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TRUTH IN SENTENCING: ACCEPTING RESPONSIBILITY UNDER THE UNITED STATES SENTENCING GUIDELINES

Bradford C. Mank*

I. INTRODUCTION

The United States Sentencing Guidelines (hereinafter Guidelines) allow federal district courts to reduce a defendant’s sentence if the defendant “clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct . . . .”\(^1\) In United States v. Perez-Franco, the United States Court of Appeals for the First Circuit held that the above Guidelines section on acceptance of responsibility did not require a defendant to accept responsibility for charges that were to be dismissed as part of a plea agreement.\(^2\) The Perez-Franco decision is an affront to the fundamental principle that a defendant ought to take personal responsibility for the crime that defendant actually committed if he or she desires mercy from the sentencing court. It may also encourage prosecutors to usurp the judicial function of determining which defendants deserve a sentence reduction pursuant to the acceptance-of-responsibility section.\(^3\)

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2. 873 F.2d 455 (1st Cir. 1989).
3. Professor Abraham Goldstein has argued that plea bargaining undermines the integrity of the judicial system where the parties distort the facts as a means to permit the defendant to plead guilty to a lesser charge. See A. Goldstein, The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea 44 (1981) (“The distorting effect of inac-
The Perez-Franco court offered two primary grounds for its decision. First, the court interpreted the express language of the Guidelines pertaining to acceptance of responsibility. Second, the court observed that certain statements by the defendant about his or her conduct, beyond facts contained in the offense of conviction, might be used in a subsequent criminal prosecution and would violate the defendant's fifth amendment privilege against self-incrimination. This violation would occur where the defendant was required to make inculpatory statements about conduct beyond that in the offense of conviction and these statements were subsequently used against the defendant in a criminal trial.

This article will criticize the first ground in the Perez-Franco decision by providing an alternative interpretation of the language in the Guidelines' acceptance-of-responsibility section. In addition, this article will challenge the second ground in the decision by demonstrating that 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.

Judges should have the authority to determine whether a defendant is repentant for the real offense he or she committed as opposed to a

curate pleas is obvious. They make the world of crime and corrections a world of fictions. The criminal conviction becomes a suspect unit of analysis for counting crimes for sentencing, for making restitutionary awards, and for parole.

4. 873 F.2d at 458-59.
5. Id. at 459-61.
6. Id. at 461-63.
7. See infra notes 66-74 and accompanying text.
8. See infra notes 81-95 and accompanying text.
lesser crime negotiated in a plea bargain. Furthermore, judges should be able to ask a defendant about the real-offense behavior to curb potential prosecutorial abuses of discretion.

II. THE FEDERAL SENTENCING GUIDELINES

Congress, through the Sentencing Reform Act of 1984, established the United States Sentencing Commission (hereinafter the Commission). The Commission was given the task of constructing sentencing guidelines to restrict the discretionary sentencing authority placed in judges by existing federal criminal statutes. The Act was the product of approximately fifteen years of scholarly debate during which most commentators criticized indeterminate sentencing laws and the practice of allowing judges broad sentencing discretion. The Commission, after two

9. See supra note 3 and accompanying text; see infra notes 53-65, 75-80 and accompanying text.

10. Id.


"It should be pointed out that these studies present evidence of possible sentence disparities; at least some of the disparity can be justified on the ground that judges are making predictions about each individual's rehabilitation, and, therefore, that defendants who have committed the same crime may deserve different sentences." Mank, supra note 12, at 379 n. 12. Furthermore, the culpability of two criminals convicted of the same crime may be different. For example, one offender who committed first degree murder may have tortured her victim while another murderer killed his victim instantly. Additionally, in those jurisdictions with parole systems or other forms of early release, a judge might give a long sentence with the expectation that the offender will serve a much shorter actual sentence. The nominal sentence given by a judge, therefore, may not be an accurate measure for comparing sentences and determining whether disparities exist among judges. Still, from the evidence cited in the Frankel, O'Donnel, and Panel-on-Sentencing-Research studies, there are undoubtedly differences among judges in how they would sentence the same defendant. See Lowe, Modern Sentencing Reform: A Preliminary Analysis of the Proposed Sentencing Guidelines, 25 Am. Crim. L. Rev. 1, 9-12 (1987) for a discussion on the disparity issue and a survey of the literature on sentencing.

Other scholars criticized indeterminate sentencing statutes and broad judicial discretion on the philosophical ground that sentences ought to be based on the seriousness of the offense committed—that is, on just deserts—rather than on rehabilitative grounds. See, e.g.,
drafts and much public debate, produced the Guidelines which were effective on November 1, 1987.\footnote{Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,046 (1987).} On January 18, 1989, the United States Supreme Court in United States v. Mistretta held that the Commission and the Guidelines do not violate the separation of powers and nondelegation doctrines.\footnote{109 S. Ct. 1047 (1989).} Lower federal courts have divided over whether the Guidelines violate due process principles; however, the recent trend among federal appellate courts has been to sustain the Guidelines against that constitutional challenge.\footnote{See Mank, supra note 12 (discussing a number of federal district court decisions in which courts have divided over whether the guidelines violate due process principles; the article argues the guidelines provide enough discretion to meet due process standards). Since the article was published, a number of federal appellate courts have held that the guidelines do not violate due process guarantees. See, e.g., United States v. Erves, 880 F.2d 376 (11th Cir. 1989); United States v. Pinto, 875 F.2d 143 (7th Cir. 1989); United States v. Brittain, 872 F.2d 827 (8th Cir. 1989); United States v. Vizcaino, 870 F.2d 52 (2d Cir. 1989); United States v. White, 869 F.2d 822 (5th Cir. 1989); United States v. Frank, 864 F.2d 992 (3d Cir. 1988), cert denied, 109 S. Ct. 2442 (1989). In the Ninth Circuit, Judge Wiggins in a dissent from a decision invalidating the guidelines on other grounds expressed his view that the guidelines fulfill due process requirements. Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1269 (9th Cir. 1988) (Wiggins, J., dissenting), vacated, 109 S. Ct. 859 (1989).}

