Section 3E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty

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SECTION 3E1.1 OF THE FEDERAL SENTENCING GUIDELINES: BARGAINING WITH THE GUILTY

A defendant who is charged with criminal activity has a series of decisions to make regarding his defense strategy. The defendant's strategy is often influenced by the strength of the government's case and may include plea bargaining before trial in the hope that he will receive a shorter sentence. When entering plea agreement negotiations, the defendant's objective changes from receiving a full acquittal to obtaining the shortest possible sentence. By pleading guilty in exchange for a sentence reduction, the defendant limits the risks associated with a trial in favor of the certainty of a lesser penalty. If a defendant chooses to go to trial, he may receive a harsher sentence than that offered in the plea agreement. This is so because the Federal Sentencing Guidelines limit sentence reductions at the time of trial, whereas the prosecutor has the ability before trial to reduce the defendant's sentence by dropping charges.

1. United States v. Gonzalez, 897 F.2d 1018, 1020 (9th Cir. 1990) (stating that once a defendant is charged, he is presented with a variety of options, one of which is to enter plea negotiations).
2. See Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 AM. CRIM. L. REV. 161, 170 (1991). In most districts, a public defender may not have access to the United States Attorney's offices' files. Id. at 169. These files would assist the public defender in determining the strength of the government's case. Id.
3. See id. at 170. A defendant's decision to enter a guilty plea is often based on his belief that he will be rewarded with a lesser sentence, or, in the alternative, that the government will, if he chooses to stand trial, punish him with further investigation to find additional facts that may increase his sentence upon conviction. Id.
4. Gonzalez, 897 F.2d at 1020 (maintaining that "[p]lea bargaining is an approved method of encouraging guilty pleas") (alteration in original).
5. See Brady v. United States, 397 U.S. 742, 747-48, 751 (1970) (holding that a defendant is not impossibly enticed to enter into a plea agreement and plead guilty simply to avoid the possibility of the death penalty if convicted by a jury).
6. Heaney, supra note 2, at 220.
7. Id. On average, a defendant who chooses to stand trial can expect a sentence twice as long if convicted than the defendant who accepted a plea agreement. Id. Nonetheless, the number of guilty pleas entered has decreased since the adoption of the sentencing guidelines. Id. at 226; see also United States Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining 78-80 (1991) [hereinafter Report on Guidelines System] (demonstrating that a non-drug-trafficking defendant
Recognizing that sentencing is the crux of the criminal justice system, Congress passed the Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) to create a comprehensive, effective sentencing system based upon a coherent philosophy. The Act reflects the United States Sentencing Commission's (Sentencing Commission) compromise between a simple, uniform sentencing system and an overly complex system that ultimately would become unmanageable by providing too many determinate variables. The Federal Sentencing could expect a 12 to 39 month reduction for entering a plea agreement under the Guidelines).

8. ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING xviii (3d ed. 1994) (emphasizing the importance of an effective sentencing system).


10. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL 2-4 (1993) [hereinafter U.S.S.G.]; see Senate Committee on the Judiciary, S. REP. No. 225, 98th Cong., 1st Sess. 38 (1983) reprinted in 1984 U.S.C.C.A.N. 3182, 3221. This system was designed to replace criminal sentencing based largely on the rehabilitation model. Id. The old system required a judge to set the maximum term of imprisonment and allowed the Parole Commission to determine when the prisoner was sufficiently rehabilitated to warrant his release. Id. As the rehabilitative model lost support, judges were left to design their own methodology of sentencing. Id. This resulted in nationwide sentencing disparity.

In an attempt to solve the problem of sentencing disparity, the Senate Committee set several goals for a new sentencing system. Id. at 39. The first goal included producing legislation to provide a comprehensive and consistent statement of the federal law of sentencing. Id. This legislation would set forth the purposes of the sentencing system along with a clear statement of the types of sentences available for federal offenders. Id. The second goal sought to assure fair sentencing by providing for individual analysis, as well as a pattern of sentencing, in all federal criminal cases. Id. The third goal sought to require a judge to clearly announce the reasons for the sentence. Id. Finally, the Senate Committee sought to provide a full range of sentencing options from which an appropriate sentence may be chosen. Id.

11. The Sentencing Commission is an independent body of the judicial branch charged with the discretion to promulgate sentencing guidelines under 28 U.S.C. § 991 (1988). The Commission is composed of seven voting members and one nonvoting member. Id. Voting members of the Commission are appointed to six-year terms and may not serve more than two full terms. Id. § 992(a),(b); see Jeffrey S. Parker & Michael K. Block, The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset? 27 AM. CRIM. L. REV. 289, 292 (1989) (recognizing that the Sentencing Commission is supposed to be “an expert body rationalizing the judicial function of sentencing toward the objective of greater efficiency in punishment”).

12. U.S.S.G., supra note 10, at 3. Congress sought to narrow the wide disparity in sentences imposed for similar criminal offenses by attempting to create a reasonably uniform system. Id. at 2. Congress also sought to create proportionality in sentencing through a system that imposed appropriately different sentences for criminal conduct of differing severity. Id. The sentencing table provides a minimum sentence that is 25 percent lower than the maximum sentence in the same range, thereby still allowing the trial judge the opportunity to consider individual characteristics of each defendant in determining where
Guidelines, the product of the Commission's efforts, attempt to reach this compromise by considering the characteristics of both the offense and the offender. The Guidelines include a grid system that sets out the recommended minimum and maximum sentencing range for various criminal conduct and criminal history. Theoretically, the system increases uniformity in sentencing by narrowing the range of possible sentences while providing appropriate proportional sentencing for various criminal conduct. This system is designed to further the basic pur-

in the guideline range a defendant should be sentenced. See id. at 1. For example, if a defendant's offense level is 25 and criminal history category is IV, the trial judge may sentence the defendant anywhere from 84-105 months. Id. at Sentencing Table; see also Lisa Ryan-Boyle, et al., Sentencing, 29 AM. CRIM. L. REV. 739 (1992) (listing the desire to equalize sentences for “street criminals” and “white collar” criminals as one of the purposes of the Federal Sentencing Guidelines) [hereinafter Ryan-Boyle].

13. The initial guidelines took effect on November 1, 1987. REPORT ON GUIDELINES SYSTEM, supra note 7, at 1.

14. See ARTHUR W. CAMPBELL, LAW OF SENTENCING § 4.8, at 89 (2d ed. 1991) (taking into account individual aspects of the defendant's criminal history and the seriousness of the current offense category to determine the guideline sentence for the specific act). In determining a particular defendant's sentence, the judge should: find the applicable guideline through the statutory index; determine the base offense level for the criminal activity; add offense specific characteristics (i.e., gun use or drug quantity); make additional adjustments based upon the defendant's role in the criminal activity and his acceptance of responsibility; determine the criminal history category based on the defendant's criminal record; find the applicable guideline range in the sentencing grid; and then impose a sentence. See id. § 4.9, at 93-96.

15. The grid reflects the Commission's efforts to consider both an offender's criminal history as well as the crime committed. GENERAL GOVERNMENT DIVISION, UNITED STATES GENERAL ACCOUNTING OFFICE, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED 92-93, 6 (1992). Forty-three offense levels line the left axis of the grid, ranked from the least serious to the most serious crimes, and six criminal history categories serve as the top axis. Id. at 8-9. “The intersection of an offender's final offense level (after all adjustments) and criminal history category determines” the potential sentence range. Id. at 9; see also Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 HOFSTRA L. REV. 1, 5 (1988) (outlining the purposes and structure of the Federal Sentencing Guidelines and explaining that the guideline ranges are designed so that the top of a sentencing range cannot exceed the bottom by more than twenty-five percent).


poses of criminal punishment:\textsuperscript{18} deterrence,\textsuperscript{19} incapacitation,\textsuperscript{20} retribution,\textsuperscript{21} and rehabilitation,\textsuperscript{22} and attempts to create an equitable system that considers the public interest, as well as the interests of the victims and defendants.\textsuperscript{23}

18. U.S.S.G., supra note 10, at 1; see also Supplementary Report, supra note 17, at 15-16. The Report states:

While a very simple system may produce uniformity, it cannot satisfy the requirement of proportionality. To use an extreme example, the Commission ostensibly could have achieved perfect uniformity simply by specifying that every offender was to be sentenced to two years' imprisonment. Doing so, however, plainly would have destroyed proportionality . . . . Having only a few simple, general categories of crimes might make the guidelines uniform and easy to administer, but at the cost of lumping together offenses that are different in important respects . . . .

A sentencing system tailored to fit every conceivable case, on the other hand, could become too complex and unworkable. Complexity can seriously compromise the certainty of punishment and its deterrent effect. \textit{Id.} at 13; see also Campbell, supra note 14, § 2.1, at 18-19. The media, legislators, judges, and lawyers would not accept a system that failed to recognize all of these punishment philosophies. \textit{Id.} at 21; Parker & Block, supra note 11, at 302 (stating that all of the purposes of punishment ultimately lead to the objective of increasing efficiency in punishment).

19. Deterrence theories of criminal punishment are based on the principle that punishment systems should deter the commission of future offenses. Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes: Cases and Materials 149 (5th ed. 1989). Deterrence theories are criticized for their assumption that every person has the ability to calculate the future effects of their present conduct. Jeremy Bentham, Principles of Penal Law, in J. Bentham's Works 396, 402 (J. Bowring ed. 1843), reprinted in Kadish and Schulhofer, supra at 149. The effectiveness of a deterrence based system is dependent on the criminal justice system's ability to provide substantial risks of conviction and sufficiently severe punishment. See Franklin E. Zimring & Gordon J. Hawkins, Deterrence: The Legal Threat in Crime Control 158-72 (1973) (discussing the principles of deterrence, and its effect on crime in great detail).

20. The incapacitation theory of punishment is based on the premise that an incarcerated criminal cannot commit more crimes. See Kadish and Schulhofer, supra note 19, at 160-61.

21. Retributive punishment theories propose to deter criminal behavior by inflicting pain on an offender for committing a crime. Immanuel Kant, The Philosophy of Law (W. Hastie tr. 1887) reprinted in Kadish and Schulhofer, supra note 19, at 137.

22. Rehabilitative theories of punishment center on crime as a curable disease, ultimately focusing on transforming the offender into a productive member of society. See Morris R. Cohen, Moral Aspects of the Criminal Law, 49 Yale L.J. 987, 1012-14 (1940).

23. Supplementary Report, supra note 17, at 16 (describing that the Guidelines balance aspects of both "just desert and crime-control philosophies of sentencing"); see, Ryan-Boyle, supra note 12, at 741 (describing three fundamental policies that governed the Commission's work). "First, the Commission sought to achieve 'honesty' in sentencing by establishing a scheme of determinate sentences for specific offenses irreducible by parole or 'good time' credits." Id. Second, the Commission sought to reduce disparity across jurisdictions by providing detailed guidelines to all federal judges. \textit{Id.} Finally, the Commission tried to maintain proportionality in sentencing between comparable offenses. \textit{Id.} Thus, the Commission balanced uniformity and proportionality, two seemingly contradictory interests, when creating the guideline system. Id; see also Barbara S. Meierhoefer,
Section 3E1.1 of the Federal Sentencing Guidelines encompass many of Congress’ goals by encouraging a defendant to accept responsibility for his conduct, ensuring efficient and certain punishment, and avoiding potentially lengthy, costly, and emotionally challenging trials.

Section 3E1.1 allows a two offense-level reduction on the sentencing grid in exchange for the defendant’s acknowledgment that he committed the charged offense. Further, if the defendant notifies the authorities of his intention to enter a guilty plea in a timely manner, he may be entitled to an additional one-level reduction. Section 3E1.1 provides reductions

\[\text{Acceptance of Responsibility}\]

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

1. timely providing complete information to the government concerning his own involvement in the offense; or
2. timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by 1 additional level.

