendant's role in an offense); United States v. Deigert, 916 F.2d 916 (4th Cir. 1990) (holding that, in accordance with the 2nd, 6th, and 10th Circuits, relevant conduct should be used to determine a defendant's base offense level). *See also* Heaney, *Reality*, *supra* note 120, at 209 (maintaining

depart from the Guidelines because most circuit courts will reverse such a departure.[256] The Guidelines therefore significantly reduce district court judges' discretion in the sentencing process, while augmenting the prosecutor's role in sentencing. Thus, "the judge's sentencing range [becomes] tethered to the prosecutor's choice of charges and facts."[257]

Further, the Double Jeopardy Clause[258] of the Fifth Amendment may also be implicated by the current sentencing scheme.[259] The Double Jeopardy Clause protects an individual from reprosecution for the same offense after an acquittal or conviction and from multiple punishment for the same offense.[260] However, under section 1B1.3 of the Guidelines, a prosecutor may prosecute an individual for conduct that a sentencing judge has already used in determining

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that the Guidelines not only failed to eliminate disparity but also forced sentencing judges to violate an individual's due process rights through the real conduct provisions which enable a judge to sentence for nonconvicted offenses).

256. *See* Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 863 (1992) (asserting that departures are restricted by "overly stringent appellate review").

257. Freed, *supra* note 20, at 1697. Freed effectively depicts the judge's role in sentencing under the Guidelines. Freed contends:

> Guidelines are administrative handcuffs that are applied to judges and no one else. When [a prosecutor] negotiates a disposition by setting or reducing charges and identifying relevant facts, [the prosecutor] effectively restricts the judge's sentencing range . . . . The judge in this sense becomes a handcuffed decisionmaker, rather than the 'black box' sentencer of the past who was free to roam at will throughout the statutory range . . . . If [the prosecutor and the judge] do not agree, however, disparity may be introduced.

Id. at 1697-98 (citing Milton Heumann, *The Federal Sentencing Guidelines and Negotiated Justice*, 3 FED. SENTENCING REP. 223, 225 (1991)). *But see* Zeno, *supra* note 171, at 31 (arguing that the Guidelines did not substantially alter the prosecutor's role in sentencing).

258. *See supra* note 34 and accompanying text.

259. *See* Herman, *supra* note 3, at 352-53.

260. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). *See also Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1873) (holding that "[t]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it"). The Supreme Court has divided the Double Jeopardy Clause into two components: the prosecution component and the punishment component. *See* Grady v. Corbin, 495 U.S. 508 (1990) (holding that the defendant may not be prosecuted twice for the same conduct).

The Double Jeopardy Clause proscribes reprosecution for the same offense so an individual will not have to "live in a continuing state of anxiety and insecurity." Green v. United States, 355 U.S. 184, 187 (1957) (holding that the prosecution should not be allowed repeated opportunities to convict an individual for the same alleged offense). A defendant should not have to fear that the prosecutor will use a first trial to discover the weaknesses and strengths of the case, and then adjust the case accordingly in a second trial. Ashe v. Swenson, 397 U.S. 436 (1970). Furthermore, the Double Jeopardy Clause protects an individual's right to have a trial "completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689 (1949).

an offense level at the individual's previous sentencing hearing.[261] Alternately, the prosecutor may persuade the sentencing judge to use the defendant's previous acquittal verdict from a different proceeding to enhance the sentence.[262] The defendant may then lose the protective shield of the Double Jeopardy Clause because the defendant effectively receives another sentence for the same crime.[263]

Finally, section 1B1.3 perpetuates disparity because it enables prosecutors to engage in presentencing manipulation through plea negotiations and to shape a defendant's sentence.[264] Prosecutors ultimately control what uncharged, unadjudicated offenses the jury and the sentencing judge will hear.[265] The prosecutor may charge two different defendants with the same offenses; however, the defendants can receive dramatically different sentences, depending on the charges to which they plead guilty.[266] Also, if a defendant's attorney is not experienced with the Guidelines, the defendant may receive a more severe sentence if the defendant enters into plea unaware of the relevant conduct consequences.[267] The next sections will examine the use of acquittal conduct and nonadjudicated conduct for sentence enhancement purposes.

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261. Indeed, the defendant's prior criminal history may be factored into the base level offense under § 4A1.1 to increase the defendant's sentence. MANUAL, *supra* note 3, § 4A1.1. However, this scenario represents the reverse. Here, the prosecutor introduces *nonconvicted* conduct, not prior criminal conduct, to enhance the sentence. This conduct has never been adjudicated. The prosecutor subsequently charges the defendant with this conduct in a new proceeding.

262. *See, e.g.*, United States v. Romulus, 949 F.2d 713 (4th Cir. 1991) (holding that the prosecutor properly introduced acquittal conduct at the hearing to enhance the defendant's sentence); United States v. Welch, 945 F.2d 1378 (7th Cir. 1991) (allowing the sentencing court to consider an acquitted possession of a firearms charge for enhancement purposes); United States v. Morehead, 959 F.2d 1489 (10th Cir. 1992) (holding that the district court could enhance defendant's sentence based on acquitted drug possession charge).

263. *See* United States v. Caceda, 990 F.2d 707 (2d Cir. 1993) (holding that the sentencing court may consider nonadjudicated conduct and should not factor in the potential for subsequent prosecutions for the same conduct). *But see* Lear, *supra* note 3, at 1224 n.218. Lear asserts that under the Double Jeopardy Clause, a defendant is theoretically immune from further criminal sanction after a verdict of acquittal. *Id.* (citing United States v. Wilson, 420 U.S. 332, 334 (1975)). However, the prosecutor is not precluded from introducing this very same conduct at the sentencing hearing to enhance the defendant's sentence, essentially nullifying the jury's role in the process. *Id.* at 1233.

264. Freed, *supra* note 20, at 1715 (arguing that the Guidelines exacerbate disparity because the facts presented to the judge or jury do not place guideline boundaries on the sentence under § 1B1.3).

265. *Id.* at 1714. *See supra* text accompanying notes 169-79, 196-209.

