University of Miami Law School
University of Miami School of Law Institutional Repository

Articles

Faculty and Deans

12-1993

Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines

David Yellen
University of Miami School of Law, dny10@miami.edu

Follow this and additional works at: https://repository.law.miami.edu/fac_articles

Part of the Constitutional Law Commons, Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation
David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 *Minn. L. Rev.* 403 (1993).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines

David Yellen*

I. INTRODUCTION

One of the most remarkable and controversial aspects of the Federal Sentencing Guidelines ("Guidelines") is that the length of a defendant's sentence may be based, not only upon the crimes for which the defendant has been convicted, but also upon alleged crimes related to the offense of conviction, for which the defendant was not convicted. For example, a defendant convicted of embezzling money may be sentenced as if he had been convicted of several additional alleged embezzlements, notwithstanding the government's failure to bring such additional charges, the dismissal of the charges as part of a plea agreement, or even the defendant's acquittal of the additional charges.

The United States Sentencing Commission ("Sentencing Commission") adopted this "alleged related-offense" sentencing as part of its attempt to resolve a central question posed in forming any comprehensive sentencing system: what range of information should be considered in fashioning an appropriate sentence? At one extreme, a sentencing regime might impose identical sentences on all offenders convicted of violating the same statute. At the other extreme, judges might be authorized or required to consider all of the available information about an offender's life, as well as evidence concerning the offense of conviction. This dichotomy is commonly referred to, in terms that conceal as much as they reveal, as the choice between charge-offense and real-offense sentencing.[1]

---

* Assistant Professor of Law, Hofstra University. B.A. 1979, Princeton University; J.D. 1984, Cornell University. I am grateful to Robin Charlow, Larry Kessler, Carl Mayer, Marc Miller and Michael Tonry for their comments.

1. *See* U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(a) (1993) [hereinafter U.S.S.G.].

Rather than binary alternatives, charge- and real-offense sentencing represent the end points of a continuum of possible sentencing information. Real-offense and charge-offense sentencing are like a Scylla and Charybdis through which drafters of sentencing guidelines must attempt to navigate. Real-offense sentencing may be overly complex, administratively burdensome, and manifestly unfair in at least some of its applications. Charge-offense sentencing may fail to adequately distinguish offenders based on their culpability and may shift sentencing discretion to the prosecutor. Sentencing policy makers, in selecting a point along this continuum, must weigh the relevance to the sentencing decision of various categories of information about the offense and the offender, and consider the fairness of basing punishment on facts beyond those established by a conviction. In so doing, policy makers must bear in mind the potential conflict between their goals and the realities of the criminal justice system, particularly plea bargaining practices. The choice between charge- and real-offense sentencing thus has both practical and philosophical implications for any attempt to create a more just and effective sentencing system.

The members of the Sentencing Commission[2] regarded the election between charge-offense and real-offense oriented approaches as a cardinal assignment when they set out to draft the Guidelines in the mid-1980s.[3] In what members of the Sentencing Commission have called a "key compromise"[4] that formed the "cornerstone"[5] of the Guidelines, the Sentencing Commission ultimately settled on an ambitious and innovative approach, combining elements of both charge- and real-offense sentencing.

This Article examines the Guidelines' approach to real-offense sentencing, particularly its employment of alleged related-offense sentencing. There has never before been an opportunity to investigate a functioning real-offense sentencing system. The Sentencing Commission's decision to employ a strong version of mandatory real-offense sentencing, particularly its inclusion of alleged related-offense sentencing, is unprecedented in the his-

2. *See* 28 U.S.C. §§ 991-998 (1988).

3. U.S.S.G., *supra* note 1, ch.1, pt. A(4)(a).

4. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

5. William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

tory of American sentencing systems.[6] Although at least some real-offense sentencing practices have a long history of judicial acceptance, prior to the Guidelines they were generally hidden, because a judge's decision as to the scope of information to be included in the sentencing process was discretionary and often unexplained.[7] For the first time, six years after the introduction of the Guidelines, an assessment of real-offense sentencing can draw upon the actual experience of creating and implementing such a system.

The conclusions of this Article can be summarized briefly. The Sentencing Commission's decision to require alleged related-offense sentencing was ill-conceived and poorly executed, and has contributed to a system plagued by illogic and injustice. The Guidelines fail to reflect a sound rationale for any use of alleged related-offense sentencing, much less for the particular manner in which it is used. The Sentencing Commission also failed to foresee that plea bargaining practices would largely undermine the imagined benefits of this far-reaching form of real-offense sentencing. Although the tension between charge- and real-offense sentencing is real, alleged related-offense sentencing has been revealed as an illusory remedy.

Part II of this Article defines and contrasts charge- and real-offense sentencing and discusses the significance of each approach. After developing a working definition of charge- and real-offense sentencing, this framework is then applied to the pre-Guidelines federal sentencing system, in order to describe the extent to which it was charge- or real-offense based. Finally

6. Traditional sentencing systems based on judicial discretion have real-offense aspects, but they are not mandatory. *See infra* part II.C. None of the state sentencing guidelines systems adopted prior to the federal guidelines incorporated mandatory real-offense sentencing. *See* Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENTENCING REP. 355, 356-57 (1992) [hereinafter Tonry, *Seven Easy Steps*]; *see also infra* notes 129, 203, 217 & 229 (discussing state guidelines' approach to real-offense sentencing).

In 1978 the Uniform Law Commissioners adopted a Model Sentencing and Corrections Act calling for comprehensive real-offense sentencing, but no state adopted that proposal. *See* MODEL SENTENCING AND CORRECTIONS ACT, 10 U.L.A. Sentencing Act Special Pamphlet (1985) [hereinafter MODEL ACT]. For a critique of this proposal, see Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550 (1981) [hereinafter Tonry, *Real Offense*]. A real-offense model has been applied to parole decisions. In the 1970's, the United States Parole Commission developed its own guidelines to govern release decisions, and those guidelines were in large part real-offense oriented. *See* 28 C.F.R. § 2.19 (1980).

7. *See infra* part II.C.

this section considers the important implications plea bargaining has on the choice between charge- and real-offense guidelines regimes.

Part III describes the Sentencing Commission's compromise between charge- and real-offense sentencing. This section goes on to identify those aspects of the Guidelines that are charge-offense oriented and those that are more real-offense in nature.

Part IV considers in more detail the Guidelines' version of alleged related-offense sentencing. Initially, this section illustrates the dramatic impact this approach has on many sentences. This impact varies greatly among categories of offenses and is marked by inconsistency and apparent anomalies. Next, this section scrutinizes the Sentencing Commission's rationale for alleged related-offense sentencing. The Sentencing Commission's explanation for incorporating alleged related-offense sentencing at all, and for then treating different categories of offenses dramatically differently, is surprisingly superficial and opaque. This section considers alternative rationales and finds them similarly unconvincing, leading to the conclusion that there is no sound rationale for alleged related-offense sentencing. Finally, this section discusses how, even when taken on its own terms, the Guidelines' version of alleged related-offense sentencing does not achieve the Sentencing Commission's goals.

Part V considers possible reforms of the Guidelines' current approach. This section concludes by suggesting a framework for future sentencing commissions and legislatures to apply in addressing real-offense sentencing.

II. WHAT ARE CHARGE- AND REAL-OFFENSE SENTENCING AND WHY DOES THE CHOICE BETWEEN THEM MATTER?

A. Defining Charge- and Real-Offense Sentencing

Charge-offense sentencing is the simpler of the two concepts. It refers to a court grounding its sentencing decisions on the offense of conviction.[8] In an important sense, all sentencing is charge-based because the statutory maximum applicable to the defendant's offense of conviction establishes the outer limits

8. As this definition illustrates, *charge*-offense is something of a misnomer: *conviction*-offense sentencing is a more accurate description. Nonetheless, charge-offense sentencing will be used throughout this Article, because the Sentencing Commission uses that terminology. *See supra* note 1 and accompanying text.

of an allowable sentence.[9] Under a pure charge-offense system, two defendants convicted of violating the same statute would receive the same sentence, without regard to any aggravating or mitigating factors.

Charge-offense sentencing need not appear in such a pure form. A modified charge-offense system might take into account some factors other than the offense of conviction, such as the defendant's criminal record.[10] Similarly, a sentencing decision might be constrained, but not completely determined, by the offense of conviction. For example, mandatory minimum sentencing provisions, such as those now common in federal narcotics law, are charge-oriented because they mandate a minimum sentence for defendants convicted of violating certain statutes.[11] These provisions do not represent pure charge-offense sentencing because the judge can impose a sentence above the mandatory minimum term up to the statutory maximum.[12] Any sentencing rule requiring a particular decision or limiting the

---

9. *See, e.g.*, United States v. Valente, 961 F.2d 133, 134 (9th Cir. 1992) (holding that "when a statute requires a different sentence than that set by the Sentencing Guidelines, the statute controls"); United States v. Rodriguez, 938 F.2d 319, 320 (1st Cir. 1991); United States v. Larotonda, 927 F.2d 697, 698 (2d Cir. 1991); *see also* U.S.S.G., *supra* note 1, § 5G1.1 (providing that notwithstanding the applicable guideline range, the sentence imposed may be no greater than that authorized by statute of conviction).

10. Minnesota's sentencing guidelines, which are essentially charge oriented, take into account the defendant's criminal history, which, as in the Federal Guidelines, makes up the horizontal axis of the sentencing grid. *See* MINN. SENTENCING COMM'N, MINN. SENTENCING GUIDELINES § IV (1992) (Sentencing Guidelines Grid). For a discussion of sentencing guidelines grids, see Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587 (1992).

11. *See, e.g.*, U.S. SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) (criticizing the proliferation of mandatory minimum penalties and noting the tension between such penalties and sentencing guidelines); Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission's "Mandatory Guidelines"*, 4 FED. SENTENCING REP. 129 (1991) (noting the similarities between the Federal Sentencing Guidelines and mandatory minimum statutes).

12. In addition, the judge can impose a sentence below the mandatory minimum only if the government files a motion indicating that the defendant has provided "substantial assistance in the investigation or prosecution of another person." 18 U.S.C. § 3553(e) (1988). The Guidelines contain a similar provision, authorizing a departure from the applicable guideline range based on the government's substantial assistance motion. U.S.S.G., *supra* note 2, § 5K1.1. This guideline has been controversial. *See, e.g.*, Jonathan D. Lupkin, Note, *5K1.1 and Substantial Assistance Departure: The Illusory Carrot of the Federal Sentencing Guidelines*, 91 COLUM. L. REV. 1519 (1991) (noting that the "[u]pon motion of the government" clause has been interpreted as both a mechanical provision and an advisory clause).

sentencer's options based on the offense of conviction is a "charge-offense element." "Charge-offense sentencing" refers to any sentencing system that principally relies on charge-offense elements.

Real-offense sentencing is a more elusive concept, without widespread agreement on its meaning.[13] The phrase itself is something of a misnomer, suggesting simply an attempt to discover the true nature of the offense committed by the defendant.[14] A broader definition is appropriate, however, because the concerns raised by real-offense sentencing relate to a judge's reliance on any fact not necessary for conviction. Therefore, for purposes of this Article, real-offense sentencing is the antithesis of charge-offense sentencing. A "pure" real-offense system would be one that considered the entirety of the defendant's life, an almost limitless undertaking.[15] While the statute of conviction determines or constrains a charge-offense element, a "real-offense element" is any sentencing factor not included in the definition of the offense of conviction and either established at trial or admitted by the defendant as part of a guilty plea. This Article uses the phrase "real-offense sentencing" to refer to any system incorporating real-offense elements to a significant extent.

With this general definition in place, one can identify the wide variety of real-offense elements and group them into mean-

---

Mandatory minimum statutes may deviate from charge-offense sentencing in other ways as well, such as by having facts necessary to their applicability determined at sentencing, rather than as elements of the offense. *See infra* note 17.

13. The Guidelines refer to a real-offense system as one in which the sentence is based "upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted." U.S.S.G., *supra* note 1, § 1A4.a; *see also* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 526 n.15 (1992) (noting different definitions of real-offense).

14. Few would advocate sentencing the defendant for something other than his or her "real" offense. The phrase "real offense sentencing" suggests an aura of inevitability and unquestionable propriety, thereby masking the debatable assumptions underlying the practice of looking beyond the offense of conviction in determining the sentence. For a discussion of the way in which the use of language can affect and limit critical analysis of phenomena, see HERBERT MARCUSE, ONE-DIMENSIONAL MAN 84 -120 (1964).

15. *See* L. WILKINS ET AL., SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION 15 (1978) ("Since human beings are capable of a virtually infinite variety of behaviors, the amount of information available about such behavior is also nearly infinite."); *cf.* 18 U.S.C. § 3661 (1988) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

ingful categories. A helpful starting point is to recognize that virtually all relevant sentencing information either pertains to the offense or to the offender. Although this is by no means the only possible analytical framework,[16] and does not account for all possible sentencing information,[17] it will facilitate understanding the Sentencing Commission's approach and assessing the merits of taking into consideration any particular real-offense element at sentencing.

Offense information enables the sentencing judge to make a more complete assessment of the case by looking beyond the mere elements of the offense for which the defendant was convicted. The general type of such information, *offense characteristics*, are aggravating or mitigating factors concerning the offense of conviction. Offense characteristics can be either *criminal* or *noncriminal* in nature, depending upon whether they constitute separate criminal offenses.

Noncriminal offense characteristics do not constitute separate offenses. For example, in a fraud case the sentence might be affected by the amount of the fraud. A typical fraud statute does not make the amount of gain or loss an element of the offense, nor does a large fraud expose the offender to more charges or a harsher statutory maximum penalty than does a small fraud.[18] Another example of a noncriminal offense characteristic a court might consider is the role the defendant played in the offense.

Criminal offense characteristics, in contrast, are facts concerning the offense of conviction that could result in a prosecution for a separate criminal offense.[19] If a bank robber uses a gun and injures a teller, these facts can be seen as aggravating factors to the offense of conviction (robbery), but they may also expose the defendant to prosecution for additional offenses (assault, weapons possession).[20]

---

16. For a somewhat different analytical structure, see Reitz, *supra* note 13, at 527, 535.

17. A sentencer interested in maximizing general deterrence might, for example, take into account an increasing occurrence rate for the type of crime committed by the defendant. This information concerns neither the offender, nor the manner in which the offense was committed.

18. *See, e.g.*, 18 U.S.C. §§ 1341-1344 (1988).

19. Michael Tonry and John Coffee have referred to these as "legally recognized" facts. Michael Tonry & John C. Coffee, Jr., *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms, in* THE SENTENCING COMMISSION AND ITS GUIDELINES 142, 155 (1987).

20. The principal federal drug mandatory minimum statute, § 841(b) of Title 21, incorporates offense characteristic sentencing by basing the applicable

One could also extend the concept of offense characteristics to include the defendant's acts in preparation for the offense of conviction, or in its immediate aftermath, that manifest the seriousness of the offense. For example, a judge or sentencing commission might view as aggravating factors the defendant's extensive planning activity prior to the offense, the defendant's theft of a car to aid in a robbery, or the defendant's taking of a hostage or driving recklessly while escaping from the offense. These factors, like all offense characteristics, can be either criminal or noncriminal in nature.

Another type of offense information, which this Article refers to as "alleged more-serious-offense" information, might be used by a court to sentence defendants based upon a more serious offense that the court believes the defendant actually committed.[21] For example, a judge might believe that a defendant who pleaded guilty to, or was convicted of, simple possession of narcotics actually was guilty of possession with the intent to distribute, and sentence the defendant on that basis. The defendant may have been acquitted of that more serious offense,[22] it

mandatory term on the drug quantity involved in the offense, an amount that courts have held is not an element of the offense, but a fact to be determined at sentencing. *See* 21 U.S.C. § 841(b) (1988); *see, e.g.,* United States v. Hodges, 935 F.2d 766, 769 (6th Cir. 1991) *cert. denied,* 112 S.Ct. 251 (1991) *and* 112 S.Ct. 317 (1991); United States v. McNeese, 901 F.2d 585 (7th Cir. 1990); United States v. Wood, 834 F.2d 1382 (8th Cir. 1987); *see also* Stephen J. Schulhofer, *Rethinking Mandatory Minimums,* 28 WAKE FOREST L. REV. 199, 205 (1993) ("To date, the courts have uniformly held that the drug quantities specified in section 841(b) are not elements of the offense but solely sentencing factors to be considered by the judge.").

21. The meaning of a "more-serious" offense is not self-evident. It might mean an offense with a higher statutory maximum, an offense for which the applicable guideline range is more serious, or simply an offense which the judge believes calls for a harsher sentence than the offense of conviction.

22. Despite the overtones of double jeopardy, most courts have sanctioned the consideration at sentencing of alleged conduct for which the defendant has been acquitted. This is because an "[a]cquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against [a] defendant." United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972). In addition, the government may still prove the alleged crime by the lower preponderance of the evidence standard generally applicable at sentencing. United States v. Lee, 818 F.2d 1052, 1057 (2d Cir.), *cert. denied,* 484 U.S. 956 (1987); *see also* Reitz, *supra* note 13, at 531 n.49 (citing and discussing such cases). *But see,* United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1991) (arguing that "we would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted"); Reitz, *supra* note 13, at 533 n.63 (noting that several state courts refuse to allow acquitted conduct to be considered).

may never have been charged, or the more serious charge may have been dropped as part of a plea bargain.

There is a wide spectrum of *offender information* that might be relevant to sentencing. Sentencing courts have traditionally considered a variety of *offender characteristics* concerning the defendant's background, such as the defendant's age, employment history, drug or alcohol use, and family or community ties.[23] A court could also consider the defendant's prior record of criminal convictions[24] and alleged prior criminal conduct not leading to convictions.

In addition, a court might be interested in the defendant's conduct subsequent to the offense of conviction. The defendant may have attempted to avoid detection or responsibility for the offense by, for example, obstructing the investigation or committing perjury at trial. The defendant's contrition or willingness to plead guilty also traditionally have had a significant impact on the sentence.[25] This type of behavior is best labelled offender, rather than offense, information. This is because if such information is relevant to sentencing,[26] it is not because it reveals anything about the offense of conviction, but rather because it sheds light on the defendant's character or culpability.