Id. (alterations in original)

25. 1 PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES 2-63 (Phylis Skloot Bamberger & David J. Gottleb eds.) (Supp. 1994) [hereinafter 1994 SUPPLEMENT]. Originally, the defendant had to accept responsibility for the “offense of conviction.” Id. at 2-65. The guideline was amended in 1988 to require the defendant to accept responsibility for his “criminal conduct.” Id. Currently, § 3E1.1 requires the defendant to accept responsibility for “his offense.” Id. at 2-66.

26. § 3E1.1, background; CAMPBELL, supra note 14, § 9.8, at 260. After entering a guilty plea, a presentence report is prepared and the defendant is sentenced by a sentencing judge. See Fed. R. Crim. P. 32(c). Rule 32 of the Federal Rules of Criminal Procedure requires that the presentence report contain: information on the existence of a prior criminal record of the defendant; a statement on the circumstances surrounding the offense; a statement on addressing the amount of harm caused to the victim (including physical, mental and monetary harm); any other helpful information; a policy statement issued by the Commission that appears relevant; and, any non-prison programs available to the defendant. Rule 32(c)(2).

27. See CAMPBELL, supra note 14 § 9.8, at 260 (describing plea agreements as “essential to the expeditious and fair administration of justice”).


29. Id. § 3E1.1(b)(2), at 248 (providing an additional one-level reduction for a defendant who timely notifies the authorities of his intention to enter a guilty plea, thereby saving government preparation for trial).
that recognize pleas as an acceptable and important element in the sentencing process.\textsuperscript{30} The justifications behind these reductions are substantially similar to those for plea agreements.\textsuperscript{31} Some judges believe that a defendant who acknowledges his guilt and accepts responsibility for his actions is less likely to commit future offenses.\textsuperscript{32} Judges also acknowledge an interest in rewarding defendants for reducing the burden on the court system,\textsuperscript{33} and recognize that some assertions in the defendant's presentencing report\textsuperscript{34} ultimately may not be provable at trial or convincing to a jury.\textsuperscript{35}

Opponents of section 3E1.1 contend that rewarding a guilty plea with a lesser sentence is functionally equivalent to making a defendant pay for

\textsuperscript{30} \textit{Supplementary Report}, supra note 17, at 204 (considering the Commissions' intention to apply § 3E1.1 primarily to defendants who plead guilty).

\textsuperscript{31} \textit{Id}. Specifically, the Commission acknowledges a judicial tendency to believe that a defendant who enters a guilty plea is less likely to commit further crimes. \textit{Id}. The Commission also notes judicial and prosecutorial desire to reward defendants for reducing the burden on the court system without compromising just and immediate punishment. \textit{Id}. at 204-05; see U.S.S.G., supra note 10, § 6B1.1, at 316 (describing the intention behind the Sentencing Guidelines to ensure that plea negotiation practices "promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a)").

The Sentencing Commission determined factors to be considered in imposing a sentence, and specifically stated:

\begin{quote}

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider...

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

\end{quote}


\textsuperscript{32} \textit{Supplementary Report}, supra note 17, at 204 (recognizing the lower probability of recidivism for defendants who accept responsibility for their criminal conduct).

\textsuperscript{33} \textit{See} Brady \textit{v}. United States, 397 U.S. 742, 752 (1970) (identifying a legitimate interest in preserving prosecutorial and judicial resources to justify a sentencing system favoring guilty pleas); \textit{Supplementary Report}, supra note 17, at 204-05.

\textsuperscript{34} \textit{See} U.S.S.G., supra note 10, § 6A1.1 (requiring a probation officer to conduct a presentence investigation and report to the court prior to the imposition of a sentence unless the record contains sufficient information to allow the sentencing court to make a meaningful sentencing decision).

\textsuperscript{35} \textit{Supplementary Report}, supra note 17, at 204 (acknowledging that lower sentences may be imposed after a defendant enters a guilty plea, versus after he is convicted, because "some of the relevant factors that appear in the presentence report might not be provable at trial" thus reducing the sentence a defendant would have received if he went to trial).
his constitutional right to a trial with an increased sentence. 36 However, 3E1.1 is recognized as providing the only possible reward for a defendant entering a guilty plea. 37 Consequently, plea bargaining under the Federal Sentencing Guidelines, and particularly section 3E1.1 is a subject of Congressional and constitutional debate. 38 The “Acceptance of Responsibility” reduction is particularly vulnerable to attack because it is less likely to be granted to a defendant who chooses to go to trial. 39 While courts uphold the constitutionality of the current 3E1.1 guideline, many courts maintain that a guideline completely excluding defendants from the same reduction solely because they choose to go to trial would fail a constitutional challenge under both the Fifth 40 and Fourteenth 41 Amendments. 42

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36. See Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978) (stating that a unilateral imposition of a penalty upon a defendant who chose to exercise a legal right is unconstitutional); Scott v. United States, 419 F.2d 264, 269-70 (D.C. Cir. 1969) (holding that a judge may not place a price tag on the right to trial by requiring a guilty plea for leniency); see also, Andrew Neal Siegel, Note, The Sixth Amendment on Ice—United States v. Jones: Whether Sentence Enhancements for Failure to Plead Guilty Chill the Exercise of the Right to Trial, 43 AM. U. L. REV. 645, 683-84 (1994) (suggesting that the United States Sentencing Commission propose an amendment to the Sentencing Guidelines prohibiting judges from denying a sentence reduction based solely on a defendant's decision not to plead guilty).

37. SUPPLEMENTARY REPORT, supra note 17, at 204; REPORT ON GUIDELINES SYSTEM, supra note 7, at 23 (identifying “a motion for a departure based upon substantial assistance, a recommendation for awarding acceptance of responsibility, or a recommendation for a sentence at the low end of the guideline range . . . as the most important incentives [a prosecutor] can offer” to encourage a guilty plea). Defense attorneys generally view “charge bargaining” as the greatest incentive for pleas. See id.


39. United States v. Saunders, 973 F.2d 1354, 1363 (7th Cir. 1992), cert. denied 113 S. Ct. 1026 (1993); see infra notes 142-48 and accompanying text (illustrating how defendants who go to trial rarely receive the “Acceptance of Responsibility” reduction). A study of imposed sentences revealed that 88% of defendants pleading guilty received the “Acceptance of Responsibility” reduction compared to only 20% of those convicted at trial who received the reduction. REPORT ON GUIDELINES SYSTEM supra note 7, at 78.

40. U.S. CONST. amend. V (establishing the constitutional privilege against self-incrimination); see Estelle v. Smith, 451 U.S. 454, 462-63 (1981) (establishing that the Fifth Amendment privilege against self-incrimination, applicable to the states through the Fourteenth Amendment, applies during sentencing).

41. U.S. CONST. amend. XIV (establishing the privileges of due process and equal protection).

42. See Saunders, 973 F.2d at 1362 (implying that if the acceptance of responsibility provision was completely unavailable to defendants electing to go to trial, constitutional problems involving one's right to trial may emerge); United States v. Rodriguez, 959 F.2d 193, 198 (11th Cir.) (vacating a sentence where the sentencing judge expressly made the acceptance of responsibility reduction dependant on the defendant's decision whether to go to trial), cert. denied, 113 S. Ct. 649 (1992); see also Siegel, supra note 36, at 650-51 (discussing the Fifth and Fourteenth Amendments' guarantees of due process as a restriction on sentencing bias against defendants who have exercised their Sixth Amendment
The Committee on Criminal Law of the Judicial Conference of the United States Courts asked the Sentencing Commission to consider a delinkage of subsections (a) and (b) of section 3E1.1.43 This delinkage would allow a court to reduce a defendant's sentence upon the submission of a timely plea, while evaluating separately whether he is entitled to an additional reduction for "clearly demonstrat[ing]" other forms of acceptance of responsibility.44 This revision could provide an automatic sentence reduction to a defendant entering a guilty plea without excluding those who exercise their right to go to trial from demonstrating acceptance of responsibility through other means.45 This proposal would prohibit a defendant who elects to go to trial from receiving the reduction under section 3E1.1(2)(b) unless he admits his culpability but goes to trial for some purpose other than refuting his factual guilt.46 This proposal distinguishes between denying a defendant a benefit and penalizing him for exercising his constitutional right to a jury trial.47 The Sentencing Commission recognizes this distinction in the current acceptance of responsibility provision, section 3E1.1.48 However, under the current provision, courts are granting some defendants who choose to go to trial a right to a jury trial). This Comment proposes that § 3E1.1 provide an automatic two-level reduction in exchange for entering a guilty plea and, exclude defendants who go to trial from getting the same reduction.

43. Letter from Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States, to Hon. Richard P. Conaboy, Chairman, United States Sentencing Commission 5-6 (Nov. 15, 1994); see supra note 24 (outlining subsection (a) and (b) and posing the delinkage issue).

44. U.S.S.G., supra note 10, § 3E1.1, at 248. Other forms of acceptance of responsibility include; presentencing efforts to make restitution, efforts toward rehabilitation, and assisting the authorities with the investigation of their own or related criminal activities. Id.


46. U.S.S.G., supra note 10, § 3E1.1, at 249 (stating that a defendant who chooses to put the government to its burden by selecting to go to trial, and who is convicted ultimately, is not entitled to a reduction when he admits guilt and expresses remorse only the after he is convicted).

47. See infra notes 62-90 and accompanying text (discussing the difference between penalizing a defendant's right to go to trial and recognizing his acceptance of responsibility through a reduction in his sentence).

48. See U.S.S.G., supra note 10, § 3E1.1, at 249 (stating that the reduction is not intended for defendants electing to go to trial); see also Hon. William W. Wilkins, Jr., Response to Judge Heaney, 29 AM. CRIM. L. REV. 795, 806 (1992) (recognizing that the
sentence reduction if they express remorse for the consequences of their conduct and accept responsibility after being found guilty. Further, courts are misinterpreting the current guideline by finding that where a defendant has entered a guilty plea and has received a two-level decrease for accepting responsibility, he is necessarily entitled to an additional one-level reduction for notifying the authorities of his intention to enter a guilty plea. This was not the original intent of the Sentencing Commission. The proposal to delink sections (a) and (b) of 3E1.1 would limit this kind of misapplication of the Guidelines.

This Comment addresses the constitutional and public policy issues surrounding section 3E1.1 of the Federal Sentencing Guidelines. First, this Comment describes the 3E1.1 Acceptance of Responsibility provision as it is currently written. This Comment next analyzes the applicable case law outlining the constitutional and punishment issues surrounding the application of guilty plea incentives. Next, this Comment evaluates the case law that challenges the current application of section 3E1.1. Additionally, this Comment presents an alternative sentencing guideline for accepting responsibility, and evaluates its benefits in light of the established case law and public policy. Finally, this Comment proposes to alter section 3E1.1 to address the original purpose of the Federal Sentencing Guidelines, while still withstandng judicial review.

I. The Current Application of the Section 3E1.1 Acceptance of Responsibility Guideline

Section 3E1.1, otherwise known as the Acceptance of Responsibility provision of the Federal Sentencing Guidelines, rewards a defendant who

admission of guilt by entering a guilty plea is consistent with any accepted notion of Acceptance of Responsibility).

49. See United States v. Saunders, 973 F.2d 1354, 1363 (7th Cir. 1992) (considering a defendant's post trial expression of remorse in deciding whether to grant the acceptance of responsibility reduction), cert. denied, 113 S. Ct. 1026 (1993).

50. United States v. Tello, 9 F.3d 1119, 1123 (5th Cir. 1993) The defendant pled guilty to aiding and abetting possession with intent to distribute marihuana. Id. at 1121. The defendant received a two-level sentence reduction for acceptance of responsibility but was denied the additional one-level reduction for timely entering a guilty plea. Id. The court found that denying the extra one-level reduction was not harmless error and vacated the defendant's sentence. Id.

