The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines

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Many commentators have argued that the Federal Sentencing Guidelines have changed the role of judges, prosecutors, and probation officers in federal criminal courts. This Article, based on empirical research, adds a new dimension to that literature by examining ways in which the Guidelines regime has altered defense attorney advocacy. The Article presents the results of a study involving forty participants, all federal criminal defense attorneys. These attorneys discuss their practices and experiences as advocates in a system that increasingly deters and penalizes zealous representation by equating it with the defendant's obstruction of justice or failure to accept responsibility. The attorneys also describe their decreasing bargaining power under a sentencing structure that overempowers their prosecutorial adversaries. Taken as a whole, the empirical evidence suggests that some lawyers have redefined what it means to be a good advocate in the face of the perceived rigidity and severity of the Guidelines. Instead of zealously presenting their client's best legal claims in every instance, defense attorneys have had to temper their zeal by focusing on the overall effect that the adversarial process has on their clients. These defense attorneys have increasingly taken on more technical, incremental roles: counseling their clients, guiding them through the criminal adjudication process, and combing the complex sentencing rules for exceptions that might apply to their clients. Their accounts reveal that the role of the defense lawyer and the meaning of the right to counsel have changed fundamentally from the time of Gideon v. Wainwright *and other cases that championed the right to counsel as a vital safeguard for the protection of individual rights and the integrity of the criminal justice system.*

INTRODUCTION

> "No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel."[1]
>
> —Stephen B. Bright

In an influential 1997 article, Harvard Law School Professor William Stuntz argues that efforts to constitutionalize and reform criminal procedure are often thwarted by changes in substantive criminal law.[2] As he discusses, liberal courts in the 1960s and early 1970s expanded criminal defendants' procedural rights but proved unable to enforce those rights in the face of conservative legislatures, which passed laws undermining the new judicial developments.[3] For example, courts came to recognize the Sixth Amendment right to counsel as an important procedural safeguard because it is often necessary to protect other rights of the accused. The rights of criminal defendants depend not merely on judicial recognition, but on the wide availability of competent defense lawyers to protect those rights. As a result, legislators were able to limit the reach of procedural rules by underfunding indigent defense programs relative to law enforcement and prosecution initiatives,[4] thus finding a different method of impacting the principle of equality between parties in criminal court.

Stuntz's contribution has exposed the interconnectedness between procedural and substantive rules in the criminal law context. This Article argues that a similar connection exists between criminal defense advocacy and federal sentencing policy. Through substantive sentencing policy, Congress has chilled criminal defense advocacy, thereby thwarting the right to counsel and other procedural safeguards that depend on the assistance of counsel.

Forty years ago, the United States Supreme Court held in *Gideon v. Wainwright* that the constitutional right to counsel is "fundamental and essential to a fair trial."[5] The Court reasoned that a fair trial can only be obtained in an adversarial system of justice when counsel is provided for the accused as well as for the accuser.[6] *Gideon* thus promised criminal defendants equality before the law.

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1. Stephen B. Bright, *Gideon's Reality: After Four Decades, Where Are We?*, 18 CRIM. JUST. 5, 5 (Summer 2003).

2. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 72-76 (1997).

3. *Id.*

4. *Id.* at 12. Another strategy employed by legislators was simply to criminalize a wider range of conduct.

5. 372 U.S. 335, 342, 343-45 (1963).

6. *Id.* at 344 ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

Gideon, which reversed decades of state-court precedent, was controversial in its day. Today, however, *Gideon* is one of the most widely eelebrated cases heralding the rights of the criminally accused. It enjoys a degree of unqualified and unanimous approval shared by few other criminal procedure decisions.[7]

Despite the apparent judicial support for the right to counsel, the promise of *Gideon* has suffered significant retrenchment in modern practice.[8] This Article argues that, although court rulings on the constitutional right to counsel have remained steadfast, the United States Sentencing Commission, under congressional authority,[9] has diluted the right by reshaping defense attorney conduct through the enactment of substantive criminal sentencing rules and policies.

This Article, the second of two on the regulation of criminal defense advocacy in federal court, examines how courts and legislatures have undermined *Gideon*'s principle of equality before the law—a notion predicated on leveling the adversarial playing field between the state and the accused by providing both sides with zealous and capable attorneys. In the companion article, doctrinal in nature, I considered the use of substantive sentencing laws under the Federal Sentencing Guidelines to regulate criminal defense advocacy.[10] I argued that the "acceptance of responsibility" provision of the Guidelines had the unintended effect of restricting zealous advocacy because some judges have imposed higher sentences on defendants whose lawyers employed aggressive defenses.[11] The mechanics of the Guidelines system and the interpretations given to the acceptance of

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7. *See, e.g.*, YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE 71 (10th ed. 2002) (citing Donald A. Dripps, Criminal Procedure as Constitutional Law (ch. 5) (2002) (unpublished manuscript)); Bright, *supra* note 1, at 5.

8. According to Stephen B. Bright, the dream of *Gideon* remains unrealized. He states:

> A properly working adversary system will never be achieved unless defender organizations are established and properly funded to employ lawyers at wages and benefits equal to what is spent on the prosecution, to retain expert and investigative assistance, to assign lawyers to capital cases, to recruit and support local lawyers, and to supervise the performance of counsel.

Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1870 (1994). *See also* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 63-100 (1999) (discussing the failed promise of *Gideon* and the poor quality of most indigent criminal defense); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986) (detailing how severe underfunding undermines the Sixth Amendment guarantee of effective assistance).

9. Congress passed the Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984), delegating broad authority to the United States Sentencing Commission to create Guidelines and policy statements for the federal sentencing process. *See* 28 U.S.C. § 994(b)(1). *See also* U.S. SENTENCING COMM'N, GUIDELINES MANUAL ch. 1, pt. A (2002) [hereinafter USSG], *available at* http://www.ussc.gov/2002guid/2002guid.pdf.

10. Margareth Etienne, *Remorse, Responsibility and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 101 (2003).

11. *Id.* at 102.

responsibility provision allowed these judges to equate a vigorous defense with a lack of contrition or remorse.[12]

This second Article provides empirical support for the doctrinal arguments made in the earlier piece and surveys the state of defense advocacy more generally. My goal was to investigate the extent to which criminal defense lawyers perceive that their advocacy decisions are influenced by the acceptance of responsibility determinations or other provisions of the Guidelines, and how these attorneys respond to their perceptions. Because defense lawyers themselves are best positioned to know whether the Guidelines influence zealous advocacy decisions, I interviewed more than forty defense lawyers who practice predominantly in federal court.[13] These semistructured interviews are the basis for the findings and conclusions drawn in this Article. Through these interviews, I found that my doctrinal suppositions about the acceptance of responsibility provision were largely confirmed. I also discovered other Guidelines, such as the "obstruction of justice" provision, and statutory provisions that many lawyers felt were used unfairly to chill their advocacy. Interestingly, the experiences described by the lawyers were richer and more nuanced than what I had hypothesized in the earlier article.

This Article proceeds in five parts. Part I discusses in some detail how the Guidelines work as substantive legal rules that establish and set sentencing policy. In this Part, I set forth the thesis that the sentencing policies embodied in the Guidelines have far-reaching unintended consequences on defense attorney advocaey and thus on the utility of a defendant's constitutional right to the assistance of counsel. Specifically, I explain how some judges consider the ways in which a defendant and her lawyer choose to defend a case as part of the "postoffense conduct" to be assessed in determining punishment. As a result, I argue, the Guidelines have been used not only to punish defendants for their own conduct but also to deter certain forms of defense attorney advocacy.

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12. *Id.* at 109.

13. All empirical research requires the researcher to make a series of limiting choices. One obvious limitation of this study is its reliance on the perceptions of defense lawyers to the exclusion of other participants in the criminal justice system. It is possible—even probable—that prosecutors, judges, witnesses, probation officers, and others might provide different "truths" about the Guidelines' effect on attorney advocacy. I should note, however, that I was not seeking any objective truth about whether the Guidelines as a matter of doctrinal law or as applied mandated that attorneys be less zealous. Rather, my quest was to determine a behavioral truth: whether defense lawyers' perceptions about the way the Guidelines were applied—regardless of whether those perceptions were right or wrong—led them to behave differently as advocates. A future study could involve asking judges, prosecutors, and other participants in the federal criminal justice system for their views about whether the Guidelines chill defense attorney advocacy to test whether their perceptions are consistent with those of defense lawyers. Indeed, this would be essential information for solving the problems that I document here. For the purposes of this Article, however, it was sufficient to determine whether the defense lawyers perceive that their advocacy is limited and how they respond to these perceptions.

Part II of the Article describes the empirical study undertaken to assess whether and how the Sentencing Guidelines influence attorney advocacy. This Part details the goals, design, and qualitative research methods of the study. Parts III and IV present the study's findings and my analysis of the data. These sections are divided based on the four categories or themes that were repeated consistently throughout the data. The respondents spoke of how the acceptance of responsibility adjustment, the obstruction of justice adjustment, departures, and statutory enhancements under the Guidelines scheme significantly influenced their advocacy decisions. I consider separately the acceptance of responsibility and obstruction of justice provisions in Part III and the departures and enhancements in Part IV because the former are decided by the judge whereas the latter are controlled almost exclusively by the prosecutor.

Part V considers the study's findings, their limitations, and their ramifications for defense advocacy in particular and for the adversarial system in general. In this Part, I conclude that the Guidelines have dramatically altered what it means to be a criminal defense lawyer in federal court and, relatedly, what the right to have a lawyer means to a federal criminal defendant.

I

THE PROBLEM: CURTAILING THE BENEFITS OF COUNSEL BY CHILLING DEFENSE ATTORNEY ADVOCACY

The United States Supreme Court has long recognized that criminal defendants have a constitutional right to the assistance of counsel in federal court.[14] The requirement that all lawyers represent their clients with zeal, although not similarly mandated by the Constitution, is an important safeguard for consumers of legal services.[15] In this Part, I argue that current practices in federal criminal courts have the effect of chilling zealous advocacy in a variety of ways. Much of this chilling effect occurs as a result of sentencing reforms that purport only to define substantive criminal conduct and penalties but that in practice have serious implications for the procedural safeguards strong advocacy provides. Although legislators are empowered to create criminal justice policy using substantive rules, they have no authority to alter constitutionally mandated procedural rules. Nevertheless, some substantive laws and policies can significantly influence defendants' constitutional rights. In this Part, I consider how the

14. Powell v. Alabama, 287 U.S. 45, 61-73 (1932).

15. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2002) [hereinafter MODEL RULES] ("A lawyer must also act . . . with zeal in advocacy upon the client's behalf."); MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (2003) [hereinafter MODEL CODE] ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.").

congressionally mandated Guidelines have worked, perhaps unintentionally, to limit the benefits of the Sixth Amendment right to counsel.

A. The Federal Sentencing Guidelines

Since they were promulgated on November 1, 1987, the Federal Sentencing Guidelines have governed virtually all sentencing in federal district courts. The Guidelines, designed to promote fairness and uniformity in sentencing among the nation's federal courts,[16] are simple in their overall concept, but complex and technical in their details.[17] Every federal crime—from drug trafficking to antitrust violations—is catalogued in the Guidelines Manual and assigued a certain number of points, a preliminary "base offense level."[18] Similarly, every defendant is categorized on a scale of one to six based on prior criminal history.[19]

Judges are given strict instructions on how to read and apply the Guidelines Manual. The first chapter of the Manual contains these instructions as well as definitions of important terms and information about the underlying policy choices and mission of the Guidelines.[20] Courts begin the sentencing process with Chapter Two, which specifies the Guideline section applicable to the charged offense.[21] At this juncture, the parties may use the facts and circumstances of the offense to argue for a different point assessment in the initial Guideline range. Once the judge has ruled on the initial Guideline range, she turns to Chapter Three of the Manual to determine if any sentencing adjustments apply.[22] Examples of adjustments include reductions for those who played a minor role in the offense or for those defendants deemed to have accepted responsibility for their crimes.[23] Adjustments can also include enhancements if, for example, the crime was

16. The overarching goal of the Sentencing Rcform Act of 1984, which authorized the Guidelines, was the reduction of scntencing disparities. *See* 18 U.S.C. § 3553(b); 28 U.S.C. § 991(b)(1)(B); *see also* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 51, 104 (1998) [hereinafter STITH & CABRANES, FEAR OF JUDGING].

17. *See* STITH & CABRANES, FEAR OF JUDGING, *supra* note 16, at 84-85 (describing the Guidelines and the Guidelines sentencing process as "dry, complicated, mechanistic, and frequently incomprehensible"); MICHAEL TONRY, SENTENCING MATTERS 98-99 (1996) (discussing the high error ratc in applying the Guidelines' complicated and enormous forty-three level sentencing grid).

18. USSG, *supra* note 9, ch. 2, introductory cmt. ("Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward.").

19. *See id.* § 4A1.1.

20. *Id.* ch.1, pt. A; *id.* §§ 1B1.1-.12.

21. *Id.* § 1B1.2; *id.* § 1B1.1(b) ("Determine the base offense level and apply any appropriate specific offense characteristics, cross refcrences, and special instructions contained in the particular guideline in Chapter Two in the order listed.").

22. *Id.* § 1B1.1(c) ("Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.").

23. *Id.* §§ 3B1.2, 3E1.1.

committed against a vulnerable victim or the defendant obstructed justice.[24] In every case, the court must consider whether the defendant is entitled to a two- or three-point sentence reduction for "acceptance of responsibility."[25] Chapter Four helps the court classify the defendant into one of six criminal history categories.[26] Applying the sentencing table in Chapter Five, the court can determine the presumptive sentencing range derived from the criminal history category from Chapter Four and the base offense level from Chapter Three.[27] Chapter Five also instructs the court regarding permissible and impermissible grounds for departing upwards or downwards from the presumptive Guideline range.[28] The only departure that permits a court to impose a sentence below the statutory maximum is the departure for substantial assistance to government authorities.[29]

As a practical matter, the Guidelines are both rigid and detailed. To illustrate the Guidelines scheme, consider the treatment of the kidnapping offense. Kidnapping carries a base offense level of twenty-four,[30] whereas counterfeiting has a base offense level of six.[31] Points can be added or subtracted for specific offense characteristics that attempt to assess the severity of the crime. If the kidnapping victim is released within twenty-four hours, the offense level decreases by one point, but if a dangerous weapon was used, the offense level increases by two points. The Guidelines attempt to quantify the seriousness of every aspect of an offense by assigning points for offense characteristics and postoffense conduct. These points are the basis of much of the litigation between the prosecution and the defense.

B. The Role of the Judge and the Prosecutor

The Guidelines have fundamentally altered the roles of judges and prosecutors. They have decreased the authority of judges while increasing that of prosecutors. In essence, the Guidelines permit the Sentencing Commission to micromanage the sentencing function of federal judges: judges must strictly follow the Guidelines to assess the severity of a defendant's criminal record or the severity of the crime.

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24. *Id.* §§ 3A11.1, 3C1.1.

25. *Id.* § 1B1.1(e) ("Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.").

26. *Id.* § 1B1.1(f) ("Determine the defendant's criminal history category as specified in Part A of Chapter Four.").

27. *Id.* § 1B1.1(g) ("Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.").

28. *Id.* § 1B1.1(i) ("Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the Guidelines that might warrant consideration in imposing sentence.").

29. *Id.* § 5K1.1, cmt. n.1.

30. *Id.* § 2A4.1(a).

31. *Id.* § 2B1.1(a).

There remain a few limited areas, however, in which judges maintain significant discretion. After the presumptive sentencing range has been determined, the judge can decrease or increase it marginally based on certain sentencing adjustments. Some of the adjustments are based on the defendant's conduct during the offense,[32] but a number consider the defendant's postoffense conduct. Postoffense conduct often occurs during the course of representation and with the acquiescence of, if not upon the advice of, defense counsel. It includes mitigating factors, such as whether the defendant has accepted responsibility, and aggravating factors, such as whether the defendant has obstructed the administration of justice.[33] In addition to these adjustments that could influence a defendant's final Guidelines sentencing range, a judge can also choose to depart upwards or downwards from the range in limited circumstances. Despite these few adjustments that are within their power, federal judges lament the lack of discretion they are given in these matters.[34]

In contrast, prosecutors have seen their power increase under the Guidelines system.[35] The most important determinant of the base offense level is the criminal charge, and prosecutors have almost unfettered discretion to determine how to charge a case. The charging decision determines the statutory maximum as well as minimum sentences to which a defendant can be exposed. In addition, the most common sentencing departure, the section 5K2.1 departure for substantial assistance, can only be obtained pursuant to a motion by the government.[36] The authority bestowed on prosecutors by the Guidelines places the prosecution at a significant advantage over the defense.

C. *The Role of the Defense Lawyer as Advocate*

Much of what criminal defense lawyers do in federal criminal cases is influenced by the Guidelines. In the pretrial phase of a case, lawyers argue for bond, examine the indictment or other charging documents for deficits, investigate all aspects of the case, move to exclude illegally obtained evidence, negotiate continuously with prosecuting attorneys, and counsel defendants about whether to go to trial or plead guilty. Many lawyers are

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32. *See* USSG, *supra* note 9, ch. 2, introductory cmt. ("Chapter Two pertains to offense conduct.").

33. See *id.* § 3E1.1 and § 3C1.1, respectively.

34. STITH & CABRANES, FEAR OF JUDGING, supra note 16, at 126; Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1719-20 (1992). As Judge Weinstein explains: "[T]he Guidelines . . . tend to deaden the sense that a judge must treat each defendant as a unique human being. . . . [I]t is quite possible that we judges will cease to aspire to the highest traditions of humanity and personal responsibility that ought to characterize our office." Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 366 (1992).

35. STITH & CABRANES, FEAR OF JUDGING, *supra* note 16, at 130-31.

36. *See* USSG, *supra* note 9, § 5K1.1.

surprised to find that their advocacy decisions during these earlier stages of a case could impact their client's Guidelines sentence later on if their pretrial strategies are considered indicators of the defendant's cooperativeness or remorse. Following conviction—whether by plea or trial—the Guidelines play an even greater role in determining the nature and content of attorney advocacy. Lawyers advocate on behalf of their clients in determining the initial Guideline range based on the facts of the offense, arguing for mitigating adjustments while challenging aggravating ones, seeking downward departures from the final range while contesting upward departures, and then making a case for a sentence at the low end of the range. This advocacy takes place with probation officers, prosecutors, and the court.

The various provisions that constitute the Guidelines and help define the roles of judges, prosecutors, and defense lawyers are a result of sentencing policy. The Sentencing Commission, under congressional authority, made policy decisions about what presumptive sentences should be for particular crimes and the factors judges may consider in altering the presumptive sentences.[37] These policy decisions have greatly affected what defense lawyers do as advocates and what it means to be represented by counsel.