Finally we come to that category of information referred to herein as *alleged related-offense* sentencing. In addition to the offense of conviction, a judge might consider offenses that the defendant allegedly committed which are related in some way to the offense of conviction, but for which the defendant was not convicted. A defendant convicted of one robbery or drug sale might be sentenced based on several other contemporaneous robberies or drug sales which the court believes the defendant to have committed. Similar to alleged more-serious-offenses, the defendant may not have been charged with the additional offenses, charges may have been dropped as part of a plea bargain, or the defendant may have been acquitted[27] of such charges.

Some might argue that alleged related-offenses should be regarded as a species of offense, not offender, information. It is more useful and accurate, however, to classify an alleged re-

---

23. *See, e.g.*, WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 102-08 (1988).

24. This is the one real-offense category that is based on facts that have been proved in a criminal trial or that the defendant has admitted as part of a guilty plea.

25. *See* WHEELER ET AL., *supra* note 23, at 115-18.

26. *See infra* notes 28-29 and accompanying text.

27. *See supra* note 22.

lated-offense as offender information. An alleged related-offense is really part of the defendant's alleged criminal history. The fact that an alleged offense bears a relationship to the offense of conviction does not convert it into information about the offense of which the defendant was convicted. In this sense an alleged related-offense differs from an alleged more-serious-offense or a criminal offense characteristic, both of which are offense facts because they do not require an examination of facts beyond the incident leading to the defendant's conviction. Ultimately, labelling alleged related-offenses as either offense or offender information is somewhat arbitrary and does not answer the central question of whether this information should play a role in determining the sentence.

B. The Significance of Choosing Between Charge- and Real-Offense Sentencing

A complex web of factors confronts a sentencing commission in deciding whether to rely on a charge-offense oriented approach, or to incorporate some or many real-offense elements. A fundamental starting point is to settle upon the purpose or purposes to be served at sentencing.[28] Real-offense elements do not have an intrinsically valid function at sentencing. Their utility depends upon the sentencing philosophy they are designed to serve. Some real-offense elements may play important roles in a variety of sentencing rationales, while others that are central under one doctrine may be largely irrelevant under another. For example, the defendant's criminal history will likely matter less, if at all, in a system guided by just deserts than in a system embracing a utilitarian principle such as deterrence or incapacitation.[29] A coherent approach to narrowing the broad range of possible sentencing information first requires articulating a sentencing rationale.

The importance of the distinction between real- and charge-offense sentencing becomes more apparent when one considers the goals of sentencing reform. One of the primary aims of recent sentencing reform efforts, including the Federal Sentencing

28. An extended discussion of the purposes at sentencing is beyond the scope of this article. For a more in-depth discussion of such purposes, see Marc Miller, *Purposes At Sentencing*, 66 S. Cal. L. Rev. 413 (1992).

29. In general, a retributivist will focus much more heavily on offense facts, while a utilitarian will also be quite interested in offender characteristics. *See, e.g.*, George Fletcher, Rethinking Criminal Law 460-66 (1978); Richard G. Singer, Just Deserts: Sentencing Based on Equality and Desert ch. 5 (1979).

Reform Act of 1984,[30] has been the reduction of unwarranted disparity.[31] To reduce unwarranted disparity, reformers must increase uniformity and proportionality.[32] That is, sentencing guidelines should impose comparable sentences on similar offenders committing similar offenses, while imposing appropriately different punishmnent on criminal conduct of varying severity. A successful sentencing reform effort should seek to maximize both uniformity and proportionality. The difficulty of this task is reflected in the characteristics of charge- and real-offense sentencing.

Charge-offense sentencing, in theory, fosters uniformity and consistency. Grounding the sentence in the offense of conviction limits the factors that make up a sentencing decision and eliminates the need for complex or time-consuming sentencing procedures, which may inhibit uniformity by straining judicial resources and inviting error.

Uniformity, however, can come at the expense of proportionality. Imposing the same sentence on all convicted defendants, regardless of the nature of the offense and the offender, achieves perfect uniformity, but is bizarrely disproportional.[33] Charge-

---

30. Federal Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3559 (1988); 28 U.S.C. §§ 991-998 (1988)).

31. Avoiding or reducing unwarranted disparity was one of the principle goals of the Sentencing Reform Act of 1984. *See* 18 U.S.C. § 3553(a)(6) (1988); 28 U.S.C. § 991(b)(1)(B) (1988).

32. Disparity is sometimes defined in the limited sense of similar cases receiving different sentences. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 933 (1990) ("The term disparity, in the sentencing context, is generally used to refer to a pattern of unlike sentences for like offenders.") (citation omitted). Efforts to achieve uniformity address this form of disparity by seeking to impose roughly equivalent sentences in similar cases. This is only half of the equation, though, because the comprehensive goal of sentencing reform is to ensure that most cases receive appropriate sentences. To attain this goal it is equally important that cases of differing severity receive appropriately different sentences. Thus, a more sophisticated approach to disparity is concerned with proportionality, as well as uniformity. *See id.* at 932-35; Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1704 (1992) ("An essential component of solving the problem of unwarranted disparity lies in distinguishing between like cases, which ought to be sentenced similarly, and unlike cases, which ought to be sentenced in proportion to their greater or lesser seriousness."); *see also* Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992) (concluding that undue uniformity, not excessive disparity, is an important current problem).

33. *See* U.S.S.G., *supra* note 1, § 1A3 ("Simple uniformity - sentencing every offender to five years - destroys proportionality."); *see also* Albert W. Al-

offense sentencing fails to account for the large variations in conduct and culpability possible among offenders who have violated the same statute.[34] Legislators tend to draw criminal statutes broadly, without detailed categories or distinctions based on harm or culpability. Many of the factors that influence sentencing decisions are not elements of the offense. For example, Judge Stephen Breyer, an original member of the United States Sentencing Commission and a principal architect of the Federal Sentencing Guidelines, wrote the following:

> A bank robber, for example, might, or might not, use a gun; he might take a little, or a lot, of money; he might, or might not, injure the teller. The typical armed robbery statute, however, does not distinguish among these different ways of committing the crime. Nor does such a statute necessarily distinguish between how cruelly the defendant treated the victims, whether the victims were especially vulnerable as a result of their age, or whether the defendant, though guilty, acted under duress.[35]

A charge-offense system, therefore, may violate the principle of proportionality by "overaggregating" or treating dissimilar offenders alike.

According to conventional wisdom, a second shortcoming of charge-offense oriented sentencing is that it shifts sentencing discretion to the prosecutor.[36] Because the prosecutor selects the charges and the judge fixes the sentence according to the offense of conviction, charge-offense sentencing enables the prosecutor to determine, or at least predict with great accuracy, whether a defendant will receive a short or long sentence if convicted or whether two similarly situated defendants will receive uniform or disparate sentences. Such heightened prosecutorial power is disturbing for several reasons. First, prosecutors are interested advocates in the criminal justice system, a position that seems incompatible with the sentencing function. In addi-

---

schuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 916 (1991) (commenting that sentencing all offenders alike would not conform to most understandings of equal justice).

34. *See, e.g.*, United States v. Kikumura, 918 F.2d 1084, 1099 n.15 (3d Cir. 1990) (opining that "it is self-evident that an internationally trained terrorist who is bent on murdering scores of innocent civilians should be sentenced far more severely than a duly licensed explosives merchant who knows that one of his customers intends to blow up an abandoned warehouse in order to commit insurance fraud, even if each of these defendants is convicted under 18 U.S.C. § 844(d) for transporting explosives 'with the knowledge or intent that [they] will be used to kill . . . any individual or unlawfully to . . . destroy any building'").

35. Breyer, *supra* note 4, at 9-10.

36. *See, e.g.*, Tonry, *Real Offense*, *supra* note 6, at 1562 (arguing that "if guidelines prescribe specific offenses, the power to initiate or dismiss charges is the power to determine sentence").

tion, because the prosecutor's charging decision is essentially unreviewable,[37] this intensified authority may be used arbitrarily, in order to coerce guilty pleas or reward favored defendants. Finally, this increased prosecutorial power can greatly undercut a charge-offense system's supposed gains in promoting uniformity. If the prosecutor can determine the sentence by selecting the charge, sentencing guidelines can be manipulated or circumvented. This can reintroduce disparity, because factors other than neutral characteristics of the offense and the offender may come into play.

Advocates of real-offense sentencing contend that it avoids these serious drawbacks of charge-offense sentencing.[38] They argue that by taking into consideration all of the facts relevant to the offense and the offender, a real-offense sentence will more fully reflect the defendant's true culpability, furthering proportionality. A real-offense system will also diminish the prosecutor's role in sentencing and the impact of plea bargaining.[39] Because the judge bases the sentence on the defendant's "real" conduct, regardless of the offense of conviction, the prosecutor's actions have only a limited effect on the sentence. This reduces unwarranted disparity by ensuring that similar defendants receive similar sentences regardless of the prosecutor's charging and bargaining decisions.

Objections to real-offense sentencing generally fall into two categories: fairness and effectiveness.[40] Critics contend that real-offense sentencing is manifestly unfair,[41] if not unconstitu-

---

37. *See, e.g.,* United States v. Batchelder, 442 U.S. 114, 124 (1979) (indicating that "whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion").

38. For summaries and critical discussions of the arguments in favor of real-offense sentencing, see Reitz, *supra* note 13, at 553-65; Stephen J. Schulhofer, *Due Process of Sentencing,* 128 U. PA. L. REV. 733, 757-72 (1980); Tonry & Coffee, *supra* note 19, at 152-63.

39. *See* MODEL ACT, *supra* note 6, § 3-206(d) cmt. (stating that real-offense sentencing is designed "to reduce the impact of plea bargaining on the sentencing process").

40. *See* Tonry, *Real Offense, supra* note 6, at 1564 ("The fundamental flaws of real offense sentencing are easily stated. The most basic are that it is incompatible with the basic values of our legal system and that it will not work."); Tonry & Coffee, *supra* note 19, at 152-163.

41. *See* Tonry, *Real Offense, supra* note 6, at 1564-69 (arguing that real offense sentencing undermines the importance of the substantive criminal law, nullifies the law of evidence, and conflicts with the requirement of proof beyond a reasonable doubt). Recently, Kevin Reitz has made a forceful case against real offense sentencing on fairness grounds. *See* Reitz, *supra* note 13, at 547-65; *see also,* Stephen J. Schulhofer, *supra* note 38, 765-68 (1980) (opining that "a sentencing system that permits conflicting policies to be pursued by in-

tional.[42] Defendants in such a regime are sentenced based on facts not proved at trial or admitted as part of a guilty plea. Indeed, the sentence may be aggravated based on conduct for which the defendant has been acquitted.[43] The sentencing judge may have found these sentencing facts by a mere preponderance of the evidence, without many of the procedural protections applicable to determinations of guilt or innocence. The defendant may be deprived of the anticipated benefit of a plea agreement, as dismissed charges are reintroduced at the sentencing stage.[44]

This sacrifice of fairness is particularly hard to justify if a real-offense system fails even to achieve its stated aims. Critics suggest that the promise of real-offense sentencing is illusory because such a system is unworkable.[45] Real-offense sentencing

---

dependent authorities, prosecutors on the one hand and sentencing or parole officials on the other, seems vulnerable to multiple constitutional objections").

42. *See, e.g.,* Tonry, *Real Offense*, *supra* note 6, at 1577-80 (arguing that real-offense sentencing under the Model Act is probably unconstitutional).

Real-offense sentencing has a long history of acceptance by the courts. *See, e.g.,* McMillan v. Pennsylvania, 477 U.S. 79 (1986) (holding that the preponderance of the evidence standard satisfies due process requirements for consideration of real-offense evidence in sentencing); Williams v. New York, 337 U.S. 241 (1949) (upholding sentencing court's reliance on a variety of real offense elements). Some commentators have argued that because of the changed nature of sentencing in the era of sentencing guidelines, *Williams* and *McMillan* are of limited precedential value, and real-offense sentencing may, in fact, be unconstitutional. *See, e.g.,* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 210-20 (1991); Susan N. Herman, *The Tail That Wagged The Dog: Bifurcated Factfinding Under the Federal Sentencing Guidelines And The Limits of Due Process*, 66 S. CAL. L. REV. 289, 311-14, 337-39 (1992); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 U.C.L.A. L. REV. 1179, 1208-18 (1993); Richard Husseini, Comment, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1399-1406 (1990) (arguing that the preponderance-of-evidence standard for real-offense determinations may be unconstitutional). *But see* Reitz, *supra* note 13, at 542-46 (suggesting that the Supreme Court is likely to continue to apply *Williams* and *McMillan*).

The courts have generally upheld the constitutionality of the Guidelines' real-offense provisions. *See, e.g.,* United States v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir. 1990), *cert. denied*, 498 U.S. 844 (1990) (rejecting due process and double jeopardy challenges); Lear, *supra*, at 1208-18. The courts have also continued to apply a preponderance of the evidence standard. *See, e.g.,* Rodriguez-Gonzalez, 899 F.2d at 182. *But see* United States v. Kikumura, 918 F.2d 1084, 1100-01 (3d Cir. 1990) (requiring at least clear and convincing evidence to support 22-level upward departure).

43. *See supra* note 22.

44. Tonry, *Real Offense*, *supra* note 6, at 1575-77 ("Real offense sentencing would involve a form of misrepresentation that would not be tolerated in most marketplaces.").

45. For a discussion of the tension between the need for workability and the value of complexity in a comprehensive sentencing system, see Paul H.

can easily lead to unmanageable complexity as judges must determine all of the "real" facts relevant to sentencing. Errors in the application of complex sentencing rules can reintroduce disparity. Prosecutors and defense attorneys may "circumvent the guidelines by developing new plea bargaining patterns."[46] Real-offense sentencing also depends upon the judge receiving complete and accurate information concerning the offense and the offender. Accordingly, a real-offense system is vulnerable to inadequate information gathering, which may be caused by a lack of resources or a willingness by the parties to "hide" facts from the court. If the impact of plea bargaining is in fact severely restricted, the system may be paralyzed if many more defendants opt to go to trial, rather than plead guilty.[47]

In sum, the choice between real- and charge-offense sentencing is difficult and perplexing. In theory, each system furthers some of the goals of sentencing reform, but inhibits others. Moreover, serious questions persist about the gap between the theory and the reality of each approach.

C. The Role of Real-Offense Sentencing in Non-Guideline Sentencing Systems

Real-offense sentencing is not a creation of the Sentencing Commission. It has long been a part of traditional American sentencing systems, such as the federal regime that existed before the introduction of the Guidelines.[48] This fact has led some to suggest that the Sentencing Commission's adoption of real-offense sentencing simply formalizes the pre-existing judicial approach to sentencing.[49] This argument is misleading and

Robinson, *A Sentencing System for the 21st Century?*, 66 Tex. L. Rev. 1, 10-12 (1987); *see also* Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. Davis L. Rev. 617 (1992) (arguing that the Guidelines' complexity may be a necessary evil, and that simplification must be approached cautiously).

46. Tonry, *supra* note 6, at 1570; *see also id.* at 1571-73 (suggesting other ways parties may circumvent real-offense guidelines).

47. *Id.* at 1570.

48. *See generally* Schulhofer, *supra* note 38, at 765-68.

49. *See, e.g.*, United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989) (interpreting "Guideline § 1B1.3 to require courts to take account of 'relevant conduct' — conduct that, very roughly speaking, corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment."); Wilkins & Steer, *supra* note 5, at 516 (stating that the Sentencing Commission's decision to include in the Guidelines offenses for which defendant was not convicted "simply formalizes the pre-Guidelines practice of considering the full range of a defendant's conduct for sentencing

understates the radical nature of the Sentencing Commission's compromise.

Federal sentencing before the Guidelines, like the systems that continue to exist in many states,[50] is best described as incorporating discretionary or permissive real-offense sentencing. One of the defining features of the pre-Guidelines federal system was that judges exercised largely unfettered discretion in selecting a punishment within broad statutory limits.[51] This discretion extended to deciding which, if any, real-offense elements would be considered.[52] Most judges believed in at least some aspects of real-offense sentencing and ordinarily tried to base the sentence on a complete picture of the defendant, the crimes he or she had committed, and any relevant aggravating or mitigating circumstances.[53]

It is important to note the limited nature of this real-offense sentencing. A judge in the former federal system was not *required* to take into account any real-offense behavior, as would be the case with binding sentencing guidelines incorporating real-offense sentencing. One judge might opt for a charge-offense approach by imposing five years imprisonment on all bank robbers, while another might consider the circumstances of the case or the defendant's background and record. Judges who agreed on the relevance of certain real-offense elements might not agree on the weight to be given such factors. The impact of real-offense elements was also not rigid and predetermined. A judge inclined to consider a real-offense fact might "discount" that fact depending upon the apparent strength of the government's evidence, or the fact that the defendant pleaded guilty. Further, individual judges did not necessarily rely on the same

---

purposes, regardless of whether all of such criminal activity was encompassed within counts of conviction").

50. For a partial survey of real-offense practices in the states, see Reitz, *supra* note 13, at 528 n.22.

51. For background on the history of American sentencing practices up to the Sentencing Reform Act of 1984, see Nagel, *supra* note 32, at 887-99.

52. *See* Reitz, *supra* note 13, at 528 (indicating that "nearly every state allows sentencing courts to engage freely in real-offense sentencing as a matter of discretion").