51. U.S.S.G., supra note 10, § 3E1.1, at 249 application note 2 (explaining that the reduction is not intended to apply to a defendant who denies the essential factual elements of guilt until after being found guilty); see id. at application note 6 (explaining that "to qualify under subsection (b)(2), the defendant must have notified authorities of his intention to enter a plea of guilty" early enough in the trial process to allow the government to conserve judicial and prosecutorial resources by avoiding trial preparation and allowing efficient scheduling of the court calendar).
accepts responsibility for his acts with a two-level reduction in the charged offense level. Further, if the defendant qualifies for the two-level reduction and either provides complete information concerning his involvement in the offense, or notifies the authorities of his intention to plead guilty in a timely fashion, he may receive an additional one-level reduction. The commentary following section 3E1.1 generally denies this same reduction to a defendant who puts the government to its burden of proof by exercising his right to a trial.

According to the Sentencing Guidelines, a defendant who exercises his constitutional right to trial rarely will qualify for the Acceptance of Responsibility reduction because he has not demonstrated a willingness to accept responsibility for his criminal conduct. For instance, the reduction is not available to a defendant who denies his criminal conduct on the stand but then essentially admits to perjury in an attempt to receive the reduction after being found guilty. Moreover, the Guidelines provide that a defendant who enters a guilty plea is not entitled to receive

52. U.S.S.G., supra note 10, § 3E1.1(a), at 248.
53. Id. § 3E1.1(b). For example, a defendant possessing a criminal history category level of III and an offense level of 20 could be sentenced to 41-51 months. Id. at 270. After the two-level acceptance of responsibility reduction combined with a one-level reduction for timely entering a plea or providing information to the government concerning one’s culpable conduct, the sentencing range could be reduced to 30-37 months. Id.
54. Id. § 3E1.1, at 249. In application note 2 of the comments to Section 3E1.1, the Sentencing Commission states: “This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse.” Id.
55. Cf. id. “In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial.” Id. This may occur when a defendant goes to trial for reasons other than to challenge factual guilt, for example, to constitutionally challenge a statute or the applicability of a statute to his conduct. Id.

Even though the Sentencing Guidelines do not generally provide for a sentence reduction, 16% of the defendants who go to trial get an “acceptance of responsibility” reduction. Heaney, supra note 2, at 179.
56. See U.S.S.G., supra note 10, § 3C1.1, at 234-35. The Commission states: “If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.” Id.; see United States v. Payne, 962 F.2d 1228, 1236 (6th Cir.) (affirming the denial of an “acceptance of responsibility” reduction for a defendant found to have testified untruthfully), cert. denied, 13 S. Ct. 811 (1992); United States v. Zayas, 876 F.2d 1057, 1060 (1st Cir. 1989) (affirming the denial of an acceptance of responsibility reduction when the defendant is found to have perjured himself).
57. U.S.S.G., supra note 10, at 108 app. C, application note 258 (1983); see id. § 3C1.1. at 234-35 (quoted supra note 56). Application note 3 to § 3C1.1 states: “The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies: . . . (b) committing, suborning, or attempting to suborn perjury; . . . (f) providing materially false information to a judge or magistrate . . .” Id. § 3C1.1., at 234-35, application note 3.
the reduction as a matter of right.\textsuperscript{58} In fact, the defendant must establish by a preponderance of the evidence that he is entitled to the reduction based upon his acceptance of responsibility.\textsuperscript{59}

The decisions challenging the application of 3E1.1 create uncertainty regarding the proper use of sentence reductions.\textsuperscript{60} This confusion fosters differing opinions on the constitutional implications and interpretations of the Acceptance of Responsibility methodology.\textsuperscript{61}

\textbf{A. Denying the Benefit Penalizes a Defendant who Stands Trial}

In pre-guideline cases, the United States Supreme Court cautioned that sentencing decisions should not coerce defendants to waive a constitutional right.\textsuperscript{62} These early decisions establish the foundation for critics' arguments that the current application of section 3E1.1 is an unconstitutional burden on a defendant's right to a fair trial.\textsuperscript{63}

The Supreme Court reiterated its interest in ensuring that constitutionally protected conduct should not be considered against a defendant during the sentencing process in \textit{North Carolina v. Pearce}.\textsuperscript{64} \textit{Pearce} establishes that punishing a person "because he has done what the law plainly allows him to do is a due process violation of the most basic sort."\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{58} Id. at 249, application note 3.
\item \textsuperscript{60} See, e.g., Heaney, supra note 2, at 179-80 (demonstrating the great disparity between districts in applying the acceptance of responsibility reduction to defendants who went to trial and were found guilty).
\item \textsuperscript{61} See id. at 220-23 (illustrating how the guidelines system infringes a defendant's constitutional right to trial and right to testify).
\item \textsuperscript{62} See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (reiterating that it is a due process violation to penalize a defendant for exercising a constitutional right); United States v. Jackson, 390 U.S. 570, 581-85 (1968) (deciding that a statute requiring the death penalty for defendants convicted by a jury while guaranteeing life imprisonment for defendants entering guilty pleas is unconstitutional).
\item \textsuperscript{63} See Siegel, supra note 36, at 652-53 (criticizing the court's decision to deny an Acceptance of Responsibility reduction based on one's decision to stand trial in \textit{United States v. Jones}).
\item \textsuperscript{64} 395 U.S. 711 (1969).
\end{itemize}
In *Pearce*, the Court confronted the constitutional limitations on a judge imposing a harsher sentence upon a defendant after a conviction is set aside and a new conviction is entered upon retrial. The Court found that the trial judge may impose a new sentence that is either greater or less than the original sentence upon retrial without violating the Constitution. However, the Court also noted that states would flagrantly violate the Fourteenth Amendment if they were allowed to impose a longer sentence on a reconvicted defendant to punish him for successfully setting aside an original conviction. Consequently, the Court held that judges cannot impose a vindictive sentence that penalizes a defendant for going to trial or exercising his right to appeal. The Court required that whenever a judge imposes a more severe sentence after a new trial, the judge's decision must clearly demonstrate that the reasoning was not based on vindictiveness stemming from the defendant's use of constitutionally protected behavior. Instead, the newer, harsher sentence must be based on objective information concerning identifiable conduct by the defendant. *Pearce* lays a foundational argument that a price cannot be placed on a constitutional right by forcing a defendant to serve a longer sentence. *Pearce* also establishes that a defendant should be free from apprehension of retaliatory behavior by the sentencing judge.

In *United States v. Jackson*, the Supreme Court held that a statute that even needlessly encourages a defendant to enter a guilty plea is an

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66. *Pearce*, 395 U.S. at 713. Pearce was convicted of assault with intent to commit rape. *Id.* He received a sentence of 12 to 15 years. *Id.* Several years later, Pearce received a retrial based on an involuntary confession that was wrongfully admitted into evidence creating constitutional error. *Id.* Upon retrial and conviction, the sentencing judge imposed an eight-year prison term, which, when added to the time he had already served, amounted to a higher sentence. *Id.* Pearce challenged his sentence on constitutional grounds. *Id.* at 713-15.

67. *Id.* at 723 (stating that the freedom of a sentencing judge to consider, for example, the defendant's conduct in the second trial or before the second trial, is not precluded by the Equal Protection Clause).

68. *Id.* at 723-24 (stating that it would be "patently unconstitutional" to impose a punishment for exercising a constitutional right) (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968)).

69. *Id.* at 725-26 (providing that a judge may impose a more severe sentence upon retrial only if the judge can clearly demonstrate with an explanation in the record that the second sentence imposed was not vindictive).

70. *Id.* at 725 (deciding that the fear of vindictiveness unconstitutionally burdens a defendant's right to an appeal).

71. *Id.* at 726.

72. *Id.* at 724.

73. See *id.* at 725 (establishing that a retaliatory motivation behind a sentencing decision should not play a part in the defendant's free exercise of constitutional rights).

74. 390 U.S. 570 (1968).
impermissible infringement on a constitutional right.\textsuperscript{75} Jackson involved a kidnape statute that permitted a jury to impose the death sentence under specific circumstances.\textsuperscript{76} The statute, however, did not allow the imposition of the death penalty for defendants who pled guilty.\textsuperscript{77} The Government argued that the goal of limiting the death penalty to jury recommended cases was a legitimate interest that only incidently chilled a defendant’s ability to contest the charges.\textsuperscript{78} The Court held that the different statutorily imposed penalties unconstitutionally encouraged defendants to forfeit their right to a jury trial.\textsuperscript{79} In reaching this conclusion, the Court considered the lack of alternatives available to advance the goal of jury control over the imposition of the death sentence, without hindering the defendant’s right to a jury trial.\textsuperscript{80} Specifically, the Jackson Court reiterated that a “procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.”\textsuperscript{81}

Similarly, after the enactment of the Federal Sentencing Guidelines, courts considered some situations where the application of the Acceptance of Responsibility provision could be unconstitutional.\textsuperscript{82} In United

\begin{itemize}
\item \textsuperscript{75} Id. at 572 (holding that the portion of the Federal Kidnapping Act providing for the death penalty only after a trial conviction, but not for defendants who enter a guilty plea, impermissibly burdens the right to a jury trial).
\item \textsuperscript{76} Id. at 581. If the defendant went to trial and the jury found him guilty he could be sentenced to death. Id.
\item \textsuperscript{77} Id. (finding that the statute has no other purpose than to chill the exercise of constitutionally protected rights by penalizing those who exercise them).
\item \textsuperscript{78} Id. at 582. The government argued that the purpose of the statute was to lessen the severity of punishment, making irrelevant any incidental effect which persuades the defendants not to contest the charge. Id.
\item \textsuperscript{79} Id. at 582-83; see also Robert O. Dawson, Sentencing: The Decision as to Type, Length, and Conditions of Sentence 175 (Frank J. Remington ed. 1969) A study on judges’ opinions that allowed a reduction in sentence in exchange for a guilty plea found that one group of judges questioned whether such an enticement could be regarded on appeal as involuntary and void because the policy might encourage an innocent person to forego trial and plead guilty for fear of being penalized with a harsher sentence by a jury. Id.; Donald J. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 4 (Frank J. Remington ed., 1966) (questioning whether non-trial adjudication practices resulting in a conviction adequately fulfill the basic objective of separating the guilty from the innocent). Newman acknowledged a concern that the accuracy of a guilty plea is based on a “voluntariness” test. Id. at 10.
\item \textsuperscript{80} Jackson, 390 U.S. at 582 (providing, as an alternative, that the choice between life imprisonment and capital punishment could always be left to a jury, regardless of how the defendant’s guilt was determined).
\item \textsuperscript{81} Id. at 583.
\item \textsuperscript{82} United States v. Watt, 910 F.2d 587, 591 (9th Cir. 1990) (agreeing that compelled self-incrimination is an unconstitutional application and denial of a § 3E1.1 reduction when applied to pre-plea conduct).
\end{itemize}
States v. Watt, the United States Court of Appeals for the Ninth Circuit decided that a judge could not hold constitutionally protected conduct against a defendant in deciding whether to grant him an Acceptance of Responsibility reduction. The defendant in Watt entered a guilty plea but also invoked his Miranda rights during an FBI interrogation. The probation officer recommended that Watt be denied a sentence reduction because he did not assist in the recovery of the fruits and instrumentalities of the crime. During sentencing, the trial court analyzed Watt's decision not to assist the government and also considered the defendant's decision to invoke his Fifth Amendment privilege against self-incrimination during sentencing. The trial court decided to deny the 3E1.1 reduction on these grounds. The Ninth Circuit vacated the sentence because it was predicated on Watt’s refusal to waive his Fifth Amendment privilege.

