Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines

Tung Yin†

Plea bargains play a central role in the operation of our criminal justice system. Encouraging defendants to plead guilty by offering to dismiss or lessen charges allows prosecutors to bring defendants to justice efficiently. Under the United States Sentencing Guidelines ("Guidelines"), charges dismissed pursuant to a plea agreement have been used as a basis for the imposition of a longer sentence than that otherwise indicated by the Guidelines. This Comment examines both the legality and social utility of this practice. Based on the assumption that defendants who agree to plea bargains involving dismissed charges know that the charges may be used in sentencing, the author supports the use of dismissed charges to increase sentence length. The author argues that the use in sentencing of charges dismissed under a plea agreement withstands both contract law and due process challenges. Further, the author concludes that using dismissed charges in sentencing advances the goals of the Guidelines by reducing sentencing disparity and restraining prosecutorial discretion.

INTRODUCTION

Plea agreements between prosecutors and criminal defendants play a pivotal role in the justice system. Approximately ninety percent of defendants convicted of federal crimes are convicted through guilty pleas, rather than trials, and many of these convictions involve some form of plea agreement.¹ The dismissal of other criminal charges against defendants provides

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† B.S. 1988, California Institute of Technology; M.J. 1992, University of California, Berkeley; J.D. candidate 1995, University of California, Berkeley (Boalt Hall). I would like to thank Professors Jesse Choper, James Gordley, Rory Little, and Jan Vetter; and Elizabeth Bluestein, Brett Cooper, Michael Isgur, Sarah Wilson, and the Notes and Comments Department, particularly Stephanie Powers. Special thanks to Professor John Yoo for supervising this Comment. The views expressed herein are my own, as are any errors or omissions.

1. See U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 1A4(c) (1994) [hereinafter U.S.S.G.]; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1992, at 514 tbl. 5.36 (Kathleen Maguire et al. eds., 1993); see also Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 652 n.1 (1981)

a significant incentive for defendants to waive their constitutional right to trial.

Under the recently implemented United States Sentencing Guidelines ("Guidelines"), however, many district courts are using the conduct underlying dismissed charges as grounds for increasing a defendant's sentence beyond the mandated guideline range for the conviction offense. Two Court of Appeals cases, *United States v. Kim*² and *United States v. Castro-Cervantes*,³ illustrate different sides of the debate over whether dismissed charges should be allowed as a basis for increasing sentences.⁴ In these cases, the Second and Ninth Circuits reached opposite holdings about the use of dismissed charges in similar sentencing situations.

In *Kim*, the defendant, an alien, attempted to smuggle illegal aliens into the United States from Korea as part of a criminal enterprise.⁵ At J.F.K. International Airport in New York, Kim lied to U.S. Customs officials by telling them that the aliens were Japanese, when in fact he knew they were Korean.⁶ The government charged Kim with two counts of smuggling aliens, one count of submitting a false statement on a customs declaration form, and one count of entering the country illegally by hiding his role in smuggling in the two aliens.⁷ Kim pled guilty to the count of lying to customs officials and, in exchange, the government dropped the other counts.⁸ Based on the false statement conviction, the Guidelines suggested a sentence range of zero to two months, plus a fine between \$100 and \$1,000.⁹ The district court instead imposed a sentence of six months' incarceration, three years of supervised release, and a \$10,000 fine. It justified the departure by referring to the additional conduct contained in the dropped charges.¹⁰

On appellate review, the Second Circuit held that the dropped charges concerning alien smuggling were "sufficiently related to the offense of conviction . . . to be available for consideration as a basis for departure."¹¹ It interpreted the Guidelines to permit sentencing courts to consider noncon-

(noting that it is commonly estimated that ninety percent of all criminal convictions are the result of guilty pleas).

2. 896 F.2d 678 (2d Cir. 1990).

3. 927 F.2d 1079 (9th Cir. 1990).

4. Throughout this comment, the term "dismissed charges," when used in reference to the basis for increasing sentences, should be understood to mean "conduct underlying dismissed charges."

5. *Kim*, 896 F.2d at 680.

6. *Id.*

7. *Id.* Two other counts concerned Kim's possession of counterfeit money. *Id.*

8. *Id.*

9. *Id.* The fine range increased to \$100 to \$5,000 after the period relevant to Kim's offense. *Id.* at 680 n.2.

10. *Id.* at 681. The additional conduct was mentioned in the Probation Department's presentence report. *Id.*

11. *Id.* at 685.

viction offenses that were related to the offense of conviction; a court could not, however, use unrelated acts to justify departure from the Guidelines.¹²

In *Castro-Cervantes*, the defendant committed a series of bank robberies over two-and-a-half months.¹³ He pled guilty to two counts of bank robbery and accepted responsibility for two counts of bank robbery that had not been charged.¹⁴ In exchange, the government dropped five other charged counts of bank robbery.¹⁵ During the presentence investigation, he admitted to the probation officer who wrote the presentence report that he had committed the five robberies that had been charged and dismissed.¹⁶ The district court rejected the Guidelines' range of thirty to thirty-seven months. The trial judge departed from the Guidelines and imposed a sixty-month sentence, based upon the actual number of robberies committed.¹⁷

The Ninth Circuit, in reversing, identified a conflict in the Guidelines. In one section, the Guidelines allow courts to consider "any information concerning the . . . conduct of the defendant."¹⁸ By itself, this section would justify using the five robberies as grounds for a departure from the Guidelines.¹⁹ In a separate section dealing with plea bargains, however, the Guidelines indicate that a court may accept a plea agreement where charges are dismissed if it determines that "the remaining charges adequately reflect the seriousness of the actual offense behavior."²⁰ The court interpreted this

12. *Id.* at 684. Thus, the court could not justify departure based solely upon Kim's possession of counterfeit money because this behavior alone would not be sufficiently related to smuggling aliens. *Id.* at 686. However, the court indicated that, given the circumstances, possession of counterfeit money would be sufficiently related if Kim knew that he possessed counterfeit money when he entered the country illegally. *Id.* The court vacated the fine and remanded for a factual finding on whether Kim knowingly possessed and imported the counterfeit notes. *Id.* at 686-87.

13. *United States v. Castro-Cervantes*, 927 F.2d 1079, 1080 (9th Cir. 1990).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 1080-81. The trial court also based its departure on the level of sophistication involved in the robberies and *Castro-Cervantes*' membership in an organized crime ring. *Id.* at 1081. The Ninth Circuit held that the level of sophistication involved in committing the crime was a proper ground for departure, but that membership in a crime ring did not justify departure because the Guidelines already took this factor into account. *Id.* Under U.S.S.G. §§ 3B1.1-2, the offense level rises or falls depending on the defendant's level of participation. *Id.* The court inferred that a member who was neither a leader nor a minor participant deserved the standard penalty, and that using membership to increase the sentence was not proper. *Id.*

18. U.S.S.G., *supra* note 1, § 1B1.4. The commentary to the section suggests that if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines.

Id.

19. *Castro-Cervantes*, 927 F.2d at 1082.

20. U.S.S.G., *supra* note 1, § 6B1.2(a). In 1993, U.S.S.G. § 6B1.2(a) was amended to include the following language:

Provided, that a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being

section to mean that a district court should not accept a plea bargain if the penalty associated with the remaining charges will not punish the defendant sufficiently.²¹ Based on this interpretation of the plea bargaining policy statement, the Ninth Circuit held that a district court cannot accept a plea bargain and then count dismissed charges for sentencing purposes.²² The court also rested its decision on a desire to remain faithful to the contractual principles of plea bargaining.²³ Allowing a court to penalize a defendant by using charges that were bargained away was "not only unfair; it violate[d] the spirit if not the letter of the bargain."²⁴ The court therefore vacated the sentence and remanded the case for resentencing.²⁵

Most of the other circuits have adopted the Second Circuit's position and ruled that charges dismissed pursuant to a plea bargain can be considered in sentencing.²⁶ Even the Ninth Circuit has not adopted a resolute stand against the use of dismissed charges in sentencing. In *United States v. Fine*,²⁷ the Ninth Circuit narrowed the scope of *Castro-Cervantes* to apply only to non-groupable offenses.²⁸ The defendant in *Fine* pled guilty to two

considered under the provisions of § 1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted.

Id.

21. *Castro-Cervantes*, 927 F.2d at 1082; see also *United States v. Plaza-Garcia*, 914 F.2d 345, 348 (1st Cir. 1990) (Breyer, C.J.) (questioning why, in light of U.S.S.G. § 6B1.2(a), a court would accept a plea bargain that necessitated departure from the Guidelines when it could refuse to accept the agreement).

22. *Castro-Cervantes*, 927 F.2d at 1082.

23. *Id.*

24. *Id.*

25. *Id.*

26. See, e.g., *United States v. Frierson*, 945 F.2d 650, 654-55 (3d Cir. 1991) (affirming the use in bank robbery sentencing of dismissed charges of bank robbery with a dangerous weapon), *cert. denied*, 112 S. Ct. 1515 (1992); *United States v. Dukes*, 936 F.2d 1281, 1282-83 (D.C. Cir. 1991) (affirming sentence based on actual amount of drug possessed); *United States v. Gonzales*, 930 F.2d 795, 797 (10th Cir.) (affirming sentence calculated by aggregating the amounts of drugs involved in the dismissed counts with the amount of drugs involved in the count to which the defendant plead guilty), *cert. denied*, 112 S. Ct. 224 (1991); *United States v. Rodriguez-Nuez*, 919 F.2d 461, 464-65 (7th Cir. 1990) (affirming determination of the base offense level from weight of drugs in crime of conviction plus weight of drugs in dismissed counts); *United States v. Cockerham*, 919 F.2d 286, 289 (5th Cir. 1990) (upholding the consideration in sentencing of financial theft charged in dismissed counts); *United States v. Scroggins*, 880 F.2d 1204, 1214 (11th Cir. 1989) (affirming the use in sentencing of a dismissed charge of postal machine theft), *cert. denied*, 494 U.S. 1083 (1990); *United States v. Wright*, 873 F.2d 437, 440-41 (1st Cir. 1989) (affirming sentence based on amount of drugs possessed and stating that additional amounts of other drugs, if adequately proven at trial, could have been considered in sentencing).

27. 975 F.2d 596 (9th Cir. 1992) (en banc). A three-judge panel of the Ninth Circuit initially followed *Castro-Cervantes* and reversed the district court's computation of Fine's base offense level. *United States v. Fine*, 946 F.2d 650, 652 (9th Cir. 1991), *withdrawn, in part, and remanded, in part*, 975 F.2d 596 (9th Cir. 1992). The Ninth Circuit then reheard the case *en banc* and withdrew that section of the panel opinion. *Fine*, 975 F.2d at 598.

28. *Fine*, 975 F.2d at 602-03. The Guidelines mandate that certain offenses, primarily those relating to narcotics and financial theft, be grouped together into single counts so that prosecutors derive no extra leverage from charging the offense as one crime or multiple crimes. U.S.S.G., *supra* note 1, § 1A4(a).

counts: mail fraud and use of a fictitious name to perpetuate a fraud. In exchange, the prosecutor promised to dismiss twelve other counts of fraud.²⁹ In sentencing *Fine*, however, the district court based the sentence on the total amount of money involved in all counts, including those dismissed.³⁰ The Ninth Circuit affirmed, reconciling its holding with that in *Castro-Cervantes* by arguing that *Castro-Cervantes* involved an upward departure, whereas *Fine* involved a sentence for groupable offenses that fell within the Guidelines range.³¹

This illusory distinction fails to address the substantive issue that *Fine* shares with *Castro-Cervantes*. In both cases, the sentence imposed on the defendant exceeded the range under which the defendant expected to fall based upon the charges for which he was convicted. In *Castro-Cervantes*, the defendant expected a sentence range of thirty to thirty-seven months, but received sixty months.³² In *Fine*, the defendant anticipated a range of thirty-three to forty-one months, but received fifty months.³³ To the defendant, it does not matter whether the increase is the result of an offense level based on aggregated amounts of money for a groupable offense or on relevant conduct justifying an upward departure. In either case, the defendant is incarcerated for a longer period than that indicated by the Guidelines range for his or her offense of conviction.

Much has been written on the Sentencing Guidelines, mostly in opposition to the Guidelines as drafted.³⁴ Some articles have attacked the use of unadjudicated conduct in sentencing.³⁵ This Comment focuses on a subset of unadjudicated conduct—charges dismissed pursuant to a plea bargain—and, unlike those articles, defends using such conduct to increase sentence lengths. This Comment analyzes the legality and social optimality of using dismissed charges to lengthen sentences and argues that both legal and public policy grounds support this practice. Given that the Guidelines sought to reduce sentencing disparity,³⁶ there should not be a split of authority among

29. *Fine*, 975 F.2d at 598.

30. *Id.* at 598-99.

31. *Id.* at 602.

32. *United States v. Castro-Cervantes*, 927 F.2d 1079, 1080-81 (9th Cir. 1990).

33. *Fine*, 975 F.2d at 599.

34. See, e.g., *infra* note 36.

35. See, e.g., Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179 (1993); David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MICH. L. REV. 403 (1993).

36. Little dispute exists about the desirability of having some type of sentencing guidelines to avoid arbitrary sentences. Nonetheless, many academic commentators have criticized the current form of the Federal Sentencing Guidelines. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 918-24 (1991) (observing that although the Guidelines aim to promote equality in sentencing, the results are often unequal); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1741-45 (1992) (attributing the failure of the Sentencing Commission to create workable guidelines to "three continuing problems—unbalanced membership, inadequate research, and mixed messages about departures"); Gerald W. Heaney, *The Reality of Guidelines*

the Courts of Appeals. This Comment therefore recommends a uniform adoption of the Second Circuit position.

In doing so, however, the Comment makes two assumptions: first, that plea bargaining plays an integral role in the criminal justice system;³⁷ and second, that defendants who agree to plea bargains involving dismissed

Sentencing: No End to Disparity, 28 AM. CRIM. L. REV. 161, 228-30 (1991) (recommending that the Guidelines adopt an offense-of-conviction sentencing scheme); Lear, *supra* note 35, at 1218-37 (attacking the real-offense nature of the Guidelines); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1951-55 (1988) (criticizing the Guidelines for failing to consider important traits of offenders and the extent of individual criminal blame, and for failing to deal with the problem of prison overcrowding); Stanley A. Weigcl, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 93-96, 103-04 (1988) (predicting that the Guidelines would decrease plea bargaining, increase probation officers' workload, and fail to eliminate prison overcrowding); Yellen, *supra* note 35, at 433-54 (criticizing the real-offense nature of the Guidelines).

In addition to policy-based criticism, the Guidelines came under attack on legal grounds when hundreds of district courts declared them unconstitutional and refused to apply them. See Lear, *supra* note 35, at 1179 n.2 (citing U.S. SENTENCING COMM'N, 1989 ANN. REP. 11 (1990)). In 1989, the U.S. Supreme Court rejected a separation of powers challenge to the constitutionality of the Guidelines in *Mistretta v. United States*, 488 U.S. 361 (1989). For a more detailed analysis of *Mistretta*, see Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 1, 23-40 (1991).

The Supreme Court has not addressed due process attacks on the Guidelines. Various lower courts, however, have held that the Guidelines do not violate a defendant's due process rights to have an individualized sentence. See, e.g., *United States v. Brady*, 895 F.2d 538, 540-41 (9th Cir. 1990) (holding that the Guidelines do take into account individual factors such as the degree of seriousness of the crime and the defendant's criminal history).

37. Although sanctioned by the Supreme Court as early as 1970 in *Brady v. United States*, 397 U.S. 742, 752-53 (1970), plea bargaining remains a controversial practice. Professor Schulhofer, who has long opposed the practice, declared that it "seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent." Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 799, 799 (1992). See generally Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988) (arguing that prosecutorial discretion in setting plea agreements does not further economic efficiency); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) (offering as a method of curbing plea bargaining a prototype bench trial system). Professor Alschuler also has argued against the practice of plea bargaining. See Alschuler, *supra* note 1, at 660 (arguing that efficiency does not justify granting a lesser sentence as a "reward" to plea bargainers); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) (arguing that plea bargaining "is an inherently irrational method of administering justice and necessarily destructive of sound attorney-client relationships").

Much of the public opposes plea bargaining, perhaps because of a belief that the practice treats defendants too lightly. See Stanley A. Cohen & Anthony N. Doob, *Public Attitudes to Plea Bargaining*, 32 CRIM. L.Q. 85, 94-97 (1989-90) (discussing a 1988 survey revealing that 68% of adult Canadians disapprove of plea bargaining and 69% think sentences are too lenient).

Despite these problems, even Professor Schulhofer acknowledges that "nearly all knowledgeable scholars and practitioners and much of the public at large" agree that plea bargaining is "necessary and inevitable." Schulhofer, *Is Plea Bargaining Inevitable?*, *supra*, at 1037. The Guidelines also recognize the importance of plea bargaining. See *infra* note 98 and accompanying text.