53. The authors of a thoughtful study on the sentencing of white collar offenders found that most judges believe to some extent in real-offense sentencing. *See*, WHEELER ET AL., *supra* note 23, at 17-18, 30-36. For example, one judge acknowledged to the authors being interested in "the total picture of what was going on, not in the slice selected by the prosecution for inclusion in the indictment." *Id.* at 17; *see also* Schulhofer, *supra* note 38, at 757 (stating that available evidence suggests that judges rely on real-offense sentencing).

types of real-offense elements, or give them the same weight, from case to case.[54]

Real-offense sentencing was therefore sporadic and unpredictable. It was also part and parcel of an offender-based, rehabilitative-oriented penology that was largely rejected by the Sentencing Reform Act of 1984 and the Guidelines.[55] Real-offense sentencing's apparently secure place in the pre-Guidelines world does not necessarily justify mandatory real-offense guidelines. Far from being a simple formalization of past practice, the Sentencing Commission's version of real-offense sentencing, which incorporates criminal offense characteristics[56] as well as alleged more-serious-offenses[57] and alleged related-offenses,[58] is a radical measure which reaches far beyond any state guideline system.[59]

D. Plea Bargaining and Real-Offense Sentencing

The reality of plea bargaining exerts a powerful influence on the conflict between real- and charge-offense sentencing. A significant part of the appeal of real-offense sentencing is its potential to minimize the impact of plea bargaining on sentencing.[60] A real-offense system, however, is itself vulnerable to manipulative plea bargaining.[61] This is true in part because, in many respects, there exists a fundamental tension between plea bargaining and sentencing guidelines. The parties engaged in plea bargaining do not share sentencing reformers' goal of reducing unwarranted sentencing disparity. Prosecutors ordinarily care less about disparity than with obtaining a conviction and a generally satisfactory sentence.[62] The defendant does not

---

54. This ability to dispense with real-offense sentencing appears to have played a major role in shaping plea bargaining in the pre-Guidelines federal criminal justice system. *See infra* part II.D.

55. Commentators also argue that the shift from a discretionary to a mandatory real-offense system, in combination with the shift away from offender-based sentencing undermines the constitutional legitimacy of the Guidelines' structure. *See* Herman, *supra* note 42, at 301-304.

56. *See infra* notes 77-83 and accompanying text.

57. *See infra* notes 88-100 and accompanying text.

58. *See infra* notes 111-140 and accompanying text.

59. *See infra* notes 141, 224, 244, 258.

60. *See supra* note 39 and accompanying text.

61. *See supra* notes 46-47 and accompanying text.

62. *See, e.g.*, Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 283 (1989) (interview data suggests that one reason prosecutors have sometimes agreed to manipulate Guidelines through plea bargaining is that they "focused upon maximizing their conviction rate, but were not ori-

care at all about disparity. In fact, in a sense the defendant actively seeks disparity, because his or her aim is to receive a lighter sentence than that imposed on similarly situated offenders. A sentencing guideline system that is serious about reducing unwarranted disparity must therefore attempt to regulate and control plea bargaining.

The utility of plea bargaining depends in large part upon the value of the inducement the prosecutor can offer a defendant for pleading guilty. The more the defendant stands to gain, the more likely he or she will be to enter a guilty plea.[63] Similarly, the more the prosecutor has to offer the defendant, the more authority the prosecutor has to encourage a guilty plea and influence the sentence. A powerful inducement for charge bargaining,[64] historically the main form of bargaining in the federal system, exists in a charge-offense system, and the inducement theoretically diminishes the more the system becomes real-offense oriented. In a pure charge-offense system, the offense of conviction determines the sentence. In such a system charge bargaining is extremely attractive to the defendant because a guilty plea can result in a significant reduction in the sentence applicable to a conviction on the dropped charges. The prosecutor, in turn, acquires a great deal of power to convince the defendant to plead guilty, because by dropping or reducing charges, the prosecutor can effectively determine the ultimate sentence.[65]

---

ented toward maximizing the severity of the sentences they obtained.... National uniformity, certainty or reduced disparity are not goals which they embrace.").

63. *See* Tonry & Coffee, *supra* note 19, at 146-52 (discussing guidelines' effect on plea bargaining in terms of available inducements and defendants' toleration of risk).

64. Charge bargaining occurs when the defendant agrees to plead guilty to either fewer counts or less serious charges than the prosecutor has brought against the defendant. Thus the bargaining concerns the counts to which a defendant pleads, not the ultimate sentence. Sentence bargaining, in contrast, concerns the ultimate sentence, and is designed to result in a sentence agreement that is binding if the judge accepts the agreement, or a sentence recommendation by the prosecutor that does not bind the judge.

65. Some commentators suggest that the power of the entire plea bargaining process, not just the power of the prosecutor, is enhanced in a charge-offense system. *See* Reitz, *supra* note 13, at 562. Nonetheless, the result is increased pressure on the defendant to plea guilty, a situation of which the prosecutor can take advantage. *See* Tonry & Coffee, *supra* note 19, at 146-47; *see also* Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978) (arguing that reform is likely to produce a system comparable to the current sentencing regime, in which discretion is concentrated in

In contrast, the formal offense of conviction only determines the statutory maximum sentence in a real-offense system. Beyond that limitation, the judge bases the sentence on the defendant's actual conduct, however that is defined, regardless of the offense of conviction. Charge bargaining may therefore be of little use in a real-offense system because the presumptive sentence may not be significantly affected by the dismissal of counts. If true, this fact significantly reduces the prosecutor's ability to encourage guilty pleas, and to influence or determine the sentence, in a real-offense system.

It is appropriate to consider why charge bargaining was widely used in the pre-Guidelines federal system, with its permissive real-offense character. At first blush, it might seem that charge bargaining would not be a useful device in such a system, because a reduction in charges would not necessarily affect the judge's decision. Nevertheless, the parties shared an expectation that if the prosecution dropped counts in exchange for a guilty plea, the defendant would receive a lesser sentence than might otherwise be imposed. What seems to account for that perception, which was by and large an accurate one,[66] is that in a variety of ways the parties were able to introduce charge-offense aspects into the sentencing process. It is important to remember that although federal judges had the freedom to use real-offense information in imposing sentences, they were not required to do so.[67] Thus if the judge agreed, explicitly or tacitly, to ignore or give diminished attention to dropped counts, a charge bargain could accomplish a great deal. This seems to have gone on, although the parties were almost always uncertain about what the value of the plea would be.[68] Furthermore, the parties were able to add a charge-offense aspect by withhold-

---

the prosecutor's office, and in which the benefits of this discretion are made available only to defendants who sacrifice their constitutional rights).

66. The Sentencing Commission's studies revealed that before the Guidelines, defendants who pleaded guilty received, on average, sentences thirty to forty percent lower than defendants who were convicted at trial. U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 48 (1987) [hereinafter COMMISSION, SUPPLEMENTARY REPORT).

67. *See supra* part II.C.

68. *See* U.S. SENTENCING COMMISSION, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 389-90 (1991) [hereinafter COMMISSION, OPERATION REPORT].

ing relevant information from the judge.[69] As long as the information upon which the judge based the sentence came primarily from the government, the prosecutor's willingness not to draw the judge's attention to aggravating factors would contribute (albeit, again, to an unknowable extent) to a lesser sentence.

Charge bargaining, although a hidden and uncertain process, seems to have been able to take advantage of the flexible nature of the old system. This suggests that real-offense systems remain vulnerable to the effects of plea bargaining. As this article discusses later, the workings of this process have important implications for charge bargaining under the Guidelines, with its real-offense aspects designed to limit the impact of plea bargaining.

III. WHAT THE SENTENCING COMMISSION DID

Faced with the necessity of attempting to resolve the conflict between "procedural and substantive fairness"[70] posed by charge- and real-offense sentencing, and given little or no statutory guidance,[71] the Sentencing Commission understandably chose neither extreme, opting instead for a middle course. After initially considering guidelines that were very much real-offense oriented,[72] the Sentencing Commission settled on a system that,

---

69. *See* COMMISSION, SUPPLEMENTARY REPORT, *supra* note 66, at 48 (arguing that "anecdotal evidence indicates that the parties may sometimes also agree to suppress relevant facts, thereby making a lower sentence likely").

70. Breyer, *supra* note 4, at 9.

71. *See, e.g.*, Nagel, *supra*, note 31, at 913 (indicating that Congress left the choice between real- and charge-offense system to the Sentencing Commission); Wilkins & Steer, *supra* note 5, at 501 (noting that the House of Representatives version of sentencing reform rejected real-offense sentencing except in some plea-bargaining arrangements, while the Senate version, which ultimately became the Sentencing Reform Act, "did not expressly specify, [but] seemed to lean toward a real offense system").

A panel of the Eighth Circuit Court of Appeals initially ruled that the Guidelines' real-offense provisions exceeded the Sentencing Commission's authority under the Sentencing Reform Act. United States v. Galloway, 943 F.2d 897, 899-905 (8th Cir. 1991). The Eighth Circuit, *en banc*, later reversed this decision. United States v. Galloway, 976 F.2d 414 (1992) *cert. denied*, 113 S.Ct. 1420 (1993).

72. The Sentencing Commission published, and received public comment on, two draft versions of guidelines prior to promulgating the final guidelines in April 1987. *See* U.S. SENTENCING COMMISSION, PRELIMINARY DRAFT SENTENCING GUIDELINES (1986); U.S. SENTENCING COMMISSION, REVISED DRAFT SENTENCING GUIDELINES (1987). The 1986 draft was more real-offense oriented than the final guidelines, while the 1987 draft was more charge-offense oriented. For a discussion of the process of drafting the Guidelines see Nagel, *supra* note 32, at 914-25.

according to Judge Breyer, reflects an attempt to "have some real- elements, but not so many that it becomes unwieldy or procedurally unfair."[73]

The following sections describe the nature and extent of the Guidelines' incorporation of real-offense elements. Before proceeding, however, it is important to note what the Sentencing Commission did not do. It did not base its decisions about the appropriate scope of sentencing information, or any other important decision, on a view of the goals at sentencing. The Sentencing Commission expressly declined to choose between, or attempt to synthesize, just deserts and crime control philosophies, claiming the following:

> A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result.[74]

This decision, for which the Sentencing Commission has been severely criticized,[75] makes it unduly difficult to discern the reasons why the Commission accepted or rejected any particular real-offense element.

A. Offense Information

1. Offense Characteristics

The Guidelines rely extensively on offense characteristics. This policy is manifested in the "specific offense characteristics" applicable to individual offense guidelines, and the "adjustments" in Chapter Three of the Guidelines, which are applicable to all offenses.[76] Specific offense characteristics and adjustments are aggravating, or occasionally, mitigating factors to the offense. They are not generally elements of the offense and consequently they are not admitted as part of a guilty plea nor must the prosecutor prove them at trial. The Guidelines draw no distinction between criminal and noncriminal offense characteristics.

---

73. Breyer, *supra* note 4, at 11.

74. U.S. Sentencing Commission, Federal Sentencing Guidelines Manual ch. 1, pt. A(3) (1989 edition). The Sentencing Commission subsequently deleted this language. *See* U.S.S.G., *supra* note 1, amend. 307.

75. *See* Miller, *supra* note 28, at 437-50; Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 Am. Crim. L. Rev. 367, 370-73 (1989).

76. Section 1B1.1 sets forth the instructions for applying the Guidelines. U.S.S.G., *supra* note 1, § 1B1.1.

Examples of offense characteristics include: the amount of money a defendant convicted of embezzlement received,[77] whether that defendant engaged in more than minimal planning,[78] whether a defendant convicted of a narcotics offense possessed a dangerous weapon,[79] or whether a money launderer knew or believed that the funds laundered were the proceeds of specified unlawful activity.[80] Significant adjustments include whether the defendant selected a particularly vulnerable victim,[81] or whether the defendant had an aggravating[82] or mitigating[83] role in the offense.

In an attempt to control the level of complexity in the Guidelines, the Sentencing Commission did not seek to identify and include every possible aggravating and mitigating factor; rather, the Guidelines include only those factors that, based on the Commission's study of past cases,[84] occur with some frequency.[85] The Guidelines recommend that judges consider unusual aggravating and mitigating factors, like a death resulting from the offense,[86] by departing from the Guidelines.[87]

---

77. *Id.* § 2B1.1(b)(1).
78. *Id.* § 2B1.1(b)(5).
79. *Id.* § 2D1.1(b)(1).
80. U.S.S.G., *supra* note 1, § 2S1.1(b)(1).
81. *Id.* § 3A1.1.
82. *Id.* § 3B1.1.
83. *Id.* § 3B1.2.
84. The Sentencing Commission's use of data concerning past sentencing practice is discussed in Nagel, *supra* note 32, at 927-32. Commissioner Paul Robinson criticized this reliance in his dissent from the Guidelines. *See* U.S. SENTENCING COMMISSION, DISSENTING VIEW OF COMMISSIONER PAUL H. ROBINSON ON THE PROMULGATION OF SENTENCING GUIDELINES BY THE UNITED STATES SENTENCING COMMISSION 4-6 (1987).
85. *See, e.g.*, Nagel, *supra* note 32, at 923 (stating that specific offense characteristics were determined in part by "empirical analysis of past sentencing practices [which] showed that judges routinely distinguished one offender convicted of the base offense from another on the basis of such a characteristic").
86. *See* U.S.S.G., *supra* note 1, § 5K2.1 ("If death resulted, the court may increase the sentence above the authorized guideline range.").
87. Departures from the Guidelines are governed by § 3553(b) of Title 18, which authorizes a departure sentence if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b) (1988); *see also* U.S.S.G., *supra* note 1, § 5K2.0. For a useful analysis of the evolving case law concerning departures from the Guidelines, see Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1 (1991).

Commissioner Paul Robinson argued in his dissent from the Guidelines that by inviting departures rather than incorporating all relevant sentencing factors into the Guidelines, the Sentencing Commission violated its statutory

2. Alleged More-Serious-Offenses

Application of the Guidelines begins with the offense of conviction, which determines the applicable offense guideline, including the base offense level and the potential list of specific offense characteristics.[88] The court is not free to unilaterally determine that because the defendant actually committed an offense more serious than the offense of conviction, a different, more severe guideline should apply.[89] Although this would appear to represent a rejection of alleged more-serious-offense real-offense sentencing, such a characterization of the Guidelines is somewhat misleading. There is an exception to the general rule that states that "in the case of a plea agreement containing a stipulation that specifically establishes a more-serious-offense than the offense of conviction," the court is to apply the guideline applicable to the stipulated offense.[90] The parties can, in effect, stipulate that the court should sentence the defendant based on a more-serious-offense than the offense of conviction.[91]

---

mandate and invited disparity. *See* Robinson, *supra* note 84, at 13-16; *see also*, Robinson, *supra* note 45, at 15-16 (arguing that a system that only mandates a few factors and gives judges substantial discretion will suffer from the same sentence disparity that prompted the current movement toward sentencing reform).

88. Section 1B1.2(a) directs the court to select the offense guideline from Chapter Two that is "most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted)." U.S.S.G., *supra* note 1, § 1B1.2(a). A Statutory Index assists the judge in selecting the appropriate guideline, but if more than one guideline is referenced in the Statutory Index, or if the referenced guideline does not adequately describe the conduct for which the defendant was convicted, § 1B1.2(a) requires the court to select the most appropriate guideline. *Id.* § 1B1.2(a) app. A; *see, e.g.*, United States v. Obiuwevbi, 962 F.2d 1236, 1242 (7th Cir. 1992) (defendant convicted of making false statements properly sentenced under guideline for currency reporting crime rather than fraud guideline ordinarily applicable to false statements statute); United States v. Beard, 913 F.2d 193, 197-98 (5th Cir. 1990) (defendant properly sentenced under fraud and deceit guideline rather than perjury guideline for making false statement under penalty of perjury in bankruptcy proceeding); THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 21-22 (1989) (discussing the standards for choice of offense guideline).

89. *See, e.g.*, United States v. Goldfaden, 959 F.2d 1324 (5th Cir. 1992) (holding that a district court may consider only the count of conviction, not defendant's relevant conduct under Guideline section 1B1.2, in selecting the most applicable guideline).

90. U.S.S.G., *supra* note 1, § 1B1.2(a); *see* Wilkins & Steer, *supra* note 5, at 501 (describing the origin of this exception).

91. *See* United States v. Braxton, 111 S.Ct. 1854 (1991) (narrowly interpreting Guideline § 1B1.2(a)'s proviso).

More important, because the offense Guidelines are generic in nature, addressing categories of criminal conduct rather than specific statutes,[92] in many instances the Guideline provisions applicable to an offense are identical to the provisions applicable to a more-serious-offense. For example, a defendant charged with assaulting a federal officer with a dangerous weapon[93] might enter into a plea agreement with the government to drop the allegation concerning the dangerous weapon. As this would reduce the applicable maximum sentence,[94] the defendant might expect to receive a corresponding reduction in the sentencing guideline range. Because the same guideline applies to the two charges,[95] however, the court would still increase the guideline score if it finds that the defendant possessed or used a weapon.[96]

In addition, even if a lesser offense is covered by a separate guideline, the offense level may be identical to that applicable to the more-serious-offense, depending on the judge's view of the defendant's "real" conduct. For example, a defendant might initially be charged with tax evasion and plead guilty to making a false statement on his tax return, an offense with a lower statutory maximum penalty than tax evasion.[97] Nonetheless, if the sentencing court concludes that the "the offense was committed in order to facilitate evasion of a tax," the guideline range will be identical to that for tax evasion.[98]

Such applications of alleged more-serious-offense real-offense sentencing are the exception rather than the rule under the Guidelines.[99] The appearance of this form of real-offense

92. There is one fraud guideline, not a separate guideline for each statute prohibiting some form of fraud. *See* Wilkins & Steer, *supra* note 5, at 500.

93. 18 U.S.C. § 111(b) (1988).

94. The maximum term of imprisonment for assaulting a federal officer with a dangerous weapon is ten years. *Id.* The maximum term of imprisonment if no dangerous weapon is used is three years. 18 U.S.C. § 111(a) (1988).

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

96. *Id.* § 2A2.2(b)(2).

97. Tax evasion carries a maximum term of imprisonment of five years. 26 U.S.C. § 7201 (1988). The maximum term for making a false statement on a tax return is three years. 26 U.S.C. § 7206 (1988).

98. Tax evasion is covered by Guideline Section 2T1.1. U.S.S.G., *supra* note 2, § 2T1.1. False statements are covered by Section 2T1.3. *Id.* § 2T1.3. Under § 2T1.3(a)(1), however, the base offense level is taken from the tax table in § 2T4.1, the same source for the base offense level for tax evasion, if "the offense was committed in order to facilitate evasion of a tax." *Id.* § 2T1.3(a)(1).