83. 910 F.2d 587 (9th Cir. 1990).
84. Id. at 592 (deciding that a court may not consider the defendant's failure to assist police in gathering inculpatory evidence as evidence that the defendant did not accept responsibility).
86. Watt, 910 F.2d at 588. Watt was charged with armed robbery in violation of 18 U.S.C. § 2113(a),(d), and with use of a dangerous weapon in the commission of a felony in violation of 18 U.S.C. § 924(c)(1). Id. Watt entered a guilty plea for the lesser included offense of unarmed bank robbery in exchange for the prosecutor's recommendation that he receive the acceptance of responsibility reduction in computing his sentence. Id. The probation officer, however, recommended that the defendant be denied the acceptance of responsibility reduction for failure to cooperate in the investigation or assist in recovering the money. Id.
87. Id. The defendant did not provide any assistance in recovering stolen property and made no attempt to make restitution prior to entering a guilty plea. Id.
88. Id. at 592. The court may not consider against the defendant his requested assistance of counsel or reliance on his Miranda protection against self-incrimination. Id.
89. Id.
90. Id. at 593. The court held that “the district court erred in concluding that Watt's failure to assist in the recovery of the fruits and instrumentalities of the crime 'counts against him.'” Id.

In a more recent decision, the United States Court of Appeals for the First Circuit held in United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989), that a reduction in sentence cannot depend upon acceptance of responsibility for charges dismissed in a plea agreement. Id. at 464. The denial of an acceptance of responsibility reduction for failing to plead guilty to other charged conduct could not be used to penalize the defendant for invoking his Fifth Amendment privilege against self-incrimination. Id. This provides another example of how the Acceptance of Responsibility provision can be unconstitutionally applied.
B. No Constitutional Error in Rewarding a Guilty Plea

Established case law holds that the denial of a sentence reduction pursuant to section 3E1.1 does not constitute a penalty or enhancement of a sentence for exercising the constitutional right to a trial. These cases demonstrate that offering a more lenient sentence in exchange for an admission of guilt is not exercising a draconian policy of penalizing all who elect to stand trial. Constitutional error is not to be assigned simply because the risks and consequences may differ among alternative trial tactics for a defendant.

These principles were established before the enactment of the Sentencing Guidelines. The Supreme Court decided, in *Bordenkircher v. Hayes*, that a prosecutor may entice a defendant to enter a guilty plea

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91. A penalty is defined as punishment which operates to compel desired performance. BLACK'S LAW DICTIONARY 1133 (6th ed. 1990). Courts have found a distinction between penalizing a defendant for going to trial and rewarding guilty pleas. See, e.g., United States v. Frazier, 971 F.2d 1076, 1086 (4th Cir. 1992); United States v. Parker, 903 F.2d 91, 105 (2d Cir. 1990); United States v. White, 869 F.2d 822, 826 (5th Cir. 1989).

92. United States v. Rogers, 899 F.2d 917, 924-25 (10th Cir.) (holding that the acceptance of responsibility provision does not unconstitutionally require a defendant to forego his Fifth Amendment right against self-incrimination), cert. denied, 498 U.S. 839 (1990). The court also distinguishes between increasing a sentence for failure to demonstrate remorse and refusing to grant a reduction from the prescribed base offense level. Id.; see also *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978) (establishing that not every burden or pressure to forego a constitutional right is invalid); United States v. Cordell, 924 F.2d 614, 619 (6th Cir. 1991) (holding that even though § 3E1.1 may influence how a defendant chooses to respond to the government's case, it is not unconstitutional to reward a guilty plea); United States v. Ross, 920 F.2d 1530, 1537 (10th Cir. 1990) (rejecting the defendant's claim that the acceptance of responsibility provision required him to plead guilty to all charged conduct thus violating his Fifth Amendment right against self-incrimination and his Sixth Amendment right to a jury trial).

93. United States v. Henry, 883 F.2d 1010, 1011 n.6 (11th Cir. 1989) (finding that § 3E1.1 of the Sentencing Guidelines, permitting leniency for accepting responsibility for criminal activity, does not enable courts to enhance punishment); United States v. White, 869 F.2d 822, 826 (5th Cir.) (finding that the imposition of a lenient sentence on a "concrete defendant" does not mean that those who stand trial are penalized), cert. denied, 490 U.S. 1112 (1989); United States v. Thompson, 476 F.2d 1196, 1201 (7th Cir.) (finding that granting leniency to remorseful defendants who admit their guilt does not mean that courts follow a policy of penalizing those who stand trial), cert. denied, 414 U.S. 918 (1973); see *Bordenkircher v. Hayes*, 357 U.S. 357, 364 (1977) (finding that the prosecutor permissibly may discourage a defendant from asserting his right to a trial by disclosing his intent to pursue further charges if a guilty plea is not entered).

94. See United States v. McNeal, 900 F.2d 119, 122 n.3 (7th Cir. 1990) (dismissing a challenge to the constitutionality of § 3E1.1 and noting a difference between failing to show lenience toward a defendant and penalizing a defendant), aff'd, 1992 U.S. App. LEXIS 32978 (7th Cir. 1992).

95. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (finding no constitutional violation when a prosecutor encourages a defendant to enter a guilty plea by threatening to reindict the accused on more serious charges).

by offering not to pursue more serious charges against the defendant. In Bordenkircher, the prosecutor attempted to dissuade the defendant from entering a plea of not guilty by offering to recommend a five-year sentence in exchange for a guilty plea. The prosecutor also conveyed that if the defendant didn’t “save the court the inconvenience and necessity of a trial” by entering a guilty plea, he would seek an indictment under the Kentucky Habitual Criminal Act, subjecting the defendant to a mandatory sentence of life imprisonment for having two prior convictions. The Court found that the prosecutor’s actions were not materially different from a grand jury indictment that included a charge under the Kentucky Habitual Criminal Act where the prosecutor offered to drop the Habitual Criminal charge in exchange for a guilty plea. The threat of further pursuit of criminal charges was not found to be a vindictive act. The Court differentiated this situation from the issue presented in Pearce by acknowledging a more equal bargaining ability between the parties during plea negotiations. The Court concluded that a prosecutor may selectively pursue charges in an attempt to persuade the defendant to plead guilty without violating the constitutional rights of the defendant.

Similarly, the issue has arisen since the enactment of the Sentencing Guidelines whether the judicial application of guidelines may persuade a defendant to enter a guilty plea by denying a sentence reduction to a defendant who goes to trial. In United States v. Jones, the United States Court of Appeals for the District of Columbia refused to reduce a defendant’s sentence the entire two-levels for acceptance of responsibility. The defendant in Jones originally received a two-level reduction for accepting responsibility in recognition of his sincere remorse and ad-

97. Id. at 357 (stating that the prosecutor’s conduct “merely presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution”).
98. Id. at 358.
99. Id. at 358-59.
100. Id. at 361.
101. Id. at 362.
102. Id. at 362-63. The Court differentiated the situations by pointing out the Pearce decision dealt with “the State’s unilateral imposition of a penalty” whereas the plea bargaining stages of trial provided a “relatively equal bargaining power.” Id. at 362.
103. Id. at 364.
104. 973 F.2d 928 (D.C. Cir.), vacated in part, reh’g granted, en banc, 980 F.2d 746 (D.C. Cir. 1992), and adhered to on reh’g, en banc, 997 F.2d 1475 (D.C. Cir. 1993), and cert. denied, 114 S. Ct. 741 (1994).
105. 973 F.2d at 932-33, 938 (recommending that the defendant not get the full two-level reduction under the “acceptance of responsibility” provision after not providing a defense and failing to take responsibility for his actions until after the jury found him to be guilty).
mission after the trial finding that he was guilty of the charged conduct.  

However, the trial court decided that the defendant, after the benefit of putting the government to its burden of proof, should not receive the full benefit of the reduction, "in view of the fact that [the defendant] simply has acknowledged that he was guilty of what the jury found him guilty of." The District of Columbia Circuit framed the issue as whether a sentencing judge may take the defendant's decision to stand trial into account when determining the defendant's sentence, within the applicable range, after granting the two-level Acceptance of Responsibility reduction. This case explicitly held that during sentencing, a judge may consider the defendant's decision to stand trial as an indication that the defendant has not accepted responsibility for his criminal conduct.

The court reasoned that a sentencing order that had enhanced the defendant's sentence by six months for wasting the state's time was a denial of the full benefit allowed under section 3E1.1 as opposed to a penalty for standing trial. The trial judge stated that he would have sentenced the defendant to the minimum allowable penalty under the sentencing guideline range if a guilty plea had been entered before trial. Because the defendant took the case to trial, however, the judge added six months to the guideline sentence, stating that there should be some reward for

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106. 997 F.2d at 1476. "The presumptive sentencing range, based on appellant's Criminal History Category (I) and the applicable Base Offense Level (34), was 151 to 188 months." Id. After the defendant received the two-level reduction, his sentencing range was 121-to-151 months. Id.

107. Id. The sentencing judge chose not to sentence the defendant in the lowest end of the sentencing range because he felt the defendant did not provide any defense to the charges against him. Id. The judge decided that the defendant's lack of any defense to the charged conduct should not be rewarded by imposing the lowest possible sentence. Id. Cf. United States v. Valencia, 957 F.2d 153 (5th Cir. 1992) (overturning a decision to give a defendant only half of a two-level reduction for acceptance of responsibility).

108. Jones, 997 F.2d at 1476.

The issue presented in this case is quite straightforward: whether a sentencing judge who grants a defendant credit for acceptance of responsibility, thereby putting the defendant in a lower range under the Sentencing Guidelines, may take account of the defendant's decision to go to trial when sentencing within the new, lower range.

109. Id. The court noted that granting a two-level decrease for accepting responsibility did not require that the defendant be sentenced at the bottom of that range. Id. at 1479.

110. Id. The judge essentially granted an Acceptance of Responsibility reduction, but enhanced the defendant's sentence within the resulting sentencing range by adding six months to the minimum possible sentence. See id. However, the sentence was still within the sentencing range available after the reduction. Id.

111. United States v. Jones, 973 F.2d 928, 932 (D.C. Cir.) vacated in part, reh'g granted, en banc, 980 F.2d 746 (D.C. Cir. 1992), and adhered to on reh'g, en banc, 997 F.2d 1475 (D.C. Cir. 1993), and cert. denied, 114 S.Ct. 741 (1994); see supra note 107, and accompanying text.
pleading guilty before trial. Ultimately, the Court of Appeals decided that it was perfectly acceptable for a trial judge to consider that the timing of a defendant's acceptance of responsibility may permit a lesser or greater penalty.

Not only may courts deny a full two-level reduction to a defendant who stands trial, but the Supreme Court has upheld sentences that reward defendants for entering guilty pleas. The Supreme Court, in *Corbitt v. New Jersey*, recognized that legislatures may encourage guilty pleas by reducing the sentence imposed on defendants who plead guilty. The New Jersey homicide statute at issue in *Corbitt* mandated life imprisonment for a first degree murder conviction, but permitted a lesser sentence if the defendant entered a plea of non vult or nolo contendere before trial. The Court reasoned that because the risk of life imprisonment was not avoided completely by entering a guilty plea, and the defendant did not necessarily benefit by entering a guilty plea, the New Jersey statute imposed no unconstitutional burden on Corbitt's right to a jury trial. Recognizing that no rule had emerged against encouraging guilty pleas, the Court held that a state may encourage a guilty plea by offering

112. 973 F.2d at 932. The judge awarded the acceptance of responsibility reduction, but increased the sentence by six months for not providing any defense and wasting the court's time. *See id.* The judge encouraged a constitutional review of his imposed sentence and his decision not to grant an Acceptance of Responsibility reduction because the defendant did not provide more than a frivolous defense to the charged offense. *Id.*


114. *See Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978) (acknowledging that it is acceptable for a statute to "encourage a guilty plea by offering substantial benefits in return for the plea"). Substantial benefits may include the possibility of avoiding a life sentence or similar reduction in a sentence. *See Brady v. United States*, 397 U.S. 742, 751 (1970) (providing that a substantial benefit may include a lesser penalty than the court could impose after a guilty verdict); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 363-65 (1978) (holding that it is acceptable to present a defendant with options which make entering a plea bargaining agreement before trial the most attractive alternative available to the defendant); *American Bar Ass'n., Standards for Criminal Justice Standard 14-1.8(a)(iv)* (2d ed. 1980) (providing that courts may grant sentence concessions to an offender who has "given or offered cooperation" in the event of a guilty plea).


