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Section 3E1.1 Contrition and Fifth Amendment Incrimination: Is There an Iron Fist Beneath the Sentencing Guidelines' Velvet Glove?

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SECTION 3E1.1 CONTRITION AND FIFTH AMENDMENT INCrimINATION: IS THERE AN IRON FIST BENEATH THE SENTENCING GUIDELINES' VELVET GLOVE?

The Sentencing Reform Act of 1984\(^1\) was enacted in response

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In 1973, Judge Frankel, a United States District Judge for the Southern District of New York, attacked the existing sentencing practices and proposed the creation of a sentencing commission that would be responsible for promulgating sentencing guidelines for the federal courts. See Frankel, Lawlessness in Sentencing, 41 U. Cin. L. Rev. 1, 50-54 (1972). Judge Frankel's suggestions played an influential role in the course of sentencing reform and for his efforts he was dubbed "the father of sentencing reform" by Senator Edward Kennedy. Nagel, supra, at 899 n.97. Heeding Judge Frankel's advice, Senator Kennedy introduced a

\(^2\) See United States v. Scroggins, 880 F.2d 1204, 1207 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1816 (1990). Prior to the Sentencing Reform Act, prison sentencing followed the medical model, which regarded criminal behavior as a disease that could be treated and cured scientifically. See M. FRANKEL, CRIMINAL SENTENCES, LAW WITHOUT ORDER 89 (1973) (“first [dubiosity [of rehabilitative model] is the fallacious . . . assumption that criminals are ‘sick’ in some way that calls for ‘treatment’”). The dominant goal of the medical model was rehabilitation. Scroggins, 880 F.2d at 1207. However, the Senate Judiciary Committee’s investigation into medical model sentencing revealed the following: Recent studies suggest that this approach has failed, and most sentencing judges as well as the Parole Commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.


\(^3\) See Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 357 (1979) (sentencing reform influenced by “recent studies demonstrating inequity in the sentences actually imposed on similarly situated offenders convicted of the same crimes”); see also Scroggins, 880 F.2d at 1207 (under indeterminate sentencing, court establishes maximum length for defendant’s sentence, but actual length determined by parole board).


Investigations have revealed significant sentencing disparities in federal courts. See, e.g., A. PARTRIDGE & W. ELDREDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974), *reprinted in* S. REP. No. 225, *supra* note 2, at 41-43 (on identical hypothetical presentence reports, sentences imposed by fifty federal judges ranged from twenty years imprisonment and a $85,000 fine to three years imprisonment and no fine). Furthermore, studies have indicated that sentencing disparity may rest on irrational bases such as race, gender, or social class. See, e.g., Tiffany, Avichai & Peters, *A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial 1967-1968*, 4 J. LEGAL STUD. 369, 388 (1975) (“simplest explanation [for sentencing disparity] may be the correct one—the difference may be due to race”). The Senate Judiciary Committee concluded that

[1] these disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers
to curb this unrestrained discretion, Congress created the United States Sentencing Commission ("Commission") as an independent agency charged with the responsibility of promulgating detailed,

on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance or review procedures to which courts and parole boards might look. S. Rep. No. 225, supra note 2, at 38 (footnote omitted).

Discretion refers to "the freedom or authority to make decisions and choices." WEBSTER'S NEW WORLD DICTIONARY 403 (2d ed. 1982). Proponents of judicial discretion argued that it was necessary to individualize sentencing, which in turn is indispensable to the medical model concept that individual criminals respond differently to rehabilitation attempts. See, e.g., Williams v. New York, 337 U.S. 241, 247 (1949) ("modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime"); Alschuler, THE SELLING OF THE SENTENCING GUIDELINES: SOME CORRESPONDENCE WITH U.S. SENTENCING COMMISSION, in THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE 50 (D. Champion ed. 1989) (criticizing federal sentencing guidelines as dehumanizing, political, impatient, simple, and mechanistic solution to human problems). Opponents of judicial discretion, however, argued that it left sentencing to the whim of the particular judge, subject to his or her peculiar personality traits. See, e.g., Corrothers, RIGHTS IN CONFLICT: FAIRNESS ISSUES IN THE FEDERAL SENTENCING GUIDELINES, 26 CRIM. L. BULL. 38, 44 (1990) ("neither society nor individual defendants are well served by a justice system that operates like a roulette wheel"); Frankel, supra note 1, at 8 ("[i]t is disturbing enough that a charged encounter like the sentencing proceeding, while it is the gravest of legal matters, should turn so arbitrarily upon the variegated passions and prejudices of individual judges"); Lowe, supra note 3, at 11 n.54 (studies show that young, well-educated judges are more lenient than judges with working class backgrounds). In addition, they argued that under discretionary sentencing, the sentence imposed depended on the judge's personal view of the purposes of sentencing. See S. Rep. No. 225, supra note 2, at 38 ("[e]ach judge is left to apply his own notions of the purposes of sentencing"). Furthermore, "[d]iscretion seemed inextricably linked with discrimination" because "the offender's race, sex, religion, income, education, occupation and other status characteristics were found to influence judicial outcomes." Nagel, supra note 1, at 895. Consequently, the "perceived disparities in sentencing . . . led to public loss of confidence in the fair and impartial administration of criminal justice and . . . [caused] many to advocate the elimination of the sentencing discretion of the trial court judge." L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION at vii (1978); accord S. Rep. No. 225, supra note 2, at 49-50 ("existing Federal system lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime").

See 28 U.S.C. § 991 (1988) (establishment and purposes of Commission). "The United States Sentencing Commission . . . is an independent agency in the judicial branch composed of seven voting and two non-voting, ex-officio members." UNITED STATES SENTENCING COMM'N GUIDELINES MANUAL 1.1 (1990) [hereinafter U.S.S.G.]. The members of the Commission are appointed by the President, with the advice and consent of the Senate, after consultation with various individuals and entities "interested in the criminal justice process." 28 U.S.C. § 991(a). At least three of the voting members must be federal judges and a maximum of four may belong to the same political party. Id. The Senate Judiciary Committee has warned that "Presidential appointments based on politics rather than merit would, and should, be an embarrassment to the appointing authority." S. Rep. No. 225, supra note 2, at 160. Each member serves six years in office, but is subject to removal by the President "for neglect of duty or malfeasance in office or for other good cause shown." 28 U.S.C. §§ 991(a), 992(a).
uniform federal sentencing guidelines. The Commission was directed to advance the goals of federal sentencing by promoting
"honesty," "reasonable uniformity," and "proportionality" in the sentencing procedure. In a further effort to limit discretion in the lengths of prison sentences, Congress also acted to abolish the system of parole effective November 1992.

Although prisoner rehabilitation efforts and sentencing discretion have been curtailed under the United States Sentencing Commission Guidelines ("Guidelines"), courts have been accorded a certain amount of latitude in imposing sentences on criminals who have exhibited some potential for reform. For example, while

choice if the primary purpose for the sanction is rehabilitation of the offenders." Nagel, supra note 1, at 901 n.109. Consequently, "[p]rograms which enhanced the possibility of rehabilitation . . . [have been] continued." Id.

7 U.S.S.G., supra note 4, at 1.2 (outlining basic approach to federal sentencing). The common thread running through all three objectives is the "basic objective . . . to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system." Id. Regarding "honesty," Congress "sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison." Id. As a result of the parole system, defendants often served "only about one-third of the sentence imposed by the court." Id. The simple solution to this problem was to abolish parole. Id.; see infra note 8.

With regard to "uniformity" and "proportionality," however, Congress encountered tension between "narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders" and developing "a system that imposes appropriately different sentences for criminal conduct of differing severity." Id. Although "there was no completely satisfying solution to this problem," Congress directed the Commission "to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court." Id. at 1.3.