Much has already been written on how the Guidelines have affected the way that judges judge,[38] that prosecutors prosecute,[39] that criminals are punished,[40] and that probation officers supervise the justice system.[41] In the

37. *Id.* ch. 1, pt. A, no. 3.

38. *See, e.g.*, Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247 (1997) [hereinafter Stith & Cabranes, *Judging*] (arguing that the loss of judicial discretion in sentencing under the Guidelines has denied judges the opportunity to develop a principled sentencing jurisprudence); Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109 (1992) (suggesting that the Guidelines foster an abdication of the judicial duty of responsible sentencing).

39. *See, e.g.*, Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511 (2000) (recognizing the tremendous discretion afforded to federal prosecutors and recommending a means for helping prosecutors navigate decision making given their broad authority); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471 (1993) (arguing that prosecutors yield extraordinary power and discretion in the plea-bargaining context).

40. *See, e.g.*, Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 YALE J.L. & FEMINISM 291 (2002) (arguing that women have been given harsher punishments since the enactment of the Guidelines); Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547 (2001) (providing a district court judge's analysis of the appropriateness of a mandatory sentence in one case); A. Abigail Payne, *Does Inter-Judge Disparity Really Matter? An Analysis of the Effects of Sentencing Reforms in Three Federal District Courts*, 17 INT'L REV. L. & ECON. 337, 346 (1997) (concluding that, among other effects, prison terms for drug offenses have increased significantly since the adoption of the Guidelines, but prison terms for other offenses have changed very little); Jacqueline Ross, *Damned Under Many Headings: The Problem of Multiple Punishment*, 29 AM. J. CRIM. L. 245 (2002) (describing the process of multiple sentencing under the Guidelines); Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1855 (1995) (discussing the interplay of various sentencing options under the

companion piece to this Article, I sought to add to this literature by considering the ways in which the Guidelines influence defense attorney advocacy. I hypothesized—relying on doctrinal evidence, case law, and personal experience—that because a vigorous defense was often equated with a lack of remorse, criminal defense lawyers were forced to choose between zealous advocacy and a sentence reduction for acceptance of responsibility under the Guidelines.[42] This Article attempts to explore those claims empirically and to consider other ways in which defense attorneys perceive that the Guidelines have impacted their ability to be good advocates.

II
RESEARCH METHODOLOGY

A. Project Design

This Article is based on in-depth, semistructured interviews with forty criminal defense attorneys who practice mostly or exclusively in federal court. During the winter and spring of 2003, I traveled to two large and demographically diverse federal districts—in two different federal circuits—and met with a mix of public defenders and private attorneys.[43] The interviews lasted approximately sixty to ninety minutes each. They focused on the participants' perceptions of advocacy and the factors that they felt influenced the amount of zeal that federal defense attorneys brought to their advocacy of defendants. As seen in Figure 1, I asked respondents about topics that included the following: their relationships with clients, prosecutorial and judicial practices, the Federal Sentencing Guidelines,

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Guidelines). For a summary of research addressing the Guidelines' effects on various demographic groups, see generally David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 286 (2001).

41. *See, e.g.*, STITH & CABRANES, FEAR OF JUDGING, *supra* note 16, at 128-30 (explaining that the Guidelines have transformed the fact-finding function of probation officers into a lawyer-like function of interpreting and applying the law); Michael Piotrowski, *The Enhanced Role of the Probation Officer in the Sentencing Process*, 4 FED. SENTENCING REP. 96, 97 (1991) (describing the enhanced role of the probation officer from a supervising probation officer's perspective); Stith & Cabranes, *Judging*, *supra* note 38, at 1256-63 (describing the enhanced role of probation officers under the Guidelines); Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933 (1995) (describing the changed role of probation under the Guidelines system); Leslie A. Cory, Comment, *Looking at the Federal Sentencing Process One Judge at a Time, One Probation Officer at a Time*, 51 EMORY L.J. 379 (2002) (describing the role of probation officers in federal sentencing).

42. Etienne, *supra* note 10.

43. I have omitted the specific jurisdictions in order to help preserve the anonymity of the respondent attorneys as well as the judges and prosecutors they mentioned. My selection of these jurisdictions was determined by the fact that they are both in large, diverse metropolitan cities and are located in different parts of the country. I also wanted to talk to attorneys who practice in districts with a wide array of judges and prosecutors so that their experiences were not merely a function of local personalities. Finally, I chose these two jurisdictions in part for their accessibility: they were relatively easy to travel to and the respondents were open to being interviewed by a researcher.

their colleagues, reputation concerns, and value-based motivations. Each interview was audiotaped, transcribed, and coded.

FIGURE 1
SAMPLE QUESTIONS FOR SEMI-STRUCTURED INTERVIEWS

1. How would you characterize the goals of your job?
2. How do you determine what is the best result in any given case?
3. What are the kinds of things that the client gets to decide or that you decide and not the client? Are there such things?
4. How much control would you say that you have over how your cases develop? Why?
5. Do you think there is a correlation betwecn the degree of zealousness and the outcome of the case?
6. If you were a criminal defendant, what would you do to get the best representation possible? Are there things you think clients could do to make their lawyers more aggressive or more zealous?
7. What are some of the strategies you use in dealing with prosccutors to get good results in your cases?
8. Are there strategies that prosecutors use to affect your advocacy?
9. Are there instances where you've been asked to negotiate away your ability to either argue something or to make a certain kind of argument, or file a particular motion?
10. Does acceptance of responsibility play a role in your thinking about a case and what strategies or what decisions you're going to make?
11. Are there other aspects of the Guideline system that influence your advocacy decisions?
12. When you get a client who's cooperating, how does that affect what you do in a case?
13. Are there circumstances in which you worry about going over the line in regards to zealousness—such as making frivolous arguments?
14. What are the kinds of things that judges might do if they think that you are going overboard or are too aggressive?
15. Do you think that public defenders face different challenges than private attorneys from prosecutors, judges, or their clients?
16. To what extent are you ever in the position of having to worry about your reputation and credibility?
17. Tell me about the use of appeal waivers in this district.
18. Do you think appeal waivers have any influcnce on the judges when they make their rulings?
19. To what extent do your colleagues or other members of your defense bar influence what you think is appropriate for you to do as an advocate?
20. Is there a particular culture in this office as far as advocacy issues?
21. Arc there things the appellate courts do to influence advocacy?
22. Since you've started defending, has the nature of the job changed? How has it changed?
23. Is there anything about your background or training or values that you think significantly informs what kind of lawyer you are?
24. Why do you do this job?
25. Is there anything I haven't asked that maybe I should have asked? Any aspects of the work that you think bears on your ability to be an effective lawyer?

The lawyers for the study were identified in "snowball" fashion,[44] starting with the federal public defender offices in each selected jurisdiction. Each of the two public defender offices I visited employs fifteen to twenty attorneys.[45] I contacted each attorney by electronic mail or telephone seeking an interview. I obtained a response rate of approximately 70%.[46] I interviewed all the attorneys who responded, with the exception of those whose work was exclusively in appeals or habeas corpus cases. My goal was to meet with attorneys who litigated regularly in federal court. I asked each respondent for the names of other criminal defense attorneys in that jurisdiction who might be willing to be interviewed. Because I was interested in privately retained attorneys who appear regularly in federal court, I believed that public defenders who themselves appear exclusively in federal court would be helpful sources. I maintained a list of lawyers whose names were mentioned by more than one respondent. I contacted these individuals, often mentioning the lawyers who referred me, and obtained positive responses from approximately 30% of the "snowballed" subjects.

Of the forty respondents interviewed in the study, approximately half were public defenders and half were private attorneys. The lawyers ranged in experience and background. Most of the lawyers interviewed had been practicing law between six and twenty-five years. Three of the respondents had been practicing in federal court for five or fewer years and seven had been practicing for more than twenty years. A number of the lawyers had previously worked in law firms or government organizations doing civil or other noncriminal work, but most of them had done only criminal defense work during their careers.[47] Three had practiced for short stints as prosecutors.[48]

I obtained demographic information by having each attorney complete a short questionnaire before beginning the interview. Some of the

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44. Using a "snowball" or "chain" is one of several accepted methods of obtaining a reliable subject sample in qualitative research. In a grounded theory study such as this one, the researcher chooses participants initially based on their abilities to contribute to an evolving theory. *See* JOHN W. CRESWELL, QUALITATIVE INQUIRY AND RESEARCH DESIGN: CHOOSING AMONG FIVE TRADITIONS 118 (1998). Snowballing allows the researcher to "identif[y] cases of interest from people who know people who know what cases are information-rich." *Id.* at 119 (citing MATTHEW B. MILES & MICHAEL A. HUBERMAN, QUALITATIVE DATA ANALYSIS: A SOURCEBOOK OF NEW METHODS 28 (2d ed. 1994)).

45. At the time of these interviews, one federal public defender office employed nineteen attorneys and the other employed sixteen attorneys. The private attorneys were either self-employed or worked in small firms. Although a significant portion of the private attorneys' clients were privately retained, almost all the attorneys also handled court-appointed clients.

46. In approaching the lawyers, I told them very generally that I was conducting a study on the factors that influence defense attorney advocacy. Most of the attorneys agreed to meet with me, but there were several whose schedules did not coincide with mine. Generally, attorneys who declined to participate up front also cited trials, vacations, or other scheduling conflicts.

47. *See* Figure 2.

48. *Id.*

information from the questionnaires has been synthesized in Figure 2 to facilitate comparison. The respondents self-identified as fourteen females, twenty-six males, twenty-eight White or Caucasian, seven Black or African-American, three Hispanic, Latina/o, or Mexican, and two Asian or Indian. They ranged in age from twenty-five to sixty-three years.[49] They attended reputable law schools all over the country.[50]

The sample of lawyers in this study is varied, but it is neither random nor fully representative of the federal defense bar or even the specific jurisdictions visited. Consistent with most qualitative empirical studies, my goal was not to conduct a randomized survey, but to obtain an in-depth and nuanced understanding of defense lawyers' responses to a perceived phenomenon[51]: the effect of the Federal Sentencing Guidelines on defense advocacy and thus on the right to counsel. Studies such as this one, often referred to as grounded theory studies,[52] are most helpful in developing theories or models to explain certain practices or occurrences.

FIGURE 2
DEMOGRAPHIC CHARACTERISTICS OF RESPONDENTS

Atty.	Gender	Race	Age (Optional)	Years Practicing Law	Years Defense Atty.	Years Prosecutor	Private Atty./Pub. Defender
A1	Male	Caucasian	35	9	9	0	Public
A2	Male	African-American	35	10	6	0	Public
A3	Female	Caucasian	40	7	7	0	Public

49. *Id.*

50. Law schools attended by the subjects include Emory Law School, Howard Law School, the University of Illinois at Urbana-Champaign, Northwestern University, Notre Dame Law School, Seattle University, Seton Hall University, the University of Texas, Tulane Law School, Vermont Law School, and the University of Virginia, to name a few.

51. Similar studies have appeared in other legal journals. *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181 (1975) (explaining that the usefulness of qualitative studies lies not in obtaining a scientific measure of a problem but in helping to "guide analysis and to permit an evaluation of the inherency of the problems"); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 & n.15 (1968) (describing the study as "legal journalism" with particular analytic utilities rather than a scientific survey); Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 278-79 (2001) (reporting that his qualitative study, consisting of interviews of thirty-nine attorneys, was conducted with the goal of in-depth exploration of case selection, management, and settlement strategies rather than arriving at a quantitative measure of specific variables); Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 421 (1999) (explaining that the small sample studied—twenty nuisance cases—is useful in generalizing about the types of problems encountered if not in measuring the extent of the problem).

52. A grounded theory study is simply the use of empirical data to develop a generalizable theory about a particular phenomenon. CRESWELL, *supra* note 44, at 55-56. Interviews play a critical role in data collection in grounded theory studies. It is recommended that grounded theorists interview twenty to thirty respondents in order to develop a reliable model or theory with adequate categorization of findings, and to categorize these findings adequately. *See id.* at 56.

Atty.	Gender	Race	Age (Optional)	Years Practic-ing Law	Years Defense Atty.	Years Prosecutor	Private Atty./Pub. Defender
A4	Male	Caucasian	34	7/12	7/12	0	Public
A5	Male	Caucasian	45	12	12	0	Public
A6	Female	African-American	37	1	9	0	Public
A7	Male	African-American	42	17	15	0	Private
A8	Male	Caucasian	49	23	18	0	Public
A9	Female	Hispanic	37	12	8	0	Public
A10	Female	Caucasian	44	19	9	Never!	Public
A11	Female	Caucasian	39	16	14	0	Private
A12	Female	African-American	38	6	5	0	Private
A13	Female	Caucasian	36	12	12	0	Private
A14	Male	African-American	52	24	23	0	Private
A15	Male	Caucasian	52	25	15	10	Private
A16	Male	Caucasian	51	27	23	0	Private
A17	Male	Caucasian	36	9	6	0	Private
A18	Male	Caucasian	59	30	25	5	Private
A19	Female	Caucasian	43	14	14	0	Private
A20	Male	Caucasian	40	14	13	0	Public
A21	Female	Asian	32	5	4	0	Public
A22	Male	White	40	8 ½	8 1/2	0	Public
A23	Male	White	44	16	16	0	Public
A24	Male	African-American	31	6	3	0	Public
A25	Male	Hispanic	48	24	24	0	Public
A26	Female	White	41	4 ½	4 1/2	0	Public
A27	Female	Black	25	5 mos.	5 mos.	0	Public
A28	Female	White	53	27	27	0	Public
A29	Male	Indian Subcontinent	Blank	15	12	0	Public
A30	Male	White	28	1 ½	1 1/2	0	Private
A31	Male	White/Hispanic	43	13	13	0	Public
A32	Male	White	52	27	27	blank	Private
A33	Male	White	43	18	18	0	Public
A34	Female	White	32	6	4	0	Public
A35	Male	White	48	23 ½	23 1/2	0	Private
A36	Male	White	43	18	18	0	Private
A37	Male	White	51	26	16	10	Private
A38	Male	White	57	31	27	4	Private
A39	Male	White	63	34	30	0	Private
A40	Female	White	54	23	20	0	Private

B. Data Analysis

As noted above, data were collected in the form of structured interviews. Before gathering the interview data, I identified primary themes and subthemes[53] derived from previous research, literature reviews, and personal experiences with the subject matter. The themes were used as a framework with which to code the entire corpus of forty interviews. One primary coder marked the text by assigning codes or themes to contiguous units of text. In order to understand the participants' experiences in as rigorous and detailed a manner as possible, the coding employed a grounded theory approach[54] to identify categories within the text and to link them to substantive theories.[55]

The coding process helped identify commonalities among the lawyers' responses as they related to particular themes or categories. These commonalities enabled me to draw final conclusions that could be substantiated using examples from the interview data. Most of the reported results focus on the themes relating to the most common areas of sentencing advocacy: advocacy decisions and practices regarding presumptive sentencing levels, adjustments, departures, and sentencing enhancements. This Article considers the findings as they relate to attorney perceptions of advocacy and the factors that affect advocacy decisions.

C. Triangulation: Case Law and Ethnographic Component

At the heart of rigorous qualitative research is triangulation.[56] Triangulation, the use of multiple data sources to measure the same phenomenon

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53. The primary themes pertained to nine constructs: (1) the nature of attorney-client relationships, (2) prosecutor influence on strategies of the defense, (3) judge conduct and influence in the courtroom, (4) attorney perception of and factors that influence zealous advocacy, (5) perceptions of frivolous arguments, (6) the appeals process, (7) factors affecting advocacy, (8) notions of lawyer credibility and attorney conduct, and (9) the effects of the Guidelines on attorney strategies and zealous advocacy. Within the final category, I examined five subthemes: (1) acceptance of responsibility, (2) obstruction of justice, (3) substantial assistance procedures and departures, (4) other upward/downward departures, and (5) sentencing range determinants. Not all of these themes and subthemes will be addressed in this Article.

54. *See generally* HOWARD S. BECKER, TRICKS OF THE TRADE: HOW TO THINK ABOUT YOUR RESEARCH WHILE YOU'RE DOING IT (1998); YVONNA S. LINCOLN & EGON G. GUBA, NATURALISTIC INQUIRY (1985); Kathy Charmaz, *"Discovering" Chronic Illness: Using Grounded Theory*, 30 SOC. SCI. & MED. 1161 (1990).

55. The coding involved a verbatim reading of interview transcripts, studying each text line by line. Key phrases were highlighted, using "open coding" to cull potential themes by collecting real examples, in the form of quotes, from each text. *See* LINCOLN & GUBA, *supra* note 54. As coding categories were identified in each interview text, they were organized in matrices. To focus the themes and to organize the data into manageable segments, the data were further reduced by organizing primary themes into additional refined matrices.

56. "Triangulation is not a tool or strategy of validation, but an alternative to validation. The combination of multiple methodological practices, empirical materials, perspectives, and observers in a single study is best understood, then, as a strategy that adds rigor, breadth, complexity, richness, and

in one study, enhances research credibility by helping to eliminate alternative explanations and to control for inaccurate or unreliable reporting.[57] This study uses reported case law and ethnographic participant observation[58] as part of the triangulation process to help contextualize and validate the self-reported practices and perceptions of respondents. Many of the lawyers were reluctant to provide the names of their clients or of judges and prosecutors they worked with daily. Where possible, I sought reported case law supporting or challenging the stories cited by the attorneys. These cases help to verify the existence of the general phenomenon described, if not its frequency or occurrence in a specific case.

In addition to the case law, I also relied on ethnographic observations. Although this study does not involve a formal ethnography, it contains a distinct ethnographic component. Ethnographically informed reports apply some ethnographic concepts and techniques to enrich and validate other research.[59] In this study, the semistructured interviews are the crux of the project. However, my analysis and conclusions have been enriched by my observations and personal experiences in the public defender work setting. With one exception, I conducted each of the forty interviews during work hours in the office of the attorney being interviewed. In many instances, the interviews were preceded, followed, or interrupted by conversations with investigators, other attorneys, and clients regarding ongoing cases. Some lawyers discussed cases with me "off the record" and sought advice on strategies. I spent several full days in each of the federal public defender offices where I was able to observe firsthand many aspects of their legal practices. I talked extensively with the directors of each of these offices and obtained from them a sense of the office cultures and practices they sought to implement.[60] I also attended at least one weekly office-wide meeting at each of the public defender offices. These meetings portrayed a

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depth to any inquiry." HANDBOOK OF QUALITATIVE RESEARCH 5 (NORMAN K. DENZIN & YVONNA S. LINCOLN eds., 2d ed. 2000) [hereinafter DENZIN & LINCOLN] (citations omitted).

57. DAVID M. FETTERMAN, ETHNOGRAPHY: STEP BY STEP 93 (2d ed. 1998); Michelle Fine et al., *For Whom? Qualitative Research, Representations, and Social Responsibilities*, *in* DENZIN & LINCOLN, *supra* note 56, at 107, 118.