The Guidelines follow a numerical grid scheme. There are forty-three offense severity ratings, and an offender's criminal history is rated on a scale from one to six.\footnote{GUIDELINES, supra note 1, § 5A (sentencing table).} There are 258 sentence boxes contained in the grid and each box includes a sentence range that usually measures twenty-five percent from maximum to minimum.\footnote{Id.} Judges retain complete discretion in determining where an offender's sentence fits within the twenty-five percent sentence range, but must justify to a federal appellate court any “departure” from the range in the box.\footnote{See Mank, supra note 12, at 382-83, 391-93 (discussing the Guidelines’ departure principles). For an in-depth discussion see Alschuler, Departures and Plea Agreements Under the Sentencing Guidelines, 117 F.R.D. 459, 459-76 (1988).} Each major crime category is assigned a base offense level on the forty-three point scale. For example, the Commission established a base level of seventeen points for a residential burglary.\footnote{GUIDELINES, supra note 1, § 2B2.1.} Points are added to the base offense depending upon such variables as the amount of money stolen, the type and quantity of illegal drug sold, or the degree of bodily injury to the victim.\footnote{Id. passim.} For instance, one point is added to the base of seventeen points

for residential burglary if between $2,501 and $10,000 worth of property is taken or destroyed. A judge is authorized to add an additional two points if the offender possessed a firearm or other dangerous weapon during the course of the burglary.21

If an offender's total offense level is twenty points and the offender's criminal history places him or her within the second criminal history category,22 then the Guidelines' sentencing table provides a range of thirty-seven to forty-six months incarceration for this offender.23

One of the most difficult issues that confronted the Commission was how to reconcile sentencing guidelines with the pervasive practice of plea bargaining. The overwhelming majority of convictions in federal courts, as well as most state courts, are the result of guilty pleas, and most of these are the product of negotiated plea bargains between the prosecutor and defense counsel.24 Generally, a defendant who pleads guilty as a result of a negotiated plea bargain receives a lighter sentence than a defendant who is convicted after a jury trial. Moreover, judges tend to give a sentence reduction to those defendants who plead guilty even without a formal plea agreement with the government.25

22. Id. § 5A (sentencing table).
23. Id.
24. In the year ending June 30, 1986, approximately 75% of the defendants processed in the Second Circuit pleaded guilty. United States v. Fernandez, 877 F.2d 1138, 1145 (2d Cir. 1989) (citing United States Department of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Statistics—1987 at 430, table 5.17 (1988)). In the federal district courts, 81% of the criminal convictions obtained in fiscal year 1982 were based on guilty pleas. Note, Double Jeopardy, Due Process, and the Breach of Plea Agreements, 87 Colum. L. Rev. 142, 142 n.1 (1987); see also Alschuler, The Changing Plea Bargaining Debate, 69 Calif. L. Rev. 652, 652 n.1 (1981) (“It is commonly estimated that 90% of all criminal convictions are the result of guilty pleas.”). For a discussion of the pervasive role of plea bargaining in the criminal justice system see id. In the year ending June 30, 1985, 33,823 convictions in United States district courts were the result of guilty pleas or pleas of nolo contendere, 87.8% of the total 38,530 convictions for that year. United States Department of Justice, supra note 24, at 352, table 5.14.


25. See Alschuler, supra note 24, at 652-57 (most studies show that defendants who plea bargain receive lighter sentences, although a few studies found no significant sentence differential between guilty plea convictions and trial convictions, which suggests that some defendants may not have enough information to assess whether a plea bargain deal provides a less severe sentence than is likely to be received after a trial). In the past, before the advent of sentencing guidelines, judges had considerable discretion, and could limit the impact of plea bargaining by sentencing based on the "real offense." See Schulhofer, supra note 3, at 743-48. In light of Professor Alschuler's review of the literature, it appears that
Plea bargaining presented a dilemma for the Commission. The practice of giving lighter sentences to defendants who plea bargain is at odds with the primary goal of the Guidelines, which is to reduce sentence disparities among defendants who have committed similar crimes. On the other hand, eliminating plea bargaining altogether is probably unrealistic given the limited number of federal judges and judicial resources, although a few commentators have disagreed. The United States Supreme Court in Santobello v. New York, stated that plea bargaining is "an essential component of the administration of justice" because "if every criminal charge were subjected to a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and facilities."28

The Commission apparently considered the issue of how the Guidelines should address plea bargaining carefully. The Chairman of the Commission, Judge William W. Wilkins, even wrote a law review article on the subject. Judge Wilkins stated in his article that the Commission considered and rejected the concept of giving a fixed-sentence discount to all defendants who entered guilty pleas. Judge Wilkins noted that the Commission believed that this proposal was constitutionally viable in light of the United States Supreme Court's decision in Corbitt v. New Jersey. In Corbitt, the Court upheld a New Jersey homicide statute that mandated life imprisonment for a defendant convicted by a jury of first defendants usually, but not always, received a lighter sentence as a result of pleading guilty. Alschuler, supra note 24, at 652-57.

26. See Alschuler, supra note 18, at 459-76 (discussing the potential conflict between the goal of the guidelines to reduce disparities among defendants who have committed similar crimes and prosecutorial plea bargaining practices); see also supra note 3 and accompanying text.

