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# Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines

Michael M. O'Hear
*Marquette University Law School*, michael.ohear@marquette.edu



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# REMORSE, COOPERATION, AND "ACCEPTANCE OF RESPONSIBILITY": THE STRUCTURE, IMPLEMENTATION, AND REFORM OF SECTION 3E1.1 OF THE FEDERAL SENTENCING GUIDELINES

*Michael M. O'Hear**



* Associate, Sonnenschein Nath & Rosenthal, Chicago. Former Law Clerk, United States District Judge Janet Bond Arterton. J.D., Yale Law School, 1996. The author would like to thank Daniel Freed and Rachel Harmon for helpful comments on earlier drafts. A shorter version of this Article has appeared in the *Federal Sentencing Reporter*. Michael M. O'Hear, *The Need To Reform the "Acceptance of Responsibility" Adjustment*, 9 FED. SENTENCING REP. 101 (1996).

## I. INTRODUCTION

The Federal Sentencing Guidelines devote much attention to the categorization and ranking of offense severity (Chapter 2) and criminal history (Chapter 4). Other aspects of the offender's background, conduct, and personal characteristics, although traditionally important in sentencing, are given short shrift in the Guidelines, much to the dismay of the federal bench and bar.[1] This Article concerns one category of sentencing criteria: the offender's conduct and attitude between the time of the offense and the time of the sentencing. Post-offense conduct, particularly the decision of a defendant to plead guilty or go to trial, has traditionally played a crucial role in sentencing decisions, and, many would argue, necessarily so. However, a concern with what happens after the offense may seem at odds with the spirit of sentencing reform, impeding the goals of making the sentence fit the crime and establishing certainty in the sanctions for criminal conduct. Caught between these competing instincts, the Guidelines handle post-offense conduct and attitudes in a fragmentary and oblique manner.

This Article specifically focuses on section 3E1.1 of the Guidelines, which provides a reduction in sentence to the defendant who "clearly demonstrates acceptance of responsibility for his offense."[2] An assessment of the origins, development, and implementation of section 3E1.1 provides insight into many of the central issues confronting the national experiment with guided sentencing. This Article will offer a specific reform proposal for section 3E1.1. It also seeks to highlight the difficulties of accounting for offender characteristics and non-offense conduct in a guided sentencing scheme, the institutional pressures and constraints faced by sentencing actors at the district court level, and the problems that may result when the U.S. Sentencing Commission and the appellate courts are insensitive to the realities confronting sentencing judges.

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1 Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1715 (1992).

2 U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (1994). Currently, the benefit for acceptance of responsibility is equal to a reduction of two offense levels, U.S.S.G. § 3E1.1(a), with a possibility of reduction by a third level under certain circumstances, U.S.S.G. § 3E1.1(b).

All subsequent citations to the 1994 *Guidelines Manual* will be made using the abbreviated citation form "U.S.S.G." with no specific year denoted. Citations to the 1987 *Guidelines Manual* will also employ the "U.S.S.G." form, but with the date noted in parentheses.

This Article first considers the purposes and structure of 3E1.1. The guideline apparently grew out of uncertainty over the proper manner of handling guilty pleas, which had routinely been rewarded in pre-Guidelines sentencing. Attempting to retain this pre-Guidelines practice in some fashion, yet also accommodating concerns over possible negative public reaction, the Commission instituted a vaguely defined adjustment for "acceptance of responsibility." I argue that the application notes to this provision reflect two distinct, and sometimes competing, visions of what it means to "accept responsibility" for an offense: either to feel remorse for the offense or to provide cooperation to police, prosecutors, and court officials. After assessing the role of these paradigms in the application notes, and discussing the implications of a reform proposal currently pending before the Commission,[3] the Article next considers judicial interpretation and implementation of the guideline. I argue that a significant disjunction exists between appellate court treatment of section 3E1.1, which focusses on the remorse paradigm, and district court practices, which tend to provide the adjustment automatically to the defendants who plead guilty. Moreover, although district courts generally treat section 3E1.1 as a plea discount, a certain amount of disparity is evident in the implementation of section 3E1.1—an unsurprising finding in light of the facial ambiguity of the provision.

The Article next considers a variety of other problems with the current structure and implementation of the guideline. Some of these criticisms grow out of the obvious difficulties of using what is essentially one all-or-nothing adjustment to accomplish two ends: rewarding both remorse and cooperation. The Article also highlights shortcomings inherent in the remorse paradigm and argues that this paradigm should not routinely play a role in sentencing. Accordingly, the Article proposes a restructuring of section 3E1.1 along the lines of the cooperation paradigm. The Article concludes with a consideration

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[3] At the time this Article went to press, the Commission was considering three amendments to section 3E1.1. *See* 62 Fed. Reg. 179-81 (1997). The first of these proposed amendments (amendment 24) would represent the most substantial departure from the present structure of the guideline, clearly shifting section 3E1.1 in the direction of what I term the cooperation paradigm, yet not fully resolving the ambiguities in the guideline. Amendment 24 is addressed in greater detail below in subpart II.D. Amendment 25 addresses a circuit split over the narrow issue of whether the commission of a crime dissimilar to the offense of conviction pending sentencing may preclude the award of the section 3E1.1 adjustment. If adopted, amendment 25 will overrule the Sixth Circuit's decision that only similar or related criminal conduct may be considered in the acceptance inquiry. *See* United States v. Morrison, 983 F.2d 730, 735 (6th Cir. 1993). Amendment 26 lifts the existing limitation on adjustments under section 3E1.1(b) to defendants whose offense level is 16 or greater. *See infra* subpart II.C.

Although the Commission has not adopted any of these proposed amendments in the present amendment cycle, this Article will consider proposals, particularly amendment 24, because they will doubtlessly provide the baseline for efforts to reform section 3E1.1 in future amendment cycles.

of a broader Guidelines reform which would address the problems of post-offense conduct.

## II. Purposes and Structure of Secion 3E1.1

### *A. Themes of Remorse and Cooperation*

Notwithstanding the suggestion in section 3E1.1 that defendants must "clearly demonstrate acceptance," judges grant the acceptance-of-responsibility adjustment in the vast majority of cases.[4] Generally, in the few cases when judges decline to grant the adjustment, the defendant has elected to go to trial rather than plead guilty. A small number of cases, however, do not fit this pattern, that is, the defendant pleads guilty but is nonetheless denied the reduction. Although anomalous, these cases reveal a great deal about the internal tensions and potential misapplications of the provision.

The case of *United States v. Echevarria* provides an example.[5] The defendant, Salvador Echevarria, pled guilty to a number of charges relating to running a fraudulent, unlicensed medical practice.[6] During his plea allocution, Echevarria admitted that he falsely presented himself as a psychiatrist, but still asserted that he was a doctor. "Upon further questioning by the district judge, he again stated: 'I am not a psychiatrist, but I am a doctor.'"[7] Echevarria insisted that he had a medical degree from the University of Puerto Rico. Though there is no indication that the court was misled by Echevarria's false assertions—and notwithstanding a suggestion that his statements may have been connected to a "long and profound history of psychiatric problems"[8]—the court denied Echevarria's request for a 3E1.1 reduction based primarily on Echevarria's performance at the plea allocution. As a result, Echevarria may have cost himself an additional thirteen months in prison.[9] The Second Circuit upheld the sentence on appeal.

In *United States v. Cook*,[10] the defendants, members of the Mohawk Indian tribe, were prosecuted for operating a gambling estab-

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4 U.S. Sentencing Comm'n, Staff Discussion Paper: Chapter Three Adjustments app. 2 (1995) [hereinafter Staff Discussion Paper] (indicating that 84.4% of defendants receive the section 3E1.1 discount).

5 33 F.3d 175 (2d Cir. 1994).

6 *Id.* at 177. Although Echevarria was not a licensed physician, he advertised and operated a practice in psychiatry and neurology, prescribed drugs under a false registration number and applied for reimbursement for his services from private and governmental insurers. *Id.*

7 *Id.* at 179.

8 *Id.* at 177 n.2.

9 Echevarria was sentenced to 70 months, near the middle of the recommended guideline range for his offense level (26) and criminal history category (I). *Id.* at 178. If his offense level has been reduced by two, and if the judge still would have placed him in the middle of the suggested range, Echevarria's sentence would have been 57 months.

10 922 F.2d. 1026 (2d Cir. 1990), *cert. denied*, Tarsell v. United States, 500 U.S. 941 (1991).

lishment in violation of New York state law.[11] After losing various pretrial motions to dismiss the indictment, defendant Anthony Laughing entered a conditional plea of guilty, with the intention of challenging jurisdiction and the government's interpretation of the relevant federal Indian gaming law on appeal. At sentencing, Laughing made the following statement:

> I will go to my grave saying I did nothing wrong.... I take full responsibility as running the place. I never denied the fact that I am owner of [the casino]. I believe that what may be against the law in New York State is not necessarily against the law on the reservation. We are a sovereign nation, whether [the Assistant United States Attorney] wants to believe it or not.[12]

Based primarily on this statement, the district court denied Laughing the benefit of section 3E1.1. Once again, the Second Circuit upheld the sentence on appeal, observing that "acceptance of responsibility necessitates candor and authentic remorse."[13]

The *Echevarria* and *Cook* cases illustrate an approach to section 3E1.1 that I call the remorse paradigm. Under the remorse paradigm, section 3E1.1 calls for an inquiry into the defendant's state of mind and is thought to reward an appropriate attitude. The remorse paradigm asks whether the defendant fully and freely admits to committing the offense, whether the defendant accepts punishment as an appropriate consequence of the offense, whether the defendant regrets what was done, and whether the defendant is sincerely committed to avoiding future criminal activity. Conduct such as pleading guilty may be an important evidentiary consideration in the remorse paradigm, but is not of importance in and of itself.

An alternative approach to section 3E1.1 is the "cooperation paradigm," which focuses not on the defendant's state of mind, but on his post-offense conduct. The purpose of the cooperation paradigm is to encourage and reward a defendant's behavior if it facilitates the efficient administration of the criminal justice system, contributes to the recovery and restoration of victims, or protects society at large from additional criminal activity. A defendant's demeanor and verbal assertions are of little concern to the cooperation inquiry, except insofar as a defendant's statements are materially misleading to the government.

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[11] *Id.* at 1029. Under 19 U.S.C. § 1955(b)(1)(i) (1988), operation of a gambling business is a federal offense only if it is proscribed by the law of the state in which it is conducted. *Cook*, 922 F.2d at 1035. The government maintained that the federal Indian Gaming Regulatory Act did not implicitly repeal § 1955. According to the government, the defendants were subject to state law, thought their gambling operations were conducted on Indian land. *Id.* at 1033-34.

[12] *Id.* at 1039 (Lasker, J., dissenting) (quoting from a sentencing transcript).

[13] *Id.* at 1037 (quoting United States v. Royer, 895 F.2d 28, 30 (1st Cir. 1990)).

The remorse and cooperation paradigms are evident in both the Sentencing Commission's commentary to § 3E1.1 and the published judicial interpretations of the guideline. Notwithstanding a deep tension between the paradigms, the Commission has declined to choose between them, leaving an anomalous area of broad judicial discretion within the Guidelines. For their part, appellate courts emphasize the remorse paradigm, and, being unable to assess the offender in person, likewise generally leave the acceptance-of-responsibility adjustment to the district courts. However, as will be described below, both the Commission and the appellate courts have been insensitive to the institutional pressures and constraints that force the district courts towards the cooperation paradigm. Thus, by and large, the cooperation paradigm prevails. Yet, as *Echevarria* and *Cook* demonstrate, the remorse paradigm also exerts an influence. Consequently, section 3E1.1 gives rise to much of the sort of unwarranted disparity that the Guidelines were intended to eradicate. Tension between the paradigms has also generated persistent confusion and litigation over section 3E1.1.[14] The Judicial Conference of the United States believes the problems with section 3E1.1 to be so acute that it has recently argued in favor of a "fundamental reformation" of the guideline.[15] Sharing the U.S. Judicial Conference's concerns, and making use of the remorse/cooperation distinction, this Article proposes just such a fundamental reform.

### *B. Encouraging Guilty Pleas: The Genesis of a Guideline*

The proper treatment of guilty pleas was among the most difficult issues facing the drafters of the Sentencing Guidelines. During the early phases of the development of the Guidelines, the Sentencing Commission considered a proposal to provide a fixed, automatic discount for guilty pleas: defendants who pled guilty would receive a reduction of ten to fifteen percent in their sentences.[16] Such a provision would have codified pre-Guidelines practices. The Commission's data indicated that defendants who pled guilty received, on average, sentences between thirty and forty percent lower than they would

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[14] *See, e.g.*, Letter from Maryanne Trump Barry, Chair of the Committee on Criminal Law of the Judicial Conference of the United States, to Judge Richard P. Conaboy, Chairman of the United States Sentencing Commission 1 (Dec. 5, 1995) (copy on file with author) [hereinafter Barry Letter]. This letter, discussing proposed changes to section 3E1.1, observes, "The case law indicates continued confusion with the way the acceptance of responsibility guideline has come to be interpreted," and further notes, "[T]he various factors which comprise the current 'acceptance' adjustment interact with each other . . . to generate needless litigation." *Id.* Among Guidelines Issues, section 3E1.1 accounts for the third highest number of appeals by both defendants and the government. *Id.*

[15] *Id.*

[16] William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 190 (1988).

have had they gone to trial.[17] Many viewed this plea discount as an incentive to encourage guilty pleas,[18] which in turn are a necessary lubricant for an overburdened criminal justice system.[19] Indeed, Commission's research suggests that eighty-five percent of federal criminal sentences involves some form of plea bargaining.[20] The automatic plea discount proposal would have retained an incentive for such plea bargaining, but in a more predictable form than during the pre-Guidelines era, thus contributing to one of the "underlying purposes of sentencing reform, that of 'certainty of punishment.'"[21]

Notwithstanding these advantages, the Commission rejected the automatic discount because the proposal could have been construed as a penalty for defendants who exercised their constitutional right to a jury trial.[22] Moreover, because it awarded a benefit for pleading guilty regardless of the nature of the offense or other post-offense conduct, the proposal could have resulted in "unjustified windfalls" to some defendants, and "would not be in keeping with the public's perception of justice."[23]

The Commission thus faced a conundrum: how could the Guidelines encourage guilty pleas without incurring the disadvantages—and perhaps constitutional infirmities—of an automatic sentence discount? The solution was acceptance of responsibility. Rather than rewarding guilty pleas per se, the Commission invited judges to provide a benefit to the defendant who "clearly demonstrates acceptance of responsibility for his offense."[24] By the admission of one of the framers of the Guidelines, this was a vague standard.[25] However, the conceptual grounding of section 3E1.1 and the provision's link to the

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17 *Id.* at 191.

18 *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (Although "confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiations of pleas.'") (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1972)).

19 *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 29 (1988) (noting that many witnesses argued to Commission that "plea bargaining was highly desirable and practically necessary").

20 *Id.* at 29-30.

21 Wilkins, *supra* note 16, at 190.

22 Breyer, *supra* note 19, at 28. The constitutional analysis of plea discounts will be discussed at greater length in Subpart V.G *infra*. The Commission's belief in 1986 and 1987 seems to have been that "[i]nvesting the Court with *discretion* to mitigate the sentence by a specified amount or amounts, rather than directing specified 'guilty plea credit' in all cases, would very much undercut any Constitutional objection to the plan." Wilkins, *supra* note 16, at 191 n.65 (quoting U.S. SENTENCING COMM'N, PUBLIC HEARINGS ON PLEA AGREEMENTS IN WASHINGTON, D.C. 3 (Sept. 23, 1986) (testimony of William F. Weld, Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice)) (emphasis added).

23 Wilkins, *supra* note 16, at 191.

24 U.S.S.G. § 3E1.1(a).

25 Breyer, *supra* note 19, at 29.

automatic plea discount proposal are discernible. In essence, the Commission resolved the conundrum of how to encourage guilty pleas by adopting a functionalist stance. The Commission identified the underlying purposes of rewarding guilty pleas and developed a mechanism to achieve those purposes, thus converting a bright-line rule proposal—always give a discount for guilty pleas—into a discretionary open-ended test—does the defendant accept responsibility?[26] Such a discretionary test can overcome the difficulties of the automatic plea discount by permitting judges to avoid unseemly or inappropriate downward adjustments, by preserving an opportunity for defendants who go to trial to earn the same adjustment as those who plead guilty, and by retaining uncertainty in the system.

In the Commission's view, the purposes of rewarding guilty pleas were twofold. First, a guilty plea provided immediate, concrete benefits to society at large: "such pleas conserve the resources of the criminal justice system, and . . . witnesses (particularly victims) are spared the stress of a trial."[27] Although the acceptance-of-responsibility provision was designed to advance these interests by encouraging guilty pleas, it could also encourage other "socially desirable actions," such as "tak[ing] affirmative steps towards disassociation from past criminal conduct, and . . . rectify[ing] the harm done to others."[28] The intent of this prong of acceptance of responsibility is to provide incentives for a defendant to engage in certain socially desirable conduct between the time of his offense and the time of sentencing. This is, in short, the cooperation paradigm. But rewarding guilty pleas and acceptance of responsibility had also another purpose, less oriented to gaining immediate benefits for society, and more oriented towards giving a break to defendants with certain personal characteristics. The Commission observed that "the guilty plea 'is the first step toward

26 I cannot ascertain whether this functionalist maneuver was consciously made by the Commission. I offer this account of the genesis of section 3E1.1 less as history than as a helpful analytic device which is not inconsistent with the sources. Precisely how section 3E1.1 grew out of the plea discount debate—politically or conceptually—is not clear; *that* it grew out of the plea discount debate is more clear. Breyer and Wilkins, both framers of the Guidelines, strongly imply as much in their separate accounts of acceptance of responsibility. Breyer, *supra* note 19, at 28-29; Wilkins, *supra* note 16, at 190-92. Moreover, in the 1986 draft of the Guidelines, the commentary on the acceptance of responsibility provision includes a request for public comment on whether guilty pleas should receive an automatic sentence discount. U.S. SENTENCING COMM'N, PRELIMINARY DRAFT OF SENTENCING GUIDELINES § B321 commentary (Sept. 1986) [hereinafter 1986 DRAFT]. Finally, the 1987 report on the Guidelines discusses section 3E1.1 under the heading "Guilty Pleas, Applicable Guidelines and Policy Statements." U.S. SENTENCING COMM'N, SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 48, 50 (1987).

27 1986 DRAFT, *supra* note 26, § B321.

28 *Id.*

rehabilitation'"[29] and that other conduct demonstrating acceptance of responsibility, such as disassociation from criminal conduct and rectification of past harms, "is a sound indicator of rehabilitative potential."[30]

The Commission did not indicate how judges were to weigh these two purposes of accepting responsibility against one another. For instance, what of the defendant whose post-offense conduct provided substantial social benefits, but whose words and demeanor suggested little hope for rehabilitation? What of the defendant who went to trial and otherwise significantly taxed the criminal justice system, but who appeared genuinely to have turned over a new leaf in his life? Put differently, the Commission rejected a bright-line rule on plea discounts in favor of a more functional approach, but failed to choose which potential function to emphasize. Thus, instead of a "Post-Offense Conduct Adjustment" or a "Rehabilitative Potential Adjustment," judges were left with the conceptually more ambiguous "Acceptance of Responsibility Adjustment."

### *C. Remorse, Cooperation, and the Evolving Structure of Section 3E1.1*

Mirroring the Commission's indecision on the purpose of section 3E1.1, the structure of the guideline and its commentary suggest two distinct focuses of the acceptance-of-responsibility inquiry: (1) the facts of a defendant's post-offense conduct, and (2) the attitude of the defendant towards his offense. There is, of course, substantial overlap between these types of inquiry, for post-offense conduct has an obvious evidentiary value in the examination of a defendant's state of mind. Yet there is an analytical difference between examining a defendant's conduct from the standpoint of its social desirability and examining the same conduct as part of a broader inquiry into the defendant's subjective state.

Notwithstanding the analytical distinction, section 3E1.1 encompasses both types of inquiry. Although the balance struck by the Commission between the cooperation paradigm and the remorse paradigm has shifted somewhat over time, both paradigms have been evident from 1987 to the present. One aspect of the guideline that has not changed much has been the central mechanism of section 3E1.1(a): "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels."[31]

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[29] *Id.; see also* Brady v. United States, 397 U.S. 742, 753 (1969) (stating a defendant "demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary").

[30] 1986 DRAFT, *supra* note 26, § B321, commentary.

[31] U.S.S.G. § 3E1.1(a).

Although the preliminary draft of the Guidelines provided for a variable downward adjustment of up to twenty percent,[32] the adjustment of subsection (a) has been of a fixed, all-or-nothing nature since 1987. Partly in response to the lack of judicial flexibility in the provision,[33] the Commission added the current subsection (b) in 1992. The new provision creates an opportunity for defendants whose offense level is sixteen or greater to earn a third point of reduction.[34]

Though preconditioned on the subsection (a) reduction and likewise denominated as an acceptance-of-responsibility adjustment, subsection (b) suggests a substantially different inquiry, one closely hewing to the cooperation paradigm. The additional third point reduction is made available to the defendant who "has assisted authorities in the investigation or prosecution of his own misconduct" by either "timely providing complete information to the government concerning his own involvement in the offense" or "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently."[35] This provision seems wholly focussed on rewarding desirable post-offense conduct. With its emphasis on assistance to the authorities, subsection (b) provides no

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32 1986 DRAFT, *supra* note 26, § B321.

33 *See* U.S. SENTENCING COMM'N, ACCEPTANCE OF RESPONSIBILITY WORKING GROUP 33 (1991) [hereinafter *Working Group*] ("The current guideline takes an 'all or nothing' approach. . . . An alternative would be to allow different defendants to qualify for a different level of reduction. This would allow courts to distinguish between defendants who admit their wrongdoing and those who do something more . . . .").