58. Ethnography has historically been a theoretical paradigm used within anthropology. However, in recent years, ethnography has been co-opted as a methodology by various fields in the behavioral and applied sciences, including law. *See* Barbara Tedlock, *Ethnography and Ethnographic Representation*, *in* DENZIN & LINCOLN, *supra* note 56, at 470. One assumption of this paradigm is that by interacting with and observing participants, the researcher can reach a more complete understanding of their beliefs and behaviors. Ethnography involves an ongoing attempt to place specific events into a more meaningful context by combining research design and participant observation to produce historically and politically situated interpretations of the studied phenomenon. *See* NORMAN K. DENZIN, INTERPRETIVE ETHNOGRAPHY: ETHNOGRAPHIC PRACTICES FOR THE 21ST CENTURY xi (1997) ("Ethnography is that form of inquiry and writing that produces descriptions and accounts about the ways of life of the writer and those written about."); FETTERMAN, *supra* note 57, at 1-4.

59. FETTERMAN, *supra* note 57, at 126; *see also* Fine et al., *supra* note 57, at 118.

60. I considered this important background research in designing a research project and questions, but neither of those meetings is included in the forty reported interviews.

sense of the group mission, politics, frustration, camaraderie, and other elements not clearly apparent from the semistructured interviews.

In addition to observing these lawyers in their office settings, I also spent several days in federal courts, in various districts, observing mostly pleas and sentencings.[61] These observations helped validate and contextualize the reports made by the lawyers. They also helped me determine the extent to which the practices in the two jurisdictions I researched could be generalized. In this study, I chose depth over breadth by limiting my research to two federal districts. While this allowed me to obtain a fuller picture of the practices in those jurisdictions, I cannot claim knowledge of the specific practices in all districts. Through my courtroom observations, I learned that even though each district, indeed each courtroom, functions in a distinct way, the Guidelines have been effective in creating a great deal of uniformity in procedure and practice. In essence, much of what I learned from the attorneys in this study could occur anywhere. Whether it actually does occur in a specific district would require particular investigation into that district itself.

III
THE ACCEPTANCE OF RESPONSIBILITY AND OBSTRUCTION OF JUSTICE SENTENCING ADJUSTMENTS AND THEIR EFFECT ON DEFENSE ATTORNEY ADVOCACY

In general, the lawyers interviewed were unenthusiastic about the Federal Sentencing Guidelines. The lawyers voiced common criticisms of the Guidelines regime, arguing that they result in overly harsh sentences,[62] rob judges of the discretion necessary for individualized sentencing,[63]

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61. It is also worth noting that, before conducting this study, I had observed and participated in hundreds of sentencings and pleas during my five years practicing as a criminal defense attorney in Georgia. I am certain that my own experiences inform my views and observations to this day and should be considered by the objective reader as a potential source of bias. Bias, however, is not a flaw in ethnography, which is based largely on participation and immersion into the culture or group being studied and "precludes conducting field research as a detached, passive observer." ROBERT M. EMERSON ET AL., WRITING ETHNOGRAPHIC FIELDNOTES 2 (1995).

62. *See* STITH & CABRANES, FEAR OF JUDGING, *supra* note 16, at 62-65 (describing the Sentencing Commission's failure in replicating past practices as it increased the severity of sentences under the Guidelines); TONRY, *supra* note 17, at 72 (listing some of the most common criticisms of the Guidelines on various grounds); *see also* Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730 (2002) [hereinafter O'Hear, *Uniformity*] (explaining that the number of federal defendants sentenced to probation has changed from approximately 50% to 15% and that average prison sentences have increased by thirty months with the advent of the Guidelines).

63. *See* TONRY, *supra* note 17, at 72 (listing among common criticisms of the Guidelines that very different defendants receive the same sentences due to lack of individualized sentencing); Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649, 651 (2003) ("The judge's job of crafting a sentence for the defendant before her has largely been replaced by the task of conducting a senteneing as rigidly directed by the book before her."); Stith & Cabranes, *Judging*, *supra* note 38, at 1255 (describing the

overempower prosecutors[64] and probation officers,[65] and fail to achieve the goal of eliminating unjustified disparity in sentences.[66] In addition to these criticisms, the respondents discussed in great detail their concern that the Guidelines limited the effectiveness of lawyers. Specifically, they lamented that zealous lawyering was deterred and that even when it was not, zealousness was less critical in affecting the results of a case than in pre-Guidelines days. The lawyers' assessments of the ways in which advocacy has been affected by the Guidelines fell into several categories.

The lawyers spoke of how the Guidelines had further tipped the already unlevel playing field[67] between the government and the accused in two principal ways. First, they explained that the acceptance of responsibility and obstruction of justice sentencing adjustments unfairly penalized defendants for raising legitimate claims and restricted the strategies available to attorneys in representing their clients. Second, they claimed that sentencing departures and enhancements limited them in negotiating on behalf of their clients and prevented them from challenging the government's legal and factual allegations. The defense lawyers also expressed concerns about the effect the Guidelines regime had on their relationships with their clients. The sections that follow focus on the recurring themes raised by the respondents in the study.

A. The Acceptance of Responsibility Adjustment

Of the attorneys questioned, a significant number thought that the Guideline provision regarding acceptance of responsibility, section 3E1.1, shaped their advocacy decisions and strategies more than any other aspect of the Guidelines. Under the Guidelines regime, once a sentencing judge determines a presumptive sentence, she must determine whether the defendant is entitled to an adjustment (a reduction) for acceptance of

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judge's role as being "largely limited to factual determinations and rudimentary arithmetic operations" with "little opportunity for judicial reasoning").

64. *See generally* Podgor, *supra* note 39 (examining prosecutors' broad discretion in presenting evidence to the grand jury, charging suspects, providing witness statements, and offering reduced sentences); Standen, *supra* note 39 (discussing the dangers of prosecutorial control of discretion under the Guidelines).

65. *See* Piotrowski, *supra* note 41, at 97 (describing the enhanced role of probation officers in making factual and legal determinations despite lack of legal training); Stith & Cabranes, *Judging*, *supra* note 38, at 1256 (discussing the empowerment of probation officers under the Guidelines regime).

66. *See* STITH & CABRANES, FEAR OF JUDGING, *supra* note 16, at 126 (arguing that the Guidelines have shifted the locus of disparity from judges to others but have failed to reduce the overall quantity of disparity); TONRY, *supra* note 17, at 72; Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991).

67. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1730-48 (1993) (discussing the many advantages that the state enjoys over the criminal defendant, including funding, resources, procedural advantages, reputational advantages, and plea bargaining advantages).

responsibility. The acceptance of responsibility guideline has recently been amended.[68] At the time of these interviews, however, the provision stated:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
>
> (1) timely providing complete information to the government concerning his own involvement in the offense; or
>
> (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by I additional level.[69]

The two- or three-level reduction in sentence can be very significant depending on the presumptive sentence. It can represent the difference between prison and probation for defendants with sentences in the lower ranges, or a difference between life in prison and a little over twenty years at the higher ranges.[70] As such, the acceptance of responsibility provision acts as an incentive for quick guilty pleas among criminal defendants.[71]

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68. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401(g), 117 Stat. 650, 671 (2003). The new version of the provision states:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 2 (2003), *available at* http://www.ussc.gov/2003guid/2003amendments.pdf (boldface omitted). The amended guideline essentially makes timeliness and efficiency by the defendant a more significant variable in the acceptance of responsibility determination and requires a motion by the government before a third point reduction for acceptance of responsibility can be awarded. *See* Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENTENCING REP. 310, 312 (2003). For a discussion of how the amendments to section 3E1.1 may further impact lawyering under the Guidelines, see Margareth Etienne, *The Elusive Third Point for Acceptance of Responsibility After the Feeney Amendment and Its Effect on Pleas and Plea Bargaining*, 15 FED. SENTENCING REP. (forthcoming Dec. 2003).

69. USSG, *supra* note 9, § 3E1.1 (boldface omitted).

70. *See id.* ch. 5, pt. A, Sentencing Table; Etienne, *supra* note 10, at 120.

71. Osler, *supra* note 63, at 667-68 (stating that practitioners equate a guilty plea with a reduced sentenced for acceptance of responsibility); *see* Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1509 (1997) [hereinafter O'Hear, *Remorse*] (discussing the acceptance of responsibility provision as a plea inducement).

Any defendant who believes that she is likely to be convicted—and statistics reveal that close to 90% of all federal criminal defendants are ultimately convicted[72]—can reduce her sentence significantly by entering a plea and otherwise "demonstrat[ing] acceptance of responsibility" for her offense.[73]

While the acceptance of responsibility provision presents defendants with the possible benefit of lowering their sentences by three levels, this opportunity is not without its costs. In order to receive this reduction, a defendant must in most instances forego other benefits such as the right to a jury trial and the possibility of an acquittal. While similar to a plea bargain,[74] this process differs in one key respect: unlike a defendant who agrees to plead guilty in exchange for a guaranteed benefit, the defendant who pleads guilty under the Guidelines system is not guaranteed the acceptance of responsibility reduction at sentencing.[75] Nor is the defendant assured of receiving a specific sentence because the points for various possible offense characteristics and adjustments are left to be litigated by the parties and independently determined by the judge. The denial of acceptance of responsibility is often based on the defendant's attempts to litigate unresolved issues. These are the instances that trouble defense lawyers most because many involve lawyer conduct or lawyer-counseled conduct. Tellingly, the acceptance of responsibility provision is one of the most appealed sentencing issues under the Guidelines.[76] The appeal rate suggests a key difference between defendants who plead to get acceptance versus those who plead to get a plea bargain. Defendants who plead for the acceptance reduction are less likely to receive the benefit of their bargain.

Lawyers must be concerned about "losing acceptance" at every stage of the trial and sentencing process. Acceptance of responsibility can also be denied based on defendant or lawyer conduct at any stage of the

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72. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 414 tbl. 5.17 (2001), *available at* http://www.albany.edu/sourcebook/1995/pdf/t517.pdf. According to these statistics, a significant percentage of those "not convicted" were dismissed cases. Among cases that actually proceed through the system, the percentage of cases that result in conviction is much higher than 90%. *See id.*

73. USSG, *supra* note 9, § 3E1.1(a).

74. For an extensive discussion of the merits and shortcomings of plea bargaining, see Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1046-48 (1983); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

75. USSG, *supra* note 9, § 3E1.1, cmt. n.3 ("A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.").

76. Acceptance of responsibility is the fourth most commonly appealed Guidelines issue for appeals filed by the defendant. U.S. SENTENCING COMM'N, 2001 APPEALS DATAFILE, APPFY01, tbl.57. It is the second most commonly appealed issue for appeals filed by the government. *Id.* tbl.58; *see also* O'Hear, *Remorse*, *supra* note 71, at 1524 (noting that section 3E1.1 decisions are among the most frequently appealed federal sentencing issues).

representation, including the sentencing hearing itself, as the lawyer attempts to raise issues under the Guidelines that could result in a lower sentence.[77] In addition, lawyers worry that the defendant might be denied acceptance of responsibility based on the cumulative number of motions and arguments they make or their general aggressiveness in contesting specific aspects of the government's case. Part of the justification for the acceptance of responsibility reduction is the defendant's role in helping to conserve government and court resources.[78] As a result, many of the decisions defense lawyers make are influenced by the possibility of losing the reduction.

1. "Losing Acceptance" for "Frivolous" Arguments and Denial of Conduct

Respondents explained that the acceptance of responsibility reduction can be lost by making arguments considered frivolous by judges and prosecutors, denying or minimizing conduct, and contesting uncharged but relevant conduct, among other activities. The vast majority of lawyers interviewed explained that their advocacy and strategic decisions were often influenced by the fear of "losing acceptance" for clients who had plead guilty or who would likely plead guilty. One lawyer described the acceptance of responsibility provision as a "whipping stick" or a "rod over the head of the defendant, and the defendant's lawyer" used to prevent the defense from challenging the government.[79] Because close to 90% of federal convictions are resolved by guilty pleas,[80] plea cases represent a significant portion of most lawyers' caseloads. Every lawyer interviewed spoke about the acceptance of responsibility sentencing reduction as though a defendant is presumed or even entitled to receive it once she pleads guilty.[81] Although the courts and the Guidelines themselves clearly reject treating acceptance

77. Fear of losing the acceptance of responsibility reduction "limits the kind of legal arguments you can make to the court at any stage of the proceedings and it limits what you can say [at] sentencing." Interview with Attorney A28 (Mar. 11, 2003) [hereinafter Interview A28]. Transcripts of all interviews cited within this Article are on file with the author.

78. USSG, *supra* note 9, § 3E1.1(b)(2); *see also* Interview with Attorney A6 (Feb. 25, 2003) [hereinafter Interview A6] ("[I]f they have to bring a witness to court and cause the judge to have to listen to the witness, wasting [everybody's] precious time[,] from their perspective, that is the kind of thing that is going to cause you to lose acceptance.").

79. Interview with Attorney A14 (June 13, 2003) [hereinafter Interview A14]. Another noted that by "[c]hallenging legal arguments challenging some of the government's ease, obviously you are going to risk losing acceptance." Interview with Attorney A5 (Feb. 24, 2003) [hereinafter Interview A5].

80. STITH & CABRANES, FEAR OF JUDGING, *supra* note 16, at 164.

81. *See, e.g.*, Interview with Attorney A26 (Mar. 10, 2003) [hereinafter Interview A26] (explaining that some judges and prosecutors treat acceptance "like it's something that they're giving us, when the reality is if you plead guilty you get acceptance. And sometimes they don't see it like that. They think [it's] their power to give or take back").

of responsibility as a plea discount,[82] the idea seems to persist in the minds and practices of defense lawyers that once a plea is entered the reduction can only be denied if the defendant or her attorney affirmatively does something to lose it.[83]

Defendants are denied acceptance of responsibility perhaps most commonly for making arguments the court later determines to be frivolous or false.[84] The frivolous argument standard presents several difficulties for zealous or aggressive advocates. None of the lawyers interviewed believed (or admitted) that they engaged in making frivolous arguments. When pressed, however, a number of them conceded that their definitions of frivolous might differ from the definitions offered by prosecutors and some judges.[85] The fear and unpredictability of making an argument that the court might find frivolous is a real concern for lawyers afraid of losing the acceptance of responsibility reduction.

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82. *See* United States v. Ruth, 946 F.2d 110, 113 (10th Cir. 1991); United States v. Fields, 906 F.2d 139, 142 (5th Cir. 1990); United States v. Guarin, 898 F.2d 1120, 1122 (6th Cir. 1990); United States v. Gonzalez, 897 F.2d 1018, 1020 (9th Cir. 1990); *see also* Osler, *supra* note 63, at 667-68 (noting that the Guidelines and courts do not treat the acceptance of responsibility reduction as a plea discount but that practitioners tend to equate pleading with acceptance); Interview with Attorney A23 (Mar. 4, 2003) [hereinafter Interview A23] ("[I]f you're so hide-bound by what the legal precedent is, particularly with respect to guidelines, if that's guiding the issues, you're not going to get very far.").

83. *See* Interview A23, *supra* note 82 ("[I]f you plead guilty and say the magic word[s], . . . 'I'm sorry, it will never happen again,' you're going to get the acceptance of responsibility . . . if you know there isn't anything out there."); Interview with Attorney A37 (May 13, 2003) [hereinafter Interview A37] ("[I]f we're gonna plead we're gonna get the [a]cceptance of [r]esponsibility."); Interview with Attorney A24 (Mar. 10, 2003) [hereinafter Interview 24] ("Usually [a]cceptance is given unless the person goes to trial."). This view is perpetuated by the fact that the vast majority of defendants who plead guilty receive the reduction for doing nothing more. *See* Osler, *supra* note 63, at 667-68. Many judges award the reduction based solely on the plea. *Id.*

84. A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true acts in a manner inconsistent with acceptance of responsibility. USSG, *supra* note 9, § 3E1.1; *see also* United States v. Wright, 133 F.3d 1412, 1413-14 (11th Cir. 1998) (arguing that frivolous legal as well as factual arguments are relevant in determining whether the defendant accepted responsibility); United States v. Purchess, 107 F.3d 1261, 1266 (7th Cir. 1997) (discussing whether frivolous argument by lawyer should be held against defendant at sentencing).

85. When asked whether his definition of frivolous differed from judges' definitions, one lawyer answered:

> Probably so because to them it is frivolous if it could get them reversed. . . . Prosecutors and judges who are mostly former prosecutors tend to have a cynical [view] of something and they tend to make assumptions that people behave the way they usually do[. F]or instance, they would think it is frivolous for me to argue that the person who has dealt drugs on numerous occasions in the past, on this occasion was just in the wrong place at the wrong time. . . . I think that is entirely possible and I think that is in keeping with human nature, but you can get into a position where it looks like you are crying wolf just because you have in the past done things the wrong way.

Interview A6, *supra* note 78. A number of lawyers thought that many judges and prosecutors defined frivolousness based on the likelihood of an argument's success. Defense counsel, however, did not consider claims to be frivolous merely because they had only a minimal chance of success. As one lawyer explained, if defense attorneys did not file claims unless they had a good chance of winning, "we would never file anything at all." Interview with Attorney A11 (June 12, 2003) [hereinafter Interview A11]; *see also* Interview with Attorney A12 (June 12, 2003) [hereinafter Interview A12] (explaining that "anything that causes delay is seen as frivolous" by the court and prosecutors).

Many lawyers spoke about the necessity of doing a cost-benefit analysis to decide which arguments to raise.[86] Because the acceptance of responsibility adjustment can make a significant difference in a defendant's sentence,[87] some lawyers worried that "the more you want to litigate pretrial issues, [the more prosecutors] . . . can threaten" a denial of acceptance.[88] For instance, one lawyer spoke of a case in which the defendant and the government agreed on guilt but disagreed about the exact monetary loss suffered by the victim.[89] The difference between the versions of loss would have resulted in a two-point differential on the sentencing grid. The lawyer worried that if he argued on behalf of his client's version and lost the argument, the court could decide that his client was not fully accepting responsibility.[90] In that case, he had to weigh the likelihood of succeeding on his claim and the potential two-point benefit for the defendant against the possible three-point loss if the judge determined that the defendant had not truly accepted responsibility.[91] Of course, the client's position was that he had fully accepted responsibility for the harm he caused and disclaimed responsibility for harm that he did not cause.[92] Nevertheless, this lawyer made the decision to "hold back on arguing too strenuously in order to avoid losing acceptance."[93]

Discussing a different case, another lawyer explained:

> I definitely will advise clients, we don't need to challenge that because we are going to lose acceptance of responsibility. We might have the grounds for it, and we might succeed but chances

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86. For example, one attorney stated:

> [I]n every case now . . . you have to start weighing[:] 'Can I? Can't I? . . . [D]o I have any wiggle room? . . . [A]re there pretrial issues we [can] raise?'. . . It's always this weighing. What's it going to cost me? And the cost is what's it going to cost me in guidelines. . . . [I]s it going to cost me acceptance of responsibility if we do this?