99. There appears to be a recent trend towards greater use of alleged more-serious-offense sentencing in the Guidelines. The Commission has required such sentencing for several additional offenses. *See* U.S.S.G., *supra* note 1, amend. 320, 444, 448.

sentencing is apparently haphazard, because the Sentencing Commission has not explained its approach.[100] Contrary to what one might expect, the Guidelines offer no guidance as to why defendants are sometimes, but not always, sentenced based on alleged criminal conduct that is more serious than the offense of conviction.

B. Offender Information

1. Offender Characteristics

The Guidelines take a restrictive view of offender characteristics. They generally instruct judges to give only limited consideration to offender characteristics that have historically played a role in sentencing, such as age, education, mental and emotional conditions, drug or alcohol dependence, employment record, community ties, and family ties and responsibilities. The Sentencing Commission has not really explained this position, but it seems to have been motivated by fears of disparity and discrimination resulting from consideration of such factors,[101] and by the Sentencing Commission's adoption of a "harm-based penology."[102]

2. Criminal History

The defendant's criminal history does play a significant role under the Guidelines. Chapter Four of the Guidelines attaches a score to the defendant's history of criminal conviction, which attempts to measure the "frequency, recency, and seriousness" of the defendant's prior criminal conduct.[103] This score becomes the horizontal axis on the Guidelines' sentencing table.[104] The defendant's alleged criminal history is not specifically incorporated into the Guidelines, but the Commission invites sentencing judges to impose a harsher sentence than that called for by the Guidelines if "reliable information indicates that the criminal history category does not adequately reflect the seriousness

---

100. *See infra*, part IV.B. This is unfortunately true of much of the Sentencing Commission's work.

101. *See* Breyer, *supra* note 4, at 19-20.

102. The Guidelines generally require harm-based, rather than offender-based sentencing, a limitation for which the Commission has been frequently criticized. *See, e.g.*, Freed, *supra* note 32, at 1715-18.

103. Breyer, *supra* note 4, at 20.

104. *See* U.S.S.G., *supra* note 1, § 5A (Sentencing Table).

of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes."[105]

3. Post-Offense Behavior

The Guidelines take post-offense behavior into account in several important respects. First, application of the Guidelines is based upon conduct occurring, *inter alia*, "in the course of attempting to avoid detection or responsibility" for the offense.[106] In addition, several adjustments from Chapter Three of the Guidelines measure particular aspects of post-offense behavior. The defendant receives a two level increase in the offense score (on average a twenty-five to thirty percent increase in sentence length) "if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense."[107] Although such conduct could occur prior to or during the offense, most forms of obstruction leading to this adjustment, such as perjury,[108] occur after the offense is completed. Another two level increase applies if the defendant recklessly endangered another person while fleeing from a law enforcement officer.[109] The defendant may receive a two level reduction if the defendant "clearly demonstrates acceptance of responsibility for his offense."[110]

4. Alleged Related-Offenses

Finally, the most controversial aspect of the Guidelines is probably the Commission's treatment of alleged related-offense sentencing. The primary governing principle is set forth in the relevant conduct guideline,[111] referred to by the chairman and general counsel of the Sentencing Commission as the "corner-

105. U.S.S.G., *supra* note 1, § 4A1.3. This provision has been criticized as an open invitation to sentencing disparity. *See Sentencing Guidelines: Hearings Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 326-327 (1987) (statement of Andrew von Hirsch).

106. U.S.S.G., *supra* note 1, § 1B1.3(a).

107. *Id.* § 3C1.1.

108. The Supreme Court recently upheld the constitutionality of increasing a defendant's sentence under U.S.S.G. § 3C1.1 for committing perjury while testifying in his or her own defense. The Court rejected claims that this practice unduly chills the defendant's right to testify. United States v. Dunnigan, 113 S.Ct. 1111, 1113 (1993).

109. U.S.S.G., *supra* note 1, § 3C1.2.

110. *Id.* § 3E1.1.

111. *Id.* § 1B1.3.

stone" of the guideline system.[112] According to section 1B1.3(a)(1), a judge applying the Guidelines must consider the following:

> all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or wilfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.[113]

This provision appears to reject alleged related-offense real-offense sentencing by limiting the focus at sentencing to the offense of conviction. The section immediately following this language indicates, however, that the drafters intended the Guidelines to take into account much more related real-offense conduct for most cases. For those offenses for which the applicable guideline primarily bases the offense level on an amount or quantity involved in the offense, the court determines the offense level based on "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction."[114] Such offenses[115] include fraud, theft, tax offenses, narcotics distribution, bribery, counterfeiting, firearms offenses, antitrust violations, and money laundering, and constitute approximately seventy to eighty percent of the federal criminal docket.[116] For a defendant convicted of one of these offenses, the Guideline sentence is based on all similar alleged offenses in "the same course of conduct or common scheme or plan," even if the defendant was not charged with the alleged offenses,[117] such charges were dropped pursuant to a plea agreement,[118] or the defendant was acquitted[119] of such charges.[120]

---

112. Wilkins & Steer, *supra* note 5, at 496.

113. U.S.S.G., *supra* note 1, § 1B1.3(a)(1).

114. *Id.* § 1B1.3(a)(2).

115. The offenses that are included in § 1B1.3(a)(2) are those identified in the multiple count grouping rule in § 3D1.2(d). *See* U.S.S.G., *supra* note 1, § 1B1.3(a)(2).

116. *See* U.S. SENTENCING COMMISSION, 1991 ANNUAL REPORT 53, tbl. 15 (1992).

117. *See, e.g.,* United States v. Ebbole, 917 F.2d 1495-96 (7th Cir. 1990).

118. *See, e.g.,* United States v. Salva, 902 F.2d 483, 488-89 (7th Cir. 1990).

119. *See, e.g.,* United States v. Fonner, 920 F.2d 1330, 1332 (7th Cir. 1990).

120. The Ninth Circuit has been a cauldron of controversy, because it has resisted critical aspects of the Sentencing Commission's real-offense approach. Initially, a panel of the Ninth Circuit found § 1B1.3 in conflict with the multiple count rules in Chapter Three and declined to aggregate drug quantities from alleged related-offenses. United States v. Restreppo, 833 F.2d 781, 786 (9th Cir. 1989). The panel later reversed itself. United States v. Restreppo, 903 F.2d 648 (9th Cir. 1990) *aff'd en banc*, 946 F.2d 654 (9th Cir. 1991) *cert. denied*, 112 S.Ct. 1564 (1992). The court has continued, however, to impose significant re-

A sentencing system that plans to take into account alleged related-offenses must define the nature of the relationship between the conviction and alleged offenses that will cause the alleged offenses to be considered at sentencing. The defining and limiting concept in the Guidelines' version of alleged related-offense real-offense sentencing is the phrase "same course of conduct or common scheme or plan as the offense of conviction."[121] Although the Guidelines do not define this phrase, the drafters seem to have designed it to identify those alleged offenses that are linked in some important way to the offense of conviction. The chairman and general counsel of the Sentencing Commission have explored the meaning of this phrase in a much-cited article.[122] In their view, the clause "common scheme or plan" is closely analogous to the provision of the Federal Rules of Criminal Procedure pertaining to joinder of offenses,[123] which suggests a focus "on the connection between the offenses in terms of time interval, common accomplices, common victims, similar *modus operandi*, or other evidence of a common criminal endeavor involving separate criminal acts."[124] The authors fur-

strictions on real-offense sentencing. *See, e.g.*, United States v. Castro-Cervantes, 927 F.2d 1079, 1081-82 (9th Cir. 1990) (holding that courts cannot base upward departure in robbery case on additional alleged robberies that were dismissed as part of plea agreement); United States v. Faulkner, 934 F.2d 190, 193 (9th Cir. 1991) (holding that courts cannot base upward departure in robbery case on uncharged robberies); United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1991) (holding that courts cannot base upward departure on acquitted conduct).

More recently, the Ninth Circuit has distinguished between offenses such as robbery and offenses subject to alleged related-offense sentencing under §§ 1B1.3 and 3D1.2. In *United States v. Fine* a panel applied the rule from *Castro-Cervantes* to a mail fraud case, an offense where alleged related-offense sentencing is required by § 1B1.3. After a rehearing en banc, however, the court reversed itself and, aligning itself with all of the other courts of appeals, held that for offenses covered by §§ 1B1.3(a)(2) and 3D1.2(d), courts can include dismissed counts as relevant conduct. United States v. Fine, 946 F.2d 650, 652 (9th Cir. 1991), *rev'd in part, remanded in part en banc*, 975 F.2d 596, 600 (9th Cir. 1992).

The Ninth Circuit's approach to these issues is criticized in Steven E. Zipperstein, *Relevant Conduct and Plea Bargaining*, 4 FED. SENTENCING REP. 223 (1992).

121. U.S.S.G., *supra* note 1, § 1B1.3(a)(2).

122. *See* Wilkins & Steer, *supra* note 5, at 515-16. A number of courts have relied on the authors' explanation in interpreting the relevant conduct provision. *See, e.g.*, United States v. Bethley, 973 F.2d 396, 401 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1323 (1993); United States v. Santiago, 906 F.2d 867, 872 (2d Cir. 1990)).

123. FED. R. CRIM. P. 8(a).

124. Wilkins & Steer, *supra* note 5, at 515 (citation omitted). As an example, the authors suggest that "multiple embezzlements over a period of time, or

ther suggest that the other clause, "same course of conduct," "contemplates that there be sufficient similarity and temporal proximity to reasonably suggest that repeated instances of criminal behavior constitute a pattern of criminal conduct."[125] Some courts have recommended a sort of sliding scale of these components.[126]

The impact of the alleged related-offense approach is substantial.[127] For example, if the sentencing judge concludes that a defendant convicted of one count of fraud involving $10,000 actually committed three frauds totalling $50,000 in the same course of conduct, the defendant's guideline range would be calculated based on the higher amount.[128] The judge also applies the specific offense characteristics and adjustments based on all of the offenses included in the same course of conduct.[129] Thus, if in one of the frauds not leading to conviction the defendant defrauded more than one victim,[130] targeted a vulnerable victim,[131] or played a leadership role,[132] the defendant's offense

---

multiple drug deliveries on different occasions would each be considered part of a 'common scheme or plan'." *Id.*

125. *Id.* at 515-16. The authors give the following example, which contrasts the two clauses:

> [I]f a drug dealer sells heroin to various customers on one day and cocaine to various customers on the next day, his conduct may or may not be part of a "common scheme or plan." There can be little doubt, however, that his conduct is within the "same course of conduct" heading because of the similarity and close temporal proximity of his illegal actions. Similarly, a crime spree of larcenies might not fit the definition of "common scheme or plan," but would be considered part of the "same course of conduct."

Id. at 516; *see also*, United States v. Perdomo, 927 F.2d 111, 114 (2d Cir. 1991) (holding that the trial court properly included two kilograms of cocaine that defendant sold in March 1988 in calculating the base offense level for conviction of conspiracy to distribute cocaine in July 1988 as defendant's crimes were part of "same course of conduct").

126. *See, e.g.*, United States v. Hahn, 960 F.2d 903, 910 (9th Cir. 1992) ("When one component is absent, . . . courts must look for a stronger presence of at least one of the other components.").

127. *See* Heaney, *supra* note 37, at 209-10 (finding that in districts studied, one half of sentences were increased based on uncharged conduct).

128. The fraud guideline, § 2F1.1, provides for an adjustment in the offense level based on the amount of the loss. *See* U.S.S.G., *supra* note 1, § 2F1.1(b)(1). A $10,000 loss increases the offense level two levels, while a $50,000 loss increases the offense level five levels. *See id.*

129. *See, e.g.*, United States v. Paulk, 917 F.2d 879, 883 (5th Cir. 1990) (enhancing the defendant's offense level for possession of firearm although defendant was not convicted of that offense).

130. *See* U.S.S.G., *supra* note 1, § 2F1.1(b)(2) (providing for a two level increase).

131. *Id.* § 3A1.1 (providing for a two-level increase).

132. *Id.* § 3B1.1 (providing for a two-, three-, or four-level increase).

score will be increased despite the lack of a conviction on such counts. In contrast, a defendant convicted of one count of robbery[133] would not have the amounts of other robberies committed in the same course of conduct aggregated, because section 3D1.2(d) does not apply to robbery.[134] Similarly, a judge would only apply the specific offense characteristics and adjustments for robbery on the basis of convicted counts.

United States v. Colon[135] illustrates the potential impact of alleged related-offense sentencing under the Guidelines. Colon plead guilty to conspiring to distribute heroin, possessing heroin with the intent to distribute, and to other substantive narcotics offenses.[136] The trial judge originally calculated a sentencing range of fifty-seven to seventy-one months, based on a finding that the quantity of heroin the defendant plead guilty to selling to undercover officers and possessing at the time of his arrest was approximately seven and one-half grams.[137] The Second Circuit ruled on the first appeal that under the Guidelines the judge was required to include all quantities of narcotics Colon sold as part of the same course of conduct as the offenses of conviction.[138] On remand, the judge based the offense level on the 400 grams of heroin that the judge estimated Colon sold over a 300 day period prior to the offense of conviction.[139] The court then sentenced Colon, within the applicable guideline range, to a term of fourteen years imprisonment. The Second Circuit affirmed this approximate tripling of the applicable sentencing range based on the inclusion of Colon's alleged related-offenses.[140]

---

133. *See id.* § 2B3.1.

134. U.S.S.G., *supra* note 1, § 3D1.2(d).

135. United States v. Colon, 961 F.2d 41 (2d Cir. 1992) [hereinafter Colon II].

136. *Id.* at 42.

137. *Id.*

138. United States v. Colon, 905 F.2d 580, 586-87 (2d Cir. 1990) [hereinafter Colon I], *remanded for resentencing, sentence aff'd*, 961 F.2d 41 (2d Cir. 1992). Originally, the trial judge did not incorporate these amounts in the base offense level, but did rely on them to justify a substantial upward departure from the applicable guideline range. *Id.*

139. *Colon II*, 961 F.2d at 43.

140. *Id.*; *see also* United States v. Concepcion, 983 F.2d 369, 387-89 (2d Cir. 1992), *petition for cert. filed sub. nom.* United States v. Frias (U.S. June 23, 1993) (increasing the applicable guideline range from 12 to 36 months to 210 to 262 months based upon conduct of which the defendant had been acquitted).

IV. ALLEGED RELATED-OFFENSE SENTENCING: DID THE COMMISSION DRAW A WISE LINE?

The mere fact that the Sentencing Commission compromised between the extremes of real- and charge-offense sentencing does not ensure success. Sometimes it is better not to compromise, but to choose one option nearly in its entirety. This is apparently the view of the states that have adopted sentencing guidelines, all of whom have opted for sytems which are far more charge-offense oriented than the Guidelines.[141]

Even assuming a compromise is in order, the results can be either elegant or irrational. If two competing alternatives have attractive and undesirable features, a sound compromise should capture as many of the benefits of each position as possible, while limiting the negative consequences of each option. This delicate task of harmonizing conflicting approaches requires sound theory and judgment, not simply splitting the difference.

The Sentencing Commission's treatment of alleged related-offenses is the most controversial aspect of its approach to real-offense sentencing, and is troubling on a number of levels. The line the Sentencing Commission drew—between a strong version of alleged related-offense sentencing for many offenses and a much more charge-offense oriented approach for others—requires strikingly different treatment of the two categories of offenses. The Sentencing Commission does not justify these apparent anomalies. It has offered only a limited, and ultimately unsatisfying, rationale for employing alleged related-offense sentencing at all, and for treating the two categories of offenses in such a radically different manner. Given this background, it should not be surprising that the Sentencing Commission's approach to alleged related-offenses has not worked. Not only is the unfairness inherent in real-offense sentencing clearly present, but the very evils this system is designed to avoid re-

141. According to Michael Tonry, all of the states that have adopted sentencing guidelines have rejected real-offense sentencing in favor of a charge-offense approach. Tonry, *supra* note 6, at 356-57. Professor Tonry's use of the term real-offense sentencing is more narrow than the definition employed in this article. His definition of real-offense sentencing roughly correlates to criminal offense characteristics, alleged more-serious-offenses, and alleged related-offenses. In this sense, the states have generally rejected real-offense sentencing. *See, e.g.*, WASH. REV. CODE § 9.94A.370(2) (1988). There are exceptions to this general rule, however. For a more complete discussion of state practices, see Reitz, *supra* note 13, at 535-40.

In addition, states have generally taken a more permissive attitude towards noncriminal offense characteristics. *See, e.g.*, *infra* note 258 and accompanying text.

main largely undisturbed. In the end, this major component of the Sentencing Commission's compromise on real-offense sentencing reveals itself to be irrational, pernicious and ineffective.

A. The Impact of the Guidelines' Approach

The Sentencing Commission's basic compromise on alleged related-offense sentencing is that for one category of offenses, the type for which the Guideline range is determined largely on the basis of an amount or quantity, the sentence is based not solely on the offense of conviction, but also on "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction."[142] This rule requires radically different treatment for the two categories of offenses and generates puzzling results.

Imagine that Defendant A has robbed $10,000 from a bank and Defendant B has sold three grams of cocaine base ("crack"). Both defendants would have an offense level of twenty-two.[143] Now instead assume that each defendant has committed two offenses. Defendant A robbed $10,000 from each of two banks, and possessed a gun while committing the second offense. Defendant B sold three grams of crack on two occasions, and during the second offense possessed a gun. Each defendant, if convicted on both counts, would have a guideline offense level of twenty-eight.[144] If, however, they are each convicted only of the

142. U.S.S.G., *supra* note 1, § 1B1.3(a)(2); *see supra* part III.B.4.

143. Defendant A's offense level would be calculated starting from the base offense level for robbery, which is 20. *See* U.S.S.G., *supra* note 1, § 2B3.1(a). There is a two-level increase for taking the property of a financial institution. *Id.* § 2B3.1(b)(1). There is no adjustment for taking $10,000 or less. *Id.* § 2B3.1(b)(6).