266. Freed, *supra* note 20, at 1714.

267. *Id.*

A. Acquittal Conduct

Acquittal conduct is conduct that a defendant has been charged with, and acquitted of, in a previous proceeding.[268] Under section 1B1.3 of the Guidelines, a prosecutor may use acquittal conduct to enhance the defendant's sentence.[269] While some circuit courts challenge the constitutionality of using acquittal conduct,[270] most circuits readily accept its introduction in a sentencing proceeding.[271] The circuits that support the use of acquittal conduct predominantly reason that, although the prosecutor failed to prove guilt beyond a reasonable doubt, the defendant is not necessarily innocent for sentencing purposes.[272]

Guidelines proponents argue that the courts have always used acquittal conduct to determine the defendant's sentence.[273] Indeed, during the pre-Guidelines period, sentencing judges could consider acquittal conduct at the hearing.[274] In *Williams v. New York*,[275] the Supreme Court held that a sentencing court could consider a wide spectrum of information about the

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268. *See* Reitz, *supra* note 3, at 551 (discussing the "vulnerability of acquittals").

269. *See supra* note 3 for the text of § 1B1.3.

270. *See* Lear, *supra* note 3, at 1183 n.11. The majority of the lower federal courts have been less likely to reject constitutional challenges to the relevant conduct provisions. *Id.* However, the Ninth Circuit is the only circuit that prohibits the use of acquittal conduct at sentencing. *Id. See* United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1991) (holding that a sentencing judge cannot punish a defendant for conduct "that the jury has necessarily rejected by its judgment of acquittal").

271. *See, e.g.*, United States v. Rivera-Lopez, 928 F.2d 372 (11th Cir. 1991) (rejecting the argument that the use of acquittal conduct at sentencing constitutes a denial of due process and usurps the jury's role, reasoning that acquittal conduct has been used in other cases); United States v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir. 1990) (holding that the use of acquittal conduct does not violate due process or the Double Jeopardy Clause because pre-Guidelines courts used acquittal conduct), *cert. denied*, 498 U.S. 844 (1990); United States v. Mocciola, 891 F.2d 13 (1st Cir. 1989) (allowing the use of acquittal conduct because, although the prosecutor could not prove defendant's guilt beyond a reasonable doubt, it was not "improbable" that defendant committed acquittal conduct); United States v. Dawn, 897 F.2d 1444, 1449-50 (8th Cir. 1990) (upholding the use of acquittal conduct for sentence enhancement because of the lower standard of proof at sentencing), *cert. denied*, 498 U.S. 960 (1990); United States v. Ryan, 866 F.2d 604, 609 (3d Cir. 1989) (holding that because acquittal conduct traditionally had been used before the Guidelines, its use was not unconstitutional); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir.1989) (holding that acquittal conduct may be used at sentencing "to justify the heavier penalties for the offenses for which defendant was convicted"); United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989) (rejecting a due process challenge to the use of acquittal conduct at sentencing because a verdict of acquittal did not conclusively establish defendant's innocence).

272. Lear, *supra* note 3, at 1185 (citing *Isom*, 886 F.2d at 738).

273. *See* Webber, *supra* note 36 (arguing that the sentencing judge should be able to consider acquittal conduct).

274. *See, e.g.*, United States v. Johnson, 823 F.2d 840 (5th Cir. 1987); United States v. Morgan, 595 F.2d 1134 (9th Cir. 1979); United States v. Sweig, 454 F.2d 181 (2d Cir. 1972).

275. 337 U.S. 241 (1949).

defendant, including nonadjudicated crimes.[276] However, in the *Williams* era, the judge could impose a sentence at any level within the statutory parameters for the offense.[277] Sentencing judges did not have to explain their sentencing decisions.[278] Moreover, the decision to consider prior conduct, acquittal conduct, or nonadjudicated conduct was left to the judge.[279] Further, the pre-Guidelines judge's objective, consistent with the parole officer's objectives, was to rehabilitate the defendant.[280] Accordingly, the sentencing judge would attempt to factor in the parole officer's potential adjustments to the sentence.[281] Consequently, the sentencing judge might prescribe a longer sentence than what the defendant actually served.[282]

Many courts have upheld the use of acquittal conduct in sentencing even against double jeopardy and due process challenges by reasoning that the prosecutor simply could not satisfy the considerable burden under the reasonable doubt standard.[283] According to this reasoning, a prosecutor may introduce acquittal conduct because the sentencing judge is applying a different standard of proof to determine the defendant's guilt or innocence.[284] However, this view comports with neither the double jeopardy bar against reprosecution nor the protections afforded by the Due Process Clause.[285] While courts upheld

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276. *Id.* at 252. In *Williams*, the defendant committed a murder while burglarizing a home. The jury convicted the defendant and recommended life imprisonment. *Id.* at 244. At sentencing, the judge considered other nonadjudicated conduct in addition to the convicted offense. *Id.* The defendant argued that this violated his due process rights, but the Supreme Court rejected the argument. *Id.* at 252. The Court noted that the sentencing judge exercised proper discretion in sentencing. *Id.* at 249.

277. Freed, *supra* note 20, at 1713 (contending that the *Williams* holding "was influenced by [different] considerations that no longer govern today").

278. *Id.*

279. *Id.*

280. *Id.*

281. *See* S. REP. NO. 225, *supra* note 6, at 3232.

282. *Id.*

283. *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986). However, the Supreme Court decided *McMillan* in the pre-Guidelines era. Further, *McMillan* involved a state statute that imposed a five year minimum mandatory sentence if the judge found that the defendant "visibly possessed" a firearm during the commission of certain crimes. *Id.* at 82 n.1. Gun possession was merely a sentencing factor that the judge determined after conviction. *Id.* Under Pennsylvania law, if the prosecutor could prove by a preponderance of the evidence that the defendant possessed the weapon, the judge had to impose the five year sentence. *Id.* The Supreme Court upheld the statute and the use of the preponderance standard. *Id.* at 91.

284. Kirchner, *supra* note 36, at 811.

285. *See* Reitz, *supra* note 3, at 551-52 (arguing that the prosecutor's ability to prove acquittal conduct at sentencing by a preponderance of the evidence subverts the jury's role because it prevents the jury from "communicating an affirmative finding of innocence"). *But see* Webber, *supra* note 36, at 473 (concluding that federal judges should reconsider and evaluate "ambiguous acquittals" during sentencing).

the use of acquittal conduct to enhance sentences prior to the Guidelines,[286] the "steadfastness with which the courts have proclaimed the constitutionality of [acquittal] offense sentencing should not deter its re-examination."[287]

The pre-Guidelines courts generally allowed prosecutors to introduce acquittal conduct as evidence during the sentencing hearing, reasoning that the prosecutors had different standards of proof in the two proceedings.[288] Most pre-Guidelines courts relied on the Second Circuit's decision in *United States v. Sweig*.[289] In *Sweig*, the court held that the judge could enhance the defendant's sentence based on acquittal conduct.[290] The court held that the acquittal conduct provided dependable evidence for sentencing purposes.[291] Further, the prosecutor had a lower standard of proof at the sentencing hearing and could, therefore, prove the acquittal conduct.[292]

The *Sweig* court concluded that an acquittal verdict did not conclusively establish the untruth of the evidence.[293] However, the Second Circuit neither mentioned nor considered a double jeopardy analysis in its opinion[294] and did

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286. *See* United States v. Sweig, 454 F.2d 181 (2d Cir. 1972) (holding that a sentencing judge could refer to evidence of underlying acquittal conduct).