Interview with Attorney A40 (May 13, 2003) [hereinafter Interview A40]. *See also* Interview A14, *supra* note 79 ("[Acceptance] makes you withdraw defenses. . . . [I]t becomes a juggling act whether or not it is in my client's best interest to assert a certain denial of a certain fact.").

87. *See* Etienne, *supra* note 10, at 120 (explaining that the adjustment for acceptance of responsibility can result in the difference between probation and a prison sentence at the low end of the sentencing chart or between twenty and thirty years at the high end); *see also* Interview with Attorney A29 (Mar. 11, 2003) [hereinafter Interview A29] ("[Acceptance] is a huge thing, because that can be as much . . . [as] a three point swing."); Interview with Attorney A33 (Apr. 21, 2003) [hereinafter Interview A33] (explaining that "the higher the offense level you have in the Guidelines, the more dramatic the three points off means"); Interview with Attorney A39 (May 13, 2003) [hereinafter Interview A39] ("[I]t's such a great difference in the sentence. . . . I mean, three points off is sometimes four or five years.").

88. Interview A29, *supra* note 87; *see also* Interview A40, *supra* note 86; Interview A24, *supra* note 83; Interview with Attorney A16 (June 13, 2003) [hereinafter Interview A16].

89. Interview with Attorney A1 (Feb. 24, 2003) [hereinafter Interview A1].

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

> are we are going to lose, and . . . it is not worth the risk if you are going to plead anyways [sic].[94]

A third attorney summed up the dilemma of this balancing process: "If you object to certain things[,] . . . [objections] which could be favorable for the client[,] you can try to take one step forward by taking three steps back, by losing acceptance of responsibility."[95]

In weighing the potential benefit of an argument against its likelihood of success, lawyers sometimes decline to raise meritorious issues in exchange for the relative certainty of the acceptance of responsibility reduction. A court is not likely to see an objection it ultimately sustains as a waste of time or a false denial of conduct. "[I]f you are going to prevail on the issue[,] then obviously . . . you are not risking losing acceptance."[96] The difficulty is in predicting whether you will prevail or come close enough so as not to anger the judge. In general, a number of lawyers worried that uncertainty about advocating for a particular issue on a client's behalf led them to forego potentially meritorious claims. One attorney confessed that

> there have been times that I have reluctantly put the government to its proof on something[,] and found out that there really was something to the objection[. A]nd so I do worry that by ditching issues in favor of not making waves and in favor of trying to get less time[,] we sometimes ditch meritorious issues.[97]

Respondents explained that lawyers have to walk a tightrope in deciding whether to file certain motions. Some lawyers insisted that, although they worried about losing the acceptance of responsibility reduction, they would never withhold a claim or argument they believed was meritorious or important to their clients. "You really do have to evaluate . . . things" before filing motions, one explained.[98] "But if you have a legitimate enough issue, and you believe in it and . . . your client's telling the truth, then . . . sometimes you take that risk."[99] Another lawyer stated that the acceptance determination should in no way "change [your] opinion [about filing a motion] . . . if you truly believe that there's been a violation of their rights. . . . But you run the risk" of being challenged on acceptance.[100]

A number of lawyers addressed this risk by avoiding direct factual challenges to the government's case and instead crafting innovative legal arguments that are less susceptible to accusations of frivolousness or false denials of conduct. One lawyer explained:

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94. Interview A5, *supra* note 79.
95. Interview A6, *supra* note 78.
96. Interview A5, *supra* note 79.
97. Interview A6, *supra* note 78.
98. Interview A23, *supra* note 82.
99. *Id.*
100. Interview with Attorney A35 (Apr. 21, 2003) [hereinafter Interview A35].

> That's why . . . I always try and fashion [a] motion any way I can to keep acceptance in play at all times. . . . I try to put the motion together to make my client's story irrelevant to the motion itself, so if we lose that motion to suppress, we can still argue for acceptance.[101]

Another lawyer described attempts to "couch" claims as "a legal challenge, not challenging the facts."[102] But while such arguments may be less risky from a strategic point of view, they may also be less persuasive. As the same lawyer acknowledged, "unfortunately, we have lost a lot of those."[103]

Even when lawyers decided to make arguments that might run the risk of "losing acceptance," they were cognizant of the fact that the Guidelines helped dictate the nuances of the arguments and the forcefulness with which defense counsel could make them. Striking the proper tone in an objection, lawyers said, was critical but difficult if they did not want to appear to be litigating too aggressively.[104] As one lawyer summarized, the Guidelines "limit[] both how you can fight a particular issue and what you can say in that fight because [it's] always looming over you. . . . You know it's gonna come down [on you] and say, . . . 'You've gone too far. You've no longer accepted'" responsibility.[105]

Section 3E1.1 grants the acceptance of responsibility reduction when a defendant "truthfully admit[s] the conduct comprising the offense(s) of conviction . . . or [does not] falsely deny[] any relevant conduct for which the defendant is accountable."[106] Section 3E1.1's prohibition against making false denials as a precondition to receiving the acceptance of responsibility reduction suggests that the Sentencing Commission saw this provision as a helpful tool in rewarding truth telling and possibly as a way to enhance the truth-seeking function of the criminal justice process. Interestingly, some lawyers believed that this section had the opposite effect. Some commented that the Guidelines' all-or-nothing approach to acceptance means that defendants are less likely to share factual nuances with the court or challenge the government's often simplified version of the facts. As one respondent put it, many prosecutors

> truly believe that unless the client comes before the court and basically says, I did everything exactly the way the government is

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101. Interview A23, *supra* note 82.

102. Interview A5, *supra* note 79.

103. *Id.*

104. To illustrate this point, one attorney said:

> Well how do you not affirmative[ly] fight something? 'OK, I passively objeet, OK, so I'm basically laying down.' So yeah, . . . you can lose acceptance based on a person just remaining silent and letting their lawyer litigate the case at senteneing . . . depending on how you do it and who the judge is.

Interview A33, *supra* note 87.

105. Interview A28, *supra* note 77.

106. USSG, *supra* note 9, § 3E1.1, cmt. n.1(a).

> saying I did it or the way the agents said I did it[, i]f they stray from that in any way, from total submission to those facts, I think the government tends to hold[] it as a potential acceptance of responsibility issue.[107]

Sometimes the path of least resistance is to adopt all of the facts exactly as the government alleges them. "[E]ven if the person doesn't necessarily agree with the relevant conduct they may just remain silent" rather than challenge part of the facts so that "they get their three points off for acceptance of responsibility."[108]

Beyond remaining silent, some lawyers counseled their clients to admit to facts alleged by the government whether or not they are true.[109] Respondents explained that the risk of putting a defendant's credibility at issue against a police officer or other witness often put lawyers in an awkward position as advocates: they sometimes had to tell their clients not to voice any disagreement with the government if they wanted to receive a lower sentence.[110] While this advice is clearly meant to help protect defendants, it likely impedes the court's truth-seeking function. Judges may get less than accurate facts in an adversarial system when one party declines to put forth its version of events.

2. *"Losing Acceptance" for Untimely Guilty Pleas*

Defense lawyers were also concerned about the acceptance of responsibility provision's emphasis on timeliness.[111] To be assured of the reduction, defendants must decide whether to enter a guilty plea or go to trial as early in the case as possible. Some of the lawyers explained that certain judges require defendants to decide how to plead within a strictly limited time after being formally charged at arraignment.[112] A defendant who has not declared her intention by the stated deadline will either receive no reduction in sentence, even if she eventually pleads guilty, or will receive only a partial reduction. In such instances, defense lawyers may lack the information to assess the merits of the case or to properly advise their

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107. Interview with Attorney A21 (Mar. 4, 2003) [hereinafter Interview A21].

108. Interview A29, *supra* note 87; *see also* Interview A14, *supra* note 79 ("[Y]ou will be punished or . . . acceptance will be taken away from you if you challenge even a particular isolated question[] in terms of your sentencing.").

109. Interview with Attorney A17 (June 13, 2003) [hereinafter Interview A17] (explaining that some lawyers will tell their clients: "Hey this is what they want to hear, this is the way they think it happen[ed] and that's what you say.").

110. *See* Interview with Attorney A31 (Apr. 21, 2003) [hereinafter Interview A31] ("[Y]ou sit and talk with [clients] and say, 'It's your word against a couple of cops,' for instance. And it can be a five-point swing. And it translates to a lot of time in jail. And that's unfortunate.").

111. USSG, *supra* note 9, § 3E1.1, cmt. n.1(h) (stating the court should consider the "timeliness of the defendant's conduct in manifesting the acceptance of responsibility").

112. *See, e.g.*, Interview with Attorney A32 (Apr. 21, 2003) [hereinafter Interview A32] ("I've heard that some judge[s] absolutely will not allow you to get aceeptanee unless you do it by x date. . . . I take it seriously so I've never really run into a problem.").

clients before the deadline. As one lawyer explained, "[I]t has a potential for limiting advocacy or at least time[-]constraining it . . . to a point where you may have to make decisions earlier rather than later in regards to what the person should do."[113] Some lawyers felt that even when they received evidence from the government before the deadline, they did not have enough time to review all the information or to conduct their own investigations.[114] Others noted that, even when they had all the information they needed, they had little opportunity to develop a trusting relationship with the client so early in the process. They explained that many defendants were already wary of lawyers, especially public defenders or appointed lawyers, and were concerned that the lawyers would not represent their interests as well if they were not getting paid by the defendants themselves.[115]

Even before the defendant decides whether she will go to trial or enter a guilty plea, lawyers must think several steps ahead about the possibility that certain strategies might impact the sentencing court's final determination regarding acceptance. At sentencing,

> the judge is making a determination as to whether or not this person has . . . accepted responsibility for having done wrong, so to speak[,] and done it in such a timely fashion and in a manner . . . [so that] it has been a minimum expenditure of time and resources on the government's part. I think one thing the court can look [at] under the case law is . . . the motions that have been filed.[116]

Motions to suppress evidence appear to raise particular concerns for lawyers worried about losing acceptance.[117] Motion hearings take time and consume court and government resources. Thinking about how such expenditures of resources will be perceived at sentencing compounds the intense time pressures defense attorneys feel as they make important decisions during all stages of the criminal proceedings.

3. *Judges as a Significant Factor in Denial of Acceptance*

One unexpected result of the study that I had not anticipated in the earlier doctrinal article was the extent to which the denial of acceptance of

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113. Interview A33, *supra* note 87.

114. *See, e.g.*, Interview with Attorney A22 (Mar. 4, 2003) (describing pressure from some judges to schedule a plea before a lawyer has had adequate time to review discovery or investigate a case); Interview A31, *supra* note 110 (explaining that deadlines by which to accept plea agreements might not provide enough time to conduct research or investigate facts).

115. *See, e.g.*, Interview A12, *supra* note 85; Interview A14, *supra* note 79.

116. *See* Interview with Attorney A2 (Feb. 24, 2003) [hereinafter Interview A2].

117. One lawyer explained that, while it doesn't happen all the time, he has "heard horror stories" of it happening to others. Interview with Attorney A8 (Feb. 25, 2003) [hereinafter Interview A8]. He later confirmed, "I have experienced it myself where a judge did not [give] acceptance because of things that I did strategically like filing a suppression motion." *Id.*

responsibility depended less on the law than on the judges (and, to some extent, the prosecutors) involved. Most lawyers do not consider the potential benefit of a claim, its merits, or its timing to be the most significant factor in deciding what arguments they can raise without jeopardizing acceptance. Instead, the most significant factor is the judge. Lawyers reported a wide range of judicial opinion about the propriety of basing the acceptance of responsibility determination at least in part on attorney advocacy decisions. "On a guideline calculation, it helps to know the judges. There's some where you'll never win and there's some where you'll almost always win."[118] Whatever the strategy or argument to be made, when it comes to assessing the likelihood of obtaining the acceptance of responsibility reduction, one has to consider "the human factor . . . [the] judge[]."[119] In general, the lawyers interviewed reported that some judges will almost always grant the acceptance reduction at sentencing when the defendant has entered a guilty plea.[120] On the other hand, "[s]ome judges feel . . . [that] if you fight [the case] at all you don't have acceptance."[121] To these judges, however, "fighting" consists of making motions to suppress or "different arguments you might make."[122]

Defense lawyers have some justification for giving serious consideration to who the judge is in a particular case. Review of acceptance of responsibility determinations is highly deferential and appellate courts rarely reverse district court determinations—at least when defendants appeal.[123] Recent statistics reveal that the affirmance rate on all defendant appeals of the acceptance of responsibility findings is 95.2%.[124] In contrast, the affirmance rate for government appeals of acceptance of responsibility findings is only 16.7%.[125]

The private practitioners who take cases in other districts stressed the importance of learning about the judge hearing their case. Many of the attorneys in one particular district stressed that they thought the judges in their district were as fair as judges anywhere,[126] but a few of them

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118. Interview A37, *supra* note 83.

119. Interview A23, *supra* note 82; *see also* Interview A21, *supra* note 107 (explaining that the government may argue against acceptance or in favor of obstruction, but "whether or not the judge will always grant it depends on the judge").

120. *See, e.g.*, Interview with Attorney A7 (Feb. 25, 2003) [hereinafter Interview A7].

121. *Id.*

122. *Id.*

123. *See, e.g.*, United States v. Lghodaro, 967 F.2d 1028, 1031-32 (5th Cir. 1992) (holding that the district court finding that the defendant was not truthful to authorities was not clearly erroneous).

124. U.S. SENTENCING COMM'N, OFFICE OF POLICY ANALYSIS, 2000 DATAFILE, OPAFY00, tbl.57 (2000).

125. *Id.* tbl.58.

126. *See, e.g.*, Interview with Attorney A25 (Mar. 10, 2003) [hereinafter Interview A25] ("I think we're really kind of lucky in this district. We have some really good judges. There's really only a couple that do vengeful stuff [to hurt a defendant]."); Interview with Attorney A36 (May 13, 2003)

spontaneously related stories they had heard from colleagues about judges in a neighboring jurisdiction.[127] More than one of these lawyers spoke of judges in the nearby district who would deny an aeceptance of responsibility reduction if the defendant pleaded "not guilty" at the initial appearance or arraignment.[128]

One judge in yet a third district was said to require that any lawyer with a pending sentencing hearing before him sign a statement explaining that the lawycr understood that any arguments or objections made by the lawyer could be used to deny acceptance of responsibility to the defendant.[129] This warning, which put lawyers on notice that arguments made while advocating for their clients could do more harm than good, ineludes a citation of *United States v. Smith*, a case in which the Eleventh Circuit warned lawyers that their legal arguments, even those bascd on the assertion of constitutional rights, could be grounds for the denial of acceptance of responsibility.[130] Notably, a number of lawyers mentioned the *Smith* case in their interviews.[131]

The study also revealed a difference between lawyers who had been practicing for a long time and those who were more junior in their careers, based in part on the depth of knowledge each group had about the practices of particular judges. In general, lawyers who were more experienced or had more familiarity with the judges were far more confident in their assessment of what issues might prevail and appeared less concerned about the

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[hereinafter Interview A36] ("But in this district the judges have been pretty liberal about granting acceptance of responsibility.").

127. *See, e.g.*, Interview A32, *supra* note 112. In order to obtain a more in-depth view, this study involved looking closely at only two districts. However, because many private practitioners practice in more than one jurisdiction, some were able to provide limited information regarding practices elsewhere. This information, some of it secondhand, was nonetheless useful in gauging the generalizability of accounts of the two primary jurisdictions.

128. *See, e.g.*, Interview A35, *supra* note 100. Lawyers, who often meet their clients on the day of the initial appearance or the indictment, commonly advise their clients to plead "not guilty" until the lawyer has had a chance to revicw the evidence and advise the client regarding a change of plea. A delayed plea of guilty has been found to be a relevant factor in determining whether a defendant later receives a scntencing adjustment for acceptance of responsibility. Confirming the existence of this practice, see United States v. Wilson, 878 F.2d 921, 923 (6th Cir. 1989) (holding the defendant's failure to plead guilty at arraignment is relevant to the finding of acceptance of responsibility despite the cventual guilty plea), *superceded by statute as stated in* United States v. Williams, 940 F.2d 176, 181 (6th Cir. 1991).

129. *See* Interview with Attorney A4 (Feb. 24, 2003).

130. 127 F.3d 987 (11th Cir. 1997) (en banc). The appellate court in *Smith* held that the law permits a district court to deny a defendant a sentencing reduction under section 3E1.1 for any conduct that appears inconsistent with accepting responsibility, "even when that conduct includes the assertion of a constitutional right." *Id.* at 989. *Smith* thus rejected the argument that sentencing courts were restricted to considering only false or frivolous factual claims.

The 7th Circuit has also found that frivolous legal arguments can be used as a basis for denying acceptance. *See* United States v. Purchess, 107 F.3d 1261, 1264 (7th Cir. 1997).

131. *See, e.g.*, Interview with Attorney A18 (June 13, 2003); Interview with Attorney A10 (Feb. 25, 2003) [hereinafter Interview A10]; Interview A6, *supra* note 78.

possibility of losing the acceptance of responsibility reduction. One lawyer explained that some of these decisions depended a lot on "what you know about the judges" and whether you are "likely to prevail on the issue" before a particular judge.[132]

Defense attorneys with more experience of prosecutors' tactics were also less likely to be deterred from making aggressive legal arguments. While a number of lawyers stated that it was relatively common for prosecutors to threaten to oppose a finding of acceptance,[133] the more experienced lawyers had learned that a prosecutor's threats should not always be taken seriously. As a result, these lawyers were less likely to alter their strategies or advocacy decisions in the face of such threats. One lawyer who had been practicing for six years explained that she was slowly gaining an understanding of when to take seriously the threats of prosecutors. She recalled "a couple of different instances where the prosecutor made good on their threat to recommend no acceptance," yet also noted that, when she argued the issue before the judge, "in every case the judge has found in favor of acceptance. So . . . after a while you don't get quite so gun-shy at doing that," she explained.[134] Another lawyer explained that even though prosecutors often make "implicit threats or even direct threats" to challenge findings on such issues as acceptance of responsibility, "for the most part I feel confident that I can argue the position" successfully.[135]

Of course, the prosecutor's ability to successfully argue the issue of acceptance depends on the court's receptiveness to such arguments. The influence prosecutorial conduct has on defense attorneys thus highlights the importance of the judge as a factor in the lawyer's advocacy strategy. As one experienced lawyer who practices in a district with several tough judges lamented,

> I hate to say it[,] but . . . acceptance plays one of the largest roles . . . [i]n anything that I do. . . . I know that [at] every step of the way, [there's] something I could do to jeopardize my client's acceptance. And if that's one of the only departures that I can get, I'm really leery about what I do in that case.[136]

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132. Interview A5, *supra* note 79.