27. Professors Alschuler and Schulhofer have argued that the criminal justice system, with just a modest increase of resources, could provide a mini-trial before the court rather than a jury to every criminal defendant, and Alschuler in particular emphasizes that with a moderate increase in judicial resources a full jury trial could be provided in serious criminal cases to every criminal defendant. See Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. Chi. L. Rev. 931 (1983); Schulhofer, Is Plea Bargaining Inevitable?, 97 Harv. L. Rev. 1037 (1984). Regrettably, the Congress and various state legislatures have failed to provide the judicial resources necessary to implement their proposals and to make plea bargaining less essential.


30. Id. at 190-91.

31. Id at 191 & n.65 (noting Corbitt v. New Jersey, 439 U.S. 212 (1978)).
degree murder, but also allowed for the possibility of a judge granting a lesser sentence for a defendant who entered a plea of non vult.\textsuperscript{32}

As an alternative to granting fixed-sentence discounts to defendants who plead guilty, the Commission, in section 3E1.1 of the Guidelines, gave federal district courts the discretion to reduce a defendant's sentence by two offense-levels on the forty-three point scale. Under section 3E1.1, a court may reduce the sentence "...if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct."\textsuperscript{33}

The Commission was at pains to emphasize that "acceptance of responsibility" was not synonymous with entering a guilty plea. Section 3E1.1(b) of the Guidelines provides: "A 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."\textsuperscript{34} Section 3E1.1(c) of the Guidelines provides: "A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right."\textsuperscript{35} In its official commentary to section 3E1.1 of the Guidelines, the Commission notes some circumstances unrelated to plea bargaining or guilty pleas that might indicate acceptance of responsibility. For example, the Commission observed that "voluntary surrender to authorities after commission of the offense" or "voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense" may be conduct worthy of a two-level sentence reduction.\textsuperscript{36} Despite the Commission's insistence that entering a guilty plea does not automatically entitle an offender to a lesser sentence, the "acceptance of responsibility" section of the Guidelines is likely to benefit primarily defendants who plead guilty. The Commission clearly expected that result.\textsuperscript{37}

\textsuperscript{32} 439 U.S. at 216-17. In New Jersey at the time Corbitt was decided, guilty pleas were not allowed in murder cases, but a plea of non vult was allowed. Id at 215. A plea of non vult is equivalent to a plea of nolo contendere, or no contest. Id.

\textsuperscript{33} \textit{GUIDELINES, supra} note 1, § 3E1.1(a).

\textsuperscript{34} Id. § 3E1.1(b).

\textsuperscript{35} Id. § 3E1.1(c).

\textsuperscript{36} Id. § 3E1.1 official commentary 1(d), (e).

\textsuperscript{37} \textit{See} Alschuler, \textit{supra} note 18, at 471-72 (Commission intended that two-offense-level reduction pursuant to acceptance-of-responsibility section would encourage guilty pleas). Two of the seven Commissioners on the United States Sentencing Commission have stated in law review articles that the Commission did not intend to cause significant changes in the practice of plea bargaining, and accordingly, it is clear that both Judges Wilkins and Breyer understood that the acceptance-of-responsibility section of the Guidelines would primarily benefit defendants who plead guilty, the overwhelming majority. \textit{See} Breyer, \textit{The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest}, 17 \textit{Hofstra L. Rev.} 1, 30-31 (1988) ("The Guidelines seek to change existing plea bargaining prac-
A major question concerning the Guidelines is whether federal prosecutors will attempt, through "charge bargaining," to offer bigger discounts than those allowed under the Guidelines to induce defendants to plead guilty. Judge Wilkins, Chairman of the Commission, has defined charge bargaining as follows: "Under charge bargaining, the parties only negotiate the charge or charges to which the defendant will plead guilty rather than the type or length of the sentence. The agreement is a general limitation on the potential maximum sentence to which the defendant will plead guilty rather than a specific recommendation of punishment."\(^{38}\)

The two-offense-level reduction under the Guidelines' acceptance-of-responsibility section translates into about a twenty percent reduction for most defendants—"somewhat less than twenty percent at the highest offense levels, substantially more at the lowest levels."\(^{39}\) The Commission's studies indicate that the Guidelines' twenty percent discount is generally not as great as the sentence reductions given to most defendants who pleaded guilty in federal courts before the advent of the Guidelines.\(^{40}\) Thus, the Guidelines, if strictly enforced, would reduce the sentence disparities among defendants who plead guilty and those convicted after exercising their constitutional right to a jury trial.

III. The Perez-Franco Decision

The Perez-Franco case involved a rather typical charge-bargain agreement. The grand jury indicted Perez-Franco on five counts: Count I charged him with conspiracy to deliver heroin and possession with intent to distribute heroin; Count II charged him with delivery of heroin on October 16, 1987; Count III charged him with delivery of heroin on October 26, 1987; Count IV charged him with possession with intent to distribute one kilogram or more of heroin; and Count V charged him with possession with intent to distribute 100 grams or more of heroin.\(^{41}\) Perez-Franco entered into a charge-bargain agreement with the government under which he would plead guilty to Count IV in exchange for the government dismissing Counts I, II, and III.\(^{42}\) In addition, the prosecutors agreed to

\(^{38}\) Wilkins, _supra_ note 29, at 186.

\(^{39}\) Alschuler, _supra_ note 18, at 471.

\(^{40}\) _Id._

\(^{41}\) United States v. Perez-Franco, 873 F.2d 455, 456 (1st Cir. 1989).

\(^{42}\) _Id._
recommend to the federal district court that it impose a sentence of ten years imprisonment, the statutory minimum, for Count IV. Count V had been dismissed prior to the plea agreement.