Furthermore, plea bargaining is often defended by economists, who believe that it is a socially efficient method of administering criminal justice. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.7 (4th ed. 1992) (noting that negotiation resolves disputes more cheaply than litigation); Frank H. Easterbrook, *Criminal Procedure As a Market System*, 12 J. LEGAL STUD. 289, 297-98 (1983) (arguing that limiting the ability to plea bargain reduces the savings available from avoiding trial); Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749, 750

charges understand that these charges can be considered in sentencing. The second assumption argues in favor of the Second Circuit's position based on the idea of explicit consent: if the defendant understands that the dismissed charges can be used in sentencing (though not as convictions), and the defendant still agrees to plea bargain, then the defendant has accepted that limited use of the dismissed charges. Whether defendants actually have such complete understanding is an open question; theoretically, there are safeguards to ensure that defendants receive sufficient information.³⁸ A separate argument opposing this assumption is that while defendants may understand the terms of the plea bargain, they have little or no bargaining power due to the coercive nature of plea bargaining. As later shown, however, the use of dismissed charges in sentencing tends to reduce the coercive effect of plea bargaining by shrinking the disparity in possible sentencing outcomes.³⁹

Part I of this Comment examines the procedures of federal sentencing both prior to and under the United States Sentencing Guidelines. This Part explains that the wild disparity in sentencing in the pre-Guidelines era provided the impetus for sentencing guidelines. It also demonstrates the mechanics of the Guidelines.

Part II looks at the legal challenges to the Second Circuit's position. The strongest challenges are based on either contractual or due process grounds. This Part first applies common law contract principles and concludes that a plea bargain in which charges are dismissed retains sufficient consideration, even when the dismissed charges are used as sentencing factors. This Part then applies due process analysis and determines that the use of dismissed charges, where the conduct alleged in those charges is supported by at least a preponderance of the evidence, does not violate due process when it occurs in the sentencing stage after a defendant's conviction.

Part III considers the effect the use of dismissed charges has on the incentives of prosecutors and defendants to plea bargain. This Part argues for the use of dismissed charges in sentencing to further the goals of the Guidelines by curtailing sentencing disparity and restraining prosecutorial discretion.

(1983) (demonstrating that plea bargaining can serve as a self-selection mechanism for separating the guilty from the innocent).

38. See *infra* notes 141-44 and accompanying text.

39. See *infra* Part III.B.2.

I

SENTENCING UNDER THE FEDERAL GUIDELINES

A. *Pre-Guidelines Sentencing*

Before the United States Sentencing Guidelines took effect in 1987, sentencing of convicted federal felons was left largely to the discretion of sentencing judges. The only apparent limits on judges' authority were those stated in statutes defining criminal offenses.⁴⁰ Defendants convicted of the same crime, such as solicitation to murder, could potentially receive sentences varying from no prison term to twenty years.⁴¹ The variance in sentences actually imposed was nearly as dramatic, ranging, for example, in the Second Circuit, from three to twenty years for identical crimes.⁴² Parole boards exacerbated the problems caused by a lack of guidelines. Due to the broad discretion granted to the parole boards, one prisoner might serve only a fraction of his or her sentence before being released on parole, whereas another prisoner might serve the full sentence.⁴³ These sentences were therefore called indeterminate.

One reason that the prison terms varied so much was that sentencing emphasized rehabilitation as a crucial goal.⁴⁴ Theoretically, indeterminate sentences allowed the judge and the parole board to use their knowledge of each case to devise a course of treatment to rehabilitate the particular

40. See Ogletree, *supra* note 36, at 1941.

41. See 18 U.S.C. § 373(a) (1988).

42. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988) (citing S. REP. NO. 225, 98th Cong., 2d Sess. 41 n.22 (citing A. PARTRIDGE & W. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES* 1-3 (1974)), reprinted in 1984 U.S.C.C.A.N. 3182, 3224 n.22). A 1974 study highlighted the seemingly arbitrary variance in sentences imposed before the Guidelines were developed. In that study, fifty U.S. District Court judges were given the same actual case file. Despite this identical information, the judges in the study would have imposed sentences ranging from three years imprisonment with no fine to twenty years imprisonment and a \$65,000 fine. S. REP. NO. 225, 98th Cong., 2d Sess. 37, 41-44 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3224-27.

43. See Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 29 & n.97 (1972); see also 18 U.S.C. § 4205 (1988 & Supp. V 1994) (repealed effective Nov. 1, 1987); *United States v. Scroggins*, 880 F.2d 1204, 1207 n.7 (11th Cir. 1989), cert. denied, 494 U.S. 1083 (1990).

44. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (explaining that both indeterminate sentencing and parole were premised upon a belief in the offender's probable rehabilitation); ANDREW VON HIRSCH ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* 3 (1987) (noting that "wide discretion was ostensibly justified for rehabilitative ends"). Before the Revolutionary War, colonial courts imprisoned defendants for three reasons: retribution, deterrence, and incapacitation. *Scroggins*, 880 F.2d at 1206. Rehabilitation as a goal of sentencing came into vogue after the American Revolution, based on the belief that criminals were still rational and could be "cured" with the right treatment. See *id.* (citing ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 2, at 10-11 (1978)).

By the end of the 1800's, the emphasis had shifted from the seriousness of the offense to the offender's potential for rehabilitation. This change in emphasis led to the so-called "medical" sentencing model, in which a judge would sentence a defendant to an indeterminate term. A parole board would monitor the offender's rehabilitation and would grant parole when it deemed that the offender was ready to return to society. See *Scroggins*, 880 F.2d at 1206-07.

offender.⁴⁵ In reality, however, discretion became "a blank check which judges and parole officials could use as they wished. . . . [I]t permitted individual decision makers to pursue *whatever* aims or policies they personally preferred (or no coherent aims at all) when deciding sentence."⁴⁶

As a result, factors such as geography, sex, and race exerted significant effects on the length of sentences.⁴⁷ Defendants convicted in the South served on average six months more than those convicted of the same crime across the rest of the country.⁴⁸ Those convicted in central California served approximately a year less.⁴⁹ Average sentence lengths for forgery varied 173 percent, from thirty months in the Third Circuit to eighty-two months in the District of Columbia Circuit; for interstate transportation of stolen cars, sentence lengths varied ninety-one percent, from twenty-two months in the First Circuit to forty-two months in the Tenth Circuit.⁵⁰ For the crime of bank robbery, convicted women typically served half a year less than men in similar circumstances; convicted black bank robbers in the South served more than a year longer on average than others.⁵¹

The problem of widely divergent sentences did not go unnoticed. In 1972, U.S. District Court Judge Marvin E. Frankel wrote a law review article arguing for sentencing guidelines.⁵² According to Frankel, "[a]ll would presumably join in denouncing a statute that said 'the judge may impose any sentence he pleases.' Given the mortality of men, the power to set a man free or confine him for up to 30 years is not sharply distinguishable."⁵³ Frankel supported the creation of a legislative code that would state the underlying goals of sentencing (deterrence, rehabilitation, etc.), relevant mitigating and aggravating factors to be used in sentencing, and the procedural mechanics for determining the appropriate sentence.⁵⁴

At the same time, Congressional representatives, judges, lawyers, and academics grew disenchanted with indeterminate sentencing.⁵⁵ They realized that rehabilitating criminals was a much more difficult task than had been anticipated, and that efforts to do so were often unsuccessful.⁵⁶ The primary problem was that no one could forecast accurately which prisoners

45. See *Mistretta*, 488 U.S. at 363.

46. VON HIRSCH, *supra* note 44, at 3 (emphasis in original); see also *Mistretta*, 488 U.S. at 363 (noting the wide discretion allowed sentencing judges).

47. See, e.g., *Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 676-77 (1987) [hereinafter *Hearings*].

48. *Id.* at 676.

49. *Id.*

50. Whitney N. Seymour, Jr., *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. St. B.J. 163, 167 (1973).

51. *Hearings*, *supra* note 47, at 676.

52. Frankel, *supra* note 43, at 2-3.

53. *Id.* at 4 (footnote omitted).

54. *Id.* at 41.

55. VON HIRSCH, *supra* note 44, at 3; Ogletree, *supra* note 36, at 1944.

56. See *Mistretta v. United States*, 488 U.S. 361, 365-66 (1989); VON HIRSCH, *supra* note 44, at 3-

could be rehabilitated, much less how to go about doing so.⁵⁷ Critics also saw indeterminate sentencing as potentially unfair to prisoners in that their sentences were based not on how heinous their actions were, but rather on how much rehabilitation they were seen as needing.⁵⁸ Ultimately, many federal judges rejected rehabilitation as a sentencing goal.⁵⁹

Still, Congress did not move toward creating federal guidelines until about ten years after Judge Frankel's article appeared. By that time, several states had already implemented their own sentencing guidelines. Minnesota's Sentencing Guidelines became effective in May 1980 and achieved considerable success in increasing uniformity and proportionality in sentences.⁶⁰ Pennsylvania and Washington also established sentencing guidelines in the 1980's, and Maine, Connecticut, New York, and South Carolina all created commissions to study the issue.⁶¹

Finally, in 1984, Congress passed the Sentencing Reform Act.⁶² The Sentencing Reform Act created the United States Sentencing Commission ("Commission"),⁶³ and the Commission submitted guidelines to Congress on April 13, 1987.⁶⁴ The Commission had spent a year and a half drafting guidelines, with the intention of following the general sentencing patterns in place at the time.⁶⁵ To do so, it analyzed detailed reports on about 10,000 federal criminal cases and summaries of another 100,000 cases.⁶⁶ The resulting Guidelines went into effect on November 1, 1987.⁶⁷

57. See *United States v. Scroggins*, 880 F.2d 1204, 1207 (11th Cir. 1989) (describing the eventual abandonment of attempts at sentencing based upon an offender's potential for rehabilitation), *cert. denied*, 494 U.S. 1083 (1990).

58. VON HIRSCH, *supra* note 44, at 4.

59. S. REP. NO. 225, *supra* note 42, at 41 & n.18, reprinted in 1984 U.S.C.C.A.N. at 3224 & n.18.

60. See VON HIRSCH, *supra* note 44, at 127. In the first year after the Minnesota Guidelines took effect, the percentage of sentences that departed from the guidelines dropped to 6.2 percent. Prior to the guidelines' implementation, approximately 17-18 percent of cases would have departed from the guidelines. *Id.* With regard to proportionality, the guidelines led to a 73 percent increase in incarceration of violent offenders with low criminal histories, and a matching 72 percent reduction in incarceration of nonviolent offenders with median to high criminal histories. *Id.*

61. *Id.* at 20-26.

62. Pub. L. No. 98-473, 98 Stat. 1988 (codified as amended at 18 U.S.C. §§ 3551-3559 (1988 & Supp. V 1994) and 28 U.S.C. §§ 991-998 (1988 & Supp. V 1994)).

63. 28 U.S.C. § 991 (1988). The Commission was comprised of seven members: three Article III judges, a U.S. Parole Commissioner, an economics professor, and two law school professors. Freed, *supra* note 36, at 1741 & n.290. The three judges were Stephen G. Breyer (1st Circuit), William W. Wilkins (4th Circuit), and George R. MacKinnon (D.C. Circuit). The other members of the Commission were Michael K. Block, Helen G. Corrothers, Ilene H. Nagel, and Paul H. Robinson. *Id.*

One criticism of the composition of the Commission was that it lacked federal prosecutors, federal public or private defenders, and probation officers. As a result, "[n]one of the members had extensive experience in sentencing offenders in a high-volume urban court." *Id.* at 1741.

64. U.S.S.G., *supra* note 1, § 1A2.

65. See Breyer, *supra* note 42, at 6-7. Breyer notes that the Commission did deviate from the status quo for, among others, white-collar crimes, for which the Commission elected to impose short periods of confinement rather than probation. *Id.* at 7 n.49.

66. *Id.* at 7 & n.50; Ogletree, *supra* note 36, at 1948.

67. U.S.S.G., *supra* note 1, § 1A2. The Guidelines were to go into effect 180 days after they were submitted to Congress, unless Congress rejected them. *Id.*

B. Principles of the Federal Guidelines

The Guidelines dramatically altered the sentencing process by shifting to a determinate sentencing scheme⁶⁸ and eliminating parole.⁶⁹ Both changes stemmed from the Commission's three goals of honesty, uniformity, and proportionality in sentencing.⁷⁰ The Guidelines achieved honesty by abolishing parole and ensuring that defendants would serve the full sentence imposed by the court.⁷¹ Uniformity and proportionality were more difficult objectives. Perfect uniformity, according to the Commission, would lead to the imposition of the same sentence for every offender, regardless of the crime of conviction.⁷² Although this type of system would be simple and easy to administer, the Commission felt that it would "lump together offenses that are different in important respects."⁷³ Perfect proportionality, on the other hand, would require that the Guidelines take into account every possible relevant conduct factor. Such a system would become immensely unwieldy, impractical, and potentially unfair, particularly when the subcategories might "apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system."⁷⁴ The Guidelines sought to balance the inherent tension between the goals of uniformity and proportionality by choosing a determinate sentencing scheme, thus achieving some measure of uniformity while injecting proportionality regarding specific offense characteristics.⁷⁵

1. Real-Offense Versus Charge-Offense Sentencing

In drafting the Guidelines, the Sentencing Commission had to decide whether to use real-offense or charge-offense sentencing. Real-offense sentencing refers to the practice of basing a defendant's sentence "upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted."⁷⁶ One commentator reads this to mean that under real-offense sentencing, a court can consider:

- (1) The current conviction offenses and their surrounding circumstances, and
- (2) All nonconviction offenses the offender is believed to have committed contemporaneously with the conviction offenses,

68. *Id.* §§ 1A2, 1A3.

69. *Id.* § 1A3.

70. *Id.*

71. *Id.*

72. *Id.* Although this conclusion seems counter-intuitive, it follows from Congress' mandate to narrow the disparity in sentencing.

73. *Id.*

74. *Id.*

75. All federal judges did not welcome the Guidelines. See Alan Abrahamson, *U.S. Judge To Quit; Cites Sentencing Guidelines*, L.A. TIMES, Sept. 27, 1990, at A3. In particular, U.S. District Judge J. Lawrence Irving was not pleased with the new guidelines. In resigning, the judge said "that the guidelines had 'dehumanized the sentencing process' into a 'numbers game.'" *Id.*

76. U.S.S.G., *supra* note 1, § 1A4(a).

whether different than or in addition to the current conviction offenses, together with their surrounding circumstances, and

(3) Prior conviction offenses and their surrounding circumstances, and

(4) All nonconviction offenses the offender is believed to have committed in the past, whether different than or in addition to the prior conviction offenses, together with their surrounding circumstances, and

(5) All behaviors of the offender, including all harms ever caused by the offender.⁷⁷

Meanwhile, charge-offense sentencing considers only conduct "constitut[ing] the elements of the offense for which the defendant was charged and of which he was convicted."⁷⁸

Consider a criminal who, while robbing a bank, uses a firearm, scares and injures patrons, and ignores orders to stop. Under a real-offense system, the court would sentence the defendant based on all identifiable conduct.⁷⁹ For the defendant to be sentenced, the prosecutor must show that the defendant is guilty by proving the elements of the underlying crime of robbery. However, during the guilt phase of the trial, the prosecutor does not have to establish the other aspects of the crime, such as the injuries inflicted on bystanders and the refusal to stop when ordered. If the prosecutor introduces such evidence at the sentencing phase, the judge can increase the defendant's sentence.⁸⁰

Under a charge-offense system, however, the court would sentence the defendant based only on those elements that made up the charged statutory offense.⁸¹ Thus, the judge could not consider inflicted injuries or refusal to stop unless those acts constituted elements of the charged offenses.

Prior to the implementation of the Guidelines, real-offense sentencing was the norm among federal jurisdictions.⁸² Perhaps the most striking example of real-offense sentencing is a 1949 case, *Williams v. New York*,⁸³ in which the U.S. Supreme Court affirmed a death sentence that relied on evidence of prior crimes for which the defendant was not even charged,

77. Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 527 (1993) (footnote omitted).

78. U.S.S.G., *supra* note 1, § 1A4(a).

79. *Id.*

80. An important issue concerns the standard of proof required to admit such evidence. Unlike the trial phase, when elements of crimes must be established beyond a reasonable doubt, the usual level of proof at the sentencing phase is by a preponderance of the evidence. See *infra* notes 208-25 and accompanying text.

81. U.S.S.G., *supra* note 1, § 1A4(a).

82. *Id.* Typically, the sentencing judge and the parole board would commission a parole officer to write a presentence report. The parole officer would determine the conduct in which the defendant actually had engaged, and the judge would use the report in sentencing. *Id.*

83. 337 U.S. 241 (1949).

much less convicted.⁸⁴ A jury convicted Williams of murder and recommended a sentence of life imprisonment.⁸⁵ The judge instead imposed the death penalty, based on: (1) important facts contained in the presentence report but not disclosed to the jury; (2) information that the judge supposedly had indicating that the defendant had committed a rash of burglaries; and (3) "certain activities of [the defendant] as shown by the probation report that indicated [he] possessed 'a morbid sexuality' and classified him as a 'menace to society.'"⁸⁶ The Supreme Court affirmed the death sentence based on the extraconviction facts because "[h]ighly relevant—if not essential—to [a judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."⁸⁷ Although *Williams* is nearly fifty years old, subsequent sentencing cases often rely on it.⁸⁸

84. The sentencing judge referred to appellant's involvement in " 'thirty other burglaries in and about the same vicinity' where the murder had been committed." *Id.* at 244. Although the appellant had not been convicted of the thirty burglaries, he had confessed to some and witnesses had identified him as the perpetrator of others. *Id.* See also Reitz, *supra* note 77, at 530 (explaining that the transcript of sentencing hearing does not indicate the judge was convinced that Williams had committed the additional crimes "per se," but that the court concluded nothing in Williams' life history required mercy in sentencing).

85. *Williams*, 337 U.S. at 242.

86. *Id.* at 244.

87. *Id.* at 247.