9 See supra notes 2-3 (discussing failure of prisoner rehabilitation as a goal of incarceration and efforts to curtail discretion of sentencing authorities); see also 28 U.S.C. § 994(k) (1988) ("Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment").

10 See S. REP. No. 225, supra note 2, at 51-52. The sentencing guidelines did not eliminate discretion, but rather structured and defined its boundaries. Thus, the Senate Judiciary Committee noted the following:

The sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence. . . .

. . . . The purpose of the sentencing guidelines is to provide a structure for
the Guidelines as a whole provide for a system of determinate sentencing, rehabilitation and discretion remain important factors under section 3E1.1, which provides for a two-level reduction in sentence “[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct.” The sentencing judge is permitted to consider a wide variety of factors in determining entitlement to the two-level reduction. However, difficult issues of statutory interpretation and constitutional law are implicated when the sentence reduction is denied based on the defendant’s refusal to accept responsibility for crimes other than those to which he pleaded guilty or of which he has been convicted. In United States v. Perez-Franco, the

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11 See notes 5-8 and accompanying text.

12 See U.S.S.G., supra note 4, § 3E1.1, comment. (n.5) (“determination of the sentencing judge is entitled to great deference on review” because “sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility”); Purdy & Lawrence, Plea Agreements Under the Federal Sentencing Guidelines, 26 Crim. L. Bull. 483, 504 (1990) (“reduction [in sentence] for acceptance of responsibility in furtherance of legitimate societal interests remains an important area of judicial discretion under guideline sentencing”); see also Capra, Sentencing Guidelines and the Fifth Amendment, N.Y.L.J., Jan. 3, 1991, at 3, col. 1 (quoting Brady v. United States, 397 U.S. 742, 753 (1970)) (“[l]enient treatment for contrite defendants is deemed warranted because such defendants have shown that they will ‘enter the correctional system in a frame of mind that affords hope for success of rehabilitation over a shorter period of time than might otherwise be necessary’ ”).


14 See U.S.S.G., supra note 4, § 3E1.1, comment. (n.1) (providing nonexhaustive list of appropriate considerations in determining acceptance of responsibility).

15 See Cohen, Symposium: Federal Sentencing Guidelines, 26 Crim. L. Bull. 3, 4 (1990) (citing United States v. Perez-Franco, 873 F.2d 455 (lst Cir. 1989)) (Perez-Franco, which did not require defendant to accept responsibility for uncharged crimes, “is the type of decision certain to produce scholarly criticisms and, indeed, such manuscripts have begun to appear on my desk”).

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evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. Id.; see also 28 U.S.C. § 991(b)(1)(B) (1988) (guidelines should “provide certainty and fairness in meeting the purposes of sentencing, . . . while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices”).

Rehabilitation continues “to be a particularly important consideration for persons placed on probation.” Nagel, supra note 1, at 901 n.109; see also United States v. Scroggins, 880 F.2d 1204, 1208 n.10 (11th Cir. 1989) (noting various sections of title 18 of U.S.C. in which rehabilitation still plays role), cert. denied, 110 S. Ct. 1816 (1990); supra note 6 (noting limited role of rehabilitation under sentencing guidelines).
First Circuit, on the basis of statutory interpretation and the fifth amendment privilege against compelled self-incrimination, held that a reduction in sentence could not be predicated on acceptance of responsibility for charges dismissed pursuant to a plea agreement. Since Perez-Franco was decided, however, a sharp division has developed among the circuits regarding both the statutory and constitutional issues associated with section 3E1.1. This Note will examine the various approaches taken by the circuit courts in reconciling the two-level reduction of sentence provided in section 3E1.1 with the fifth amendment privilege against compelled self-incrimination. Part One will discuss the is-
sues of statutory interpretation implicated by the term "criminal conduct" in section 3E1.1. Part Two will analyze the allegation that section 3E1.1 places an unconstitutional condition or penalty on the exercise of the defendant's fifth amendment privilege against compelled self-incrimination. Finally, Part Three will present various alternative approaches posited by courts and commentators and will conclude that section 3E1.1 suffers from no constitutional infirmities.

I. INTERPRETATION OF "CRIMINAL CONDUCT"

A threshold issue for courts addressing section 3E1.1 is determining what constitutes "criminal conduct" within the meaning of the section.\textsuperscript{20} Courts espousing a narrow interpretation of "criminal conduct" argue that the term is limited to conduct to which the defendant has pleaded guilty or of which he has been convicted.\textsuperscript{21} Courts favoring a broad interpretation argue that, to be eligible for the two-level reduction in sentence, the defendant must accept responsibility for all "relevant criminal conduct."\textsuperscript{22} In justifying the defendant's claim that denial of downward adjustment under section 3E1.1 violates sixth amendment right to jury trial; United States v. Gonzalez, 897 F.2d 1018, 1019-20 (9th Cir. 1990) (same); United States v. White, 869 F.2d 822, 826 (5th Cir.) (same), cert. denied, 490 U.S. 1112 (1989). The constitutional analysis of fifth and sixth amendment claims under section 3E1.1 is similar. See United States v. Crawford, 906 F.2d 1531, 1534 (11th Cir. 1990) (section 3E1.1 "does not violate either the Fifth or Sixth Amendment, but merely formalizes and clarifies a tradition of leniency extended to defendants who express genuine remorse and accept responsibility for their wrongs").

Section 3E1.1 has also been challenged unsuccessfully on equal protection grounds. See United States v. Mayes, 917 F.2d 457, 465 n.12 (10th Cir. 1990) (rejecting argument that section 3E1.1 "violates equal protection in that it results in different sentences for defendants convicted of the same crime" because "[g]iving defendants who accept responsibility for their conduct lighter sentences than unrepentant defendants is rationally related to the government's legitimate interest in rehabilitating convicted criminals"), cert. denied, 111 S. Ct. 1037 (1991); see also United States v. Trujillo, 906 F.2d 1456, 1457 (10th Cir.) (sentencing judge "not obligated to consider codefendants' sentences when imposing sentence on a defendant"), cert. denied, 111 S. Ct. 396 (1990).

\textsuperscript{20} See, e.g., Mourning, 914 F.2d at 705-06 (defining scope of term "criminal conduct"); Oliveras, 905 F.2d at 628-32 (same); Perez-Franco, 873 F.2d at 458-59 (same).

\textsuperscript{21} See, e.g., Oliveras, 905 F.2d at 628-29 (defendant required to accept responsibility for conduct with respect to those counts to which he pleaded guilty).

\textsuperscript{22} See, e.g., United States v. Taylor, 997 F.2d 676, 680 (D.C. Cir. 1991) (section 3E1.1 not limited to "narrow offense of conviction and its essential elements"); Mourning, 914 F.2d at 706 (Guidelines encompass acceptance of responsibility for "all relevant criminal conduct"). See generally Sands & Coates, supra note 17, at 64-74 (discussing "relevant conduct"). The Fourth Circuit, perhaps inadvertently, spoke of requiring acceptance of responsibility for "all criminal conduct." See Gordon, 895 F.2d at 936 ("in order for section 3E1.1 of the guidelines to apply, a defendant must first accept responsibility for all of his criminal
fying their disparate positions, courts have relied on a recent amendment to section 3E1.1, commentary to the section, maxims of statutory interpretation, and the legislative history and policy objectives of section 3E1.1.

A. Amendment to Section 3E1.1

In determining whether “criminal conduct” should be given a broad or narrow interpretation, a number of courts have focused on a 1987 amendment to section 3E1.1, which substituted the term “criminal conduct” for the term “offense of conviction.” The Commission’s accompanying explanation stated only that “[t]he purpose of this amendment is to clarify the guideline.”