In many jurisdictions, including the federal courts, it is the usual practice to have a probation officer prepare a presentence report that examines the offense at issue and the offender's social background and personality. In their presentence reports, probation officers frequently include a suggested sentence or range that the sentencing court is free to disregard, but which may assist in making its determination. As part of the preparation for Perez-Franco's presentence report, a United States probation officer asked Perez-Franco to explain his involvement in the offense. Perez-Franco acknowledged that he had possessed more than one kilogram of heroin with intent to distribute, the basis for Count IV, but declined to incriminate himself concerning the dismissed counts. Because Perez-Franco refused to provide inculpatory information relating to the four dismissed counts, the probation officer in his presentence report did not recommend that Perez-Franco receive a two point reduction pursuant to the Guidelines' acceptance-of-responsibility section.

During Perez-Franco's sentencing hearing, the defense counsel and the government prosecutor urged the federal district court to grant the defendant the two point sentence reduction. The reduction was urged on the basis that Perez-Franco's acceptance of responsibility for the offense of conviction was sufficient under the Guidelines. The federal district court judge, Judge Pettine, rejected the arguments of both the defense and prosecution and ruled the Guidelines required a defendant to admit responsibility for "his total criminal conduct" to receive a two-offense-level reduction. Accordingly, the federal district court determined that it would not grant Perez-Franco a two-offense-level reduction unless he

43. Id.
44. Id.
45. See Note, A Proposal to Ensure Accuracy in Presentence Investigation Reports, 91 Yale L.J. 1225, 1226-28 (1982).
46. Id. at 1228.
47. Perez-Franco, 873 F.2d at 456-57.
48. Id. at 457.
49. Id.
50. Id. at 457-59 & n.2. The government reversed its position on appeal to argue that the federal district court had the authority to refuse to grant a two-point reduction; the First Circuit approved of this reversal because "[b]y supporting the court below, the government makes it easier for us to examine all aspects of this controversy." Id. at 458 n.2.
51. Id. at 457-58.
admitted responsibility for the criminal conduct related to the dismissed counts.\textsuperscript{52}

The United States Court of Appeals for the First Circuit rejected the district court’s analysis of the Guidelines’ acceptance-of-responsibility section, and held that a defendant need only admit his guilt concerning the offense of conviction.

\textbf{IV. REAL OR CONVICTION OFFENSE?}

At first glance, the First Circuit’s determination that a district court can require a defendant to accept responsibility for only the offense of conviction may appear reasonable, and it may seem to make little difference whether defendants acknowledge responsibility for the real offense or conviction offense if the government has declined to prosecute them for criminal conduct beyond that contained in the conviction offense. There is ultimately, however, a great deal at stake concerning whether a defendant acknowledges responsibility for the real offense. At issue is whether judges or prosecutors will control sentencing, and whether prosecutors will subvert the Guidelines.

\textbf{A. Charge Bargaining}

It will be useful in understanding the \textit{Perez-Franco} decision to make a distinction between “real-offense” and “conviction-offense” sentencing. A common form of plea bargaining involves “charge bargaining.”\textsuperscript{53} In a charge bargain, a prosecutor agrees not to charge a defendant with a more serious crime for which at least enough facts exist to secure an indictment or to support an information, or agrees to seek dismissal of an indictment or an information alleging a more serious crime, in exchange for a defendant’s guilty plea to a lesser offense.\textsuperscript{54} In some cases there may be doubt about whether the government could obtain a conviction on the more serious charge. In many instances there is substantial evidence that a defendant’s real or actual offense behavior was significantly more culpable than the conviction offense to which that defendant pleaded guilty.\textsuperscript{55} Before the advent of sentencing guidelines, judges in both state and federal courts often sentenced a defendant based on the

\textsuperscript{52} Id.

\textsuperscript{53} See Alschuler, \textit{supra} note 18, at 474-75 (discussing charge bargaining); Wilkins, \textit{supra} note 29, at 185-86 (same).

\textsuperscript{54} Id.

\textsuperscript{55} See A. Goldstein, \textit{supra} note 3, at 35-70 (discussing various cases in which the conviction offense was less serious than the real offense).
real-offense behavior, although the conviction offense established a statutory limit on the maximum sentence.\textsuperscript{56}

Charge bargaining presents a serious problem for sentencing within the Guidelines. The Guidelines' sentences for most crimes, with the notable exception of drug sentences which are based on the type and quantity of drug, are generally determined by the conviction offense rather than the real-offense behavior.\textsuperscript{57} The Commission had originally experimented in its preliminary draft of September 1986 with a modified real-offense system of sentencing guidelines but later shifted to the less complex conviction-offense system.\textsuperscript{58} The Guidelines do provide a twenty-five percent sentence range for most crimes and also provide for sentence "departures" under the appropriate circumstances. However, the Guidelines' restrictions on judicial discretion in many cases would prevent a judge from imposing a sentence based on the real-offense behavior if the conviction offense is substantially less serious than the actual criminal conduct.\textsuperscript{59}

Thus, charge bargaining can defeat the central goal of the Guidelines, which is to reduce disparities among criminals who have committed similar real crimes. In \textit{United States v. Fernandez}, the Second Circuit noted Congress' concern that prosecutorial charge bargaining could undermine the Guidelines: "Congress' concern regarding plea bargaining centered on prosecutors' discretion in charge bargaining, which it believed if left unchecked would undermine uniformity in sentencing."\textsuperscript{60} For example, absent any adjustments or departures, the Guidelines provide a sentence of life imprisonment without parole for first degree murder, but