133. *See* Interview with Attorney A34 (Apr. 21, 2003) [hereinafter Interview A34] ("I've had a couple of different instances where the prosecutor made good on [her] threat to recommend no acceptance."); Interview A21, *supra* note 107 (describing implicit or direct threats from the prosecutor regarding acceptance); Interview A35, *supra* note 100 (describing the risk that a prosecutor will argue that a motion was inconsistent with accepting responsibility because it "put [the government] to the test"); Interview A37, *supra* note 83 (citing concern about the prosecutor saying "you're jeopardizing acceptance if you . . . litigate" this); Interview A39, *supra* note 87 ("[O]ftentimes they'll say, 'Well you could lose acceptance if you raise that issue.'").

134. Interview A34, *supra* note 133.

135. Interview A21, *supra* note 107.

136. Interview with Attorney A13 (June 12, 2003) [hereinafter Interview A13].

B. The Obstruction of Justice Adjustment

Defense lawyers cite the obstruction of justice provision as another aspect of the Federal Sentencing Guidelines that severely restricts their ability to defend their clients.[137] A defendant may receive a two-point penalty at sentencing under section 3C1.1 for obstructing justice or impeding the administration of justice "if (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction."[138] The obstruction of justice provision sets forth a wide range of conduct that could result in assessment of the penalty.[139] Respondents seemed most concerned that the prohibitions against providing false information to judges, magistrates, and law enforcement had the effect of silencing defendants altogether, thus handicapping the lawyers from making certain arguments or putting forth certain defenses.

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137. A few lawyers made a point of explaining that they believed that the obstruction of justice provision was more injurious to zealous advocacy than the acceptance of responsibility provision. *See* Interview A8, *supra* note 117 ("I think the thing that has a more chilling effect is the enhancement for obstruction so that when the client is considering some kind of hearing[, whether he] should testify or not . . . is what I would look at . . . and discuss [with] the client."); Interview A29, *supra* note 87 ("[T]he one that really gets me is the obstruction of justice threat, because if your client testifies, and . . . the judge does not believe . . . your client, then they can ask for obstruction . . . [a]nd that is very frustrating, because you . . . are silencing a person's ability to speak about . . . constitutional issue[s] . . . ."); Interview A35, *supra* note 100 ("I have a fundamental problem with the obstruction enhancement. I think it's the most unfair thing.").

138. USSG, *supra* note 9, § 3C1.1.

139. According to the commentary to the obstruction of justice provision:

> The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:
>
> (a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
>
> (b) committing, suborning, or attempting to suborn perjury;
>
> (c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;
>
> (d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (*e.g.*, shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;
>
> (e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;
>
> (f) providing materially false information to a judge or magistrate;
>
> (g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;
>
> (h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;
>
> (i) other conduct prohibited by obstruction of justice provisions under [18 U.S.C. §§ 1501-1516].

USSG, *supra* note 9, § 3C1.1, cmt. n.4.

Under section 3C1.1, any written or oral statement by the defendant in support of a particular argument can be grounds for an obstruction enhancement if deemed materially false by the court.[140] If this occurs, the defendant not only loses the underlying issue raised by her attorney, but can suffer an additional two-point penalty. To exacerbate matters, the obstruction of justice enhancement often accompanies the loss of acceptance of responsibility. The Guidelines state explicitly that "conduct resulting in an enhancement under § 3C1.1 . . . ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct."[141] Consequently, when lawyers strategize to avoid advocacy that might lead to an obstruction enhancement for the defendant, it is because they often contemplate a five-point difference in sentence rather than merely a two-point difference.

1. Testimony by Defendants

According to the lawyers interviewed, arguments or motions that require the testimony of defendants are the primary casualty of the obstruction of justice provision.[142] One defense lawyer confessed, "I don't think I have ever put a client on the witness stand because of the obstruction of justice [enhancement]."[143] A second attorney, who has a significant practice in state court, was incredulous when she learned of the federal penalty for defendants who testify in unsuccessful cases: "[W]hen I first heard about this . . . provision, that if you testify you're going to get hit with two extra points, I thought someone was kidding. I thought it was a joke. Unfortunately that's what has happened, and it's such an infringement on a defendant's right to testify."[144] As another attorney put it:

> I think one thing that really calls the way we present our cases is the possible enhancement for obstruction of justice, because a lot of times, either at trial or at a suppression hearing, we want to have our client testify, tell his side of the story. . . . I think it is

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140. *Id.* § 3C1.1, cmt. n.3(f) (Defendants can be found to be obstructing justice for "providing materially false information to a judge or magistrate.").

141. *Id.* § 3E1.1, cmt. n.4. The acceptance of responsibility reduction may be given along with the obstruction enhancement in "extraordinary cases." *Id.*

142. Clearly, the decision about whether to testify in any proceeding rests ultimately with the defendant and not the attorney. A criminal defendant cannot be compelled to testify. *See* Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 AM. J. LEGAL HIST. 235, 241 (1998). The attorneys interviewed seemed aware that testifying was the defendant's choice. *See, e.g.*, Interview A14, *supra* note 79 (explaining that decisions regarding whether to testify or go to trial were up to the defendant). However, most of the lawyers I spoke with conceded, and my experience confirms, that most defendants generally follow the advice of their lawyers on this and other important issues. *See, e.g.*, Interview A29, *supra* note 87 ("I find often times, more than 90% of the time the client is really looking towards you for some guidance and understanding . . . ."); Interview A7, *supra* note 120; Interview A17, *supra* note 109; Interview A39, *supra* note 87.

143. Interview A5, *supra* note 79.

144. Interview A32, *supra* note 112 (omission in original).

> particularly important in trials because . . . testify[ing] might make a difference in my client getting . . . [a not] guilty verdict.[145]

Lawyers discussed the quandary they faced when deciding whether to put a defendant on the stand at trial. Trials are generally all-or-nothing battles because they are the only chance of an acquittal and because the client who goes to trial has likely lost any possibility of a reduced sentence for acceptance of responsibility.[146] Yet some lawyers advise their clients not to testify at trial[147] even when testifying might substantially improve the chances of an acquittal. They know that because of the possibility of an obstruction of justice enhancement, testifying generally results in a higher sentence for clients who are ultimately convicted.[148]

The fear of receiving a penalty for defendant testimony later deemed false is relevant not only at trial but at every stage of the criminal prosecution.[149] One lawyer explained that he is reluctant to put his clients on the stand at a bond or preliminary hearing because the client might say something that will later be deemed false or a failure to accept responsibility.[150] Another said that she was reluctant to allow her client to speak during allocution at sentencing until after all the Guideline calculations were decided.[151] Unfortunately, by that point, most of the critical issues have

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145. Interview with Attorney A9 (Feb. 23, 2003) [hereinafter Interview A9].

146. *See* Osler, *supra* note 63, at 668. The respondents confirmed this view. *See, e.g.*, Interview A36, *supra* note 126 ("[I]f you go to trial you're not going to get acceptance[;] . . . if you plead guilty you're going to get acceptance . . . ."); Interview A24, *supra* note 83 (explaining that the Guidelines impose a penalty for going to trial).

147. Interview A34, *supra* note 133 ("I tend to recommend strongly against [my clients] testifying at trial . . . ."); Interview A5, *supra* note 79 (describing the decision not to put "client[s] on the witness stand because of the obstruction" enhancement); Interview A9, *supra* note 145 (recommending against testifying at trial due to fear of the obstruction penalty).

148. For example, one attorney stated:

> So if you go to trial, . . . you are trying to win[. B]ut if you put the client on the stand and you know the client is going to say they didn't do it because it is exculpatory that there is a possibility that people wouldn't believe him. . . . In the end, if you end up losing [at] trial . . . you are going to end up with not just no acceptance of responsibility for go[ing] to trial, but also obstruction of justice because the client testified.

Interview A6, *supra* note 78.

149. Courts have found the obstruction enhancement for conduct at various stages of prosecution. *See, e.g.*, United States v. Hernandez-Ramirez, 254 F.3d 841, 843-44 (9th Cir. 2001) (giving false statements regarding a defendant's financial status during the request for court-appointed counsel justifies the obstruction enhancement); United States v. Ransom, 990 F.2d 1011, 1014 (8th Cir. 1993) (lying to the grand jury can constitute obstruction); United States v. McDonough, 959 F.2d 1137, 1141 (1st Cir. 1992) (giving false testimony during trial justifies the obstruction enhancement); United States v. Hassan, 927 F.2d 303, 309 (7th Cir. 1991) (making false statements during a bond hearing justifies the obstruction enhancement); United States v. Matos, 907 F.2d 274, 276 (2d Cir. 1990) (giving false testimony during a suppression hearing justifies the obstruction enhancement).

150. Interview A8, *supra* note 117.

151. Interview A34, *supra* note 133.

been decided, and the defendant's statements can have only a limited benefit.[152]

Concerns about obstruction enhancements permeate the attorneys' decisions about whether to file motions to suppress. "[Y]ou have to be careful about attaching affidavits to motions . . . [because] that gets into obstruction," cautioned one lawyer.[153] According to another attorney, because there are often factual issues in motions to suppress, "your client ends up needing to testify" unless it is a rare case in which the lawyer can find another witness who was present.[154] Any motion arguing a nonconsensual search by police officers or failure to advise a defendant of Miranda rights often requires either the testimony of the defendant or an affidavit alleging facts at odds with those alleged by the government.[155] One suspects that the government does not take kindly to a criminal defendant who alleges not only that an agent acted illegally in the first place but that he now is lying about it.[156] This problem is compounded by the fact that most defendants are likely to lose a credibility contest against a law enforcement officer.[157]

Just as lawyers developed strategies to deal with the threat of losing acceptance of responsibility reductions,[158] more experienced attorneys found strategies to counter the looming threat from prosecutors that a particular argument or motion might result in a penalty for obstruction of justice. According to one lawyer who had been practicing in federal court for twenty-four years, there are "little avenues that you can take to [get around] on those kinds of things. If you're really skilled there [are] ways to file motions to suppress so that you don't have to put your clients on [the stand] or . . . file an affidavit."[159] A lawyer might be able to accomplish this by finding other witnesses or evidence to support the defendant's version of the facts, or the lawyer might file a motion alleging facts without

152. When all the Guideline calculations have been determined, the judge is still left with a final sentencing range. The defendant's allocution can influence the judge's decision about where within the narrow range the defendant's sentence should fall. *See, e.g.*, Reuben Castillo, *Reflections on Sentencing by a Judge/Commissioner*, 29 LITIG. 8, 13 (Fall 2002) (explaining, from the perspective of a federal judge and member of the Sentencing Commission, that the "opportunity [for allocution] should not be lightly waived by any defendant. In most cases, it is the final statement that a judge hears before announcing the sentencing decision.").

153. Interview A32, *supra* note 112.

154. Interview A21, *supra* note 107.

155. *See* Interview A23, *supra* note 82 (discussing motions based on lack of consent to search); Interview A21, *supra* note 107 (same).

156. *See* Interview A21, *supra* note 107 (explaining that the government will generally take the position that the agent acted legally, "got the consent, or did this or did that").

157. *See* Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1323 (1994) (explaining that judges are more likely to believe law enforcement officers because they assume that defendants are guilty, that officers are presumptively trustworthy, and that defendants have a greater incentive to lie).

158. *See supra* notes 101-03 and accompanying text.

159. Interview A25, *supra* note 126.

providing the supporting evidence. In many instances, lawyers hope to develop the evidence through cross-examination of law enforcement or other government witnesses. Such strategies avoid the trap of a penalty for obstruction but are rarely as persuasive as the use of direct evidence in support of a claim.

2. Statements to Probation Officers

In addition to in-court testimony, the obstruction of justice enhancement is commonly assessed for out-of-court statements made to probation officers. Probation officers are required by statute to prepare a presentence report in every case.[160] These reports include information regarding the offense, the defendant's background, the criminal history, and preliminary recommendations to the judge on Guidelines findings. In preparation for the report, most probation officers seek to interview the defendant. Some of the respondents voiced concerns that statements made by their defendants during these interviews were used to withhold the acceptance of responsibility reduction or apply the obstruction of justice enhancement.[161] The case law confirms that these concerns are justified. Courts have routinely found that a sentence increase for obstruction of justice is justified when a defendant's statements[162] or omissions[163] result in the communication of misleading or even potentially misleading information to the probation officer.

Overall, some lawyers complained that courts' ready use of the obstruction of justice provision was tantamount to penalizing a defendant for exercising her constitutional right to present evidence in her own defense. One attorney noted that the use of the obstruction of justice provision was "very frustrating" because it "silenc[es] a person's ability to speak

160. *See* 18 U.S.C. § 3552(a) (2000); FED. R. CRIM. P. 32.

161. *See, e.g.*, Interview A29, *supra* note 87 (discussing statements to a probation officer that might later be construed as misstatements that justify adverse sentencing rulings on obstruction or acceptance); *id.* (describing the reluctance to provide information correcting errors in presentence reports because of the concern that the judge will regard them as deliberate). For confirmation that this is a widespread concern, see O'Hear, *Remorse*, *supra* note 71, at 1535 (arguing that defense lawyers aggressively control the flow of information from defendants to probation officers and judges, whereas they previously permitted defendants to speak freely).

162. *See, e.g.*, United States v. Nelson, 54 F.3d 1540, 1543-44 (10th Cir. 1995) (affirming obstruction for statements regarding the defendant's bank accounts); United States v. Thomas, 11 F.3d 1392, 1399-1401 (7th Cir. 1993) (affirming the finding of obstruction where the defendant made erroneous statements to a probation officer regarding prior arrests); United States v. Lofton, 905 F.2d 1315, 1316-17 (9th Cir. 1990) (holding that the obstruction finding was justified where the defendant lied to the probation officer about having accepted responsibility for the crimes).

163. *See, e.g.*, United States v. Anderson, 68 F.3d 1050, 1055-56 (8th Cir. 1995) (affirming the obstruction finding where the defendant provided incomplete and misleading financial information to a probation officer); United States v. Benitez, 34 F.3d 1489, 1497 (9th Cir. 1994) (affirming the obstruction determination where the defendant attempted to conceal an outstanding escape warrant); United States v. Edwards, 911 F.2d 1031, 1033-34 (5th Cir. 1990) (finding that failure to disclose the location of a coconspirator was grounds for obstruction).

about . . . a constitutional issue" and "to challenge the government."[164] Unfortunately, courts have not been receptive to these constitutionally grounded challenges to the acceptance of responsibility[165] and obstruction of justice[166] provisions. Instead, courts have found that acceptance of responsibility, obstruction, and other sentencing adjustments are permissible because they are deemed not to penalize a defendant for going to trial but rather to allow sentencing judges to reward defendants who cooperate with the criminal justice system.[167]

IV
GOVERNMENT SPONSORED DEPARTURES, ENHANCEMENTS, AND THEIR EFFECT ON DEFENSE ATTORNEY ADVOCACY

A. Downward Departures for Substantial Assistance

Once the court has made findings regarding acceptance of responsibility, obstruction of justice, and other adjustments, the court can determine the presumptive sentencing range. The court may depart from this range based only on limited factors permitted by the Guidelines. Among permitted departures, the departure most often granted is the substantial assistance departure outlined in section 5K1.1 of the Guidelines and 18 U.S.C. § 3553(e).[168]

A sentencing departure for providing substantial assistance to the government in the investigation or prosecution of another person can be obtained only upon motion of the government.[169] Upon such a motion, the court may reduce a defendant's sentence based on the significance and usefulness of the assistance, the truthfulness and reliability of information or testimony provided, the danger or risk of injury to the defendant resulting

164. Interview A29, *supra* note 87; *see also* Interview A35, *supra* note 100 ("[T]he thing that I disagree with most is the obstruction enhancement. I think it's violative of every right that a defendant has.").

165. *See, e.g.*, United States v. Saunders, 973 F.2d 1354, 1362-63 (7th Cir. 1992), *rev'd*, 92 F.3d 1188 (7th Cir. 1996); United States v. Cordell, 924 F.2d 614, 619 (6th Cir. 1991); United States v. Ross, 920 F.2d 1530, 1537 (10th Cir. 1990); United States v. Parker, 903 F.2d 91, 106 (2d Cir. 1990); *see also* Corbitt v. New Jersey, 439 U.S. 212 (1978); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 840 n.228 & accompanying text (2001); O'Hear, *Remorse*, *supra* note 71, at 1556-60. For a detailed discussion of how courts have responded to constitutional challenges to "acceptance of responsibility," see Etienne, *supra* note 10, at 150-54.

166. The Supreme Court followed most federal appellate circuits in upholding the constitutionality of the obstruction of justiee provision. United States v. Dunnigan, 507 U.S. 87 (1993).

167. *See* Etienne, *supra* note 10, at 152 nn. 241-46.

168. Section 5K1.1 states: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." USSG, *supra* notc 9, § 5K1.1.

169. *Id.*; *see also* United States v. Spears, 965 F.2d 262, 281 (7th Cir. 1992); United States v. Kelley, 956 F.2d 748, 751-57 (8th Cir. 1992) (en banc); United States v. Romolo, 937 F.2d 20, 23 (1st Cir. 1991); United States v. Ortez, 902 F.2d 61, 64 (D.C. Cir. 1990), *overruling recognized by In re* Sealed Case, 149 F.3d 1198 (D.C. Cir. 1998); United States v. Alamin, 895 F.2d 1335, 1337 (11th Cir. 1990).

from the assistance, and the timeliness of the assistance.[170] The extent of the departure is determined by the sentencing court.[171]

Three aspects of this departure make it a unique sentencing mechanism under the Guidelines scheme. First, as mentioned, the government retains the sole authority to decide whether to move for a downward departure, and the departure cannot be obtained absent a government motion.[172] To complicate matters, the sentencing court may not inquire into the government's refusal to file a motion.[173] Second, substantial assistance departures are highly valued and in great demand because they tend to be greater in extent than other Guideline reductions[174] and because they are the only departure mechanism that permits a sentencing court to impose a sentence below the statutorily required minimum.[175] Third, the cooperation scenario presents itself in a significant number of cases. Of all federal sentences imposed, approximately 20% are reduced based on substantial assistance departures.[176] Downward departures requested by the prosecutor, generally for substantial assistance, constitute over 80% of all downward departures.[177]

Based on these features, I hypothesized prior to conducting this study that substantial assistance departures would be an area in which defense

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170. USSG, *supra* note 9, § 5K1.1(a)(1)-(5).