Courts espousing a narrow interpretation of “criminal conduct” assert two arguments to support their position that the term extends only to the criminal conduct to which the defendant pleads guilty or of which he has been convicted. First, these courts observe “that the original ‘offense of conviction’ language was believed to be ambiguous, because on its face it implies the restrictive interpretation that a defendant actually had to be tried and convicted of an offense.” Reasoning that a literal reading of the section would prevent a defendant who pleaded guilty and avoided trial from receiving a reduced sentence, these courts argue that the Commission must have adopted the 1987 amendment merely to avoid such an inequitable result.

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23 See, e.g., United v. Frierson, 945 F.2d 650, 655 (3d Cir. 1991) (discussing 1987 amendment to section 3E1.1); United States v. Mourning, 914 F.2d 699, 706 (6th Cir. 1990) (same); United States v. Oliveras, 905 F.2d 623, 629 (2d Cir. 1990) (same); Perez-Franco, 873 F.2d at 458-59 (same).

24 U.S.S.G., supra note 4, app. C, at 378, amend. 46 (“[s]ection 3E1.1(a) is amended by deleting ‘the offense of conviction’ and inserting in lieu thereof ‘his criminal conduct’”). The amendment took effect on January 15, 1988. Id.

25 Id.

26 Perez-Franco, 873 F.2d at 459; accord Oliveras, 905 F.2d at 629.

27 Perez-Franco, 873 F.2d at 459.

28 See United States v. Oliveras, 905 F.2d 623, 629 (2d Cir. 1990) (amendment adopted to remove “ambiguity as to whether the provision applies only to a defendant who has been tried and convicted of an offense or applies also to one who has pled guilty”); Perez-Franco, 873 F.2d at 459 (original language “would incorrectly exclude guilty pleas, where no trial occurs”).

29 See Oliveras, 905 F.2d at 629 (“Commission has clarified that it intended the provision to apply to the defendant who has pled guilty, as well as one convicted after trial”); Perez-Franco, 873 F.2d at 459 (Commission intended to clarify original language which “would incorrectly exclude guilty pleas”). Courts espousing a narrow interpretation of the
The second basis for a narrow interpretation of the 1987 amendment is that a broader construction “would effect a change rather than simply a clarification” of section 3E1.1. Related to this argument is the distinction between the “real-offense” and “charge-offense” systems of punishment. The charge-offense sentencing system prescribes punishment based on “the offense for which the defendant was convicted,” whereas the real-offense sentencing system “bases punishment on the specific circumstances of the case and the defendant’s actual conduct.” Although the Commission generally adopted a charge-offense approach in drafting the Guidelines, certain sections were specifically excepted from this general rule to reflect the real-offense approach. Because the drafters did not expressly except section 3E1.1, the Second Circuit in United States v. Oliveras concluded that the section reflects the charge-offense approach to sentencing. According to the Second Circuit, a broad interpretation of “criminal conduct” would have changed section 3E1.1 to require a real-offense approach and therefore would have contravened the Commission’s intent merely to clarify the section.

The Fifth Circuit in United States v. Mourning rejected the First and Second Circuits’ interpretation of the amendment to section 3E1.1 and concluded that the “guideline now speaks to acceptance of responsibility for all relevant criminal conduct.”

1987 amendment concede, however, that “[t]here may have been clarifying reasons other than the ones discussed above.” Perez-Franco, 873 F.2d at 459; accord Oliveras, 905 F.2d at 629.

Oliveras, 905 F.2d at 629.

See id. at 630 (discussing distinction between real-offense and charge-offense systems and concluding that section 3E1.1 is based on charge-offense system of punishment). See generally Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 Hofstra L. Rev. 1, 8-12 (1988) (discussing compromises within Guidelines between real-offense and charge-offense sentencing systems).

Id.

Oliveras, 905 F.2d at 630.

Id. For example, “one compromise was to use a ‘real offense’ approach for a particular subset of crimes that includes drug trafficking.” Id. 905 F.2d 623 (2d Cir. 1990).

Id. at 630. The court recognized, however, that the Commission had not adopted a pure charge-offense approach since a real-offense approach was still applicable in drug trafficking cases. Id.

See id. at 629-30 (discussing distinction between “real offense” and “charge offense” and concluding that broad interpretation of “criminal conduct” would constitute change).

914 F.2d 699 (5th Cir. 1990).

though the Fifth Circuit made no significant effort to support its position,\textsuperscript{39} strong arguments for a broader interpretation do exist.\textsuperscript{40} For instance, before the Guidelines were promulgated, sentencing judges had authority to weigh the defendant's real-offense behavior.\textsuperscript{41} Thus, the 1987 amendment may have been intended merely to \textit{clarify} the position that a continuation of this real-offense approach was contemplated under the new Guidelines.

Furthermore, the argument that the original language of section 3E1.1 was ambiguous because it restricted the reduction in sentence to only those defendants who had been convicted after a trial\textsuperscript{42} is defeated by the very language of section 3E1.1(b). That section expressly states that the "conviction" could be "based upon a guilty plea or a finding of guilt by the court or jury."\textsuperscript{43} Finally, as the Second Circuit conceded, the term "'criminal conduct' is more encompassing than 'offense of conviction.'"\textsuperscript{44} It is unlikely that the Commission would have employed "more encompassing" language without intending any change in the scope of the statute,\textsuperscript{45} thus a broad construction of "criminal conduct" may

\textsuperscript{39} See Mourning, 914 F.2d at 706-07. The Fifth Circuit did note, however, that certain sections of the Guidelines required the sentencing court to look only to the specific offense committed, whereas section 3E1.1 contained no such restriction. \textit{Id.} at 705.

\textsuperscript{40} See, e.g., Mank, \textit{supra} note 13, at 194-98 (criticizing First Circuit's interpretation of amendment to § 3E1.1 and offering several arguments for broader interpretation of "criminal conduct").

\textsuperscript{41} Mank, \textit{supra} note 13, at 195-96; see also infra note 62 (discussing wide discretion of sentencing judge prior to Guidelines).

In drafting the Guidelines, the Commission sought to establish "a system that blends the constraints of the offense of conviction with the reality of the defendant's actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes." Wilkins & Steer, \textit{Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines}, 41 S.C.L. Rev. 495, 497 (1990).

\textsuperscript{42} U.S.S.G., \textit{supra} note 4, § 3E1.1(b) ("defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial"). Furthermore, the restrictive interpretation would have been implausible "[i]n view of the fact that the overwhelming majority of convictions in federal courts result from guilty pleas" and that "the Commission intended to use the acceptance-of-responsibility section as a means to encourage guilty pleas." Mank, \textit{supra} note 13, at 196.

\textsuperscript{44} Oliveras, 905 F.2d at 629. By relying on verbal niceties such as the distinction between "change" and "clarification," the Second Circuit left itself open to criticism for its position regarding the distinction between a "denial of benefit" and a "penalty." \textit{See id.} at 627-28 (rejecting distinction between denial of benefit and penalty as "simple dichotomy" that "does not answer the question").

\textsuperscript{45} Insisting that something can be "more encompassing" and yet not a "change" seems a contradiction in terms. "[C]hange denotes a making or becoming distinctly different and
be appropriate.

B. Commentary and Maxims of Statutory Construction

In defining the scope of "criminal conduct," courts have also relied on the commentary to section 3E1.1 and on maxims of statutory construction. For instance, the Fifth Circuit, employing the doctrine of noscitur a sociis, examined the words and phrases associated with the term "criminal conduct" in the commentary to section 3E1.1. Noting that the section's application note 1(c) lists "voluntary and truthful admission to authorities of involvement in the offense and related conduct" as one of the factors to consider in determining whether a defendant has accepted responsibility, the Fifth Circuit concluded that "criminal conduct" should be interpreted as broadly as "relevant conduct," a term used in sections of the Guidelines that follow the real-offense approach to sentencing.