34 U.S.S.G. § 3E1.1(b). According to the Commentary to section 3E1.1, subsection (b) applies only to defendants with high offense levels because "At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range." *Id* commentary (backg'd.). No doubt, the Commission was partially motivated by concerns that the two-level reduction provided an insufficient incentive to plead guilty for defendants facing lengthy jail terms. *See* WORKING GROUP, *supra* note 33, at 2 (noting that one of the four areas of concern for the working group was "whether the guideline provides a significant enough offense level reduction, especially for defendants whose offense levels are relatively high"); *id.* at 4 (noting that "defendants convicted of more serious offenses tended to plead guilty less often than those convicted of less serious offenses"); *id.* at 32 (discussing possibility of adding a third point to section 3E1.1 adjustment in order to provide "a greater incentive, across the board, for defendants to accept responsibility").

> Among defense counsel and prosecutors, and to some extent among probation officers and judges, there was a pervasive perception that the acceptance of responsibility discount was too low. . . . [W]here offenders faced terms that would keep them in prison with no hope of parole for fifteen to twenty years, the possibility of getting out three to five years earlier was thought to be an insignificant inducement.

Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 267 (1989).

35 U.S.S.G. § 3E1.1(b).

particular role for a defendant's motivation or attitude.[36] Put differently, a defendant may receive an additional acceptance-of-responsibility adjustment for exceptional cooperation, but not for exceptional remorse.[37]

Because the subsection (a) inquiry is substantially more ambiguous than the subsection (b) inquiry, most of the application notes to section 3E1.1 focus on the former, providing guidance as to what it means for a defendant "clearly [to] demonstrate[ ] acceptance of responsibility." Although some of the application notes suggest that this inquiry is to be open-ended and discretionary,[38] the commentary also provides two rules that appear to be nearly bright lines. First, "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial."[39] The application note states that conviction by trial "does not automatically preclude" a section 3E1.1 discount, but underscores that discounts in such cases should only occur in "rare situations," as when a defendant admits to the factual bases of his guilt and goes to trial merely to raise legal or constitutional claims.[40] Second, "[c]onduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility."[41] Only in "extraordinary cases" will sections 3C1.1 and 3E1.1 adjustments both apply.[42]

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36 Accordingly, some appellate courts have held that the subsection (b) reduction is much less discretionary than the subsection (a) reduction. *E.g.*, United States v. Eyler, 67 F.3d 1386, 1390-91 (9th Cir. 1995); United States v. Covarrubias, 65 F.3d 1362, 1368 (7th Cir. 1995).

37 The Commission is presently considering two amendments that would alter subsection (b). *See supra* note 3. The more modest amendment would offer the third-point benefit to defendants with offense level below 16. United States Sentencing Commission, Sentencing Guidelines for United States Courts 62 Fed. Reg. 152, 180 (1997) (proposed Jan. 2, 1997) [hereinafter cited by amendment]. A more sweeping amendment would in a sense reverse the nature of the inquiries under subsections (a) and (b). *See* Amendment 24, 62 Fed. Reg. at 179. Under this amendment, the two-point discount under subsection (a) would turn more clearly on objective aspects of post-offense conduct, particularly pleading guilty, while the third point under subsection (b) would depend on a more open-ended, remorse-oriented inquiry. *See infra* subpart II.D.

38 *See, e.g.*, U.S.S.G. § 3E1.1 application note 1 ("In determining whether a defendant qualifies under subsection (a), appropriate considerations include, *but are not limited to*, the following . . . ."); *id.* application note 5 (emphasis added) ("The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility.").

39 *Id.* application note 2.

40 *Id.* Notwithstanding the strong language of note two, some sentencing judges seem quite generous in awarding the section 3E1.1 reduction to defendants who go to trial. *See infra* subpart IV.B (discussing differences between districts in the correlation between the mode of conviction and the award or denial of acceptance-of-responsibility credit).

41 U.S.S.G. § 3E1.1 application note 4.

42 *Id.* The Commission recently considered an amendment to application note 4 that would impose a similarly strong presumption accepting responsibility when a defendant commits a new offense while awaiting trial or sentencing. *See* Amendment 25, 62 Fed. Reg. at 180.

These two application notes are in the spirit of the cooperation paradigm. Going to trial and obstructing justice are types of post-offense conduct that society would want to discourage a great deal; it is to be expected that both types of conduct would result in a nearly automatic denial of the acceptance-of-responsibility benefit. On the other hand, it would seem a bit odd under the remorse paradigm for such conduct to result in a strong presumption against the adjustment. An act of obstruction may occur at a relatively early stage of an investigation or prosecution. Why should a court presume at sentencing that such an act is a nearly dispositive indicator of the defendant's attitude towards the offense?[43] Likewise, though the decision to go to trial may be a later and more carefully considered action than an instance of obstruction, nothing is implausible about a defendant turning over a new leaf during or after a trial, perhaps as a result of hearing testimony from victims or receiving counseling or drug rehabilitation prior to sentencing. Nonetheless, the section 3E1.1 commentary expressly excludes from its ambit the defendant who challenges the factual elements of his guilt at trial and "only then admits guilt and expresses remorse,"[44] regardless of the sincerity or degree of that remorse.[45]

Notwithstanding the strength of the presumption against acceptance of responsibility when a defendant goes to trial, the commentary to section 3E1.1 suggests that a guilty plea should not be dispositive. How, then, are judges to determine whether a defendant who pleads guilty is deserving of the adjustment? Application note 1 lists eight distinct forms of post-offense conduct that are said to constitute "ap-

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43 *See* THOMAS HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 517 (2d ed. 1994) ("There is nothing inherently inconsistent with finding that a defendant who at one point obstructed an investigation later regretted that action and accepted responsibility for the offense.").

44 U.S.S.G. § 3E1.1 application note 2.

45 An analysis of earlier versions of section 3E1.1 underscores the strength of the current presumption against giving the a/r adjustment to defendants who go to trial. The a/r provision of the 1986 Preliminary Draft of the Guidelines made no mention of particular inferences to be drawn from the decision to go to trial, and stated, "An offender may qualify for a reduction under this section *without regard* to whether the offender's conviction is based upon a guilty plea or a finding of guilty by a court or jury." 1986 DRAFT, *supra* note 26, § B322 (emphasis added). The 1987 Draft employed similar language, U.S.S.G. § 3E1.1(b) (1987), though more clearly recognized the evidentiary value of mode of conviction. The pertinent application note in 1987 stated, "Conviction by trial does not preclude a defendant from consideration under this section. *A defendant may manifest sincere contrition* even if he exercises his constitutional right to a trial." *Id.* application note 2 (emphasis added). Thus, not only were the early drafts more neutral in their language with respect to defendants who went to trial, but they expressly envisioned the very scenario precluded by the current draft: granting an a/r adjustment to the defendant who goes to trial, but who afterwards manifests sincere remorse. In this respect, the early versions of section 3E1.1 seem to have been closer than the current version to the remorse paradigm. Treatment of guilty pleas has undergone similar modification.

propriate considerations."[46] Many of these considerations represent socially desirable actions, such as "voluntary termination or withdrawal from criminal conduct or associations" and "voluntary surrender to authorities promptly after commission of the offense." Others more clearly pertain to the remorse paradigm rather than the cooperation paradigm, such as "truthfully admitting the conduct comprising the offense(s) of conviction" and "voluntary resignation from the office or position held during the commission of the offense."[47] However, no mention is made of evidentiary considerations that would exclusively pertain to the remorse paradigm, such as "contrite demeanor" or "public apology." Indeed, words such as "remorse" and "contrition" do not appear in section 3E1.1 or its commentary, except in one context in which the evidentiary value of expressions of remorse is expressly denigrated: "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial . . . and only then admits guilt and expresses remorse."[48]

Although application note 1 lists several considerations that are "appropriate" in the acceptance-of-responsibility inquiry, the commentary does not indicate how these considerations are to be weighed. Is the presence of one of these considerations *necessary* for a defendant to earn the adjustment? Is the presence of one *sufficient*? Application note 1 leaves these questions unanswered, but does indicate that its list of eight factors is not intended to be exhaustive.[49] The

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[46] U.S.S.G. § 3E1.1 application note 1. These considerations are as follows:

(a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct . . .
(b) voluntary termination or withdrawal from criminal conduct or associations;
(c) voluntary payment of restitution prior to adjudication of guilt;
(d) voluntary surrender to authorities promptly after commission of the offense;
(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
(f) voluntary resignation from the office or position held during the commission of the offense;
(g) post-offense rehabilitative efforts . . . and
(h) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

*Id.*

[47] *Id.* I see greater emphasis in these provisions on the remorse vision than the cooperation vision; I recognize, though, that all eight enumerated considerations are, to a greater or lesser extent, consistent with both visions.

The "truthful admission" factor has been among the more controversial aspects of § 3E1.1, due to concerns that it may lead to infringements on the privilege against self-incrimination. Consequently, the language of this provision has been modified several times since 1987. *See infra* section III.C.1.

[48] U.S.S.G. § 3E1.1 application note 2. Curiously, notwithstanding the apparent disavowal of remorse and contrition in the guideline itself, appellate courts have generally seen these principles as the primary focus of section 3E1.1. *See infra* subpart III.A.

[49] *Id.* application note 1. While the Commission has not provided clear guidance as to how the eight factors are to be weighted, appellate case law generally holds that no single factor is either necessary or sufficient for a demonstration of accepting responsibility. *See, e.g.*, United States v. Russell, 913 F.2d 1288, 1295 (8th Cir. 1990); United States v. Knight, 905 F.2d 189 (8th

open-ended, discretionary nature of the acceptance-of-responsibility inquiry—at least for defendants who have neither gone to trial nor obstructed justice—is further underscored by application note 5, which states, "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review."[50] Why is the sentencing judge in such a "unique position"? Though the current version of section 3E1.1 is silent on the subject, the 1986 draft may provide the answer in its counterpart to application note 5: "The sentencing judge is in a unique position to evaluate whether the offender's post-offense conduct is *sincere or merely self-serving*. For this reason, the sentencing judge is not required to find that conduct such as that described [in the counterpart to application note 1] actually justifies a sentencing adjustment."[51]

Thus, as originally formulated, the open-ended discretionary nature of the acceptance-of-responsibility inquiry was associated with the remorse paradigm: the 1986 draft suggests that no matter how beneficial post-offense conduct is, a judge may still deny the adjustment if the defendant is motivated by the wrong reasons.[52] This tendency in section 3E1.1 is deeply at odds with the cooperation paradigm, as I have defined it. Under the cooperation paradigm, section 3E1.1 creates an incentive for desired behavior. The paradigm presupposes the acceptability of rewarding self-interested conduct, for it would be absurd to develop an incentive mechanism that could not be applied in precisely those cases in which its presence would make a difference.

That application note 5 does not include the "merely self-serving" language of the 1986 draft may be a further indication of the movement of section 3E1.1 away from the remorse paradigm. At the same time, the near nonreviewability of section 3E1.1(a) decisions may be the strongest indicator of the continuing viability of the remorse paradigm. Application note 5 assumes that the sentencing judge is in possession of some form of evidence that is not readily gleaned from an official record, namely demeanor evidence. Such evidence is plainly of value in a remorse inquiry, but of little relevance to a cooperation

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Cir. 1990). *But cf.* United States v. Austin, 17 F.3d 27, 30 (2d Cir. 1994) (implying that acceptance of responsibility may only be denied based on one of the eight factors listed in note one). For a discussion of the *Austin* case, see *infra* section III.C.1.

50 U.S.S.G. § 3E1.1 application note 5.

51 1986 DRAFT, *supra* note 26, § B321 commentary (emphasis added).

52 This remains the predominant attitude among appellate courts. *See, e.g.*, United States v. Zanni, 64 F.3d 654, 654 (1st Cir. 1995) (upholding denial of a/r adjustment when district court "was not persuaded that [defendant] was genuinely contrite"); United States v. Boothe, 994 F.2d 63, 71 (2d Cir. 1993) (upholding denial of adjustment when district court had relied on the fact that defendant "failed to prove the sincerity of his acknowledgment of guilt"). *See also infra* subpart III.A.

analysis.[53] Put differently, determining the relative social value of a defendant's post-offense conduct is largely a factual determination, but not a factual determination that seems intrinsically less reviewable than most factual determinations. By suggesting that acceptance-of-responsibility determinations are particularly unsuitable for review, the note leans towards the remorse paradigm. Moreover, regardless of its implicit intentions, application note 5 serves, as a practical matter, to provide protection for remorse-centered decisions by insulating them from appellate review. This issue will be taken up in Part III.

The deletion of the 1986 elaboration on application note 5 points to a broader issue in the development of § 3E1.1: while the provision retains much of its open-ended, discretionary nature—at least for defendants who plead guilty and do not obstruct justice—it has been drained of express principles and purposes. Language pertaining to the remorse paradigm has been removed,[54] but not replaced with language offering an alternative principled basis for the adjustment, such as encouraging desired post-offense conduct. Moreover, the discussion of purposes included in the commentary to the 1986 draft, which mentioned both the "socially desirable actions" prong and the "rehabilitative potential" prong, has been replaced by the curt pronouncement that "[f]or several reasons, a defendant who clearly demonstrates acceptance of responsibility . . . is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility."[55] Such changes not only diminish the capacity of judges to render fully rational, meaningful sentences, but also invite disparate treatment of like offenders. Express principles and purposes seem a necessary predicate to the consistent implementation of a concept like acceptance of responsibility, which is otherwise hardly self-defining.

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[53] The First Circuit, in an opinion emphasizing the remorse paradigm, has captured the spirit of this observation:

> The inquiry into acceptance of responsibility is necessarily factbound. In deciding whether a defendant is entitled to a reduction on this score, a district court must weigh a multitude of factors, some objective, some subjective. Credibility and demeanor evidence play a crucial role in determining whether a person is genuinely contrite.

United States v. Royer, 895 F.2d 28, 30 (1st Cir. 1990). For similar sentiments, see also *United States v. Spires*, 79 F.3d 464, 467 (5th Cir. 1996) and *United States v. Zanni*, 64 F.3d 654, 654 (1st Cir. 1995).

[54] In addition to the deletion of the "merely self-serving" provision discussed *supra*, the current version of section 3E1.1 has also changed the basic mechanism from a state-of-mind-oriented inquiry, 1986 DRAFT, *supra* note 26, § B321 (providing adjustment for offender who "*recognizes and sincerely accepts* responsibility for the offense(s)") (emphasis added), to a more objective inquiry, *see* U.S.S.G. § 3E1.1(a) (1994) (providing adjustment for defendant who "clearly demonstrates acceptance of responsibility for his offense").

[55] U.S.S.G. § 3E1.1 commentary (backg'd).

### D. *Implications of Amendment 24*

As noted earlier, the ambiguities of acceptance of responsibility have prompted calls for fundamental reform.[56] The Commission has presented one such reform proposal for public comment during the present amendment cycle.[57] While the ultimate fate of amendment 24 is unclear, this subpart provides a brief assessment of how the proposal would alter the substance of section 3E1.1. In essence, the amendment would retain the guideline's two-part structure (subsection (a), which provides a two-level adjustment for acceptance, and subsection (b), which offers a third point for exceptional acceptance by defendants with offense level of 16 or greater), but would modify the relevant inquiry for each part. Under the proposed application note, the two-point reduction of subsection (a) would no longer turn on an open-ended, highly discretionary inquiry, but would focus more clearly on objective post-offense conduct, particularly pleading guilty. The amendment states that a defendant qualifies for the two-point adjustment if the defendant timely and truthfully admits to the misconduct and does not "after the filing of charges . . . commit[ ] conduct that, under the totality of the circumstances, negates an inference of acceptance of responsibility."[58] Apparently, the defendant qualifies for the two-point adjustment by pleading guilty[59] and can only be denied the adjustment by virtue of the commission of specific undesirable acts. The amendment mentions obstruction of justice and fresh criminal conduct as examples of the sorts of acts that may overcome the presumption of acceptance arising from a guilty plea. However, these acts do not necessarily overcome the presumption if the "totality of the circumstances" dictates otherwise.[60] The lessening of the burden of proof on the defendant who pleads is underscored by a change in the required showing from "clearly demonstrat[ing] acceptance of responsibility" to "demonstrat[ing] acceptance of responsibility."[61]

When proposed application note is read in conjunction with the retention of language that the section 3E1.1 adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial,"[62] it appears that amendment 24 would move section 3E1.1(a) closer to the automatic plea discount model that was initially

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56 *See, e.g.*, Barry Letter, *supra* note 14.

57 Amendment 24, 62 Fed. Reg. at 179-80.

58 *Id.* (proposed application note 1).

59 Although the defendant's admission of guilt must be "timely" under amendment 24, the drafters of the amendment do not envision the timeliness requirement as particularly demanding: "[A] defendant who pleads guilty one day before his scheduled trial date may qualify under subsection (a)." *Id.* (note to proposed application note 2(b)).

60 *Id.* (proposed application note 1(b)).

61 *Compare* U.S.S.G. § 3E1.1(a) *with* Proposed § 3E1.1(a).

62 *Id.* (proposed application note 3).

rejected by the Commission. Moreover, to the extent that the subsection (a) inquiry implicates anything beyond mode of conviction, the emphasis on "conduct" in proposed application note 1 leaves little apparent room for demeanor and sincerity in the analysis. Thus, amendment 24 downplays the remorse paradigm and would shift subsection (a) in the direction of a cooperation adjustment, although retention of the confusing acceptance-of-responsibility standard as the relevant yardstick might limit the actual effect of this change.

The thrust of the proposed changes to subsections (a) and (b) stand in marked contrast. In order to qualify for the third point of adjustment available under subsection (b), defendants must "clearly demonstrate[ ] extraordinary acceptance of responsibility," whereas presently a defendant qualifies for the third point by taking certain specified actions in a timely manner.[63] Under proposed application note 2, subsection (b) would involve an open-ended, discretionary inquiry, in which "appropriate considerations [would] include" the laundry list of concerns set forth in current application note 1.[64] In weighing the "totality of the circumstances" that are relevant to subsection (b), "the sentencing judge is [said to be] in a unique position."[65] In short, amendment 24 retains all of section 3E1.1's mixed messages in subsection (b), manifesting both the cooperation and remorse paradigms.

Although amendment 24 represents one the most thoughtful and comprehensive reforms of section 3E1.1 yet considered by the Commission, the proposal does not fully address the ambiguities that plague the guideline. By retaining the vague terminology of "acceptance of responsibility" and continuing to conflate the cooperation and remorse paradigms, at least in subsection (b), amendment 24, if adopted, might still be subject to many of the problems detailed later in this Article.

## III. Appellate Court Construction of Section 3E1.1

In the absence of clear guidance from the Sentencing Commission, courts are obliged to give meaning to accepting responsibility. This Part considers how appellate courts have responded to this challenge. In general, courts of appeals emphasize the remorse paradigm and defer to the acceptance-of-responsibility decisions of district courts. Because appellate courts generally take the view that acceptance of responsibility must be determined by reference to the defendant's demeanor and credibility, sentencing judges, who are the only judges who actually see the defendants, are rarely overturned when

63 *Compare* U.S.S.G. § 3E1.1(b) *with* proposed § 3E1.1(b).

64 Proposed application note 2.

65 *Id.*

their decisions are appealed. However, there are exceptions. This Part concludes with a consideration of how appellate courts have policed self-incrimination concerns in the section 3E1.1 context and an assessment of a recent, unusually thoughtful Ninth Circuit opinion that deemphasizes the remorse paradigm.

### *A. Emphasis on Remorse*

Although section 3E1.1 decisions are among the most frequently appealed federal sentencing issues,[66] few reported decisions discuss the purposes and principles of the acceptance of responsibility.[67] This is no doubt related to the summary, mechanical nature of most section 3E1.1 review, which will be discussed further in the next section. However, a small number of opinions deal with the bigger issues underlying section 3E1.1. Several courts note the connection between the provision and the encouragement of guilty pleas.[68] For instance, a recent First Circuit opinion identified "two distinct purposes" for the provision: "to recognize a defendant's sincere remorse and to reward a defendant for saving the government from the trouble and expense of going to trial."[69] A Second Circuit opinion similarly emphasizes the importance to section 3E1.1 for encouraging guilty pleas.[70]

These opinions are unusual, however, in their treatment of section 3E1.1 as a device for saving the government from trouble and expense.[71] Virtually all appellate case law on the subject equates acceptance of responsibility with remorse, leaving the cooperation paradigm out of the picture—at least at the level of articulated principle. *United States v. Dyce*,[72] a recent D.C. Circuit opinion, reveals a court

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66 STAFF DISCUSSION PAPER, *supra* note 4, at 8 (noting that 11% of all sentencing-related appeal issues involve acceptance of responsibility).

67 My conclusions in this Part about appellate court treatment of section 3E1.1 are drawn primarily from an analysis of three subsets of the enormous body of section 3E1.1 case law: (1) all published section 3E1.1 cases decided between March 1995 and March 1996 (approximately 50 cases), (2) all published Second Circuit cases on section 3E1.1 (approximately 50 cases), and (3) an additional 20 to 30 cases frequently cited in the secondary literature or in other cases.

68 In a particularly insightful opinion, Judge Easterbrook wrote:

> "Acceptance of responsibility" is in most cases a thinly disguised reduction for pleading guilty, a lure the prosecutor and the court may dangle for saving them the time and risk of trial. Perhaps it would have been simpler had the Guidelines said this. They do not, the reduction is not automatic, and the vague standard creates a possibility of confusion.

United States v. Escobar-Mejia, 915 F.2d 1152, 1153 (7th Cir. 1990) (citations omitted).