Defendant B's offense level would be calculated based on a "Drug Quantity Table". *Id.* § 2D1.1(a)(3). The offense level applicable to three grams of crack is 22. *Id.* § 2D1.1(c)(11).

144. Defendant A's offense level would be determined starting with the offense level for the first robbery which is 22, as in the previous example. The offense level for the second robbery is 27 (base offense level of twenty, plus two levels for taking property of financial institution, plus five levels for possessing a gun. *See* U.S.S.G., *supra* note 1, §§ 2B3.1(b)(1) & 2B3.1(b)(2)(C), respectively. Chapter 3, part D of the Guidelines establishes the rules for dealing with multiple counts of conviction. *Id.* § 3D. Offenses are arranged in one or more "groups," an offense level is determined for each group, and the final offense level is determined by taking the group with the highest offense level and increasing it depending upon the number and seriousness of the other groups. *See id.* §§ 3D1.2, 3D1.3, & 3D1.4, respectively. Each of Defendant A's robberies would be a separate group under § 3D1.2 (unless the defendant robbed the same bank each time and the robberies were "connected by a common criminal objective" or constituted "part of a common scheme or plan," in which case they

first offense, their situations are entirely different. Defendant A would have an offense level of twenty-two, a reduction of six levels. This is a significant reduction. For a first offender, the sentencing range for level twenty-eight is seventy-eight to ninety-seven months of imprisonment. For level twenty-two, however, the range is only forty-one to fifty-one months.[145]

Defendant B, in contrast, would retain an offense level of twenty-eight. What has happened, in effect, is that if Defendant A is convicted of only one count of robbery (e.g., because of a charge bargain or an acquittal), the other robbery "disappears"—it is not included in the Guidelines calculation. In contrast, even if Defendant B is only convicted of one count of selling drugs, the guideline sentence will be determined based on both sales. Thus, conduct not leading to a conviction can have a dramatic effect on the sentence of a drug defendant, but not a robbery defendant.

It is not merely the base offense level that is affected by these grouping and aggregation rules. For section 3D1.2(d) offenses, specific offense characteristics present in counts that are grouped despite the lack of a conviction are added to the defendant's offense level. In the above example, when the defendants are only convicted on the first count, the drug defendant, but not the robbery defendant, receives an increase in his or her base offense level for possessing a gun during the second offense. Similarly, assume a defendant in a fraud case engaged in more than minimal planning and pretended to be acting on behalf of a charitable organization. Even if the defendant was not convicted for this conduct, the defendant's offense level would be increased by four levels since it occurred in the same course of conduct as the offense of conviction.[146]

---

would be grouped together, and the defendant's resulting offense level would be 27 — the level of the highest count in the group). The total number of "units" under § 3D1.4 would be one and one-half (one for the count with the highest level, plus one half for the other count because it is five to eight levels less serious than the highest level). *See id.* § 3D1.4(b). A total of one and one-half units adds one level to the highest group, so the final offense level from Chapter Two would be 28.

Defendant B's offense level would be determined differently. The drug trafficking guideline, § 2D1.1, is included in § 3D1.2(d), which requires the court to treat both counts as one group and aggregate all of the conduct and harm. *Id.* §§ 2D1.1, 3D1.2(d). Thus, the offense level would be 28: the base offense level of 26, is drawn from the Drug Quantity Table and based on a total of six grams of cocaine base from the two offenses, plus two levels for the possession of a gun. *See id.* §§ 2D1.1(c)(9) & 2D1.1(b)(1), respectively.

145. *See* U.S.S.G., *supra* note 1, § 5A.

146. *See id.* § 2F1.1(b)(2), (b)(3).

Some of the adjustments from Chapter Three of the Guidelines can compound this effect. Adjustments such as vulnerable victim[147] and leadership role in the offense[148] can, for offenses grouped under section 3D1.2(d), be based on conduct in related counts for which the defendant has not been convicted. The same is not true for non-3D1.2(d) offenses, like robbery. This is because most of the Chapter Three adjustments are tied into the relevant conduct principle. The sentencing judge makes adjustments such as vulnerable victim and aggravating role in the offense based on all of the defendant's relevant conduct, not just that occurring in the offense of conviction.[149]

Furthermore, for defendants convicted of non-3D1.2(d) offenses, even the presence of a Chapter Three adjustment factor in a second count of conviction may not effect the guideline range. If a defendant has been convicted of two robberies, with offense levels (excluding adjustments from Chapter Three) of thirty and twenty-six respectively, an increase in the second count's level to twenty-eight for selecting a vulnerable victim will have no effect on the applicable guideline range, despite the conviction on that count.[150] For a 3D1.2(d) offense, in contrast, the presence of a vulnerable victim in a related count will cause a two level increase, whether or not the defendant is convicted of that second count.

The impact of a second charge of equal or lesser seriousness, in terms of the offense level associated with that second charge, also differs greatly depending upon the nature of the offenses. For the robbery defendant, conviction on a second robbery count of equal seriousness will increase the offense level by two.[151] For the offender sentenced under a 3D1.2(d)-grouped offense, the impact is much less predictable. If it closely resembles the first count, the second count may have no effect on the guideline range, adding little to the base offense level, specific offense characteristics, or adjustments applicable to the first count.[152]

147. *Id.* § 3A1.1.

148. *Id.* § 3B1.1.

149. *See* U.S.S.G., *supra* note 1, § 1B1.3(a).

150. A conviction on a second robbery count with an offense level of either 26 or 28 would add two levels to the offense level of the first count. *See id.* § 3D1.4.

151. *See id.* § 3D1.4.

152. For example, assume that a defendant has committed two frauds in the same course of conduct. The first netted $40,000, involved more than minimal planning, a vulnerable victim, and an abuse of a position of trust. The second fraud netted $30,000, but was otherwise identical to the first. The offense level applicable to each fraud considered separately would be sixteen: base offense level of six, plus four levels for the amount of the fraud, plus two levels each for

A second count with the same offense level but with a different mix of specific offense characteristics and adjustments, however, could increase the offense level by many levels.[153] Thus, the second robbery adds two levels, but only if the defendant is convicted of both crimes; the second fraud may add nothing even if it results in a conviction, or it may add months or years to the presumptive sentence even if there has not been a conviction on that second count.

The consequences of this situation for plea bargaining are dramatic, particularly if the defendant has committed multiple offenses with very different offense levels. For non-3D1.2(d) counts the prosecutor can offer the defendant potentially very large sentence decreases if the defendant is allowed to plead to the lesser charge, thus eliminating guideline consideration of the more-serious-offense. The prosecutor can offer Defendant A, who robbed two banks, a reduction of six levels (not including two additional levels for accepting responsibility) by dropping the second count. For a defendant with no prior record, this reduces the likely sentence approximately three and one-half years.[154] In contrast, dropping the second of Defendant B's crack sales has no effect on the guideline range. Thus, as one would expect, as the Guidelines are designed to be applied, the

more than minimal planning, vulnerable victim, and abuse of a position of trust. *See* U.S.S.G., *supra* note 1, §§ 2F1.1(a), 2F1.1(b)(1), 2F1.1(b)(2), 3A1.1 & 3B1.3 respectively. Grouping them together would have no effect on the guideline range because the total amount, $70,000, does not provide any increase over the lower individual amounts, and the specific offense characteristics and adjustments are identical.

153. In this example, again assume that a defendant has committed two frauds in the same course of conduct. The first netted $40,000, involved more than minimal planning, a vulnerable victim, and an abuse of a position of trust. The second fraud netted $175,000, and the defendant played a managerial role in the offense. As in the prior example, the offense level applicable to the first fraud would be sixteen. *See supra* note 152. The offense level applicable to the second fraud would also be sixteen (base offense level of six, plus seven levels for the amount of the fraud, plus three levels for the managerial role). *See* U.S.S.G., *supra* note 2, §§ 2F1.1(a), 2F1.1(b)(1), & 3B1.1(b) respectively. Unlike the previous example, however, grouping these two offenses together would produce an increase in the offense level to twenty-three (base offense level of six, plus eight levels for the amount of the fraud, plus three levels for the managerial role, plus two levels each for more than minimal planning, vulnerable victim, and abuse of a position of trust). *Id.* §§ 2F1.1(a), 2F1.1(b)(1), 3B1.1(b), 2F1.1(b)(2), 3A1.1 & 3B1.3 respectively. This seven level increase would more than double the offender's likely prison sentence, from a range of 21 to 27 months to a range of 46 to 57 months. *Id.* § 5A (Sentencing Table).

154. This reduction assumes the judge selected the midpoint from the applicable guideline range.

utility of charge bargaining is dramatically different depending on whether alleged related-offense sentencing applies.[155]

B. THE RATIONALE FOR ALLEGED RELATED-OFFENSE SENTENCING

As illustrated above, the Guidelines divide federal criminal offenses into two categories, those that fall under Section 3D1.2(d) and those that do not, and treat alleged related-offenses in each category dramatically differently. This stark contrast in treatment raises two questions: why did the Sentencing Commission include mandatory alleged related-offense sentencing at all, and why did it distinguish between the two categories of cases?

In view of the serious questions of fairness raised by employing alleged related-offense sentencing and the marked discrepancy in the manner in which the two categories of offenses are treated, and the fact that this practice deviates sharply from past practice and all previous efforts at sentencing reform,[156] one would reasonably expect the Sentencing Commission to offer a thoroughgoing justification for its position. Unfortunately, the Sentencing Commission's rationale for the alleged related-offense component of the Guidelines is sketchy at best.[157] The only real discussion takes place in the commentary to section 1B1.3, the relevant conduct guideline.[158] Here the Sentencing Commission explains why alleged related-offense real-offense sentencing applies to offenses when the guideline range is determined largely by an amount or quantity as follows:

> Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (*i.e.*, to which § 3D1.2(d) applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. . . . In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. . . . Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of

155. *But see infra* notes 178-209 and accompanying text (discussing the ways in which plea bargaining retains vitality despite alleged related-offense sentencing).

156. *See supra* note 141.

157. This is consistent with the Sentencing Commission's general failure to articulate its principles. *See supra* note 75 and *infra* part IV.B.

158. U.S.S.G., *supra* note 1, § 1B1.3. The section of Chapter One, part A(4)(a) labeled "Real Offense vs. Charge Offense Sentencing" does not address the substance of alleged related-offense sentencing, and is generally limited to a justification of the Commission's approach to offense characteristics.

> related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when § 3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to § 3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.[159]

This explanation is rather opaque. For example, the Commission states that the offenses subject to alleged related-offense sentencing often "involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing." The Commission seems to be saying that just punishment requires the court to take into account the defendant's entire range of related conduct for such offenses. One must ask, however, why the counts of conviction do not fairly reflect the conduct for which the defendant should be punished. If the "pattern of misconduct" can be identified at sentencing, the elements of that pattern should be chargeable. If such elements are not charged, it must be that the prosecutor chose not to bring all of the possible charges, some charges were bargained away, or a jury rejected some charges and acquitted the defendant.

The Sentencing Commission's rationale for alleged related-offense sentencing, then, seems to focus primarily on the fear of "count manipulation" in a charge-offense system and seeks to correct "erroneous" charging and bargaining decisions.[160] This is in effect a restatement of the conventional wisdom that a charge-offense system shifts sentencing authority to the prosecutor.[161] Although the Commission does not elaborate on this concept, it would seem that count manipulation could manifest itself in one of two ways: undercharging or overcharging. A prosecutor might seek to ensure an unduly lenient sentence for an offender by bringing charges that, in terms of the number of counts or their severity, understate the seriousness of the offender's misconduct. Conversely, if the number of counts affect

159. U.S.S.G., *supra* note 1, § 1B1.3 (Background).

160. The Commission's concern with correcting "erroneous" acquittals seems secondary, as acquittals are not discussed in any of the Guidelines sections or commentary applicable to alleged related-offense sentencing.

161. *See supra* notes 36-37 and accompanying text.

the severity of the resulting sentence, a prosecutor could punish an offender by taking what was really one criminal episode and breaking it up into a number of counts.

Neither of these possible explanations for the Sentencing Commission's decision to adopt a version of alleged related-offense sentencing withstands closer scrutiny. Although the ability of the prosecutor to secure overly lenient sentences for favored offenders would certainly contribute to unwarranted disparity, this is a particularly weak justification for the Sentencing Commission's decision to punish defendants based on crimes for which they have not been convicted. First, its goal is probably unattainable. There are many sources of prosecutorial leniency outside of the control of the Sentencing Commission. The prosecutor can decline to file charges, or can file charges with a low statutory maximum penalty.[162] Through "fact bargaining"[163] and other devices, the prosecutor can keep from the court the information necessary to the operation of real-offense sentencing. In addition, the Guidelines themselves offer prosecutors avenues to circumvent real-offense sentencing. These avenues include charging counts not subject to grouping under section 3D1.2(d), which are therefore not eligible for alleged related-offense treatment,[164] and filing substantial assistance motions under section 5K1.1, which authorizes the court to depart below the applicable guideline range, even if such motions are not completely warranted.[165]

Even if adopting real-offense sentencing would inhibit permissive plea bargains, such a policy would be unwise. There is little reason to believe that undue prosecutorial leniency seriously obstructs the imposition of just punishment or frequently

162. Individual federal prosecutors have great latitude in selecting the charges to be pursued. *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 506-12 (1992); *see also*, Schulhofer, *supra* note 20, at 206-07 (describing the ability of prosecutors to select charges to avoid mandatory sentences).

163. *See, e.g.*, Nagel & Schulhofer, *supra* note 162, at 547 ("Fact bargaining occurs most often with respect to the amount of drugs or the particular drug involved, such as substituting cocaine for crack, or in the dollar amount involved in economic crimes.").

164. *See infra* note 169 and accompanying text.

165. Schulhofer and Nagel have uncovered evidence that some prosecutors seem on occasion to make unwarranted substantial assistance motions. *See* Nagel & Schulhofer, *supra* note 162, at 522-23, 531-32, 550-51. Probation officers in one district the authors studied estimate that there is guideline evasion in 50% of the cases when the defendant provides some cooperation. *Id.* at 541.

deprecates the seriousness of an offense. It is probably fair to assume that prosecutors on the whole are not disposed toward undue leniency. When prosecutors offer favorable treatment to a defendant, it is usually either a pragmatic response to caseload pressure, the vagaries of trial, the need to obtain the defendant's cooperation in other prosecutions, or, as has been evident under the Guidelines, a reaction to clearly excessive sentences. Policy makers should not lightly eliminate a safety valve mechanism of this sort. If they think that such practices are problematic, they should address such problems by developing explicit controls or guidelines regulating the exercise of prosecutorial discretion,[166] rather than by embracing alleged related-offense sentencing. The radical response of alleged related-offense sentencing is not commensurate with the problems it seeks to remedy.

The other credible rationale for the Sentencing Commission's adoption of alleged related-offense sentencing, that prosecutors in a charge-oriented system may be able to inflate a defendant's sentences by breaking up one criminal episode into a number of counts, presents a more plausible and appropriate concern. Prosecutors could bring a typical mail fraud case, for example, as one count, alleging the entire scheme, or as many counts, since each mailing is a separate offense.[167] It would indeed be disquieting if a prosecutor could increase the defendant's exposure by filing many counts, rather than one count alleging the same misconduct.[168] The prosecutor's power would be greatly enhanced, with all of the concerns that scenario raises. Unwarranted disparity would increase, because, depending upon the prosecutor's decisions, defendants who committed and were convicted of identical criminal behavior could receive substantially different sentences.

These concerns, although legitimate, do not justify alleged related-offense sentencing. In the first place, it is not clear to what extent the Guidelines' version of alleged related-offense

166. Indeed, commentators have made many suggestions for the creation of prosecutorial guidelines governing charging and bargaining. *See, e.g.*, Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 8, 25-34 (1971); Stephen J. Schulhofer, *Sentencing Issues Facing the New Department of Justice*, 5 FED. SENTENCING REP. 225 (1993); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 678-83 (1976).

167. *See* Badders v. United States, 240 U.S. 391, 394 (1916).

168. *See* United States v. Wheelwright, 918 F.2d 226, 229-30 (1st Cir. 1990) (noting that the Guidelines' relevant conduct approach to "fungible items" is designed to prevent double counting of amounts).

sentencing in fact reduces the prosecutor's ability to influence the severity of the defendant's sentence. The prosecutor can manipulate, and increase, the likely sentence for a particular defendant by, for example, charging offenses with high statutory maximum or mandatory minimum sentences, bringing additional charges not subject to grouping under § 3D1.2(d), or bringing sequential charges against a defendant in separate trials.[169]

More important, although a concern with punitive count manipulation may warrant aggregation of counts of conviction, it does not justify equating an alleged related-offense with a conviction offense. In other words, if the Sentencing Commission wished to enforce the principle that two defendants convicted of the same misconduct should not receive different sentences depending upon whether the prosecutor chooses to break up the criminal episode into numerous counts, the most sensible approach would be to devise rules diminishing the importance of the number of *counts of conviction*. One way to do this would be the approach taken in the grouping rule of section 3D1.2(d). The Guidelines could identify those types of offenses that "involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing"[170] and aggregate all of the counts of conviction for such offenses.

Alleged related-offense sentencing is essentially irrelevant to the question of punitive count manipulation. In the absence of alleged related-offense sentencing, the prosecutor would have an incentive to charge the defendant with all offenses the prosecutor thinks should influence the sentence. Whether the prosecutor has an incentive to break up a criminal episode into a number of counts to obtain a harsher sentence, however, depends on how the guidelines deal with counts of conviction, not on whether alleged related-offenses are considered. In fact, rejecting alleged related-offense sentencing probably gives the

169. The Guidelines may limit the prosecutor's ability to increase the total sentence by proceeding via sequential trials for the same defendant. *See* U.S.S.G., *supra* note 1, § 5G1.3. The operation of this Guideline section is, however, by no means clear. *See*, United States v. Lechuga, 975 F.2d 397, 401 (7th Cir. 1992) (holding that when a defendant is convicted in separate trials of two offenses that would be grouped if tried together, the court should impose a sentence in the second case so that the total sentence is what the defendant would have received if there had been only one trial, even if the court must depart downward in the second case to reach that result).