The Second Circuit in Oliveras, applying the maxim expressio unius est exclusio alterius, noted that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." Therefore, the court concluded, since the Commissioner's failure to use "relevant conduct" was not mistake in draftsmanship.

Maxims of statutory construction are merely rules of thumb. See BLACK'S LAW DICTIONARY 979 (6th ed. 1990). Similar language appears elsewhere in the commentary. See id. § 3E1.1, comment. (n.3) ("truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility"); id. § 3E1.1, comment. (backg'd) ("recognition and affirmative acceptance of personal responsibility for the offense and related conduct").

U.S.S.G., supra note 4, § 3E1.1, comment. (n.1(c)) (emphasis added). Similar language appears elsewhere in the commentary. See id. § 3E1.1, comment. (n.3) ("truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility"); id. § 3E1.1, comment. (backg'd) ("recognition and affirmative acceptance of personal responsibility for the offense and related conduct").

See Mourning, 914 F.2d at 706.

See Mourning, 914 F.2d at 706.

See Oliveras, 905 F.2d at 629-30 (concluding that § 1B1.3 represents specific departure from general rule to use "charge offense" approach to sentencing).

Oliveras, 905 F.2d at 630 (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722
sion employed the term "relevant conduct" throughout the Guidelines, its failure to use the term in section 3E1.1 "suggests that it was referring to something else." 82

As demonstrated by the opinions of the Second and Fifth Circuits, the interpretive value of maxims is limited. 83 A preferable approach, it is suggested, is for courts to read the section in light of its legislative history and policy objectives. 84

C. Legislative History and Policy Objectives of Section 3E1.1

In drafting section 3E1.1 of the Guidelines, the Commission sought to balance the objectives of reasonable uniformity and certainty in sentencing with the goal of proportionality of punishment. 85 In an effort to achieve greater uniformity and predictabil-

(5th Cir. 1972)); see also Black's Law Dictionary 581 (6th ed. 1990) ("expression of one thing is the exclusion of another").

82 Oliveras, 905 F.2d at 650.

83 See Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 401-06 (1950) (characterizing maxims as "thrust and parry maneuver").

It is possible that the Commission's use of the phrase "related conduct" instead of "relevant conduct" in section 3E1.1 is a mistake in draftsmanship. Congress directed that the Guidelines be neutral as to the race, sex, national origin, creed, and socioeconomic status of the offender. 28 U.S.C. § 994(d) (1988). As drafted, however, section 3E1.1 is gender specific. See U.S.S.G., supra note 4, § 3E1.1(a) ("for his criminal conduct") (emphasis added). The need for a clarifying amendment in 1987 is further evidence of sloppiness in the drafting of the section. See id. § 3E1.1, app. C, amend. 46. Thus, reliance on the presumption of accurate draftsmanship may be unwarranted in this particular case.

84 Other than the Second Circuit's discussion of the compromise between the real-offense and charge-offense sentencing systems, see Oliveras, 905 F.2d at 630, detailed discussion by the courts of the legislative history and policy objectives of section 3E1.1 is lacking.

85 See Wilkins, 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). For an explanation of the three objectives that the Commission was directed to seek, see supra note 7 and accompanying text.

Despite the efforts to promote uniformity and certainty in sentencing, it has been noted that "since the guidelines have gone into effect, the degree of commitment and conformity to the guidelines varies greatly among federal district judges." Goodstein & Kramer, Case Processing and the Federal Sentencing Guidelines, in The U.S. Sentencing Guidelines: Implications for Criminal Justice 126 (D. Champion ed. 1989).

After promulgation of the Guidelines, some judges unfamiliar with their terms abandoned their traditional discretion to "the probation officer's expertise in developing the most appropriate guidelines sentence." Id. Indeed, most judges apparently took the Guidelines too literally and regarded them "as immutable and not open to alternative interpretations." Id. Obviously, these developments were contrary to the intent of the Commission, which sought to preserve judicial discretion in the sentencing judge. Id.

Recent data indicate that federal judges now comply with the Guidelines more than 80% of the time. See Wilkins & Steer, supra note 41, at 496.
In sentencing, the Commission considered a proposal that would have awarded a defendant entering a plea of guilty a fixed and automatic reduction in sentence. The automatic sentence reduction was rejected, however, because it "would have rewarded every defendant who pled guilty regardless of the circumstances of the offense or the defendant’s post-offense conduct." Nevertheless, some form of leniency was deemed necessary in order to reward contrite defendants and to promote the govern-

66 Wilkins, supra note 55, at 190. In testifying before the Commission, Professor Schulhofer, of the University of Chicago Law School, offered the following proposal:

Explicit guilty plea discounts. The sentencing guidelines could authorize or require a specified sentence reduction in the case of convictions by guilty plea. . . .

Amount of the discount. The discount should be small—10% or perhaps 15% at most. This is a crucial point because we are considering here the automatic discount that will be built into the guidelines and extended to all offenders on a uniform basis. Larger discounts would pressure a plea from the innocent defendant who has significant prospects for acquittal at trial; at the same time larger discounts would extend unwarranted leniency to the clearly guilty offender whose defense (if any) could be easily overcome at trial. The occasional need for larger discounts is best met on a case-by-case basis through charge-reduction agreements negotiated with prosecutorial approval and reviewed by the judge under Rule 11(e)(2).

67 Id. (quoting United States Sentencing Comm’n Public Hearing on Plea Agreements in Washington, D.C. 8, 16 (Sept. 23, 1986)).

68 See Minnick v. Mississippi, 111 S. Ct. 486, 498 (1990) (Scalia, J., dissenting) ("while every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves"); see also Brady v. United States, 397 U.S. 742, 753 (1970) (constitutional to extend benefit to defendant who pleads guilty because he “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”); United States v. Belgard, 694 F. Supp. 1488, 1497 (D. Or. 1988) (section 3E1.1 “recognizes societal interest in . . . increased potential for rehabilitation among those who feel and show true remorse for their anti-social conduct”), aff’d, 894 F.2d 1092 (9th Cir.), cert. denied, 111 S. Ct. 164 (1990).

On the topic of voluntary confessions, Justice Scalia asserted the following:

Not only for society, but for the wrongdoer himself, “admission of guilt . . . , if not coerced, [is] inherently desirable,” because it advances the goals of both “justice and rehabilitation.” A confession is rightly regarded by the sentencing guidelines as warranting a reduction of sentence, because it “demonstrates a recognition and affirmative acceptance of personal responsibility for . . . criminal conduct,” which is the beginning of reform. We should, then, rejoice at an honest confession, rather than pity the “poor fool” who has made it; and we should regret the attempted retraction of that good act, rather than seek to facilitate and encourage
mental interest in encouraging guilty pleas. Consequently, the Commission left the two-level sentence reduction to the discretion of the sentencing judge.

By preserving judicial discretion in sentence reduction, section 3E1.1 of the Sentencing Guidelines was designed to encourage guilty pleas. See Wilkins, supra note 55, at 191 (Commission “concluded that a defendant’s acceptance of responsibility for his conduct has provided a potential basis for mitigation under existing practices, and that it should continue to be encouraged”); see also Perez-Franco, 873 F.2d at 464 (“two point reduction serves the invaluable function of inducing the defendant to plead guilty”); Sands & Coates, supra note 17, at 63 (section 3E1.1 “is one of the few ‘carrots’ to facilitate plea bargains, without which the criminal justice system would collapse”).

A two-level reduction is effective in inducing guilty pleas because “[w]ithout such a reduction, there is little incentive for a defendant to plead guilty, as he will receive the same sentence if he pleads guilty as he would if he were to go to trial and is found guilty.” Perez-Franco, 873 F.2d at 464.