69 United States v. DeLeon Ruiz, 47 F.3d 452, 455 (1st Cir. 1995).

70 United States v. Cruz, 977 F.2d 732, 734 (2d Cir. 1992) ("The Sentencing Guidelines reflect this [plea] 'discount' approach by affording a defendant a two-level reduction in the otherwise applicable offense level in recognition of the defendant's 'acceptance of responsibility.'").

71 For another opinion sharing this spirit, see *United States v. Bradford*, 78 F.3d 1216, 1226 (7th Cir. 1996) ("When the United States Attorney's office and the district court expend the vast amount of time and resources necessary to properly prepare for and hold a trial, the defendant will rarely be eligible for an acceptance of responsibility reduction . . . .").

72 78 F.3d 610 (D.C. Cir. 1996).

seeking, and failing, to find in section 3E1.1 a principle other than remorse. In *Dyce*, the court considered whether remorse could constitute a basis for departure under the Guidelines:

> While "acceptance of responsibility" may be an essential component of "remorse," the latter is not a necessary element of the former. A person can accept responsibility for a crime ("yes, I killed my wife") without feeling remorse ("she had it coming"). In its commentary, however, the Commission made it clear that it contemplated a moral element to the section 3E1.1 reduction. In determining whether departure warranted [sic] [under section 3E1.1, the Commission has indicated that] courts may consider, among other factors, the voluntary termination of criminal conduct, the voluntary payment of restitution, the voluntary surrender to the authorities, and post-offense rehabilitative efforts. We hold, therefore, that implicit in the phrase "acceptance of responsibility," as used in section 3E1.1(a), is an admission of moral wrongdoing. Accordingly, an expression of remorse cannot provide an independent ground for departure beyond the two-level reduction Dyce already received.[73]

In *United States v. Henry*,[74] an early opinion upholding the constitutionality of section 3E1.1, the Eleventh Circuit was far less reticent in endorsing the remorse paradigm. It reasoned that the state may extend a benefit to a defendant

> who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.
>
> Section 3E1.1 formalizes and clarifies that tradition of leniency .... To hold the acceptance of responsibility provision unconstitutional would be to say that defendants who express genuine remorse for their actions can never be rewarded at sentencing. This the Constitution does not require.[75]

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[73] *Id.* at 618 (citations omitted). I appreciate the tendency to reach this result under the guideline as presently drafted (*i.e.*, without clear principles) but, as suggested in the previous Part, I believe that there is a plausible reading of section 3E1.1—the cooperation paradigm—in which remorse is not a central element of the provision. One advantage of the proposal I will make in the final Part of this Article would be to clarify the availability of a departure for remorse.

The Ninth Circuit recently also engaged in some semantic hair-splitting in a section 3E1.1 case, but reached a somewhat different conclusion, suggesting that lack of contrition was not a valid basis on which to deny an acceptance-of-responsibility adjustment. *See* United States v. Vance, 62 F.3d 1152, 1158 (9th Cir. 1995). For further discussion of *Vance*, see *infra* section III.C.2.

[74] 883 F.2d 1010 (11th Cir. 1989).

[75] *Id.* at 1012 (quoting Brady v. United States, 397 U.S. 742, 753 (1969)). Though interesting as an articulation of the remorse paradigm, the *Henry* court's analysis here is quite obviously wrong: even without section 3E1.1, remorseful defendants could, in fact, be rewarded at sentencing. First, such defendants could be sentenced at the lower end of the applicable sentencing range. Second, remorse might be used as a basis for departing downward in certain cases.

Few courts devote as much attention to the basis and implications of the remorse paradigm as the courts in *Dyce* and *Henry*, but virtually all who have pronounced on the matter seem to endorse the notion that section 3E1.1 inquiry is fundamentally about remorse or contrition.[76] Moreover, many courts implicitly accept this position by upholding lower-court decisions expressly based on findings of remorse.[77]

### *B. Deferential Standards of Review*

Reflecting the emphasis of most appellate courts on the remorse paradigm, appellate opinions tend to apply a very generous standard of review to section 3E1.1(a) decisions. With an eye to the special contribution that may be made by a district court in weighing a defendant's sincerity,[78] appellate courts take seriously the admonition of application note 5: "[T]he determination of the sentencing judge is entitled to great deference on review." The language of this note, or other words to that effect, appears often in appellate review of section 3E1.1 decisions—and invariably signals that the decision below will be

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The greater ambivalence of the *Dyce* opinion, decided seven years later, with respect to the remorse paradigm might be in part a reflection of the decreasing emphasis in section 3E1.1 itself on remorse. *See supra* subparts II.C. and II.D.

[76] *See, e.g.*, United States v. Spires, 79 F.3d 464, 467 (5th Cir. 1996) (referring to the § 3E1.1 inquiry as "the trial court's assessment of a defendant's contrition"); United States v. Eyler, 67 F.3d 1386, 1390-91 (9th Cir. 1995) ("[T]he key inquiry for purposes of section (a) is whether the defendant has demonstrated contrition . . . ."); United States v. Echevarria, 33 F.3d 175, 179 (2d Cir. 1994) (holding that defendant may be denied the adjustment for failing "to acknowledge the wrongfulness of his acts"); United States v. Cousineau, 929 F.2d 64, 69 (2d Cir. 1991) ("[O]ne who is without remorse and fails to acknowledge that his behavior was wrong clearly is not entitled to a reduction for acceptance of responsibility . . . ."); United States v. Royer, 895 F.2d 28, 30 (1st Cir. 1990) ("In deciding whether a defendant is entitled to a reduction . . . . a district court must weigh a multitude of factors . . . . [to] determin[e] whether [the] person is genuinely remorseful."); United States v. Cook, 922 F.2d 1026, 1037 (2d Cir. 1990) (noting that "acceptance of responsibility necessitates candor and remorse" (citing *Royer*, 895 F.2d 28)). *See also* HUTCHINSON & YELLEN, *supra* note 43, at 513 ("What the Commission seems to have intended is that the defendant be sincerely contrite. The few reported decisions are consistent with this analysis.").

[77] *See, e.g.*, United States v. Zanni, 64 F.3d 654, 654 (1st Cir. 1995) (upholding a denial of adjustment when district court "was not persuaded that [defendant] was genuinely contrite"); United States v. Boothe, 994 F.2d 63, 71 (2d Cir. 1993) (upholding denial of adjustment when district court had relied on the fact that defendant "failed to prove the sincerity of his acknowledgment of guilt"); United States v. Austin, 948 F.2d 783, 787-88 (1st Cir. 1991) (upholding a denial of adjustment when district court "remained unconvinced the [defendant] had any remorse whatever"); United States v. Whitehead, 912 F.2d 448, 451 (10th Cir. 1990) (upholding denial of adjustment based in part on finding that defendant "did not accept fully that his actions were morally and legally improper"); United States v. Hill, 911 F.2d 129, 131 (8th Cir. 1990) (upholding denial of adjustment based on fact that defendant "did not express sorrow or state that he wished he had not committed the crime").

[78] *See supra* note 53 and cases cited therein.

upheld.[79] In more technical terms, the standard of review is often said to be clear error.[80] The Fifth Circuit, however, has ruled that the standard of review for section 3E1.1 decisions is "even more deferential than clear error,"[81] while the Second Circuit will only overturn an acceptance-of-responsibility decision if it is "without foundation."[82] In any event, regardless of the technical standard of review, my review of the appellate case law indicates that section 3E1.1 decisions are overturned little more than ten percent of the time in published decisions. The rate of reversal is presumably far lower if summary orders are taken into account.[83]

When upholding an acceptance-of-responsibility determination,[84] appellate courts rarely parse the language of section 3E1.1 or the application notes. In avoiding legal analysis of section 3E1.1, appellate decisions generally find acceptance of responsibility to be strictly a factual determination. Reviewing courts merely look for the presence of something in the factual record to support the district court's finding. If the defendant is challenging the denial of the adjustment, obstruction of justice or going to trial will generally suffice to uphold the lower court's ruling.[85] If a defendant pleads and does not obstruct justice, an appellate court will still generally uphold a denial of section

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79 *See, e.g.*, United States v. Spires, 79 F.3d 464, 467 (5th Cir. 1996) ("[T]he standard of review is even more deferential than clear error. . . . [b]ecause the trial court's assessment of a defendant's contrition will depend heavily on credibility assessments . . . .") (citation omitted); United States v. Myers, 66 F.3d 1364, 1372 (4th Cir. 1995); United States v. Luciano-Mosquera, 63 F.3d 1142, 1157 (1st Cir. 1995); United States v. Kerr, 13 F.3d 203, 205 (7th Cir. 1993) ("[T]he trial judge is in a unique position to decide whether the acceptance is sincere . . . ."); United States v. Sanchez-Estrada, 62 F.3d 981, 986 (7th Cir. 1995); United States v. Bonds, 48 F.3d 184, 187 (8th Cir. 1995); United States v. Cousineau, 929 F.2d 64, 69 (2d. Cir. 1991); United States v. Whitehead, 912 F.2d 448, 451 (10th Cir. 1990) ("Because of our deference to the trial court's assessment of credibility . . . .").

80 *See, e.g.*, United States v. Lunsford, 1996 WL 67919, at *2 (6th Cir. Feb. 15, 1996); United States v. Morris, 76 F.3d 171, 175 (7th Cir. 1996); United States v. Myers, 66 F.3d 1364, 1372 (4th Cir. 1995); United States v. Bonds, 48 F.3d 184, 187 (8th Cir. 1995); United States v. Whitehead, 912 F.2d 448, 451 (10th Cir. 1990); *see also* Jon M. Sands & Cynthia A. Coates, *The Mikado's Object: The Tension Between Relevant Conduct and Acceptance of Responsibility in the Federal Sentencing Guidelines*, 23 ARIZ. ST. L.J. 61, 78 (1991).

81 United States v. Spires, 79 F.3d 464, 467 (5th Cir. 1996).

82 United States v. Boothe, 994 F.2d 63, 70 (2d Cir. 1993) (citations omitted).

83 Among 47 published section 3E1.1 cases from all circuits decided between early 1995 and early 1996, only five resulted in a remand for a fresh acceptance-of-responsibility determination. Among 53 Second Circuit cases decided between 1988 and 1996, only seven resulted in a remand on the section 3E1.1 issue.

84 Generally, the cases involve an appeal by a defendant who was denied the adjustment, rather than an appeal by the government over an improperly granted adjustment.

85 *See, e.g.*, United States v. Spires, 79 F.3d 464, 467 (5th Cir. 1996) (defendant admitted factual elements of guilt, but went to trial to raise entrapment and duress claims); United States v. Lunsford, 1996 WL 67919, at *2 (6th Cir. Feb. 15, 1996) (defendant received obstruction enhancement); United States v. Luciano-Mosquera, 63 F.3d 1142, 1157 (1st Cir. 1995) (defendant went to trial after government took a hard line in plea negotiations); United States v. DeLeon

3E1.1 credit if it can identify any fact or finding below that would call the defendant's good faith into question. Any indication of fresh post-offense criminal activity will usually suffice, even the presence of drugs in a defendant's urine.[86] Other cases uphold acceptance-of-responsibility findings based solely on statements by the defendant[87]—as in the *Echevarria* and *Cook* cases—or on conclusory assertions by the district court.[88]

In sum, although the detailed section 3E1.1 application notes furnish a foundation on which to construct legal parameters for the guidance of district courts in balancing the various principles and purposes implicit in the provision, appellate courts—focusing primarily on application note 5 and characterizing acceptance of responsibility as purely a matter of fact—generally eschew such a possibility. Six years ago, a pair of commentators asserted, "Many trial judges regularly grant the [acceptance-of-responsibility] discount to guilty plea defendants. When other judges deny the discount, appellate courts rarely reverse or set standards for even-handed administration."[89] A similar argument might still be made today.

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Ruiz, 47 F.3d 452, 455 (1st Cir. 1995) (defendant went to trial after government took a hard line in plea negotiations).

86 *See, e.g.*, United States v. Vital, 68 F.3d 114, 120-21 (5th Cir. 1995) (granting no adjustment when defendant tested positive for drugs prior to sentencing); United States v. Gordon, 64 F.3d 281, 285 (7th Cir. 1995) (denying adjustment because of bank robbery prior to sentencing). With respect to evidence of post-offense drug use, some—but not all—courts distinguish cases based on whether the offense of conviction was drug-related. If the offense was not drug related, then subsequent drug use may be said to be irrelevant to the question of whether the defendant accepts responsibility for the offense. *Compare* United States v. Morrison, 983 F.2d 730, 735 (6th Cir. 1993) (holding that subsequent drug use is not relevant to acceptance of responsibility in a firearms violation) *with* United States v. Watkins, 911 F.2d 983, 985 (5th Cir. 1990) (stating that subsequent drug use may be considered in acceptance-of-responsibility analysis in case of possession of stolen checks).

87 In *United States v. Drapeau*, the Eighth Circuit upheld a denial of acceptance of responsibility to a sex offender who pled guilty, but who was drunk at the time of the offense, claimed an inability to recall the details of his conduct and stated that he "had difficulty in believing that he had committed the offense. 943 F.2d 27, 28-29 (8th Cir. 1991). And in *United States v. Whitehead*, a fraud case, the Tenth Circuit upheld—albeit reluctantly—a denial based primarily on the defendant's honest admission to a probation officer that, while he regretted causing harm to individuals, he "felt no remorse over cheating large businesses." 912 F.2d 448, 450-51 (10th Cir. 1990).

88 In *United States v. Cousineau*, the Second Circuit upheld a denial of acceptance of responsibility based solely on the district court's finding that the defendant "had not shown remorse or acknowledged the wrongfulness of the conduct for which he was convicted," but cited no evidence to support this conclusion. 929 F.2d 64, 69 (2d Cir. 1991). And in *United States v. Friedman*, the Second Circuit upheld a denial based on a similarly conclusory finding by the district court that the defendant "had refused to 'come forward' and, by his actions, show 'clear acceptance of responsibility.'" 998 F.2d 53, 60 (2d Cir. 1993).

89 Dan Freed & Marc Miller, *Editors' Observations: Plea Bargained Sentences, Disparity and "Guideline Justice,"* 3 FED. SENTENCING REP. 175, 176 (1991) (citations omitted).

### *C. Exceptions to Appellate Deference*

Though rare, a number of appellate opinions have overturned section 3E1.1 determinations. Two lines of such cases are of particular relevance to the argument of this Article and are detailed in the following sections.

*1. Section 3E1.1 and Self-Incrimination.*— Many appellate opinions on section 3E1.1 presuppose that district courts will base their determinations on free-ranging inquiries into the defendant's state of mind in which no single fact is meant to be dispositive. However, such an inquiry may conflict with a defendant's Fifth Amendment privilege against self-incrimination because a court may use the threat of withholding the adjustment—expressly or implicitly—to pressure a defendant into disclosing information or admitting wrongdoing that would result in an enhanced sentence or prosecution for additional crimes.

The Fifth Amendment concerns of judges and commentators have focused on the "scope of conduct" for which a defendant must accept responsibility.[90] Section 3E1.1 originally required defendants to accept responsibility for "the offense of conviction," but a 1988 amendment changed this language to "[the defendant's] criminal conduct."[91] Several circuits took the position that this change required defendants to accept responsibility not just for the offense of conviction, but also for all relevant conduct as defined in section 1B1.3 of the Guidelines.[92] In contrast, the First, Second, Ninth, and D.C. Circuits argued that "criminal conduct" should be interpreted as still meaning "offense of conviction," in part out of Fifth Amendment concerns that would be raised by alternative interpretations.[93] The first of these opinions, *United States v. Perez-Franco*,[94] provides a useful illustration of the issues.

In *Perez-Franco*, the defendant was indicted on five counts that charged several distinct offenses related to a broader drug conspiracy. The defendant agreed with the government to plead guilty to one of the counts in return for dismissal of the others. During both the presentence investigation by a probation officer and the subsequent sentencing hearing, the defendant declined to answer questions relating to the counts that were to be dismissed. As a result the district

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90 *See* WORKING GROUP, *supra* note 33, at 16.

91 HUTCHINSON & YELLEN, *supra* note 43, at 515. The Commission characterized this amendment as merely a "clarification," although the new language seemed to carry substantively different connotations. *See id.*

92 WORKING GROUP, *supra* note 33, at 17 (citing decisions by the Third, Fourth, Fifth, and Eleventh Circuits).

93 HUTCHINSON & YELLEN, *supra* note 43, at 516.

94 873 F.2d 455 (1st Cir. 1989).

court declined to award the adjustment, holding that "acceptance of responsibility means total candor by the defendant as to his total criminal conduct."[95] However, the First Circuit disagreed, arguing that requiring total candor as to conduct that might result in future prosecution violated the defendant's privilege against self-incrimination. The court observed:

> The government maintains that the Guidelines require a defendant to make self-incriminatory statements concerning criminal charges which are to be dismissed as part of a plea agreement. If the defendant does not make such statements, he will suffer the penalty of not receiving a reduction in his offense level, resulting in a longer prison sentence. There are no guarantees given the defendant that such statements will not be used against him in subsequent proceedings. . . . The touchstone of the fifth amendment is compulsion, and the Supreme Court has recognized that imprisonment is one of a wide variety of penalties which can serve to trigger a constitutional violation. . . .
>
> . . . Given both the language of the Guidelines and the constitutional restrictions, the acceptance of responsibility section can only be interpreted to mean that a defendant who has made a plea agreement must accept responsibility solely for the counts to which he is pleading guilty.[96]

In response to the circuit split on the *Perez-Franco* issue, the Sentencing Commission modified section 3E1.1 in 1992, so that a defendant now need only accept responsibility for "his offense."[97] Further, application note 1 now lists as one of the aspects of post-offense conduct that a court may "appropriately" consider the defendant's "truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting *or not falsely denying* any additional relevant conduct for which the defendant is accountable under § 1B1.3."[98] The note further specifies that a defendant "may remain silent" with respect to relevant conduct beyond the offense of conviction,[99] which provides protection to defendants like Perez-Franco.

Although the 1992 amendments alleviated much of the self-incrimination risk related to section 3E1.1, some appellate courts still aggressively police acceptance-of-responsibility determinations when Fifth Amendment interests are implicated. The Second Circuit's deci-

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95 *Id.* at 457-58 (quoting transcript of sentencing hearing).

96 *Id.* at 463. For an argument against the reasoning of the *Perez-Franco* court, see Bradford C. Mank, *Truth in Sentencing: Accepting Responsibility Under the United States Sentencing Guidelines*, 25 GONZ. L. REV. 183 (1990). For a discussion of various ways that the 1988 version of section 3E1.1 might have been reconciled with the Fifth Amendment, see Luke T. Dokla, Note, *Section 3E1.1 Contrition and Fifth Amendment Incrimination: Is There an Iron Fist Beneath the Sentencing Guidelines' Velvet Glove?*, 65 ST. JOHN'S L. REV. 1077 (1991).

97 HUTCHINSON & YELLEN, *supra* note 43, at 516.

98 U.S.S.G. § 3E1.1 application note 1(a) (emphasis added).

99 *Id.*

sion in *United States v. Austin*[100] furnishes a striking example. In *Austin*, the defendant was charged with selling thirty-six firearms without a license. As a result of plea bargaining, the government agreed to dismiss all counts except for those relating to five guns sold to an undercover agent. At the sentencing hearing, the judge expressed concern over the defendant's refusal to assist the government in recovery of the other thirty-one weapons, which were primarily sold to drug dealers. As a result of this refusal, the judge determined that the defendant was not "truthfully remorseful"[101] and denied any adjustment. In reviewing this decision, the appellate court focused on the "appropriate considerations" enumerated in application note 1, particularly considerations (a) ("truthfully admitting . . . the offense(s) of conviction and truthfully admitting or not falsely denying . . . relevant conduct") and (e) ("voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense"). The appellate court determined that consideration (a) did not permit a denial of the reduction to Austin because of the language added in 1992 permitting defendants to remain silent regarding relevant conduct.[102] The appellate court further determined that consideration (e) could not apply, either, because "[c]onditioning a sentence reduction on a defendant's 'voluntary assistance to authorities in the recovery of . . . fruits and instrumentalities' not associated with the offense of conviction infringes upon Fifth Amendment protections no less than requiring a defendant to accept responsibility for an offense other than the offense of conviction."[103] The court concluded, "[T]he district court looked beyond the offense of conviction in evaluating Austin's acceptance of responsibility; under the facts of this case, neither Application Note 1(a) nor 1(e) empowered it to do so. Accordingly, we hold that the record does not furnish a foundation for the denial of a reduction . . . ."[104]

Not only is the spirit of *Austin* starkly at odds with the typically deferential review of section 3E1.1 decisions, but the court seems simply wrong in its use of application note 1. The note expressly purports to be a nonexhaustive list of post-offense actions that a court may legitimately count as evidence in favor of acceptance of responsibility. Nothing in the application note hints that a judge may deny a reduction only if "empowered" to do so by one of the provisions of the note. Both the application notes and the case law clearly state that the burden of proof in section 3E1.1 lies with the defendant and that the judge is not limited in acceptance-of-responsibility findings to

100 17 F.3d 27 (2d Cir. 1994).

101 *See id.* at 30.

102 *Id.* at 31 ("The language of Application Note 1(a) is unconditional.").

103 *Id.* at 32.

104 *Id.* at 30.

the considerations set forth in application note 1. The strained reading of the note—a reading that I have seen in no other opinion inside or outside the Second Circuit—may be explicable only on the basis of the exceptional sensitivity of the *Austin* court to the Fifth Amendment interests.