88. See, e.g., *United States v. Grayson*, 438 U.S. 41, 53-54 (1978) (relying on *Williams* to support consideration of extra-conviction conduct in sentencing); *Specht v. Patterson*, 386 U.S. 605, 608 (1967) (adhering to *Williams*, but declining to extend its rule to a situation where defendant was not offered a hearing to rebut new criminal charge).

In a move toward real-offense sentencing, recent lower court decisions have interpreted the Guidelines to allow the use of offenses for which defendants have been acquitted. In *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989) (per curiam), a jury convicted the defendant of two counts of distributing cocaine but acquitted him of a "count of carrying a firearm during and in relation to a drug trafficking offense." *Id.* at 748. The judge sentenced the defendant to the same term, 76 months, that the co-defendant received, even though the co-defendant had been convicted of all three of the same charges. *Id.* The Fifth Circuit affirmed the sentence on the grounds that "[t]he sentencing court was not relying on facts disclosed at trial to punish the defendant for the extraneous offense, but to justify the heavier penalties for the offenses for which he was convicted." *Id.* at 749.

Some circuits have criticized the *Juarez-Ortega* court's rationale. See, e.g., *United States v. Brady*, 928 F.2d 844, 851 (9th Cir. 1991) ("We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted."); see also Lear, *supra* note 35, at 1216-17; Reitz, *supra* note 77, at 531-33. However, other circuits have allowed trial courts, when sentencing, to make factual findings that juries implicitly rejected under a "beyond reasonable doubt" standard. *United States v. Dawn*, 897 F.2d 1444, 1449-50 (8th Cir.) (relying for purposes of sentence enhancement on finding that defendant used firearm, although defendant had been acquitted on that charge), *cert. denied*, 498 U.S. 960 (1990); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 179-82 (2d Cir.) (holding that neither double jeopardy nor due process prohibited an increase in base offense level on the basis of conduct for which defendant had been acquitted), *cert. denied*, 498 U.S. 844 (1990); see also *United States v. Moeciola*, 891 F.2d 13, 16-17 (1st Cir. 1989) (finding that uncharged drug possession could be used as evidence of common scheme or plan for purposes of calculating offense level); *United States v. Ryan*, 866 F.2d 604, 609 (3d Cir. 1989) (allowing sentencing judge to consider quantity and purity of drugs although both factors had been omitted from charge of conviction).

Partly in recognition of the historical use of real-offense sentencing, the Commission first tried to develop a real-offense system.⁸⁹ By late 1986, however, the Commission had abandoned the notion of a pure real-offense system as impractical. A real-offense system would require multiple variables to account for different circumstances and different harms, thus involving "the use of, for example, quadratic roots and other mathematical operations . . . considered too complex to be workable."⁹⁰ The end result of such a system could be a return to widely disparate sentences for similar crimes.⁹¹

2. *Adjustments and Departures from the Guidelines*

After the Commission recognized that it could not devise a real-offense sentencing scheme that would eliminate the possibility of unfairness or inefficiency, it moved toward a charge-offense system.⁹² The Commission did not want the system to be inflexible, however. The present system retains elements of real-offense sentencing by allowing the sentencing court to take into account "specific offense characteristics . . . and adjustments."⁹³

In addition, if a judge finds "an aggravating or mitigating circumstance . . . [that was] not adequately taken into consideration by the Sentencing Commission," she can depart either upward or downward from the Sentencing Guidelines.⁹⁴ The grounds for such a departure must be stated with enough detail to allow an appeals court to review the sentencing decision.⁹⁵ Despite the Commission's declaration that it has "moved closer to a charge-offense system,"⁹⁶ the flexibility of the system has caused many

89. U.S.S.G., *supra* note 1, § 1A4(a).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* § 1A4(b) (quoting 18 U.S.C. § 3553(b)).

95. *E.g.*, *United States v. Todd*, 909 F.2d 395, 399 (9th Cir. 1990) (remanding "to the district court to express its reasons for the extent of the departure"); *United States v. Wells*, 878 F.2d 1232, 1233 (9th Cir. 1989) (per curiam) (vacating sentence and remanding when district court's explanation for departure was too conclusory to permit meaningful review).

The Guidelines recognize two kinds of departures: by specific guidance or without guidance. U.S.S.G., *supra* note 1, § 1A4(b). Specific guidance refers to departure situations already anticipated by the Commission, but not written explicitly into the Guidelines. The Guidelines provide the example of a suggested downward adjustment of eight offense levels for the crime of Transportation for the Purpose of Prostitution not involving commercial purposes. *Id.* Without guidance refers to departure situations that "may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines." *Id.*

Interestingly, the Commission placed limits on the facts that judges may consider when departing from the Guidelines. Chemical dependency, financial difficulties, race, sex, national origin, creed, religion, and socio-economic status are all considered not relevant factors for departure. *See id.* § 5H1.4 ("Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the guidelines."); *id.* § 5K2.12 ("[P]ersonal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence."); *id.* § 5H1.10 ("[R]ace, sex, national origin, creed, religion, and socio-economic status] are not relevant in the determination of a sentence.").

96. *Id.* § 1A4(a).

commentators to consider the Guidelines in their current form to be a real-offense system.⁹⁷

3. *Plea Bargaining Under the Guidelines*

The Guidelines recognize that plea bargains between the defendant and the prosecutor are an integral part of the criminal justice system.⁹⁸ The Commission decided not to address the controversial aspects of plea bargaining.⁹⁹ It planned for the Guidelines to have no major effect on pre-Guidelines plea bargaining practices and to allow courts to accept or reject plea bargains as described by the Federal Rules of Criminal Procedure.¹⁰⁰ Thus, plea bargaining under the Guidelines retains much of its pre-Guidelines character.¹⁰¹

4. *Calculating Sentence Lengths Under the Guidelines*

The heart of the Sentencing Guidelines is the Sentencing Table, a two-dimensional grid with six columns and forty-three rows, creating 258 possible sentencing ranges.¹⁰² The columns represent the defendant's "criminal history category," and the rows represent the "offense level." By cross-indexing the criminal history level with the offense level, the judge finds the mandated sentence term range. For example, an offense level of 25 combined with a criminal history category of III leads to a sentence range of seventy to eighty-seven months.¹⁰³ The difference between the high and

97. *E.g.*, Lear, *supra* note 35, at 1218-37; Yellen, *supra* note 35, at 433-54. *But see* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 500-03 (1990) (explaining that the limited exception to the general "starting point" rule for guilty pleas in U.S.S.G. § 1B1.2(a) is to achieve a closer conformity between the charged offense and the real-offense conduct). The primary attack on real-offense sentencing is that it violates the due process rights of defendants by allowing courts to use facts not proven beyond a reasonable doubt as the basis for increases in sentence lengths. Lear, *supra* note 35, at 1218-23; Reitz, *supra* note 77, at 559-60. For an analysis of due process attacks on the use of dismissed charges in sentencing, see discussion *infra* Part II.B. For a comprehensive criticism of real-offense sentencing in general, see Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550, 1561-80 (1981).

98. *See* U.S.S.G., *supra* note 1, § 1A4(c).

99. *Id.*

100. *Id.* The relevant Federal Rule states that:

If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

. . . If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court . . . that the court is not bound by the plea agreement . . .

FED. R. CRIM. P. 11(e)(3)-(4).

101. A discussion of the nature of plea bargaining is beyond the scope of this Comment. For more details, see Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979). *See supra* note 37 (discussing the controversial aspects of plea bargaining).

102. U.S.S.G., *supra* note 1, § 5A.

103. *Id.*

low end of the ranges intentionally do not exceed six months or twenty-five percent, whichever is longer.¹⁰⁴

To calculate the offense level, the sentencing judge consults the Guidelines to determine the base offense level for the statute under which the defendant has been convicted.¹⁰⁵ Any applicable specific offense characteristic modifies the base offense level.¹⁰⁶ For multiple convictions, the judge determines the adjusted offense level for each additional count, and then applies specified grouping rules to aggregate the multiple counts.¹⁰⁷ Acceptance of responsibility by the defendant acts as a mitigating factor and reduces the offense level by two or three levels.¹⁰⁸ A separate section enables the sentencing judge to calculate the appropriate criminal history category.¹⁰⁹ This section is based on the amount of previous imprisonment or disciplinary action imposed on the defendant.¹¹⁰

For an example of how the Guidelines operate in a specific case, consider a defendant convicted of three counts of Obstruction of Justice.¹¹¹ The Guidelines procedure for dealing with multiple counts is to calculate the offense levels for each count first. The count with the highest offense level is used as the baseline crime. The other counts are then aggregated through the use of a table that increases the baseline offense level by one to five levels, depending on the number and severity of the additional counts.¹¹²

The base offense level for Obstruction of Justice is twelve.¹¹³ If the offense interfered substantially with the administration of justice, the offense level jumps three levels; if, on the other hand, it involved causing or threatening to cause injury, the offense level jumps by eight levels.¹¹⁴ Thus, if the hypothetical defendant's first count involves injury to a bystander, the offense level rises to twenty. Suppose the second count also yields an offense level of twenty for the same reason. Finally, suppose the third count of Obstruction of Justice interfered substantially with the administration of justice, thereby increasing the offense level for that count to fifteen.

104. 28 U.S.C. § 994(b)(2) (1988 & Supp. V 1994), cited in U.S.S.G., *supra* note 1, § 1A2.

105. U.S.S.G., *supra* note 1, §§ 1B1.1(a)-(b).

106. *Id.* § 1B1.1(b).

107. *Id.* § 1B1.1(d).

108. *Id.* §§ 1B1.1(e), 3E1.1. The offense level may be decreased by one additional level if the defendant has assisted authorities. *Id.* § 3E1.1.

109. *Id.* §§ 1B1.1(f), 4A1.1.

110. *Id.* § 4A1.1.

111. For examples of obstruction of justice charges, see 18 U.S.C. §§ 1503, 1505-1513, 1516 (1988 & Supp. V 1994).

112. U.S.S.G., *supra* note 1, § 3D1.4.

113. *Id.* § 2J1.2(a).

114. *Id.* § 2J1.2(b). Note that a conviction might include both aggravating circumstances, in which case both increases are added to the base offense level.

The first count serves as the baseline offense level and counts as one unit.¹¹⁵ The Guidelines state that any count that is equally serious or from one to four levels less serious counts as one unit.¹¹⁶ Any count that is five to eight levels less serious counts as half a unit, and any count that is nine or more levels less serious is disregarded for the offense level.¹¹⁷ Thus, the hypothetical defendant has one unit for the first count, one unit for the second count and half a unit for the third count. The combined two and a half units increase the offense level by three levels.¹¹⁸ These three levels are added to the offense level for the first count, making a total offense level of twenty-three.

The court would then calculate the defendant's criminal history. Suppose the defendant had previously served a two-year prison term. Under the Guidelines, the defendant has a criminal history category of II.¹¹⁹ An offense level of twenty-three and a criminal history category of II yields a sentence range of fifty-one to sixty-three months.¹²⁰

Now consider what happens when the same defendant pleads guilty to the first count of Obstruction of Justice, in exchange for which the prosecutor dismisses the other two counts. The base offense level is still twelve, and is still raised to twenty because the crime involved injury to a bystander. If dismissed charges cannot be used in sentencing, the base offense level remains at twenty. The defendant will likely receive a two or three level reduction in offense level for acceptance of responsibility.¹²¹ Thus, his final offense level with plea bargaining can be as low as seventeen. An offense level of seventeen and a criminal history category of II yields a sentence range of twenty-seven to thirty-three months.¹²² This sentence range is approximately fifty percent less than the range above.

There are three ways in which dismissed charges might be used in sentencing under the Guidelines. First, the district court judge could choose the highest sentence within the range called for by the defendant's offense level and criminal history category. Second, the judge could factor the dismissed charges into the calculation of the offense level itself. Finally, the judge could choose to depart upward from the range called for by the offense level and criminal history category.¹²³ In no case, however, can the sentence imposed on the defendant under the Guidelines exceed the statutory maximum for the crime of conviction.¹²⁴

115. *Id.* § 3D1.4(a).

116. *Id.*

117. *Id.* §§ 3D1.4(b)-(c).

118. *Id.* § 3D1.4.

119. *See id.* §§ 4A1.1(a), 5A.

120. *Id.* § 5A.

121. *See supra* note 108 and accompanying text.

122. U.S.S.G., *supra* note 1, § 5A.

123. *See supra* notes 92-110 and accompanying text.

124. U.S.S.G., *supra* note 1, § 5G1.1(a) ("Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence

II

THE LEGALITY OF USING DISMISSED CHARGES IN SENTENCING

Opponents to the use of dismissed charges in sentencing have advanced legal challenges on both contract and due process grounds. This Part first analyzes contract law attacks and concludes that allowing the use of dismissed charges in sentencing does not constitute breach of contract, nor do such plea agreements violate contract principles generally. This Part also examines due process attacks on the use of dismissed charges and concludes that the sentencing court's consideration of dismissed charges does not violate due process.

A. *Contract Analysis*

One way to analyze whether courts should be able to use dismissed charges in sentencing is to consider plea agreements between prosecutors and defendants as enforceable contracts. The U.S. Supreme Court has applied such an analysis in cases alleging broken plea bargains.¹²⁵ Academic literature has also analyzed plea bargaining in contract terms, examining whether there was a valid offer, consideration, and acceptance between the prosecutor and defendant.¹²⁶

In *Santobello v. New York*,¹²⁷ the defendant was indicted on two counts of gambling. He pled guilty to a lesser charge that carried a maximum prison term of one year, in exchange for which the prosecutor prom-

shall be the guideline sentence."); *United States v. Thompson*, 32 F.3d 1, 4 (1st Cir. 1994) ("Since the applicable Sentencing Guideline range . . . was above the statutory maximum . . . , the latter figure became the Sentencing Guideline range"); *United States v. Bos*, 917 F.2d 1178, 1183 (9th Cir. 1990) (stating that when the guidelines exceed the statutory maximum, the statutory maximum becomes the recommended guideline sentence); *United States v. Donley*, 878 F.2d 735, 741 (3d Cir. 1989) (holding that the Guidelines "do not supercede the underlying statute for any offense"), *cert. denied*, 494 U.S. 1058 (1990). Thus, for example, neither the sentencing range nor the sentence imposed for a conviction of Obstruction of Criminal Investigations may exceed five years imprisonment. *See* 18 U.S.C. § 1510 (1988 & Supp. V 1994).

125. *E.g.*, *Mabry v. Johnson*, 467 U.S. 504 (1984); *Santobello v. New York*, 404 U.S. 257 (1971); *see also Blackledge v. Allison*, 431 U.S. 63, 75 n.6 (1977) (analogizing the presumption of validity of a guilty plea to the parole evidence rule in contract law). Various lower courts have followed this lead. *See, e.g.*, *United States v. Asset*, 990 F.2d 208, 215 & n.6 (5th Cir. 1993) (listing other circuit court decisions recognizing the contract analogy); *United States v. Kingsley*, 851 F.2d 16, 21 (1st Cir. 1988) (finding that defendant's reliance on government promise sufficient to enforce the promise); *Virgin Islands v. Scotland*, 614 F.2d 360, 364 (3d Cir. 1980) ("The bargaining process has often been analogized to contract principles, and plea agreements are often likened to unilateral contracts . . .").

126. *See, e.g.*, Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 910-15 (1980); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992); Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471, 530 (1978). The law and economics movement has consistently supported plea agreements on the grounds that prosecutors and defendants are often both better off bargaining than going to trial. While this argument does not compare plea bargaining with contracts explicitly, it does resemble the underpinnings of the bargain theory in contract analysis. *See* POSNER, *supra* note 37, at 561-62; Easterbrook, *supra* note 37, at 297-98.

127. 404 U.S. 257 (1971).

ised to make no sentence recommendation.¹²⁸ Due to a delay in sentencing, a new prosecutor replaced the original prosecutor and recommended the maximum sentence based on the defendant's "criminal record and alleged links with organized crime."¹²⁹ The judge imposed this sentence.¹³⁰ The U.S. Supreme Court remanded the case to the state court to decide whether the defendant deserved specific enforcement of the plea agreement or the opportunity to withdraw his plea.¹³¹ The Court reasoned that the promise not to make a sentence recommendation was "part of the inducement or consideration" for the defendant's guilty plea and that the defendant relied on this promise.¹³²

Thirteen years later, the Court in *Mabry v. Johnson*¹³³ seemed to narrow *Santobello* so that defendants could overturn convictions only where they could show that their reliance on the agreement had "impair[ed] the voluntariness or intelligence of [their] guilty plea[s]."¹³⁴ If the prosecutor revoked the offer prior to performance by the defendant, mere acceptance of the prosecutor's offer would not entitle the defendant to specific performance of the proposed plea bargain. In *Mabry*, the defendant, Johnson, was initially tried and convicted of burglary, assault, and murder, but the Arkansas Supreme Court set aside the conviction.¹³⁵ The prosecutor then offered to recommend concurrent, rather than consecutive, sentences on the charges in exchange for a guilty plea by the defendant.¹³⁶ Johnson tried to accept the offer the next day, but the prosecutor informed counsel that the offer was withdrawn. Johnson rejected a new offer and instead opted for trial, which resulted in a mistrial. The defendant then accepted the prosecutor's second offer which he had rejected earlier.¹³⁷ The Court refused to overturn his conviction because his guilty plea was entered under no deception, "rested on no 'unfulfilled promise' and fully satisfied the test for voluntariness and intelligence."¹³⁸ The Court distinguished *Santobello* on the grounds that *Santobello*, unlike Johnson, was injured through his reliance on the offered plea bargain.¹³⁹ This distinction demonstrates that the

128. *Id.* at 258.