\begin{itemize}
  \item \textsuperscript{56} See Schulhofer, \textit{supra} note 3, at 757-58 (before the advent of sentencing guidelines, evidence suggests that judges often took into account the real-offense behavior in determining the final sentence). On the other hand, the evidence also suggests that defendants who pleaded guilty before the emergence of sentencing guidelines received lighter sentences. See Alschuler, \textit{supra} note 3, at 652-57. This evidence is not necessarily contradictory; what it suggests is that in the era before sentence guidelines judges, not prosecutors, largely determined the sentence discount granted to defendants who pleaded guilty. See Schulhofer, \textit{supra} note 3, at 745-46 (discussing how judges by rejecting a small number of plea bargains can shape how prosecutors negotiate most plea bargains to fit judicial attitudes).
  \item \textsuperscript{57} See United States v. Guerrero, 863 F.2d 245, 248 (2d Cir. 1988) (the Guidelines generally use a "charge-offense" approach, but treat certain offenses, including drug trafficking crimes, on a "real-offense" basis).
  \item \textsuperscript{58} Id. Mr. Paul H. Robinson, one of the seven original Commissioners on the United States Sentencing Commission, has criticized the basic charge-offense nature of the Guidelines and proposed a more complex system of measuring the harmfulness of criminal conduct. See Robinson, \textit{A Sentencing System for the 21st Century?}, 66 Tex. L. Rev. 1 (1987).
  \item \textsuperscript{59} The Guidelines primarily determine a sentence based on the charged offense rather than the real offense, except in the case of drug offenses, which are largely based on the real-offense conduct. See, e.g., United States v. Fernandez, 877 F.2d 1138, 1141-42 (2d Cir. 1989); Breyer, \textit{supra} note 37, at 8-12; see also Guerrero, 863 F.2d 245.
  \item \textsuperscript{60} United States v. Fernandez, 877 F.2d 1138, 1145 (2d Cir. 1989).
\end{itemize}
establish a sentence of about twelve years for second degree murder, which may be further reduced to ten years if the court determines that a defendant has accepted responsibility for the offense. Thus, charge bargaining can undermine judicial authority unless district courts are permitted by federal appellate courts to protect their sentencing authority by aggressively departing from the Guidelines' sentencing ranges whenever a prosecutor charges a defendant with an offense significantly less serious than the real-offense behavior. It remains to be seen to what extent federal appellate courts will permit such departures.

Furthermore, charge bargaining in the context of the Guidelines may have the effect of transferring power from judges to prosecutors because the Guidelines restrict the judicial discretion to impose a real-offense sentence and thereby override an overly lenient plea bargain. There are several reasons why it may be undesirable to place primary sentencing authority in the hands of federal prosecutors: They are generally less experienced than federal district judges; their decisions are usually made in private with defense counsel and are less subject to scrutiny than the actions of federal district judges; and, obviously, they are partisan and subject to possible political pressures unlike federal district judges, who enjoy life tenure.

B. The Language of the Guidelines

The district court and First Circuit disagreed in the Perez-Franco case regarding whether the Guidelines' acceptance-of-responsibility section requires a defendant to accept personal responsibility for merely the offense of conviction, as the First Circuit held, or for the real-offense be-

61. See GUIDELINES, supra note 1, §§ 2A1.1-2A1.4, 3E.1; Alschuler, supra note 18, at 462.
62. See Alschuler, supra note 18, at 459-76.
63. See generally id. (discussing in general the standards under which a district court may depart from the guidelines); Mank, supra note 12, at 382-83, 391-93 (discussing the Guidelines' departure principles).
64. Congress recognized that prosecutorial charge bargaining might take the place of judicial discretion once the guidelines went into effect. See Fernandez, 877 F.2d at 1145. Professors Alschuler and Schulhofer have argued that sentencing guidelines tend to transfer power from judges to prosecutors. See Alschuler, supra note 3; Alschuler, supra note 18; Schulhofer, supra note 3. Professor Paul Robinson, a former Commissioner on the United States Sentencing Commission, has also noted the potential impact of prosecutorial plea bargaining on sentencing outcomes. Robinson, supra note 57, at 10 & n.37. Furthermore, Attorney General Richard Thornburgh has clearly recognized the potential for prosecutorial abuses under the Guidelines in light of his decision to issue instructions to federal prosecutors placing limits on plea bargaining. See infra note 79 and accompanying text.
65. See Schulhofer, supra note 3, at 754.
havior, as the district court held.\textsuperscript{66} The district court interpretation is more sound.\textsuperscript{67} The Commission had originally proposed requiring a defendant to accept responsibility for the "offense of conviction," but in October 1987 amended the section so that a defendant had to accept responsibility for "his criminal conduct."\textsuperscript{68} The Commission made the following ambiguous comment regarding this amendment: "The purpose of this amendment is to clarify the guideline."\textsuperscript{69}

The First Circuit in \textit{Perez-Franco} argued that the Commission did not intend to require defendants to accept responsibility for their real-offense behavior, but simply mandated that offenders acknowledge that they committed the offense of conviction:

We find that the Sentencing Guidelines cannot be interpreted to mean what the government now urges. If a defendant's "criminal conduct" is interpreted to mean literally "all of his criminal conduct," then not only does it include counts for which he was indicted and to which he has not pleaded guilty, but also must include criminal activity relating to the current offense for which he may not have been indicted, as well as any past criminal conduct. This reading could not possibly have been what the drafters intended. Nor can we accept the government's argument that "criminal conduct" means "all criminal conduct," while at the same time limiting "all criminal conduct" to mean only that included in the original indictment. The government has offered us no reason to adopt this particular interpretation—in our view, a strained one—of "all criminal conduct."\textsuperscript{70}

The First Circuit's argument that examining \textit{all} of a defendant's "criminal conduct" would require him or her to accept responsibility for "any past criminal conduct" is logical on its face, but the argument appears rather strained in light of traditional sentencing practices before the advent of sentence guidelines. Before guidelines, and currently in those states that have not yet adopted sentence guidelines, it was commonplace for judges to factor in the real-offense behavior as part of the final sentence, although the offense of conviction set a statutory ceiling on the maximum sentence.\textsuperscript{71} Thus, it is quite possible that the Commission amended the acceptance-of-responsibility section in order to allow federal district courts their traditional authority to weigh an offender's real-of-
fense behavior in determining whether that offender has truly accepted personal responsibility for a crime.