170. U.S.S.G., *supra* note 1, § 1B1.3 (Background).

prosecutor an incentive to bring less, rather than more counts if there is a choice. Only in that way can the prosecutor ensure that the sentence will be based on an alleged fraudulent scheme as a whole, for example. If the prosecutor breaks the case up into a number of charges, and the defendant is acquitted on any of those counts, the allegations in those counts would not be considered at sentencing.

The prosecutor cannot gain any strategic advantage, in terms of manipulating the sentence, by charging less than all of the conduct for which the defendant might be convicted.[171] It is therefore perverse to suggest that a defendant is protected from count manipulation by allowing charges that the prosecutor did not bring or dropped, or for which the defendant was acquitted, to increase the defendant's sentence.[172]

Ironically, aside from section 3D1.2(d) grouping, the Guidelines already have rules that diminish the effect of punitive count manipulation. The multiple count provisions of Chapter Three, part D reflect a reasoned approach to the difficult question of multiple count convictions.[173] Under this approach, counts of conviction in separate "groups" can increase the defendant's sentence, but only incrementally, with a maximum increase of only five levels, regardless of the amount and severity of additional counts beyond the one yielding the highest offense level. Thus, even if one repealed the alleged related-offense component of the Guidelines, prosecutors in a drug case could affect only a slight increase in the offense level by breaking a criminal episode into a number of counts, an increase that might

171. The potential use of counts for which the defendant has been acquitted demonstrates the grotesque nature of such a rationale. Assume the prosecutor chooses to bring many counts against the defendant, rather than charging the entire scheme as one count, and the defendant is then acquitted on one or more of the counts. In this situation the Guidelines would still require the judge to consider the acquitted counts if they were in the same course of conduct. It is absurd to suggest that it is necessary to do this to protect the defendant from the consequences of the prosecutor bringing multiple charges.

172. Some commentators have argued that real-offense sentencing of this type gives the prosecutor an incentive not to bring some charges, such as those that potentially are difficult to prove, since she knows that these allegations will still be considered at sentencing. Freed, *supra* note 32, at 1714. It is probably more accurate to say that alleged related-offense sentencing reduces the prosecutor's incentive to bring such charges. The prosecutor has nothing to lose by bringing such charges, because even if the defendant is acquitted the prosecutor may still allege the facts at sentencing. Furthermore, the prosecutor still has reasons to bring such charges, including maintaining leverage in plea negotiations and increasing the statutory maximum penalties the defendant faces.

173. For a useful discussion of the drafting principle the Sentencing Commission employed in this area, see Breyer, *supra* note 4, at 25-28.

be offset by the decreased amount of drugs involved in each count of conviction.

The Sentencing Commission has also failed adequately to explain the location and manner in which it fixed the alleged related-offense sentencing "line" between the two categories of offenses. The differential treatment of the two categories alone does not demonstrate that the dividing line is an irrational one. Any time a policy line is drawn, with cases on either side of the line dealt with differently, it will appear anomalous that cases, similar to one another in some way, but on opposite sides of the dividing line, receive dissimilar treatment. Whether this differential treatment is in fact anomalous depends upon the rationale for these rules. To use the language of sentencing reform, whether these disparities in the Guidelines' approach to alleged related-offenses are unwarranted depends upon the basis for the location of that line and the manner in which it was drawn.

Because fear of count manipulation appears to have been the prime motivating force behind the adoption of alleged related-offense sentencing, perhaps the Sentencing Commission felt that certain types of offenses were more susceptible to count manipulation, namely those that "often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing."[174] In other words, a prosecutor might be more likely to overlook an additional small drug sale than an additional bank robbery. This contention is questionable, because prosecutors have traditionally engaged in charge bargaining with all types of offenses. More important, even if there is some truth to the idea that some types of offenses are more susceptible to count manipulation, the Commission's response misses the mark. Even if a defendant is more likely to be convicted of a second robbery in the same course of conduct than a second drug sale, once that second robbery fails to lead to a conviction a judge should be just as interested in the alleged robbery as the alleged drug sale. As discussed above, possible distinctions between groups of offenses may warrant different treatment of multiple counts of conviction, but do not support alleged related-offense sentencing for some offenses but not others.[175]

The Sentencing Commission's method of aggregating alleged related-offenses also is rather crude. For example, the Guidelines treat alike three $10,000 thefts and one $30,000

174. U.S.S.G., *supra* note 1, § 1B1.3 (Background).
175. *See supra* notes 167-170 and accompanying text.

theft. This puts too much importance on the amount taken, a fact that may be a matter of chance and beyond the control of the offender. Most judges are likely to view the repeat offender as more culpable and dangerous than the one-time offender who happened to steal the same amount. The wisdom of the Commission's approach is further undercut by the unpredictable effect of the alleged related-offense rules as compared to the multiple count rules applicable to non-3D1.2(d) offenses: sometimes an alleged related-offense greatly increases the severity of the sentence, sometimes it has little or no effect.[176]

The Sentencing Commission took a technique for separating offenses and elevated it to a principle. The Commission decided that for certain types of crimes, amounts would largely determine the sentence. Then, because they could easily count amounts for nonconviction offenses, they did.[177] This mechanical approach, apparently unguided by principle, seems destined to accomplish very little of value.

C. What Has Alleged Related-Offense Sentencing Accomplished?

The goals of real-offense sentencing are to increase proportionality, limit the impact of plea bargaining on sentencing, and avoid excessive shifts of sentencing authority to the prosecutor. For real-offense sentencing to be worth its costs—increased unfairness, or at least the appearance of unfairness, and a greater administrative burden for the courts—there must be substantial progress towards these goals. In almost all important respects, the Sentencing Commission's adoption of alleged related-offense sentencing has failed to further these goals.

Plea bargaining has retained much greater than anticipated vitality under alleged related-offense sentencing.[178] As initially promulgated, the Guidelines offered some significant loopholes that enabled the parties to bargain their way out of alleged related-offense sentencing. In the narcotics area, for example, the

176. *See supra* notes 151-153 and accompanying text.

177. Professor Albert Alschuler has criticized the entire Guidelines' undertaking on this basis. *See* Alschuler, *supra* note 33, at 914-15 (stating that part of the reason the Guidelines tend to be harm-based is that harms can be more readily counted or quantified than can situational factors or offender characteristics).

178. Commissioner Ilene Nagel and Professor Stephen Schulhofer have conducted the most complete studies to date about plea bargaining under the Guidelines. *See* Schulhofer & Nagel, *supra* note 62; Nagel & Schulhofer, *supra* note 162.

Guidelines called for aggregating alleged related drug distribution offenses, but not "telephone counts" and simple possession. Through charging and bargaining decisions, then, the prosecutor could determine whether alleged related-offense sentencing applied to a narcotics defendant. A plea to a telephone count or simple possession charge eliminated the Guidelines' consideration of other alleged drug activity in the same course of conduct.[179]

The Sentencing Commission apparently recognized this situation and responded by trying to close the loopholes. In a series of amendments, the Sentencing Commission lengthened the list of offenses subject to grouping under section 3D1.2(d) and, accordingly, included in alleged related-offense sentencing, by adding narcotics "telephone counts,"[180] bribery,[181] and some firearms offenses.[182] The Commission also considered adding robbery to this list, but ultimately declined to do so.[183] As a result, the Guidelines have become more and more alleged related-offense oriented without the Commission carefully considering the consequences of that shift.[184]

Despite these changes, there remain ways to plea bargain out of alleged related-offense sentencing under the Guidelines, or at least to limit its impact. The prosecutor may be able to bring charges with a statutory maximum penalty below the sentence called for by the Guidelines. "Fact bargaining" can limit the reach of relevant conduct.[185] If, for example, the parties agree that the offense involved a lesser amount of drugs than might be provable at trial, they can manipulate, and lower, the applicable guideline range. There is anecdotal evidence that

179. Prosecutors and defense lawyers have apparently used these same mechanisms to evade the statutory mandatory minimum penalties applicable to drug distribution and conpiracies. Stephen Schulhofer has wryly noted that these provision seem to "have produced an epidemic of telephone use and simple possession," as "[i]n some federal districts, these counts have become the most serious charge in up to thirty percent of all drug convictions." Schulhofer, *supra* note 20, at 206-07; *see also id.* at 219.

180. *See* U.S.S.G., *supra* note 1, app. C, amend. 320.

181. *See id.* app. C, amend. 121.

182. *See id.* app. C, amend. 349.

183. The Sentencing Commission published a proposed amendment adding robbery to § 3D1.2(d) in January 1991, but ultimately declined to adopt this amendment. *See* 56 Fed. Reg. 1846 (Jan. 17, 1991) (proposed amendment 7(c)); 56 Fed. Reg. 2276 (May 16, 1991) (failing to included this amendment in final amendments).

184. The Guidelines have increased the use of other forms of real-offense sentencing over time as well. *See supra* note 99.

185. *See supra* note 163.

this type of fact bargaining does, in fact, take place.[186] Parties have also used "date bargaining," which occurs when the defendant agrees to plead guilty to a pre-guidelines offense for criminal conduct straddling the Guidelines' November 1, 1987, effective date.[187] The Guidelines are then inapplicable.[188] Furthermore, the prosecutor can, in his or her sole discretion, decide to move for a downward departure from the Guidelines based on the defendant's "substantial assistance."[189] This again gives the prosecutor the ability to vitiate real-offense sentencing and orchestrate a lower sentence for the defendant.[190]

Another way charge bargaining retains vitality relates to the adjustments in Chapter Three of the Guidelines. Apparently the Commission intended these adjustments to be made on the basis of the relevant conduct principle.[191] A defendant might, for example, engage in several drug transactions in the same course of conduct, but have an aggravating role in the offense in only one such transaction. If the defendant pleads guilty to one of the other counts, the aggravating role adjustment would seem to still apply. Several courts, however, have limited the role in the offense adjustments to the offense of conviction.[192] Under such rulings, if the defendant pleads guilty to a count in which the defendant did not play an aggravating role, the defendant would not receive the aggravating role adjustment, despite having played such a role in the related dismissed counts.[193]

---

186. *See, e.g.*, Schulhofer & Nagel, *supra* note 62, at 272-78 (discussing fact bargaining).

187. *Id.* at 271-72 (discussing date bargaining).

188. *See id.* While date bargaining is undoubtedly occurring, it should cease to be a significant factor as time goes on and there are fewer and fewer straddle cases.

189. U.S.S.G., *supra* note 1, § 5K1.1.

190. *See supra* note 162.

191. *See* U.S.S.G., *supra* note 1, § 1B1.3(a).

192. *See, e.g.* United States v. Barbontin, 907 F.2d 1494 (5th Cir. 1990) *superceded by statute as stated in* United States v. Caballero, 936 F.2d 1292 (D.C. Cir. 1991)); United States v. Tetzlaff, 896 F.2d 1071 (7th Cir. 1990) *superceded by statute as stated in* United States v. Arrellano-Soto, Nos. 91-50488, 91-50489, 91-50516, 91-50519, 1992 U.S. App. LEXIS 14208 (9th Cir. June 10, 1992); United States v. Williams, 891 F.2d 921 (D.C. Cir. 1989) *superceded by statute as stated in* United States v. Saucedo, 977 F.2d 597 (10th Cir. 1991).

193. The Sentencing Commission amended the Introductory Commentary to the Role in the Offense Section of Chapter 3, effective November 1, 1990, in an apparent attempt to clarify that these adjustments are to be based on the defendant's relevant conduct. *See* U.S.S.G., *supra* note 1, app. C, amend. 345.

The parties do face certain obstacles in circumventing the Guidelines' alleged related-offense provisions. The policies of the Department of Justice in theory forbid a prosecutor from engaging in some of the practices described above.[194] One Department directive is that prosecutors not bargain away "readily provable" charges.[195] The probation officer may stand in the way of a charge bargain that deviates from the intent of the guidelines. The judge may, based on a policy statement in the Guidelines Manual, reject a charge bargain unless "the remaining charges adequately reflect the seriousness of the actual offense behavior and . . . the agreement will not undermine the statutory purposes of sentencing."[196]

In practice, however, the parties retain a great deal of flexibility in plea bargaining. The Department of Justice only loosely supervises line prosecutors,[197] giving them significant leeway.[198] Pre-indictment bargaining is particularly hard to control.[199] The probation officer may not have complete access to the relevant facts, or the judge may ignore the probation officer's recommendation.[200] In addition, judges remain very unlikely to reject plea agreements, out of deference to the prosecutor's role, hostility to the Guidelines, concern with excessive sentences, or caseload pressures.

Paradoxically, then, the alleged related-offense component of the Guidelines to some extent resembles the rejected charge-

194. *See* U.S. DEPARTMENT OF JUSTICE, PROSECUTOR'S HANDBOOK ON SENTENCING GUIDELINES AND OTHER PROVISIONS OF THE SENTENCING REFORM ACT OF 1984 (1987) (hereinafter REDBOOK); Memorandum from Richard Thornburgh, Attorney General, Plea Bargaining Under the Sentencing Reform Act (March 13, 1989), *reprinted in* HUTCHISON & YELLEN, *supra* note 88, at app. 12. For a discussion of these provisions, see Schulhofer & Nagel, *supra* note 62, at 252-56; Nagel & Schulhofer, *supra* note 162, at 506-12.

195. REDBOOK, *supra* note 194, at 46-47.

196. U.S.S.G., *supra* note 1, § 6B1.2(a).

197. *See* Nagel & Schulhofer, *supra* note 162, at 544.

198. For example, prosecutors seem to apply a flexible concept of "readily provable" charges, which enables them to dismiss counts in an effort to reach a desired result in plea bargaining. Nagel & Schulhofer, *supra* note 162, at 549; *see also* Schulhofer & Nagel, *supra* note 62, at 254-56.

199. *See* COMMISSION, OPERATION REPORT, *supra* note 68, executive summary 77-78 (finding that pre-indictment bargaining is likely to cause a study to underestimate impact of plea bargaining on sentencing); *see also* David N. Yellen, *Two Cheers For "A Tale of Three Cities"*, 66 S. CAL. L. REV. 567, 569-70 (1992) (discussing the practice of pre-indictment bargaining and arguing that it has increased under the Guidelines).

200. *See* Heaney, *supra* note 42, at 169 n.22 (finding that judges calculate the guideline range differently from the manner recommended by the probation officer in ten percent of cases); Schulhofer & Nagel, *supra* note 62, at 274-78.

offense approach.[201] Real-offense sentencing remains partly discretionary, as it was under the pre-Guidelines system; the difference is that now the prosecutor, rather than the judge, exercises most of that discretion. Alleged related-offense sentencing, like mandatory minimum sentencing provisions,[202] strengthens the prosecutor's hand in plea bargaining: the prosecutor can dangle the "carrot" of charge-oriented sentencing backed up by the "stick" of real-offense sentencing.[203] If the defendant pleads guilty and the prosecutor collaborates, the defendant can avoid this aspect of real-offense sentencing and receive a substantially lower sentence than would apply after trial. If the defendant instead goes to trial, the real-offense provisions loom large.[204]

The carrot and stick of plea bargaining are particularly forceful because of the widely shared perception that the Guidelines require severe sentences.[205] To a risk averse defendant,

---

201. This observation is consistent with Michael Tonry's insight that the Guidelines as a whole resemble mandatory minimum sentencing provisions far more than the Sentencing Commission would like to acknowledge. *See* Tonry, *supra* note 11, at 131-32.

202. The Sentencing Commission itself has issued a report highly critical of the proliferation of mandatory minimum sentencing provisions. *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) [hereinafter MANDATORY MINIMUM REPORT]. In particular, the Report observed that mandatory minimum penalty provisions shift sentencing discretion to the prosecutor, inviting disparity, and undercut the Guidelines' goal of increasing proportionality. *Id.* at 27-34. Mandatory minimum penalty provisions invite manipulation and evasion, according to the Sentencing Commission's data, which indicates that offenders whose conduct warrants application of mandatory sentences receive less than such mandatory sentences in approximately 41 percent of cases. *Id.* at 89. In addition, mandatory minimum penalty provisions appear to be applied in a racially discriminatory manner. *Id.* at 80 (finding that white defendants were sentenced below mandatory minimum penalties 46% of the time, black defendants only 32.3% of the time).

203. Professor Alschuler has analogized this situation to the well known "good-cop, bad-cop" routine, with the Sentencing Commission and the Guidelines as the "bad-cop," and the prosecutor offering potential relief to the defendant as the "good-cop." Alschuler, *supra* note 33, at 928.

204. Not only has the Guidelines' alleged related-offense provision failed significantly to limit the prosecutor's authority in plea bargaining, but the available evidence also suggests that charge-offense systems have not experienced the dramatic shifts of power to the prosecutor that some had predicted. *See, e.g.*, Reitz, *supra* note 13, at 541. There may be multiple factors at work here, including the state guidelines' generally more reasonable severity level. This evidence lends further support, however, to the inappropriateness of alleged related-offense sentencing.

205. *See, e.g.*, Heaney, *supra* note 42, at 176-79 (setting forth data suggesting a substantial increase in time served under the Guidelines). *But see*, COMMISSION, OPERATION REPORT, *supra* note 68, at executive summary 12 (in-

this perceived severity may increase the value of the inducement the prosecutor can offer for a guilty plea, or alternatively, the penalty for going to trial. A guilty plea to a lesser charge may be the defendant's only way to avoid a predictably long prison term.[206] This is particularly true in drug cases, where charge bargaining may allow a defendant to evade a stern mandatory minimum sentence.

The rates at which narcotics defendants go to trial supports this hypothesis. The percentage of narcotics trafficking convictions obtained after trial rather than by guilty plea is higher than the trial conviction percentage for all offenses.[207] Conversely, virtually all of the convictions for simple possession and use of communication facilities in connection with narcotics offenses result from guilty pleas.[208] Apparently, then, the government uses the "carrot" of lower Guideline ranges and statutory maximum penalties, and the avoidance of mandatory minimums, as an incentive to plead guilty to lesser charges. Those who do not accept or are not offered such bargains frequently opt to "roll the dice" at trial.