129. *Id.* at 259.

130. *Id.* at 260.

131. *Id.* at 263. *Santobello* wanted to withdraw his plea, rather than enforce the prosecutor's agreement, because he allegedly did not know at the time of the plea that he could have moved to suppress evidence against him. *Id.* at 258.

132. *Id.* at 262.

133. 467 U.S. 504 (1984).

134. *Id.* at 510.

135. *Id.* at 505.

136. *Id.* at 505-06.

137. *Id.* at 506.

138. *Id.* at 510. This requirement can be read to mean that the defendant must be informed that charges dismissed pursuant to the plea bargain can still be considered for sentencing purposes.

139. *Id.*

defendant is entitled to at least the protection he would receive under commercial contract law *for reliance damages*, but not expectation damages.¹⁴⁰

The use in sentencing of charges dismissed pursuant to a plea bargain raises several possible contract defenses. A defendant might contend that the plea agreement is unenforceable because it lacked consideration, was made under duress, or was unconscionable. This Comment considers each of these possible defenses and argues that none support the rescission of plea agreements due to the use of dismissed charges in sentencing.

This analysis assumes, however, that prosecutors are not deceiving or misleading defendants during the bargaining process. Fraud has traditionally been grounds for rescinding a contract;¹⁴¹ thus, a prosecutor who enters into a plea agreement fraudulently with a defendant could not enforce that agreement against the defendant. Consider a prosecutor offering a specified sentence in exchange for a guilty plea. The prosecutor does not have the authority to bind the court to this agreement, according to the Federal Rules of Criminal Procedure.¹⁴² If the court did not impose the specified sentence, a defendant in this hypothetical could argue that he was misled by the prosecutor and should be able to retract his guilty plea. This result is simply an extension of *Santobello* and *Mabry*, which require pleas based on full knowledge. Theoretically, the defense attorney should protect the defendant against this deception by informing the defendant of the relevant provision of the Federal Rules of Criminal Procedure.¹⁴³ If the attorney fails to do so, a defendant can file an ineffective assistance of counsel claim.¹⁴⁴ Moreover, the prosecutor and the district court both have incen-

140. Plea bargains are not true contracts, however. See, e.g., *United States v. Asset*, 990 F.2d 208, 216 (5th Cir. 1993); *Johnson v. Sawyer*, 980 F.2d 1490, 1501 (5th Cir. 1992); *Westen & Westin*, *supra* note 126, at 534. One difference arises because broken plea bargains do not generate standard civil remedies such as expectation damages. See *Johnson*, 980 F.2d at 1501. More importantly, however, the defendant's constitutional rights limit his or her pseudo-contractual obligations, so that "[t]he fact that defendant has the right to withdraw the plea does not necessarily mean that the United States Attorney should have the equivalent right." *Virgin Islands v. Scotland*, 614 F.2d 360, 364 (3d Cir. 1980).

141. See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* § 4.12 (1982).

142. See FED. R. CRIM. P. 11(e)(1)(B), which states that the attorney for the government will "make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court"

143. The American Bar Association's ethical rules require that an attorney explain the legal situation in enough detail that the client can "make informed decisions regarding the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983). The comment to this rule states that "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." *Id.* at Rule 1.4 cmt. Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980) ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-2 (1980) ("[A] lawyer should fully and promptly inform his client of material developments in the matters being handled for the client.").

144. *Strickland v. Washington*, 466 U.S. 668, 687 (1984), sets forth a two-pronged test for judging ineffective assistance of counsel claims. First, the attorney's performance must be deficient in the sense that he or she made serious errors judged from an objective, reasonableness standard. Second, the errors must have deprived the defendant of a fair trial.

tive to make clear to the defendant that these dismissed charges can be used for sentencing purposes; otherwise, the defendant's plea has not been truly informed, as required by *Mabry*, and an appellate court could overturn the conviction.

Note that in a true contractual sense, the prosecutor's promise is to drop charges, not to ensure that those charges are not used by the judge in sentencing. Because the prosecutor has no legal authority to bind the court, the court is a third party outside the bargain (contract).¹⁴⁵ Nevertheless, the remainder of this Section will analyze whether a plea agreement to drop charges is otherwise enforceable against a court.¹⁴⁶

1. Consideration

Under the classic theory of contracts, promises are unenforceable unless supported by consideration.¹⁴⁷ The consideration requirement is satisfied when parties strike a bargain in which each promises to perform an

A defense attorney who fails to warn his or her client that the prosecutor cannot bind the sentencing court likely commits such an error. The rules of professional responsibility require a defense attorney to provide the client with enough information to make an informed decision. See *supra* note 143. Failure to reach the standards set for professional conduct should be a failure to reach an objective standard of reasonableness. Further, this particular type of failure is likely to prejudice the defendant sufficiently under *Strickland*.

As a practical matter, prevailing in an ineffective assistance of counsel claim is very difficult. See, e.g., *Freelove v. United States*, No. 93-35787, 1994 U.S. App. LEXIS 11228, at *4-6 (9th Cir. May 4, 1994) (declared not appropriate for publication pursuant to 9th Cir. R. 36-3) (holding that the defendant's claim of ineffective assistance, based upon counsel's incorrect statement that sentences would run concurrently, failed because the defendant knew that the sentences could be imposed consecutively).

145. The prosecutor's lack of authority to bind the court suggests that the court would be considered a third party. See *supra* note 142. Similarly, prosecutors have neither inherent nor apparent authority to bind other prosecutors. *Staten v. Neal*, 880 F.2d 962, 965-66 (7th Cir. 1989).

Moreover, application of the doctrine of consideration, discussed in the next section of this Comment, sheds light on why contracts to bind third parties are unenforceable, where there is no authority to do so. Those third parties are being bound to the contract even though they have not received any consideration. See *infra* notes 147-51 and accompanying text. In fact, there is neither offer nor acceptance by the third party.

146. Alternatively, the defendant might try to enforce the bargained-for sentence under agency principles. Under the concept of apparent authority, an agent employed by a principal can bind that principal. Apparent authority exists when the principal allows the agent to act as if the agent has the power to make decisions on behalf of the principal, even if the agent does not in fact possess such authority. However, apparent authority exists only with regard to third parties who actually and reasonably believe that the agent has authority. RESTATEMENT (SECOND) OF AGENCY §§ 8, 27 (1958); see also ROBERT C. CLARK, CORPORATE LAW § 3.3 (1986).

The good faith requirement should prevent a defendant from succeeding with an apparent authority argument. If the defense attorney informs the defendant that the prosecutor does not have the authority to bind the court to a given sentence, the defendant could not rely in good faith on the apparent authority. The situation is analogous to that involving deception on the part of the prosecutor. See *supra* notes 141-144 and accompanying text.

147. See, e.g., *Dougherty v. Salt*, 125 N.E. 94, 95 (N.Y. 1919) (refusing to enforce a contract where the consideration was nothing more than a printed form with the words "value received"); FARNSWORTH, *supra* note 141, at § 2.2.

action.¹⁴⁸ In a plea bargain, the prosecutor promises to drop charges, while the defendant surrenders her constitutional right to force the prosecutor to prove guilt beyond a reasonable doubt. The prosecutor benefits when the defendant pleads guilty because the prosecutor saves the time and cost of a trial. Similarly, the defendant benefits, *inter alia*, by facing lesser or fewer charges.

Each party need not provide consideration that is objectively equal in value.¹⁴⁹ Applied to plea bargains, this principle indicates that so long as the defendant, in giving up her right to trial, receives some benefit from the prosecutor, she cannot attack the plea agreement for lacking consideration. The plea agreement is a valid contract even if the prosecutor gains much more in time and resources saved than the defendant does from facing lesser or fewer charges.

There is a limit to this principle, however. Courts have generally refused to enforce contracts where the consideration was "nominal," such as the exchange of a penny for \$200.¹⁵⁰ In theory, the doctrine of nominal consideration conflicts with the notion that consideration does not have to be equal in value. The Second Restatement of Contracts deals with this conflict by viewing nominal consideration as involving bargains in form, not substance.¹⁵¹ Thus, a plea bargain in which the prosecutor's consideration is a mere formality without any true value would be unenforceable for lack of consideration.

As discussed above, the consideration in a typical plea bargain is valid. But where charges dismissed pursuant to a plea bargain are used in sentencing, the defendant may argue that there was no consideration, and therefore, no benefit to the bargain.¹⁵² The defendant's argument rests on her expectation of receiving a sentence less than that which would have been imposed had she been convicted of all counts at trial. Yet, the use of the dismissed charges can lead to a sentence range virtually identical to that

148. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) states that:

(1) To constitute consideration, a performance or a return promise must be bargained for.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

149. See *Batsakis v. Demotsis*, 226 S.W.2d 673, 675 (Tex. Civ. App. 1949). In *Batsakis*, the defendant wrote a promissory note for \$2,000 in exchange for the equivalent of \$25 during World War II, when it was difficult for her to access her money and credit in the United States from Greece. *Id.* at 673-74. The court enforced the contract. *Id.* at 675. *Batsakis* is an unusual case, but the Restatement also stands for the same proposition. "If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged . . ." RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981).

The reluctance of courts to evaluate the value of the bargain stems in part from a belief that rational parties know their own preferences better than courts do. POSNER, *supra* note 37, at 93, 99.

150. *Schnell v. Nell*, 17 Ind. 29 (1861).

151. See RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. d, illus. 5, 6 (1981).

152. See *United States v. Zweber*, 913 F.2d 705, 711 (9th Cir. 1990).

received for conviction on all counts.¹⁵³ Considering only the outcome of sentence length, one might think that the prosecutor provided no consideration.¹⁵⁴

Consideration exists, however, because a defendant receives benefits from a plea agreement beyond the potential for a reduced sentence resulting from dismissed charges. For example, the Guidelines provide for a two or three level reduction in the offense level for acceptance of responsibility.¹⁵⁵ While the Guidelines make clear that a guilty plea does not automatically entitle a defendant to this reduction,¹⁵⁶ the prosecutor can offer to recommend the acceptance of responsibility reduction as part of the plea agreement.¹⁵⁷

Also, the dismissal of other charges can limit the maximum sentence to less than the sentence that could have been imposed if the defendant were convicted of all the charges. A sentence imposed by the Guidelines cannot exceed the statutory maximum sentence mandated by Congress for the offense of conviction, thus capping the defendant's exposure under the plea agreement.¹⁵⁸

A related advantage to having charges dismissed is that the defendant can avoid certain mandatory minimum sentences, typically imposed for narcotics offenses. For example, a conviction for possession with intent to distribute in excess of five kilograms of cocaine carries a minimum sentence of ten years.¹⁵⁹ Consider a defendant charged with two counts of possession with intent to distribute, one in excess of five kilograms and one under. As a result of a plea agreement, the defendant pleads guilty to the second count, with the first one dropped. The Guidelines aggregate the drug quantities, with the same sentence computation as if the defendant had

153. See, e.g., *United States v. Fine*, 975 F.2d 596, 604 (9th Cir. 1992) ("A plea to some charges in exchange for dismissal of others may sometimes produce little benefit, but it may be the best a defendant can get."). The *Fine* court also noted that an array of other benefits can accrue to the defendant, so that in many instances, the defendant will actually receive a lesser sentence by plea bargaining. *Id.* at 603.

154. Such analysis also overlooks the fact that charges dismissed voluntarily and even conduct for which the defendant was acquitted can be used in sentencing. See *supra* note 88.

155. U.S.S.G., *supra* note 1, §§ 3E1.1(a)-(b).

156. What is interesting about the acceptance of responsibility reduction is that it is neither automatic for plea bargainers, nor out of reach defendants who are convicted through trials. See Breyer, *supra* note 42, at 28-29. Perhaps the Commission was afraid that an automatic reduction for plea bargainers would be an unconstitutional penalty on defendants who chose to go to trial.

However, in *Corbitt v. New Jersey*, 439 U.S. 212 (1978), the Court upheld a statute that potentially imposed higher sentences on defendants who went to trial compared to those who pled guilty. A defendant convicted of first-degree murder at trial automatically received a life sentence. Those who pled no contest, on the other hand, could receive, at the judge's discretion, a sentence of up to thirty years. *Id.* at 215. The rationale was that a state could encourage guilty pleas through reduced penalties. *Id.* at 221-23.

157. Assuming full knowledge on the part of the defendant, as this Comment does, such an exchange is likely to be part of the plea bargain.

158. See *supra* note 124.

159. 21 U.S.C. § 841(b)(1)(A) (1988 & Supp. V 1994).

been convicted of both counts, but the defendant avoids the ten-year statutory minimum sentence.¹⁶⁰

One final benefit that accrues to defendants who plea bargain is that these defendants are not convicted of dismissed charges, even if their sentences take into account the conduct underlying those dismissed charges. Some crimes, like sex crimes and child abuse, carry a particularly damaging stigma.¹⁶¹ Often, felony convictions lead to the loss of certain privileges and rights.¹⁶² Having some charges dismissed will not necessarily alleviate these problems, because the defendant will still have at least one conviction on her record. Not having the other convictions on record can be advantageous in future prosecutions, however, as the Federal Rules of Evidence allow the use of convictions to impeach witnesses.¹⁶³ Because the Federal Rules of Evidence place no limit on the number of convictions that may be admitted, a defendant receives some marginal gain from not having dismissed charges appear as convictions on her record.¹⁶⁴

Usually, some of these consideration factors will be present in any plea agreement. However, even if none of these factors is present, there may still be enough consideration to bind the agreement. For example, in *United States v. Zweber*,¹⁶⁵ the Ninth Circuit held that a prosecutor's promise to recommend adjustments, although not binding on the sentencing court, constituted adequate consideration. As a result, the plea bargain was not illusory.¹⁶⁶ This holding suggests that consideration exists when a plea bargain involves merely the prospect of a lesser sentence than that which would have been imposed in the absence of a prosecutorial recommendation.

2. Coercion (Duress)

Another common attack made on the plea bargaining process is that it coerces defendants into pleading guilty. The use of dismissed charges in sentencing, however, reduces the potential for coercion.

160. See Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 279 (1989). For a detailed analysis of the interaction of mandatory minimum sentences and the Guidelines, see Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61 (1993).

161. See McCoy & Mirra, *supra* note 126, at 894 & n.37.

162. For example, a convicted felon can lose the right to vote, to hold public office, and to serve as a juror. For a comprehensive, if somewhat dated survey, see Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 939 (1970).

163. See FED. R. EVID. 609(a), which reads:

For the purpose of attacking the credibility of a witness,

... evidence that an accused has been convicted of ... a crime [punishable by death or imprisonment in excess of one year] shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused ...

164. It is true that this benefit may create an undesirable incentive, as it tends to aid repeat offenders. This judgment is normative, however, and is thus different from the question of whether there actually is a benefit.

165. 913 F.2d 705, 711 (9th Cir. 1990).

166. *Id.*

The allegedly coercive plea bargaining situation arises when there is a great difference between the expected sentence offered under a plea agreement and the expected sentence if convicted at trial. A defendant facing such a choice, according to this theory, may agree to plead guilty for a lower sentence merely to avoid the possibility of being convicted at trial and sentenced to a much longer prison term.¹⁶⁷

The use of dismissed charges in sentencing counters this potential coerciveness by shrinking the differential between sentences imposed as a result of a plea bargain and those imposed as a result of a conviction. The promise of dismissed charges will be less enticing when the resulting sentence is similar to what a defendant would receive if convicted on all counts. Curiously, the arena of plea bargaining pits the concepts of duress and consideration against each other: a large sentencing differential makes it more likely that a defendant is coerced into pleading guilty, and yet it also increases the benefit offered in exchange for the guilty plea.

The duress argument ultimately fails, though, when examined under the classic contract theory, which does not consider a weak bargaining position to create a situation of duress.¹⁶⁸ The prosecutor has a strong bargaining position because he or she is the only "buyer" of guilty pleas; therefore, defendants must bargain with the one prosecutor or else go to trial.¹⁶⁹ The defendant, on the other hand, has a relatively weak bargaining position,¹⁷⁰ because he or she has been arrested and charged with a crime.

Since the prosecutor decides what charges, if any, to file against the defendant, he can, to some degree, weaken the defendant's bargaining position.¹⁷¹ To the extent that such prosecutorial control can create contractual

167. See Easterbrook, *supra* note 37, at 311. See generally Alschuler, *supra* note 1 (discussing, *inter alia*, the criminal defendant's belief that plea bargaining will result in more lenient treatment than would follow conviction at trial). The problem is exacerbated by the possibility that innocent defendants who are very risk-averse may appear indistinguishable to prosecutors from less risk-averse, guilty defendants. Grossman & Katz, *supra* note 37, at 755-56. This may result unfortunately in some innocent people pleading guilty.

In an influential opinion, Chief Judge Bazelon of the District of Columbia Circuit Court defended the sentencing differential on the grounds that it "reflect[ed] only the uncertainty of conviction before trial" and that "the 'expected sentence before trial'—length of sentence discounted by probability of conviction—is the same for those who decide to plead guilty and those who hope for acquittal but risk conviction by going to trial." *Scott v. United States*, 419 F.2d 264, 276 (D.C. Cir. 1969).

168. See *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 300-05 (1942) (holding that the government's wartime need for ships did not amount to duress); see also *Chouinard v. Chouinard*, 568 F.2d 430, 434 (5th Cir. 1978) ("[A] duress claim . . . must be based on the acts or conduct of the opposite party and not merely on the necessities of the purported victim.").