287. Lear, *supra* note 3, at 1185 (citing Brown v. Board of Educ., 347 U.S. 483 (1954)).

288. *See* United States v. Sweig, 454 F.2d 181 (2d Cir. 1972). Some Guidelines commentators cite *Sweig* as the "seminal" case allowing the use of acquittal conduct in the pre-Guidelines era. *See* Webber, *supra* note 36, at 463-64 (asserting that post-Guidelines courts rely on the reasoning in *Sweig* to support double jeopardy challenges against the use of acquittal conduct in sentencing); Kirchner, *supra* note 36, at 814 (writing that courts that follow *Sweig* allow acquittal conduct because "an acquittal [does] not necessarily establish the untruth of the evidence against the defendant").

289. 454 F.2d 181 (2d Cir. 1972). In *Sweig*, the jury convicted the defendant of one count of perjury after a trial on 15 counts. *Id.* At the sentencing hearing, Judge Marvin Frankel, the district court judge, considered the acquitted counts in addition to the perjury. Judge Frankel then sentenced the defendant. *Id.* at 181. The defendant appealed, but the Second Circuit Court of Appeals upheld the sentence. *Id.* at 184. The Second Circuit reasoned that Judge Frankel had the discretion to consider the conduct. *Id.* at 183-84. The court reasoned that a verdict of acquittal did not "conclusively establish . . . the untruth of all the evidence." *Id.* at 184. Further, Judge Frankel had the ability to watch the trial, hear the evidence, and draw his own conclusions. *Id.*

However, under the Guidelines, the sentencing judge is not always the same judge that presided at trial. *See* Kirchner, *supra* note 36, at 802 n.34. Further, the *Sweig* Court reasoned that the judge had substantial discretion to determine the sentence, unlike the post-Guidelines judges. *Id.* at 823.

290. *Sweig*, 454 F.2d at 184.

291. *Id.*

292. *Id.*

293. *Id.*

294. *See* Kirchner, *supra* note 36, at 822. Kirchner notes that "most other pre-Guidelines cases considering this question simply quoted the *Sweig* conclusion without any independent analysis or discussion [which] implicates a real weakness within this body of law." *Id.* (citing Billiteri v. Board of Parole, 541 F.2d 938, 944 (2d Cir. 1976); United States v. Bernard, 757 F.2d 1439, 1444 (4th

not support its decision to allow acquittal conduct.[295] Regardless, post-Guidelines sentencing courts regularly use acquittal conduct at sentencing and rely on the *Sweig* rationale to refute due process and double jeopardy challenges.[296]

A sentencing hearing is critical to a criminal proceeding and tantamount to a trial,[297] but does not provide the same procedural protections that are available in a jury trial.[298] The defendant does not have the right to empanel a jury at sentencing or the right to confront witnesses.[299] Moreover, the judge replaces the petit jury as the fact-finder in the sentencing hearing.[300] Significantly, the sentencing judge does not have to be the same judge that presided over the trial. Further, the defendant does not even have the protection of the "proof beyond a reasonable doubt" standard at the sentencing hearing.[301] For example, under section 1B1.3, the prosecutor can enhance the defendant's sentence by proving acquittal conduct by a preponderance of the evidence.

In the 1990 decision of *Dowling v. United States*,[302] the Supreme Court addressed the use of acquittal conduct in subsequent proceedings. In *Dowling*, the prosecutor presented acquittal conduct, under Federal Rule of Evidence 404(b), at the defendant's trial.[303] The defendant argued that the prosecutor should have been collaterally estopped from attempting to prove that the defendant was involved in the acquittal conduct.[304] The Supreme Court held that the prosecutor could introduce the acquittal conduct under Rule 404(b).[305] Thus, the *Dowling* Court merely held that acquittal conduct could be used as

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Cir. 1985); United States v. Cardi, 519 F.2d 309, 314 n.3 (7th Cir. 1975); United States v. Haygood, 502 F.2d 166, 171-72 n.16 (7th Cir. 1974); United States v. Atkins, 408 F.2d 1209, 1224 (D.C. Cir. 1967); United States v. Campbell, 684 F.2d 141, 152 (D.C. Cir. 1982)).

295. Kirchner, *supra* note 36, at 822-23.

296. For examples of cases upholding the use of acquittal conduct for sentence enhancement, see United States v. Carter, 953 F.2d 1449 (5th Cir. 1992); United States v. Brown, 946 F.2d 1191 (6th Cir. 1991); United States v. Nunez, 958 F.2d 196 (7th Cir. 1992); United States v. Morehead, 959 F.2d 1489 (10th Cir. 1992).

297. *See* Lear, *supra* note 3, at 1202-03

298. *See id.* at 1202-03, 1233. Lear notes that if the prosecutor introduces acquittal conduct as relevant conduct at the sentencing hearing, the prosecutor "will likely encounter no impediment to having that conduct 'counted' at sentencing." *Id.* at 1233 (citing United States v. Mack, 938 F.2d 678, 679-80 (6th Cir. 1991); United States v. Garcia, 919 F.2d 881, 886 (3d Cir. 1990)).

299. *See* Reitz, *supra* note 3, at 548-49.

300. *Id.* at 524. *See* Herman, *supra* note 3, at 304-05 (arguing against giving judges fact-finding power because it undermines the jury's role in the criminal process).

301. *See* Herman, *supra* note 3, at 290.

302. 493 U.S. 342 (1990).

303. *Id.*

304. *Id.* at 347-48.