*2. Reducing the Scope of Judicial Discretion in the Ninth Circuit.*—Several recent decisions suggest that the Ninth Circuit is moving away from the generous standard of review accorded by other circuits to acceptance-of-responsibility determinations: the Ninth Circuit is finding questions of law where most appellate courts have only seen questions of fact.[105] In addition, these decisions suggest a discomfort with the idea that section 3E1.1 calls for an open-ended, highly discretionary inquiry into the defendant's state of mind. *United States v. Vance* provides an illustration. Following an airport-terminal search and seizure, the defendant, Vance, was arrested and charged with importing methamphetamine into the United States. Vance moved to suppress the drugs found on his body. The district court denied this motion, after which Vance pled guilty, but reserved his right to appeal the suppression decision. At sentencing, the court denied Vance the adjustment "on the ground that Vance had taken the case through a suppression hearing, had refused to talk to the probation officer, had refused to assist law enforcement authorities, had not fully admitted his guilt, and had shown insufficient evidence of contrition."[106]

The appellate court rejected the validity of each of the district court's reasons one by one. Citing earlier Ninth Circuit precedent,[107] the court asserted that the "exercise of a constitutional right cannot be held against a defendant for purposes of the [acceptance-of-responsibility] adjustment"[108] and, as a result, found impermissible the district court's reliance on Vance's refusal to talk and his assertion of Fourth Amendment rights at a suppression hearing. The appellate court further rejected reliance on Vance's failure to assist law enforcement authorities, noting that assistance to law enforcement "is not closely related to contrition."[109] Next, the appellate court held that by accepting Vance's guilty plea, the district court necessarily found that

105 *See, e.g.*, United States v. Eyler, 67 F.3d 1386, 1391-92 (9th Cir. 1995); United States v. Vance, 62 F.3d 1152, 1159-60 (9th Cir. 1995); United States v. Gonzalez, 16 F.3d 985, 990-91 (9th Cir. 1993).

106 62 F.3d at 1157. Vance refused to discuss the offense with his probation officer on the advice of counsel because of a concern that statements to the probation officer could be used against him if his appeal of the suppression motion proved successful. *Id.*

107 United States v. LaPierre, 998 F.2d 1460 (9th Cir. 1993).

108 62 F.3d at 1157.

109 *Id.* at 1158.

the defendant had fully admitted his guilt. Finally, the court addressed "contrition":

> In general usage, the word "contrition" means sincere remorse for wrongdoing, repentance for wrongdoing, penitence, . . . or consciousness of guilt giving rise to humility and sorrow . . . . The factual inquiry required by the guidelines does not require a penetrating judicial examination of the criminal's soul. There is no particular social purpose to be served by lenience toward those who cry more easily, or who have sufficient criminal experience to display sentiment at sentencing instead of restraining their emotions in public.[110]

Having rejected or belittled the evidence considered by the sentencing judge, the appellate court turned its focus to application note 3, which states that a guilty plea is "significant evidence" of accepting responsibility. In essence, because the court determined that the evidence *against* acceptance of responsibility was insignificant or impermissible, it ruled that, as a matter of law, Vance's guilty plea required that he be given the section 3E1.1 adjustment.[111]

The court framed its holding in *Vance* in light of the purposes of section 3E1.1:

> One purpose of the guidelines was to reduce disparity among sentences on pleas of guilty . . . . The guidelines recognized that sentences have historically been reduced by fairly predictable percentages upon pretrial pleas of guilty, and came about as close as they could, without penalizing the exercise of constitutional rights, to codifying the percentage.
>
> A defendant need not make a deal, and need not engage in histrionic display, to get the reduction for pleading guilty. An analysis of "acceptance of responsibility," focusing on the objectively ascertainable evidence such as that designated in the application notes facilitates the reduction of sentencing disparity which the guidelines are intended to promote.[112]

Thus, *Vance* seems to push section 3E1.1 in the direction of an automatic, fixed discount for guilty pleas.

The court's position on contrition (the remorse paradigm) is somewhat ambivalent. On the one hand, the court did not challenge the appropriateness per se of considering contrition. On the other hand, the court plainly felt that the contrition requirement may be quite easily satisfied by defendants and that the perspective of district courts on contrition is not particularly valuable. Although the court viewed contrition as an important animating principle in section 3E1.1, it adopted an unusual conception of the principle, seeking to reduce it to "objectively ascertainable evidence," particularly guilty

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110 *Id.* at 1158-59 (citations omitted).

111 *Id.* at 1157 ("[W]e are compelled to find that the district court clearly erred in this case . . . because of the absence of significant evidence that Vance did not accept responsibility.") (citation omitted).

112 *Id.* at 1160.

pleas. The immediate result is a substantially more aggressive form of appellate review than is carried out in most circuits.[113]

## IV. District Court Practices

Notwithstanding the two discretion-constraining lines of cases discussed in the previous Part, appellate courts generally provide district courts with a great deal of freedom in applying section 3E1.1. Appellate courts believe that section 3E1.1 empowers district courts to make open-ended, discretionary inquiries into a defendant's state of mind for purposes of determining whether the defendant is remorseful. Because appellate courts perceive district courts to be relying heavily on subjective evidence of a defendant's sincerity, appellate courts will generally uphold acceptance-of-responsibility findings on the slimmest of evidence on the record. In light of such generous review practices, the day-to-day decisions of district courts have an exceptionally high degree of importance to the overall impact of section 3E1.1. This Part reviews evidence of how district courts actually implement the guideline. It first considers the practices of one district, the District of Connecticut, in which section 3E1.1 has effectively become an automatic discount for guilty pleas. After discussing the dynamics involving prosecutors, defenders, probation officers, and judges that shape Connecticut practices, this Part will review evidence of nationwide practices. Although the particular dynamics of Connecticut may or may not be unique, national data suggests that the bottom-line result, the treatment of section 3E1.1 as a more-or-less automatic plea discount, has been widely replicated. Yet, deviations from the Connecticut model also exist, raising concerns about unwarranted disparity which will be further considered in the next Part.

### *A. Connecticut Case Study: Section 3E1.1 as Automatic Plea Discount*[114]

In general, in the District of Connecticut, the section 3E1.1 adjustment is automatically granted to defendants who plead guilty and

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113 For other examples of the Ninth Circuit's aggressive approach to section 3E1.1 review, see *United States v. Gonzales*, 16 F.3d 985, 991 (9th Cir. 1993) (holding that a defendant's untruthful statement to a probation officer concerning motive for offense cannot overcome presumption in favor of adjustment when defendant has pled guilty, admitted facts of offense, and stated to probation officer that he "feels bad for what he has done") and *United States v. Eyler*, 67 F.3d 1386, 1391-92 (9th Cir. 1995) (holding that a district court *must* grant one-point section 3E1.1(b) reduction when a defendant receives subsection (a) reduction and admits involvement in one charged offense at time of arrest, notwithstanding defendant's alleged misrepresentations of his background and decision to go to trial to contest second charge, of which defendant was acquitted).

114 This account is based on interviews conducted in New Haven, Connecticut, in April of 1996, with three senior probation officers, three senior assistant United States attorneys, and an assistant federal public defender. These seven individuals were in virtually complete agreement

automatically denied to defendants who go to trial. Approximately eighty percent of the time, guilty pleas result in a two-point reduction; also approximately eighty percent of the time, going to trial results in a denial of the reduction. Like the *Vance* court, practitioners in Connecticut do not believe that section 3E1.1 requires "a penetrating judicial examination of the criminal's soul." Rather, practitioners believe that there is a difference between remorse and acceptance of responsibility, and that the requirements of acceptance of responsibility are generally met by a mere guilty plea. When questioned about the tendency of appellate courts to equate acceptance of responsibility with remorse, some practitioners express exasperation with the unrealistic expectations of judges who, in the words of one probation officer, "only see paper, not people." Notwithstanding the rhetoric of appellate courts, the District of Connecticut has effectively transformed section 3E1.1 into a plea discount. This change has been effected through the work, or at least complicity, of defense counsels, probation officers, prosecutors, and judges.

Under the Guidelines, the role of a defense counsel in sentencing has changed substantially. In particular, defense lawyers have adopted a much more aggressive posture towards controlling the flow of information from defendants to probation officers and judges. Whereas previously counsels often permitted defendants to speak freely, counsels now generally try to limit the openness of exchanges, in particular those pertaining to the offense. Counsels permit greater openness in conversations about the defendant's background and character, particularly if the defendant has a sympathetic story, but the Guidelines present many risks in dialogue about the offense, including: loss of the section 3E1.1 reduction, addition of new relevant conduct, changed "role in the offense" categorization, and enhancement for obstruction of justice. Thus, one defender characterized a "free-wheeling exchange" between a defendant and his probation officer or the court as "a nightmare."[115] Instead of such exchanges, the prevailing practice among the defense lawyers in Connecticut—both public defenders and private practitioners—is to send a written docu-

as to the manner in which section 3E1.1 is implemented in the district. The author's subsequent experience as a law clerk in the district has served to confirm the interviewees' observations. Nothing in this account, however, should be understood as a description of the practices or opinions of Judge Arterton specifically.

The author is grateful to the seven interviewees for their thoughtful participation. The interviewees will be identified herein by organization but not by name.

115 The defender elaborated by discussing an instance in which one of his clients had, in the hope of getting the reduction, provided an exceptionally complete statement of his involvement in a series of illegal gun sales. However, the judge used the defendant's admission that the sales had largely been to gang members as a basis for upward departure, reasoning that gun sales to gang members were far more dangerous than the "heartland" cases of such transactions. "After you get burned like that," the defender concluded, "you learn to be very defensive."

ment to the probation office in which the defendant cursorily states, in effect, "I did it, and I am sorry."[116] In most cases, defense counsel will also attend presentence interviews with probation officers—also a change from pre-Guidelines practices—in order to prevent defendants from commenting on the offense. If the officer begins to probe into the offense, counsel will remind the officer that the defendant has already submitted a statement on the offense. If the defendant begins to disclose more than what is contained in the written statement, counsel will "kick him under the table."[117] In short, defense lawyers exert what influence they have in order to prevent the section 3E1.1 inquiry from functioning as an open-ended examination of the defendant's attitude towards his offense.

Probation officers sometimes express frustration with the minimal written statements they now receive from defense lawyers, but, according to a public defender, officers rarely "take it out" on defendants by not recommending the adjustment.[118] Many factors apparently contribute to this complicity. First, many probation officers themselves believe that a guilty plea generally satisfies the requirements of accepting responsibility.[119] Second, probation officers claim to have always been more oriented toward the "why" of the offense than toward the offense itself. Because police reports are readily available, officers have minimal interest in probing into the offense

116 This observation, of course, primarily applies to defendants who plead guilty (the vast majority); defendants who go to trial rarely make a serious bid for acceptance of responsibility, in part to preserve an uncompromised position through the appeals process and in part because such defendants have adopted a mentality of adversity that is incompatible with a request for reduction. It is to be observed, however, that only approximately 2% of cases go to trial in Connecticut, meaning that such situations are rare. U.S. SENTENCING COMM'N 1995 ANN. REP. 53 [hereinafter ANNUAL REPORT].

117 In order to underscore the importance of these functions, a public defender observed that the attorneys in his office "make a large investment" of time and resources in presentence interviews. Attending the interviews often involves lengthy car trips in addition to the time consumed by the interview itself, which is usually at least two hours. Moreover, defenders may spend several hours preparing defendants for the interviews.

118 Indeed, probation officers claim that they try to protect the interests of defendants whose lawyers do not "know how to play the game." For instance, if a defense lawyer fails to provide the standard written stipulation of culpability, the officer may refer the lawyer to the public defender's office for advice on how to represent his client properly during the sentencing process. Notwithstanding such assertions, however, the federal public defender I spoke with remains concerned that defendants without good lawyers may be disadvantaged in the acceptance-of-responsibility process by not having safeguards against freewheeling conversations with probation officers.

119 One probation officer noted, however, that some of her colleagues are less generous than others with recommending the adjustment. She believes that this may be because the less generous officers require some evidence of genuine remorse before recommending it. She tends to think that this is an unrealistic expectation, and believes that it may diminish with experience. In some cases, supervisors can change recommendations in presentence reports which they believe to be unfair, but acceptance of responsibility is considered to be enough of a close judgment call that recommendations are rarely altered.

beyond what is contained in the defendant's stipulation. Third, probation officers indicate that they try to maintain cooperative working relationships with defense lawyers.[120] Fourth, judges rarely express an interest in having more information and admissions pertaining to acceptance of responsibility.[121] Fifth, prosecutors rarely challenge acceptance-of-responsibility findings based solely on minimal written stipulations.[122] Finally, if a probation officer is truly unhappy with a defendant's attitude, "there are easier ways" to punish the defendant—especially by inflating role in the offense or relevant conduct—than recommending a denial of the section 3E1.1 benefit. According to a defender, judges generally favor the adjustment when a defendant pleads guilty and will view recommendations of the acceptance of responsibility more favorably than the findings on role in offense or relevant conduct. As a result, virtually all presentence reports in Connecticut contain a recommendation of acceptance of responsibility when the defendant pleads.[123]

Prosecutors do not challenge the treatment of section 3E1.1 as a more-or-less automatic plea discount.[124] Indeed, the standard form plea agreement of the U.S. Attorney's office includes a conditional promise to recommend the adjustment.[125] Prosecutors approve of the current arrangement because "it helps them to move their cases

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120 Indeed, if a defense lawyer is unable to attend a presentence interview, probation officers say that they will often abide by requests from defense lawyers to avoid certain topics in the interview.

121 One probation officer noted an exception to this general tendency: if an offense involves drugs, guns, or money, and if the police have not recovered all of its fruits or instrumentalities, some judges are reluctant to give the reduction if the defendant has not assisted with recovery. The officer cited an instance in which one judge expressed displeasure with the probation office for recommending a reduction for an embezzlement in which the defendant had not helped the police recover all of the stolen money. The judge's statement had an effect on probation office practices, but, of course, the judge's approach to section 3E1.1 cannot be pushed very far in the wake of *Austin*, which was a Second Circuit case that, in fact, originated in Connecticut.

122 A defender asked rhetorically, "What is a probation officer going to do if the entire federal bar—prosecutors and defenders—supports the practice?"

123 If a defendant goes to trial, the probation office rarely recommends the reduction. According to a probation officer, this is due to the language of application note 2 counsel's desire to protect the defendant's position in appeals precludes even a minimal statement of culpability.

124 Observing the shared approach to section 3E1.1 by prosecutors, defenders, and probation officers, one prosecutor estimated that section 3E1.1 "is probably just about the least litigated Guidelines issue in this district."

125 A copy of this standard form has been provided to the author. Recommendation of the adjustment is conditioned on truthful disclosures to the probation office and may be withdrawn if the defendants maintain their criminal conduct or associations, obstruct justice, or violate a condition of their release. Assistant United States Attorneys state that they do not have discretion to deviate from this standard agreement.

By contrast, outside of the plea context, prosecutors "have a hard time imagining" a situation in which acceptance of responsibility should be recommended. An example of such a case, according to one interviewee, is if the defendant goes to trial only to raise an entrapment defense.

along." Because the U.S. Attorney's office in Connecticut claims adherence to the Department of Justice policies against charge bargaining, section 3E1.1 reduction is one of the few benefits available for a guilty plea. Prosecutors do not desire to challenge this benefit, and, even if they did, do not believe they would be successful because judges generally believe that defendants should get something for pleading guilty.[126] Finally, prosecutors do not believe that pleading guilty provides a helpful indicator of remorse or rehabilitative potential, but see section 3E1.1 as advancing more pragmatic interests of easy administration.[127]

Some judges view remorse, or the lack thereof, as an appropriate factor in sentencing, but, according to probation officers, rarely deny acceptance of responsibility to a defendant simply on the basis of the defendant's attitude. Rather, the concern for remorse is manifested in the implementation of other aspects of the Guidelines.[128] A prosecutor indicated that because of the perceived harshness of the Guidelines and the strictness of the plea bargaining practices of the U.S. Attorneys, judges are reluctant to deny the adjustment to defendants who plead.[129] Moreover, even when judges consider denying the reduction, they are likely to face a united front of prosecution, defense, and probation office in favor of the adjustment. In such instances, a judge might feel compelled to grant the adjustment despite judge's own preferences.[130] And in cases in which a judge is inclined to be lenient, the judge may be particularly reluctant to probe a defendant for statements pertaining to the offense and the defendant's attitude

126 One prosecutor noted that in a handful of guilty plea cases each year, prosecutors will change their position and oppose acceptance of responsibility as a result of post-offense conduct (*e.g.*, failed drug tests), but that the court usually awards acceptance of responsibility anyway.

A defender suggested that, more generally, the prosecutor's recommendation carries little weight with the court. He believes that this tendency reflects the continuing force of pre-Guidelines practices in Connecticut: traditionally, judges in the district "have not wanted to hear from prosecutors when it comes to sentencing" because "judges believe they can get everything they want to know from the probation office."

127 Indeed, one prosecutor suggested that, in his experience, recidivism rates may be higher among defendants pleading guilty than among defendants going to trial.

128 For instance, a probation officer recalled one instance in which a judge sentenced a defendant at the top of the recommended sentencing range due to lack of remorse, which may have resulted in an extra five years of incarceration.

129 A defender observed, "It is no secret in our district that judges think the Guidelines are too harsh. They are very results-oriented and will manipulate the Guidelines to obtain a result they believe is just."

130 A probation officer cited an instance in which one judge wished to deny the adjustment to a defendant who failed to assist police in recovering money he had embezzled. The judge ultimately awarded the adjustment, however, because everyone else in the room—prosecution, defense, and probation officer—supported it.

towards the offense for fear that the defendant will disclose aggravating information.[131]

In sum, all of the major institutional actors in sentencing in the district—defense lawyers, probation officers, prosecutors, and judges—possess a mutually reinforcing set of interests and expectations, the result of which is the effective transformation of section 3E1.1 into a more-or-less automatic discount for guilty pleas. Indeed, without exception, the practitioners I asked expressed the belief that a formal restructuring of section 3E1.1 into an automatic plea discount would have no appreciable effect on practices in Connecticut.

### *B. National Norms and Local Variation*

National statistics suggest that many other districts join Connecticut in effectively treating section 3E1.1 as a plea discount, and not as a device to recognize sincere remorse. Overall, eighty-four percent of defendants receive the adjustment;[132] data compiled by the 1991 working group suggests that eighty-eight percent of those who plead guilty receive a reduction, in comparison to only twenty percent of those who go to trial.[133] As an Eighth Circuit panel remarked upon such data, "It may be that in each case additional factors [beyond the guilty plea] led the court to grant the reduction, but that seems unlikely."[134] Rather than "a penetrating judicial examination of the criminal's soul," these numbers suggest pro forma inquiries in which mode of conviction creates powerful presumptions.

To gain greater insight into what factors other than mode of conviction influenced the section 3E1.1 inquiry, the 1991 working group studied forty-three randomly selected case files of defendants who pled but did not receive the reduction, and thirty-three files of defendants who received the reduction despite going to trial. Tellingly, the working group labeled these cases "aberrations."[135] Among the forty-three denials studied, twenty-eight seem to fit the remorse paradigm. In these cases, the defendants were denied credit because they denied

131 One prosecutor recalled an instance in which a new judge attempted to elicit mitigating factors from a defendant at a sentencing hearing in the hope of justifying a departure, but instead uncovered a great deal of relevant conduct. The judge was able to cover these admissions up only with much effort and embarrassment. Perhaps as a result of such experiences, most judges pose few, if any, questions to defendants at sentencing hearings.

132 STAFF DISCUSSION PAPER, *supra* note 4, app. 2 (citing 1994 data).

133 WORKING GROUP, *supra* note 33, at 5.

134 United States v. Knight, 905 F.2d 189, 192 (8th Cir. 1990). The *Knight* case also provides an interesting piece of anecdotal evidence for the commonness of equating acceptance of responsibility with pleading guilty: the trial court evidently caught the defense counsel completely off-guard by asking for evidence of acceptance of responsibility. Believing that the guilty plea would be sufficient, the lawyer was not prepared to answer the question. *Id.* at 190.

135 WORKING GROUP, *supra* note 33, at 7-8, 11.

or minimized their culpability.[136] The remaining may reflect a greater emphasis on the cooperation paradigm: in each, the defendant either obstructed justice, or refused to talk with, or lied to, a probation officer.[137] Among the aberrant cases in which credit was awarded notwithstanding a trial, explanations are more difficult to discern, though it may be significant that in thirty of the cases, the defendant made at least a partial admission of guilt to a probation officer or the government.[138] That observation leaves three aberrant cases which are wholly enigmatic: not only did the defendants go to trial, but they also maintained their complete innocence after conviction, yet still received the acceptance-of-responsibility benefit.[139]

The aberration analysis of the working group raises the specter of disparity, the possibility that—notwithstanding a general consensus that mode of conviction should control section 3E1.1—some judges hold a rather different opinion. The working group noted that in only five districts do judges grant the reduction to fewer than seventy-five percent of defendants who plead guilty.[140] And in only four districts do judges grant the reduction to more than thirty percent of defendants who go to trial.[141] The working group concluded, "Although variations with respect to the application of the acceptance of responsibility adjustment do exist, the Commission may conclude that they are not too pronounced."[142]

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136 *Id.* at 8. In ten of the cases, defendants maintained an outright denial of guilt, despite pleading guilty. *Id.*

137 *Id.*

138 *Id.* at 11. Unfortunately, the working group's study does not indicate what percentage of these defendants went to trial to raise purely legal issues, what percentage raised affirmative defenses (*e.g.* entrapment, duress, and insanity), and what percentage fully contested the factual bases of the charges against them. Application note 2 suggests that defendants in the third category, and perhaps defendants in the second as well, should not be permitted to receive the reduction.