169. Economists call this situation of a single buyer with multiple sellers a monopsony, and, in many ways, it is analogous to a monopoly. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1472-73 & n.1, 1477-78 (1993).

170. The defendant's bargaining position depends primarily on the prosecutor's lack of resources to try every defendant. Therefore, to maximize the deterrent effect of prosecution, the prosecutor must accept some number of plea bargains so as to maintain a high conviction rate. See generally Easterbrook, *supra* note 37, at 295-96 (discussing prosecutorial discretion in resource allocation).

171. See *id.* at 306. This problem can potentially manifest itself as selective prosecution, because prosecutors can choose to overcharge certain defendants and undercharge others. Legal challenges on

duress, all plea bargaining practices are implicated, not merely those involving the use of dropped charges in sentencing.¹⁷² Moreover, such a tenet in commercial contract settings would suggest that a party who exploits a strong bargaining position selectively would be guilty of imposing duress while one who exploits that position consistently would not be. This argument is irrational, for it would allow a seller who controls a scarce resource to escape a claim of duress by charging exorbitant prices to all, and not merely some customers.¹⁷³ Therefore, the prosecutor's use of his strong bargaining position to influence the defendant to plead guilty should not be seen as contractual duress.

3. Unconscionability

The doctrine of unconscionability provides a final attack on plea bargains as enforceable contracts. When one assumes that defendants know that dismissed charges can be used against them in sentencing, unconscionability becomes the most tenable contractual argument against such a use of dismissed charges. The Uniform Commercial Code defines an unconscionable contract as one that is "so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."¹⁷⁴ An unconscionable contract is so unfair or oppressive that courts will refuse to enforce it. The doctrine is not meant, however, to "disturb[] . . . allocation of risks because of superior bargaining power."¹⁷⁵

The contract in *Williams v. Walker-Thomas Furniture Co.*¹⁷⁶ is held out as a classic example of unconscionability. In *Walker-Thomas*, the defendant sold items to the plaintiffs on credit, with an obscure contract provision that payments would be pro-rated on all items with a remaining balance. Thus, there would be a balance due on all credit purchases until the balance due on each item was paid off completely. As a result, when Mrs. Williams defaulted on one payment, the furniture company sought to reclaim all of the items she had bought on credit.¹⁷⁷ The Court of Appeals was concerned with the potential unfairness of enforcing "a commercially unreasonable contract" entered into by a party with "little bargaining power, and hence little real choice" and "little or no knowledge of [the contract's]

these grounds, however, are likely to fail, as the Court has shown deference toward prosecutorial charging decisions. See, e.g., *Wayte v. United States*, 470 U.S. 598, 608 (1985) (holding that a claim of selective prosecution must show both discriminatory effect and motivation of discriminatory purpose).

172. Therefore, this potential problem lies outside the scope of this Comment.

173. Paradoxically, such a defense would lead to more price-gouging in the commercial contract setting. Yet, that is the defense suggested by the analogy to the use of prosecutorial discretion to create duress.

174. U.C.C. § 2-302 cmt. 1 (1989); see also RESTATEMENT (SECOND) OF CONTRACTS § 208 cmts. a, c (1981).

175. U.C.C. § 2-302 cmt. 1 (1989); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

176. 350 F.2d 445 (D.C. Cir. 1965). The Court of Appeals did not actually find that the contract was unconscionable. It instead remanded the case to the trial court for further findings. *Id.* at 450.

177. *Id.* at 447.

terms.”¹⁷⁸ In such a situation, the court felt that the plaintiffs likely may not have consented to such terms.¹⁷⁹

The doctrine of unconscionability does not translate well to the plea bargaining arena, however. Unlike the victims in commercial unconscionability cases, a criminal defendant always has a choice not to plea bargain: she can exercise her right to a jury trial. The defendant's other choice is a constitutional right, not the deprivation of a commodity or a necessity, as in the commercial unconscionability cases.

The presence of the defense attorney further distinguishes the plea bargaining setting from the paradigm case of unconscionability. The defense attorney's duty is to apprise the defendant of the plea bargain's terms and the ramifications of a guilty plea. If Mrs. Williams had had an attorney with her to review the contract before she signed it, it seems considerably less likely that a court would have found the contract unconscionable. Although courts have considered a plaintiff's lack of education or ability to understand to be an important factor in unconscionability cases,¹⁸⁰ the presence of an attorney makes these elements less critical. Therefore, in a plea bargain situation, where the defense attorney is expected to inform the defendant that dismissed charges may be used in sentencing, a court is unlikely to find the plea agreement unconscionable.

B. Due Process Analysis

Challenges to the use of dismissed charges in sentencing are often premised upon the Due Process Clause of the Fourteenth Amendment, which guarantees that the government will not “deprive any person of life, liberty, or property, without due process of law.”¹⁸¹ Because criminal sentencing always implicates the defendant's liberty or property, sentencing procedures must comport with the Due Process Clause. In essence, due process in sentencing requires that the State provide sufficient procedural safeguards to reduce the risk that it will deprive a person of his liberty or property unjustly.¹⁸²

178. *Id.* at 449.

179. *Id.*

180. Compare, e.g., *Weaver v. American Oil Co.*, 276 N.E.2d 144, 145-46 (Ind. 1971) (“The facts reveal that Weaver had left high school after one and a half years and . . . was not one who should be expected to know the law or understand the meaning of technical terms.”) with *Block v. Ford Motor Credit Co.*, 286 A.2d 228, 231 (D.C. 1972) (“The defendant in this case is a Ph.D. business executive and can hardly be heard to say that he did not have the capacity to understand the plain language of the instrument.”).

181. U.S. CONST. amend. XIV, § 1; see also U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law”).

182. Typically, procedural due process safeguards involve some type of hearing where the person can present evidence to dispute or contest the charges or claims against him or her. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that due process requires a hearing prior to termination of welfare benefits).

The Court tries to be flexible in considering Due Process claims by "call[ing] for such procedural protections as the particular situation demands."¹⁸³ In the seminal case of *Mathews v. Eldridge*,¹⁸⁴ the Court devised a balancing test, considering on one side the individual's personal interest and the risk of a wrongful deprivation of that interest through the procedures in place, and on the other side the government's interest, "including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹⁸⁵ *Mathews* involved a civil proceeding, the termination of disability insurance benefits, but in some instances the Court has applied its balancing approach in criminal proceedings.¹⁸⁶

Recently, however, the Court in *Medina v. California*¹⁸⁷ declined to use *Mathews* in determining whether California violated due process by placing on the defendant the burden of proving incompetency to stand trial.¹⁸⁸ The Court did not apply *Mathews* because *Medina* concerned criminal procedure, an arena in which, other than the specific guarantees of the Bill of Rights, "the Due Process Clause has limited operation."¹⁸⁹ Instead, the court adopted a more narrow inquiry: whether the challenged procedure "offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁹⁰ This more narrow inquiry intruded less on states' extensive expertise in and common-law

183. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

184. 424 U.S. 319 (1976). *Mathews* has been criticized as being concerned with technique, rather than values, and therefore as being incomplete in its analysis. See Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46 (1976).

185. *Mathews*, 424 U.S. at 335.

186. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (using the *Mathews* balancing approach to determine whether due process requires the state to provide the defendant with psychiatric assistance for an insanity defense); *United States v. Raddatz*, 447 U.S. 667, 677 (1980) (using the balancing approach to determine whether a district court could rule on a suppression motion without hearing live testimony and referring only to a record produced before a Magistrate); see also *Sassower v. Sheriff of Westchester County*, 824 F.2d 184, 189 (2d Cir. 1987) (applying *Mathews* to a criminal contempt proceeding).

The Court has also used the *Mathews* test in considering the due process rights of prisoners being confined to administrative segregation in *Hewitt v. Helms*, 459 U.S. 460, 473-74 (1983); see also Michael Benjamin, Case Comment, *Constitutional Law: Extent of Procedural Due Process Required to Adjudge the Competency of a Condemned Prisoner*, 38 U. FLA. L. REV. 681, 684 n.38 (1986) (discussing the due process requirements imposed in cases involving prisoners); Thomas L. Finigan, Note, *The Procedural Due Process Implications of Involuntary State Prisoner Transfers*, 25 B.C. L. REV. 1087, 1113-16 (1984) (same).

Mathews itself seems to suggest that its approach has broad applicability. See 424 U.S. at 334-35 ("[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors . . .").

187. 112 S. Ct. 2572 (1992).

188. *Id.* at 2576.

189. *Id.* (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

190. *Id.* at 2577 (quoting *Spicer v. Randall*, 357 U.S. 513, 523 (1958)).

traditions of criminal procedure. Thus, it represented "substantial deference to legislative judgments in this area."¹⁹¹

Since 1992, the Court has twice followed *Medina* in analyzing due process challenges to criminal procedures. In *Godinez v. Moran*,¹⁹² the Court upheld a single standard of competency throughout all stages of a trial.¹⁹³ In *Herrera v. Collins*,¹⁹⁴ the Court rejected a claim that a mere claim of actual innocence, by a habeas petitioner without a sufficiently concrete showing, entitled the prisoner to a new trial.¹⁹⁵ Although neither of those cases involved a due process challenge to sentencing procedures, a 1990 Ninth Circuit case, *United States v. Brady*,¹⁹⁶ appeared to foreshadow *Medina* in rejecting a procedural due process attack on sentencing under a much more lenient standard than *Mathews*. Beginning with the proposition that due process "is flexible and calls for such procedural protections as the particular situation demands,"¹⁹⁷ the court noted that the Guidelines gave the defendant "the right to appear, to offer evidence, and to challenge the Government's evidence."¹⁹⁸ The court concluded that the Guidelines provided sufficient procedural protections to fulfill the requirements of the Due Process Clause.¹⁹⁹

Although it now appears that a due process challenge to sentencing procedures would be examined under *Medina*, this Comment analyzes dismissed charges under *Mathews*' more rigorous due process test.²⁰⁰ This Section examines the extent of a defendant's due process right to challenge the information on which a sentence enhancement is based. It also looks at the standard of proof necessary for the use of such information in a sentencing decision. Finally, it examines concerns about the defendant's right to be sentenced solely on the elements of the crime of conviction. The primary concern of this Section is not whether, as a normative judgment, the use of dismissed charges in sentencing is fair to individual defendants.

191. *Id.*

192. 113 S. Ct. 2680 (1993).

193. *Id.* at 2689 (Kennedy, J., concurring).

194. 113 S. Ct. 853 (1993).

195. *Id.* at 864; see also *Billotti v. Legursky*, 975 F.2d 113, 115 (4th Cir. 1992) (upholding West Virginia's discretionary criminal appeals process under *Medina*), *cert. denied*, 113 S. Ct. 1578 (1993).

196. 895 F.2d 538 (9th Cir. 1990).

197. *Id.* at 541 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

198. *Id.* at 542 (quoting *United States v. Thomas*, 884 F.2d 540, 544 (10th Cir. 1989) (quoting *United States v. Vizcaino*, 870 F.2d 52, 56 (2d Cir. 1989))).

199. *Id.* at 542-43. The court disposed of the defendants' contention that *Mathews* applied, stating in dictum that even the application of *Mathews* "would not support the defendants' position." *Id.*

200. If the use of dismissed charges in sentencing satisfies *Mathews*, then it necessarily satisfy *Medina*, as *Medina* adopts a more lenient standard. As discussed earlier in this Comment, real-offense sentencing, of which the use of dismissed charges is a subset, has been the historical norm. See *supra* notes 82-88 and accompanying text. Thus, historically, courts found that sentencing based in part upon unadjudicated conduct satisfied the requirements of due process. *E.g.*, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (holding that a State's treatment of visible possession of a firearm as a sentencing condition, rather than an element of the offense, did not violate due process).

Rather, this Section focuses exclusively on whether the use of dismissed charges in sentencing satisfies legal due process standards.²⁰¹

1. *Challenging The Presentence Report*

To sentence a defendant under the Guidelines, the trial court often needs more information than can be obtained from a guilty plea to determine whether specific offense characteristics apply. The court assigns a probation officer to write a presentence report covering the facts relevant to sentencing, including the defendant's prior criminal history.²⁰² The report also contains the probation officer's recommendation as to the appropriate offense level and criminal history category, along with a description of factors that might justify upward or downward departure from the Guideline range,²⁰³ including dismissed charges.²⁰⁴

Because the sentencing judge relies heavily on this presentence investigation report, the Federal Rules of Criminal Procedure require a court to present the defendant with a copy of the report at least ten days before the sentencing hearing.²⁰⁵ The defendant may comment on the report, and, at the court's discretion, the defendant may "introduce testimony or other information relating to any alleged factual inaccuracy contained in it."²⁰⁶

If the defendant claims a factual inaccuracy, the court must either determine whether the allegation of inaccuracy is correct or decide that the contested fact will not be used in sentencing.²⁰⁷ Thus, if a presentence report discusses charges dismissed pursuant to a plea bargain, the defendant

201. See *infra* Part III.B.2 for a discussion of the normative issue.

202. FED. R. CRIM. P. 32(c)(1)-(2)(A); U.S.S.G., *supra* note 1, § 6A1.1, p.s. & comment.

203. FED. R. CRIM. P. 32(c)(2). For a more detailed description of the investigative process through which probation officers gather information, see PROBATION DIVISION, ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO. 105, THE PRESENTENCE INVESTIGATION REPORT 3 (1984) [hereinafter PRESENTENCE INVESTIGATION REPORT].

204. For example, in *United States v. Kim*, 896 F.2d 678, 680-81 (2d Cir. 1990), the probation officer's report considered dismissed charges.

205. See FED. R. CRIM. P. 32(c)(3)(A).

206. *Id.*; see also FED. R. CRIM. P. 32(a)(1).

207. FED. R. CRIM. P. 32(c)(3)(D). The sentencing hearing appears to go a long way toward meeting even the most rigorous standards of a fair hearing. In an article written prior to the *Mathews* decision, Judge Friendly enumerated the elements of a fair hearing as:

- 1) Lack of bias by the judging party;
- 2) Notice;
- 3) Opportunity to challenge;
- 4) Right to present witnesses;
- 5) Right to confront the evidence;
- 6) Right to have the decision based only on the evidence presented;
- 7) Counsel;
- 8) Making of a record;
- 9) Statement of reasons behind the ultimate decision;
- 10) Public attendance; and
- 11) Judicial review.

Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1279-95 (1975). As set forth under the Federal Rules of Criminal Procedure, the sentencing hearing meets the first (lack of bias), second (notice), third (opportunity to challenge), fifth (right to confront evidence), sixth (right to have

can force the court to evaluate whether the defendant actually committed the acts alleged in the dismissed charges before using those charges in the sentencing decision.

2. *The Standard of Proof at the Sentencing Phase*

The Federal Rules of Criminal Procedure are silent as to the amount of proof needed to overcome a defendant's challenge to facts contained in the presentence report. Traditionally, courts choose from among three standards: preponderance of the evidence; clear and convincing evidence; or evidence beyond a reasonable doubt.²⁰⁸ At a minimum, the Due Process Clause requires some level of proof of the facts contained in the presentence report before those facts may be used in sentencing a defendant.

Presently, most circuit courts require district courts to apply only the preponderance of the evidence standard in evaluating factual disputes in sentencing.²⁰⁹ Thus, once the prosecution has proven the defendant's commission of a crime beyond a reasonable doubt, his sentence can be enhanced by facts proven merely by a preponderance of the evidence.

In *McMillan v. Pennsylvania*,²¹⁰ the Supreme Court endorsed the use of the preponderance standard for state sentencing procedures.²¹¹ The statute in question in *McMillan* imposed an additional five-year sentence on felons who "visibly possessed a firearm" during the crime of conviction, subject to the limitation that the final sentence not exceed the maximum allowable for the crime.²¹² Thus, like the use of dismissed charges in

the decision based on the evidence presented), seventh (counsel), eighth (record), ninth (statement of reasons), and eleventh (appellate review) requirements. See FED. R. CRIM. P. 32(a)-(e).

208. Proof by a preponderance of the evidence is commonly defined as "proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence." MCCORMICK ON EVIDENCE § 339 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK]. In most civil cases, the party with the burden of persuasion of a fact need only prove it by a preponderance of the evidence. *Id.*

MCCORMICK does not give a precise definition of clear and convincing evidence, except to say that it is an intermediate standard between the preponderance and reasonable doubt standards. *Id.* § 340 (citing *Addington v. Texas*, 441 U.S. 418, 425 (1979)). The clear and convincing evidence standard has been used in a variety of non-criminal proceedings, ranging from deportation to fraud. See, e.g., *Woodby v. INS*, 385 U.S. 276, 285-86 & n.18 (1966) (applying the standard to deportation proceedings); MCCORMICK, *supra*, § 340.

The reasonable doubt standard is used in criminal prosecutions and is generally self-defining. For a discussion of the difficulties in defining the standard further, see *id.* § 341.

209. E.g., *United States v. Wilson*, 900 F.2d 1350, 1354 (9th Cir. 1990); *United States v. Frederick*, 897 F.2d 490, 492-93 (10th Cir.), *cert. denied*, 498 U.S. 863 (1990); *United States v. McDowell*, 888 F.2d 285, 290-91 (3d Cir. 1989); *United States v. Guerra*, 888 F.2d 247, 250-51 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990); *United States v. Urrego-Linares*, 879 F.2d 1234, 1237-38 (4th Cir.), *cert. denied*, 493 U.S. 943 (1989); *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989). But see *United States v. Kikumura*, 918 F.2d 1084, 1100-02 (3d Cir. 1990) (requiring, based on the sentencing statute, clear and convincing standard in a case involving a "twelve-fold, 330-month departure from the median of an applicable guideline range").