Justice White has noted that there is a “mutuality of advantage” in the plea bargaining process:

For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant’s guilt or in which there is substantial doubt that the State can sustain its burden of proof.


In addition to judicial and law enforcement economy, plea bargaining promotes “societal interest in the reduction of crime, restitution, early withdrawal from criminal activity, [and] withdrawal of criminals from positions of trust and responsibility.” Belgard, 694 F. Supp. at 1497.

See Wilkins, supra note 55, at 192 (Commission decided existence of acceptance of responsibility is “offender characteristic [which] is particularly appropriate for determination by the sentencing judge”). The commentary to § 3E1.1 explains that while “[e]ntry of a plea of guilty prior to the commencement of trial... will constitute significant evidence of acceptance of responsibility,” the “evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility.” U.S.S.G., supra note 4, § 3E1.1, comment. (n.3). Furthermore, since “[t]he sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility,” his or her decision “is entitled to great deference on review.” Id. § 3E1.1, comment. (n.5).
3E1.1 retains certain practices as they existed prior to the Guidelines, when "it was commonplace for judges to factor in the real-offense behavior as part of the final sentence." Thus, restricting the sentencing decision to charge-offense behavior would contravene the Commission's intent to preserve judicial discretion in evaluating the defendant's acceptance of responsibility.

The First Circuit in Perez-Franco argued that a real-offense approach to sentence reduction would actually chill guilty pleas because a defendant, fearing that any self-incriminating statement could be used against him in a future criminal prosecution, would be unwilling to admit responsibility for crimes other than those to which he had pleaded guilty or of which he had been convicted.

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61 See Breyer, supra note 31, at 31 ("[w]ith respect to . . . acceptance of responsibility . . . , the Commission has basically left the problem, for the present, where it found it"); see also United States v. Aichele, 941 F.2d 761, 767 (9th Cir. 1991) (Kozinski, J., dissenting in part) (describing judges' right to consider defendant's acceptance of responsibility in sentencing as "hoary tradition"); United States v. Henry, 883 F.2d 1010, 1012 (11th Cir. 1989) (same).

62 Mank, supra note 13, at 195. Prior to the Guidelines, "a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." Williams v. New York, 337 U.S. 241, 246 (1949). "Accordingly, the sentencing judge was held not to have acted unconstitutionally in considering . . . the defendant's participation in criminal conduct for which he had not been convicted . . . ." United States v. Grayson, 438 U.S. 41, 49 (1978). "[I]nstead, '[t]o deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.' " Id. (quoting Williams, 337 U.S. at 249-50).

63 Any encroachment on judicial discretion is compounded by the fact that under the Guidelines a sentencing judge is limited to granting a mere two-level reduction to the defendant who has accepted responsibility, whereas prior to the Guidelines no such restriction existed. See Weigel, The Sentencing Reform Act of 1984: A Practical Appraisal, 36 UCLA L. Rev. 83, 89 (1988) ("[u]nder the old indeterminate sentencing system, final determination of the sentence rested in the discretion of the judge so long as the sentence imposed did not exceed the statutory maximum").

64 See Perez-Franco, 873 F.2d at 464 (requiring defendant to accept responsibility for uncharged crimes "would adversely impact on the plea bargaining process itself"). Professor Capra reasoned that while a reduced sentence for acceptance of responsibility of all relevant conduct can be justified as an exception to the Fifth Amendment, the sentencing guideline may fail in its mission to encourage contrition. This is because a defendant who accepts responsibility for uncharged conduct may receive a two-point reduction under § 3E1.1, but may simultaneously receive an enhancement when the sentencing court considers the relevant conduct as part of the defendant's wrongdoing.

Capra, supra note 12, at 4, col. 6; see also United States v. Rogers, 921 F.2d 975, 977 n.6, 978 (10th Cir.) (by accepting responsibility for trafficking in twenty-four ounces of heroin rather than five ounces specified in indictment, defendant "may have increased his sentence..."
However, one commentator contests this chilling effect, arguing that if a sentencing judge conditions reduction of sentence upon the defendant's acknowledgment of responsibility for other crimes, "it is likely that a court would hold these admissions involuntary and therefore inadmissible in any subsequent criminal proceeding." Moreover, the charge-offense approach contravenes the Commission's intent to reward only those defendants who are sincerely contrite in that it permits selective admission of guilt for personal benefit.

The charge-offense approach would also encroach on judicial discretion by delegating excessive discretion to the prosecutor. Because a federal judge acting in the public interest may block the dismissal of an indictment or refuse to accept a plea bargain, one commentator has argued that the sentencing judge must have "the authority to question defendants about their real-offense behavior to ensure that the judiciary can act as an effective watchdog against potential prosecutorial abuses, however rare."
II. Unconstitutional Condition or Penalty on Exercise of Fifth Amendment Privilege Against Compelled Self-Incrimination?

Assuming that section 3E1.1 requires a defendant to accept responsibility for all relevant criminal conduct, the next issue that must be addressed is whether such a construction violates the defendant's fifth amendment privilege against compelled self-incrimination. Although no court has held section 3E1.1 facially invalid, a number of courts have indicated that the section may violate the Constitution as applied in a particular case. For example, some courts have determined that conditioning a section 3E1.1 reduction in sentence on the waiver of constitutionally protected rights is unconstitutional. According to this "unconstitutional conditions doctrine," the denial of a reduction in sentence based on the de-
fendant’s refusal to accept responsibility for crimes to which he has not pleaded guilty and of which he has not been convicted is equivalent to penalizing the defendant for exercising his fifth amendment privilege against compelled self-incrimination.\textsuperscript{74}

Other courts, refusing to recognize the unconstitutional conditions doctrine, argue that the government is not penalizing the defendant by denying a reduction in sentence, but simply denying a benefit to which the defendant is not automatically entitled.\textsuperscript{75} Even if the sole purpose of section 3E1.1 were to induce guilty pleas, the constitutionality of the government’s bargaining for a guilty plea in exchange for a reduced sentence is well established.\textsuperscript{76}

\textsuperscript{74} See Oliveras, 905 F.2d at 626 ("effect of requiring a defendant to accept responsibility for crimes other than those to which he pled guilty or of which he has been found guilty is to penalize him for refusing to incriminate himself"); Perez-Franco, 873 F.2d at 463 ("government cannot impose penalties because a person elects to exercise his fifth amendment right not to give incriminating testimony against himself"). However, pursuant to the unconstitutional conditions doctrine, the "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989). The doctrine "reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt." Id. But while "[t]he Supreme Court has consistently held that imposing punishment on a person who invokes his Fifth Amendment rights is impermissible compulsion," it "has been considerably more vague about whether Fifth Amendment compulsion can be found where the government conditions a benefit on a waiver of the right against self-incrimination." Capra, supra note 12, at 3, col. 2. For a discussion of the unconstitutional conditions doctrine, see generally Sullivan, supra, and Sunstein, Is There an Unconstitutional Conditions Doctrine?, 26 San Diego L. Rev. 337 (1989).

\textsuperscript{75} See, e.g., United States v. Rogers, 921 F.2d 975, 982-83 (10th Cir.) ("[t]here is a difference between increasing the severity of a sentence for failure to demonstrate remorse and refusing to grant a reduction from the prescribed base offense level"), cert. denied, 111 S. Ct. 113 (1990); United States v. Rowland, 906 F.2d 621, 622 (11th Cir. 1990) (section "3E1.1 is not a penalty or sentence enhancement provision, but is rather a section providing for leniency under certain statutorily prescribed conditions"); United States v. Gonzalez, 897 F.2d 1018, 1021 (9th Cir. 1990) ("reduction provided for in Section 3E1.1 is merely a benefit which may be accorded to a defendant if he is able to make the necessary showing").