139 One may hypothesize that these cases—and perhaps many others in which acceptance of responsibility is awarded notwithstanding a trial—represent efforts by judges to subvert Guidelines sentences that were perceived as overly harsh. Alternatively, these cases may be a result of carelessness or of unusual interpretations of section 3E1.1. Unfortunately, the records of the working group do not provide any basis for choosing among these explanations.

140 *Id.* at 6. Interestingly, all five of these districts that are the least generous with section 3E1.1 are located in the South: Western Texas, Western Arkansas, Northern Oklahoma, Northern Georgia, and Southern Alabama. *Id.*

141 *Id.* at 6-7 (Maryland, Middle North Carolina, Eastern Louisiana, and Southern Ohio).

142 *Id.* at 7. The working group's conclusion might be more persuasive if it provided more data. For instance, the working group noted that five districts awarded the section 3E1.1 adjustment to fewer than 75% of defendants who pled guilty, *id.* at 6, but did not indicate either how far below 75% these districts were, or how many districts were at the opposite extreme, say, above 90%.

Other studies may raise greater disparity concerns.[143] A 1989 analysis of four districts in the Eighth Circuit indicates that the percentage of defendants pleading guilty who receive the section 3E1.1 adjustment varies from fifty-four to eighty-six percent, with an average of seventy-seven percent.[144] The Nagel and Schulhofer analysis of plea bargaining practices in three cities also presents evidence of disparity.[145] In one district in 1990, judges awarded the reduction in over ninety percent of guilty plea cases and an astonishing forty percent of cases going to trial—twice the national average.[146] In another district, judges were similarly generous with guilty plea cases, but awarded the discount to between twenty-five and thirty percent of defendants going to trial in 1989 and 1990. This was still greater than the national average.[147]

Unwarranted disparity may also be evident in the application of section 3E1.1 to different social groups. For instance, while blacks comprise only thirty-five percent of all drug defendants,[148] black males comprise forty-seven percent of the male drug defendants who are denied the adjustment.[149] This data suggest that blacks may be denied the adjustment more frequently than nonblack defendants who commit similar offenses.

One may also observe disparity in the published case law. Although both the Connecticut case study and the overall national averages suggest that judges, by and large, do not engage in extensive acceptance-of-responsibility inquiries, the *Echevarria*, *Vance*, and *Austin* cases, and many others of their ilk, suggest that *some* district judges in *some* cases are, in fact, demanding far more from a defendant than a guilty plea in order to grant the section 3E1.1 adjustment.

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143 Indeed, based on an extensive series of interviews conducted in twelve different judicial districts, the working group itself observed, "[S]everal statements suggest that acceptance of responsibility is applied differently across the nation and within a given district." *Id.* at 24.

144 Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 775 (1992). The percentage of defendants going to trial who received the benefit varied from 2% to 33%, with an average of 16%. *Id.* These numbers, of course, need not necessarily represent unwarranted disparity. It may be that, due to the nature of crime prosecuted or other factors differentiating the districts, there are important differences among the populations of defendants being sentenced. For instance, the defendants in one district may actually be more remorseful than those in the others. Unfortunately, strictly numerical comparisons, such as those offered by Heaney, do not make this sort of analysis possible.

145 *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992).

146 *Id.* at 531, 550.

147 *Id.* at 540. The Nagel and Schulhofer study does not provide exact numbers because the authors wished to preserve the anonymity of the districts they studied. *Id.* at 553 n.73.

148 ANNUAL REPORT, *supra* note 116, at 103.

149 Letter from Susan Katzenelson, Director, U.S. Sentencing Commission Office of Policy Analysis, to Maria Rodrigues McBride, Chief Probation Officer of the District of Connecticut (Feb. 20, 1997) (copy on file with author).

Disparity also becomes apparent in comparisons of specific cases. For instance, in *United States v. Harris*,[150] a robbery defendant who pled guilty was denied the adjustment because he engaged in three types of noncooperative behavior: changing address without notifying the court, failing a drug test, and failing "to take advantage of opportunities for drug rehabilitation and counseling."[151] In *United States v. Schultz*,[152] by contrast, the defendant, who pled guilty to a money-laundering offense, received a reduction notwithstanding an extensive list of similar conduct: failure to complete a prescribed treatment program for alcohol abuse, refusal to provide urine samples, missed appointments with his probation officer, and an arrest for drunken driving, after which the defendant's pretrial release was revoked.[153] Plainly, the *Schultz* court employed a different standard for section 3E1.1 than the *Harris* court. The implications of such disparity for the legitimacy of section 3E1.1 will be addressed in the next Part.

## V. Problems with Section 3E1.1

To recapitulate, the development and implementation of section 3E1.1 hardly constitute a model of effective communication between the Sentencing Commission, the appellate courts, and the district courts. The Sentencing Commission has designed an open-ended, functional test, but has failed to specify what function is to be served by the test. Moreover, as structured by the Commission, section 3E1.1 possesses at least two distinct animating principles—remorse and cooperation—which may be in tension with one another in certain cases. The appellate courts, for their part, have focused overwhelmingly on the remorse principle, but have generally failed to establish clear standards for the implementation of this principle. Notwithstanding the wariness of some circuits when constitutional rights are implicated, few appellate courts will seriously scrutinize an acceptance-of-responsibility determination. Although district courts are granted tremendous discretion by appellate courts and provided with equivocal or contradictory signals from the Commission, many of them, facing a variety of institutional pressures, have adopted a fairly consistent approach to section 3E1.1. This approach emphasizes the very factor, mode of conviction, that the Commission itself was initially most con-

150 13 F.3d 555 (2d Cir. 1994).

151 *Id.* at 557. The appellate court upheld the denial of a reduction on these grounds.

152 880 F. Supp. 605 (N.D. Ind. 1995).

153 *Id.* at 608-09. The court remarked dryly, "Mr. Schultz performed poorly with respect to the conditions of his pretrial supervision." *Id.* at 608. In deciding to grant the section 3E1.1 adjustment despite Schultz's poor performance, the court gave weight to the following factors: Schultz's plea was timely (two weeks before trial), he admitted the conduct comprising the offense of conviction, and he acknowledged his alcoholism at the sentencing hearing. None of these factors seems particularly extraordinary, suggesting a strong inclination on the part of the sentencing judge to reward guilty pleas, regardless of other aspects of the post-offense conduct.

cerned with. Yet, not all courts emphasize this factor, or emphasize it in the same manner. This state of affairs has generated a number of important concerns about the operation of section 3E1.1. This Part details some of the problems with the guideline, and the next presents suggestions for reform.

### *A. Unnecessary Litigation*

In its recent proposal for reform of section 3E1.1, the Judicial Conference of the United States noted that "astonishingly, the acceptance guideline accounts for the third highest number of appeals" among all elements of the Guidelines.[154] It attributed this flood of litigation to the vagueness of "acceptance of responsibility" and the lack of clear legal standards in the guideline and its application notes[155]—and, one might add, in the appellate case law. Without clear standards according to which defendants who go to trial may be granted the reduction or according to which defendants who plead may be denied the benefit, the aggrieved parties in that small—but not insubstantial—body of cases in which acceptance of responsibility does not match expectations based on the mode of conviction are apt to believe that the district court has either misinterpreted the law or abused its discretion.[156] Thus, the lack of clarity in section 3E1.1 contributes to an unusually high tendency among parties to litigate the issue at the appellate level. Though the acceptance-of-responsibility findings are rarely overturned, this litigation constitutes an unfortunate and unnecessary drain on the judicial system.

### *B. Unwarranted Disparity*

In the Sentencing Reform Act, "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."[157] Arguably, section 3E1.1 contravenes this goal by varying sentences based on post-offense conduct and statements. Undoubtedly, the guideline provides for disparate treatment of similar criminal offenses. For two bank robbers whose offenses are identical, for instance, section 3E1.1 will generally result in a lower sentence for the robber who pleads guilty than for the robber convicted by a jury. This disparity may be justified, however, if mode of conviction indicates that the two *offenders* are dissimilar in some way that ought to be recognized by a

154 Barry Letter, *supra* note 14, at 1.

155 *Id.* ("This confusion is generated by the interaction and definition of the numerous factors listed in the current acceptance guideline, all of which comprise the vague concept of 'acceptance.'").

156 Both prosecutors and defendants appeal section 3E1.1 decisions at a relatively high rate: it is the third most litigated issue among both groups. *Id.* at 1 n.1.

157 U.S.S.G. § 1A3.

sentencing system. As discussed in Part II above, the Preliminary Draft of the Guidelines suggests two such justifications for the disparity: (1) the offender who pleads guilty has greater rehabilitative potential; and (2) the offender who pleads guilty engages in cooperative behavior that ought to be rewarded in part as an incentive for future cooperative behavior.

Even assuming, however, that the disparities created by § 3E1.1 are warranted in principle, the description of district court implementation offered above suggests that substantial unwarranted disparity may exist in practice. The underlying problem is that the provision "is written so ambiguously as to invite disparate interpretations."[158] Evidence suggests that in most cases the adjustment is granted to a defendant as a matter of course, unless the defendant does something extraordinary, such as obstructing justice or going to trial. Unfortunately, neither the implementation notes nor the appellate case law provide much guidance as to what precisely is required to tip the balance against the adjustment. Is simply going to trial enough? How about a failed presentencing drug test? An unremorseful demeanor? And how can unusual affirmative evidence of acceptance of responsibility—successful drug rehabilitation, voluntary restitution, tearful courtroom confession—be weighed against negative evidence? All of these questions are largely left to the discretion of sentencing judges, and much evidence suggests that sentencing judges provide inconsistent answers.

Most judges seem to reach these difficult balancing issues only in unusual cases. If the Connecticut experience is typical, judges rarely engage in meaningful individualized determinations of acceptance of responsibility, but in the context of unusual cases, disparity may be endemic.[159] Moreover, disparity may be heightened by the fact that a minority of judges may not routinely grant the a/r adjustment even in

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158 Freed & Miller, *supra* note 89, at 176.

> Some interviewees feel that a review of the acceptance guidelines should start by going back to the original philosophy that serves as a foundation for the guideline. Training the operation and rationale of the acceptance guidelines frequently generates the comment, 'Well, which is it, a reduction for the defendant who accepts responsibility for his conduct, or a guilty plea discount?'

STAFF DISCUSSION PAPER, *supra* note 4, at 12.

159 By the term "unusual cases," I mean to encompass cases that go to trial, in addition to even more exceptional cases, such as those involving egregious presentencing behavior like the *Schultz* case discussed in the previous Part. Though trials may at first blush appear unexceptional, Commission data indicates that nearly 92% of federal criminal convictions result from guilty pleas. ANNUAL REPORT, *supra* note 116, at 53. Moreover, notwithstanding the strong language of application note 2 against giving a reduction to a defendant who goes to trial, courts seem to vary significantly in their willingness to find acceptance of responsibility in trial-conviction cases. *See supra* text accompanying notes 146-47. Thus, going to trial seems just such an exceptional circumstance as is capable of triggering disparate applications of section 3E1.1.

run-of-the-mill cases.[160] Cumulatively, to judge by the national data and the case law examples discussed in the previous section, it would appear that the application of section 3E1.1 generates an amount of sentencing disparity that is not insubstantial. This disparity is often the fruit of varying judicial interpretations of the provision—precisely the sort of disparity unrelated to offense and offender that the Guidelines are meant to eradicate.[161]

### *C. Subversion of the Policy Goals Underlying Section 3E1.1*

Unwarranted disparity seems per se undesirable: such disparity runs contrary to the Sentencing Commission's congressional mandate and undermines the legitimacy of sentencing generally. But unwarranted disparity in the context of section 3E1.1 also raises concerns that the underlying policy goals of the provision—recognizing rehabilitative potential and encouraging desired post-offense conduct—will be defeated. On the one hand, if judges focus primarily on rewarding desired conduct, then section 3E1.1 may not effectively serve to distinguish defendants who "enter the correctional system in a frame of mind that affords hope for success in rehabilitation"[162] from those who do not.[163] On the other hand, if judges focus primarily on state of mind, then the ability of section 3E1.1 to encourage desired behaviors will be diminished. The Commission may be sensitive to the tension between the two goals and may have tried to build into section 3E1.1 an appropriate manner of balancing them,[164] but the disparities in the actual implementation of the provision suggest that, whatever the Commission's intentions, the goals are not being harmonized in a con-

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160 The district judge in *Knight*, for instance, apparently insisted that defendants must do one of the acts listed in application note 1 in order to qualify for the adjustment. United States v. Knight, 905 F.2d 189 (8th Cir. 1990).

161 *See* U.S.S.G § 1A3 ("[Granting broad discretion in the Guidelines] risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.").

162 Brady v. United States, 397 U.S. 742, 753 (1969).

163 Notwithstanding the assertion of the *Brady* court that guilty pleas are a good indicator of rehabilitative potential, a plea is only a proxy for such potential, and an inquiry that focuses solely on conduct, such as pleading guilty, will necessarily produce somewhat different results than in an inquiry into rehabilitative potential per se. Indeed, focusing on some of the conduct that is emphasized in the application notes may actually undermine the ability of section 3E1.1 to reward rehabilitative potential. For instance, one of the prosecutors I interviewed argued that defendants who plead guilty actually have a higher recidivism rate than those who go to trial.

164 For instance, a plausible reading of the application notes might be as follows: the Commission so wishes to discourage going to trial and obstructing justice that when a defendant engages in either conduct the defendant is appropriately precluded from a reduction based on state of mind. In other cases, however, section 3E1.1 is available and functions to provide a benefit for defendants with rehabilitative potential. Put differently, in cases of trial or obstruction, the cooperation paradigm predominates; otherwise, the remorse paradigm predominates. Such a reading might or might not constitute wise policy, but it would at least *be* a policy and represent a coherent harmonization of the competing goals of section 3E1.1.

sistent or thoughtful manner. In proposing a fundamental reformation of section 3E1.1, the Judicial Conference of the United States has expressed particular concern about this issue.[165]

Inconsistency in implementation of section 3E1.1 may be particularly damaging to the cooperation paradigm, for an effective incentive structure must deliver its rewards in clear, predictable manner. And, indeed, over the years critics of section 3E1.1 have levelled the charge that the provision's incentive for guilty pleas is insufficiently effective because it is not reliable.[166] This charge has two components. First, it is claimed that some judges are too willing to provide the adjustment to defendants who go to trial: "To the extent that a convicted defendant can expect to receive a two-level reduction after trial by merely voicing remorse, the acceptance of responsibility discount obviously affords scant incentive to plead guilty."[167] Second, other judges are criticized as too *unwilling* to provide the adjustment to defendants who plead guilty. Discussing two guilty plea cases in which the defendants were denied the adjustment due to lack of sincere remorse, Professor Stephen J. Schulhofer observed, "The line of thought reflected in [these cases], if pursued seriously, could quickly destroy the value of the acceptance-of-responsibility discount as a plea-inducing

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165 *See* Barry Letter, *supra* note 14, at 1-2. The Judicial Conference argued:

> The current guidelines try to do too much with one adjustment . . . and consequently it does not serve any of its numerous goals well. Any plea incentive is inextricably intertwined with issues of attitude, other conduct, the government's preparation, etc. which either get lost in the overwhelming thrust to reward a plea, or worse, prevent the plea incentive from working. How does a court reward entry of a plea where the defendant has done something (perhaps submitted a bad urine sample) which arguably prevents the allowance of the first 2-level adjustment? There is no way to provide a reward for the many non-plea incentives listed in § 3E1.1 if the court rewards the entry of the plea; the other incentives either overcome the plea incentive, or vice versa. In a case where the defendant agrees simply to enter a timely plea, and if the court rewards the plea, it must do so with the full three points . . . with no adjustment left to act as an incentive for the other commendable conduct which the guideline attempts to encourage.

*Id.*

166 This concern has been echoed in studies of prohibitions on plea bargaining in state courts: without the clear, predictable benefits associated with negotiated pleas, defendants are more willing to take their chances with a trial. *See* Teresa White Carns & John A. Kruse, *Alaska's Ban on Plea Bargaining Reevaluated*, 75 JUDICATURE 310, 311 (1992); Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 311 (1987).

167 Schulhofer & Nagel, *supra* note 34, at 267. Schulhofer and Nagel's subsequent survey of plea bargaining in three districts found continuing evidence of this concern.

> According to [assistant U.S. Attorneys], this practice [of awarding a discount to defendants who go to trial] prompts the belief that the acceptance-of-responsibility discount with a sentence at the bottom of the range does not provide an adequate incentive for defendants to plead guilty because defendants have a good chance of receiving the same benefit even after proceeding to trial.

Nagel & Schulhofer, *supra* note 145, at 550.

device."[168] In short, the emphasis of some judges on the remorse paradigm impedes the predictability of both the "punishment" for going to trial and the "reward" for pleading guilty. Such unpredictability interferes with effective plea bargaining[169] and may lessen the likelihood that defendants will plead guilty.[170]

Heightening the risk that the tension between the two purposes of section 3E1.1 will result in the subversion of one of them, many courts have held that the presence of section 3E1.1 in the Guidelines precludes departures based on remorse, drug rehabilitation, voluntary restitution, and other "[acceptance-of-responsibility] factors."[171] Section 5K2.0 of the Guidelines permits departures if the court finds

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168 Stephen J. Schulhofer, *Implementing the Plea Agreement Provisions of the Federal Sentencing Guidelines*, 3 FED. SENTENCING REP. 179 (1991); *see also* Freed & Miller, *supra* note 89, at 176 (commenting favorably on Schulhofer's analysis).

169 *See* Robert H. Edmunds, Jr., *The Need for Predictable, but Not Mandatory, Sentences*, 8 FED. SENTENCING REP. 16, 17 (1995) ("Predictability may be a difficult goal to reach, but reliable knowledge of the likely course of a case would be of immense value to attorneys and defendants.").

170 On the other hand, the defenders of section 3E1.1 have observed that the rate of guilty pleas has not appreciably changed since introduction of the Guidelines. WORKING GROUP, *supra* note 33, at 4. In response, the critics of section 3E1.1 might argue that the rate of guilty pleas has only been maintained because *most* districts have followed the Connecticut pattern and effectively transformed section 3E1.1 into an automatic plea discount, and because the actors in the criminal justice system have *circumvented* the Guidelines and found mechanisms other than section 3E1.1 to reward guilty pleas, such as written stipulations that minimize the role in offense or relevant conduct). *Cf.* Schulhofer & Nagel, *supra* note 34, at 268 ("[W]e cannot be certain whether the relative stability of the guilty plea rate indicates that the 'acceptance' discount is set at an appropriate level, or whether the system has found alternative ways to grant guilty plea inducements."). While overall national rates of plea bargaining may be appropriate, districts that do not hew to the Connecticut model or circumvent the Guidelines may have an inadequate plea inducement.

Critics might also reject the use of pre-Guidelines practices as a benchmark: perhaps pre-Guidelines plea discounts were also insufficiently reliable and effective. For an argument that section 3E1.1 should *not* be changed to increase the frequency of plea agreements, see Andrew J. Kleinfeld, *The Sentencing Guidelines Promote Truth and Justice*, FED. PROBATION, Dec. 1991, at 16, 18 ("The value to society . . . of a guilty plea is much less than its value to actors within the justice system.").

171 *See, e.g.*, United States v. Brownstein, 79 F.3d 121, 123 (9th Cir. 1996) (refusing to depart for self-surrender to authorities because self-surrender adequately considered in section 3E1.1); United States v. Dyce, 91 F.3d 1462, 1469 (D.C. Cir. 1996) (no departure for remorse); United States v. Broderson, 67 F.3d 452 (2d Cir. 1995) (restitution not a basis for departure); United States v. Arjoon, 964 F.2d 167, 171 (2d Cir. 1992) (return of stolen property not a basis for departure). *But see* United States v. Maier, 975 F.2d 944, 948 (2d. Cir. 1992) (notwithstanding section 3E1.1, drug rehabilitation may furnish a ground for departure); United States v. Rogers, 972 F.2d 489, 493 (2d Cir. 1992) (surrender to police and confession one day after robbery may furnish a basis for departure); United States v. Garcia, 926 F.2d 125, 126 (2d Cir. 1991) ("activities facilitating proper administration of justice in the District Courts" may furnish grounds for departure). *See generally* HUTCHINSON & YELLEN, *supra* note 43, at 517 (discussing departures for "superacceptance of responsibility" in Second, Third, and Seventh Circuits); WORKING GROUP, *supra* note 33, at 14 (discussing a sample of 21 case files involving departures for acceptance of responsibility).

"that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."[172] In the eyes of some courts, section 3E1.1 indicates that the Commission did, in fact, adequately consider a variety of mitigating circumstances and that therefore they may not be grounds for departure. Under the right conditions, these rulings may preclude a court from taking one of the goals of section 3E1.1 into account in sentencing. Consider, for instance, a sincerely contrite defendant who pleads guilty in a district like Connecticut, in which the adjustment is generally automatic for a guilty plea. Under the logic of section 3E1.1, a defendant whose remorseful frame of mind indicates a strong rehabilitative potential should be sentenced less harshly than a defendant without a remorseful attitude. However, the sentencing court cannot truly distinguish the contrite defendant with the section 3E1.1 discount, because that discount is available in all guilty plea cases, regardless of the defendant's state of mind. But if departure for remorse is foreclosed by appellate case law, the sentencing court has little opportunity to recognize the defendant's rehabilitative potential, thus defeating a policy goal of section 3E1.1.[173]

In sum, the aggregation of two distinct purposes into § 3E1.1, coupled with the sentencing disparity reflecting tension between those purposes, may result in a less complete realization of both goals than if they had been disaggregated.

### *D. Discriminatory Impact*

Under the Connecticut model, in which acceptance of responsibility is effectively an automatic plea discount, little opportunity exists, as one public defender noted, for discriminatory effects against disadvantaged social groups. As judicial discretion increases, however, the risk of discrimination also grows. This subpart will, in particular, highlight the potential for discrimination against the mentally

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172 U.S.S.G. § 5K2.0 (quoting 18 U.S.C. § 3553(b)).