116. *Id.* at 218-19.

117. *Id.* at 215. The statute further provided that if the judge accepts the plea, "the punishment 'shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.' " *Id.* (quoting N.J. Stat. Ann. § 2A: 113-3 (West 1969)).

substantial benefits\textsuperscript{119} to a defendant in return for the plea.\textsuperscript{120} The defendant's plea may result in a shorter sentence than that possibly imposed, or even required by statute, following a guilty verdict at trial, and may provide a lesser penalty than a jury is required to impose after a guilty verdict.\textsuperscript{121}

The Corbitt Court recognized that although section 3E1.1 may affect a criminal defendant's exercise of his constitutional rights, "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid."\textsuperscript{122} Available alternatives posing different risks and consequences do not render the process unconstitutional.\textsuperscript{123} The defendant must choose between the possibility of leniency for entering a plea, or a mandatory penalty if convicted at trial.\textsuperscript{124} The Corbitt decision concluded that a defendant convicted at

\textsuperscript{119} See supra note 114 (providing an explanation of substantial benefits).
\textsuperscript{120} Corbitt, 439 U.S. at 218-19.
\textsuperscript{121} Id. at 219-20; see Brady, 397 U.S. at 751 (finding that "the defendant's desire to accept the certainty or probability of a lesser penalty" did not compel the entering of a guilty plea for Fifth Amendment purposes where counsel advised the defendant that the judge had a reputation for being more lenient toward defendants who plead guilty than those who exercised their right to a trial).
\textsuperscript{122} Corbitt, 439 U.S. at 218. The Corbitt Court held that withholding the possibility of leniency from those who stand trial "cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed." Id. at 223-24 (recognizing that the plea bargaining system inherently extends leniency to defendants who plead guilty). Plea bargaining inherently creates the possibility of leniency that becomes unavailable after trial. Id. at 224; see also United States v. Henry, 883 F.2d 1010, 1011 (11th Cir. 1989) (confirming that, while "[s]ection 3E1.1 may add to the dilemmas facing criminal defendants," the provision does not punish defendants for exercising their rights).
\textsuperscript{123} United States v. Gonzalez, 897 F.2d 1018, 1020 (9th Cir. 1990) (recognizing that district courts have been free to consider a defendant's acceptance of responsibility in making sentencing decisions long before the promulgation of the Sentencing Guidelines).
\textsuperscript{124} See id. The Supreme Court has recognized freedom of choice as an important consideration in determining the constitutionality of criminal sentences. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). In Bordenkircher, Hayes was charged with uttering a forged instrument. Id. at 358. At the time, the punishment for this offense was two to ten years in prison. Id. The prosecutor agreed to recommend a five-year sentence in exchange for a guilty plea. Id. The prosecutor also warned the defendant that if he did not enter a guilty plea, the state would seek an indictment under the Kentucky Habitual Criminal Act. Id. Under this Act, Hayes would receive a mandatory life sentence because he had two prior felony convictions. Id. at 358-59. Choosing not to plead guilty, Hayes was indicted under the Act and received a life sentence at trial. Id. at 359. Hayes challenged the sentence as an unconstitutional penalty for not accepting the prosecutor's plea bargain. Id. The Court found the prosecutor's use of the habitual offender indictment as leverage in the bargaining process to be proper. Id. at 365. The Bordenkircher Court concluded that the crucial factor in determining the constitutionality of a sentence was the defendant's freedom to choose between sentencing options. Id. at 363 (stating that "there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer"); see also, supra notes 96-103 and accompanying text (discussing the constitutionality of plea agreements in Bordenkircher).
The court in *United States v. Rogers* applied this reasoning after the promulgation and enactment of the Federal Sentencing Guidelines. In *Rogers*, the defendant argued that section 3E1.1 violated his Fifth Amendment privilege against self-incrimination by requiring him to further incriminate himself to avoid the penalty of not receiving the reduction. The United States Court of Appeals for the Tenth Circuit found no violation of the defendant's Fifth Amendment rights. The Court differentiated between "increasing the severity of a sentence for failure to demonstrate remorse and refusing to grant a reduction from the prescribed base offense level." The court further noted that extending leniency to a cooperative defendant is different from administering additional punishment to a defendant who remains silent. Thus, the court concluded that section 3E1.1 did not compel the defendant to incriminate himself in violation of the Fifth Amendment.

C. A Court May Not Base the Severity of a Sentence Solely Upon a Defendant's Decision to Stand Trial

Other case law suggests that because sentence reductions under section 3E1.1 are neither awarded automatically nor withheld according to the defendant's decision to go to trial, the provision is constitutional. In *United States v. Rodriguez*, for instance, the court held that as long as the leniency decision is not based solely on the defendant's decision to stand trial, the defendant's constitutional rights are not impaired. The

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125. *Corbin*, 439 U.S. at 226. Courts have upheld on similar grounds disparity in sentencing between co-defendants based on a defendant's choice to enter a guilty plea or to provide an incriminating statement in the presentencing interview. *See United States v. Trujillo*, 906 F.2d 1456, 1464-65 (10th Cir.), *cert. denied*, 498 U.S. 962 (1990).
127. *See id.*
128. *Id.* at 919. During a presentence interview, the defendant admitted to trafficking 24 ounces of heroin instead of the five ounces alleged in the indictment. *Id.* at 918. The defendant claimed that the admission was necessary to obtain the Acceptance of Responsibility reduction. *Id.* The court characterized the defendant's belief as "unwitting" behavior. *Id.* at 919.
129. *Id.* at 924-25.
130. *Id.*
131. *Id.*
134. *Rodriguez*, 959 F.2d at 197; *see also Standards for Criminal Justice Sentencing* at 81 (3d ed. 1994). The ABA, through the American Bar Association’s Criminal Jus-
Court of Appeals for the Eleventh Circuit vacated the sentence because the trial judge had conditioned the defendant’s receipt of the Acceptance of Responsibility reduction upon the defendant’s forfeiture of his right to appeal. The trial judge in Rodriguez stated that the ultimate test of acceptance of responsibility could be whether the defendant pursues an appeal, and reasoned that an appeal is indicative of a defendant’s failure to accept responsibility. The judge had asked the defendants to admit, under oath, that they were guilty of the indicted offenses and then inquired as to whether they intended to appeal their convictions. The judge proceeded to impose sentences based on the defendants’ answers. The appellate court vacated the sentences, but recognized the importance of a defendant’s conduct in determining whether to grant a reduction. Ultimately, the appellate court held that the sentencing judge should weigh all of the recommended justifications for a reduction in the defendant’s favor, but may not weigh against the defendant his decision to exercise a constitutional right.

...
Under *United States v. Saunders*, a defendant who stands trial generally is not eligible for the acceptance of responsibility reduction. The *Saunders* case challenged the constitutionality of 3E1.1 based on the disadvantages it creates for a defendant who confesses after trial. According to the *Saunders* decision, definitively prohibiting a sentence reduction solely because a defendant stands trial would be unconstitutional. Alternatively, a defendant who demonstrates sincere remorse at trial may be able to obtain an acceptance of responsibility reduction. The *Saunders* court recognized that a defendant will have difficulty convincing a trial judge that he has accepted responsibility if he has maintained his innocence throughout the trial and has not cooperated with the authorities. But the court decided that this difficulty alone did not render section 3E1.1 unconstitutional.

Further, a defendant who pleads guilty is not guaranteed the two-level reduction. In *United States v. Gonzalez*, the court characterized a 3E1.1 reduction as a possible benefit for a qualified defendant. The mere possibility of leniency does not preclude a judge from denying lenient treatment where the defendant fails to show contrition. In this instance, the judge’s denial of the reduction was based on the defendant’s conduct at trial, not on his decision to stand trial. Therefore, the appellate court found that the application of 3E1.1 did not violate the defendant’s constitutional rights.

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142. 973 F.2d 1354 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1026 (1993). Saunders was convicted of “conspiring to possess cocaine with the intent to distribute and of possessing cocaine with the intent to distribute.” *Id.* at 1356.
143. *Id.* at 1361-63.
144. *Id.* at 1362-63.
145. *Id.*
146. *Id.* at 1363 (stating that although a defendant going to trial may be prohibited from receiving the acceptance of responsibility reduction, the reduction could be available under unusual circumstances upon a showing of extreme remorse).
147. *Id.*
148. *Id.* The trial court was unimpressed with Saunders’ expression of remorse, stating that it was “too little, too late” to warrant an Acceptance of Responsibility reduction. *Id.* at 1364.
149. *United States v. Gonzalez*, 897 F.2d 1018, 1020 (9th Cir. 1990).
150. *Id.* at 1018.
151. *Id.* at 1021.
152. *Id.* Gonzalez argued that his contrition was demonstrated by his “appearing for sentencing, accepting the judgment of the jury and the sentence of the judge, and serving his time.” *Id.* at 1020.
153. *Id.*
154. *Id.* at 1021.
D. Judicial Economy Considerations

1. Retaliatory Sentences for Wasting the Court’s Time Are Impermissible

Although the Commission emphasized the importance of judicial economy in the construction of the Sentencing Guidelines, courts have struck down retaliatory sentences which were imposed for frivolously consuming the court’s time.\textsuperscript{155} In \textit{United States v. Hutchings},\textsuperscript{156} the United States Court of Appeals for the Second Circuit required the resentencing of a defendant who was penalized for wasting public funds and resources.\textsuperscript{157} The trial judge stated during sentencing that the absence of a defense rendered the trial superfluous.\textsuperscript{158} Because the judge sentenced the defendant to the maximum possible sentence and maximum fines, without explanation other than the reference to wasting the court’s time and public funds, the appellate court remanded the case for resentencing.\textsuperscript{159}

Another retaliatory issue arises when a co-defendant enters a guilty plea and receives a lesser sentence than the defendant who chose to stand trial. In \textit{United States v. Mazzaferro},\textsuperscript{160} the trial judge imposed concurrent twenty-year sentences for three drug-related counts against Mazzaferro, who did not plead guilty, while imposing upon his co-defendants, who plead guilty, one ten-year sentence for the same offenses.\textsuperscript{161} This disparity is particularly alarming in light of the minor role that Mazzaferro played in the perpetration of the crime, as compared to his co-defendants.\textsuperscript{162} The appellate court noted a strong inference that Mazzaferro was penalized for wasting the court’s time.\textsuperscript{163}

\textsuperscript{155} See \textit{United States v. Mazzaferro}, 865 F.2d 450, 460 (1st Cir. 1989) (remanding a sentence which appeared retaliatory); \textit{United States v. Hutchings}, 757 F.2d 11, 14 (2nd Cir.) (remanding a sentence where the record was unclear whether the trial judge considered the defendant’s decision to stand trial in determining his sentence), \textit{cert. denied}, 472 U.S. 1031 (1985).

\textsuperscript{156} 757 F.2d 11 (2d Cir.), \textit{cert. denied}, 472 U.S. 1031 (1985).

\textsuperscript{157} 757 F.2d at 13. The trial judge stated that the trial had been a “total waste of public funds and resources” since the defendant did not provide any defense to his case. \textit{Id.} at 14. Furthermore, the trial judge wanted to consider the expenditure of public funds at sentencing but also sought to tax the defendant for the costs associated with his prosecution. \textit{Id.} at 13-14.

\textsuperscript{158} \textit{Id.} at 13.

\textsuperscript{159} \textit{Id.} at 14; \textit{see also} \textit{United States v. Crocker}, 788 F.2d 802 (1st Cir. 1986). A judge’s remarks concerning defendants who exercise their constitutional right to stand trial could be a factor in determining the length of sentence imposed in cases where defendants present a frivolous case “sufficient to establish that there was a reasonable likelihood of vindictiveness in the imposition of a harsher sentence.” \textit{Id.} at 809.

\textsuperscript{160} 865 F.2d 450 (1st Cir. 1989), later proceeding, 907 F.2d 251 (1990).