The First Circuit in Perez-Franco offered another argument that appears less persuasive in light of traditional sentencing practices. The court maintained that the acceptance-of-responsibility section may have been amended because "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. Such a reading would incorrectly exclude guilty pleas, where no trial occurs."72

In view of the fact that the overwhelming majority of convictions in federal courts result from guilty pleas, the First Circuit's theory that the Commission believed that federal district judges would interpret the term "offense of conviction" to exclude guilty pleas is implausible. Especially so because the Commission intended to use the acceptance-of-responsibility section as a means to encourage guilty pleas.73 A literal interpretation of the Commission's amendment of the section from "offense of conviction" to "his criminal conduct" supports the understanding that the Commission expanded the scope of what a defendant must acknowledge from the offense of conviction to the real offense. It also emphasizes the importance of the distinction between conviction-offense and real-offense sentencing in terms of allowing judges sufficient discretion to control prosecutorial charge bargaining.74

C. Real Offense Sentencing Versus Prosecutorial Discretion

Judges should have the authority to question a defendant about the real-offense behavior as a means to determine whether a prosecutor's plea bargain is consistent with the public interest. In the leading case of

72. 873 F.2d at 459 (emphasis in original).
73. The overwhelming majority of convictions in federal courts are the products of guilty pleas. See supra note 24. The Guidelines' acceptance-of-responsibility section is primarily aimed at encouraging defendants to plead guilty. See Alschuler, supra note 18, at 471-72.
74. For a discussion of the distinction between real-offense and conviction-offense sentencing see supra notes 53-56. When Congress created the Sentencing Commission in 1984, it directed the Commission to promulgate policy statements concerning the acceptance or rejection of plea agreements by federal judges. See Alschuler, supra note 18, at 470 & n.43 (citing 28 U.S.C. § 994(a)(2)(E) (Supp. II 1984)). The legislative history of this provision revealed Congressional concern that charge bargaining could undermine the guidelines. Id. at 470. Thus, it is quite possible that the Commission amended the acceptance of responsibility section with the intention of giving judges greater authority to consider real-offense facts as a means to limit the impact of plea bargaining. See generally id. at 470-76.
United States v. Ammidown,\textsuperscript{76} the United States Court of Appeals for the District of Columbia Circuit established the principle that a federal district court may refuse to dismiss a more serious indictment or allow a guilty plea to a lesser offense where the district court "finds that a prosecutor has failed to give consideration to factors that must be given consideration in the public interest ... ."\textsuperscript{76} The court of appeals did conclude, however, that the district court had abused its own discretion in refusing to accept a plea agreement in which the defendant was allowed to plead guilty to second degree murder instead of being prosecuted for first degree murder, in exchange for his testimony against an accomplice who actually committed the murder. In addition, pursuant to Rule 11(f) of the Federal Rules of Criminal Procedure, a federal district court must find "that there is a factual basis for the plea" before it may accept a defendant's guilty plea.\textsuperscript{77} A district court can generally rely upon the representations of the prosecutor in determining the factual basis of a plea bargain and whether it is consistent with the public interest. Nonetheless, a district court should have the option of questioning the defendant about the real-offense behavior. This would assist the court in reviewing the actions of the prosecuting attorney to determine whether there has been an abuse of prosecutorial discretion.

Furthermore, allowing federal district courts to question defendants about their real-offense behavior will enhance the ability of courts to fulfill their duties under the Guidelines. Section 6B1.2(a) of the Guidelines mandates that a district court determine in the case of a plea bargain whether the "remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing." Moreover, section 6B1.4(a)(2) of the Guidelines provides that a plea agreement should "not contain misleading facts."\textsuperscript{78} In order to fulfill these duties pursuant to sections 6B1.2 and 6B1.4(a)(2), district courts need 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, how-

\textsuperscript{75} 497 F.2d 615 (D.C. Cir. 1973).
\textsuperscript{76} Id. at 617-18, 622; see also United States v. Cowan, 524 F.2d 504, 512 (5th Cir. 1975) (While courts generally should not disturb a prosecutor's discretion to terminate a case, there remains an "essential judicial function of protecting the public interest in the even handed administration of criminal justice . . . "); see generally A. Goldstein, supra note 3, at 35-70 (discussing judicial authority to overrule prosecutorial decisions relating to plea bargaining).
\textsuperscript{77} Fed. R. Crim. P. 11(f); see A. Goldstein, supra note 3, at 38-41 (discussing Rule 11(f)).
\textsuperscript{78} Guidelines, supra note 1, §§ 6B1.2, 6B1.4(a)(2).
ever rare. By restricting the ability of district courts to question defendants about their real-offense behavior, the Perez-Franco decision may have the effect of expanding prosecutorial power at the expense of the judiciary.

V. FIFTH AMENDMENT

The First Circuit in Perez-Franco concluded that requiring a defendant to accept responsibility for conduct beyond that in the offense of conviction would violate the privilege against self-incrimination under the fifth amendment because the elicited information might be used in a subsequent trial against the defendant. To the contrary, the fifth amendment’s fundamental requirement that any statement used in a criminal prosecution be a voluntary expression of the defendant’s free will would likely bar the use of this information in a subsequent criminal prosecution. The failure of the First Circuit in Perez-Franco to consider the issue of voluntariness casts serious doubt on its fifth amendment analysis.

The Perez-Franco court emphasized that in some situations statements made by a defendant during plea negotiations, or as the result of a completed plea bargain, may be used against that defendant in a subsequent criminal trial. This suggests that information elicited from a defendant under the Guidelines’ acceptance-of-responsibility section may be admissible in a future criminal trial.