171. *Id.*

172. *Id.*

173. The exception to this rule applies only in the rare cases where the government has contractually obligated itself to file the motion in a plea agreement expressly requiring it to do so. *See, e.g.*, United States v. Isaac, 141 F.3d 477, 481 (3d Cir. 1998); United States v. Melton, 930 F.2d 1096, 1098-99 (5th Cir. 1991). The court can then enforce the terms of the plea contract or allow the defendant to withdraw her plea. *See* United States v. Conner, 930 F.2d 1073, 1076 (4th Cir. 1991) ("Where the bargain represented by the plea agreement is frustrated, the district court is best positioned to determine whether specific performance, other equitable relief, or plea withdrawal is called for."). In any event, in my experience most plea agreements set forth various conditions before a motion will be made or make clear that the government has sole discretion in deciding whether to make the motion. Very few agreements include express requirements for the government to make a substantial assistance motion.

174. There is no lower limit on the extent of a substantial assistance departure. *See, e.g.*, United States v. Baker, 4 F.3d 622, 624 (8th Cir. 1993); United States v. Snelling, 961 F.2d 93, 96-97 (6th Cir. 1992). Many of the attorneys interviewed described the average departure for substantial assistance as being a 30% to 50% reduction from the presumptive Guidelines range. *See infra* note 190 and accompanying text.

175. Resolving a circuit split, the Supreme Court held that a motion under section 5K1.1, if accompanied by a motion under 18 U.S.C. § 3553(e), authorized a sentence departure below the statutory minimum and the applicable Guideline range. Melendez v. United States, 518 U.S. 120 (1996).

176. U.S. SENTENCING COMM'N, DATAFILE USSCFY00, tbl.29 (2000) (showing that 9,506 defendants out of 52,660 received downward departures for substantial assistance in 2001); U.S. SENTENCING COMM'N, DATAFILES USSCFY97-USSCFY01, fig.G (1997-2001) (showing that from 1997 to 2001, the percentage of all defendants receiving downward departures for substantial assistance ranged from 17.1 to 19.3).

177. *See* Frank O. Bowman, III, *When Sentences Don't Make Sense*, WASH. POST, Aug. 15, 2003, at A27.

lawyers felt disempowered as zealous advocates. I assumed that the significant leverage afforded to government prosecutors combined with the high stakes involved in obtaining one of these departures would place defense lawyers in an inferior bargaining and advocacy position. This hypothesis proved only partially correct. Some of the lawyers confirmed that the process of seeking a substantial assistance departure impeded their ability to be zealous advocates.[178] However, a significant portion of the lawyers interviewed reported either that they were more effective advocates when their clients were cooperating with the government or, alternatively, that aggressive advocacy was less critical in those cases.[179]

B. The Perceived Effect of Downward Departures on Defense Advocacy

1. One View: An Impediment to Advocacy

Lawyers who said that they felt constrained in advocating for clients who were involved in cooperation agreements with the government provided numerous reasons. They explained that some prosecutors used the immense leverage they had over cooperating defendants to exact concessions on unrelated matters.[180] As one lawyer explained,

> [I]f you get . . . an agreed downward departure, say for cooperation, [prosecutors] usually require that you give up your right to appeal, they usually require that you give up your ability to make any other downward departures. . . . You frequently have to accept . . . the guideline calculations they come up with because they've got so much leverage with the guidelines.[181]

This statement was representative of the views of several attorneys. One attorney observed feeling "more restrained" in the types of arguments he could make while representing a cooperating defendant.[182] For example, he mentioned that as part of such agreements, the prosecutor would often limit his ability to argue for other reductions.[183] Another lawyer described a case

178. *See infra* notes 180-91 and accompanying text.

179. *See infra* notes 192-200 and accompanying text.

180. This view is certainly plausible, but given the relative absence of transparency surrounding the government's decision to make substantial assistance motions, it is difficult to know the motivations behind them. Nonetheless, at least one scholar has noted that "the decision whether to move for a lower sentence in exchange for 'substantial assistance' [departures] is made secretively and provides a strong bargaining tool against the defendant, who depends on the prosecution's good graces if he or she hopes to receive a merciful sentence." Oliss, *supra* note 40, at 1855. For further support regarding the concern that prosecutors have too much power with reference to the departure for substantial assistance, see Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199 (1997).

181. Interview A23, *supra* note 82; *see also* Interview A37, *supra* note 83 (explaining that the biggest leverage prosecutors have "is cooperation [be]cause they're the only one[s] who can [file] the 5K").

182. Interview A33, *supra* note 87.

183. *Id.*

in which her client was helping the Federal Bureau of Investigation apprehend suspects in a drug case. The defendant's cooperation carried great risk; he was shot at several times during the cooperation efforts. Once the cooperation was complete and it was time to discuss other Guideline issues as part of a plea agreement, the prosecutor rejected this lawyer's Guideline calculations, explaining that it was a "take it or leave it deal," and that, if the defendant turned it down, the substantial assistance departure was "off the table."[184]

If the defendant wants the departure in such instances, "at a certain point [the lawyer] just kind of [has] to shut up."[185] According to defense lawyers, the types of legal strategies the government most sought to restrict included challenging other Guideline findings,[186] filing motions for downward departure on other grounds,[187] arguing for the low end of the final Guideline range,[188] and appealing.[189] It seems that many lawyers often retreated in the face of such threats because they recognized that virtually nothing they could do as advocates could match the 30% to 50% sentence reduction their clients could obtain through cooperating.[190] Because "the surest way for clients to get a reduced sentence under the guidelines . . . [is] to get that motion[,] . . . [defense lawyers have] to agree to what [prosecutors] say."[191]

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184. Interview A34, *supra* note 133.

185. *Id.*

186. Interview A37, *supra* note 83 (describing a situation in which the defendant was barred from contesting enhancement based on his leadership role); Interview A34, *supra* note 133 (describing a situation where a defendant was barred from challenging Guideline applications); Interview A23, *supra* note 82 (explaining how a defendant was barred from challenging Guideline calculations regarding his role in a robbery or drug scheme).

187. Interview A33, *supra* note 87 (describing a cooperation agreement as an implicit agreement not to seek other departures); Interview A6, *supra* note 78 (describing how, in exchange for 5K1.1, a prosecutor sought an agreement for the defense not to file a motion for downward departure even though the client had some serious "medical issues"); Interview A23, *supra* note 82 (explaining how a defendant was required to waive filing any downward departures).

188. Interview A26, *supra* note 81.

189. Interview A6, *supra* note 78 (describing how a defendant was forced to waive appeal because a prosecutor can "hold[] a 5K over your head"); Interview A23, *supra* note 82 (telling how a defendant was required to waive appeal).

190. *See, e.g.*, Interview A23, *supra* note 82 (explaining that "[m]ost of the time . . . their policy is if you cooperate within your case, you get one-third off the low end of the guideline. If you make another case for them outside of your case, you get fifty percent off the low end of the guideline" range); Interview A26, *supra* note 81 (describing the section 5K1.1 departure as being "up to fifty percent off"); Interview A33, *supra* note 87 (describing the departure as being "either usually a third or a half off the low end of the guideline range"); Interview A39, *supra* note 87 (stating that "sometimes they just want to give you one-third or twenty percent or twenty-five percent"). *But see, e.g.*, Interview A11, *supra* note 85 ("Well, two years ago, maybe three years ago, it was pretty standard to tell a client you'll get anywhere from 25 percent to 50 percent off. . . . You know what we're getting now? 10 percent!").

191. Interview A23, *supra* note 82.

2. Another View: No Hindrance to Advocacy

Other lawyers perceived no hindrance in their abilities to represent their clients aggressively merely because their clients were involved in cooperating with the government. One lawyer explained, "I don't think it affects me that much. I still make all those objections."[192] Another echoed this view, explaining that he still "vigorously evaluate[s] and object[s]" to other Guidelines issues even though the client hopes to receive a reduction from cooperation alone.[193] Challenging other Guidelines issues that determine the presumptive range remains important even when a defendant is providing substantial assistance. Because the departure motion is often stated in terms of percentages, the collateral issues determine "the starting point from which to depart."[194] Accordingly, the failure to make sure that the defendant is not starting from an inflated point of departure can essentially rob the defendant of the benefit of his bargain. At least one other lawyer expressed confidence that it all works out in the end because a reasonable prosecutor would take into account in the section 5K motion any issues left unchallenged.[195]

In fact, some lawyers felt that having their clients cooperate placed them in a better negotiating position with the prosecutor on collateral Guidelines issues. One lawyer noted, "[i]f you have a client that's cooperating, it's much easier to get the Government to concede on those issues."[196] These lawyers felt that "prosecutors rely so heavily on these [cooperating defendants]" that they could ask prosecutors for whatever their clients were entitled to and always get it.[197]

Some lawyers acknowledged making some concessions to prosecutors but felt that concessions were a necessary part of the negotiation process. They were unapologetic about their decisions to refrain from making certain arguments in exchange for a substantial assistance departure as long as their clients received a significant reduction in sentence. One lawyer explained that when his client is cooperating, "what's expected . . . by the prosecution is that [the lawyer should] just kind of lay by the wayside and [not] do anything."[198] The attorney felt that "there really isn't too much of a point" to getting "involved in any further aspect of the case or the defense

192. Interview A11, *supra* note 85.

193. Interview A8, *supra* note 117.

194. Interview A16, *supra* note 88.

195. Interview A17, *supra* note 109.

196. Interview A11, *supra* note 85.

197. *See, e.g.*, Interview with Attorney A30 (Mar. 11, 2003). *But see* Interview A34, *supra* note 133 ("[T]here's nothing we can do to force them to file a better 5K, there is just nothing. You know, you negotiate, but . . . they [can] choose not to negotiate with you and say, 'This is what it is. Challenge it one more time and it's off the table entirely.'").

198. Interview A36, *supra* note 126.

of the case" when a client is cooperating.[199] As a second attorney argued, if the government gives the defendant a substantial benefit, there is not "anything wrong with you then giving as well."[200]

While such negotiations may be a sensible approach from a practical standpoint, it appears to conflict with several courts' holding that only factors relating to the defendant's cooperation may be considered in determining the extent of the departure.[201] A defendant might object to such a strategy if she believes that she is entitled to a departure in exchange for her assistance plus any other Guideline adjustments or reductions to which she might otherwise be entitled. Some defense lawyers, however, take a more pragmatic view. Because success on corollary issues is never certain, and a substantial assistance departure is better than no departure at all, it may sometimes be in the defendant's best interests to "hold back on some [arguments] . . . to maximize the [substantial assistance] reduction."[202]

Finally, other defense attorneys reported that, while they did not feel otherwise constrained as advocates, they nonetheless felt discomfort or confusion in the nonadversarial role of assisting government prosecutors. These lawyers noted that the cooperation agreement "affects advocacy" on behalf of clients.[203] The adversarial process changes when "all [of a] sudden you want your client to tell on everyone" and "give as much" to the government as she gets in return.[204] Lawyers with clients who are cooperating sometimes feel as if they are "working for the government" rather than advocating for a client against the government.[205] One lawyer confessed that she didn't "feel like . . . a true advocate" when negotiating for a cooperation departure because it often required "getting all 'buddy buddy' with these prosecutors" when she would prefer to be trying cases against them.[206] But even some lawyers who personally felt awkward playing a less adversarial role did not think that it was necessarily bad for the client. One

199. *Id.*; *see also* Interview with Attorney A38 (May 13, 2003) [hereinafter Interview A38] ("[O]nce the client is cooperating . . . I pretty much sit back . . . .").

200. Interview A24, *supra* note 83.

201. *See* United States v. Thomas, 930 F.2d 526, 529-30 (7th Cir. 1991) (finding that the defendant's sentence should be reduced only on the basis of the assistance she provided to the government), *superceded by regulation as stated in* United States v. Canoy, 38 F.3d 893 (7th Cir. 1994); *see also* United States v. Pearce, 191 F.3d 488, 492-93 (4th Cir. 1999) (finding that "any factor considered by the district court on a § 5K1.1 motion must relate to the 'nature, extent, and significance' of the defendant's assistance"). Unfortunately, there is no method of enforcing this requirement against prosecutors because a prosecutor's decision not to file a motion cannot be reviewed even if based on reasons unrelated to cooperation. The only exception is for prosecutorial decisions based on unconstitutional motives or categories such as race or gender. Wade v. United States, 504 U.S. 181, 185-86 (1992).

202. Interview A8, *supra* note 117.

203. *See, e.g.*, Interview A14, *supra* note 79.

204. Interview A11, *supra* note 85.

205. *See, e.g.*, Interview A14, *supra* note 79.

206. Interview A13, *supra* note 136.

lawyer who expressed a strong discomfort in this new role explained that "for many clients cooperating is the best thing for them personally" even though "it makes me sick."[207] One summarized the situation: "It's a really uncomfortable position but . . . a necessary evil."[208]

C. *Statutory Enhancements and Mandatory Minimums*

Like downward departures for substantial assistance, statutory enhancements and mandatory minimums also have a chilling effect on defense attorney advocacy. Federal criminal law is replete with crimes that carry mandatory minimum penalties. Where defendants are convicted of such crimes, judges have no choice but to impose a minimum term of years. These mandatory minimum sentences, often required by statute, essentially shift sentencing discretion from judges to prosecutors because the prosecutor's charging decision determines whether a defendant is exposed to the statutorily required minimum term.[209] The prosecutor can often choose whether to seek indictment for an offense under a statute that requires a minimum sentence or to amend or supersede an indictment to add a statutory minimum.

A key illustration of this practice involves the statutory firearm enhancement under 18 U.S.C. § 924(c). Consider a case in which a defendant participates in a string of three armed bank robberies. If the indictment charges three robberies, the Guideline calculation will account for the firearm use, and each robbery will yield a higher sentence than it would have had the defendant not used a gun. However, the prosecutor can instead choose to indict the defendant with three counts of robbery and three additional counts for the separate offense of brandishing a firearm during and in relation to a crime of violence.[210] If charged in this way, the firearm charge for the first robbery carries a mandatory minimum of seven years that must be served consecutively to the sentence imposed for the robberies. The second and third firearm charges carry a mandatory minimum sentence of twenty-five years each to be served consecutively to the robbery sentence and to one another.[211] The prosecutor can thus choose to indict the defendant with no firearm charge, with one, two, or three firearm charges, or with only firearm and no robbery charges. Most lawyers would agree to stipulate to almost any facts or withdraw any arguments—even strong and meritorious ones—rather than expose their clients to a second or third firearm enhancement carrying what amounts to a life sentence.

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207. Interview A11, *supra* note 85.

208. Interview A13, *supra* note 136.

209. *See* TONRY, *supra* note 17, at 148 (referring to U.S. Sentencing Commission report, *Mandatory Minimum Penalties in the Federal Criminal Justice System*).

210. *See* 18 U.S.C. § 924(c) (2000).

211. *Id.* § 924(c)(1)(C) ("In the case of a second or subsequent conviction under this subsection, the person shall . . . be sentenced to a term of imprisonment not less than 25 years . . . .").

In addition to the charging decisions under § 924(c), lawyers repeatedly raised concerns about the use of enhancements under 21 U.S.C. § 851.[212] The "section 851" enhancement scheme permits prosecutors in drug cases to file notice of prior convictions. The enhancement applied pursuant to this notice can increase a sentence from a ten-year minimum penalty to a twenty-year minimum penalty.[213] As with all charging decisions, the prosecutor has the sole discretion to decide whether to indict for the drug charge only or whether to include the notice of prior convictions in the indictment.[214]

Lawyers strongly criticized the immense leverage that this charging discretion affords to prosecutors.[215] According to some lawyers, prosecutors often applied enhancements that were not based on the severity of the crime or characteristics of the offender but that were, rather, a way to restrict the way a defense attorney dealt with a case or to force the offender to cooperate. According to one respondent, a prosecutor might say, "if you don't plead now, I'm going to modify the charges or enhance the sentence" or "if you file this motion, then we're gonna file an enhancement."[216] At least one lawyer described a scenario in which a prosecutor tried to force his client to provide information against others by threatening to double his sentence through an enhancement.[217] That sort of threat "definitely plays into how you're gonna make your next move," one attorney noted.[218] Lawyers who contemplated contesting a particular fact or legal issue struggled to explain the enhancement dilemma to their clients: "I can't help but explain to my client that, you know, we gotta bear that in mind. If we're going to fight this battle, they've always got[] the ability to file these enhancements. And if . . . you lose, you're in [a] really bad place."[219]

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212. *See* Interview A39, *supra* note 87 (explaining that a drug enhancement leading to a twenty-year mandatory minimum sentence "kicks in" only if the prosecutor files it); Interview with Attorney A15 (June 3, 2003) [hereinafter Interview A15] (describing the punitive nature of mandatory sentences in drug cases); Interview A17, *supra* note 109 (describing being scared of this particular enhancement); Interview A1, *supra* note 89 (explaining the increased use of section 851 enhancements even in guilty plea cases).

213. *See* 21 U.S.C. §§ 841, 851 (2000).

214. *See id.* § 851; *see also* Cynthia K.Y. Lee, *Prosecutorial Discretion, Substantial Assistance and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994) (describing broad prosecutorial discretion in charging decisions); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1472 (1993) (same).

215. Interview A17, *supra* note 109 (stating that Assistant U.S. Attorneys are "given an incredible amount of latitude, and [an] incredible amount of influence with charging decisions. They're taking a lot away from the judges and putting back in the hands of the government"); Interview A11, *supra* note 85 (explaining that the "system relies on prosecutorial discretion" and assumes that prosecutors "exercise that discretion in an appropriate way").

216. Interview A13, *supra* note 136.

217. Interview A9, *supra* note 145.

218. Interview A13, *supra* note 136.

219. Interview A17, *supra* note 109.

Despite the effect that a prosecutor's use of enhancements and mandatory minimums can have on a lawyer's ability to raise certain defenses, court challenges to such uses of statutory enhancements and mandatory minimums are likely to fall on deaf ears. The Supreme Court has upheld the prosecutorial authority to charge offenses under statutes that carry enhancements and mandatory minimums even when less severe statutes exist that equally define the offense.[220] Moreover, the use of mandatory minimums to induce defendant conduct is a well-established practice.[221] It is not surprising that this practice significantly impacts lawyer and defendant bargaining power under the federal sentencing regime, given the system's heavy reliance on enhancements and mandatory minimum sentences.[222]

V
IMPLICATIONS AND CONSEQUENCES: THE STATE OF THE ADVERSARIAL SYSTEM IN FEDERAL COURT

A. The Impact of the Guidelines on Defense Attorney Advocacy

In assessing the respondents' reactions to the Guidelines, it was important to disentangle whatever dislike they might feel for the regime as a policy matter from their beliefs about the Guidelines' impact on advocacy as a procedural matter. At first blush, it was unclear whether the perceptions of the defense lawyers merely reflect their dislike for the Guidelines' harsh treatment of defendants[223] or whether their stories reflect something more—that is, a belief that the Guidelines have brought about not merely a change in sentencing policy but a fundamental and perhaps unintended shift in the adversarial system in federal court.