\textsuperscript{161} 865 F.2d at 457.

\textsuperscript{162} \textit{Id.} The defendants in this case were arrested by the United States Coast Guard for three drug-related charges involving possession with intent to distribute 3,468 pounds of marijuana. \textit{Id.} at 451-52. The testimony at trial, however, showed Mazzaferro’s responsi-
zaferro’s sentence was motivated by retaliation for not entering a guilty plea and remanded the case for resentencing. The appellate court noted that one of the purposes of the Sentencing Guidelines is to reduce the disparity in sentencing between defendants who commit similar crimes.163

2. Judicial Economy Arguments for Encouraging Guilty Pleas

Even if section 3E1.1 burdens the defendant who chooses to go trial, there is authority holding that such a burden is constitutional.164 The Supreme Court has held that plea bargaining is justified by the state’s interest in conserving prosecutorial and judicial resources.165 In Brady v. United States,166 for example, the Supreme Court identified the preservation of prosecutorial and judicial resources as legitimate state interests in upholding the constitutional validity of a sentencing scheme that favored guilty pleas.167

In addition to the encouragement of judicial and law enforcement economy, courts have justified the Acceptance of Responsibility provision on the strong societal interests it serves.168 These interests include “the reduction of crime, restitution, early withdrawal from criminal activities were limited to assisting in the sailing of the boat and not to executing the drug transactions. Id. at 453. Mazzaferro was found guilty and sentenced to twenty years imprisonment and fined $25,000. Id. The other defendants, who plead guilty and played a more substantial role in the execution of the illegal transactions, were each sentenced to ten years imprisonment and five years supervised release. Id.; see also United States v. Capriola, 537 F.2d 319 (9th Cir. 1976). The Capriola court stated that when some defendants plead guilty and others do not, and "there is substantial disparity in sentences imposed upon different individuals for engaging in the same criminal activity, the preservation of the appearance of judicial integrity and impartiality requires that the sentencing judge record an explanation." Id. at 321.

163. Mazzaferro, 865 F.2d at 460.
164. See, e.g., Brady v. United States, 397 U.S. 742, 753 (1970) (upholding the validity of extending a benefit to a defendant who demonstrates that he accepts responsibility for his crime by entering a guilty plea), later proceeding, 433 F.2d 924 (10th Cir. 1970); United States v. Belgard, 694 F. Supp. 1488, 1497 (D. Or. 1988) (rejecting argument that § 3E1.1 is unconstitutional on its face), aff’d in part and vacated in part, 894 F.2d 1092 (9th Cir.), and cert. denied, 498 U.S. 860 (1990).
165. See Corbitt v. New Jersey, 439 U.S. 212, 223 (1978) (stating that the plea bargaining system is designed to be mutually beneficial to the defendant and the state); Brady, 397 U.S. at 749, 752 (1970) (finding the defendant’s voluntary guilty plea valid, and choosing to limit his punishment to life imprisonment as opposed to the possibility of the death penalty had he been convicted by a jury); United States v. Jones, 973 F.2d 928, 934 (D.C. Cir.) (relying on the Brady and Bordenkircher decisions to find a legitimate interest in preserving prosecutorial and judicial resources) vacated in part, reh’g granted, en banc, 980 F.2d 746 (D.C. Cir. 1992), and adhered to, on reh’g, en banc, 997 F.2d 1475 (D.C. Cir. 1993), and cert. denied 114 S. Ct. 741 (1994).
166. 397 U.S. 742 (1970), later proceeding, 433 F.2d 924 (10th Cir. 1970).
167. 397 U.S. at 752.
ity, withdrawal of criminals from positions of trust and responsibility, and the increased potential for rehabilitation among those who feel and show true remorse for their anti-social conduct." The United States Court of Appeals for the Eleventh Circuit stated in United States v. Henry that a state may extend a benefit to a defendant "who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for the success of rehabilitation over a shorter period of time than might otherwise be necessary." The Henry court did not hold the Acceptance of Responsibility provision unconstitutional because such holding would recognize that "defendants who express genuine remorse for their actions can never be rewarded at sentencing."

II. THE DIFFERENCE BETWEEN DENYING A DEFENDANT A BENEFIT AND PENALIZING HIM

The most difficult issue to address when considering the proposed and current section 3E1.1 reductions, is whether there is a difference between providing a reduction to a defendant for entering a guilty plea and penalizing a defendant for standing trial. One line of authority suggests that 3E1.1 does not impose a penalty on the defendant, but instead provides a possible reduction in his sentence. This rationale serves as the foundation for judicial approval of plea bargaining arrangements as a valid method for encouraging guilty pleas. Cases such as Corbitt and Bordenkircher encouraged legislation providing for adequate incentives for an Acceptance of Responsibility reduction prior to the promulgation of the Federal Sentencing Guidelines.

In Jones, for instance, the court demonstrated the vast discretion a trial judge permissibly can exercise regarding the effect a defendant's decision...
to stand trial has on his sentence length. The *Jones* decision also illustrates how the Federal Sentencing Guidelines allow a trial judge to weigh factors, including the defendant's decision to plead guilty, when deciding on an equitable sentence.

The *Corbitt* decision provides further support for the philosophy of differentiating between encouraging a defendant to enter a guilty plea and penalizing a defendant for standing trial by holding that the legislatures can statutorily encourage a defendant to enter a guilty plea by affording different sentencing options when the defendant decides to plead guilty. *Bordenkircher* also supports the aforementioned proposition by upholding sentencing differentials that are based on a defendant's freedom to choose between entering a plea or putting the government to its burden of proof.

These cases suggest that differing risks and consequences among a defendant's available defense alternatives are insufficient grounds for assigning constitutional error. These cases provide the necessary foundation to support an automatic sentence reduction for a guilty plea by distinguishing between increasing the severity of a sentence for failure to demonstrate remorse and refusing to reduce a sentence from the prescribed base-level offense for a defendant's refusal to accept responsibility.

In contrast, the argument that the Acceptance of Responsibility provision impedes a defendant's right to stand trial parallels the issues arising when a defendant successfully attacks his original conviction but receives a harsher sentence upon reconviction. It is an established principle

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177. United States v. Jones, 973 F.2d 928, 937-38 (D.C. Cir.) (stating that a judge may weigh a defendant's refusal to plead guilty as evidence that he will not accept responsibility thus affecting a defendant's sentence), vacated in part, reh'g granted, en banc, 980 F.2d 746 (D.C. Cir. 1992), adhered to, on reh'g, en banc, 991 F.2d 1475 (D.C. Cir. 1995), and cert. denied, United States v. Jones, 114 S. Ct. 741 (1994).

178. *Id.* at 932-33. Here, the trial judge acknowledged that Jones should receive a portion of the acceptance of responsibility reduction, but not the entire two level reduction. *Id.*

179. *See supra* notes 114-25 and accompanying text (discussing the *Corbitt* decision).

180. *See supra* notes 95-103 (discussing the *Bordenkircher* decision).

181. *See Jones*, 973 F.2d at 938 (recognizing that the defendant must have some incentive to plead guilty and is afforded the opportunity to take advantage of the incentive by entering a guilty plea).


183. *See North Carolina v. Pearce*, 395 U.S. 711, 722-25 (1969) (holding that the imposition of a longer sentence after a resentencing must be supported by evidence clearly demonstrating that the new sentence is not vindictive).
that a court must not penalize a defendant for engaging in constitutionally protected conduct.\textsuperscript{184} Opponents of the Acceptance of Responsibility provision equate the denial of the benefit derived under this provision with the imposition of a penalty for the exercise of a constitutional right. These critics maintain that the Acceptance of Responsibility provision should be available even to defendants who exercise their constitutional right to stand trial.\textsuperscript{185} Case law consistent with this view supports the notion that an automatic reduction which is available only to the defendant foregoing a trial is an unconstitutional burden on the defendant's right to a trial.\textsuperscript{186} Most of these cases, however, were decided prior to the promulgation of the Federal Sentencing Guidelines and before plea bargaining became such an accepted practice.\textsuperscript{187}

If, as these cases suggest, defendants fear the possibility of a greater sentence if they choose to go to trial, the number of defendants opting to enter a guilty plea under the Sentencing Guidelines should logically increase. Surprisingly, however, since the enactment of the Federal Sentencing Guidelines, the number of defendants pleading guilty has decreased,\textsuperscript{188} even though the incentive to plead guilty supposedly has increased.\textsuperscript{189}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
 & Percentage of Guidelines & Percentage of Pre-Guideline\
Defendants Pleading & Guilty in 1989 & Defendants Pleading Guilty in 1989 \\
\hline
All Selected Districts & 79\% & 86\% \\
Dist. No. 1 & 80\% & 84\% \\
Dist. No. 2 & 78\% & 94\% \\
Dist. No. 3 & 87\% & 94\% \\
Dist. No. 4 & 73\% & 76\% \\
\hline
\end{tabular}
\caption{Sentencing trends in four districts.}
\end{table}

\textsuperscript{184} E.g., United States v. Watt, 910 F.2d 587, 592 (9th Cir. 1990) (holding that constitutionally protected conduct may not factor into the court's sentencing determination); United States v. Perez-Franco, 873 F.2d 455, 463 (1st Cir. 1989) (concluding that the government cannot penalize a person because he exercises his Fifth Amendment right not to incriminate himself).

\textsuperscript{185} See Pearce, 395 U.S. at 724 (stating that penalizing a defendant for exercising a constitutional right is patently unconstitutional); United States v. Jackson, 390 U.S. 570 (1968); Watt, 910 F.2d at 587; Perez-Franco, 873 F.2d at 455.

\textsuperscript{186} Cf. Pearce, 395 U.S. at 711; Jackson, 390 U.S. at 570; Perez-Franco, 873 F.2d at 455.

\textsuperscript{187} Pearce, 395 U.S. at 711 (decided in 1969); Jackson, 390 U.S. at 570 (decided in 1968); Perez-Franco, 873 F.2d at 455 (decided in 1989).

\textsuperscript{188} See Heaney, supra note 2, at 175-76, 184. Sentencing trends in four districts were analyzed under both pre-guideline practices and post-guideline practices. The study concluded that the number of defendants pleading guilty diminished, and the number of trials under the guidelines increased by one-third in the selected districts. See id. at 175-84.

\textsuperscript{189} See id. at 175-84 (discussing sentencing data to determine the effects of the Sentencing Reform Act of 1984 and the Federal Sentencing Guidelines on the sentencing process). A defendant who receives the two-level Acceptance of Responsibility reduction gets
A final line of cases state that the severity of a defendant's sentence cannot be based solely on his decision to stand trial. However, these cases add that as long as the defendant has an opportunity to prove he has accepted responsibility, even if it is practically impossible for him to do so after maintaining his innocence at trial, the Guidelines are constitutional. In light of these cases, an automatic Acceptance of Responsibility reduction for those pleading guilty is supportable, but only if other reductions are made available to defendants going to trial, such as some of those provided under subsection (a) of 3E1.1.

III. PROPOSAL TO CHANGE THE ACCOMPECTION OF RESPONSIBILITY PROVISION OF THE FEDERAL SENTENCING GUIDELINES TO PROVIDE FOR AN AUTOMATIC REDUCTION

Section 3E1.1 should be redrafted to include an automatic reduction in a defendant's sentence in exchange for entering a pre-trial guilty plea. This reduction should be denied to a defendant who chooses to exercise his right to stand trial because he obtains the benefit of putting the government to the expense of a trial, and not necessarily because he feels his innocence has been determined prior to trial. The following table demonstrates clearly, the possibility of receiving an Acceptance of Responsibility reduction is substantially greater if one enters a guilty plea.