210. 477 U.S. 79 (1986).

211. *Id.* at 91.

212. *Id.* at 81-82.

sentencing under the Guidelines, it increased the sentence term, but within the statutory limits of the crime of conviction.

To reach this result, the Court distinguished the seminal case on burden of proof in criminal cases, *In re Winship*,²¹³ which held that the Due Process Clause required "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged."²¹⁴ The *Winship* Court reasoned that the reasonable doubt standard, which was considerably higher than the preponderance standard applied in civil cases, reflected the gravity of a criminal prosecution and instilled confidence among the public in the criminal process.²¹⁵

In *McMillan*, the Court distinguished *Winship* and a similar case, *Mullaney v. Wilbur*,²¹⁶ on the grounds that the Pennsylvania statute in question did not alter the elements of the crime so as to make it easier for the government to convict the defendant. Rather, it "dictated the precise weight to be given [to a] factor" that has "always been considered by sentencing courts to bear on punishment."²¹⁷

The Court's reasoning translates well to the Guidelines: "We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance."²¹⁸

Some commentators oppose this lenient approach and contend that courts should accept evidence only when it is proven at least by the clear and convincing standard,²¹⁹ if not beyond a reasonable doubt.²²⁰ Moreover, some support for this argument may be found in a line of U.S. Supreme Court cases epitomized by *Addington v. Texas*²²¹ and *Santosky v. Kramer*.²²² In those cases, the Court required a standard of proof greater than preponderance of the evidence in civil cases involving commitment to a mental hospital²²³ and termination of parental rights.²²⁴ Because criminal sentencing often involves a greater deprivation of liberty than either civil commitment or termination of parental rights, one might expect a sentencing hearing to require at least the standard prescribed in those civil cases.

213. 397 U.S. 358 (1970).

214. *Id.* at 364.

215. *Id.* at 363-64.

216. 421 U.S. 684 (1975) (striking down a statute requiring a murder defendant to prove that he acted in the heat of passion to reduce the crime to manslaughter). See *infra* notes 253-56 and accompanying text.

217. *McMillan*, 477 U.S. at 89-90.

218. *Id.* at 92.

219. Richard Hussein, Comment, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1407-11 (1990).

220. See *Lear*, *supra* note 35, at 1202-03 & n.111, 1213-18.

221. 441 U.S. 418 (1979).

222. 455 U.S. 745 (1982).

223. *Addington*, 441 U.S. at 425-27.

224. *Santosky*, 455 U.S. at 758.

Although this argument is compelling, it can be countered by applying the *Mathews* balancing test. In *Addington* and *Santosky*, the individuals' personal stakes were the loss of liberty inherent in being committed to a mental institution and in losing parental access rights to children, respectively. These stakes were balanced against the government's burden of having a higher burden of proof than preponderance of the evidence.²²⁵ On the other hand, in both cases, the interest of the State actually argued in favor of a higher burden of proof. In *Addington*, the State had an interest in providing care for individuals who were mentally ill.²²⁶ Similarly, in *Santosky*, the State had an "urgent interest in the welfare of the child" and thus shared the parent's interest in an accurate and just decision at the factfinding proceeding.²²⁷ Given that the State in both cases was acting in the role of *parens patriae*,²²⁸ increasing the standard of proof from preponderance of the evidence to clear and convincing evidence neither "impos[ed] substantial fiscal burdens upon the State," nor "create[d] any real administrative burdens for the State's factfinders."²²⁹

In contrast, in a sentencing phase of a criminal proceeding, the *Mathews* calculus shifts toward a lower burden of proof. In sentencing, the State has no *parens patriae* interest in the welfare of the defendant. Instead, the State's interest lies in a cost-effective and manageable sentencing system.²³⁰ A higher standard of proof in sentencing could tax the capacities of over-burdened courts.²³¹ Justice Stephen Breyer, one of the original Sentencing Commissioners, felt that such a higher standard "would threaten the manageability that the procedures of the criminal justice system were designed to safeguard."²³²

Moreover, the individual's stake decreases during the sentencing phase because the dismissed charges are used only to enhance the defendant's sentence. It is worse to go from no conviction and hence no prison term to,

225. *Id.* at 764 ("Given the weight of the private interests at stake, the social cost of even occasional error is sizable."); see also *Addington*, 441 U.S. at 425 ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

226. *Addington*, 441 U.S. at 426.

227. *Santosky*, 455 U.S. at 766 (quoting *Lassiter v. Department of Social Services*, 425 U.S. 18, 27 (1981)).

228. *Santosky*, 455 U.S. at 766; *Addington*, 441 U.S. at 426. *Parens patriae* refers to the role of the State as "guardian of persons under legal disability, such as juveniles or the insane." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

229. *Santosky*, 455 U.S. at 767.

230. The government's interest might also be expressed as being in the reduction of great variations in sentencing, an interest that is impeded by extremely high levels of proof. See *United States v. Brady*, 895 F.2d 538, 543 (9th Cir. 1990).

231. See *United States v. Lee*, 818 F.2d 1052, 1057 (2d Cir.), cert. denied, 484 U.S. 956 (1987).

232. Breyer, *supra* note 42, at 11. As one of the original Sentencing Commissioners, Justice Breyer may lack detachment and neutrality from the subject. His reasoning, nevertheless, seems plausible: the higher the standard of proof, the more facts a court must determine during the sentencing hearing. Whether the additional burden can be justified is, of course, a normative question that is considered to some degree by the first two prongs of the *Mathews* balance.

say, conviction and three years in prison than it is to go from five years in prison to eight years in prison, even though both involve increases of three years. The marginal cost to the defendant is higher in the first example for two primary reasons. First, it includes the stigma of conviction,²³³ and the resulting penalties that convictions carry.²³⁴ Second, rational individuals "discount" the future, which means that they value time in the future less than they value time in the present.²³⁵ This is analogous to the idea that money in the present is more valuable than money in the future. Any money earned in the present can be invested to yield greater value in the future; therefore, investors "discount" the future value of money based on projected interest rates.²³⁶ Similarly, Judge Easterbrook argues that defendants discount the burden of future imprisonment based on considerations such as "the possibility that the state will relent or they will die before the tenth year arrives."²³⁷ Thus, Easterbrook concludes, "the prospect of twenty years' imprisonment is not twice as onerous as the prospect of ten years' imprisonment."²³⁸

The Court used a similar type of marginal cost analysis in *Mathews* to distinguish an earlier case involving welfare benefits. In *Goldberg v. Kelly*,²³⁹ the Court had required the government to provide an evidentiary hearing before terminating a person's welfare benefits.²⁴⁰ The Court noted in *Mathews* that an evidentiary hearing was not needed in the case of terminating disability benefits because, unlike welfare, disability benefits were not likely to be a person's last source of income; thus, "[t]he potential deprivation here is generally likely to be less than in *Goldberg*."²⁴¹ In essence, the Court looked at not the absolute amount of money at issue, but the marginal value of that money to the person facing termination of benefits. Thus, an examination of the marginal cost to the defendant of the use of dismissed charges is in keeping with the Court's doctrinal underpinnings of due process.

Ultimately, any apparent unfairness to the defendant concerning the standard of proof in sentencing is normative rather than substantive. While a reasonable doubt standard applies to the determination of guilt at trial, it

233. See, e.g., *In re Winship*, 397 U.S. 358, 363 (1970) ("The accused during a criminal prosecution has at stake interests of immense importance . . . because of the certainty that he would be stigmatized by the conviction.").

234. See *supra* note 162.

235. See POSNER, *supra* note 37, at 230-31 (arguing that if criminals have a "significant discount rate," the deterrence value of additional years' imprisonment will decrease).

236. JAMES P. QUIRK, *INTERMEDIATE MICROECONOMICS* 217 (2d ed. 1983).

237. Easterbrook, *supra* note 37, at 294.

238. *Id.* at 295.

239. 397 U.S. 254 (1970).

240. *Id.* at 269-70.

241. *Mathews*, 424 U.S. at 341 (1976).

need not and does not apply at other stages of the criminal process.²⁴² For example, the Supreme Court, in *Bourjaily v. United States*,²⁴³ held that in determining what evidence to admit and what to reject, a court need only make determinations at the preponderance of the evidence level.²⁴⁴ In *Bourjaily*, the prosecution wanted to show that the defendant was involved in a conspiracy to sell cocaine.²⁴⁵ Once the prosecution showed that a conspiracy existed, statements made during and in furtherance of the conspiracy would be exempted from the hearsay rule.²⁴⁶ The statements made in furtherance of the conspiracy had a crucial role in the convictions, as they were used to establish that the conspiracy existed in the first place.²⁴⁷ Thus, in *Bourjaily*, the evidence admitted under a lesser standard had a tremendous impact on the defendant, as it arguably swung the outcome from acquittal to conviction. In sentencing, on the other hand, the impact on a defendant is lessened because the defendant is already going to prison.

Nevertheless, *Winship* retains vitality for commentators who oppose the preponderance standard. The *McMillan* court, for example, consisted of a slim five-vote majority, with Justices Marshall, Brennan, Blackmun, and Stevens dissenting on the grounds that *Winship* required proof beyond a reasonable doubt for any fact that leads to special punishment.²⁴⁸

However, the *Winship* court found that the reasonable doubt standard was crucial *at the trial stage* because it reduced the risk of erroneous convictions and instilled confidence in the criminal justice system.²⁴⁹ Justice Harlan's concurrence elaborated on this last point: "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to con-

242. In *In re Winship*, 397 U.S. 358, 364 (1970), the Court noted that the reasonable doubt standard existed "to command the respect and confidence of the community in applications of the criminal law." This community respect and confidence is maintained through the insistence upon a reasonable doubt standard during the guilt phase of a criminal trial. For an example of an instance in the criminal trial process where a reasonable doubt standard is not used, see *infra* note 244 and accompanying text. A reasonable doubt standard is also not required at preliminary hearings. There, the standard of proof for binding a defendant over for trial is mere probable cause. See *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that the Fourth Amendment requires timely judicial determination of probable cause for detention but does not require that that determination take the form of adversarial proceedings).

243. 483 U.S. 171 (1987).

244. *Id.* at 175-76 (holding that Federal Rule of Evidence 104(a) requires only a preponderance standard); see FED. R. EVID. 104(a)-(h). In particular, FED. R. EVID. 104(b) allows evidence that is conditionally relevant to be admitted if there is evidence sufficient to support a finding of the conditional fact.

245. *Bourjaily*, 483 U.S. at 173-74.

246. FED. R. EVID. 801(d)(2)(E); *Bourjaily*, 483 U.S. at 183-84.

247. The Court also held that "bootstrapping"—the consideration of the contents of a proffered declaration in determining its admissibility absent independent evidence—was allowed under the Federal Rules of Evidence. *Bourjaily*, 483 U.S. at 181-84.

248. *McMillan v. Pennsylvania*, 477 U.S. 79, 93-94 (1986) (Marshall, J., dissenting); *id.* at 96-98, 103 (Stevens, J., dissenting).

249. *In re Winship*, 397 U.S. 358 (1970).

vict an innocent man than to let a guilty man go free.”²⁵⁰ Thus, Justice Harlan acknowledged that the high hurdle of the reasonable doubt standard existed to protect the innocent from being convicted wrongfully, even though it would mean that guilty criminals might be acquitted. This value determination, however, need not apply to the sentencing phase, where the court is no longer separating the guilty from the innocent.

Based on precedents, particularly *McMillan*, the U.S. Supreme Court would almost certainly uphold the preponderance standard for the use of dismissed charges in sentencing under the Guidelines. With regard to burden of proof analysis, the Court appears to have divided criminal prosecution into two stages: guilt and sentencing. Determinations at the guilt stage, controlled by *Winship* and *Mullaney*, must be based on proof beyond a reasonable doubt. Once the defendant has been convicted and the proceeding advances to sentencing, however, due process no longer requires proof beyond a reasonable doubt, and *McMillan* becomes the relevant precedent. The Guidelines obviously take effect only after a defendant has been convicted, and thus *McMillan* suggests that reasonable doubt need not apply.

3. *Element of the Crime Analysis*

An alternate due process attack on the use of dismissed charges in sentencing is that this practice “can fairly be characterized as ‘a tail which wags the dog of the substantive offense.’”²⁵¹ In effect, the dismissed charges become more important than the offense of conviction in determining the sentencing range. According to this argument, dismissed charges should therefore be proven with the same certainty as the elements of the offense of conviction.²⁵²

Relying on *Winship*, the Court in *Mullaney v. Wilbur*²⁵³ struck down a Maine statute that required a defendant charged with murder to prove that he or she acted in the heat of passion to reduce the crime to manslaughter.²⁵⁴ The Court held that due process requirements were not abandoned simply because a defendant would be convicted of a crime.²⁵⁵ The Court observed that “the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between

250. *Id.* at 372.

251. *United States v. Kikumura*, 918 F.2d 1084, 1101 (3d Cir. 1990) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

252. This approach is a variant of the standard of proof analysis, but differs in that it focuses on the importance of factual elements in determining the sentence.

253. 421 U.S. 684 (1975).

254. *Id.* at 700-03. The standard of proof for the defendant was by a fair preponderance of the evidence. *Id.* at 686.

255. *Id.* at 698.

guilt or innocence for many lesser crimes.”²⁵⁶ The statute in *Mullaney* therefore violated due process rights in two ways: by placing the burden of proving heat of passion on defendants rather than placing the burden of proving its absence on the prosecution; and, by establishing an impermissibly lenient standard of proof.

By itself, *Mullaney* might suggest that any facts used to increase a defendant’s sentence must be proven beyond a reasonable doubt. In subsequent cases, however, the Court has applied the holding in a narrower fashion. In *Patterson v. New York*,²⁵⁷ the Court upheld a statute that required the defendant to prove an affirmative defense of extreme emotional disturbance by a preponderance of the evidence to mitigate a homicide down to manslaughter.²⁵⁸ The Court distinguished *Mullaney* on the grounds that the statute in *Mullaney* shifted the burden of negating an element of the crime, malice aforethought, from the prosecution to the defense.²⁵⁹ In *Patterson*, on the other hand, the prosecution still had to prove all of the statutory elements of murder: death, intent to kill, and causation. Once the State established these facts beyond a reasonable doubt, due process did not require that it also carry the burden of proving the non-existence of every mitigating factor it recognized.²⁶⁰

The Court narrowed *Mullaney* further by holding in *McMillan v. Pennsylvania*²⁶¹ that a state could “properly treat visible possession [of a firearm] as a sentencing consideration and not an element of any offense.”²⁶² The statute in question imposed a mandatory minimum sentence of five years for any defendant convicted of certain felonies where the judge found, by a preponderance of the evidence, that the person visibly possessed a gun during the crime.²⁶³ The Court, following *Winship*, *Mullaney*, and *Patterson*, reasoned that the Pennsylvania statute created no presumption as to the elements of the underlying felonies and “in no way relieve[s] the prosecution of its burden of proving guilt.”²⁶⁴ Moreover, the statute neither increased the maximum sentence for the offense nor created a new crime, but instead limited the discretion of the court’s range of sentences.²⁶⁵ Thus, the state could require a standard of proof below proof beyond a reasonable doubt.²⁶⁶

256. *Id.* The statutory punishment for murder is life imprisonment; for manslaughter, a fine of not more than \$1,000 or a prison term of not more than twenty years. *Id.* at 686 (citing ME. REV. STAT. ANN. tit. 17, §§ 2551, 2651 (West 1964)).

257. 432 U.S. 197 (1977).

258. *Id.* at 210.

259. *Id.* at 215-16.

260. *Id.* at 205-07.

261. 477 U.S. 79 (1986).

262. *Id.* at 93.

263. *Id.* at 81.

264. *Id.* at 83 (internal quotation marks and citations omitted).

265. *Id.* at 87-88.

266. *Id.* at 92.

As a due process issue, the use of dismissed charges in sentencing resembles the operations of the respective statutes in *McMillan* and *Patterson* more closely than those in *Mullaney* and *Winship*. Although the dismissed charges can lead to a higher sentencing range for the defendant, they are not elements of the crime itself, but rather are sentencing factors. The prosecution still bears the burden of proving the elements of the offense of conviction beyond a reasonable doubt.²⁶⁷ Once the prosecution proves its case, the dismissed charges, while enhancing the sentence, do not increase the maximum penalty for the offense of conviction.²⁶⁸ They are simply additional factors, like the aggravating and mitigating factors specifically listed for each crime. Like the use of specific offender characteristics, consideration of the dismissed charges lifts the sentencing range to a higher level, but still within the original statutory limits that had been available to courts before the Guidelines.²⁶⁹ The Guidelines already operate to constrain judicial discretion; the use of dismissed charges is simply another constraint. Such a sentencing practice is therefore controlled by *McMillan*, not *Mullaney*.

Furthermore, although some commentators criticize the current two-phase system for according too little protection to defendants in sentencing, these arguments exaggerate the impact of the sentencing phase under the Guidelines. One commentator has suggested that the system

accords elaborate procedural protection during first-round decisions on which ten months of an individual's freedom may depend, and few and sporadic protections to similar, final decisions, on which twenty-nine or more years of freedom may depend—simply because one decision has been allocated to a proceeding called a trial and the other to a proceeding called a sentencing.²⁷⁰

In actuality, however, the Guidelines act to curtail drastic increases in sentence length based upon unadjudicated conduct. The Guidelines begin with the most serious offense of conviction to determine the base offense level.²⁷¹ The additional counts, which may include dismissed charges, are then grouped together, such that the marginal increase in offense level

267. Plea agreements create an interesting situation because the prosecution's proof comes from the defendant's own guilty plea. Apart from any claims of coercion, though, a bargained guilty plea should pass the same test of accuracy that an unbargained guilty plea does.