To be sure, most of the criminal defense lawyers interviewed felt beleaguered by the Guidelines. When the Guidelines took effect in November 1987, one of their principal goals was to increase the severity of sentencing penalties.[224] When they were promulgated, commentators predicted that the

220. United States v. Batchelder, 442 U.S. 114, 124-26 (1979) (holding that a prosecutor's decision to prosecute using a statute with a higher minimum penalty than the maximum penalty of another statute that criminalizes the same offense violates neither due process nor equal protection).

221. *See* Oliss, *supra* note 40, at 1881 (noting that mandatory minimums are useful for inducing cooperation); *see also* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 211-13 (1993) (describing how mandatory minimum sentences coupled with exceptions for cooperation provide inducements for assistance).

222. TONRY, *supra* note 17, at 146 (stating that between 1985 and the mid-1990s, Congress enacted at least twenty mandatory sentencing laws and that by 1991 more than one hundred federal crimes were subject to mandatories).

223. As one lawyer put it: "I really dislike the guidelines and I dislike them more over time. It's not the concept [of] guidelines that makes me dislike them more over time, it's the fact that sentencing[] has been enhanced . . . with mandatory minimums and the new limitations on departure[s]." Interview A37, *supra* note 83.

224. TONRY, *supra* note 17, at 72 (explaining that the Sentencing Commission wanted sentences to become much harsher overall), 78 (noting that the Sentencing Commission took an ideological law-and-order approach in promulgating Guidelines that were intended to increase the severity of federal

Guidelines would triple the federal prison population within a decade.[225] Consequently, it is not surprising that criminal defendants, as well as the attorneys who represent them, feel under siege by the federal sentencing regime. While the lawyers themselves left little doubt that they disliked the severity of the Guideline sentences and the "tough on crime" attitudes that helped spawn them,[226] it soon became evident that their experiences signal perhaps even more important changes in the role of advocacy for federal criminal defense attorneys.

In this Section, I consider the ramifications of the Guidelines system for the adversarial system. The defense lawyers' concerns about the Guidelines' influence on zealous advocacy fall into three categories: the shifting of the burden of proof from the prosecution to the defense, the law's unbalanced treatment of prosecutors and defense lawyers, and the erosion of the attorney-client relationship.

1. The Shifting Burden of Proof

One critical tenet of the American criminal justice system has always been that it is the state's burden to prove every element of the offense beyond a reasonable doubt.[227] As the Supreme Court has discussed, this principle plays a critical role in reducing the risk of faulty convictions and ensuring that the community feels respect for and confidence in the criminal justice system.[228] The Supreme Court has confirmed that, to some degree, the state bears a similar burden of proof in the sentencing context as well.[229]

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sentencing); Stith & Cabranes, *Judging*, *supra* note 38, at 43-44 (describing the Senate's instructions to the Sentencing Commission to change penalties to reflect more accurately the seriousness of crimes).

225. *See, e.g.*, TONRY, *supra* note 17, at 58. Indeed, the increased use of imprisonment as a sanction during the Guidelines era is striking. Before 1987, approximately 50% of defendants were sentenced to probation without any imprisonment. By 1998 that figure was down to 12%. Stith & Cabranes, *Judging*, *supra* note 38, at 62.

226. *See* Interview A1, *supra* note 89 ("[T]here are plenty of enhancements in the guidelines that I think are way to [sic] harsh."); Interview A33, *supra* note 87 (stating that "the guidelines are a disaster for criminal defendants in this country"); Interview A11, *supra* note 85 ("Congress is laboring under this weird philosophy that there are too many [downward] departures."); Interview A15, *supra* note 212 (describing the Guidelines as "too punitive"); Interview A32, *supra* note 112 (describing even the minimum sentences as "absurd"); Interview A35, *supra* note 100 (noting the harshness of federal sentences in comparison to state sentences).

227. The Supreme Court stated in *In re Winship* that the due process clause of the U.S. Constitution requires prosecutors to persuade the judge or jury "beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged." 397 U.S. 358, 364 (1970).

228. *Id.* at 363-64.

229. *See* Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (finding that in federal cases, the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt); *see also* Apprendi v. New Jersey, 530 U.S. 466 (2000) (applying similar principles to state prosecutions).

Although the Supreme Court has not directly held that the state bears the burden of proof with regard to "sentencing factors" like those involved in the Guidelines (that is, those that do not increase the statutory maximum),[230] the Guidelines themselves place the burden of proof for most sentencing enhancements on the prosecution.[231] The government must prove facts relied upon by district courts by a preponderance of the evidence. The burden of proof is also on the government with respect to base offense level and enhancing factors.[232] In general, the government bears the burden of proving any sentence increases and the defense bears the burden of proving any sentence decreases.[233]

However, the allocation of burdens between the prosecution and defense does not necessarily function in practice as it was intended to in theory. Theoretically, in calculating the initial offense level, the prosecutor must establish all the relevant factors, such as the quantity of narcotics sold by a defendant in a drug case,[234] whether a defendant in a robbery case brandished a firearm,[235] or the amount of tax lost to the government in a tax evasion case.[236] In turn, there is in theory no burden on the defense to disprove such facts. A zealous defense attorney may question the evidence presented by the government and make every effort to verify that the government has fully met its burden.

Under the Guidelines system, however, some attempts to challenge or even to question the government's evidence may place the defendant in a worse position in terms of sentencing. These challenges can lead to a higher sentence based on the finding that the defendant has either failed to accept responsibility or has obstructed justice.[237] Once the prosecutor

230. McMillan v. Pennsylvania, 477 U.S. 79, 90 (1986) (distinguishing "sentencing factors" from elements of the offense and finding no *Winship* violation).

231. USSG, *supra* note 9, § 1B1.1.

232. United States v. Hammer, 3 F.3d 266, 268 (8th Cir. 1993) (holding that the government must prove base offense level and sentence enhancements by a preponderance of the evidence); United States v. Howard, 894 F.2d 1085 (9th Cir. 1990) (holding that the government has the burden of proof for any fact that the sentencing court would find necessary to determine base offense level).

233. *See Howard*, 894 F.2d at 1090 (holding that the government bears the burden of proof when it seeks to raise the offense level under the Guidelines, and the defendant bears the burden of proof when the defendant seeks to lower the offense level); United States v. Kirk, 894 F.2d 1162, 1162 (10th Cir. 1990) (holding that the government bears the burden of proof for sentence increases under the Guidelines, while the defendant bears the burden of proof for sentence decreases; "evidence which does not preponderate or is in equipoise simply fails to meet the required burden of proof"); United States v. Urrego-Linares, 879 F.2d 1234, 1239 (4th Cir. 1989) (holding that the government should bear the burden when it "seeks to enhance the sentencing range and potentially increase the ultimate sentence").

234. USSG, *supra* note 9, § 2D1.1 (specifying the offense level based on drug quantity).

235. *Id.* § 2B3.1 (specifying the points to be added for the nature of use of a firearm).

236. *Id.* § 2T1.1 (specifying the offense level based on tax loss).

237. The respondents in the study repeatedly provided examples of how the acceptance of responsibility and obstruction of justice provisions deterred them from making specific arguments challenging the Guideline calculations or the legality of prosecution evidence. *See supra* Parts III.A and III.B. In addition, numerous reported cases document the denial of acceptance based on challenges to offense conduct calculations. *See, e.g.*, United States v. Meacham, 27 F.3d 214, 217-18 (6th Cir. 1994)

alleges that the defendant has not accepted responsibility for her conduct, the burden of proof is then on the defendant to demonstrate that she is entitled to a sentencing reduction under that provision.[238] The clearest way for a defendant to show that she is not needlessly challenging the government or falsely denying offense conduct is to demonstrate that the government's underlying facts or Guideline calculations are incorrect. The affirmative burden this places on the defense is tantamount to burden shifting because the defense now has to disprove allegations regarding the offense. If the defendant simply challenges the government's evidence as inadequate without presenting affirmative proof to the contrary, she places herself at risk of losing her acceptance of responsibility reduction and possibly receiving an obstruction enhancement. As a result, defense lawyers may be reluctant to challenge the government's case unless they can affirmatively prove it incorrect.

This study cannot predict the frequency with which lawyers refrain from challenging government evidence because they cannot meet the burden of disproving the government's case. Although a number of the lawyers described instances in which defendants "lost acceptance" because of arguments made by the attorney,[239] the reality is that more than 90% of criminal defendants who plead guilty receive either a two- or three-point reduction for acceptance of responsibility.[240] This figure is certainly high enough to make it plausible that the need to preserve an acceptance reduction influences attorney conduct. Indeed, it is quite possible that many defendants receive acceptance of responsibility reductions substantially as a result of precautions exercised by their defense lawyers. Such precautions might include a strategy of making motions and arguments only when defense attorneys are confident they will prevail.[241] The danger is that lawyers might forego making meritorious arguments solely because they have little or an unknown likelihood of success.

(affirming the denial of acceptance for the defendant's failure to discuss his role in a drug conspiracy); United States v. Anderson, 15 F.3d 979, 980-81 (10th Cir. 1994) (affirming the denial of acceptance for the defendant's failure to admit possession of a knife); United States v. White, 993 F.2d 147, 150-51 (7th Cir. 1993) (affirming the denial of acceptance for the defendant's denial of relevant conduct).

238. A defendant has the burden to show that he is entitled to a sentencing reduction under the Guidelines for acceptance of responsibility. USSG, *supra* note 9, § 3E1.1; *see* United States v. Nguyen, 339 F.3d 688 (8th Cir. 2003); United States v. Ngo, 132 F.3d 1231, 1233 (8th Cir. 1997).

239. *See, e.g.*, Interview A8, *supra* note 117 (describing a case in which the judge denied acceptance because of the lawyer's suppression motion). *But see* Interview A23, *supra* note 82 ("I've never seen a court deny acceptance because they didn't like a motion someone's lawyer filed. . . . I'm not saying it couldn't happen . . . .").

240. U.S. SENTENCING COMM'N, DATAFILE USSCFY01, tbl.18 (2001) (showing that 62.9% of defendants received a three-level reduction for acceptance of responsibility and 28.4% of defendants received a two-level reduction, leaving 8.8% of the defendants receiving no adjustment for acceptance of responsibility).

241. Interview A16, *supra* note 88 (describing attempts to "filter" the arguments that defendants want to make).

The danger in shifting the burden of proof to the defense in this way is twofold. First, because placing the burden of proof on the government is designed to enhance accuracy as well as fairness, shifting the burden to the defense increases the risk of wrongful convictions and unwarranted elevated sentences. Under such a regime, defendants will base their challenges not on the merits of their claims but on the likelihood of success. This factor, however, is difficult for lawyers to assess accurately when they are presenting novel claims, or when it is early in a case and they have had little time to investigate. Second, burden shifting has societal costs as well. The public's faith in the criminal justice system rests on the belief that the victor in an adversarial process has earned the victory because a capable opponent soundly tested credible evidence of guilt, not because one side pulled its punches.

2. *The Growing Inequity Between Adversaries*

The problem of burden shifting may well be an unintended consequence of the Guidelines system. On the other hand, the broader—and growing—power inequity between prosecutors and defense lawyers is no accident. One refrain repeated by many lawyers during this study involved the overwhelming discretion afforded to prosecutors under the Guidelines system.[242] Although federal prosecutors exercised discretion in many of these areas before the enactment of the Guidelines, they could seldom single-handedly determine the sentence to be imposed by the judge.[243]

Even before the Guidelines were enacted, prosecutorial discretion had a significant effect on plea bargaining or charge bargaining.[244] However, prosecutors have now gone beyond inducing pleas to dictating the particulars of how the defense handles pretrial and postplea issues. The defense is asked to waive hearings, forego challenging evidence the lawyer suspects was illegally obtained, enter pleas before conducting thorough investigations into the charges, cooperate with law enforcement, withdraw objections to sentencing calculations, and waive the right to appeal the ensuing sentence. What is more, judges are unable to moderate perceived abuses as they could in the pre-Guidelines plea bargaining context. "[T]he exercise of broad prosecutorial authority over sentencing within a system that severely limits the sentencing discretion of federal judges means that the power of prosecutors is not subject to the traditional checks and balances that help prevent abuse of that power."[245]

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242. See *supra* notes 180-89, 215-19 and accompanying text. These views have been echoed by others. *See, e.g.*, STITH & CABRANES, FEAR OF JUDGING, *supra* note 16, at 130 ("Prosecutors exercise sentencing discretion under the Guidelines as three critical points: in deciding upon a charge, in entering into plea agreements, and in filing motions for downward departures.").

243. STITH & CABRANES, FEAR OF JUDGING, *supra* note 16, at 131.

244. *Id.*

245. *Id.* at 141 (emphasis omitted).

In addition to judges, the zealous advocacy of opposing attorneys is another check on government overreaching in an adversarial system. The reports of the attorneys interviewed strongly suggest that this check on prosecutorial abuse has been eroded. Attorneys decried their own disempowerment as lawyers under the federal scheme. They described feeling powerless as advocates in the face of tremendously high stakes in which prosecutors "hold [all] the cards."[246] Rather than acting as a zealous advocate protecting the rights of the accused, the job of being a criminal defense lawyer, as one respondent put it, has increasingly been reduced to "professional begging."[247] Other attorneys described themselves as not "feel[ing] like a true advocate"[248] or as "playing a different role" from the traditional one.[249] Many of the lawyers felt that they had been co-opted into the prosecutorial system and that their role was reduced to "helping them make the trains run on time."[250]

3. *The Erosion of the Attorney-Client Relationship*

The Guidelines' negative effect on the relationship between defense attorneys and their clients is further evidence that the Guidelines have diluted the efficacy and altered the role of counsel in federal criminal courts. Criminal defendants expect their lawyers to be able to help them by using their legal expertise to challenge the government's case, make arguments on their behalf, and counsel them about their legal options. Yet, under the Guidelines, defense lawyers often help their clients by affirmatively not doing many of those things and by acting as gatekeepers who determine which legal claims and arguments will ultimately advance the client's position.

In an ideal world, lawyers act as legal experts who can help their clients evaluate the substantive legal merits of a case. Decisions about whether to raise a claim can be based solely on the merits of the claim itself rather than on its collateral effects. Instead of going over the substantive merits of potential claims, federal criminal defense lawyers are often in the position of explaining to their clients that making otherwise promising arguments may be an unwise strategy, given their potential consequences under the Guidelines. One lawyer noted that he spends a lot of time trying to filter out the arguments his clients want him to make.[251] Many clients

246. Interview A11, *supra* note 85.

247. *Id.*; *see also* Interview A10, *supra* note 131 (explaining that "I feel like I have very limited power, as far as negotiations go, due to the approach of this particular district").

248. Interview A13, *supra* note 136.

249. Interview A14, *supra* note 79.

250. Interview A11, *supra* note 85.

251. Interview A16, *supra* note 88; *see also* Interview A6, *supra* note 78 (explaining that making a particular objection might be taking "one step forward only by taking three steps back" if the court denies acceptance of responsibility).

read the Guidelines and application notes and arrive at what they believe to be salient arguments. Lawyers then have to work with clients to help them understand the consequences of making those arguments. Attorneys also attempt to dissuade their clients from sharing their version of the facts with the judge or probation officer.[252] Although it is legally the client's decision, most lawyers strongly recommend that their clients not testify in court.

One lawyer described having to advise his client of the dangers of pursuing a motion to suppress that might require his testimony. He had to explain to the client that what was at stake was more than a win or loss on the motion; the act of making a legal challenge could result in a five-point difference in the defendant's final sentence if the defendant lost the acceptance reduction and was penalized for obstruction. As the lawyer put it, "you sit and talk with them and say, 'It's your word against a couple of cops,' for instance. And it can be a five-point swing. And it translates into a lot of time in jail. And that's unfortunate."[253] Lawyers often have a similar conversation with their clients about the risks of taking the stand. As one put it:

> [I say,] "Look, the only way you can win this case is [if] you . . . testify. This is a case where the jury [will] want to hear your version. But I gotta tell you, if you lose, you get two points extra, which depending on your range, could be anywhere from 12 to 18 months [difference in your sentence]".[254]

Lawyers worry about the message they are sending to a client when they are forced to have such discussions.[255] It may be difficult, for example, to convince the client that her lawyer is not accusing her of lying. In trying to convince the defendant to forego testifying, the lawyer, in the words of one respondent, might have to say something like this: "[Y]ou were there and the cops were there. We know what they're going to say[, a]nd [we know] what the judge is going to believe and if you're not believed, here is what you risk."[256] This, undoubtedly, is little consolation to most defendants.

If the Guidelines sometimes encourage defense lawyers to make decisions that clients should make, they also sometimes result in lawyers deferring to clients on decisions that lawyers are better equipped to make. Generally, although the client has ultimate authority to determine the purposes to be served by legal representation, the lawyer determines the means

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252. *See, e.g.*, Interview A16, *supra* note 88 ("I don't let the client talk to the probation officer about the facts."); Interview A34, *supra* note 133 (explaining that she does not allow her client to allocute to the judge before sentencing).

253. Interview A31, *supra* note 110.

254. Interview A35, *supra* note 100.

255. *Id.*

256. Interview A31, *supra* note 110.

to be employed.[257] According to the Model Rules of Professional Responsibility, the lawyer should assume responsibility for "technical, legal and tactical issues."[258] For example, the client decides whether to go to trial or enter a guilty plea, but the lawyer determines which witnesses to present at trial, what pretrial or trial motions to file, and what legal arguments to make at sentencing.

However, under the Guidelines, many tactical legal decisions that the lawyer would ordinarily make may result in the loss of the acceptance of responsibility reduction or the assessment of an obstruction of justice enhancement. A decision to file a motion to suppress, for example, while the lawyer's responsibility under the Model Rules, may mean likely additional jail time for the client if it does not succeed. As a result, lawyers may feel uncomfortable making such decisions without the client's understanding and consent. One respondent resolved this problem by seeking informed consent from clients on any decision that "[i]s going to deprive them of . . . acceptance of responsibility" or "potentially harm them."[259] While consulting with clients is generally recommended,[260] this process threatens to displace the decisions of the advoeate as a legal expert and obscure the careful distinction the ethics rules draw between the lawyer's role and the client's role. For clients, who may be required to understand complicated issues of legal strategy, this is problematic: after all, a defendant needs an attorney who can take responsibility for the legal aspects of a case.