The examples cited by the Perez-Franco court are of limited value though, because the court did not consider the issue of voluntariness. For

79. Attorney General Richard Thornburgh has issued instructions to the United States Attorneys to prevent possible prosecutorial abuses of plea bargaining that might undermine the Guidelines. These instructions require federal prosecutors to "openly identify" any "departures from the guidelines," and discourage charge bargaining. United States Department of Justice, Plea Policy For Federal Prosecutors, 1 FED. SENT. REP. 421, 421-23 (1989). Whether these instructions will be carried out in every case despite the caseload pressures on federal prosecutors remains to be seen. At the 1989 annual meeting of the American Bar Association, Assistant United States Attorney Mark Bennett of Honolulu, Hawaii, noted that these restrictions on plea bargaining can be avoided in the pre-indictment stage since Department of Justice regulations apply to the dismissal of charges that are already brought. Reports and Proposals, 45 Crim. L. Rep. (BNA) 2392, 2396 (Aug. 30, 1989). Thus, plea bargaining negotiations and charge bargaining may well go on as before except that bargaining will begin at an earlier stage. Congress and the Commission may have wanted judges to assume the function of policing prosecutors to insure that plea bargaining does not undermine the Guidelines. See supra note 74 and accompanying text; see also supra text accompanying note 78.

80. See The Old Days: When a Plea Was a Plea . . . , Nat’l L. J., Nov. 6, 1989, at 13, col. 4; see also supra notes 60-65, 74-79 and accompanying text.

81. 873 F.2d at 459-63.

82. Id. at 459-61.
example, the court notes that "unwithdrawn guilty pleas in a state court have been admitted for their evidentiary value in subsequent federal prosecutions involving the same event." The Perez-Franco court failed to observe that the admission of such information is not automatic, but rests upon a separate determination of whether the statement is voluntary. For instance, the Seventh Circuit Court of Appeals, in United States v. Long, carefully considered whether the defendant's statements to state officials during negotiations for a prior state plea agreement were voluntary before holding that the federal district court properly admitted those statements in a subsequent federal criminal prosecution. "The cooperative atmosphere and the fact that Long initiated negotiations militates against finding the situation here particularly coercive . . . ."85

It will be useful at this juncture to consider under what circumstances a defendant's statement is voluntary pursuant to the standards of the fifth amendment. The United States Supreme Court has employed a "totality of all the surrounding circumstances" test for determining whether a statement is voluntary under the fifth amendment. An "important" factor in determining whether a statement is voluntary is whether the government has offered inducements to or made threats to the defendant as a means to obtain inculpatory information, although governmental inducements do not automatically render a statement involuntary.87

This article will now examine under what circumstances statements made by a defendant in connection with the Guidelines' acceptance-of-responsibility section are likely to be construed by courts as voluntary or involuntary. It should be noted that the totality of the circumstances test for determining voluntariness is necessarily somewhat subjective; however, there are many cases in which the voluntariness issue is relatively clear.88 If a defendant, in the era before the Guidelines, had made incrim-

83. Id. at 460.
84. 852 F.2d 975 (7th Cir. 1988).
85. Id. at 977.
87. See Long, 852 F.2d at 977 (an "important" factor); see also Hutto v. Ross, 429 U.S. 28, 30 (1976) (per curiam); Bram v. United States, 168 U.S. 353, 542-43 (1897); Gunsby v. Wainwright, 596 F.2d 654, 658 (5th Cir. 1979), cert. denied, 444 U.S. 946 (1979); People v. Conte, 421 Mich. 704, 721-50, 365 N.W.2d 648, 648-57 (1984). All these cases illustrate the proposition that government inducements may, in some circumstances, render a defendant's confession involuntary pursuant to the fifth amendment.
88. In some close cases judges may disagree concerning whether a defendant's statement is voluntary. See, e.g., People v. Conte, 421 Mich. 704, 365 N.W.2d 648 (1984) (four-to-three decision). On the other hand, courts are likely to find a defendant's statement involuntary where the defendant made the statement while in custody, unrepresented by counsel,
inating admissions to a probation officer or a court in the hope of demonstrating contrition as a means to obtain a lighter sentence, it is likely that a court would have held that those admissions were voluntary because the defendant had initiated the discussion and the government had not made any inducements or threats to obtain the information. If a federal district court today tells a defendant that he or she must admit to criminal conduct beyond that contained in the offense of conviction to obtain a two-offense-level reduction pursuant to the Guidelines' acceptance-of-responsibility section, it is likely that a court would hold these admissions involuntary and therefore inadmissible in any subsequent criminal proceeding.

A distinction can be made between admissions made in specific response to a sentencing court's request and statements made as part of a plea bargain. In plea bargains, defendants voluntarily waive their right to a jury trial in exchange for promises of leniency by the government. While critics of plea bargaining often make the point that the government is usually in a superior bargaining position in comparison to the average criminal defendant, defendants do have the choice of either agreeing to a plea bargain or exercising their constitutional right to a jury trial. On the other hand, a sentencing court, even with the advent of the Guidelines, has considerable discretion in determining a defendant's sentence.

and after the government has made promises of leniency. Courts would rule this way because defendants who are unrepresented by counsel are deemed especially vulnerable to direct or implied promises no matter how slight the inducement is. See Brady v. United States, 397 U.S. 742, 754 (1970); Green v. Scully, 850 F.2d 894, 901 (2d Cir. 1988), cert. denied, 109 S. Ct. 374 (1988).