305. *Id.* at 348.

evidence in a subsequent trial of the same defendant on a different charge.[306] Indeed, the *Dowling* Court did not address the constitutionality of using acquittal conduct as a sentencing factor.[307] Because the Supreme Court has not squarely addressed the issue, the lower courts are more receptive to constitutional challenges of the use of acquittal conduct.[308] However, most circuit courts, except for the Ninth Circuit, allow the use of acquittal conduct in sentencing hearings.[309] Accordingly, prosecutors are able to present acquittal conduct for sentence enhancement under section 1B1.3 in most jurisdictions.[310]

In *United States v. Brady*,[311] a divided panel of the Ninth Circuit held that acquittal conduct could not be used for sentence enhancement purposes.[312] In *Brady*, the prosecutor originally charged the defendant with first degree murder and assault with the intent to commit murder.[313] The jury convicted the defendant of the lesser included offenses of voluntary manslaughter and assault with a deadly weapon.[314] The prosecutor included the acquittal conduct (the murder charge) at the sentencing hearing, and the sentencing judge enhanced the defendant's sentence based on that conduct.[315] On appeal, the Ninth Circuit vacated the sentence and remanded the case for a new sentencing hearing.[316] The Ninth Circuit held that although the Guidelines allow a judge to consider conduct outside of the crimes of conviction, the use of acquittal conduct for sentence enhancement directly circumvented the jury's verdict.[317]

However, the Ninth Circuit stands alone. Indeed, most other circuits allow

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306. *Id.* at 349-50. However, in his dissent, Justice Brennan accurately predicted that the lower courts would apply the majority's reasoning to consider acquittal conduct for sentence enhancement purposes. *Id.* at 363 (Brennan, J., dissenting).

307. *See* Webber, *supra* note 36, at 470.

308. *See* Lear, *supra* note 3, at 1183 n.11 (citing United States v. Clark, 792 F. Supp. 637, 650 (E.D. Ark. 1992)) (asserting that "[t]he district courts have been slightly more receptive to constitutional challenges" to the use of acquittal and nonadjudicated conduct in sentencing).

309. *See* Webber, *supra* note 36, at 467. The Ninth Circuit is the only circuit that disallows the use of acquittal conduct. *Id.* All of the other federal circuit courts allow the prosecutor to present acquittal conduct for sentence enhancement purposes.

310. *See* Kirchner, *supra* note 36, at 806-07 n.90.

311. 928 F.2d 844 (9th Cir. 1991).

312. *Id.* at 852.

313. *Id.* at 845.

314. *Id.* at 845-46.

315. *Id.* at 850.

316. United States v. Brady, 928 F.2d 844, 854 (9th Cir. 1991).

317. *Id.* at 851.

prosecutors to introduce acquittal conduct.[318] For example, the Second Circuit upheld the use of acquittal conduct in *United States v. Rodriguez-Gonzalez*.[319] In that case, the court reaffirmed the validity of the *Sweig* decision,[320] holding that the sentencing court properly considered acquittal conduct.[321] Further, the court held that the sentencing court had used the acquittal conduct to enhance the sentence, not to create a new sentence.[322] Accordingly, even though the defendant received approximately nineteen to twenty-four additional months,[323] the court relied heavily on the ambiguous distinction between an enhancement and a separate sentence.[324]

The Double Jeopardy Clause of the Fifth Amendment precludes relitigation of acquittal conduct and multiple punishments after a conviction.[325] However, under the Guidelines, a prosecutor can successfully introduce acquittal conduct at sentencing under section 1B1.3 without encountering double jeopardy problems under the current system.[326] Moreover, if the defendant challenges the use of acquittal conduct on appeal, most circuits will reject a double jeopardy challenge and uphold the district court's decision.[327] Proponents of using acquittal conduct argue that because the prosecutor has to prove the conduct under a different standard of proof at sentencing, the judge is not bound by the jury's conclusions.[328] Accordingly, the sentencing judge may reach an

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318. *But see* United States v. Rodriguez, 741 F. Supp. 12 (D.D.C. 1990) (holding that acquittal conduct may not be used for sentencing purposes because it violates due process and the constitutional ban against double jeopardy); United States v. Guadagno, 766 F. Supp. 617 (N.D. Ill. 1991) (recognizing that courts may use acquittal conduct for enhancement, but rejecting its use because of unfairness to the defendant).

319. 899 F.2d 177 (2d Cir. 1990). In *Rodriguez*, the defendant argued that the prosecutor improperly introduced evidence at the sentencing hearing upon which the jury acquitted the defendant. *Id.* at 179. Specifically, the jury found that the defendant did not use a firearm in connection with a drug offense, thereby acquitting him of that charge. *Id.* However, the sentencing judge enhanced the defendant's sentence based on that acquittal conduct. *Id.*

320. *Id.* at 181. The court applied the *Sweig* rational to the case even though "the *Sweig* court did not expressly address double jeopardy." *Id.* *See supra* notes 289-96 and accompanying text for a discussion of the *Sweig* decision.

321. *Id.* at 180.

322. *Id.* (citing United States v. Mocciola, 891 F.2d 13, 17 (1st Cir. 1989)).

323. *Id.* at 181.

324. United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181 (2d Cir. 1990).

325. *See supra* note 34. *See also* North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (holding that the Double Jeopardy Clause prescribes relitigation of acquittal conduct).

326. *See* Reitz, *supra* note 3, at 551-52. Under the current sentencing system, the prosecutor may introduce acquittal conduct for sentence enhancement even though the defendant has to defend himself or herself again, in a new forum, and without the same protections afforded at trial. *Id.*

327. *See* Kirchner, *supra* note 36. Most circuits will reverse a district court's departure and refusal to consider acquittal conduct. *Id.* However, the Ninth Circuit may uphold such a departure. *Id.* at 806-09; *see supra* notes 319-24 and accompanying text.

328. *Kirchner*, *supra* note 36, at 807-09.

opposite conclusion.