268. See *supra* notes 124, 158 and accompanying text.

269. See *Mistretta v. United States*, 488 U.S. 361, 396 (1989) (noting that the Guidelines did "no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits established by Congress").

270. Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 292 (1992).

271. U.S.S.G., *supra* note 1, § 3D, intro. cmt.

decreases as additional counts are grouped.²⁷² As a result, additional counts never increase the sentence by more than five offense levels.²⁷³

III

USING DISMISSED CHARGES IN SENTENCING TO FURTHER THE GOALS OF THE GUIDELINES

This Comment next considers whether the use of dismissed charges furthers the goals of the Sentencing Guidelines and the plea bargaining process. The use of dismissed charges has two primary benefits: it limits prosecutorial discretion and reduces sentencing disparity. On the down side, it decreases the defendant's incentive to plea bargain and may therefore clog the federal courts with more trials.

A. *Modelling the Behavior of the Plea Bargain Actors*

The use of dismissed charges in sentencing theoretically affects the incentives of both the prosecutor and the defendant. This Comment analyzes the effects by considering the goals of the prosecutor and the defendant and by examining the impact of the use of dismissed charges on the attainment of those goals. The resulting model makes an assumption common to most law and economics analyses, that of rationality.²⁷⁴

1. *Prosecutors*

The goal of a prosecutor, defined in the most basic terms, is to increase societal welfare by maximizing the reduction of crime.²⁷⁵ To achieve the maximum reduction in crime within a limited budget, a prosecutor must decide whom to prosecute and in what manner.²⁷⁶ Many law and economics theories predict that a prosecutor will prosecute many easy cases, rather than a few difficult ones, even though the expected punishment (the severity

272. *Id.* The sentencing court can use the dismissed charges in three ways: as convictions to be grouped in with the offense conviction, as reason for selecting the high end of the sentence range, or as grounds for departure. See *supra* note 123 and accompanying text.

273. *Id.* § 3D1.4. Under pre-Guidelines sentencing rules, such charges could lead to an increase of the sentence to whatever term the judge deemed appropriate, subject only to the statutory limit of the crime of conviction. See *supra* Part I.A.

274. See, e.g., Grossman & Katz, *supra* note 37, at 750. Rationality consists of three characteristics: (1) stable preferences; (2) constrained choices; and (3) self-maximization. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 234 (1988). Thus, rationality merely assumes that the defendant knows his preferences and acts to achieve the best result for himself. See *id.* at 22.

275. See Brian Forst & Kathleen B. Brosi, *A Theoretical and Empirical Analysis of the Prosecutor*, 6 J. LEGAL STUD. 177, 178-79 (1977); Grossman & Katz, *supra* note 37, at 749-50. These studies concern the deterrent effect of prosecuting crime, as opposed to the incapacitative effect.

The societal welfare theory views the prosecutor as an agent of the government. However, it is possible that prosecutors often act independently. This is particularly true of United States Attorneys, who are appointed for four year terms and not elected by the public, as district attorneys are. For more discussion, see Grossman & Katz, *supra* note 37, at 750 & n.6; Easterbrook, *supra* note 37, at 300-01.

276. See Easterbrook, *supra* note 37, at 295-96.

of punishment multiplied by the probability of conviction, summed across all the cases) might be the same in both approaches.²⁷⁷

Whether a prosecutor chooses to increase societal welfare through maximizing the number of convictions, the severity of punishment, or some combination of both, his incentive to bargain with the defendant increases if dismissed charges can be used in sentencing. A prosecutor choosing to maximize the severity of punishment will be more likely to plea bargain if dismissed charges can be used in sentencing because the sentencing differential between plea bargain sentences and trial sentences is thereby reduced. Importantly, the decrease in sentencing differential results from higher sentences being imposed on plea bargainers.

In contrast, a prosecutor choosing to maximize the number of convictions will be relatively indifferent to the decreased sentencing differential, and from that standpoint his incentive to plea bargain will remain unaffected. However, such a prosecutor will still want to maintain the same number of plea bargains. Convictions by guilty plea are cheaper than those by trial, and the prosecutor must operate within the constraint of a fixed budget. Thus, because the defendant is less likely to plea bargain when dismissed charges can be used in sentencing,²⁷⁸ this prosecutor must be more flexible in plea bargaining if he wants to maintain the same number of plea bargains as would be achieved if dismissed charges could not be used in sentencing.

2. Defendants

A criminal defendant seeks to minimize her defense costs and expected punishment.²⁷⁹ As a rational actor, a defendant evaluates a proposed plea bargain by calculating the punishment expected under the plea agreement and subtracting any costs saved by avoiding trial, such as litigation costs and public exposure. The defendant then compares this total plea agreement cost with the expected punishment from a trial conviction multiplied by the probability that she will be convicted. If the plea agreement leads to a lesser expected cost, the defendant will agree to plead guilty.²⁸⁰

When dismissed charges can be considered in sentencing, the defendant's incentive to plea bargain may decrease. The expected punishment or cost of the plea agreement increases because the dismissed charges will

277. See *id.* at 296 & n.9; Forst & Brosi, *supra* note 275, at 180, 183. Forst and Brosi, in a more complicated model, demonstrate that a prosecutor will also add to his or her considerations of whom to prosecute, "cases . . . for which the severity of punishment associated with the offense and the extensiveness of the defendant's criminal history are greater." *Id.* at 183. This result occurs because punishing repeat offenders is likely to reduce future crimes to a greater extent than prosecuting non-repeat offenders. *Id.* at 178-79.

278. See *infra* Part III.A.2.

279. See Grossman & Katz, *supra* note 37, at 750. In arguing that the defendant's primary goal is to minimize his punishment, Grossman and Katz fail to take into account the costs of litigation. A complete model, however, should take this factor into account.

280. See Easterbrook, *supra* note 37, at 297.

now enhance the offense level. In some instances, involving drug or money offenses, the dismissed charges can raise the offense level to what it would have been had the defendant been convicted of the dismissed charges.²⁸¹ Unless the defendant will benefit by avoiding statutory minimum sentences or by being able to take advantage of a statutory maximum sentence for a given offense,²⁸² the punishment will be the same in either case.²⁸³ In such a situation, the defendant will choose to plea bargain or not based on whether the costs saved in avoiding trial outweigh the decrease in expected sentence due to the possibility of being acquitted.²⁸⁴ The prosecutor has no influence over this decision.

Decreased incentives to plea bargain can have a severe impact on federal court dockets. Assuming that ninety percent of all convictions result from plea bargains, a ten-percent drop in the number of plea bargains will nearly double the number of trials required to maintain the same number of convictions.²⁸⁵ Because of the Federal Speedy Trial Act of 1974,²⁸⁶ these criminal trials will take priority in federal courts,²⁸⁷ thereby possibly creating a backlog of civil cases. The cost of a rule that decreases the amount of plea bargaining must include this factor.²⁸⁸

The few empirical studies that have been conducted since the Guidelines suggest, however, that the Guidelines may not have had a signif-

281. See *supra* note 153 and accompanying text.

282. See *supra* notes 124, 158 and accompanying text.

283. The punishment will differ if the defendant receives the acceptance of responsibility reduction. See *supra* text accompanying note 157.

284. This decrease is greater than the sentence length multiplied by the probability of being acquitted, because acquittal avoids the other penalties of conviction. See *supra* notes 157-64 and accompanying text.

285. Suppose there are 100 convictions in a given court. According to the statistics, 90 are by guilty plea and 10 are by trial. If the percentage of guilty pleas drops by 10 percent, then of the 100 convictions, 81 will be by guilty plea and 19 by trial. The number of trial convictions nearly doubles from 10 to 19. See Chief Justice Warren Burger, *The State of the Judiciary 1970*, 56 A.B.A. J. 929, 931 (1970).

286. 18 U.S.C. §§ 3161-3174 (1988 & Supp. V 1994).

287. The Act sets limits on the time period between arrest and indictment (within 30 days generally), and indictment and trial (70 days). 18 U.S.C. §§ 3161(b)-(c)(1). If these deadlines are not met, the charges are to be dismissed. 18 U.S.C. §§ 3162(a)(1)-(2).

288. Judge Posner argues that trial delay is not as hopeless as it may seem. POSNER, *supra* note 37, § 21.12. To date, the government's solution has been to increase the number of federal judges. Posner analogizes this solution to that of building a new freeway to help alleviate traffic jams. Some drivers who previously were better off not taking the existing freeways will now find it worthwhile to take the new freeway. Similarly, some potential litigants who were deterred by the long delay will find that the new judges will reduce the trial delay sufficiently to make it worth their while to file suit. As a result, the extra litigants will clog the expanded court system.

Posner suggests that the problem is that court time, unlike other scarce resources in society, is not rationed by price. Raising filing fees could force litigants to internalize the costs of using court time and of delaying other cases.

Assuming that Posner's solution of raising filing fees is adopted, the cost of decreased plea bargaining on civil suits would be the cost of litigants whose cases would have been worth resolving before the filing fees were raised because of the increase in criminal trials, but are now not worth resolving.

icant effect on plea bargaining.²⁸⁹ An analysis of sentencing cases in the Fifth Circuit showed that plea bargaining rates remained statistically the same in seven of thirteen offenses.²⁹⁰ For one crime, marijuana distribution, the plea bargaining rate actually increased by 15.14 percent.²⁹¹ In the other five offenses, the plea bargaining rate dropped by amounts varying from 7.59 percent to 19.13 percent.²⁹² It is not clear if this correlation is causal. The authors concluded that, as of 1991, the Guidelines had not affected overall rates of plea bargaining in the Circuit, but that "[a] decrease may . . . become measurable as defendants learn that there may be reduced benefits to plea bargaining under the Guidelines."²⁹³

The relative stability in the percentage of plea bargains can perhaps be traced to the remaining tangible reasons for a defendant to plea bargain, among them the acceptance of responsibility reduction and the potential for a prosecutor's recommendation of the low end of the sentence range.²⁹⁴ Moreover, sentencing under the Guidelines may not be appreciably worse for defendants than sentencing in the pre-Guidelines era, when judges could consider whatever information they wanted.²⁹⁵ Finally, with respect to dismissed charges, the defendant may not be better off if she goes to trial, for even conduct for which the defendant is acquitted may be used in sentencing under the Guidelines.²⁹⁶ Thus, for defendants who will be convicted of at least one crime either way, plea bargaining procures at least the

289. Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 404 (1991). A significant limitation of this study is that it focuses on federal sentencing only in Louisiana, Mississippi, and Texas, all in the Fifth Circuit, because it was too cumbersome to conduct a nationwide study. *Id.* at 402. However, because the Fifth Circuit, like the Second Circuit, allows the consideration of dismissed charges in sentencing, the results of the study should reflect the impact of that practice on plea bargaining.

For related studies of the effect of the Guidelines on charging practices, see Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992); Schulhofer & Nagel, *supra* note 160. These studies suffer from the same limitations as the Karle and Sager study. In the 1989 Schulhofer and Nagel study, the authors examined just four federal districts. The resulting study is not representative, but instead was intended "to identify certain common patterns." *Id.* at 258. In the 1992 Nagel and Schulhofer study, the same authors published part of a larger study, focusing this time on three federal districts. Nagel & Schulhofer, *supra*, at 514.

290. The offenses were robbery, bank embezzlement, postal fraud, marijuana importation, cocaine importation, heroin distribution, and heroin importation. Karle & Sager, *supra* note 289, at 403-04.

291. *Id.*

292. *Id.*

293. *Id.* at 404.

294. See *supra* note 155 and accompanying text.

295. See, e.g., *supra* notes 83-87 and accompanying text.

296. See, e.g., *United States v. Grayson*, 438 U.S. 41, 54-55 (1978) (holding that the sentencing judge could properly consider the defendant's false testimony during trial, even though the defendant was neither indicted for nor convicted of perjury); *United States v. Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989) (per curiam) (holding that the sentencing judge could properly consider evidence of the defendant's possession of a handgun despite his acquittal from the substantive firearm offense).

benefits listed above without surrendering any potential advantage of going to trial.

3. Probation Officers

Since the creation of the Guidelines, federal probation officers have taken on an expanded role in the sentencing process. Under the old sentencing regime, a court used the probation officer's presentence investigation report ("PSI") "to provide [it] with a complete portrait of the individual defendant" and to help it "determine an appropriate sentence."²⁹⁷ If there were conflicting facts, the officer could simply report both accounts and let the court evaluate them.²⁹⁸ Under the Guidelines, however, the probation officer must provide a single account of the defendant's criminal activity and any context relevant to the application of the Guidelines.²⁹⁹ An important difference between the old and new systems, therefore, is that the probation officer must now reconcile conflicting facts.

The probation officer's goal is to help the court reach the appropriate sentence for the defendant.³⁰⁰ It is unclear how or even if allowing the use of dismissed charges affects this goal. It is clear, however, that the probation officer has a significant role in the sentencing phase, especially concerning charges dismissed pursuant to a plea bargain. It is the probation officer who, when writing the PSI, details the facts underlying the dismissed charges.³⁰¹ Ideally, the probation officer develops the information in his report without relying on the prosecutor.³⁰² Without a complete

297. Keith A. Findley & Meredith J. Ross, Comment, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under Julian and the Sentencing Guidelines*, 1989 WIS. L. REV. 837, 840-41; see also PRESENTENCE INVESTIGATION REPORT, *supra* note 203, at 1 ("The presentence report describes the defendant's character and personality . . . helps the reader understand the world in which the defendant lives . . . and discloses those factors that underlie the defendant's specific offense and conduct in general.").

298. See Susan K. Grunin & Jud Watkins, *The Investigative Role of the United States Probation Officer Under Sentencing Guidelines*, FED. PROBATION, Dec. 1987, at 43, 46; Megan E. Burns, Note, *The Presentence Interview and the Right to Counsel: A Critical Stage Under the Federal Sentencing Structure*, 34 WM. & MARY L. REV. 527, 544 (1993).

299. Grunin & Watkins, *supra* note 298, at 44; Burns, *supra* note 298, at 544. Federal Rule of Criminal Procedure 32(c)(2)(B) requires that the PSI contain:

the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines . . . and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances.

300. See PRESENTENCE INVESTIGATION REPORT, *supra* note 203, at 1; see also Grunin & Watkins, *supra* note 298, at 44 (discussing changes in probation officers' investigative procedures under the Guidelines).

301. The two major conflicting cases in this Comment provide examples where the probation officer's PSI explained the conduct underlying the dismissed charges. See, e.g., *United States v. Castro-Cervantes*, 927 F.2d 1079, 1080 (9th Cir. 1990); *United States v. Kim*, 896 F.2d 678, 680-81 (2d Cir. 1990).

302. See PRESENTENCE INVESTIGATION REPORT, *supra* note 203, at 3 ("The officer is responsible for investigating each defendant without preconception or prejudgment as to the outcome of the case."); Grunin & Watkins, *supra* note 298, at 44 ("Information gathering and verification are traditional tasks

investigation by the probation officer, therefore, dismissed charges are less likely to come up during the sentencing phase.

Admittedly, this system seems to shift a significant measure of discretion from the prosecution and defense to the probation officer. A probation officer so inclined could omit mention of the dismissed charges in the PSI, in which event the sentencing court would be unlikely to come across the relevant facts unless the prosecutor raises them during the sentencing hearing. This problem of concentrated discretion in the hands of probation officers is, however, built into the present structure of federal sentencing, and potential abuses can occur whether dismissed charges are used or not. Moreover, unlike the prosecutor or the defendant, each of whom has incentives to manipulate the system in his or her favor, the probation officer theoretically is a neutral party.³⁰³ Empirical studies of bargaining practices under the Guidelines indicate anecdotally that probation officers often act as monitors of the prosecution and defense.³⁰⁴

B. *The Effect of Using Dismissed Charges in Sentencing*

This Section conducts a normative analysis of the use of dismissed charges in sentencing and argues that there are two major benefits to such a sentencing practice: a restraint on prosecutorial power and a reduction in sentencing differential.

1. *Restraining Prosecutorial Power*

The use of dismissed charges limits the prosecutor's ability to determine the sentence range through strategic selection of charges. Prosecutors have this ability because the Guidelines are, for the most part, charge-based.³⁰⁵ Given a certain factual pattern, the prosecutor often can choose

performed by probation officers."). But see *Lear*, *supra* note 35, at 1205 n.124 ("[I]t is from the prosecutor's office and the defendant that the probation officer typically obtains most of her information.").

303. See *United States v. Jackson*, 886 F.2d 838, 844 (7th Cir. 1989) (explaining that "the probation officer serves as a neutral information gatherer for the sentencing judge"). But see *Williams v. New York*, 337 U.S. 241, 249 (1949) (asserting that probation officers "have not been trained to prosecute but to aid offenders"); *Burns v. United States*, 501 U.S. 129, 134 (1991) (noting that Federal Rule of Criminal Procedure 32 "provides for focused, adversarial development of the factual and legal issues"); *Burns*, *supra* note 298, at 561-63 (arguing that probation officers are perceived as an arm of the prosecution).