<table>
<thead>
<tr>
<th>District</th>
<th>% of Total Guilty Pleas</th>
<th>% of Total Trials</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Selected Districts</td>
<td>77%</td>
<td>16%</td>
</tr>
<tr>
<td>Dist. No. 1</td>
<td>83%</td>
<td>17%</td>
</tr>
<tr>
<td>Dist. No. 2</td>
<td>86%</td>
<td>24%</td>
</tr>
<tr>
<td>Dist. No. 3</td>
<td>78%</td>
<td>33%</td>
</tr>
<tr>
<td>Dist. No. 4</td>
<td>54%</td>
<td>2%</td>
</tr>
</tbody>
</table>

Id. at 180.

190. See supra notes 132-41 and accompanying text (discussing the Rodriguez decision); United States v. Saunders, 973 F.2d 1354 (7th Cir. 1992), cert. denied, 113 S. Ct. 1026 (1993).


192. U.S.S.G., supra note 10, § 3E1.1 application note at 248. The application note 1 lists other appropriate considerations as:

- voluntary termination or withdrawal from criminal conduct or associations;
- voluntary payment of restitution prior to adjudication of guilty;
- voluntary surrender to authorities in the recovery of the fruits and instrumentalities of the offense;
- voluntary resignation from the office or position held during the commission of the offense;
- post-offense rehabilitative efforts (e.g., counseling or drug treatment).

Id.

193. Contra, U.S.S.G., supra note 10, § 3E1.1, at 249 application note 3 (stating that "[a] defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.").
ernment to its burden of proof and the opportunity to rebut the government's case. However, an exception from the latter should exist for a defendant who stands trial to challenge the constitutionality of a statute or its application, even though he does not deny the factual criminal conduct of the charges. This proposal would not permit a judge to impose a sentence longer than the base-level sentencing guideline range because a defendant decides to stand trial, but would require a court to deny an Acceptance of Responsibility reduction to a defendant who simply demonstrates remorse after being found guilty.

This adjustment can be accomplished by delinking subsections (a) and (b) of section 3E1.1 of the Federal Sentencing Guidelines. The sections should be rewritten to allow the defendant entering a guilty plea to receive an automatic reduction of two levels under subsection (b). Then, subsection (a) should provide a one-level reduction if any defendant has demonstrated acceptance of responsibility outside of entering a guilty plea. Thus, a defendant who enters a guilty plea and a defendant choosing to stand trial would both receive a one-level reduction if they demonstrate, to the satisfaction of the sentencing judge, the applicable factors currently promulgated in the Acceptance of Responsibility provision outside of entering a guilty plea.

IV. Weighing Constitutional Rights, Plea Bargaining, and Judicial Economy

To decide whether the proposed change to section 3E1.1 better fulfills the purposes of the Sentencing Guidelines and the philosophies of punishment.

194. See id. application note 2. The Sentencing Commission established that: Conviction by trial . . . does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt. Id.

195. The proposal relies on the distinction between denying a benefit and penalizing a defendant as demonstrated in § 1 part A of this Comment. Other sentencing proposals recommend taking the sentence reduction away from the judge's discretion. STANDARDS FOR CRIMINAL JUSTICE SENTENCING, supra note 8, § 18-3.8, at 77. One proposal recommends that the consideration of guilty pleas should not be left to the discretion of individual sentencing judges. Id. at 79. Furthermore, this proposal recommends that defendants exercising their right to stand trial can accept responsibility and should not be penalized. Id. However, the proposal acknowledges that courts should be suspicious of acceptance of responsibility claims that follow a full adjudication of guilt. Id.

196. For the text of subsections (a) and (b), see supra note 24.

197. See infra note 194 (listing reductions that are available to a defendant who does not enter a guilty plea).
ishment without compromising a defendant's constitutional rights, each item will be discussed under the terms of the proposed amendment.

A. Purposes of the Sentencing Guidelines

The purposes of the Guidelines are to promote honesty, uniformity, and proportionality in sentencing.\textsuperscript{198} The proposal to delink subsection (a) and (b) accomplishes all three goals. The foundation of the sentencing guidelines is the reduction of unwarranted sentencing disparity.\textsuperscript{199} An automatic reduction presumption would allow a judge to acknowledge the entry of a guilty plea while reserving the judicial right to depart from the guideline reduction for unusual or extreme cases.\textsuperscript{200} The two-level reduction provides a proportional reduction based on where, under the guideline range, the defendant's charged conduct places him in the sentencing table.\textsuperscript{201} This reduction, therefore, allows a uniform reduction that is tailored to the individuals sentencing range.

The Commission promulgated the Federal Sentencing Guidelines to establish a more uniform sentencing structure.\textsuperscript{202} To reduce arbitrary sentencing, the guidelines limit, but do not totally remove, a judge's discretion in sentencing each individual defendant.\textsuperscript{203} By providing an automatic two-level reduction for a guilty plea, the proposed delinkage of subsections (a) and (b) of section 3E1.1 would create a bright-line rule, thereby simplifying the sentencing process, but still allow the judge to consider individual characteristics of each defendant in determining two things; the appropriate sentence within a guideline range, and the applicability of the one-level Acceptance of Responsibility reduction for acceptance of responsibility conduct outside of entering a guilty plea.

\textsuperscript{198} See Campbell, supra note 14, at 92.

\textsuperscript{199} Id. at 90; supra note 12 and accompanying text (identifying uniformity as a goal of the Guidelines).

\textsuperscript{200} Under 18 U.S.C. § 3553(b), a sentence may be increased or decreased if the court finds aggravating or mitigating circumstances that are not adequately considered by the guidelines. 18 U.S.C. § 3553(b) (1994). A sentencing judge could also use the guideline provision for sentence enhancements or departures to in effect deny a defendant a substantive reduction. U.S.S.G., supra note 10, § 5K2.0, at 307 (providing an opportunity for the sentencing judge to depart from the recommended sentencing range if he finds that there are aggravating or mitigating circumstances not adequately considered by the guidelines). See Campbell, supra note 14, § 4.8, at 88.
B. Furthering the Philosophies of Punishment

The United States Sentencing Commission recognizes incapacitation, retribution, rehabilitation, and deterrence as the purposes of criminal punishment.\(^{204}\) All of these purposes can be served better by the proposed change to section 3E1.1. When a defendant is enticed to enter a guilty plea, efficient and certain punishment is ensured.\(^{205}\) The rehabilitative goals of punishment are better served if a defendant affirmatively recognizes his criminal behavior. This is true because after recognizing his wrongdoings, the defendant may be more receptive to rehabilitation programs.\(^{206}\) Another justification for rewarding a defendant who accepts responsibility include judges’ beliefs that acknowledgment of guilt and responsibility correlate to a lower probability of recidivism.\(^{207}\) As early as 1959, judges acknowledged that a defendant who takes steps toward rehabilitation by pleading guilty should be treated differently than a defendant who seeks every opportunity to avoid conviction.\(^{208}\) The counterargument, that the rehabilitative purpose of section 3E1.1 is ineffective, is unsubstantiated. Rehabilitation was the country’s leading sentencing rationale until the late 1970’s.\(^{209}\) When sentencing reform debates arose in the late 70’s and 80’s, however, the consensus opinion was that rehabilitative efforts generally failed.\(^{210}\) Some sentencing critics, instead of concluding that rehabilitation was an ineffective rationale, viewed an inadequate prison system as frustrating the purpose of the rehabilitative philosophy.\(^{211}\) Therefore, the alleged failure of the rehabilitative philosophy should not negatively effect the purpose of rewarding guilty pleas under section 3E1.1.

C. Societal Benefits of Plea Incentives

Society benefits when a defendant receives an incentive to enter a guilty plea. The first such benefit is the judiciary’s interest in promoting

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\(^{204}\) Id. § 2.1 at 17; see, supra notes 19-22 and accompanying text (discussing these purposes).

\(^{205}\) See U.S.S.G., supra note 10, § 3E1.1, at 249-50 (stating that a defendant who enters a guilty plea accepts responsibility in a manner that “ensures the certainty of his just punishment in a timely manner”).

\(^{206}\) SUPPLEMENTARY REPORT, supra note 17, at 204.

\(^{207}\) Id.

\(^{208}\) DAWSON, supra note 79, at 175; see id. at 175 n.9 (comparing defendants who plead guilty and publicly acknowledging their guilt versus those exercising their constitutional rights but never taking any steps toward rehabilitation).

\(^{209}\) CAMPBELL, supra note 14, at 29.

\(^{210}\) Id. at 32. Arguably, the lack of genuine rehabilitative efforts attempted in the nation’s correctional system was the cause of the aforementioned failure. Id.

\(^{211}\) Id. at 31.
judicial economy. Other societal benefits include sparing the victims of crime and their families from further disruption to their lives by avoiding trial. Additionally, the public saves substantial resources in prosecuting fewer defendants. Perhaps most importantly, the offender, upon entering a guilty plea, is quickly removed from society, eliminating the possibility of immediate future criminal activity.

D. Providing for a More Honest Plea Bargaining System

Critics of sentence reductions argue that plea agreements are sufficient to reward a defendant for entering a guilty plea. Approximately ninety percent of all federal criminal cases involve guilty pleas, and many involve some form of plea agreement. The most common form of plea agreement consists of dismissing a count in exchange for a defendant’s guilty plea to other counts. This “charged offense” system directly affects the sentence level for a defendant according to his charged conduct as opposed to his actual conduct. A second form of plea agreement under the Guidelines is sentence bargaining. The effect of this form of agreement is dependant on the judge’s reaction to a requested departure

212. See Brady v. United States, 397 U.S. 742, 752 (1970) (discussing the benefits of conserving scarce judicial and prosecutorial resources when a defendant enters a guilty plea) later proceeding, 433 F.2d 924 (10th Cir. 1970); see also United States v. Wiley, 184 F. Supp. 679, 684-85 (N.D. Ill. 1960) (promoting leniency for guilty pleas as an administrative necessity); Dawson, supra note 79, at 175 (noting the necessity of rewarding guilty pleas for courts to handle their case load); Most judges agree that “since the defendant has saved the government the time and expense of trial, the sentence is less than it ordinarily would be.” Wiley, 184 F. Supp. at 684. The operation of a criminal court depends on inducing a large number of actually guilty defendants to plead guilty in exchange for leniency. Id. at 685.

213. See supra note 212.

214. See U.S.S.G., supra note 10, at 249-50 (acknowledging that a defendant who enters a guilty plea will be ensured certain, just, and timely punishment).

215. See Schulhofer & Nagel, supra note 38, at 238 (discussing prosecutorial discretion in charging and plea negotiations as a modern practice that greatly impacts a defendant’s ultimate sentence).


217. See Schulhofer & Nagel, supra note 38, at 262-64 (discussing charge bargaining, guideline factor bargaining, and date bargaining); Ryan-Boyle, supra note 12, at 747 (recognizing that the guidelines are primarily a “charge offense” rather than “real offense” system).


from the sentencing guidelines after a defendant has been convicted or has entered a guilty plea.\textsuperscript{220}

Under the charge bargaining system, the body of a presentence report is written to reflect the offense of conviction agreed upon between the prosecutor and the defendant, not the actual offense charged.\textsuperscript{221} The decision the prosecutor makes at the charging stage can greatly affect the sentence a defendant receives regardless of the defendant's decision to enter a guilty plea.\textsuperscript{222} By agreeing on the charged conviction, a defendant can determine the applicable sentencing range under the Guidelines.\textsuperscript{223} The impact of the plea agreement is to be documented in the presentence report thereby enabling the judge to compare the proposed sentence to the sentence for all charged conduct.\textsuperscript{224} In effect, this charged offense bargaining system shifts power from the judge to those who are involved in the preparation of the presentence report, the prosecutor and the probation officer.\textsuperscript{225}

Such prosecutorial discretion should be limited to avoid the creation of a new sentencing disparity involving plea and charge bargaining practices.\textsuperscript{226} By allowing the plea bargaining process to be open completely

\textsuperscript{220} See id.