173 The judge may, of course, take the defendant's remorse into account when selecting a precise sentence from the range available to him under the Guidelines. This, however, may be an unsatisfactory mechanism for rewarding remorse, both because the recommended range may be quite narrow and because other factors may otherwise dictate a sentence at or near the bottom of the range anyway. For instance, judges who automatically sentence at the bottom of the range out of a belief that most Guidelines sentences are too harsh—the author has met at least one judge who admits to this practice—have little practical ability to differentiate between remorseful offenders through a selection of a sentence from a range.

Judges may reward remorseful defendants through manipulation of other aspects of the Sentencing Guidelines, such as through generosity on role in offense or relevant conduct, but some judges may be disinclined to use the Guidelines dishonestly, and, in any case, it seems unwise to build policy decisions around assumptions that judges will circumvent or subvert the black-letter law.

disabled and racial minorities.[174] An underlying factor contributing to both forms of discrimination, as well as a troubling form of discrimination in its own right, is the potential for section 3E1.1 to punish defendants for having unskilled or inexperienced lawyers. Even in Connecticut, a public defender informed me, "Getting acceptance is easy *if you have a good lawyer*." This defender worried, however, that lawyers insensitive to the pitfalls of the Guidelines, including section 3E1.1, could cost their clients much time in prison.[175] Recall that defense counsel in Connecticut plays an important role in the acceptance-of-responsibility inquiry by reducing the defendant's statement on the offense to a brief written document, coaching the defendant prior to presentence interviews and sentencing hearings, and attending and policing meetings with probation officers. A defense lawyer who fails to take these steps—due to lack of experience, acuity, or diligence—may see the client fall into the trap of an open-ended discussion of the offense, which is said to jeopardize the reduction. Thus, a good lawyer may make a substantial difference under § 3E1.1, and those defendants who are unable to obtain good representation may be systematically discriminated against in the acceptance-of-responsibility inquiry.

Even a good lawyer, however, cannot entirely script the exchanges between defendant and probation officer and defendant and judge. And if a judge or probation officer treats the acceptance-of-responsibility inquiry as "a penetrating examination of the criminal's soul," the results of that inquiry would seem unavoidably to turn on the defendant's capacity to present himself effectively.[176] One group disadvantaged by such a tendency is the mentally disabled popula-

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[174] I do not mean to suggest that these are the only forms of undesirable discrimination that may result from section 3E1.1, but they may have the greatest social salience. Subpart V.F below suggests that section 3E1.1 may also discriminate against naive or inexperienced criminal defendants. Subpart V.G argues that section 3E1.1 may discriminate against defendants who exercise constitutional rights.

[175] The defender particularly worried about the ability of private practitioners to represent their clients well during sentencing. He believed that the federal public defenders, who spend a great deal of time on sentencing issues, generally did a good job of protecting the interests of their clients on matters like section 3E1.1, but feared that private practitioners, who rarely work on federal criminal matters full time, were not capable of remaining abreast of developments in sentencing law and practice, especially now in the era of the Guidelines, which have rendered sentencing as complex and technical a matter as the tax code.

Notwithstanding these concerns, probation officers in Connecticut maintained that they could and would adequately protect the interests of defendants represented by unskilled lawyers.

[176] *See* United States v. Vance, 62 F.3d 1152, 1158 (9th Cir. 1995) (equating "penetrating examination of the criminal's soul" with "lenience toward those who cry more easily, or who have sufficient criminal experience to display sentiment at sentencing"). As one Connecticut probation officer observed, knowing how to present oneself to the court in an appropriate manner is a learned skill, and not all defendants possess the skill to an equal degree.

tion.[177] Disadvantage may spring from a variety of sources: inability to comprehend fully the nature or consequences of criminal conduct; inability to adopt a humble or contrite demeanor in the presence of a judge or probation officer; inability to understand what one needs to say in order to earn the reduction; and inability to comprehend or fully answer questions posed by a judge or probation officer. Any of these inabilities may lead a judge or probation officer to conclude that the defendant is unwilling, not just unable, to admit fully the facts of the offense and to display an appropriate attitude, thus disqualifying the defendant from the adjustment.[178]

The *Echevarria* case may indicate that such concerns are more than academic: the defendant was denied the two-point reduction because, while admitting that he was not a psychiatrist, he insisted that he was a doctor. The court made no apparent effort to investigate whether this transparent and gratuitous lie was related to Echevarria's "long and profound history of psychiatric problems."[179] Likewise, in *United States v. Altman*,[180] the sentencing judge denied the reduction based on the defendant's contradictory statements at his plea allocution, notwithstanding evidence that the defendant was a manic-depressive whose illness, according to the defense counsel, "compelled him to 'go back and forth' between reality and his own world."[181]

Heightening the potential for discrimination against the mentally disabled, some courts have treated the entry of an insanity plea as evidence of "a failure to demonstrate contrition (presumably because

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177 By this term, I mean to encompass both people of low intelligence and people with psychiatric disorders.

178 Indeed, even if a judge recognized that a defendant's failure to accept responsibility was due to a mental condition, rather than simple unwillingness, there is no apparent basis in section 3E1.1 for the judge to grant the adjustment: in order to qualify for the reduction, a defendant must "clearly demonstrate" acceptance of responsibility, regardless of capacity to do so.

179 United States v. Echevarria, 33 F.3d 175, 178 n.2. (2d Cir. 1994).

180 901 F.2d 1161 (2d Cir. 1990).

181 *Id.* at 1164. The appellate court in *Altman*, unlike the appellate court in *Echevarria*, remanded the case for reconsideration of the acceptance-of-responsibility issue in light of the defendant's mental illness. *Altman*, 901 F.2d at 1166.

The *Vance* case may also involve a form of mental incapacity, perhaps related to substance abuse. When initially arrested, Vance was described as "dazed and glassy eyed, and seemed to have difficulty understanding and responding to . . . questions." 62 F.3d at 1155. Portions of Vance's statement at his plea allocution, reprinted in the appellate decision, suggest a continued lack of mental acuity. *See id.* at 1158.

*United States v. Schultz*, 880 F. Supp. 605 (N.D. Ind. 1995) more clearly implicates a disability related to substance abuse: alcoholism. Schultz's probation officer recommended that the reduction be denied based on Schultz's alcohol-related conduct during his pretrial release. *See id.* at 608-09. The court, attempting to distinguish Schultz's conduct from his disability, *id.* at 609, ultimately rejected the officer's recommendation and granted the reduction. However, the case raises the question of how often violations of the conditions of pretrial release—a common basis for denying the adjustment—are due to disability, rather than to simple poor judgment.

the plea entry denied legal responsibility for the offense)."[182] The failure of an insanity plea should not be viewed as particularly good evidence of mental health,[183] especially under the rigid requirements for insanity pleas in the federal system.[184] Yet courts deny reductions to defendants who raise unsuccessful insanity defenses without questioning the possibility that such decisions may fall disproportionately hard on the mentally ill. In one case,[185] the sentencing court denied the adjustment after the defendant stated that he was "very ashamed because [he] could not control [his] illness and [was] sorry [he could] not continue the treatment that was necessary to bring [him] back to reality."[186] Courts may plausibly view such statements, especially in conjunction with an insanity plea, as evidence that the defendant is minimizing personal culpability. Yet, such statements may be honest and accurate assessments of the defendant's condition. If so, denial of a benefit that is routinely granted to more than eighty percent of defendants seems an unfair punishment for a condition that is beyond a defendant's control.

Racial and cultural characteristics are also beyond a defendant's control, even though they may also play a significant role in the assessment of a defendant's acceptance of responsibility.[187] The *Vance* court, for instance, observed that a "penetrating judicial examination of the criminal's soul" may disadvantage people who are inclined to "restrain[ ] their emotions in public."[188] This seems to be a helpful observation, though it may be augmented by noting an important racial element to the problem. In an eloquent essay reflecting many years of experience representing capital defendants, James Doyle compares official interactions between members of dominant and subordinate social groups in this country, including interactions in the criminal justice system, to interactions between Western ethnographers and indigenous peoples abroad:

> James C. Scott explores a Malaysian peasant village and assesses the claim that ethnographic accounts comprise a "full transcript" of peasant life. Scott carefully demonstrates how anthropologists can mistake vari-

182 Michael J. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 449 (1995) (citing United States v. Spedalieri, 910 F.2d 707, 711-12 (10th Cir. 1990)).

183 *Id.* at 452; *see also* James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 444 (1996) ("Research resoundingly proves that there is a yawning gap between what mental health professionals will diagnose as mental disability and what jurors (or judges) will accept as a mitigating condition.").

184 GEORGE E. DIX & M. MICHAEL SHARLOT, CRIMINAL LAW: CASES AND MATERIALS 790-92 (3d ed. 1987).

185 United States v. Reno, 992 F.2d 739 (7th Cir. 1993).

186 *Id.* at 744.

187 For some statistical evidence of this effect, see *supra* text accompanying notes 148-49.

188 62 F.3d at 1158. As one probation officer observed, "You are just not going to get remorse from some people."

> ous peasant behaviors—lateness, foot-dragging, unpredictability, noncommunication—for intrinsic elements of their culture, when in fact these behaviors are resistance strategies designed as protections against external modernizing pressures (with which the peasants would probably associate anthropologists). Is it not likely that similar strategies were played out when the African-American defendant was interviewed, as a child, by the white guidance counselor? When the sexually abused defendant was interviewed by his juvenile probation officer? The confusions that Scott describes are not exotic phenomena; they are to be expected. Scott's peasants employed the classic defenses of the vulnerable in the presence of the strong . . . . [A]ll the members of all of the outcast and stigmatized groups learn to depend on concealment, dissimulation, noncooperation.[189]

As a perusal of the section 3E1.1 case law demonstrates, "concealment, dissimulation, [and] noncooperation" time and again constitute the basis for a denial of the two-point reduction. To what extent are the courts in these cases ultimately punishing defensive strategies that have been inculcated in an offender by virtue of membership in a subordinated racial, cultural, or economic group? Doyle noted in particular the defensive strategies adopted by young black males, who tend to "adopt[ ] a 'hard' pose . . . . (Teenagers do this everywhere, at every time: Disadvantaged teenagers are even more likely to conceal the 'full transcript' of their lives behind a group mask.)."[190] Again, this "hard pose" seems an unpromising starting point for a defendant hoping to meet whatever requirements a probation officer or judge may have for genuine contrition.[191]

The negative effect of the hard pose of many minority defendants is surely augmented by the stereotypes of white probation officers and judges. In particular, as Doyle observes, there seems to be a limited "menu" of images of black men in contemporary American culture: "a Manichean selection of Good Blacks and Bad Blacks—Bill Cosby and Willie Horton."[192] Given the context of the interaction, there seems little likelihood that a white probation officer or judge will see a black defendant as Bill Cosby.[193] Thus, regardless of the actual behavior of a black defendant, the criminal justice system may be predisposed to

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189 Doyle, *supra* note 183, at 430-31 (citing JAMES C. SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE (1985)).

190 *Id.* at 438 (citation omitted).

191 Who is to say that the mistrust, concealment, and hostility displayed by members of subordinated groups to figures of authority is inappropriate? One Connecticut probation officer expressed opposition to treating section 3E1.1 as an inquiry into remorse because many defendants have good reason to be hostile towards the criminal justice system. Yet, such behaviors may make a real difference to actors in the system. For instance, another probation officer maintained that the "tough" attitudes of some defendants may affect declinations and other prosecutorial decisions: "whether the prosecutor likes you, can matter a lot."

192 Doyle, *supra* note 183, at 436.

193 *See id.* at 437-38.

finding that such a defendant has a bad attitude and is therefore disqualified from a sentencing adjustment based on remorse.

### *E. Dishonesty in Sentencing*

Notwithstanding the evidence of disparity discussed above, section 3E1.1 seems generally to function as a plea discount, creating an incentive for defendants to forego their constitutional right to trial by jury. Yet, this reality is hardly well reflected in the language of the provision, the application notes, and the appellate case law. Indeed, the very term "acceptance of responsibility" seems more evocative of the remorse paradigm than of an automatic benefit for an action that might be undertaken in a cold, calculating manner. One may thus identify a certain dishonesty in the implementation of section 3E1.1, a disjunction between the rhetoric of the Commission and appellate courts and the reality of day-to-day actions by probation officers and appellate judges.

In the Sentencing Reform Act of 1984, which created the Sentencing Commission and called for the development of the Guidelines, Congress sought to achieve "honesty in sentencing . . . to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system."[194] In light of this congressional mandate, the disjunction between the rhetoric and reality of section 3E1.1 seems troublesome. To the extent that defendants, victims, and the public deserve rational, meaningful sentences that are derived from analytical processes open to public knowledge and debate, the sentencing system ought to consider ways of reducing the scope of the disjunction.

The need for openness in the context of section 3E1.1 may be particularly acute when the provision trenches on the rights of defendants to trial by jury. When a reduction that is routinely granted to more than eighty percent of defendants is generally denied to defendants who go to trial, one may easily reconceptualize the "reduction" provision as a penalty imposed for the exercise a constitutional right.[195] Such a penalty may or may not be good public policy, and it may or may not be permitted by the Constitution, but the precise contours of the penalty should be fully open to judicial review and public debate. As matters now stand, however, the trial penalty is hidden in an acceptance-of-responsibility provision, and judges are largely free to set standards for the penalty on an ad hoc basis. As a result, even examinations of national data and the practices of specific districts, as I have offered, do not fully clarify the nature of the penalty. A cynic

194 U.S.S.G. § 1A3 (policy statement).

195 It does seem, however, that the current Sixth Amendment doctrine is amenable to a distinction between a trial penalty and a plea benefit. *See infra* subpart V.G.

might argue that this state of affairs is no accident: the Commission apparently had some concerns about both the constitutionality and the public response to an open, automatic trial penalty,[196] and consequently, may have intentionally obfuscated the existence and operation of such a penalty in the Guidelines. Regardless of whether this is the case, the Commission now ought to consider restructuring section 3E1.1 in order to render such a controversial matter as a trial penalty more open to public and judicial scrutiny.

### *F. Remorse: Epistemological Challenges and the Problem of Manipulation*

To the extent that section 3E1.1 is merely a trial penalty or a plea discount, implementation of the provision is simple: judges need little fact-finding to determine whether a defendant has gone to trial. To the extent that section 3E1.1 inquires more broadly into the cooperativeness of the defendant's post-offense conduct, the fact-finding accordingly grows more complex. How do the facts of the *Schultz* case, for instance, compare to those of a case in which the defendant fully complies with the terms of the pretrial release but goes to trial merely to raise a legal defense? Which defendant has engaged in more desirable post-offense conduct? On balance, do either of the defendants merit recognition for their post-offense conduct? The epistemological problems seem even more acute in the context of an inquiry into *remorse*. The difficulties of *knowing* the state of mind of another—indeed, the question of whether people even possess stable, *knowable* personality attributes—have plagued modern literature and psychology. Not surprisingly, doubts about the ability of the criminal justice system to gauge remorse were a recurrent theme in my interviews in Connecticut.[197]

On the ability of judges to assess personality, Judge Frankel has written, "The effort to appraise 'character' is, to be sure, a parlous one, and not necessarily an enterprise for which judges are notably equipped by prior training."[198] Moreover, a judge may have little personal contact with a defendant on which to base an appraisal of character, particularly if the defendant does not go to trial.[199] Probation officers may be in a better position to assess remorse, but they, too,

196 *See* Wilkins, *supra* note 16, at 191.

197 As a defender put it, "What are you going to do—hook up a lie detector to defendants when they say they are sorry?"

198 United States v. Hendrix, 505 F.2d 1233, 1236 (1974).

199 In a dissenting opinion objecting to the use of a defendant's perjury in sentencing, Justice Stewart pointed out the inadequacy of brief interactions in the courtroom as evidence of a defendant's character: "Indeed, without doubting the sincerity of trial judges, one may doubt whether the single incident of a defendant's trial testimony could ever alter the assessment of rehabilitative prospects so drastically as to justify a perceptibly greater sentence." United States v. Grayson, 438 U.S. 41, 56 n.3 (1977) (Stewart, J., dissenting).

complain about the brevity of their interactions with defendants[200] and suggest that not all officers are equally skilled at breaking down the natural suspiciousness of defendants and getting to know their true personalities.[201]

To the extent that judges and probation officers do consider remorse in the section 3E1.1 inquiry, the difficulties of truly knowing a defendant's state of mind must contribute to the problems of unwarranted disparity and invidious discrimination discussed above. The epistemological dilemma also places a premium on the quality of a defendant's performance. The performance is not an easy one: interactions with judges and probation officers are fraught with peril for defendants and may implicate much deep-seated racial, cultural, class, and gender baggage. To convey humility and sincere regret under such circumstances cannot be a simple matter. Performance in the formal setting of the courtroom may be particularly problematic.[202] Conveying an appropriate attitude there, according to a Connecticut probation officer, is an acquired skill. The remorse paradigm may therefore reward experienced criminals at the expense of first-timers,[203] although first-timers may actually be the class of defendants with the greatest "rehabilitative potential."

In a similar vein, the epistemological difficulties of remorse open a substantial risk of dishonesty. If a defendant falsely asserts, "I am sorry I did it," there is little risk of penalty—how can the court ever know that the defendants lie about their state of mind? To put the matter more concretely, consider the case of *United States v. Whitehead*, in which the defendant in a fraud case was denied a two-level reduction largely because he "made a frank statement that, although it might hurt his position, he felt no remorse over cheating large busi-

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Ironically, section 3E1.1 application notes most discourage judges from assessing contrition in precisely the context in which judges are probably in the best position to know something about the defendant's character: sentencing after a trial, in which the judge has had an opportunity to witness the defendant's demeanor—and perhaps testimony—over a great deal of time.

200 In Connecticut, officers typically meet for two to two and a half hours with defendants. Officers are expected to follow up this initial meeting with a visit to the defendant in the defendant's home, but this second meeting often fails to materialize due to scheduling difficulties and resource constraints.

201 Apparently, much of the probation officer's success depends on whether the officer is relaxed in interviews. As one officer stated, "A relaxed probation officer will help the defendant to relax."

202 A Connecticut defender observed, "Most people do not act like themselves in the courtroom." As an example, he recalled one particular client who could not stop himself from grinning in the courtroom. The grinning was simply an expression of nervousness, but the defender believes a judge could have easily interpreted the defendant's demeanor as disrespectful and insincere.

203 *See* United States v. Vance, 62 F.3d 1152, 1158 (9th Cir. 1995) (discussing defendants "who have sufficient criminal experience to display sentiment at sentencing instead of restraining their emotions").

nesses."[204] Defendants with more dishonesty or experience, or a better lawyer, surely would not have made such a statement, and would have likely received a lighter sentence as a benefit for their lie. To echo the concern of the *Vance* court, what is the "social purpose to be served" by distinguishing the honest defendant from the dishonest defendant in such a fashion? Rewarding and encouraging dishonest charades in the courtroom or presentence interview seems unwise for a sentencing system founded on the principles of truth in sentencing and the rationally proportionate treatment of offenders.

In sum, a particular focus on the problems of truly knowing a defendant's state of mind adds new dimensions to the concerns over disparity, discrimination, and dishonesty discussed above. While these concerns are most serious in instances in which remorse really matters, even in the Connecticut system, one may question the honesty and propriety of the routine lawyer-drafted statements in which defendants purportedly acknowledge their guilt and apologize for their misdeeds.

### *G. Chilling the Exercise of Constitutional Rights*

Although courts have repeatedly upheld the facial constitutionality of section 3E1.1,[205] numerous cases and commentators suggest that particular applications or interpretations of the provision may violate the Constitution.[206] In particular, judicial and academic opinion has focused on the risk that the threat of loss of the adjustment may effectively coerce defendants to offer self-incriminating testimony in violation of the Fifth Amendment. As noted above, the Commission addressed these concerns with a 1992 amendment to application note 1, which prohibited judges from using the invocation of the Fifth Amendment privilege against a defendant in the acceptance-of-responsibility inquiry. Nonetheless, due to the loose standards of appellate review of acceptance-of-responsibility findings, some risk remains that defendants will be chilled from invoking their Fifth Amendment

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204 912 F.2d 448, 450 (10th Cir. 1990).

205 *See, e.g,* United States v. Cordell, 924 F.2d 614, 619-20 (6th Cir. 1991) (no violation of Fifth Amendment privilege against self-incrimination); United States v. Skillman, 922 F.2d 1370, 1378 (9th Cir. 1990) (self-incrimination); United States v. Rogers, 921 F.2d 975, 982 (10th Cir. 1990) (self-incrimination); United States v. Gonzalez, 897 F.2d 1018, 1021 (9th Cir. 1990) (no violation of Sixth Amendment right to trial); United States v. Wivell, 893 F.2d 156, 159 (8th Cir. 1990) (section 3E1.1 not unconstitutionally vague); United States v. Henry, 883 F.2d 1010, 1011 (11th Cir. 1989) (right to trial); United States v. White, 869 F.2d 822, 826 (5th Cir. 1989) (right to trial).