Further, a prosecutor can successfully refute a double jeopardy argument by arguing that the sentencing court uses the acquittal conduct for sentence enhancement, not to create a separate sentence.[329] Indeed, most circuits recognize this illogical distinction.[330] For the defendant in the sentencing process, the two are indistinguishable because the defendant ultimately spends more time in jail because of the enhancement.[331]

Because the Double Jeopardy Clause precludes the relitigation of settled verdicts, it should also prohibit sentence enhancement based on acquittal verdicts.[332] Collateral estoppel principles should govern in sentencing hearings in order to protect the defendant's rights under the Double Jeopardy Clause of the Fifth Amendment.[333] The practice of using acquittal conduct in sentencing is not only unjust for the defendant, but it also completely usurps the role performed by the jury.[334] The limited power of the sentencing judge to depart,[335] coupled with the prosecutor's ability to relitigate the conduct in the sentencing hearing, both undermines the jury's function and unduly disadvantages the defendant.[336]

B. Nonadjudicated Conduct

The use of nonadjudicated offenses in sentencing raises as many concerns as the use of acquittal conduct. Unlike acquittal conduct, the prosecutor neither charged the defendant at the grand jury proceeding for nonadjudicated conduct

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329. *Id.* at 820 (citing United States v. Mocciola, 891 F.2d 13, 17 (1st Cir. 1989); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 180 (2d Cir. 1990)). According to Kirchner, "this reasoning asserts that although the Double Jeopardy Clause would not allow courts to impose a separate sentence for acquitted conduct, it does not prevent them from expanding a sentence for a separate conviction on the basis of acquitted conduct." *Id.*

330. *See supra* note 309 and accompanying text.

331. Kirchner, *supra* note 36, at 820-21.

332. *Id.* at 819.

333. *See* Herman, *supra* note 3, at 351. The Supreme Court has recognized that the Double Jeopardy Clause contains a collateral estoppel concept. *Id.* (citing Ashe v. Swenson, 397 U.S. 436 (1970)). The Court acknowledges that a defendant will suffer more anxiety from being prosecuted again for the same offense. *Id.* Further, the prosecutor will be at an advantage in the second proceeding because of the additional familiarity with the case and the lower standard of proof. *Id.* Therefore, according to Herman, "[d]efining sentencing and conviction as part of the same criminal proceeding, and therefore outside of the prohibition against double jeopardy, defines away the problem without solving it." *Id.*

334. *Id.* at 352 (arguing that the prosecutor gets a second chance, under a much lower burden of proof, to prove charges without the jury's scrutiny).

335. *See supra* notes 159-63 and accompanying text.

336. *See* Lear, *supra* note 3, at 1233 (asserting that "punishment absent conviction . . . skews the power relationship between the federal prosecutor and the petit jury").

nor proved it to the petit jury at trial.[337] However, under section 1B1.3, a sentencing judge is required to consider uncharged or unproven offenses as related conduct to enhance the sentence level at the sentencing hearing.[338] Accordingly, the prosecutor may circumvent the jury's role and unduly disadvantage the defendant in the following ways: (1) by dismissing or dropping a charge during plea negotiations and later presenting it at the sentencing hearing,[339] (2) by withholding a charge until after trial and then introducing it at the sentencing hearing,[340] and (3) by withholding a charge from the jury, using the charge for sentence enhancement, and subsequently relitigating that same charge.[341]

Under section 1B1.3, the prosecutor has the power to increase the defendant's sentence, even if a plea agreement exists, by presenting relevant conduct at sentencing.[342] Indeed, the prosecutor will coax the defendant to enter into a plea agreement by dropping or dismissing charges in exchange for the guilty plea.[343] The prosecutor may then impart any uncharged offense information to the sentencing judge, even though the defendant never conceded or stipulated to it in the plea negotiations.[344] Under section 6B1.2(a) and section 1B1.3, the sentencing judge must consider the conduct in the sentence determination.[345]

Alternately, if the defendant goes to trial, the prosecutor can withhold certain offenses from the jury and then present the withheld offenses as relevant conduct at sentencing. The prosecutor only has to prove by a preponderance of the evidence that the defendant committed the offenses.[346] Further, the prosecutor can later prosecute the defendant for the very same nonadjudicated conduct before a different jury.[347]

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337. *See* Lear, *supra* note 3, at 1218-29 (stating that conviction is a prerequisite to punishment).

338. Heaney, *Reality*, *supra* note 120, at 209. Judges must consider conduct that the prosecutor never included in the indictment or information. *Id.*

339. The prosecutor may do this pursuant to § 6B1.2(a) of the MANUAL, *supra* note 3. *See supra* notes 217, 222 and accompanying text.

340. Lear, *supra* note 3, at 1229.

341. *Id.*

342. *See* Freed, *supra* note 20, at 1713-14 (contending that § 1B1.3 unduly enhances the prosecutor's power at plea bargaining because the prosecutor can actually increase the defendant's sentence by offering the defendant a reduced plea, obtaining a guilty plea, and later introducing the other conduct at the sentencing hearing).

343. Freed, *supra* note 20, at 1713-14.

344. *Id.*

345. MANUAL, *supra* note 3, § 6B1.2(a).

346. *See supra* notes 5, 232 and accompanying text.

347. *See* United States v. Caceda, 990 F.2d 707 (2d Cir. 1993) (holding that the sentencing judge may not consider the possibility of future prosecutions when using nonadjudicated conduct to enhance a sentence).

Sentencing courts have always considered nonadjudicated conduct at sentencing.[348] However, under the pre-Guidelines indeterminate system, the sentencing judge had more latitude in the sentencing system and could prescribe a sentence anywhere within a statutory range.[349] Further, if the sentencing judge did not want to include the nonadjudicated conduct, the judge was not restricted by the Guidelines' departure restrictions.[350]

For instance, in *United States v. Dunlop*,[351] the Eighth Circuit Court of Appeals upheld a pre-Guidelines sentence against the defendant's claim that the sentence was excessive.[352] Specifically, the defendant objected to the PSI, which alleged that he had provided cash to a co-conspirator to purchase cocaine.[353] The prosecutor never charged the defendant with this conduct.[354] Consequently, the defendant objected that the sentencing judge had considered the nonadjudicated conduct in the sentence determination.[355] The Eighth Circuit reasoned that the pre-Guidelines court had broad discretion to consider the conduct.[356] Further, the court reasoned that the defendant received ample opportunity to rebut the evidence in the PSI.[357] Also, the sentencing judge held an evidentiary hearing for the parties to dispute the evidence.[358] Finally, the Eighth Circuit concluded that the sentencing judge appropriately sentenced the defendant within the statutory limits.[359]

Unlike the sentencing judge in *Dunlop*, a post-Guidelines sentencing judge does not have broad discretion to consider information at the sentencing hearing.[360] Indeed, the sentencing judge is required to consider any relevant conduct that the prosecutor presents, even if the conduct was never charged or was dismissed pursuant to a plea agreement.[361] Further, if the sentencing

348. *See, e.g.*, Williams v. New York, 337 U.S. 241 (1949); United States v. Cardi, 519 F.2d 309 (7th Cir. 1975); United States v. Sweig, 454 F.2d 181 (2d Cir. 1972).