There is no single pattern of plea bargaining under the Guidelines. In fact, the available evidence suggests that plea bargaining practices vary widely from district to district, from judge to judge, and from prosecutor to prosecutor.[209] Similarly

terpreting the Sentencing Commission's interview data to indicate that a majority of judges, federal prosecutors and probation officers consider Guideline sentences to be "mostly appropriate"). It is clear that drug sentences at least "are higher than those that were common prior to the Guidelines, and not just by a little bit . . . [but] orders of magnitude higher." Schulhofer, *supra* note 32, at 853.

206. In interviews conducted by the Sentencing Commission, approximately 25% of responding prosecutors indicated that they might negotiate a plea reflecting less than the defendant's total offense behavior if the guideline sentence would otherwise be inappropriate. *See* COMMISSION, OPERATION REPORT, *supra* note 68, at 185, tbl. 54.

207. U.S. SENTENCING COMMISSION, 1992 ANNUAL REPORT 59, tbl. 19 (1993). In addition, a percentage of those pleading guilty to narcotics trafficking receive substantial assistance motions, thus effectively avoiding the Guidelines and mandatory minimum penalties. *See id.* at 127, tbl. 50 (noting that over 70% of all downword departures are for substantial assistance). The percentage of narcotics trafficking defendants facing mandatory minimum terms or severe Guideline ranges who opt to go to trial may therefore be significantly higher than 44%.

208. *Id.* The percentages are 94.4 and 98.3, respectively.

209. *See* Heaney, *supra* note 42, at 192 (discussing differences among jurisdictions in manipulative plea bargaining); Nagel & Schulhofer, *supra* note 162, at 552-557 (same). For example, Nagel and Schulhofer estimate that in one district plea bargaining is used to circumvent the guidelines in over 25% of the cases, and to a "huge" extent in many of such cases. *Id.* at 534. In another

situated offenders may receive very different guideline ranges depending on such factors as the policies of the local U.S. Attorney's office, the skill of defense counsel, and the attitudes of the prosecutor, judge, and probation officer. This diversity of attitudes and approaches introduces disparity and undermines the goals of alleged related-offense sentencing.

The complexity of the relevant conduct standard also contributes to unwarranted disparity. Complexity invites errors in application or inconsistent interpretation of key concepts. According to one commentator, "District judges, prosecutors, defenders, and probation officers are today demonstrating widely different attitudes and practices respecting relevant conduct within and across districts."[210] A recent study by the Federal Judicial Center confirms this hypothesis.[211] Many private defense counsel, in particular, have only a limited grasp of the intricacies lurking in the Guidelines.[212]

Proportionality, too, has been an elusive goal.[213] In fact, the aggregation required by the Guidelines' alleged related-offense principle, combined with the Guidelines' excessive reliance on harm- and quantity-based specific offense characteristics,[214] has

district they found manipulation in only 7-11% of guilty plea cases. *Id.* at 526. The forms, as well as the extent, of manipulation appear to vary as well.

210. Freed, *supra* note 32, at 1715.

211. The study prepared for the Federal Judicial Center found that probation officers apply different interpretations to the relevant conduct rules, resulting in different versions of real offense sentencing and dramatically different sentencing ranges. *See* Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of Relevant Conduct Guideline § 1B1.3*, 4 FED. SENTENCING REP. 330 (1992).

212. *See, e.g.*, COMMISSION, OPERATION REPORT, *supra* note 68, at 90-93 (private attorneys' knowledge of Guidelines rated as fair or poor by most judges, prosecutors, and probation officers); Nagel & Schulhofer, *supra* note 162, at 530 (indicating that probation officers rated the competence of private defense counsel in Guideline matters as "abysmal").

213. Professor Stephen Schulhofer has argued that excessive uniformity, particularly in drug cases, rather than unwarranted disparity, is the most serious problem with the Guidelines. Schulhofer, *supra* note 32, at 851-61. Commissioner Ilene Nagel has acknowledged that the Sentencing Commission paid more attention to uniformity than proportionality. *See* Nagel, *supra* note 29, at 934. Nagel explained that "while every effort was made to treat like offenders alike, less attention was given in the first set of guidelines, partly because of time constraints, to the possibility of over or under-defining like offenders." *Id.* Nagel stated further that "the emphasis was more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment." *Id.*

214. Professor Paul Robinson, the only original member of the Sentencing Commission who dissented from the Guidelines, warned early on about this risk of excessive uniformity:

reinforced disproportionate sentencing.[215] For crimes like larceny, fraud, and especially narcotics offenses, the quantity or value involved drives the sentence, a fact that is often beyond the defendant's control or expectations.[216] The effect of these amounts is magnified because alleged related-offenses, in which the defendant may not have participated personally, are aggregated and the amounts count as much for relatively minor participants in the offense as they do for more culpable individuals.[217] This irrationality, combined with widespread plea bargaining manipulation and evasion, results in Guideline ranges that may not reflect anything near the defendant's true culpability.

The Guidelines' heavy reliance on quantities has also contributed to another, unanticipated, increase in the prosecution's ability to influence sentences.[218] One of the most unsettling developments under the Guidelines is the ability of law enforcement officers to manipulate the likely sentence by selecting the amount of narcotics to be proposed to a suspect in an undercover

---

> Uniformity is desirable, however, only among offenses and offenders that are similar according to the factors that are relevant to the system's distributive principle. For example, a system that sanctions all forms of unlawful takings solely according to the value of the property taken may increase uniformity, but may frustrate both deterrence and just punishment.

Robinson, *supra* note 45, at 9.

215. *See* Schulhofer, *supra* note 32, at 853-54 (criticizing the Guidelines' reliance on quantities in drug cases). At times, the Guidelines go beyond mere irrationality into the realm of the bizarre. The Supreme Court noted in *Chapman v. United States*, that the Guideline range for a first offender convicted of selling 100 doses of LSD can range from 10 to 16 months if the drug was in pure form, to 27 to 33 months if it was contained in gelatin capsules, to 63 to 78 months if the LSD were on blotter paper, to 188 to 235 months if the doses were in sugar cubes. Chapman v. United States, 111 S.Ct. 1919, 1924 n.2 (1991) *reh'g denied* 112 S.Ct. 17 (1991); *see also* Alschuler, *supra* note 34, at 919.

216. *See supra* note 176 and preceding text.

217. Another source of disproportionality is the prosecutor's sole power to authorize the judge to depart from the Guidelines based on the defendant's substantial assistance. *See supra* notes 64-66. Anecdotal evidence suggests that those higher up in a criminal enterprise, having more information that is useful to the government, may receive a disproportional amount of such motions and thus receive shorter sentences than their less culpable collaborators. Freed, *supra* note 31, at 1704-05.

218. *See* Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187, 205-14 (1993) (arguing that the Guidelines encourage and enable prosecutors and law enforcement officials to manipulate investigations and sting operations in order to increase offender's prison terms).

operation.[219] Because the amount under consideration is critical for Guideline and mandatory minimum penalty purposes, the government can in effect determine which defendants receive longer sentences by suggesting larger amounts.[220]

The emerging picture is hardly encouraging. It is by no means clear that alleged related-offense sentencing has accomplished the Sentencing Commission's goals of increasing proportionality and limiting the impact of plea bargaining[221] and the power of the prosecutor.[222] There is little evidence that the Guidelines have significantly reduced unwarranted sentencing disparity.[223] Instead, the Guidelines produce unfairness, irra-

---

219. For a description of such practices, see Heaney, *supra* note 42, at 195-97.

220. Some courts have attempted to mitigate the effects of such practices. *See, e.g.*, United States v. Barth 990 F.2d 422, 424-25 (8th Cir. 1993) (recognizing the concept of "sentencing entrapment" that may, in some cases, justify a downward departure from the Guidelines).

221. According to the Sentencing Commission's own data, published as part of a congressionally mandated evaluation of the Guidelines, there is an uncertain connection between the alleged related offense sentencing rules and the impact plea agreements have on sentences. *See* COMMISSION, OPERATION REPORT, *supra* note 68, at 188, tbl. 142. For example, in the following pairs of offense types, the percentage of guilty plea cases in which the plea agreement had an impact on the sentence is comparable:

§ 3D1.2(d) grouped offenses	non-§ 3D1.2(d) grouped offenses
drug trafficking	drug possession; burglary
larceny; embezzlement	immigration
tax; firearms	robbery

222. *See* Heaney, *supra* note 42, at 229 (arguing that "it is clear that the prosecutor has as much control under the present system as he would under an offense-of-conviction model").

223. There has been a vigorous debate over whether or to what extent the Guidelines may be reducing unwarranted disparity. The evidence is best described as inconclusive. *See* Tonry, *supra* note 208, at 142-45 (reviewing evaluations of the Guidelines). The Sentencing Commission contends that the Guidelines have significantly reduced disparity, at least for the selected groups of offenses the Commission studied. COMMISSION, OPERATION REPORT, *supra* note 68, at executive summary 31-54. The General Accounting Office determined after reviewing the Commission's analysis and conducting its own study that although the Commission's analysis demonstrated some reduction in disparity for selected offenses, "limitations and inconsistencies in the data available for pre-Guidelines and Guidelines offenders made it impossible to determine how effective the sentencing guidelines have been in reducing overall sentencing disparity." U.S. GENERAL ACCOUNTING OFFICE, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED 10-11 (1992). Interestingly, the chairman of the Sentencing Commission urged the G.A.O. to title its study "Sentencing Guidelines: Disparity Reduced, But Some Questions Remain." *Id.* at 182; *see also* Heaney, *supra* note 42, at 164 (arguing that "there is little evidence to suggest that the congressional objective of reducing unwarranted sentencing disparity has been achieved"); William W. Wilkins, *Response to Judge Heaney*, 29 AM. CRIM L. REV. 795, 799-807 (1992) (criticizing Judge He-

tionality, and hidden disparity. Rather than being an effective compromise, the Guidelines seem to have captured some of the worst aspects of both charge- and real-offense sentencing.

V. A REVISED APPROACH TO REAL-OFFENSE SENTENCING

A. Alleged Related-Offense Sentencing

The Sentencing Commission's adoption of mandatory alleged related-offense sentencing is indefensible. The theoretical underpinnings of this radical reform are weak and unpersuasive. This effort has also failed to achieve the Commission's aims: proportionality is fragile, prosecutorial power is heightened, and the parties retain the ability to circumvent the guidelines through plea bargaining, an opportunity they are exercising in part because of the harshness and rigidity generated by this form of real-offense sentencing. At the same time, the principal drawback of real-offense sentencing, the appearance and reality of unfairness, has been all too apparent. In addition, the evidence available from state guideline systems that have rejected alleged related-offense sentencing does not validate the fear of uncontrolled plea bargaining that apparently motivated the Sentencing Commission.[224] Any legislature or sentencing commission constructing a new sentencing system should reject this approach and should confront real-offense sentencing in a manner more in harmony with the goals of sentencing reform.

Some have suggested reform rather than abolition.[225] Certainly there is some appeal to this argument, at least if one accepts the legitimacy of basing sentences on crimes not proved beyond a reasonable doubt. A critical examination of how a modified alleged related-offense system might work demonstrates, however, the shortcomings of a reform approach. A first step might be to eliminate consideration of alleged criminal con-

---

aney's methodology and conclusions); *cf.* Alschuler, *supra* note 33, at 915-18 (suggesting that studies purporting to demonstrate reduced disparity under sentencing guidelines are misleading).

224. *See* Reitz, *supra* note 13, at 541 (citing studies of Minnesota, Washington, and Florida experiences for the proposition that "plea bargaining behaviors have not changed radically following the adoption of conviction-offense practice").

225. *See, e.g.*, Jon O. Newman, *Five Guideline Improvements*, 5 Fed. Sentencing Rep. 190 (1993).

duct of which the defendant has been acquitted.[226] Although apparently constitutional under current doctrine because of the lower standard of proof applicable at sentencing, holding one accountable for a charge that the government has tried and failed to prove is probably the most disturbing form of alleged related-offense sentencing.[227] The perceived unfairness of this approach had, prior to the introduction of the Guidelines, led the United States Parole Commission, which itself took a real-offense approach to release decisions, generally to refuse to consider acquitted conduct.[228] The Sentencing Commission recently considered but declined to take a similar step.[229]

Rejecting acquitted conduct would be important symbolically, and it would eliminate some of the most unseemly results under the Guidelines.[230] The practical impact of such a step is unclear, however, given the lack of available information about the frequency of acquitted conduct having a measurable effect on the Guidelines' calculations. Furthermore, the government could undercut the potential impact of such a restriction through its charging policies. If the prosecutor believed that acquittal on a particular charge was a realistic possibility, the prosecutor could simply decline to pursue that charge and seek to introduce it as an alleged related-offense at sentencing. With-

---

226. The Ninth Circuit, alone among the federal courts of appeals, has restricted the use of acquitted conduct under the guidelines. *See* United States v. Brady, 928 F.2d 844 (9th Cir. 1991) (holding that upward departure cannot be based on acquitted conduct).

227. *See* Reitz, *supra* note 13, at 552 (recommending "the restoration of the legal force of acquittals at sentencing through a prohibition of the consideration of facts embraced in charges for which the defendant has been acquitted").

228. An important limitation on the Parole Commission guidelines' real-offense approach was that "the Commission shall not consider in any determination, charges upon which a prisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., a subsequent admission or other clear indication of guilt)." 28 C.F.R. § 2.19(c) (1980). The Parole Commission, which is in the process of being phased out, modified this limitation after the Federal Sentencing Guidelines were introduced by substituting a statement of general policy with respect to such charges. 56 Fed. Reg. 30,867 (1991).

229. *See* U.S. SENTENCING COMMISSION, PROPOSED GUIDELINE AMENDMENTS FOR PUBLIC COMMENT amend. 1 (1993); *see also* 57 Fed. Reg. 62832 (Dec. 31, 1992).

230. For example, in *United States v. Concepcion*, the Second Circuit ruled that the sentencing court correctly increased the defendant's applicable guideline range from 12 to 36 months to 210 to 262 months based upon conduct for which the defendant had been acquitted. United States v. Concepcion, 983 F.2d 369, 387-89 (2d Cir. 1992); *see also id.* at 393-94 (Newman, J., concurring) (describing as "bizarre" this result required by the Guidelines and expressing "the hope that some revision may receive serious consideration").

out an acquittal on the charge, the information would not be barred. The prosecutor would sacrifice the longer statutory maximum penalty that would apply if there were an additional count of conviction, but given the prevailing high maximum penalties, in most cases this would be only a slight impediment.[231] Thus, although eliminating consideration of acquitted conduct would, on balance, be an improvement, it could also have the counterintuitive tendency to further erode the primacy of the guilt determining phase of the criminal process.

A related step would be to reject inclusion of alleged related-offenses if such related charges were dropped as part of a plea bargain. This would remedy one of the more blatant examples of unfairness in plea bargaining under the Guidelines,[232] depriving the defendant of the presumed benefit of a plea bargain without the opportunity to withdraw the plea.[233] Indeed, the Ninth Circuit has already mandated such an approach.[234] As with banning acquitted conduct, however, such a reform might have some unintended consequences and open new avenues for prosecutorial manipulation. Prosecutors might more frequently engage in pre-indictment plea bargaining,[235] or use superseding indictments to get around such a restriction.

To take the opposite approach, real-offense sentencing advocates might argue that the Sentencing Commission should extend related-offense sentencing to curtail plea bargaining. One of the problems with the Guidelines' approach is that it fails to explain why some offenses are subject to alleged related-offense sentencing while others are not.[236] As the Sentencing Commission recognized, however, full real-offense sentencing would be unmanageable and unworkable. Furthermore, new plea bargaining techniques would meet any additional steps toward real-offense sentencing. Plea negotiators are very creative in devising ways to evade restrictions placed upon them. Stephen

231. Before the Guidelines, statutory maximum penalties were generally set with an indeterminate sentencing system in mind. The maximum was set for the theoretical "worst case," and even such an offender would probably have been eligible for parole after serving one-third of the sentence. Statutory maximum penalties have not generally been adjusted to more realistic levels in light of determinate sentencing guidelines. *See* Tonry, *Real Offense*, *supra* note 6, at 1593.

232. *See* Yellen, *supra* note 199, at 573-74.

233. *See* Tonry & Coffee, *supra* note 19, at 158-60 (discussing illusory plea bargaining).

234. *See* United States v. Fine, 946 F.2d 650, 651-52 (9th Cir. 1991).

235. *See* Yellen, *supra* note 199.

236. *See supra* text accompanying notes 155-58.

Schulhofer has predicted that if Congress closes the "loopholes" that exclude telephone counts and simple possession from mandatory minimum penalties, guilty pleas to misprision of felony, false statements, and filing false tax returns will proliferate.[237] The same sort of reaction is likely to be produced by any effort by the Sentencing Commission to further extend the reach of the Guidelines' real-offense provisions.

A more intriguing reform would be for the Sentencing Commission to reconsider both the weight given to alleged related-offenses and the categories of offenses that receive such treatment. Currently if an offense is within section 3D1.2(d), alleged related-offenses are not only included in the Guideline calculation, they count as much as if the defendant were convicted of those unproven charges. The Sentencing Commission might strike a different balance by providing that when sentencing calls for inclusion of alleged related-offenses, such offenses will count less than they would if the defendant were actually convicted of them.[238] The Guidelines could duplicate the current treatment of multiple counts of conviction for non-§ 3D1.2(d) offenses, giving such additional counts a relatively small, but predictable effect on the sentence.[239] Alternatively, the Guidelines might designate a range of weights to be given to alleged related-offenses, depending on factors such as the defendant's role in the alleged related-offense.[240] It might matter, for example, whether the defendant actually committed the related-offense, or whether the Guildelines hold the defendant responsible for that conduct on the basis of conspiratorial or accessorial liability. The sentencing judge might be allowed some discretion in determining the weight given to alleged related-offenses.