206 *See, e.g.*, United States v. Piper, 918 F.2d 839, 840 (9th Cir. 1990) (self-incrimination); United States v. Oliveras, 905 F.2d 623, 626 (2d Cir. 1990) (self-incrimination); United States v. Perez-Franco, 873 F.2d 455, 461-64 (1st Cir. 1989) (self-incrimination); Dokla, *supra* note 96, at 1094-97 (self-incrimination); Andrew Neal Siegel, Note, *The Sixth Amendment on Ice*—United States v. Jones: *Whether Sentence Enhancements for Failure to Plead Guilty Chill the Exercise of the Right to Trial,* 43 AM. U. L. REV. 645 (1994).

rights during the sentencing process. The *Vance* and *Austin* cases both present post-amendment instances of district courts penalizing a defendant for exercising Fifth Amendment privileges. Both decisions were reversed on appeal, but given the perfunctory review of most acceptance-of-responsibility decisions, one wonders how often the *Vance* and *Austin* scenarios are repeated without effective appellate oversight[207]—how often do sentencing judges consciously or unconsciously roll the invocation of Fifth Amendment privileges into a conclusion that a particular defendant failed to show remorse or accept responsibility? This possibility may cause some defendants to be wary of exercising their Fifth Amendment rights.

Constitutional concerns have also focused on the chilling of the Sixth Amendment right to trial. Constitutional doctrine in this area is somewhat puzzling.[208] Notwithstanding assertions that the state may not penalize a defendant for exercising constitutional rights,[209] courts have recognized the societal benefits of encouraging plea agreements[210] and have permitted sentencing schemes that provide inducements for guilty pleas.[211] In upholding such inducements, courts often distinguish between "the denial of a benefit for failure to waive rights and the imposition of a penalty for exercising the same rights."[212] Insofar as section 3E1.1 plea inducement has been structured as a benefit that is rarely awarded when a defendant goes to trial (rather than as a trial penalty), the provision may be conceptualized as meeting the technical requirements of Sixth Amendment law.[213] Nonetheless, one

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207 Bearing in mind that the *Austin* court could not effectively reach the Fifth Amendment issue without torturing the language and intent of application note 1, the problem of appellate protection of the Fifth Amendment privilege seems even more difficult. *See supra* section III.C.1.

Heightening the ineffectiveness of appellate policing of the privilege, some appellate decisions hold that a denial of adjustment may be affirmed even if it violates the Fifth Amendment if another basis for the denial exists. United States v. Cousineau, 929 F.2d 64, 69 (2d Cir. 1991); United States v. Ramirez, 910 F.2d 1069, 1071 (2d Cir. 1990).

208 *See* Dokla, *supra* note 96, at 662.

209 *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

210 *See, e.g.*, United States v. Corbitt, 439 U.S. 212, 222 (1978).

211 In *Corbitt*, for instance, the Supreme Court upheld a New Jersey statute that permitted judges to reward defendants who did not contest a charge of first-degree murder with a lower sentence than the otherwise mandatory life imprisonment. *Id.* at 226.

212 Dokla, *supra* note 96, at 662. This seems a rather esoteric distinction in some cases. For an argument that attempting "to discern a meaningful difference" between a penalty and a denial of a benefit "can only induce vertigo," see *United States v. Jones*, 997 F.2d 1475, 1483 (D.C. Cir. 1993) (Mikva, C.J., dissenting).

213 The structure of section 3E1.1 seems difficult to distinguish from the mechanism upheld in *Corbitt*, which also provided a benefit for guilty pleas. *See* Dokla, *supra* note 96, at 660. Another similarity between the mechanisms that may be of constitutional significance is that both provide a sentence reduction at the sentencing judge's discretion, rather than an automatic adjustment for not going to trial. The Commission may have viewed this discretionary feature as an important characteristic for a plea inducement to pass constitutional muster. *See* Wilkins,

may question whether the benefit and penalty distinction makes a difference in the mind of a defendant who contemplates going to trial.[214] However technically characterized, section 3E1.1 may chill the exercise of Sixth Amendment rights in an everyday sense of the term, if not in a formal legal sense.[215] This chilling effect may be justified as a necessary attribute of an administrable criminal justice system,[216] but—if we are to take the constitutional right at stake seriously—such a burden should not imposed without careful structure and forethought, which are arguably not present in the section 3E1.1 context.

A final constitutional right subject to chilling under section 3E1.1 deserves notice, though it has escaped attention from litigants and previous commentators. The risk of losing the reduction may inhibit defendants from engaging in constitutionally protected forms of expression. First, defendants may be chilled in their exercise of freedom of speech during sentencing hearings. Courtrooms have long been an

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*supra* note 16, at 191 n.65. For an argument that the plea inducement may be made automatic without risking rejection on constitutional grounds, see Ellen M. Bryant, Comment, *Section 3E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty*, 44 CATH. U. L. REV. 1269, 1303-05 (1995).

214 Indeed, the distinction between benefit and penalty may be less secure in legal doctrine than its supporters appreciate. The *Perez-Franco* decision, discussed *supra*, section III.C.1, plainly rejected the distinction in the context of the Fifth Amendment, referring to "the penalty of not receiving a reduction in [ ] offense level." United States v. Perez-Franco, 873 F.2d 455, 463 (1st Cir. 1989). If such a sentiment were incorporated into the Sixth Amendment analysis of section 3E1.1, the provision—at least as it is commonly applied today—might be in some jeopardy.

215 The case of *United States v. Jones* illustrates an additional manner in which section 3E1.1 may threaten Sixth Amendment rights, though in an oblique and unusual fashion. In *Jones*, the defendant chose to go to trial, but the sentencing judge awarded the section 3E1.1 reduction, believing the loss of the two-point reduction would represent too great a penalty (30 months) on Jones' failure to plea bargain successfully with the government. 997 F.2d at 1476. However, in order to preserve the incentive structure for plea bargaining, the judge sentenced Jones six months higher within the recommended range expressly to penalize the decision to go to trial. *Id.* at 1477. On appeal, the case presented substantial difficulties for the D.C. Circuit, producing an initial panel opinion upholding the sentence, an en banc opinion upholding the sentence on different grounds, and three dissents to the en banc opinion. The en banc majority characterized the trial penalty imposed below as, in effect, a reduction of the section 3E1.1 benefit. *Id.* at 1478. The holding thus opens a loophole in the traditional rule that a penalty may not be imposed for going to trial. Under *Jones*, a judge may expressly penalize the decision to go to trial when choosing a sentence within a range so long as the defendant receives the adjustment and the penalty does not wholly erase the benefit of accepting responsibility.

Judge Mikva's dissent in *Jones* raises concerns about the constitutionality of the majority's holding. Regardless of the validity of his dissent, however, I have seen no evidence that the *Jones* scenario has been replayed elsewhere. In other words, even to the extent that *Jones* impermissibly burdens the right to trial, the case may not constitute a compelling basis for restructuring section 3E1.1.

For a lengthy discussion of the *Jones* case, see Siegal, *supra* note 206.

216 The Judicial Conference believes that even an automatic plea discount would be upheld by the courts because the "benefit which a plea brings to the system" outweighs the constitutional harms of burdening the right to trial. Barry Letter, *supra* note 14, at 2-3.

important forum for statements of conscience,[217] and courtroom proceedings potentially provide a permanent record, a public space for political speech, and, in some trials in which media are involved, vast audiences. Due to the limitations on freedom imposed during incarceration, sentencing may be the last, best hope for defendants to make statements of conscience. Yet, a voice of dissent—a statement of the illegitimacy of the law or the social system under which a defendant is being punished—can result in a punitive response from the sentencing judge in the form of denial of section 3E1.1 credit. The *Cook* case seems to be an illustration of just this troubling dynamic. Further the risk of losing acceptance-of-responsibility reduction may have stunted national debate over drug policies. Would not the debate be enriched by making available to judges and to the public the authentic voices of the defendants who are the victims of the draconian sentences associated with the war on drugs?

Perhaps less commonly, section 3E1.1 may also serve to chill speech in more traditional fora. While awaiting sentencing, a defendant may be inhibited from speaking to the press about the case or making other public statements for fear of losing the reduction. One imagines, for instance, that the *Cook* defendant might have lost his two-point reduction just as easily by questioning the law under which he was prosecuted in a widely-circulated newspaper article as by making a courtroom statement.

In sum, section 3E1.1 may serve to chill the defendant's exercise of the First, Fifth, and Sixth Amendment rights. I do not mean necessarily to suggest that section 3E1.1, either as written or as applied, violates the Constitution,[218] but the implication of threats to funda-

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217 For a discussion of the qualities of courtroom proceedings that lend themselves to powerful political statements, and an argument that the abolitionist John Brown's courtroom performance exerted a profound influence over the development of Northern opinion prior to the Civil War, see Robert Ferguson, *Story and Transcription*, 6 YALE J.L. & HUMAN. 37, 42-45, 55-58 (1994).

Notwithstanding famous counterexamples, such as the trials of John Brown and the Chicago Seven, courtroom proceedings and the operation of the criminal justice system generally function to reinforce the legitimacy of prevailing hierarchies and belief structures. *See* Doyle, *supra* note 183, at 438-42 (describing constraints imposed on criminal defense attorneys by the need to respect racial and other prejudices of jurors); Cara W. Robertson, *Representing "Miss Lizzie": Cultural Convictions in the Trial of Lizzie Borden*, 8 YALE J.L. & HUMAN. 351, 392 (1996) (discussing trial strategies of Lizzie Borden case as reflecting prevailing gender and class ideologies and reinforcing divisions between elite and working-class elements of Fall River, Massachusetts society); Louis Michael Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J.L. & HUMAN. 149, 151 (discussing the focus of criminal justice system on obtaining confessions as an effort to reinforce legitimacy of the system). One might argue, however, that the criminal justice system actually weakens, rather than strengthens, its claims to legitimacy by squelching the authentic voices of defendants.

218 A detailed examination of the technical constitutional questions involved is beyond the scope of this Article, but the consistent upholding of section 3E1.1, *see* cases cited *supra* in note 205, suggests that courts would generally be unreceptive to fresh constitutional challenges.

mental rights should at least be taken into account by policymakers when thinking about restructuring section 3E1.1.

## VI. A Reform Proposal Emphasizing Cooperation and Clarity

In light of the concerns raised in the previous Part, appellate courts and the Commission should consider changes in the treatment of acceptance of responsibility under the Guidelines. In particular, I urge that the role of the remorse paradigm in section 3E1.1 be eliminated or minimized. Courts or the Commission may do this in the manner suggested in the *Vance* case: make clear that section 3E1.1 does not require "a searching judicial inquiry into the criminal's soul" and that the presumptions about acceptance of responsibility that arise from specific, objective acts, such as going to trial, are quite strong. As noted above, amendment 24 would go far in this direction. Alternatively, and more ambitiously, the Commission could redraft section 3E1.1 so that the primary purpose of the provision—which is, in my view, to encourage socially desired post-offense conduct—is more clear and the structure more coherent. An example of such a restructuring might be as follows:

§ 3E1.1 Adjustment for Cooperative Behavior

(a) The sentencing judge may reduce the offense level by 0 to 3 levels based on the degree to which the defendant's post-offense conduct facilitates the efficient and fair administration of the criminal justice system and the recovery and restoration of victims.

(b) For defendants who plead guilty and do not otherwise engage in any significantly cooperative or uncooperative conduct, the presumptive reduction shall be two levels.

(c) For defendants who go to trial and do not otherwise engage in any significantly cooperative or uncooperative conduct, the presumptive reduction shall be zero levels.

Under this proposal, the application notes would set forth examples of types of conduct, other than pleading guilty, that would be relevant to the section 3E1.1 analysis.[219]

My proposal is consistent with the general spirit of the development of section 3E1.1, which has increasingly emphasized conduct and

219 Examples might include various types of conduct currently enumerated in the application notes, such as voluntary restitution, turning oneself in to the authorities, voluntary assistance to authorities in recovering fruits and instrumentalities of the offense, and obstructing justice. The new application notes might further suggest presumptive point values for each of these acts. For instance, a defendant who pleads guilty might have a presumptive two-level benefit reduced by one level for obstructing justice, but increased by two levels for a timely plea and voluntary restitution, resulting in an overall reduction of three points. As my proposal is structured, desired and discouraged acts would be treated cumulatively, but the net benefit would be limited to three levels.

objective evidence and deemphasized remorse.[220] It is also consistent with the spirit of amendment 24, which really transforms section 3E1.1(a) into a cooperation adjustment, although the amendment does not use that terminology.[221] However, my proposal offers several distinct advantages over amendment 24. First, as noted above, amendment 24 simply moves the present ambiguities of section 3E1.1(a) into subsection (b). Second, amendment 24 retains the confusing term "acceptance of responsibility," which is associated in much of the existing case law with the remorse paradigm. Third, the subsection (a) adjustment is still a two-point all-or-nothing affair, limiting the ability of judges to recognize subtle shades of difference in offender cooperation. Fourth, the subsection (b) adjustment is limited to defendants with an offense level of sixteen or greater. Yet, permitting judges to award zero, one, two, or three points to any defendant regardless of offense level would transform section 3E1.1 into a more flexible, powerful tool for encouraging, or discouraging, certain types of post-offense conduct.[222]

In short, although amendment 24 represents, in my view, a clear improvement on the current structure of section 3E1.1, a more sweeping reform may be even more desirable. This Part considers in greater detail some of the potential advantages of my proposal, then discusses alternative approaches to reform, other than Amendment 24, that may also warrant serious consideration.

### *A. Advantages*

*1. Consistency with Existing Practice.*—The proposed change would not substantially alter who gets a section 3E1.1 adjustment and who does not. As in the present system, those who plead guilty would routinely receive a benefit and those who go to trial would not. But, also as in the present system, these adjustments would not be auto-

220 *See supra* subpart II.C. In a similar vein, the Judicial Conference of the United States has also observed that the Commission has progressively moved closer to a direct reward for a guilty plea. Barry Letter, *supra* note 14, at 2.

221 *See supra* subpart II.D.

222 Granting judges discretion to reduce any sentence by as many as three points may raise problems with respect to the "25% rule," which provides, "If a sentencing range specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25% or six months." 28 U.S.C. § 994(b)(2). Under the traditional inclusive interpretation, "the 25% rule applies to all steps in the guideline process, restricting all kinds of guideline formulations available, and requiring numerical adjustments for each sentencing factor." Catharine M. Goodwin, *Background of the AO Memorandum Opinion on the 25% Rule*, 9 FED. SENTENCING REP. 109 (1995). If this interpretation is accepted, then the third point of the adjustment may have to be limited to defendants with high offense levels, as is presently the case under section 3E1.1. However, critics of the inclusive interpretation, including the Administrative Office of the United States Courts, have argued convincingly that the 25% rule should be limited to its plain meaning, *i.e.*, that the rule is only applicable to the ranges in the sentencing table itself. *Id.*

matic: defendants who plead guilty could still lose their benefit for violating the terms of their pretrial release, obstructing justice, or engaging in comparably poor behavior, whereas defendants who go to trial could still qualify for a reduction based on other aspects of post-offense conduct. Furthermore, a third point of reduction would be available for those who not only plead guilty, but do so in a timely manner or are otherwise exceptionally cooperative.

In terms of day-to-day practice, my proposal would represent only marginal changes. Judges would have greater flexibility in awarding section 3E1.1 benefits because, rather than an all-or-nothing two-point reduction with a potential third-point available to a small class of defendants, judges would be permitted to reduce the sentence of any defendant by one, two, or three points.[223] On the other hand, judges would be precluded from denying the benefit based on a remorseless demeanor or on statements by the defendant not rising to the level of obstruction of justice.[224] This seems to occur in only a small category of cases, but eliminating such cases may foster more honest and open communications between defendants and defense lawyers and between probation officers and judges.

By not attempting a significant change from existing practices, my proposal might be more easily accepted than a more dramatic change. Moreover, to the extent that my proposal brings the language of section 3E1.1 into closer conformity with actual practices, it would advance the cause of honesty in sentencing.

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223 One of the U.S. Judicial Conference's objections to the current structure of section 3E.1 is that judges may not award a one-point reduction at all, and generally have little choice about awarding the third point when they award the section (a) adjustment to a defendant whose offense level is greater than sixteen; in short, judges have little ability to calibrate the § 3E1.1 adjustment to the particular circumstances of the defendant. *See* Barry Letter, *supra* note 14, at 3-4 (discussing the "all-or-nothing" problem).

Under my proposal, judges would have greater flexibility as to the amount of reduction, but would have clearer guidance from the Commission and would be more accountable to appellate courts. In short, my proposal is not intended to increase judicial discretion per se.

Note that permitting judges to award a one-point reduction under section 3E1.1 may resolve the dilemma of the district court in the *Jones* case. The sentencing judge in *Jones* felt compelled to penalize the defendant for going to trial because he could not award less than a two-point reduction for accepting responsibility. *See supra* note 215.

224 My proposal would not wholly preclude judges from taking account of a defendant's attitude in sentencing: a judge could use remorse as a basis for sentencing at the bottom of the applicable range, or defiance for sentencing at the top. Remorse might also be a basis for departure—indeed, remorse-based departures would grow more easy under my proposal because it would be clear that the Commission did not already take remorse into account in section 3E1.1. However, under my proposal there would be less room overall for remorse-based considerations in sentencing. Attitude would be only one factor most judges would want to take into account in sentencing within a range, and the size of the range is itself rather limited in many cases. Departures would provide greater degrees of recognition for remorse, but would be subject to a much more searching form of appellate scrutiny than the current acceptance-of-responsibility determinations.

*2. Complementary Relationship with Chapter 5 of the Guidelines.*—Section 5K1.1 of the Guidelines provides a departure for defendants who provide "substantial assistance" to the government. This departure provision, which also embodies the cooperation paradigm, seems a bit anomalous under the current Guidelines. Defendants who provide "substantial" assistance and who receive a motion for departure from the government suddenly have the floor dropped from underneath them: they may be sentenced anywhere below the suggested Guideline range. But defendants who do not succeed in providing substantial assistance—maybe simply because they are small-time criminals or cannot obtain favorable treatment from a fickle prosecutor are not provided any express benefit under the Guidelines. For instance, by pleading guilty a defendant may provide *meaningful* assistance to the government that does not rise to the level of *substantial.* Should not such intermediate assistance be rewarded and encouraged with some sort of intermediate reduction that falls short of the dramatic section 5K1.1 benefit?

Section 3E1.1 already implicitly recognizes assistance that falls short of substantial.[225] My proposal would serve to make this aspect of section 3E1.1 more explicit and to prevent judges from treating assistance as an all-or-nothing proposition, which carries either the tremendous benefit of section 5K1.1 or no benefit at all.[226]

Another element of Chapter 5 with significance for section 3E1.1 is section 5H1, which discusses offender characteristics and finds most to be "not ordinarily relevant." Several of the offender characteristics covered in section 5H1 seem to share the interest of the remorse paradigm of section 3E1.1 in "rehabilitative potential." These characteristics are education and vocational skills;[227] employment record;[228] military, civic, charitable, or public service;[229] employment-related contributions;[230] and record of prior good works.[231] It is difficult to see why remorse should be treated differently than these section 5H1 characteristics. If handled through section 3E1.1, remorse becomes a routine part of sentencing—"ordinarily relevant," so to speak. If removed from the section 3E1.1 inquiry, however, remorse would be treated more like other characteristics that go to the issue of rehabilitative potential.

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225 This observation has also been made by Judge Edward Becker of the Third Circuit. Comments of Judge Becker to Sentencing Workshop (New Haven, March, 1996).

226 This might happen, for instance, if a judge emphasized the remorse aspect of section 3E1.1, thereby preventing the provision from serving as the sort of intermediate assistance benefit that Judge Becker and I envision.

227 U.S.S.G. § 5H1.2.

228 *Id.* § 5H1.5.

229 *Id.* § 5H1.11.

230 *Id.*

231 *Id.*

*3. Clearer Standards and Easier Appellate Review.*—With the exception of a few cases like *Vance* and *Perez-Franco*, appellate courts have generally been quite reluctant to provide guidance for district court implementation of section 3E1.1. This reluctance is understandable in light of the current language of the provision, which fails to provide a clear sense of the purposes it serves and suggests that sentencing judges are in possession of some special evidence of the acceptance of responsibility that is not available to reviewing courts. My proposal would diminish these problems and encourage vigorous appellate review and standard-setting. First, the proposal would clearly indicate the societal interests to be served by the provision. Second, the proposal would eliminate the remorse paradigm as an animating principle and, with it, any suggestion that demeanor evidence is critical to the section 3E1.1 inquiry. Third, the proposal would offer clear, strong presumptions about how the trial-or-plea decision is to be weighed in the section 3E1.1 calculus. My proposal would thus provide substantially more guidance to sentencing courts and a firmer basis for appellate review.

Clearer standards ought to reduce litigation under the current system. Clearer standards and less deferential review also ought to reduce unwarranted disparity. The reduction in disparity and the clear focus on one policy goal (encouraging desirable post-offense behavior) would lessen the likelihood that the goals of section 3E1.1 would be subverted by inconsistent decisions. For instance, the sentencing differential for guilty pleas that is implicit in section 3E1.1 would become more reliable. As a result, fewer defendants might choose to go to trial.[232] Clearer standards and less deferential review may also reduce the risk of discriminatory impact, especially because the standards would be clarified to emphasize objective conduct rather than the subjective characteristics that may be intrinsically biased against certain groups.

*4. Less Emphasis on Factfinding Prone to Manipulation.*—As currently written, section 3E1.1 invites judges to evaluate the defendant's state of mind, a mercurial characteristic prone to easy manipulation. By contrast, my proposal clearly emphasizes objective conduct and the consequences—socially beneficial or otherwise—of that conduct. Under the proposal, defendants would have little to gain from good performances in front of a judge or a probation officer; this "learned skill" would play no particular role in the section 3E1.1 in-

232 The sentencing differential already seems to function predictably enough in Connecticut and perhaps in most other districts. However, Schulhofer's and Nagel's research suggests that there are at least a few districts in which the differential is insufficiently clear and reliable to encourage guilty pleas. *See supra* note 167. My proposal is aimed primarily at, and will have the greatest effect in, such districts, rather than districts like Connecticut.

quiry. Likewise, under the proposal, defendants would have little incentive to offer dishonest or halfhearted apologies. Finally, the emphasis on objective conduct provides less room for inconsistent or biased awards of the 3E1.1 benefit.