349. *See* S. REP. NO. 225, *supra* note 6, at 3221.

350. *See* United States v. Dunlop, 960 F.2d 55 (8th Cir. 1992) (pre-Guidelines case).

351. 960 F.2d 55 (8th Cir. 1992). The defendant was charged before November 1, 1987, the Guidelines' effective date. The district court judge sentenced the defendant pursuant to 21 U.S.C. §§ 841(b)(1)(B) & 846 (1988). The sentencing judge considered the potential for parole during the sentence determination. *Id.* at 56.

352. *Id.* at 57.

353. *Id.* at 55.

354. *Id.* at 56.

355. United States v. Dunlop, 960 F.2d 55, 56 (8th Cir. 1992).

356. *Id.* at 56-57.

357. *Id.*

358. *Id.*

359. United States v. Dunlop, 960 F.2d 55, 57 (8th Cir. 1992).

360. Nagel, *supra* note 10, at 887 (stating that under the Guidelines, judicial discretion "has been highly structured and defined").

361. MANUAL, *supra* note 3, § 1B1.3.

judge departs from the Guidelines, the prosecutor can challenge the departure on appeal.[362] Accordingly, the judge and the jury, as neutral third parties, can no longer provide an effective shield against the prosecutor.

In *United States v. Caceda*,[363] the defendant was arrested for selling thirty-seven kilograms of cocaine to an undercover agent.[364] During the course of a search, an agent found a ledger that detailed transactions involving 3166 kilograms of cocaine during a two-month period. The defendant later pled guilty to the sale of thirty-seven kilograms of cocaine to the agent.[365] At the sentencing hearing, the district court considered the evidence of the 3166 kilograms from the PSI and severely enhanced the defendant's sentence.[366] The defendant objected to this at the hearing, but the sentencing judge held that the uncharged conduct was countable under section 1B1.3.[367] The defendant appealed, but the Second Circuit Court of Appeals affirmed the decision.[368]

The Second Circuit held that the sentencing judge "was required to consider the uncharged [cocaine] quantities."[369] The court further reasoned that the sentencing judge should not consider the outcome of possible prosecutions for the same uncharged offenses.[370] The court concluded that the sentencing court had to consider relevant conduct even if the prosecutor later reprosecuted the defendant.[371]

However, the Second Circuit has recognized that sentence enhancement and subsequent relitigation can implicate the defendant's double jeopardy rights against reprosecution and multiple punishments. In *United States v. McCormick*,[372] the Second Circuit Court of Appeals addressed these issues.[373] In *McCormick*, the defendant was charged with bank fraud and related crimes in the District of Connecticut.[374] Several months later, the defendant was charged with bank fraud, mail fraud, and related crimes in the District of Vermont.[375] The jury convicted the defendant on all counts in the

362. *See* Schulhofer, *supra* note 256, at 861-63 (maintaining that judicial power to depart is vital but very limited under the Guidelines).
363. 990 F.2d 707 (2d Cir. 1993).
364. *Id.* at 708.
365. *Id.*
366. *Id.*
367. *Id.* at 708-09.
368. United States v. Caceda, 990 F.2d 707, 710 (2d Cir. 1993).
369. *Id.* at 709 (citing United States v. Schaper, 903 F.2d 891, 897 (2d Cir. 1990)).
370. *Caceda*, 990 F.2d at 709 (citing United States v. Perdomo, 927 F.2d 111 (2d Cir. 1991)).
371. *Caceda*, 990 F.2d at 709.
372. 992 F.2d 437 (2d Cir. 1993).
373. *Id.* at 438.
374. *Id.*
375. *Id.*

Connecticut indictment.[376] At the sentencing hearing, the prosecutor introduced the unproven conduct from the Vermont indictment as relevant conduct under section 1B1.3.[377] The Connecticut District Court enhanced the defendant's sentence by thirteen points based on the Vermont conduct.[378] The defendant appealed the sentence, but the Second Circuit Court of Appeals affirmed the decision.[379] The Second Circuit held that the Connecticut court had correctly considered the Vermont conduct to enhance the defendant's sentence.[380] However, the circuit court also affirmed the district court's decision to bar further prosecution of the counts used by the Connecticut court in raising the offense level.[381]

On appeal, the Second Circuit recognized that the sentencing issue implicated the Double Jeopardy Clause, and the court dismissed the counts that were used in the first sentencing proceeding to later convict in a second proceeding.[382] The *McCormick* majority reasoned that Congress did not intend to allow additional punishment for conduct that was already used to enhance a defendant's offense level.[383] Further, the court reasoned that Congress intended that sentencing courts would consolidate the punishment for certain conduct and prohibit reprosecution in a separate proceeding.[384] According to the court, if prosecutors could reprosecute defendants for the relevant conduct in similar scenarios, inconsistency would result.[385] The majority held that multiple punishments can only be avoided by precluding a second prosecution.[386] The *McCormick* majority concluded that the reprosecution of the counts would violate the Double Jeopardy Clause.[387]

The *McCormick* dissent asserted that reprosecution would not violate the Double Jeopardy Clause.[388] The dissent reasoned that the Sentencing Commission provides a safety valve in section 5G1.3, which requires appropriate adjustment of the second sentence "to achieve the same term of

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376. *Id.*
377. United States v. McCormick, 992 F.2d 437, 438 (2d Cir. 1993).
378. *Id.*
379. *Id.*
380. *Id.* at 441-42.
381. *Id.* at 442.
382. United States v. McCormick, 992 F.2d 437, 438 (2d Cir. 1993).
383. *Id.* at 440.
384. *Id.* at 439-40.
385. *Id.* at 439-41.
386. *Id.* at 440. The court held that Congress wanted to foster consistency by grouping harms for punishment purposes, not by separating offenses and imposing two different punishments. *Id.* The court reasoned that "[t]o rule otherwise would undermine the purpose of the Guidelines and introduce additional possibilities for inconsistent sentences." *Id.* at 441.
387. United States v. McCormick, 992 F.2d 437, 442 (2d Cir. 1993).
388. *Id.* (Mahoney, J., dissenting).

imprisonment that would have resulted from a single prosecution."[389] According to the dissent, section 5G1.3 does not prohibit successive prosecution in cases where the relevant conduct is retried in a subsequent proceeding.[390] The dissent reasoned that successive punishment did not constitute a double jeopardy violation.[391] The dissent concluded that the majority improperly construed the language of section 1B1.3 and inappropriately expanded the right against multiple punishment under the Double Jeopardy Clause.[392]

Because the Supreme Court has not addressed the issue of using nonadjudicated conduct for sentence enhancement under section 1B1.3, dangerous disparity exists in the federal courts.[393] However, the prosecutor's use of nonadjudicated conduct for sentence enhancement raises as many concerns as the use of acquittal conduct in sentencing.[394] Under section 1B1.3, the prosecutor infringes upon both the defendant's right to protection against reprosecution and the defendant's right to due process.