304. See Nagel & Schulhofer, *supra* note 289, at 545; Schulhofer & Nagel, *supra* note 160, at 285.

305. See Standen, *supra* note 169, at 1506-12; see also MICHAEL H. TONRY, SENTENCING REFORM IMPACTS 79 (1987). For a description of a charge-based sentencing scheme, see *supra* notes 78-81 and accompanying text. It is true that the Guidelines include certain real-offense aspects, particularly with respect to relevant criminal conduct and specific offense characteristics. These factors can increase the base offense level, and hence, the ultimate sentence range, even though they are not specific elements of the crime of conviction. Thus, their use constitutes real-offense sentencing. See Reitz, *supra* note 77, at 527. For crimes with low base offense levels, such as Obstructing or Impeding Officers (base offense level 6), the specific offender characteristic can be a significant increase, in this case 3 levels. U.S.S.G., *supra* note 1, § 2A2.4. Such relatively low offense levels, however, result in a low or no prison sentence. For example, the sentencing range for an offense level of 8 and a criminal history category of

from a variety of charges, each carrying a different base-offense level.³⁰⁶ For example, in an assault case, a prosecutor conceivably could charge a defendant with Assault with Intent to Commit Murder (base offense level 28 or 22),³⁰⁷ Aggravated Assault (base offense level 15),³⁰⁸ or Minor Assault (base offense level 6 or 3).³⁰⁹ Depending on which offense the prosecutor charges, the defendant would face a sentencing range of seventy-eight to ninety-seven months at the high end, eighteen to twenty-four months at the middle, to zero to six months at the low end.³¹⁰

Notice that the prosecutor's discretion is primarily to charge defendants with lesser charges. In the example above, if the facts support a charge of Aggravated Assault, the prosecutor can deviate downward and charge Minor Assault. The prosecutor would have trouble, however, using his discretionary power to charge Assault with Intent to Commit Murder, because the facts do not support the higher charge. The burden of proving beyond a reasonable doubt that the defendant committed the crime limits the prosecutor's ability to overcharge.³¹¹

The prosecutor might overcharge the defendant merely to gain leverage to force the defendant to plead guilty. *Bordenkircher v. Hayes*³¹² suggests that such prosecutorial practice is acceptable "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute."³¹³ In *Bordenkircher*, the defendant was indicted for forging a \$88.30 check, an offense punishable by two to ten

I is zero to six months. *Id.* § 5A. Because the initial base offense level is still the most significant factor in determining the total offense level, the Guidelines are primarily charge-based.

The problem of prosecutorial discretion has been explored much in academic literature. See, e.g., Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) (arguing that prosecutorial discretion in plea bargaining often leads to undesirable results); Heaney, *supra* note 36, at 190-200 (arguing that prosecutors control a significant portion of departures from the Guidelines through charging discretion); Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988) (arguing for restrictions on prosecutorial discretion in plea bargaining).

306. A prosecutor can undercharge either vertically or horizontally. A prosecutor would undercharge vertically when he charges a defendant with a lesser offense than the facts support. The focus of this Comment—dismissed charges—would constitute "horizontal undercharging," or charging the defendant with fewer charges than the facts support. The dynamics should be the same, but the prosecutorial discretion is easier to illustrate through vertical undercharging because the Guideline calculations do not involve aggregating multiple counts under U.S.S.G. § 3D1.4.

307. U.S.S.G., *supra* note 1, § 2A2.1.

308. *Id.* § 2A2.2.

309. *Id.* § 2A2.3.

310. This calculation assumes a defendant with no criminal history. Any criminal history would increase the sentencing range for each offense level, so that the ranges would increase correspondingly for each offense. See *id.* § 5A (Sentencing Table).

311. If forced to go to trial, the prosecutor will likely lose the case if he has overcharged, or be able to convict only on lesser included offenses. The economic cost to the prosecutor in the first instance is the lost opportunity of prosecuting and convicting the defendant of the appropriate crime, plus the cost of trial, less the expected cost of prosecuting the defendant for the lesser crime. In the second instance, the economic cost is the lost resources expended on trying to prove the more serious charge.

312. 434 U.S. 357 (1978).

313. *Id.* at 364.

years imprisonment.³¹⁴ The prosecutor offered to recommend a sentence of five years if the defendant would plead guilty. But if the defendant refused the offer, the prosecutor threatened to charge the defendant as a habitual criminal, an offense that carried a mandatory life-sentence term.³¹⁵ The defendant refused to plead guilty, was subsequently convicted of the forgery and of being a habitual criminal, and was sentenced to life imprisonment.³¹⁶

The Supreme Court upheld the prosecutor's tactic of overcharging, despite the great pressure exerted on the defendant by the prosecutor to forgo a trial.³¹⁷ Given that the Court had previously tolerated and encouraged plea bargains, it reasoned that a prosecutor's interest during such negotiations is to induce the defendant to give up her right to plead not guilty.³¹⁸ Threatening "a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights,' " but it is also inevitable and permissible, where the defendant "was plainly subject to prosecution" on the more severe charges.³¹⁹

In other words, *Bordenkircher* theoretically bars a prosecutor from overcharging a defendant where there is no probable cause for that charge. At the same time, the case implicitly condones the practice of undercharging. If undercharging were not allowed, prosecutors would never be able to threaten defendants with prosecution on more severe charges, because they would already be charging defendants with the most severe charge possible. Thus, limits on prosecutorial discretion exist only at the high end of charging.

Real-offense sentencing, of which the use of dismissed charges is a subset, counterbalances prosecutorial discretion to overcharge. In the example above, if the prosecutor charges the defendant with Minor Assault when the facts support a charge of Aggravated Assault, the court can use additional facts concerning the defendant's relevant criminal conduct to justify an upward departure.³²⁰ Although the resulting sentence is capped at the statutory maximum for Minor Assault, the sentence should still be significantly higher than that of other defendants convicted of Minor Assault. By allowing courts to consider facts and evidence beyond that contained in the offense of conviction, real-offense sentencing acts as a restraint on prosecutors who charge particular defendants too leniently.

314. - *Id.* at 358.

315. *Id.* at 358-59.

316. *Id.* at 359.

317. During the defendant's trial, the prosecutor asked on cross-examination, "Isn't it a fact that I told you at that time [the initial bargaining session] if you did not intend to plead guilty to five years for this charge and . . . save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?" *Id.* at 358 n.1 (alteration and omission in original).

318. *Id.* at 364.

319. *Id.* at 364-65 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)).

320. See U.S.S.G., *supra* note 1, §§ 1B1.3, 5K2.0.

A probation officer's independent investigation also limits prosecutorial discretion. A prosecutor who undercharges a defendant might not present the court with the underlying facts, because the facts might lead to a harsher sentence than that which the prosecutor requested. If the prosecutor were the only source of inculpatory information, he would be able to exercise much greater control over the defendant's sentence. Currently, however, the probation officer is the prime source of information for the court during the sentencing phase.³²¹ Moreover, the probation officer ideally does not rely on the prosecutor in investigating the facts of the crime.³²²

Allowing courts to consider dismissed charges therefore retards prosecutorial discretion where a prosecutor opts to undercharge to reduce the defendant's exposure to a long sentence. Given the information on dismissed charges provided in the probation report, a court can increase the defendant's sentence to what it believes is a more appropriate length. Such use of dismissed charges accords with the Sentencing Commission's general policy statement: "[A] sentencing court may control any inappropriate manipulation of the indictment through use of its departure power."³²³

2. Reducing Sentencing Disparity

In addition to restraining prosecutorial discretion, the use of dismissed charges in sentencing should reduce overall sentencing disparity. Because of the need to provide consideration and an incentive for defendants to plea bargain,³²⁴ some disparity will be inherent when sentences imposed after conviction by plea bargain are compared with those imposed after conviction by trial.

In general, however, sentencing disparity should be avoided where possible. The unfairness of widely disparate sentences was well documented in the pre-Guidelines era.³²⁵ Perhaps the most devastating aspect of the pre-Guidelines sentencing disparity was that factors bearing no relevance to the severity or context of the crime had a significant impact on the defendant's sentence. Disturbingly, these factors included categories deemed "suspect classifications" under Equal Protection analysis.³²⁶ While race as a factor in sentencing disparity might not raise constitutional concerns,³²⁷ its influence in sentencing can nevertheless be condemned. Similarly, factors such as gender and geography are inappropriate for use in

321. See *supra* note 299 and accompanying text.

322. See *supra* note 302 and accompanying text.

323. U.S.S.G., *supra* note 1, § 1A4(a).

324. See *supra* notes 147-66 and accompanying text.

325. See *supra* notes 52-67 and accompanying text.

326. See *supra* note 51 and accompanying text.

327. See *McCleskey v. Kemp*, 481 U.S. 279, 292-97 (1987) (rejecting an Equal Protection Clause attack based on a complex statistical analysis showing that the sentencing scheme in question was more likely to result in the death penalty for black defendants than for white defendants).

sentencing. Because disparities in sentencing often result from factors like race, gender, and geography, any Guidelines procedure that reduces these disparities should be used, unless there are legal barriers or compelling policy reasons not to do so. As previously demonstrated, no legal barriers exist under current constitutional doctrine that would prevent the use in sentencing of charges dismissed pursuant to a plea agreement.³²⁸

Policy also argues for the use of dismissed charges in sentencing. In a world without plea bargaining, perfect Guidelines could eliminate sentencing disparity by specifying the exact weight to be placed on each conceivable act in connection with the crime of conviction. In the real world, however, it is impossible to draft perfect guidelines that would be workable.³²⁹ Nevertheless, a primary goal of the Guidelines is to impose a similar sentence range upon defendants who commit similar crimes in similar circumstances.³³⁰ By corollary, defendants who commit similar crimes, but in different contexts, should receive different sentences.³³¹ The dismissal of charges, where there is adequate cause to believe that the defendant committed the additional acts alleged in the dropped charges, works against this principle of uniform treatment. It instead leads to similar sentences for defendants who commit similar crimes in different contexts.

Compare the defendant in *United States v. Kim*,³³² who lied to customs officials about his role in smuggling illegal aliens, with a hypothetical criminal charged with one count of lying to customs officials, the count to which Kim pled guilty. If the dismissed charges cannot be used in sentencing, these two defendants will receive the same sentence range under the Guidelines.³³³ Yet, these two defendants have violated the law in meaningfully different contexts. Kim committed his crime as part of a larger enterprise to smuggle aliens into the United States, conduct which the sentencing court found to exist by a preponderance of the evidence.³³⁴ The hypothetical defendant, in contrast, may have been guilty merely of misrepresenting herself to customs officials, particularly if she was trying to enter the coun-

328. See *supra* Part II.B.

329. First, the number of potentially relevant acts is astronomical. Second, these acts occur in multiple combinations and in significantly different contexts, making the variations in the relationships among the acts astronomical as well. Finally, each specified act or combination of acts requires a factual judgment on the part of the probation officer or the court involved in sentencing, and the greater the number of decisions, the greater the likelihood of different applications based on similar facts across different jurisdictions. U.S.S.G., *supra* note 1, § 1A3.

330. *Id.*; see also *supra* notes 52-67 and accompanying text.

331. Presumably, defendants who commit different crimes could receive similar sentences due to different combinations of circumstances and/or different criminal histories. When all the factors are held constant except the offense, however, the resulting sentencing range should be different.

332. 896 F.2d 678 (2d Cir. 1990).

333. In fact, the hypothetical defendant would receive a longer sentence if she did not accept responsibility for her actions and if Kim did. See U.S.S.G., *supra* note 1, § 3E1.1.

334. *Kim*, 896 F.2d at 680-81. Kim, in fact, had a minor role in this enterprise, for which he received a two level reduction in offense level. *Id.* at 680. Nevertheless, his other actions were taken in furtherance of this criminal enterprise.

try illegally. For these two defendants to receive the same sentence despite the marked difference in the context of their crimes defeats the purpose of the Guidelines. In fact, the Commission foresaw the potential for plea bargaining to lead to such disparity and sought to minimize it by introducing aspects of real-offense sentencing.³³⁵ To forbid courts from considering charges dismissed pursuant to plea bargains works against the principle of imposing different sentences for different criminal acts.

However, as one commentator has pointed out, the use of nonadjudicated criminal conduct as a sentencing factor acts only to increase sentence lengths, never to decrease them.³³⁶ In effect, "incorporating nonconviction offenses . . . only guarantees that offenders are not less severely punished than their 'true' conduct allegedly warrants."³³⁷ This observation is necessarily true when charges dismissed pursuant to a plea bargain are considered, because the charges can only reflect additional criminal activity. On the other hand, this objection fails to consider that the Guidelines do recognize the other side of nonadjudicated conduct: mitigating circumstances. Just as dismissed charges can increase a defendant's sentence either through specifically listed offense characteristics or as justifying upward departure, mitigating circumstances can decrease a sentence either as a specifically listed factor,³³⁸ or as justifying downward departure.³³⁹ Thus, by weighing both aggravating and mitigating factors, a sentence is more likely to reflect the context of a crime accurately.

The use of nonadjudicated conduct appears unfair only when one focuses exclusively on an individual defendant, rather than on an entire class of defendants. When the focus of a normative inquiry shifts to an entire class of defendants, it becomes more clear that the use of dismissed charges in sentencing promotes both fairness and substantive equality. Using dismissed charges as a factor in sentencing reduces disparities among the class of defendants who have engaged in similar criminal conduct. In other words, the use of dismissed charges is fair because it makes the defendant's sentence similar in length to those of other defendants who have committed the same crime in similar circumstances.

A final argument against the use of dismissed charges in sentencing focuses on a perceived safeguard in the system. If a court believes that a

335. See U.S.S.G., *supra* note 1, § 1A4(a); see also Nagel & Schulhofer, *supra* note 289, at 505 (arguing that consideration of relevant uncharged facts is essential to ensure that arbitrary differences in charging decisions do not produce disparate sentences); Schulhofer & Nagel, *supra* note 160, at 246 n.73 (discussing the Commission's eventual adoption of a system which compromised between a "real offense" and a "charge offense" system); Wilkins & Steer, *supra* note 97, at 497 (stating that the Commission ultimately chose a sentencing system blending charge-offense and actual-conduct elements).

336. Lear, *supra* note 35, at 1205.

337. *Id.*

338. For example, the Guidelines offer a two to four level reduction in offense level if the defendant played a minor role in the crime. U.S.S.G., *supra* note 1, § 3B1.2.

339. *Id.* § 5K2.0, p.s.

plea agreement is too lenient, the argument goes, the court can and should refuse to accept the agreement. The Ninth Circuit made this argument in *United States v. Castro-Cervantes*.³⁴⁰ Two problems plague this approach. First, the agreement between the prosecutor and defendant may not provide the court with sufficient information to evaluate whether the plea bargain actually does reflect the seriousness of the defendant's offenses, particularly if the prosecutor does not include information pertaining to the dismissed charges.³⁴¹ Second, rejecting the plea agreement imposes a high transaction cost on the prosecutor and defendant, who would have to start negotiations all over, and whose next agreement might be rejected too. On the other hand, the use of dismissed charges, where defendants are aware that these dismissed charges can be used against them, would allow the court to accept agreements that appeared reasonable, without fear that it might be accepting a plea that would turn out to be too lenient.

CONCLUSION

The consideration of charges dismissed under a plea agreement as sentencing factors is a controversial subset of real-offense sentencing. Current contract and procedural due process doctrines, however, present no apparent barriers to this practice. In addition, as a policy matter, using dismissed charges in sentencing provides two significant advantages. First, it limits the prosecutor's discretion to dictate lenient sentences through undercharging. Second, it decreases sentencing disparity by treating defendants who commit crimes in similar contexts similarly.

Using dismissed charges in sentencing does have a significant drawback, however, in that it diminishes the defendant's incentive to plea bargain. The benefit of pleading guilty is reduced to the acceptance of responsibility reduction and some collateral benefits. Given that guilty pleas constitute an overwhelming majority of convictions, any rule that reduces the percentage of plea bargains may clog federal courts with trials. To correct this drawback, the remaining benefits of plea bargaining may need to be adjusted to increase the incentive to plea bargain until the plea bargaining rates rise to the usual level.³⁴²

340. 927 F.2d 1079, 1082 (9th Cir. 1990) (applying U.S.S.G. § 6B1.2(a)).

341. In *Castro-Cervantes*, for example, the prosecutor dismissed five counts of bank robbery. But for the probation officer's report, there would have been no information on those counts. *Id.* at 1080. Thus, the sentencing court could not have evaluated whether the resulting plea bargain adequately represented the seriousness of the offenses, because the court would not have known whether *Castro-Cervantes* actually committed the other robberies.

Moreover, the structure of the Federal Rules of Criminal Procedure indicates that the judge does not commission the probation officer's report until after accepting a guilty plea from a defendant. *See* FED. R. CRIM. P. 32.

342. One possible solution would be to allow flexibility in the acceptance of responsibility reduction, so that a court could grant two, three, four or more levels of reduction based in part on the prosecutor's recommendation. Allowing too much reduction for plea bargaining, though, will resurrect

Ultimately, the question of whether to enhance defendants' sentences based on dismissed charges hinges on our perceptions about substantive equality. In the old system of indeterminate sentencing, race, sex, and geography were factors as important in determining the sentence length as the crime itself. The federal criminal justice system has moved away from that model, toward determinate sentencing and its goal of minimizing sentencing disparity. To sentence two people to the same sentence range, even though one has committed a criminal act in a much more serious context, does not serve the goals of the Federal Sentencing Guidelines or the value of equal justice for all.

problems of disparity and prosecutorial discretion. Therefore, this solution would need to be monitored carefully.