*5. Less Chilling of Constitutional Rights.*—With its emphasis on objective conduct and its more vigorous appellate review, my proposal would provide fewer opportunities for defendants to be penalized for invoking the Fifth Amendment privilege.[233] However, my proposal would not diminish—and might even enhance—the tendency of section 3E1.1 to chill the Sixth Amendment right to trial. The proposal has the advantage, though, of clarifying the nature of the trial penalty in § 3E1.1, thus opening the penalty to greater public scrutiny and debate. My proposal would effectively eliminate the potential chilling of First Amendment rights by section 3E1.1. Courts would no longer be permitted to hold statements of conscience against defendants in the section 3E1.1 inquiry.

### *B. Alternatives*

This subpart considers two alternatives to my proposal that merit serious consideration: eliminating section 3E1.1 altogether or rendering the plea discount automatic. Ultimately, however, I believe that my proposal better addresses the concerns with section 3E1.1 raised above.

*1. Eliminate Section 3E1.1 Altogether.*—The elimination of section 3E1.1 addresses many of the concerns raised with the current operation of the provision: unwarranted disparity, discriminatory impact, manipulation, and chilling of constitutional rights. Indeed, the elimination is probably be preferable to my proposal from the standpoint of Sixth Amendment rights: the deletion of the section 3E1.1 leaves the Guidelines formally neutral as to mode of conviction. Still, elimination presents some drawbacks. First, this alternative removes from the Guidelines the primary mechanism for encouraging guilty pleas and other desirable post-offense conduct short of substantial assistance. Perhaps troubling from a purely constitutional perspective, such incentives, particularly the guilty pleas, have long been recognized as vital to the smooth administration of the criminal justice system.[234]

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[233] In the spirit of current application note 1, my proposal specifies that a defendant cannot be penalized for failing to provide incriminating evidence or information. For instance, in the *Austin* case, the defendant would receive a two-point reduction for pleading guilty. The defendant might have qualified for the third point by providing information regarding the missing guns to the authorities. However, the defendant's two-point benefit could not be reduced for failing to provide such information.

[234] *See, e.g.*, Brady v. United States, 397 U.S. 742, 752 (1970) ("[W]ith the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a

As the Judicial Conference of the United States has recently observed, "[W]ith the increasing federalization of crime, our criminal justice system could not function without a large number of guilty pleas."[235] Thus, to the extent it is successful, an attempt to remove incentives for desirable actions like guilty pleas from the Guidelines might prove disastrous.[236]

On the other hand, there is good reason to believe that eliminating section 3E1.1 will not end plea inducements. Unlike my proposal, the elimination demands a drastic change from existing practices, in which section 3E1.1 generally provides an important incentive for pleading. There is good reason to believe, however, that enterprising prosecutors would still find ways to reward defendants for guilty pleas. Indeed, the Schulhofer and Nagel study of plea bargaining under the Guidelines suggests that, even with section 3E1.1, prosecutors routinely provide a variety of additional inducements for guilty pleas: the

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substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof."); United States v. Quejada-Zurique, 708 F.2d 857, 861 (1st Cir. 1983) (arguing that any legitimate system that allows the negotiation of pleas will necessarily and permissibly feature plea inducements); Bryant, *supra* note 213, at 1292-93 (discussing cases upholding plea bargaining based on judicial economy). On the other hand, the elimination of the section 3E1.1 incentive might not actually result in a substantial decrease in plea bargaining. Even without a reward for doing so, many defendants may prefer to dispose of their cases as quickly and painlessly as possible. *See* MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 69-71 (1978) (discussing eagerness of the defendants to plead guilty and "get it over with"). As a Connecticut public defender told me, for many defendants "the thought of appearing before a jury and having a judge glaring down at them is a real nightmare." Moreover, the elimination of section 3E1.1 might not, in fact, end the practice of rewarding guilty pleas. As will discussed further below, prosecutors and judges could still provide hidden plea discounts.

235 Barry Letter, *supra* note 14, at 5.

236 Sentencing differentials for guilty pleas seem an effective mechanism for discouraging defendants from going to trial, *see* Nagel & Schulhofer, *supra* note 145, at 524 n.56, 550, but the effect of section 3E1.1 on other forms of post-offense conduct is less clear. With respect to encouraging desired acts, many of the acts enumerated in application note 1, most of which would be carried forward in my proposal, are quite costly to the defendant or can only be carried out by limited classes of defendants. For instance, voluntary restitution may impose substantial costs and, in any case, is only available as an option to perpetrators of property crimes. With respect to the flipside of desirable post-offense conduct, discouraging disfavored acts, the record in Connecticut may provide some clues. In standard plea agreements in Connecticut, the government promises to recommend the reduction if the defendants cooperate with the probation office and disassociate themselves from criminal activities. According to prosecutors, up to 10% of the defendants evidence some form of continuing criminal conduct after entering into such agreements, generally by failing a drug test. A public defender informed me that defendants regard plea agreement forms as "lawyers' gobbledygook" and do not take into account the possibility of losing section 3E1.1 credit when considering presentence misconduct. However, a probation officer took the opposite position, opining that many defendants are, in fact, deterred from misconduct as a result of the possibility of receiving a longer sentence. In sum, both facets of the section 3E1.1 incentive—encouraging the good and discouraging the bad—may have an effect on post-offense conduct other than the plea-or-trial decision, though probably not a dramatic one.

use of section 5K1.1 motions "for cases that do not genuinely qualify for the benefit"; fact bargaining (for example, government stipulates as to the amount of drugs or money involved in quantity-sensitive cases); guideline-factor bargaining (for example, government agrees not to recommend an aggravating role adjustment); horizontal charge bargaining (for example, government agrees not to prosecute defendant for all bank robberies in which he is a suspect); and vertical charge bargaining (for example, government changes a drug distribution count to an improper use of telephone count).[237] With such tools in the hands of prosecutors, plea-based sentencing differentials seem likely to persist even without section 3E1.1.

Some commentators have posited a form of "implicit plea bargaining" as a complement to the tendencies of explicit plea bargaining:

> [T]here is agreement among all court actors that most guilty defendants should plead guilty and be rewarded for their plea. Thus, even if formal negotiations were verboten, the expectation that guilty defendants should plead would remain. All criminal court actors would recognize "implicitly" that the defendant who pleads receives a reward and that the defendant who goes to trial does not.[238]

Thus, in the absence of section 3E1.1, judges, as well as prosecutors, might be expected to continue to reward guilty pleas. Indeed, they might even be able to compensate wholly for the loss of the section 3E1.1 by increasing the plea inducements provided through other means, such as section 5K1.1 motions. Perhaps the experience in the federal system would mirror that in Minnesota, in which substantial plea-based sentencing differentials still exist notwithstanding the ex-

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237 Schulhofer & Nagel, *supra* note 145, at 547-49. Although aggressive probation officers may subvert these forms of plea bargaining through the information and recommendation contained in a presentence report, some judges may disfavor interference with plea agreements. *See* Letter from Francesca D. Bowman, Chair, Probation Officers Advisory Group to the United States Sentencing Commission, to Judge Richard P. Conaboy, Chairman of the United States Sentencing Commission 2 (Jan. 30, 1996) (concluding, based on national survey of probation officers, that courts "almost universally defer to the plea agreement, especially when it is more favorable to the defendant than the presentence report"). For further discussion of the discretionary authority of prosecutors under the Guidelines, see Freed, *supra* note 1, at 1723-24.

238 HEUMANN, *supra* note 234, at 158. Professor Heumann's conclusions were based on a study of state court practices in a nonguidelines context. However, a federal public defender assured me that precisely the same phenomenon of implicit plea bargaining occurs in the federal system today. He observed that defenders often enter guilty pleas without negotiating with the government for leniency first, because the belief that guilty pleas should be rewarded is so deeply entrenched that defendants may get the full benefits of a guilty plea without any assistance from the government. He further asserted that, were section 3E1.1 to be eliminated altogether, he would still advise his clients that they would receive more favorable treatment at sentencing if they pled guilty.

clusion of mode of conviction from consideration under the state sentencing guidelines.[239]

In sum, the elimination of section 3E1.1 seems unlikely to end plea inducements altogether, which may not be a desirable goal to begin with. Rather, it would "drive the plea inducement mechanism further underground, with the result of even more arbitrariness and disparity."[240] Elimination would also likely result in more dishonesty in the sentencing system and less ability for courts and the public to scrutinize the implicit trial penalty. For these reasons, elimination seems an unwise alternative.

*2. Automatic Plea Discount.*—If the point of section 3E1.1 is to recognize the inevitability, perhaps desirability, of rewarding guilty pleas, should section 3E1.1 become an automatic plea discount? The Commission originally considered and rejected an automatic discount proposal,[241] but the idea has been periodically revived.[242] An automatic discount provision would possess many desirable attributes: consistency with existing practice; easy scrutiny by courts and the public; and simple bright-line rules not subject to disparate interpretations, discriminatory application, or inappropriate manipulation. An automatic discount would likely result in greater honesty in the criminal justice system[243] and more openness on the part of defendants.

Indeed, my proposal does not differ a great deal from an automatic plea discount. Like the Freed-Miller discount proposal,[244] for instance, my proposal provides a presumptive benefit to defendants

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239 Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL'Y 279, 316-17 (1993) (analyzing regression analysis of Minnesota sentencing data). Research on experiments with plea-bargaining bans further reveals the deep roots of plea benefits in the criminal justice system: plea differentials persist even when negotiation is formally prohibited. *See, e.g.*, Weninger, *supra* note 166, at 312.

240 Schulhofer, *supra* note 168, at 180 (discussing effect of remorse-oriented decisions on plea bargaining).

241 Wilkins, *supra* note 16, at 190-91.

242 *See, e.g.*, Freed & Miller, *supra* note 89, at 176 (proposing relabeling § 3E1.1 a "plea benefit" and arguing that the benefit should "be presumptively granted to all defendants who plead guilty, except where the prosecutor demonstrates by clear and convincing evidence that a proportionately smaller discount is warranted by exceptional circumstances"); Barry Letter, *supra* note 14, at 6 (suggesting changes to § 3E1.1 that would result in an automatic one- or two-point reduction for a guilty plea).

243 By guaranteeing a defendant an automatic reduction in his sentence, the prosecution will be less likely to bargain over the criminal conduct charged on the presentencing report. This provides for a more honest application of the Sentencing Guidelines' offense levels for categories of criminal conduct. Thereby, the defendant will be charged with the crime he actually committed and still benefit from pleading guilty.

Bryant, *supra* note 213, at 1303 (citations omitted).

244 *See supra* note 242.

who plead guilty.[245] My proposal differs, however, in two important respects: first, I would permit defendants who go to trial to receive the benefit if otherwise justified by post-offense conduct; second, I would allow judges to add to, or subtract from, the presumptive plea benefit based on other aspects of a defendant's post-offense conduct. These differences are consistent with my vision of section 3E1.1 as an "intermediate assistance" or "cooperation" reduction. Put differently, I envision section 3E1.1 as having a broader function than a pure plea discount.

In comparison with a broader cooperation discount, the automatic plea discount proposal has several drawbacks. First, the automatic discount does not allow judges much ability to make appropriate distinctions based on post-offense conduct among defendants who plead guilty. For instance, a defendant who obstructed the investigation of his offense, violated the terms of his pretrial release, and only pled guilty at the eleventh hour might receive the same section 3E1.1 benefit as a defendant who voluntarily turned himself in to authorities, made restitution to victims, and entered a guilty plea early enough to spare the government the expense of trial preparation.[246] The Judicial Conference of the United States has consistently recom-

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245 The Freed-Miller proposal envisions a stronger presumption than I do: their presumption can only be overcome when a *prosecutor* demonstrates by *clear and convincing evidence* that a smaller discount is warranted by exceptional circumstances. I retain greater discretion in the hands of judges so that judges can more fully consider the whole range of a defendant's post-offense conduct than just the plea-or-trial decision.

The Freed-Miller proposal also provides a substantially more generous benefit than does my proposal. Freed and Miller set the plea benefit at a level at which it represents a 40% discount, mirroring pre-Guidelines practices. Freed & Miller, *supra* note 89, at 176. In the interests of proceeding with caution and due deference to existing practices, I have left the plea benefit at the existing two-level reduction, which represents on average only a 15 to 20% discount. *See id.* The increase in the benefit proposed by Freed and Miller may be desirable; as the Schulhofer-Nagel research demonstrates, the two-point reduction is insufficient to discourage prosecutors and judges from employing less honest and open methods of rewarding guilty pleas. *See* Schulhofer & Nagel, *supra* note 145, at 547-49. The U.S. Judicial Conference has also endorsed an expansion of the scope of the section 3E1.1 benefit; its proposal permits up to a four-level reduction for defendants with an offense level greater than sixteen. Barry Letter, *supra* note 14, at 5. Nonetheless, I am mindful of Judge Kleinfeld's admonition that "the value to society of a guilty plea is less than its value to actors within the justice system." Kleinfeld, *supra* note 170, at 18-19. If guilty pleas are overencouraged (as Kleinfeld believes they would be with more than a two-point reduction), innocent defendants may be tempted to plead guilty and guilty defendants may escape with less prison time than is socially desirable.

246 The two defendants might be distinguished based on other aspects of the Guidelines besides section 3E1.1, such as departures or sentencing within the prescribed range. However, the range may not be substantial, and departures may be more or less difficult depending on the appellate circuit. Less honest methods of distinction are also available, such as undeserved section 5K1.1 departures, but the Guidelines should be wary of encouraging resort to such devices. *Cf.* Susan Winarski et al., *U.S. Sentencing Commission Staff Working Group Report on § 3E1.1: The Acceptance of Responsibility Reduction*, FED. SENTENCING REP. 336, 341 (1992) (arguing that one benefit of allowing judges to use section 3E1.1 to reward defendants "who make a good

mended that section 3E1.1 take better account of such distinctions.[247] Second, by absolutely denying a section 3E1.1 discount to defendants who go to trial, the automatic discount model would not only do little to encourage such defendants to engage in appropriate post-offense conduct, but would also increase the implicit trial penalty of section 3E1.1. Such a change would further weaken the meaningfulness of the constitutional right to trial.

Finally, there are the concerns raised by the Commission when the automatic discount proposal was initially rejected: "[I]t would result in unjustified windfalls in many cases. . . . [A] fixed reduction would not be in keeping with the public's perception of justice."[248] Rather than simply rewarding guilty pleas, my proposal aims to avoid a perception of unfairness by connecting the discount with a broader principle and public policy purpose—the encouragement of desirable post-offense conduct. Connecting the plea discount to remorse and rehabilitative potential might also accomplish the same ends, although for reasons explored above, I would rather focus on just one broader principle and would prefer for that principle not to be remorse.

The cooperation principle may seem cold-blooded, arbitrary, or violative of the principle of proportionality.[249] Yet, the cooperation principle is already deeply entrenched in the Guidelines in section 5K1.1 and section 3C. The presence of these guidelines, as well as the crucial role of plea inducements in the criminal justice system, suggests that the cooperation principle is a necessary and inevitable component of any sentencing scheme. Rather than masking this principle—and thereby losing the ability to structure its implementation—the Guidelines should endorse cooperation incentives and develop mechanisms to guide judges in their proper use.

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faith effort to redress the harms [they have caused]" would be to "remove the pressure on courts to resort to unguided departures").

247 The court is unable to distinguish between a begrudging, reluctant timely plea (for which the full three points must be awarded), and a timely 'plea plus' where the defendant pleads as well as shows genuine remorse, demonstrates assistance to the authorities, has undergone post-offense rehabilitative efforts, and/or some of the other factors which the guideline attempts to reward.

Barry Letter, *supra* note 14, at 1. *See also* COMMITTEE ON CRIM. LAW AND PROBATION ADMIN., JUDICIAL CONFERENCE OF THE U.S., REPORT AND RECOMMENDATION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR AMENDMENT TO THE SENTENCING GUIDELINES 11 (1991) (recommending that the Commission consider revising section 3E1.1 "to recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a guilty plea"), *reprinted in* WORKING GROUP, *supra* note 33, at 48, 51.

248 Wilkins, *supra* note 16, at 191.

249 *See, e.g.*, Winarski et al., *supra* note 246, at 341 (stating that one drawback of providing incentive for defendants to do more than just plead guilty is that such an incentive "may treat defendants differently based on whether they (or their friends or relatives) can afford to pay restitution, and it may be seen as unfair to defendants whose crimes cause harms that, by their nature, cannot be redressed easily or that otherwise do not fit the considerations listed in Application Note 1 . . .").

## VII. Conclusion

As currently structured and interpreted, section 3E1.1 seems almost a vestige of the pre-Guidelines, standardless, idiosyncratic sentencing. The problems of section 3E1.1 reflect the difficulties the Commission had in integrating post-offense conduct into the guided sentencing scheme. These conceptual difficulties are understandable. Concern for post-offense conduct is difficult to square with the traditional purposes of sentencing. Yet, the efficient operation of the criminal justice system demands that such conduct be taken into account. However, even if the relevance of post-offense conduct is granted, the manner in which that relevance ought to be recognized is far from clear. How can post-offense acts be translated into "offense level" adjustments in a principled manner? Why is accepting responsibility worth two, or sometimes three, points? Integration of post-offense conduct into the Guidelines is not a simple matter. Yet the foregoing account of section 3E1.1 should make it clear that the present arrangements are unnecessarily problematic.

As pressure mounts for reform of section 3E1.1, the Commission might do well to reconsider post-offense conduct more broadly. Several provisions touch on such conduct, including section 5K1.1 (departure for substantial assistance to authorities), section 3C1.1 (obstructing or impeding the administration of justice), section 3C1.2 (reckless endangerment during flight), and section 1B1.3 (relevant conduct). A reform of section 3E1.1, such as I have proposed, that places the guideline more clearly among this body of provisions invites reconsideration of how these provisions relate to one another and fit into the Guidelines scheme as a whole.

As discussed above, my proposal would render the linkages between sections 3E1.1 and 5K1.1 more explicit: section 3E would more clearly function as the "little brother" of section 5K. The strengthening of this relationship, however, would bring the anomalous aspects of the substantial assistance guideline into sharper focus. While section 3E1.1 may currently appear to recognize a different *kind* of factor than section 5K1.1, my proposal would make clear that the two guidelines essentially look to different *degrees* of the same factor. Why, then, should the section 5K1.1 benefit only be available upon a prosecutor's motion, while section 3E1.1 rests on a judge's discretion? Why should section 5K1.1 entirely "drop the floor" from beneath a defendant, while section 3E1.1 provides a benefit subject to clear limitations? Perhaps the two provisions should be combined, or at least restructured to function in a more complementary fashion.

The section 3C guidelines, which provide enhancements for obstruction of justice and reckless endangerment during flight, might also be folded into the new section 3E1.1. Obstruction is already a significant factor under section 3E1.1; both that and reckless endan-

germent would seem quite appropriate considerations in a cooperation inquiry. In the interests of simplicity and clarity, the section 3C guidelines might thus be eliminated altogether.[250] Merger of sections 3C and 3E would also end the current anomaly that defendants who plead guilty are subject to much greater penalties for obstruction than defendants who go to trial. Defendants who plead will normally receive a two or three level reduction, but if such defendants obstruct justice, they will not only receive the two-level section 3C1.1 enhancement, but will also lose their section 3E1.1 benefit. In other words, the defendant who pleads may suffer a five-level penalty for obstruction, while the defendant who goes to trial probably only suffers a change of two levels as a result of obstruction. Merger would permit similar acts of obstruction to be treated similarly, regardless of the mode of conviction.[251]

Enlarging the scope of a reformed section 3E1.1 and merging the provision with other guidelines might thus enhance their integrity. However, a grander question remains: How should nonoffense conduct be weighed in the context of a sentencing scheme designed to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct"?[252] How can the principle of proportionality in sentencing be reconciled with the purely utilitarian imperatives that lie behind something like a cooperation adjustment?

Rather than addressing these questions directly, this Article will close by reemphasizing one of the most salient lessons of the section 3E1.1 experience. In striking whatever balances are necessary, the Commission should proceed with a closer eye to actual district court experiences than was manifest in the original drafting of section 3E1.1 and in subsequent appellate interpretation. The institutional pressures and constraints facing district courts, as well as the individual perspectives of sentencing judges, impose significant limitations on top-down sentencing reforms. Indeed, section 3E1.1 is not the only example of this phenomenon; other observers have noted the pressures for sub rosa avoidance of the Guidelines.[253] Thus, it is far from

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250 If this reform were adopted, section 3E1.1 should be restructured so that it could provide a net enhancement, rather than just a net reduction. Otherwise, defendants who go to trial would generally not be subject to penalties for obstruction or reckless endangerment because such defendants would presumptively not receive a section 3E1.1 adjustment anyway. In short, such defendants would have little to lose by obstruction or endangerment.

251 Interestingly, amendment 24 moves towards this end, but in a rather modest fashion. Proposed application note 2(b) makes clear that obstruction "does not necessarily disqualify the defendant" from receiving an acceptance-of-responsibility adjustment, although obstruction might weigh into the "totality of the circumstances" under which a defendant who pleads guilty may be denied the adjustment.

252 18 U.S.C. § 3553.

253 Freed, *supra* note 1, at 1726-27.

clear that unwarranted disparity is any less frequent now than in the pre-Guidelines era.[254] Guided discretion in sentencing remains a compelling vision. However, guidance will not succeed unless sentencing actors are willing and able to be guided. Guidance must be clear, principled, and ultimately founded on the accumulated wisdom of the nation's sentencing courts.

[254] *Id.* at 1684 n.5 (citing a survey of federal district judges).