Not only are defendants not automatically entitled to a sentence reduction, but they must prove entitlement to the reduction by a preponderance of the evidence. See Rogers, 921 F.2d at 982 ("burden of proof for establishing entitlement to a reduction of the offense level for acceptance of responsibility is on the defendant, who must establish the mitigating factor by a preponderance of the evidence"); United States v. Miller, 910 F.2d 1321, 1328, 1328 n.9 (6th Cir. 1990) (although government bears burden of proving justification for enhancement of sentence, defendant bears burden of proving entitlement to reduction), cert. denied, 111 S. Ct. 980 (1991).

\textsuperscript{76} See United States v. White, 869 F.2d 822, 826 (5th Cir.) ("fact that a more lenient sentence is imposed upon a contrite defendant does not establish a corollary that those who elect to stand trial are penalized"), cert. denied, 490 U.S. 1112 (1989).
Furthermore, as the Supreme Court has noted, although the denial of a reduction in sentence may place some burden on the defendant's fifth amendment rights, "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." 77

The Second Circuit argued that the distinction between penalizing a defendant and withholding a benefit is a "simple dichotomy" that the "[c]ourts squarely have rejected." 78 This proposition, however, is an overstatement. 79 While the dichotomy has been rejected by a number of courts 80 and is criticized within academic circles, 81 it remains entrenched in constitutional analysis. 82 More-

77 Corbitt, 439 U.S. at 218. Judge Kozinski characterized this rationale "as the rough-and-tumble theory of justice: While 'Section 3E1.1 may add to the dilemmas facing criminal defendants, . . . no good reason exists to believe that [§] 3E1.1 was intended to punish anyone for exercising rights.'" United States v. Aichele, 941 F.2d 761, 769 (9th Cir. 1991) (Kozinski, J., dissenting in part) (quoting United States v. Henry, 883 F.2d 1010, 1011 (11th Cir. 1989)).

78 Oliveras, 905 F.2d at 627. According to Judge Kozinski, all that can be said about the argument that a benefit can be denied for any reason is "that it will persuade only those who are already persuaded." Aichele, 941 F.2d at 769 (Kozinski, J., dissenting in part).

79 See Sullivan, supra note 74, at 1415 (academic support for unconstitutional conditions doctrine "has not put an end to confusion about its application"). Even the Second Circuit conceded that the Supreme Court was treating the unconstitutional conditions doctrine inconsistently. See Oliveras, 905 F.2d at 628 n.7 (comparing Supreme Court cases considering placement of conditions on constitutional rights).


81 See, e.g., Sunstein, supra note 74, at 344 ("[w]hether there is a penalty or a subsidy is immaterial").

82 See L. Tribe, AMERICAN CONSTITUTIONAL LAW § 11-5, at 781 (2d ed. 1988) ("problem pervading much of contemporary constitutional law is that of drawing a workable distinction between government's" broad power to subsidize or encourage and its narrow power to penalize or discourage). Distinctions between penalties and inducement lie at the heart of the analysis under the national spending power of the Constitution. See U.S. CONST. art. 1, § 8 ("[C]ongress shall have Power To . . . pay the Debts and provide for the common defence and general Welfare of the United States"); see also United States v. Butler, 297 U.S. 1, 73 (1936) ("[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced"). But see L. Tribe, supra, § 5-10, at 322 ("Supreme Court has effectively ignored Butler in judging the limits of congressional spending power" because "distinction proved unworkable").

The Court has also distinguished between affirmative and negative obligations in the context of public funding of abortions. Compare Harris v. McRae, 448 U.S. 297, 316 (1980) ("it simply does not follow that a woman's freedom of choice carries with it a constitutional
over, following the unconstitutional conditions doctrine to its literal conclusion would wreak administrative havoc because virtually every governmental decision impacts to some degree on constitutional rights. Thus, an alternative approach is required in order to reconcile section 3E1.1 with the fifth amendment.

III. ALTERNATIVE APPROACHES TO CONSTITUTIONAL PROBLEM OF SECTION 3E1.1

A. Nature of Right at Stake

The Second Circuit suggested in Oliveras that the analysis of section 3E1.1 should "focus not on the distinction between a penalty and a benefit, but instead on the nature of the right at stake." Since section 3E1.1 places a burden on the exercise of a fifth amendment right, it is subjected to a heightened level of scrutiny. Thus, according to the Second Circuit, "while there may be a legitimate interest in obtaining admissions of responsibility from...

...entitlement to the financial resources to avail herself of the full range of protected choices") with id. at 330 (Brennan, J., dissenting) (arguing that proposition is not that State has affirmative obligation to subsidize abortions, but that it "must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion").

Cf. G. Gunther, CONSTITUTIONAL LAW 586 (11th ed. 1985) ("[a]lmost all laws classify, by imposing special burdens or granting special benefits to some groups or individuals and not to others"). Pursuant to a strict interpretation of the unconstitutional conditions doctrine, plea bargaining would have to be declared unlawful because defendants who exercise their constitutional right to trial face a potential sentence greater than that received by defendants who plead guilty. See Capra, supra note 12, at 4, col. 3; see also Brady v. United States, 397 U.S. 742, 751 (1970) (holding plea bargaining constitutional despite fact that defendant standing trial faces potentially greater sentence than defendant who pleads guilty). "Given the efficiency factors and other policies furthered by plea bargaining," it is unlikely that the Supreme Court would be willing to invalidate the practice. Capra, supra note 12, at 4, col. 3; see also supra note 73 (noting importance of plea bargaining in American penal system).

With regard to the "distinction between increasing the severity of a sentence for a defendant's failure to cooperate and refusing to grant leniency," the Second Circuit conceded that although "the distinction is somewhat illusory, it is the only rule that recognizes the reality of the criminal justice system while protecting the integrity of that system." United States v. Stratton, 820 F.2d 562, 564 (2d Cir. 1987) (quoting Mallette v. Scully, 752 F.2d 26, 30 (2d Cir. 1984)); accord United States v. Cortes, 922 F.2d 123, 126 (2d Cir. 1990).

See Capra, supra note 12, at 4, col. 5 (suggesting exception to fifth amendment for Brady line of cases).

Oliveras, 905 F.2d at 628 (citing Sunstein, supra note 74).

See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments").
defendants for criminal conduct other than that included in the
plea bargain," this governmental need is not sufficiently compelling
to justify compelled self-incrimination.\textsuperscript{7}

For two reasons, however, this substantive-due-process ap-
proach seems no more desirable than the denial-of-benefit ap-
proach. First, the substantive-due-process approach requires the
judiciary to embark on the unpleasant and complex task of deter-
mining the degree of importance of the right at stake.\textsuperscript{88} Second, it
would seem to necessitate declaring plea bargaining unconstitu-
tional because "[i]f a promise of leniency for pleading guilty and
accepting responsibility were impermissible compulsion, the state
could not constitutionally provide an incentive to plead guilty."\textsuperscript{89}

B. Creating a New Exception to the Fifth Amendment

Courts could also reconcile the denial-of-benefit "line of cases
with Fifth Amendment concepts of compulsion" by openly ac-
knowledging that these cases "establish an exception to Fifth

\textsuperscript{7} Oliveras, 905 F.2d at 628. Laws that trigger a strict scrutiny analysis "will be sus-
tained only if they are suitably tailored to serve a compelling state interest." City of
Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985); cf. Gunther, \textit{The Su-
preme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court:}
\textit{A Model for Newer Equal Protection}, 86 \textit{Harv. L. Rev.} 1, 8 (1972) (strict scrutiny is strict
in theory but fatal in fact).