Unlike the acquittal conduct argument, proponents of the Guidelines cannot assert that nonadjudicated conduct can be used because of the different standards of proof at trial and the sentencing hearing.[395] Indeed, the defendant cannot exercise the right to a jury trial to resolve the defendant's guilt or innocence on the nonadjudicated conduct.[396] Moreover, the prosecutor never has to prove at sentencing the defendant's guilt beyond a reasonable doubt.[397] Accordingly, the use of nonadjudicated conduct for sentence enhancement negates the jury's critical role in the American criminal justice system and unjustly handicaps the defendant.[398]

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389. *Id.* at 443. The Commentary portion of § 5G1.3 provides that the court will credit a defendant in the second sentence for the period of incarceration served for the relevant conduct in the first proceeding. MANUAL, *supra* note 3, § 5G1.3, cmt. Under this section, the Vermont court would credit the defendant for time served in Connecticut by giving the defendant a concurrent sentence to run while the defendant is serving time in Connecticut.

390. *Id.* at 443-44.

391. *Id.* at 444.

392. United States v. McCormick, 992 F.2d 437, 444 (2d Cir. 1993). The dissent also criticized the majority's ruling as "premature" because the issue of multiple punishments was not ripe for review at the pretrial stage. *Id.* The dissent further noted that the majority's ruling should have addressed the misapplication of § 5G1.3, not the multiple punishments issue. *Id.*

393. Freed, *supra* note 20, at 1715. Disparity is flourishing because the federal judges, probation officers, prosecutors, and defense attorneys all have different views regarding the use of relevant conduct in sentencing. *Id.*

394. Kirchner, *supra* note 36, at 805-06.

395. *See supra* text accompanying notes 272, 283-96.

396. Reitz, *supra* note 3, at 524.

397. *See supra* text accompanying notes 346, 395.

398. *See supra* text accompanying notes 238-44, 246-57, 264-67, 337-94.

V. PROPOSAL

This Note proposes an amendment to section 1B1.3 of the Guidelines to protect the defendant's due process rights during the sentencing hearing and the defendant's right against reprosecution under the Double Jeopardy Clause. The following amendment prohibits the use of acquittal conduct for sentence enhancement purposes. By ensuring that acquittal conduct may not be used to enhance sentences, the amendment both protects the defendant from reprosecution and reinforces the petit jury's critical role in the criminal justice system. Moreover, because the amendment unambiguously eradicates the use of acquittal conduct, it will actually promote consistency in sentencing for similar defendants. Finally, the amendment will decrease due process and double jeopardy challenges to sentencing decisions.

Further, the amendment proposes that nonadjudicated charges may not be used for sentencing enhancement in certain situations. For example, if the prosecutor and the defendant enter into a plea agreement, the sentencing judge can consider only the offenses to which the defendant pled guilty.[399] The sentencing judge cannot consider any counts or offenses that the prosecutor dropped or dismissed during the plea negotiations. Alternately, if the case goes to trial, the sentencing judge can only consider the offenses that the prosecutor charged in the indictment. The prosecutor cannot introduce other conduct that the jury never heard or considered during deliberation.[400]

The Guidelines have brought some consistency to the sentencing process.[401] However, the Sentencing Commission needs to amend section 1B1.3 to prevent due process and double jeopardy violations. If the Sentencing Commission amended section 1B1.3 to limit or preclude consideration of acquittal conduct and nonadjudicated offenses, it would resolve some of the system's problems.

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399. *See supra* note 215 and accompanying text. In 1993, the Sentencing Commission amended § 6B1.2 to require that the prosecutor disclose to the defendant all relevant conduct that would be considered for sentencing purposes. *Id.*

400. For example, assume that the prosecutor has accused the defendant of rape and battery. When the prosecutor charges the defendant, the prosecutor must charge the defendant with aggravated rape in order to introduce the battery charge. If the prosecutor only charges the defendant with rape, the prosecutor must go back to the grand jury to receive a separate indictment for the battery.

401. *See* Zeno, *supra* note 171, at 34 (contending that the Guidelines have brought consistency to sentencing).

A. Amendment to Section 1B1.3 Relevant Conduct

> (A) To calculate a defendant's sentence under the Guidelines, a sentencing judge shall consider such factors as age, health, family responsibilities, mental capacity, degree of cooperation, prior convicted criminal conduct, and current convicted conduct. The sentencing judge may not consider the following conduct in the sentence calculation:
>
> > (1) *acquittal conduct*: the sentencing judge may not consider any conduct for which the defendant was acquitted in a previous proceeding to enhance the defendant's sentence; or
> >
> > (2) *nonadjudicated conduct*: the sentencing judge may not consider any conduct that the prosecutor did not raise in the initial charging decision or in the plea agreement.

B. Application of the Amendment

The Sentencing Commission should amend section 1B1.3 to protect criminal defendants' rights and to preserve the crucial role of juries in the American criminal justice system. The proposed amendment's main purpose is to clarify what conduct the sentencing judge may consider when sentencing the defendant under section 1B1.3. This amendment addresses the sentencing judge because the Sentencing Commission created the Guidelines to specifically guide judges.[402] However, the amendment also restricts the prosecutor's introduction of acquittal conduct and nonadjudicated conduct at the sentencing hearing. The amendment promotes proportionality in the sentencing process by ensuring that the defendant receives a sentence that reflects either a plea agreement or a jury's verdict. Further, the amendment would foster consistency in sentencing because similarly charged defendants would receive comparable sentences.

Under the amendment, the defendant would be free from reprosecution for acquittal conduct because the judge could not consider it at the sentencing hearing. Because the amendment clearly excludes consideration of acquittal conduct in sentence determinations, the prosecutor could not circumvent the petit jury's verdict at sentencing. Accordingly, this amendment protects the defendant's right against reprosecution for the acquittal conduct.