\textsuperscript{221} Administrative Office of The United States Courts, Probation Division, Presentence Investigation Reports Under the Sentencing Reform Act of 1984, reprinted in Federal Sentencing Law and Practice, at 379; see Schulhofer & Nagel, supra note 38, at 264 (discussing the prosecutor's ability to decide on an appropriate sentence and then prepare the charging documents appropriately instead of basing the presentencing report on actual criminal conduct).

This process is supposed to be governed by the Prosecutor's Handbook on Sentencing Guidelines which explains the procedures for prosecutors to follow when entering various plea bargaining negotiations. Prosecutors Handbook, supra note 219, at 33-50.

\textsuperscript{222} Prosecutors Handbook, supra note 219, at 33. The prosecutor is to determine which factors are important to the sentencing decision when preparing the charging documents and prepare the documents accordingly. Id.

\textsuperscript{223} Id. at 440.

\textsuperscript{224} Id. at 394. But see Heaney, supra note 2, at 187-88 (illustrating that a statutorily mandated minimum sentence, within the current sentencing system, promotes plea bargains that are designed to conceal important sentencing factors and avoid the mandatory minimum sentence).

\textsuperscript{225} Heaney, supra note 2, at 163, 166 (criticizing the sentencing system for limiting judicial discretion and requiring judges to spend more time on sentencing issues; and recommending that judges be authorized to impose sentences less than that mandated by the guidelines without a motion from the prosecutor).

\textsuperscript{226} Id. at 194 (recognizing a "new breed" of sentencing disparity hidden from the records and dependent on a particular prosecutor's caseload and jurisdiction); see also Gerald W. Heaney, Revisiting Disparity: Debating Guidelines Sentencing, 29 Am. Crim. L. Rev. 771, 774 (1992) (recognizing "that disparity will occur anytime the system requires exercises of discretion" and that under the federal criminal justice system this discretion is exercised "long before a district court imposes a sentence"); Schulhofer, supra note 17, at 842. The author argues that the current system allows prosecutors and defense attorneys
to prosecutorial discretion, the effectiveness of the Guidelines in reducing sentence disparity is greatly diminished.\textsuperscript{227} Since the charge of conviction is the most significant factor in determining a defendant’s sentence, prosecutor’s decisions to drop charges ultimately could undermine the purpose of the guideline system.\textsuperscript{228}

Plea bargaining power, however, also is available through prosecutorial recommendation for a specific penalty within the applicable sentencing range under the sentence bargaining form of plea agreement.\textsuperscript{229} For example, a two-level downward adjustment for acceptance of responsibility will reduce a sentence by roughly twenty-five percent.\textsuperscript{230} Further, if the prosecutor recommends that the defendant be sentenced at the low end of the sentencing range, a thirty-five percent reduction from the charged conduct may result.\textsuperscript{231}

The delinkage proposal promotes a greater degree of honesty in the presentence report as well as uniformity in sentencing.\textsuperscript{232} Strict application of the Sentencing Guidelines themselves would adequately en-

\begin{itemize}
\item to manipulate the facts and charges to produce whatever sentence they want. \textit{Id.} The result is a shift of power from judges to attorneys and providing for disparity in the sentencing process among prosecutors and districts. \textit{Id.} In fact, evasion from the proper Guideline sentence occurs in 20% to 35% of all cases. \textit{Id.} at 845; Schulhofer & Nagel, \textit{supra} note 38, at 232 (discussing the potential adverse effects of allowing the sentencing discretion to remain in prosecutorial hands, which if unchecked, could create disparities that sentencing reform was intended to prevent); Albert W. Alschuler, \textit{Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing}, 126 U. Pa. L. Rev. 550, 563-76 (1978) (discussing the detrimental effects of a prosecutor’s extensive power to bargain for guilty pleas).

To address the need to limit prosecutorial power, Congress required the Sentencing Commission to promulgate “general policy statements regarding . . . the appropriate use of . . . the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1).” 28 U.S.C. § 994(a)(2)(E) (1988). Under this provision, the Commission is “directed to issue policy statements for consideration by Federal judges in deciding whether to accept a plea agreement” in order to ensure that the prosecutors have not used plea bargaining to undermine the purposes of the Sentencing Guidelines. S. REP. No. 225, \textit{supra} note 10, at 63.

\textsuperscript{227} Albert W. Alschuler, \textit{The Failure of Sentencing Guidelines: A Plea for Less Aggregation}, 58 U. Chi. L. Rev. 901, 926 (1991) (describing an unrestrained plea bargaining system as a “prosecutor’s paradise”). But see Schulhofer, \textit{supra} note 17, at 843 (recognizing that judges are becoming less dependant on probation officer and prosecutor recommendations as they become more familiar with the Federal Sentencing Guidelines).

\textsuperscript{228} \textit{Prosecutors Handbook}, \textit{supra} note 219, at 45.

\textsuperscript{229} \textit{United States Department of Justice, Attorney General — Memorandum, Plea Bargaining Under the Sentencing Reform Act, reprinted in Federal Sentencing Law and Practice}, \textit{supra} note 17 at 625.

\textsuperscript{230} \textit{Id.}

\textsuperscript{231} \textit{See id.}

\textsuperscript{232} \textit{See id.} at 281 (recognizing guideline manipulation through charge bargaining as restricting the effectiveness of the current sentencing guidelines, which encourage plea bargaining, through inadequate incentives).
courage a more honest presentence report for charged conduct, a more reliable criminal history for possible future sentencing purposes, and the preservation of judicial discretion. Direct application of the Sentencing Guidelines will make sentences under the Sentencing Reform Act "fair, honest, and appropriate." By guaranteeing a defendant an automatic reduction in his sentence, the prosecution will be less likely to bargain over the criminal conduct charged on the presentencing report. This provides for a more honest application of the Sentencing Guideline's offense levels for categories of criminal conduct. Thereby, the defendant will be charged with the crime he actually committed and still benefit from pleading guilty.

E. Denying a Reduction Is Not Equivalent to Imposing a Penalty

The delinkage proposal encourages a defendant to plead guilty by ensuring a reduction in the applicable sentencing guideline range. The proposal also denies a reduction to a defendant who elects to stand trial. The proposal does not allow for vindictive sentencing as it has been ad-

233. See id. at 626 (calling for an "honest application of the guidelines").

234. A judge, if a defendant is guaranteed an automatic reduction in his sentence, will be less likely to tolerate the manipulation of the factual criminal conduct to achieve a sentencing range. See United States v. O'Meara, 895 F.2d 1216, 1222-23 (8th Cir.) (criticizing the current system for giving probation officers too much influence on sentencing thereby resulting in a loss of judicial discretion), cert. denied, 498 U.S. 943 (1990); see also United States v. Roberts, 726 F. Supp. 1359, 1367-68 (D.D.C. 1989) (pointing out that the current system typically gives a tremendous amount of control to young, inexperienced prosecutors as opposed to a more experienced and seasoned judge), rev'd sub. nom, United States v. Doe, 934 F.2d 553 (D.C. Cir.), cert. denied, 502 U.S. 896 (1991); Andrew von Hirsch, Federal Sentencing Guidelines: Do They Provide Principled Guidance?, 27 AM. CRIM. L. REV. 367, 376-78 (1989) (suggesting that loose departure rules allowing for departures from the Sentencing Guidelines undermines the effectiveness of the guidelines in maintaining a consistent sentencing system).

235. Prior to the enactment of the Federal Sentencing Guidelines, a judge had greater discretion in levying a sentence. REPORT ON GUIDELINES SYSTEM, supra note 7, at 24. However, under the Sentencing Guidelines, a prosecutor has great influence on the applicable sentencing range through plea negotiations and charging practices. See id. (maintaining that the charging and plea practices have a greater impact on the harshness of the defendant's sentence). Therefore, practitioners are likely to limit available information to contain sentencing exposure under the guideline system. Id. If this continues, such prosecutorial conduct can undermine the purpose of the guidelines, the elimination of sentencing disparity. Id. at 65.

236. With the two-level reduction for acceptance of responsibility, most defendants expect to receive a 25% reduction. Schulhofer & Nagel, supra note 38, at 267. Under the current system, it is difficult to determine the effect of a guilty plea on a defendant's sentence because there is no record of the offenses dropped by the prosecutor. See Heaney, supra note 2, at 190-91.

237. See Part III, supra notes 193-97 and accompanying text (proposing that the "acceptance of responsibility" reduction be denied to defendants choosing to stand trial).
addressed by the courts. In *Corbitt*, for instance, the constitutionality of a policy encouraging guilty pleas by reduced sentences turned on whether it was endorsed by the legislature, rather than imposed through the judge's initiative.238 By providing a bright-line rule regarding sentence reduction, judges cannot be selectively vindictive. Therefore, there can be no element of retaliation in denying the reduction.

The courts and the Commission both recognized that placing different risks on the exercise of options in the judicial system is permissible.239 A defendant who chooses to exercise his right to testify runs the risk of being subjected to perjury charges whereas the defendant who exercises his right not to incriminate himself does not. Both are constitutional.

Simply because a judge tells a defendant, who has been convicted, that he could have received a lower sentence if he had entered into a plea agreement, it does not signify that the judge is penalizing the defendant for standing trial.240 Furthermore, there is no difference between the aforementioned situation and a situation where the sentencing judge informs a defendant who plead guilty that the government could not have met its burden of proof. As distasteful and inappropriate as this may be, it is not unconstitutional.

The Supreme Court has recognized and upheld statutory sentencing schemes that permit judges to reduce sentences for a defendant who pleads guilty.241 The proposed Acceptance of Responsibility provision serves precisely the same purpose. The Supreme Court has upheld a statute that provides a mandatory life sentence for a defendant convicted of first degree murder, but also elects not to enforce the same punishment on a defendant who voluntarily enters a guilty plea, as a constitutional

238. *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978); see *United States v. Jones*, 973 F.2d 928, 943 (D.C. Cir.) (Mikva, C. J., concurring in part and dissenting in part) (suggesting that a legislature may statutorily encourage guilty pleas through offering substantial benefits, but such offenses may not be extended by a judge without explicit statutory authorization), vacated, in part, reh'g granted, en banc, 980 F.2d 746 (D.C. Cir. 1992), adhered to on reh'g, en banc, 997 F.2d 1475 (D.C. Cir. 1993), and cert. denied 114 S. Ct. 741 (1992).

239. See generally *Jones*, 973 F.2d at 943 (discussing the impact on sentencing of failure to choose in a plea bargaining situation); U.S.S.G., *supra* note 10, § 3E1.1, at 249 application note 2 (explaining that the reduction is not intended to apply to a defendant who puts the government to its burden of proof and is found guilty and denies the essential factual elements of his guilt); see also id. at application note 6 (explaining that to qualify under subsection (b)(2), the defendant must notify the authorities of his intention to plead guilty early enough in the trial process to allow the government to avoid wasting scarce judicial and prosecutorial resources and to allow for the efficient scheduling of the court calendar).

240. See *supra* notes 91-131 and accompanying text (discussing opinions that there is no constitutional error in rewarding a guilty plea).

241. See *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978) (reiterating prior holdings that "a State may encourage a guilty plea by offering substantial benefits in return for the plea").
method of enticing defendants to enter guilty pleas.\textsuperscript{242} The Court in \textit{Corbit} concluded that a defendant convicted at trial is not penalized for demanding a jury trial any more than a defendant who plead guilty is penalized for forfeiting a chance of acquittal.\textsuperscript{243} The Court should uphold the constitutionality of an automatic sentence reduction in exchange for a guilty plea on the same basis.

\textbf{V. CONCLUSION}

The proposal for an automatic acceptance of responsibility sentence reduction in exchange for a guilty plea includes all of the incentives of the current section 3E1.1. Further, it promotes a more honest sentencing system, that better fulfills the purposes of the Sentencing Guidelines. The criminal justice system is better served by a bright-line rule that reduces ambiguities in the sentencing process. Therefore, the United States Sentencing Commission should adopt this proposal and amend the current Acceptance of Responsibility provision appropriately.

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\textsuperscript{242} \textit{Id.}

\textsuperscript{243} \textit{Id.}