\textsuperscript{88} See Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) ("[s]ubstantive due pro-
cess has at times been a treacherous field for this Court"). Since the privilege against com-
pelled self-incrimination is not an absolute constitutional right, Roberts v. United States,
445 U.S. 552, 559 (1980) ("Fifth Amendment privilege against compelled self-incrimination
is not self-executing"), is it therefore less fundamental? Cf. \textit{Oliveras}, 905 F.2d at 628 ("there
is no valid state interest in requiring a defendant to give up his right to an attorney").
"[T]here is reason for concern lest the only limits to . . . judicial intervention become the
predicaments of those who happen at the time to be Members of this Court." \textit{Moore}, 451
U.S. at 502 (citations omitted). It seems likely that the constitutionality of § 3E1.1 likewise
will hinge on personal predilections:

\begin{itemize}
  \item It was this unlikely coalition of political liberals and conservatives which drafted
and passed determinate sentencing laws.
  \item Yet, important differences in focus exist between conservatives and liberals.
     Whereas liberals focused on the rights and privileges of convicted offenders, cons-
ervatives believed that the criminal justice system demonstrated too little con-
cern for crime's victims and other law abiding members of society. Moreover, con-
servatives reacted against what they felt was a permissive and undisciplined
criminal justice system which was too tolerant of crime and too lenient with

\textit{L. Goodstein & J. Hepburn, supra} note 68, at 24 (citations omitted).

\textsuperscript{89} Capra, \textit{supra} note 12, at 4, col. 3; \textit{see also} \textit{INS v. Chadha}, 462 U.S. 919, 944 (1983)
("fact that a given law or procedure is efficient, convenient, and useful in facilitating func-
tions of government, standing alone, will not save it if it is contrary to the Constitution").
Amendment protection against compelled self-incrimination.” Given the clarity of the concept and the Supreme Court’s willingness to create new exceptions to the fifth amendment, the exception route may have some merit. However, the courts must remain mindful that once they start whittling away at a constitutional doctrine through exceptions, they create a risk that the exceptions will swallow the rule.

C. Enjoining Use of Defendant’s Statements in Future Trials

The Second Circuit held that a sentencing judge could condition a two-level reduction in sentence on a defendant’s acceptance of responsibility for uncharged crimes only if the defendant’s statements were “immunized against use in subsequent criminal prosecutions.” According to one commentator, however, such immunity from prosecution is unnecessary because “if a sentencing court requires a defendant to make self-incriminating statements to receive a sentence reduction, then those statements are involuntary under the fifth amendment and cannot be used in a subsequent criminal trial.” Unfortunately, there is no guarantee that another court will find the defendant’s self-incriminating statements to have been involuntary, thus the argument is flawed. Furthermore,

90 Capra, supra note 12, at 4, col. 5.
91 See, e.g., Shapiro v. United States, 335 U.S. 1, 32-33 (1948) (creating required records exception to fifth amendment privilege against compelled self-incrimination).
92 See, e.g., Benner, Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective, 67 WASH. U.L.Q. 59, 163 (1989) (“[w]e must now recognize that Miranda has been silently buried”); Collins, Is Miranda Crumbling?, Nat’l L.J., Feb. 20, 1990, at 15, col. 2 (“Miranda’s judicial critics affirmed their fidelity to the symbol while ever diminishing its real-world effect”). Another area of the law in which the exceptions have become the rule is the hearsay rule that excludes evidence of other crimes. See Commonwealth v. Brown, 462 Pa. 578, 593, 342 A.2d 84, 92 (1975) (Roberts, J., concurring) (“‘traditional ‘rule’ of exclusion [for evidence of other crimes committed by defendant] is so riddled with vague and overlapping ‘exceptions’ that it would be more enlightening and more candid to say that the ‘exceptions’ have become the rule and the traditional ‘rule’ is an exception”); Comment, Admissibility of Prior Acquitted Crimes Under Rule 404(b): Why the Majority Should Adopt the Minority Rule, 16 FLA. ST. U.L. REV. 1033, 1034 n.9 (1989) (“[I]n practice, the exceptions have become the rule, so ‘other crimes’ evidence is almost always admitted”).
93 Oliveras, 905 F.2d at 626. The defendant’s statements must be immunized because “[a] plea bargain can unravel at any time, for any number of reasons.” Perez-Franco, 873 F.2d at 460.
94 Mank, supra note 13, at 184.
95 See United States v. Long, 852 F.2d 975, 977 (7th Cir. 1988) (noting that while government-offered inducement is important factor, it does not automatically render defendant’s statement involuntary); see also Mank, supra note 13, at 200 (“it is likely that a court
because the policy behind the exclusionary rule for involuntary statements is to discourage government officials from seeking to compel statements, it seems anomalous to cite the exclusionary rule to justify compelling a defendant's self-incriminating admissions.96

D. Deference to Sentencing Judge's Credibility Determination

A number of courts have reconciled section 3E1.1 with the fifth amendment by resting "on deference to the sentencing judge's credibility determination that the defendant had not accepted responsibility for the crimes of which he had been convicted." 97 Accordingly, some courts have held that the sentencing judge may consider uncharged criminal conduct to cast doubt on the credibility of a defendant's purported expressions of remorse.98 Similarly, the Second Circuit noted that "[i]f there were another clearly permissible basis for the court's denial of the reduction," it "could affirm on that other basis notwithstanding the court's reliance on one flawed basis."99 The problem with this approach, however, is that regardless of whether the reduction is predicated solely on the defendant's acceptance of responsibility for an uncharged crime or whether the uncharged crime is used as one of the factors to detract from the defendant's credibility, the defendant in effect may

would hold these admissions involuntary") (emphasis added).
96 See Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (privilege against compelled self-incrimination reflects "our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses").
97 Oliveras, 905 F.2d at 631 (emphasis in original).
98 See, e.g., United States v. Cooper, 912 F.2d 344, 347 (9th Cir. 1990) ("Cooper's subsequent fraudulent purchase of the car detracts from the credibility of her expressions of remorse for the fraudulent activities of which she was convicted"); United States v. Wivell, 893 F.2d 156, 159 (8th Cir. 1990) ("Wivell's arrest for dealing in cocaine while he was on bond awaiting disposition of this case was a clear indication that he was continuing his criminal course of conduct"); United States v. Jordan, 890 F.2d 968, 974 (7th Cir. 1989) ("it is difficult to credit Jordan with acceptance of responsibility in light of his continued drug dealing").
99 United States v. Santiago, 906 F.2d 867, 873 (2d Cir. 1990); see also United States v. Guarin, 898 F.2d 1120, 1122 (6th Cir. 1990) ("Perez-Franco is instructive only when, absent the district court's allegedly illegitimate expectation, there is clear evidence that the defendant actually accepted responsibility"). In Santiago, the court denied a reduction in sentence in part because of the defendant's "refusal to acknowledge his prior drug sales to Shattuck." Santiago, 906 F.2d at 873. Although consideration of prior criminal activity was "impermissible," the Second Circuit suggested that it would disturb the sentence only if the "impermissible" basis was the sole basis for the sentencing judge's decision. See id. at 873-74 (remanding case to determine whether proper basis existed).
be denied a reduction in sentence for remaining silent.\textsuperscript{100}

**E. Mitigating Factor Theory**

A fifth alternative method of reconciling section 3E1.1 with the fifth amendment is to apply the mitigating factor theory,\textsuperscript{101} which is conceptually distinct from the denial-of-benefit approach.\textsuperscript{102} By analogy to the law of homicide, which requires a defendant to prove extreme emotional disturbance as an affirmative defense to mitigate a charge of murder to manslaughter,\textsuperscript{103} this theory suggests that it should also be constitutional to require a defendant to prove acceptance of responsibility by a preponderance of the evidence in order to mitigate his sentence by two

\textsuperscript{100} Cf. Capra, supra note 12, at 4, col. 5 ("[c]haracterizing more time in jail as a 'denial of a benefit' rather than punishment is cold comfort to the defendant" because from "defendant's point of view, he is spending more time in jail because of his refusal to incriminate himself").