237. Schulhofer, *supra* note 20, at 207.

238. *See* United States v. Concepcion, 983 F.2d 369, 394-95 (2d Cir. 1992) (Newman, J., concurring) (opining that the Sentencing Commission made a "debatable but defensible decision" to incorporate modified real-offense sentencing with "the entirely unjustified decision to price relevant conduct at exactly the same level of severity as convicted conduct").

239. *See supra* notes 150-151 and accompanying text.

240. This would be similar to the approach taken by the Guidelines in several areas. For example, the aggravated assault guideline increases the offense level by two, four, or six levels depending upon whether the defendant caused "bodily injury," "serious bodily injury," or "permanent or life-threatening bodily injury." U.S.S.G., *supra* note 1, § 2A2.2(b)(3). The court is also allowed to "interpolate" and increase the offense level by three or five levels if the injury is between the specified categories. *See id.* The Guidelines also provide a range of adjustments, from two to four levels, depending upon the extent of the defendant's aggravating or mitigating role. *See id.* §§ 3B1.1, 3B1.2.

Such an approach has several advantages over the current system. The unfairness of sentencing a defendant based on conduct for which he has not been convicted would remain, but in a diminished form. Proportionality might be increased compared to a charge-offense system. Parties could use plea bargaining to influence the sentence, but to a lesser extent than in a pure charge-based system. Similarly, plea bargaining would not be as illusory as in a real-offense system, because dropping a count would limit, although not completely eliminate, the effect of that wrongdoing on the sentence.

In assessing this suggested modification, it is useful to compare the Guidelines' alleged related-offense approach with its treatment of the defendant's criminal history. The Guidelines, like most two dimensional guideline grids,[241] place the current offense on one axis and the defendant's criminal history on the other. Depending on the "slope" of the line, the criminal history can have a greater or lesser impact on the sentence. The Guidelines give the current offense considerably more weight than any single prior conviction. The most a prior conviction can increase the defendant's sentence is an amount equal to two offense levels.[242] It seems incongruous that an alleged offense for which a defendant has not been convicted can have a significantly greater impact on the sentence than a prior offense for which the defendant was convicted.

The Sentencing Commission could further restrict the category of offenses to which alleged related-offense sentencing applies. As discussed above,[243] the Commission did not carefully articulate a rationale for determining which offenses were included in section 1B1.3 (a)(2). The Guidelines could generally ban alleged related-offense sentencing but allow for exceptions when there is a particularly strong policy justification.[244]

---

241. *See* Miller, *supra* note 10.

242. *See* U.S.S.G., *supra* note 1, § 5A (Sentencing Table). For example, an offender with an offense level of sixteen and a criminal history score of one would have a range of 21 to 27 months. *Id.* If the offender had an additional conviction worth the maximum three points, the offender's new range would be 27 to 33 months. *See id.* § 4A1.1 (setting the maximum points for an additional conviction), § 5A (Sentencing Table). That is the same range as for an offense level of eighteen and criminal history category I. *See id.* § 5A (Sentencing Table).

243. *See supra* text accompanying note 157.

244. Washington's guidelines take this approach. For certain categories of offenses, such as major economic crimes and crimes involving ongoing patterns of child sexual abuse or violence against children, courts may depart from the Guidelines if they find that the count or counts of conviction understate the frequency of the defendant's conduct. WASH. REV. CODE ANN. § 9.94A.390(2)

One or more of these restrictions on alleged related-offense sentencing, perhaps combined with such procedural reforms as applying the rules of evidence or requiring proof of other offenses by clear and convincing evidence,[245] could effect a more meaningful compromise between real- and charge-offense sentencing. Identifying a coherent modified approach would be difficult, but the Sentencing Commission's current approach, both rigid and unpredictable, seems to be among the least sensible.[246]

In the end, reforming alleged related-offense sentencing may alleviate the symptoms, but the disease will remain. The problems that alleged related-offense sentencing attempts to address are real, but there is little reason to believe that the goals of alleged related-offense sentencing are attainable or worth the sacrifice of fairness and due process. Greater attention to charging and bargaining practices, rather than this form of real-offense sentencing, is the proper direction.[247] An offender should only be punished for the offenses that he has admitted committing, or that the government has proved beyond a reasonable doubt. The Sentencing Commission's ratification of alleged related-offense sentencing has done the integrity and fairness of the federal criminal justice system a disservice and should be repealed.

B. Considering Other Real-Offense Categories

This Article has scrutinized and urged the rejection of alleged related-offense sentencing in the Federal Sentencing Guidelines. A careful examination of the other forms of real-offense sentencing utilized in the Guidelines is beyond the scope of this Article and thus this Article will not make any concrete proposal concerning their use. Nonetheless, some initial observations are appropriate. It is important to re-emphasize that

(West 1988); *see* Reitz, *supra* note 13, at 539-40 (suggesting that the true basis for the exception may be "that certain kinds of criminal harms have evoked special concern from the public and their officials, prompting sporadic decisions to withhold the safeguards of conviction-offense sentencing").

245. *See, e.g.*, Schulhofer, *supra* note 32, at 849 (suggesting a requirement of "testimony in court and proof by clear and convincing evidence, at least when dispute centers on factors such as drug quantities that have major non-discretionary impact on the applicable Guideline range"); Husseini, *supra* note 42, at 1407-11 (arguing for adoption of the "clear and convincing" standard for Guideline determinations).

246. Such high reliance on amounts and quantities also increases the parties' ability to manipulate the Guidelines, directly undercutting the purpose of alleged related-offense sentencing.

247. *See supra* note 141 and accompanying text.

before embracing any particular real-offense element, a sentencing commission must first establish its principles and goals, and then determine which types of sentencing information will further those goals.[248]

Alleged more-serious-offenses,[249] alleged criminal history, and criminal offense characteristics[250] raise the same philosophical issues as alleged related-offense sentencing. These practices deprecate the importance of the trial stage by basing the sentence on criminal conduct for which the defendant has not been convicted. Furthermore, alleged related-offense sentencing's failure casts serious doubt on the belief that such forms of real-offense sentencing serve any necessary function. A sentencing commission should be very hesitant to deviate from the principle that a conviction is a prerequisite to punishing a defendant for conduct the legislature has chosen to label as criminal. If guidelines do incorporate such factors, the weight accorded them should be severely limited, as suggested above for alleged related-offenses,[251] and a standard of proof more stringent than a preponderance of the evidence should be applied.

A caveat is necessary here. Some special rules are probably needed for offenses, such as mail fraud[252] and RICO,[253] that cover broad ranges of conduct.[254] Violations of these statutes can differ so greatly from one another as to render any single sentencing guideline impractical. If judges simply apply the

---

248. *See supra* notes 70-75 and accompanying text.
249. *See supra* note 21 and accompanying text.
250. *See supra* note 19 and accompanying text.
251. *See supra* notes 238-242 and accompanying text.
252. 18 U.S.C. § 1341 (1988).
253. 18 U.S.C. § 1962 (1988).
254. Ironically, concern with offenses such as mail and wire fraud and RICO shaped the Sentencing Commission's early debates about real-offense sentencing. *See* Tonry, *Seven Easy Steps*, *supra* note 6, at 357 (surmising that the Commission apparently believed that "federal criminal law is incomparably more complex than are state criminal laws and that many federal offenses in their labels and elements provide no meaningful basis for measuring culpability"). This view has several weaknesses. First, even if true, it would not justify adopting alleged related-offense sentencing, the critical aspect of the Commission's compromise, because the aforementioned complexity has nothing to do with the need to sentence defendants based on offenses beyond the offense of conviction. At most it could justify an expansive version of offense characteristic sentencing. Second, most federal prosecutions are not of this allegedly complex variety, but involve drug crimes, common law offenses like theft, robbery and embezzlement, and uncomplicated crimes such as immigration offenses. *Id.*; *see also*, U.S. SENTENCING COMMISSION, 1992 ANNUAL REPORT 45, tbl. 15 (1993) (reporting that 41% of defendants sentenced had a primary offense of drug trafficking).

guideline most applicable to the underlying offense conduct, the approach apparently mandated by the current Guidelines,[255] they can sentence the defendant for an offense that the government has not proved. A compromise is probably appropriate. One option the sentencing commission might consider would be to impose a higher standard of proof, such as clear and convincing evidence, for allegations going beyond the facts proved at trial or admitted as part of a guilty plea. In addition, the sentence for these offenses should be less than that applicable to the underlying offenses if they had been proved beyond a reasonable doubt.

Noncriminal offense characteristics comprise a far more legitimate category of sentencing information. A system that did not take account of aggravating or mitigating factors beyond broad statutory definitions would risk being too crude and disproportionate. Noncriminal offense characteristics are among the least controversial forms of real-offense sentencing, because they do not require defendants to receive enhanced penalties based on crimes for which they have not been convicted. Virtually all participants in and observers of the criminal justice system acknowledge the propriety of including at least some offense characteristics in the sentencing calculations.[256] It is notable that even critics of real-offense sentencing[257] and guideline systems purporting to reject it[258] accept at least some reliance on noncriminal offense characteristics.

255. *See* U.S.S.G, *supra* note 1, § 2E1.1(a) (providing that the base offense level for racketeering offenses is the greater of 19 or the level applicable to the underlying conduct); *id.* § 2F1.1 application note 13 (providing that the fraud guideline does not apply where the offense is more aptly covered by another guideline).

256. Judges appear to believe strongly in considering noncriminal offense characteristics. *See* WHEELER ET AL., *supra* note 23, at 54-80. The support of the participants in the criminal justice system can be critical to the success of guidelines, because the more support exists, the less likely manipulation and evasion will occur.

257. *Compare* Freed, *supra* note 32, at 1712-15 (criticizing the relevant conduct principle) *with id.* at 1705 (arguing that "each case involves unique offenders and offense circumstances, and their underlying stories . . . need to be assessed and sentenced by experienced professionals exercising human judgment") (citation omitted). *But see* Heaney, *supra* note 42, at 228-30 (recommending replacement of the current Guidelines with a pure charge-offense model).

258. Washington's statute allows judges to depart from the standard guideline range if warranted by the circumstances of the offense. The statute contains a list of "illustrative factors" that may warrant a departure. Possible mitigating factors include victim initiation of the incident, duress, or diminished capacity. Aggravating factors include selecting vulnerable victim, sub-

Proper use of noncriminal offense characteristics may not only further proportionality, it may also prevent overpunishment. If judges are precluded from considering aggravating offense characteristics, and can only impose one sentence level on all defendants convicted of a particular offense, there would be a tendency for penalties to be set with more serious offenders in mind, thus overpenalizing lower level offenders.[259] One could argue that all relevant sentencing factors should be incorporated into criminal statutes and treated as elements of the offense.[260] This approach is philosophically pure, but somewhat unrealistic. Criminal codes would become unwieldy, and the trial process would bog down under the weight of additional fact finding. Furthermore, legislatures are not capable of defining in advance all of the relevant sentencing factors and the combinations in which they may occur. As Franklin Zimring has written, "we may simply lack the ability to comprehensively define in advance those elements of an offense that should be considered in fixing a criminal sentence."[261] A sentencing commission also cannot anticipate all such issues, which is why sentencing guidelines require a reasonable departure mechanism.

A potential problem with allowing consideration of noncriminal offense characteristics but not criminal offense characteristics, is that it may give legislatures an incentive to reduce the specificity in criminal statutes even further. Legislatures may realize that if they include a factor in the definition of a crime, the judge may not rely on it at sentencing unless proved at trial or admitted as part of a guilty plea. By omitting the factor from the definition of the offense, a judge will be able to take it into account at sentencing. Although some legislatures might respond in this manner, allowing consideration of noncriminal offense characteristics but not criminal offense characteristics

---

stantial monetary loss, or abuse of a position of trust. WASH. REV. CODE §§ 9.94A.390(1)-(2) (West 1988).

259. For example, if the amount of money taken in a fraud cannot influence the Guideline range, the Sentencing Commission will have three choices. The range for fraud could be based on a small loss, a middle level, or a large loss. It seems reasonable to assume that the Commission would opt for something in the middle, with pressure to increase the level.

260. Professor Susan Herman has argued that the Guidelines system violates the Due Process Clause by relying so heavily on facts determined at sentencing, instead of incorporating such sentencing factors within the statutory definition of offenses. Herman, *supra* note 42.

261. Franklin E. Zimring, *Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform*, *in* SENTENCING 331 (Hyman Gross & Andrew von Hirsch, eds. 1981).

seems to be a lesser evil than either banning noncriminal offense characteristics, which would establish a pure charge-offense system, or allowing consideration of criminal offense characteristics.

Unfettered consideration of noncriminal offense characteristics, however, may not be advisable. A number of important questions concerning the reliance on these factors remain, including the appropriate extent their impact on sentencing, the procedures that should be employed to determine essential sentencing facts, the relevance of the defendant's state of mind,[262] and the standard of review of such decisions.[263] For example, a check on the potential abuse of noncriminal offense characteristics would be to limit the weight given to such factors. Under the current Guidelines the "tail" of sentencing factors often wags the "dog" of the underlying offense.[264] This not only presents serious due process concerns, it also heightens the ability of the parties to manipulate and circumvent the Guidelines through plea bargaining. The Commission should experiment with limits on the value of such offense characteristic factors. Perhaps the Commission should limit each factor, or all such factors in the aggregate, to a set percentage increase in the base offense level.

Offender characteristics do not raise the specter of punishing a defendant for a crime without a conviction. Nevertheless, there may be other reasons to limit reliance on such information, such as the possibility of discriminatory application. The defendant's history of criminal conviction, based on prior guilty pleas or convictions, is also a legitimate factor to consider, although as with noncriminal offense characteristics, the weight given to this factor should be carefully considered.

An issue requiring further reflection is the distinction in the federal context between criminal and noncriminal offense characteristics. Because federal criminal jurisdiction is, at least in theory, limited in nature, some acts that certainly constitute

262. For example, whether a defendant who set out to obtain $1,000,000 by fraud should be treated the same as or differently from one who simply set out to defraud someone and was pleasantly surprised that the crime netted $1,000,000.

263. Possible standards range from an unreviewable decision by the judge at which the rules of evidence do not apply (essentially the method in the pre-Guidelines system) to a full evidentiary hearing requiring proof beyond a reasonable doubt.

264. For a devastating critique of the Sentencing Commission's reliance on amounts in determining the sentence for drug cases, see Alschuler, *supra* note 33, at 918-24.

state crimes are not federal crimes. A homicide committed in the course of a kidnapping or mail fraud, for example, probably does not constitute a federal offense.[265] It is arguable that such a death is simply a noncriminal offense characteristic which the judge may properly consider in determining the sentence for kidnapping or mail fraud. If so, it would be ironic that the court could take into account a killing, but not less serious misconduct that was covered by a federal criminal statute. Alternatively, because it is almost certainly a state crime, it is arguable that a killing is really a criminal offense characteristic, in which case limits should be placed on its use in a federal sentencing. Because the federal government has no ability to bring charges based on the aggravating conduct in such cases, it might not be appropriate to preclude any consideration of a killing at sentencing. Perhaps the Guidelines should require the government to prove such offense characteristics beyond a reasonable doubt at sentencing before a judge can rely on them.

The propriety of considering post-offense behavior, such as the acceptance of responsibility or obstruction or justice, derives from the nature of such behavior. The obstruction enhancement in the Guidelines[266] generally involves increasing the defendant's punishment based on a criminal act, such as committing perjury at trial. This practice, like alleged related-offenses, alleged more-serious-offenses, and criminal offense characteristics, is inconsistent with the requirement of proof of guilt beyond a reasonable doubt. The prosecutor is always free to pursue additional charges against a defendant who has committed perjury, or has obstructed justice in some other way.

The acceptance of responsibility reduction,[267] in contrast, stands on firmer ground. It does not concern conduct for which the defendant could be criminally charged; instead it identifies a factor bearing on the defendant's culpability. In this sense it is like offender characteristics. There is even less to object to here, though, because unlike offender characteristics, acceptance of responsibility is a one way street in the defendant's favor. Finally, the acceptance reduction is not only consistent with long-

265. For examples of federal homicide statutes, see 18 U.S.C. § 34 (1988) (homicide in connection with destruction of aircraft or motor vehicles); 18 U.S.C. § 351(a) (1988) (killing of a member of Congress, cabinet official, or Supreme Court Justice); 18 U.S.C. § 1512(a) (1988) (killing of a witness, victim, or informant).

266. *See supra* note 107 and accompanying text.

267. *See supra* note 110 and accompanying text.

standing practice,[268] it also furthers an important systemic function of offering an inducement for guilty pleas.[269]

VI. CONCLUSION

Six years of experience with the Federal Sentencing Guidelines should lay to rest the notion that the most ambitious goals of real-offense sentencing are attainable, or desirable. The Sentencing Commission's incorporation of alleged related-offense real-offense sentencing in the Guidelines has led to complexity, inconsistent application, and a loss of confidence in the system, while at the same time failing to ensure proportionality and to check prosecutorial power to influence sentences. The major sources of the Guidelines' failure—their rigidity, complexity and severity—are all linked closely to the Sentencing Commission's version of real-offense sentencing. This "cornerstone" of the Guidelines is badly in need of repair.

On a broader level, the failed federal experiment with mandatory real-offense sentencing may have some important implications for the future of sentencing reform. A consensus has emerged that the Guidelines have failed because they have tried to do too much, often contrary to the sound experience-based judgments of judges, lawyers, and probation officers. A more sensible system would proceed more modestly, narrowing and guiding judicial discretion, not shifting it to administrative agencies, prosecutors and probation officers.

The search for a just and effective sentencing system is an arduous one. The Sentencing Commission's version of real-offense sentencing, however, is not part of the solution.

268. *See* Commission, Supplementary Report, *supra* note 66, at 64-66 (indicating that a reduction in sentence due to the Guidelines' acceptance of responsibility is similar to reductions already obtained in plea bargaining).

269. *See* U.S.S.G., *supra* note 1, § 3E1.1.