Furthermore, under the nonadjudicated conduct subpart, the amendment

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402. MANUAL, *supra* note 3, ch. 1, pt. A.

protects the defendant's rights against double jeopardy and bolsters the grand jury's role in the criminal process. The prosecutor would have to charge the defendant for the conduct in the original indictment or the plea agreement in order to later present it at the sentencing hearing. Indeed, the sentencing judge cannot consider any conduct that the prosecutor withheld from the grand jury and tried to introduced later at the sentencing hearing. Moreover, the prosecutor could not use nonadjudicated conduct solely to enhance a sentence and then prosecute the defendant for that conduct in a different proceeding. The prosecutor would have to return to the grand jury and formally charge the defendant with the conduct in order to introduce the nonadjudicated conduct at sentencing. Alternately, the prosecutor would have to withhold the conduct until after sentencing and then charge the defendant in a new action.

For example, the amendment would change the outcome in the hypothetical posed in Part I of this Note.[403] In the hypothetical, the jury convicted the defendant on all counts in the indictment. Next, the prosecutor brought an uncharged offense to the sentencing judge's attention at the hearing to enhance the defendant's sentence level. The prosecutor never raised the offense to either the grand jury or the petit jury. In the hypothetical, the judge increased the defendant's sentence based on the uncharged offense. The prosecutor then decided to charge the defendant with the offense in a different proceeding, the new jury convicted the defendant for that offense, and the sentencing judge sentenced the defendant. Under the proposed amendment, this would never happen.

This hypothetical illustrates how the amendment protects the defendant's rights against double jeopardy and multiple punishment. The amendment prohibits the first sentencing judge from considering the new offense at the sentencing hearing unless the prosecutor could show that the charging decision included the offense. Further, the sentencing judge could only sentence the defendant for the crimes that the jury convicted the defendant of in its verdict. Alternately, the prosecutor could wait and charge the defendant for the new offense in a separate action.

Further, applying the amendment to the hypothetical posed in Part IV of this Note[404] would change the hypothetical's outcome. In that hypothetical, the prosecutor charged two defendants, *X* and *Y*, for child kidnapping in the original indictment. The jury found that both defendants were guilty beyond a reasonable doubt. During *X*'s sentencing hearing, the prosecutor proved by a preponderance of the evidence that *X* also assaulted the child. Consequently, *X*

403. *See supra* text accompanying notes 2-8.
404. *See supra* text accompanying notes 247-51.

received a more severe sentence.

In accordance with the amendment, the prosecutor would have had to charge the defendant with assault in order to raise the offense at the sentencing hearing. The judge could not consider the nonadjudicated offense. Again, if the prosecutor wanted to pursue the alleged assault charge, the prosecutor could reindict *X*. Although some may argue that, under the current Guidelines, the prosecutor proved the conduct by a preponderance of the evidence at the sentencing hearing, *X* may not have committed the assault. Thus, the amendment ensures that *X* and *Y* receive similar sentences for committing the same offense, child kidnapping.

Although the prosecutor would be more restricted at the sentencing hearing because the prosecutor could not introduce certain conduct, the amendment would foster consistency in sentencing. The amendment bolsters both the grand jury and the petit jury's role in the system, because the prosecutor would have to charge everything that the judge would be expected to consider at sentencing. Because the trial judge is not always the sentencing judge,[405] it is important for the sentencing judge to give the jury's findings great weight. If a jury decides to acquit, the prosecutor should not be able to overturn that verdict at sentencing by only proving by a preponderance of the evidence that the defendant committed the offenses.

However, one may argue that the sentencing judge should have the discretion to consider acquittal conduct and nonadjudicated offenses. Proponents of this view would argue that the amendment usurps the judge's discretion at sentencing to factor in conduct under section 1B1.3. However, the amendment really limits the prosecutor's power at sentencing to persuade the judge to enhance a sentence. Further, because judges have such limited ability to depart from the Guidelines and because a prosecutor can challenge a departure, a judge may have to factor in conduct that the judge never would have considered at the sentencing. Finally, judges should not have unbridled discretion to consider conduct for sentencing enhancement if this practice would implicate the defendant's due process rights or the defendant's right against reprosecution.

Some may contend that the amendment would discourage plea bargaining because the prosecutor would have diminished bargaining power during negotiations. Additionally, some may argue that the prosecutor would be less inclined to bargain because the prosecutor is precluded from presenting new, uncharged conduct at sentencing. Indeed, the prosecutor may charge the most serious, provable offenses rather than less severe offenses. However, that is

405. *See supra* note 151 and accompanying text.

precisely what the Office of the Attorney General directed the prosecutors to do in the *Thornburgh Memorandum*.[406] The current plea bargaining process discourages guilty pleas because the defendant, without the jury trial's procedural safeguards, risks sentence enhancement and subsequent reprosecution. Further, although the prosecutor loses some sentencing discretion under the amendment, the defendant's rights are bolstered.

This amendment would protect the defendant during plea negotiations and at the sentencing hearing. In the plea negotiation context, the prosecutor could not later introduce the dismissed or dropped offenses at the sentencing hearing as relevant conduct. Alternately, the amendment protects the defendant's right to have charged offenses proved beyond a reasonable doubt to the jury at trial. Because the standard of proof is much lower at the sentencing hearing, this amendment would ensure that the prosecutor has the burden to prove beyond a reasonable doubt to the petit jury that the defendant committed the offenses. If the petit jury acquits, the prosecutor is precluded from relitigating the conduct under the lower standard of proof. Also, if the petit jury would never consider the offenses, the prosecutor could not suddenly introduce the nonadjudicated conduct at the more relaxed sentencing hearing. Accordingly, this amendment would protect the defendant's due process rights and double jeopardy rights against reprosecution and multiple punishment.

VI. CONCLUSION

The Guidelines, even with all their inherent flaws, provide a workable framework for federal criminal sentencing. Indeed, the sentencing judge no longer has free reign to impose inconsistent, inexplicable sentences. Consequently, the defendant should be able to anticipate the potential sentence. However, under section 1B1.3, the Guidelines have shifted the balance of sentencing power to the prosecutor, to the detriment of both the defendant and the criminal justice system.

A good sentencing system is critical to the success of the American war against crime. However, the system must be fair and constitutional. Section 1B1.3 authorizes practices that abrogate the defendant's constitutional guarantees under the Fifth Amendment and undermine the jury's role in the criminal justice system. Therefore, this provision must be amended before the Guidelines can function effectively and justly.

Elizabeth A. Parsons

406. *See supra* note 126 for a discussion of the Thornburgh Memorandum.