\textsuperscript{101} See, e.g., United States v. Rogers, 921 F.2d 975, 982 (10th Cir.) (reduction of offense level for acceptance of responsibility is "mitigating factor" that defendant must establish by preponderance of evidence), cert. denied, 111 S. Ct. 113 (1990); United States v. Gordon, 895 F.2d 932, 936-37 (4th Cir.) ("acceptance of responsibility is a mitigating factor available under appropriate circumstances"), cert. denied, 111 S. Ct. 131 (1990). But cf. Sands & Coates, supra note 17, at 82 (arguing that treating acceptance of responsibility as "mitigating benefit" is unconstitutional).

\textsuperscript{102} The two theories, however, are analytically similar. Compare United States v. Gonzalez, 897 F.2d 1018, 1021 (9th Cir. 1990) ("reduction provided for in section 3E1.1 is merely a benefit which may be accorded to a defendant if he is able to make the necessary showing") with Rogers, 921 F.2d at 982 ("burden of proof for establishing entitlement to a reduction of the offense level for acceptance of responsibility is on the defendant, who must establish the mitigating factor by a preponderance of the evidence"). A "benefit" refers to "[t]he receiving as the exchange for promise some performance or forbearance which promisor was not previously entitled to receive." BLACK'S LAW DICTIONARY 158 (6th ed. 1990). "Mitigation," on the other hand, refers to circumstances that "do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." Id. at 1002.

\textsuperscript{103} See Patterson v. New York, 432 U.S. 197, 206 (1977) (Constitution not violated because "if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances"). Arguably, an affirmative defense places the burden of proof on a criminal defendant to disprove an element of the crime of murder, i.e., a sane mind. See id. at 225-27 (Powell, J., dissenting) (arguing that affirmative defense of extreme emotional disturbance unconstitutionally shifts burden of proof to defendant on element of crime). Yet, a defendant in federal court must prove the affirmative defense of insanity not merely by a preponderance of the evidence, but by clear and convincing evidence. See 18 U.S.C. § 17(b) (1988); see also United States v. Byrd, 834 F.2d 145, 146-47 (8th Cir. 1987) (constitutional to require defendant to prove affirmative defense of insanity by clear and convincing evidence); United States v. Freeman, 804 F.2d 1574, 1576 (11th Cir. 1986) (same).
CONCLUSION

This Note has outlined the various approaches that courts have taken in reconciling the two-level reduction in sentence provided by section 3E1.1 with the fifth amendment privilege against self-incrimination. Doctrinally, this tension can be resolved in one of five ways: by characterizing the reduction in sentence as a benefit, by expressly recognizing an exception to the fifth amendment for admissions of relevant criminal conduct, by deeming any confessions or admissions to the sentencing judge to be involuntary and therefore inadmissible at subsequent trials, by deferring to the sentencing judge's credibility determination, or by declaring an admission of responsibility a mitigating factor to be proved by the defendant. Ultimately, however, resolving the conflict will require the Supreme Court to balance the defendant's constitutional privilege against compelled self-incrimination against society's interests in providing just punishment, rewarding contrite defendants, and promoting judicial efficiency.

The Commission, in drafting section 3E1.1, provided a sentence adjustment level that is carefully tailored to induce pleas

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104 Rogers, 921 F.2d at 982. In debating the constitutionality of awarding sentence reductions for guilty pleas, the Commission may have been influenced by the mitigating factor theory:

Investing 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. As the Commission is aware, the Constitution has been held to forbid imposition of a penalty for a "defendant's unsuccessful choice to stand trial." Smith v. Wainwright, 664 F.2d 1194, 1196 (5th Cir. 1981). Of course, the Supreme Court has held that this does not forbid extending a "proper degree of leniency in return for guilty pleas." Corbitt v. New Jersey, 439 U.S. 212, 223 (1978). The line that distinguishes a sentencing scheme which simply provides leniency to those who plead from that which impermissibly punishes those who go to trial, however, may not always be a clear one. One key factor appears to be whether the sentencing scheme at least allows the same punishment to be imposed upon those who plead and those who go to trial. Wilkins, supra note 55, at 191 n.65 (quoting United States Sentencing Comm'n Public Hearing on Plea Agreements in Washington, D.C. 3-4 (Sept. 23, 1986)) (emphasis added).

The defendant's burden of proof is the aspect of § 3E1.1 that the Third Circuit found most troubling. See United States v. Frieron, 945 F.2d 650, 663 (3d Cir. 1991) ("tension between Fifth Amendment privilege and § 3E1.1 is greatest when the rule's assignment of the burden of proof to the defendant comes into play"). The court therefore advised sentencing judges to evaluate the defendant's contrition based on inferences from the evidence in the record rather than on the allocation of proof. See id.
from guilty defendants but not to pressure innocent ones.\textsuperscript{105} In view of the Commission's circumspection, the strong societal interests in rewarding only contrite defendants and promoting judicial efficiency, and the increasing recognition of victims' rights in connection with sentencing decisions,\textsuperscript{106} the Supreme Court should validate the sentencing judge's authority to consider uncharged crimes in determining the defendant's entitlement to a reduction in sentence. Sentencing judges have always possessed such discretion, and the Guidelines merely codify this tradition. As asserted by Justice Scalia, "We should . . . rejoice at an honest confession, rather than pity the 'poor fool' who has made it; and we should regret the attempted retraction of that good act, rather than seek to facilitate and encourage it."\textsuperscript{107}

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\textsuperscript{105} Wilkins, supra note 55, at 190 n.62 (quoting United States Sentencing Comm'n Public Hearing on Plea Agreements in Washington, D.C. 8, 16 (Sept. 23, 1986)) ("discount should be small" because "large discounts would pressure a plea from the innocent defendant who has significant prospects for acquittal at trial"). Thus, under a strict scrutiny analysis it may be argued that § 3E1.1 is "suitably tailored." See supra note 87 (articulating strict scrutiny test).

\textsuperscript{106} See, e.g., Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting) ("[r]ecent years have seen an outpouring of popular concern for what has come to be known as 'victims' rights,'" which weighs "amount of harm [defendant] has caused to innocent members of society"), overruled on other grounds by Payne v. Tennessee, 111 S. Ct. 2597 (1991); see also Payne, 111 S. Ct. at 2608-09 (permitting victim impact statements in sentencing phase of death penalty trial). But see Stewart, Springtime for Criminals, 77 A.B.A. J. 43, 43 (Mar. 1991) (commenting that two recent pro-defendant Supreme Court decisions following Justice Brennan's retirement resulted in "temporary setback" for conservative Court's efforts "to shake off the Warren Court's legacy of 'mollycoddling' criminal defendants"). Traditionally, the Supreme Court has been zealous in protecting the rights of poor and uneducated criminal defendants because otherwise they would be defenseless against the majoritarian processes of government. See L. Tribe, supra note 82, § 16-40, at 1634 ("[c]riminal procedure represents the most significant area in which concern for equal justice for the poor has found expression in constitutional guarantees other than those of equal protection"); see also Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (fair trial "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him"). However, this social philosophy has been criticized because the victims of crime are often as poor and defenseless as their aggressors. See, e.g., U. S. STATE DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 1989 BJS DATA REPORT 15 (1990) ("during 1988 blacks, Hispanics, and the poor were victims of serious crime significantly more often than were other people"); Inbau & Manak, Miranda v. Arizona—\textit{Is it Worth the Cost?} (A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort), 24 CAL. W.L. Rev. 185, 198 (1988) ("with regard to the underlying social philosophy of Miranda: a very high percentage of the victims of crime are from the ranks of the poor, the uneducated, or the unintelligent").