Such situations harm the attorney-client relationship in another way. Where attorneys feel constrained in their options, clients likely sense their lawyers' feelings of powerlessness. The idea of zealous advocacy seems inconsistent with a lawyer who is constantly "tiptoeing on eggshells."[261] As one lawyer puts it, "it's constantly a concern . . . how we portray our clients in court, what we write about them, what [we] let them write about themselves, whether [we] let them allocute before sentencing or not, which is generally not. It's a huge concern; it's absolutely pervasive in everything that we do."[262] Lawyers describe having little control over the results of their cases.[263] One lawyer insisted that attorneys can still make a difference in federal criminal cases "under the right circumstances."[264] However, such conditions may arise only rarely. According to this attorney, defense

257. *See* MODEL RULES, *supra* note 15, R. 1.2 cmt. 2.

258. *Id.*

259. Interview A13, *supra* note 136.

260. MODEL RULES, *supra* note 15, R. 1.2.

261. Interview A34, *supra* note 133.

262. *Id.*; *see also* Interview A40, *supra* note 86 ("[F]rom the very get-go you have to start weighing, 'Can I, can't I, do I have any wiggle room? . . . What's it going to cost me?'").

263. *See, e.g.*, Interview A25, *supra* note 126 ("In federal criminal law, the control that you have over . . . the end result . . . is not very great because we have the Guidelines and basically everybody gets pigeonholed into certain . . . Guidelines.").

264. *Id.*

lawyers can make a difference "if you get the right judge and the right circumstances, [and] . . . the right probation officer writing the report."[265] Even then, this attorney conceded, "the success rate isn't that great."[266] As the next Section describes, such feelings of powerlessness have profound implications in how both attorneys and clients view the right to counsel.

B. Implications for the Right to Counsel

1. The Declining Role of a Zealous Defense

For the most part, federal criminal courts have escaped the horrific problems of incompetent and overworked counsel that plague state criminal courts.[267] Federal courts routinely appoint attorneys for indigent federal defendants who are highly qualified and well trained. The quality of the lawyers in the federal defense bar is reputed to be excellent.[268] Federal public defenders generally know the intricacies of the Guidelines better than prosecutors and private attorneys.[269] Yet, while the right to counsel in federal court is in many ways alive and well, the nature of the benefits and safeguards that accompany the presence of counsel has changed.

At the time *Gideon v. Wainwright* was decided, discourse on the right to counsel stressed the benefits that the protection and guidance of trained attorneys provide to defendants navigating the criminal justice system. The Supreme Court held that assistance of counsel in criminal proceedings was "fundamental and essential" to obtaining a fair trial.[270] The Court in *Gideon* relied on its earlier reasoning in *Powell v. Alabama* that attorneys have special skills and knowledge that can help even the educated and intelligent layperson to defend herself.[271] With the aid of counsel, an accused could determine if the indictment was defective, apply the rules of evidence, challenge illegal or inadmissible evidence, and defend his innocence.[272] As noted by the *Powell* Court, a criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him."[273]

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265. *Id.*

266. *Id.*

267. For a discussion of the crisis in indigent defense services, see Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 48-49 (1995).

268. *See* Inga L. Parsons, *"Making it a Federal Case": A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837, 839 n.7 (citing COMM. TO REVIEW THE CRIMINAL JUSTICE ACT, REPORT OF THE COMM. TO REVIEW THE CRIMINAL JUSTICE ACT (1993), *reprinted in* 52 Crim. L. Rep. (BNA) 2265, 2285, 2294 (1993), which found that the overall level of representation provided by federal defender organizations—including federal public defenders and community defense organizations—was "excellent" and could serve as a model for other states and nations).

269. *See* STITH & CABRANES, FEAR OF JUDGING, *supra* note 16, at 128 (citing a study by Nagel and Schulhofer).

270. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

271. Powell v. Alabama, 287 U.S. 45, 69 (1932).

272. *Id.*

273. *Id.*

In addition to helping individual defendants, defense lawyers play a critical structural role in our adversarial system. The failure to contest the government's evidence does not only harm the individual defendants who might be punished for conduct they did not commit or who receive higher sentences than their actions justify. The failure to raise certain claims also harms society, by calling into question the integrity of the criminal justice process. The criminal justice process involves a complicated system of checks and balances of which the defendant's attorney is a vital part. When a defense lawyer feels constrained from using strategies that might increase her client's sentence, other parties are more likely to engage in corruption or abuse.

Criminal lawyers are obligated to pursue zealously the interests of their clients.[274] Indeed, forceful advocacy on behalf of clients has traditionally been viewed as coextensive with the defense lawyer's duty to promote justice and deter abuses in the criminal justice system. A lawyer is understood to serve the judicial system best when she represents her client zealously; zeal is critical in making the system truly adversarial.[275]

Unfortunately, in criminal courts today the hands of defense counsel are often tied. The Guidelines have fostered a regime under which a zealous lawyer can be as harmful to a defendant's case as an underzealous one. Consider the telling account of one attorney:

> I think that when they [decided] *Gideon* they [were] thinking, OK, you've got a constitutional right to have a lawyer defend you, and defending you meant fighting a case and making the government prove its case beyond a reasonable doubt, challenging the evidence, putting the client on the stand, testifying that the cops said things or did things that influenced the evidence in the case. And now you have, at least federally, a sentencing structure that if you do those things and you lose, you increase your client's sentence, sometimes drastically. So I can't imagine that the *Gideon* court would

274. "Zealous advocacy requires counsel . . . to act in a manner consistent with the best interests of the client . . . ." *In re* Tutu Wells Contamination Litig., 162 F.R.D. 46, 52 (D.V.I. 1995), *clarified by* 162 F.R.D. 91 (D.V.I. 1995); *see also* MODEL RULES, *supra* note 15, R. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); MODEL CODE, *supra* note 15, at DR 7-101 (stating that a lawyer "shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules) (citation omitted), Canon 7 ("A lawyer should represent a client zealously within the bounds of the law.").

275. MONROE FREEDMAN, UNDERSTANDING LAWYERS ETHICS 13-42 (1990) ("An essential function of the adversary system . . . is to maintain a free society in whieh individual rights are central. In that sense, the right to counsel is the most pervasive of rights because it affects the client's ability to assert all other rights.") (citation omitted); Michael E. Tigar, *Defending*, 74 TEX. L. REV. 101, 108-10 (1995) (discussing the importance of defense lawyers in the criminal justice system); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1314-15 (1995).

> envision how we practice defense now in the federal court system. It's certainly not what I imagined practicing when I got in here.[276]

For this attorney, and others like him who started practicing law before the onset of the Federal Sentencing Guidelines, the practice of law as a criminal defense attorney has changed in a way that few could have imagined. The common perception of the defense attorney perpetuated by the media, the legal academy, and the bar is one of the gladiator or zealous advocate, rather than a consultant or tour guide for navigating the intricacies of the system.[277] Lawyers who have spent most or all of their careers practicing under the Guidelines system reported a disconnect between their actual roles and the traditional roles of defense attorneys.[278] Some respondents felt that the Guidelines discourage the aggressive advocacy they expected to encounter when entering the profession. According to one lawycr:

> [I]f you fight a case, you put a client on the stand, the client is not believed, you've got obstruction. The client then wants to plead guilty potentially because new evidence isn't suppressed[. W]ell, if they have . . . found "obstruction of justice" then they can't get their points off for accepting responsibility, unless you've got an extraordinary case, which the court of appeals in this jurisdiction [has] generally limited to cases involving cooperation after they've committed the obstructions. Right there . . . the guidelines and the decisions by the appellate courts . . . and the Supreme Court have dramatically chilled the aggressiveness and the zealousness . . . of how you practice criminal defense in the federal system.[279]

Stories reported by participants in my study provide concrete examples of the harms that can result from defense lawyers' diminished ability to serve as advocates. One lawyer reported that the effect of thc Guidelines made it almost impossible for him to advocate for a client whom he believed had encountered police brutality.[280] This lawyer's client told him that, at the time of his arrest, he had been questioned by a federal law enforcement agent who sought his cooperation against a third party.[281] When

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276. Interview A33, *supra* note 87.

277. *See* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 40 (1989) (arguing that the image of the lawyer as loyal advocate for the beleaguered client is perpetuated by the bar, media, in literature, and common lore) (citations omitted); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 672 (1978) (arguing that the media reinforces the public view of lawyers as zealous advocates); *cf.* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 934 (2000) (arguing that criminal defense lawyers must represent even the most despicable cases with "utmost devotion and zeal").

278. *See, e.g.*, Interview A40, *supra* note 86 ("The Guidelines have incredible impact . . . and now they've been around so long, it, it starts [to] fade in your memory what it use [sic] to be like.").

279. Interview A33, *supra* note 87.

280. Interview A39, *supra* note 87.

281. *Id.*

the defendant refused to answer, the agent hit the defendant in the face several times. The lawyer had difficulty deciding whether to raise the issue of police brutality and perhaps seek a downward departure based on "government misconduct and abus[e]" of the defendant.[282] The lawyer was concerned that if he raised the issue and the agent denied it, as he likely would, the defendant might "get obstruction" or have his "acceptance of responsibility [reduction] taken away."[283]

As it happened, the prosecutor told the defense lawyer that she did not believe that the defendant had been injured from blows by the agent.[284] At the time of the interview, the attorney was still torn about how to proceed with this case because he believed that the client was telling the truth but realized that the chances of getting a departure were "practically nil" on that basis.[285] Although he doubted that raising the issue would help the client, the lawyer felt "outraged" by the conduct of the agent and wanted to bring it to light.[286]

A second example involves the many lawyers who described their general reluctance to file motions to suppress evidence, even when they believed that the evidence was illegally obtained or that a hearing was needed to determine whether the police acted illegally.[287] Possible sentencing ramifications under the Guidelines deter lawyers from filing such motions. Compounding the problem is courts' decreasing receptiveness to Fourth Amendment claims: in weighing the costs and benefits of filing motions, lawyers are well aware that courts are increasingly reluctant to grant motions to suppress. The combination of these pressures, as one lawyer noted, means that "the Fourth Amendment, which used to be a big place to . . . advocate for a client . . . when police had overstepped their bounds . . . just doesn't exist anymore."[288]

Under the Guidelines regime, lawyers are discovering that there can be a significant downside, and sometimes little upside, to aggressive litigation. The downside—a higher sentence for the defendant—is made all too clear to practicing attorneys through provisions such as acceptance of responsibility and obstruction of justice adjustments, sentence enhancements, and the limitations of obtaining sentencing departures. As one respondent noted, "The reality is the sentencing guidelines provide such a narrow capacity for defense lawyers, no matter how vigorously they challenge

282. *Id.*

283. *Id.*

284. *Id.* (stating that although the defendant had obviously suffered some injury, the prosecutor attributed it to him being "dragged out of the car during the time of arrest").

285. *Id.*

286. *Id.*

287. *See supra* notes 98-103, 153-59 and accompanying text.

288. Interview A40, *supra* note 86.

things, to have an impact."[289] This reduced impact of defense lawyers has consequences not just for individual defendants, but for society as a whole.

A free society has a vital interest in maintaining a strong criminal defense bar if it is to protect itself against the possibility of abuse by the state, such as police brutality and illegal searches. Aggressive advocacy by defense lawyers on behalf of individual rights is a critical component of maintaining a free society.[290] What started as an attempt to reform substantive sentencing practices and policies has been a disaster for procedural safeguards. In short, the Guidelines system discourages defense lawyers from performing their traditional roles in safeguarding the rights of their clients and in helping to ensure a criminal justice system free of abuse and corruption.

2. *Redefining the Role of Counsel*

To be sure, the presence of a good lawyer is still critically important in federal court.[291] But a lawyer's assistance is important now for different reasons. As sentencing becomes more technical, the federal defense lawyer must compensate by becoming more of a technician, more of a Guidelines expert. Because sentencing outcomes rest on the lawyer's ability to understand the intricate calculus of the Guidelines, "Guidelines competence" is vitally important. The Guidelines are replete with legal loopholes and minefields that require the guiding hand of counsel. The more complicated the sentencing scheme, the more defendants need expert legal guidance. The advice of a knowledgeable attorney "makes a difference to both [defendants] and maybe their families and, in how they want to [proceed] . . . with their options [and] . . . in negotiations with the government."[292]

Attorneys also emphasized the importance of creativity in seeking out benefits for their clients.[293] Many of the lawyers were optimistic about the meaningful role that attorneys can continue to play.[294] One described the

289. Interview A23, *supra* note 82.

290. *See* Luban, *supra* note 67, at 1749 ("[I]f the state is not handicapped or restrained ex ante, our political and civil liberties are jeopardized. Power-holders are inevitably tempted to abuse the criminal justice system to persecute political opponents, and overzealous police will trample civil liberties in the name of crime prevention and order.") (quoting DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 60 (1988)).

291. One of the few scholars to examine the effect of defense counsel on sentencing outcomes considers the critical difference that competent representation can have on sentencing under the Guidelines. *See* Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435 (2002).

292. Interview A17, *supra* note 109.

293. Interview A5, *supra* note 79 ("[W]ith the Guidelines you try to come up with creative ways to seek downward departure[s].").

294. *E.g.*, Interview A17, *supra* note 109 ("I still see a very . . . important and very meaningful role for defense lawyers.").

Guidelines as a hindrance but enthusiastically insisted that "you are only limited by your imagination as to how you can help the client."[295] Whereas attorneys were once able to rely to some degree on pulling "the heart strings" in presenting the mitigating facts about their clients' situations to the sentencing judge,[296] it is no longer a matter of "making an excellent sentencing pitch."[297] Lawyers have to "dig," to "look for the legal loopholes to the guidelines and pursue them mightily" in order to help their clients.[298] Good lawyers "need to know the guidelines . . . how to work the guidelines . . . [and] the cases on the guidelines" to make a difference.[299]

Other lawyers characterize counseling and educating defendants as a central focus of their jobs. They may not be able to exert as much influence as they would like over the results of their cases, but they play a critical role in helping their clients "understand the criminal justice system"[300] and choose among difficult options.[301] Defense lawyers act as the buffer between the defendant and the rest of the system. They try to help their clients through the complex maze of a criminal case, the facts, and the consequences of all the possible options they might have.[302]

Some attorneys said they wanted to give their clients the psychological benefit of knowing that someone was fighting on their behalf even if the client loses the issue in the end. "[S]ometimes, the best defense is to giv[e] them the fight they want" regardless of the eventual disposition of the case.[303] Respondents noted that, for many defendants, "no one's ever fought for them in their li[ves]" and they need "to see that someone fought for them."[304] Leaving defendants with a feeling that someone respected them enough to fight for them may also help reduce the number of post-conviction challenges on habeas and alleviate the general feeling of discontent among criminal defendants.[305]

Finally, a large portion of the attorneys characterized their roles as defense lawyers in terms suggestive of a social worker's model. A number

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295. Interview A5, *supra* note 79.

296. Interview A38, *supra* note 199.

297. Interview with Attorney A3 (Feb. 24, 2003).

298. *Id.*

299. Interview A11, *supra* note 85.

300. Interview Questionnaire A26 [hereinafter Questionnaire A26] (In addition to the interviews, each lawyer filled out a one-page questionnaire. All questionnaires are on file with the author.).

301. *See, e.g.*, Interview Questionnaire A21 (explaining a goal of the job as "provid[ing] comprehensive and full advice to clients letting them know all their options"); Questionnaire A26, *supra* note 300 (explaining some goals of the job as helping clients to understand "the options they have" and to "help them make informed choices"); Interview A12, *supra* note 85 (explaining that she tries to "counsel them about appropriate decisions in their case").

302. *See* Interview A16, *supra* note 88; *see also* Interview A13, *supra* note 136 (discussing educating clients about "the ramifications of our maneuver in light of the prosecutor's threat").

303. Interview A13, *supra* note 136.

304. Interview A11, *supra* note 85.

305. *Id.*

of defense lawyers seek to "help people"[306] or "provide . . . help socially, to the clients."[307] They view being prosecuted as a traumatic experience for defendants, whether they are guilty or innocent. Accordingly, they try to "offer support and understanding throughout the legal process"[308] or "minimize the impact of interaction with the system."[309] One lawyer explained that she sought "to counsel clients at a time in their lives when they need help but cannot think clearly."[310] At times, the counseling aspect of the job "extends beyond legal counseling," explained one lawyer who was in the process of helping a client find a guardian for her children in anticipation of being incarcerated.[311] Other lawyers found that their client's legal predicament was an occasion on which to counsel them about drugs, gambling, or other problems. These lawyers try to "assist the client in accessing any community resources" that might effect lasting change in their lives.[312]

The defense lawyer's roles as technician, counselor, and social worker are important. As the lawyers recounted, defense attorneys continue to engage passionately in the profession. Nevertheless, in order to do so, they have had to redefine what zealous advocacy is. One lawyer explained: "[T]o me what you are still doing is being a vigorous advocate for your client. . . . [H]ow you go about carrying out a vigorous act of advocacy is different" in a world where your actions risk increasing your client's sentence.[313] In short, lawyers have not ceased to be zealous advocates but rather have had to redefine their goals and strategies and take on different roles. However, they ought to take on these roles in addition to their primary roles as adversaries and advocates for justice in the criminal justice system, both generally and in individual cases. The diminution of the adversarial role is one that ought to give pause to legal scholars, practitioners, and, of course, defendants.

CONCLUSION

The United States has used an adversarial system of justice since the American Revolution,[314] and that system has served us well. The adversarial system is predicated on the notion that "the sharp class of proofs presented by adversaries" is the most effective means of arriving at the

306. Interview Questionnaire A22; *see also* Interview Questionnaire A5 (explaining a goal of the job as doing "whatever I can to help my clients"); Interview Questionnaire A9 (noting that a goal of criminal defense work is to "help others").

307. Interview Questionnaire A31.

308. Interview Questionnaire A3 [hereinafter Questionnaire A3].

309. Interview Questionnaire A40.

310. Interview Questionnaire A12.

311. Interview A12, *supra* note 85.

312. Questionnaire A3, *supra* note 308.

313. Interview A2, *supra* note 116.

314. Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 713 (1983).

truth.[315] The adversarial system also helps to preserve individual dignity by allowing individuals the freedom to present their case to the court.[316] In crippling the role of the defense attorney, the Federal Sentencing Guidelines have robbed the federal criminal justice system of both these strengths. In different voices and with different accounts, the respondents in this study resoundingly attested to the fact that "[b]efore the guidelines you really got to be an advocate."[317] But the story of advocacy has changed in the post-Guidelines regime. Now defense lawyers find themselves at the mercy of the prosecutors, tiptoeing around them to avoid receiving higher sentences for their clients. They have also seen a transition from zealous advocacy to one that emphasizes creativity and technical expertise. Despite these dramatic changes, defense attorneys demonstrate diligence and compassion and continue to represent their clients under the aegis of Sixth Amendment jurisprudence. Unfortunately, because of the Guidelines, the right to counsel no longer invokes the full protection it has traditionally promised.

315. *Id.* at 714.

316. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversarial System*, 64 IND. L.J. 301, 317-18 (1989).

317. Interview A38, *supra* note 199.