89. See, e.g., Long, 852 F.2d at 977 (fact that defendant initiated negotiations is a significant factor in determining that a statement is voluntary).
90. See infra note 95 and accompanying text.
91. See infra note 92 and accompanying text.
92. See Bordenkircher v. Hayes, 434 U.S. 357 (1978) (upholding a plea bargain despite the fact that the defendant entered a guilty plea only after the prosecutor threatened to indict him on a more serious charge carrying a mandatory life sentence). The Supreme Court declared that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Id. at 363. See also United States v. Henry, 883 F.2d 1010 (11th Cir. 1989) (upholding the Guidelines' acceptance-of-responsibility section against a sixth amendment challenge that the section, like plea bargaining, "chilled" the defendant's exercise of his right to jury trial). For a criticism of plea bargaining as inherently unfair and coercive, see Alschuler, supra note 24, at 661-69. For a defense of plea bargaining, see Church, In Defense of "Bargain Justice," 13 L. & Soc'y Rev. 509 (1979).
93. Judges retain a fair amount of discretion under the Guidelines. See supra note 18 and accompanying text. On the other hand, a prosecutor by charge bargaining a case can seriously intrude upon the sentencing judge's standard twenty-five percent discretion, although the judge does have the option of departing from the Guidelines' standard sentence range, but must convince a federal appellate court that the departure is justified. See supra
A federal district court has complete autonomy in deciding whether a sentence belongs at the low or high end of the standard twenty-five percent sentence range in the Guidelines, and may also depart from that range, although departures are subject to appellate review. Accordingly, if a court asks a defendant for information about a dismissed count and tells that defendant that his or her sentence will depend on his or her willingness to discuss conduct beyond that contained in the offense of conviction, a defendant is likely to feel compelled to answer. Thus, if Perez-Franco had responded to the district court’s request for information about conduct relating to the dismissed counts, a future court would likely hold that his statements were involuntary and therefore inadmissible in any subsequent criminal trial against him.

note 18 and accompanying text. For example, a prosecutor might agree to allow a drug dealer to plead guilty to the offense of using a communication facility in committing a drug offense, which carries a base-offense level of twelve. GUIDELINES, supra note 1, § 2D1.6. A court might believe that the real offense is selling 1 kilogram of heroin, which carries a base-offense level of 32 and a mandatory minimum sentence. Id. § 2D1.1. For a first offender, the sentence ranges for these two crimes are 10-16 months versus 121-151 months. Id. § 5A. Thus, while the sentencing court retains considerable discretion within the sentence range, a prosecutor can effectively usurp the sentencing function unless the court resorts to a sentence departure.

94. Id.
95. This author has not found a case directly on point for the proposition that statements made by a defendant as a direct result of a sentencing court’s threat to impose a longer sentence are involuntary; however, there are a number of analogous cases in which courts have determined that a judge’s participation in plea negotiations rendered a guilty plea involuntary. See, e.g., Porcaro v. United States, 784 F.2d 38, 42 (1st Cir. 1986) (Fed. R. Crim. P. 11(e)(1) prohibits judicial involvement in plea negotiations), cert. denied, 479 U.S. 916 (1986); Smith v. United States, 670 F.2d 145, 147 n.5 (11th Cir. 1982) (same); United States v. Adams, 634 F.2d 830, 834-36 (5th Cir. 1981) (same); United States v. Werker, 535 F.2d 198, 199-205 (2d Cir. 1976) (same), cert. denied, 429 U.S. 926 (1976); United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 253-56 (S.D.N.Y. 1966) (judicial involvement in plea negotiations raises substantial question of whether a guilty plea is involuntary); Anderson v. State, 263 Ind. 583, 335 N.E.2d 225, 227 (1975) (judicial participation in plea negotiations is highly suspect); In re Cox, 553 A.2d 1255, 1257 (Me. 1989) (Maine Supreme Court reprimands a trial judge for participating in plea negotiations); People v. Killebrew, 416 Mich. 189, 330 N.W.2d 834 (1982) (judicial participation rendered defendant’s guilty plea involuntary); State v. Pouncey, 29 Wn. App. 629, 637, 630 P.2d 932, 937 (1981) (“[W]e believe the appropriate appellate function is to scrutinize the available record carefully to determine whether or not the judge’s presence and/or involvement affected the voluntariness of the defendant’s plea. See State v. Byrd, 63 Ohio St. 2d 288, 407 N.E.2d 1384 (1980).”). The Washington Appellate Court in the Pouncey case determined that the judicial involvement had not been sufficient to render the defendant’s guilty plea involuntary. See generally 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE §§ 20.2(c), 20.3(d) (1984); Annotation, Judge’s Participation in Plea Bargaining Negotiations as Rendering Accused’s Guilty Plea Involuntary, 10 A.L.R. 4th 689 (1981 & Supp. 1989) (discussing a number of state and federal cases involving the issue of whether judicial participation in plea negotiations rendered a guilty plea involuntary). While some states permit judicial involvement in plea negotia-
The First Circuit's conclusion in *Perez-Franco*, that federal district courts may not ask defendants about their real-offense behavior beyond that contained in the offense of conviction in determining whether to grant a two-offense-level reduction under the Guidelines because that information might be used against defendants in a subsequent criminal trial, is flawed as a result of the court's failure to consider whether those statements are voluntary pursuant to the fifth amendment. Those statements would likely be inadmissible in any future criminal proceeding, and therefore the fifth amendment right not to give incriminating information.

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tions, see Annotation, *supra* note 35, it is noteworthy that Fed. R. Crim. P. 11(e)(1) expressly forbids such participation: "The court shall not participate in any such discussions." This suggests that federal courts are likely to examine carefully any judicial conduct that might render a guilty plea, and possibly a statement, involuntary. Obviously, the issue of whether judicial participation or inducements render a guilty plea involuntary is not exactly the same as whether a judge's demand for information from a defendant at a sentencing hearing concerning real-offense behavior beyond the conviction offense renders any statements by the defendant involuntary under the totality of the circumstances. See generally Green v. Scully, 850 F.2d 894, 901 (2d Cir. 1988), cert. denied, 109 S. Ct. 374 (1988) (discussing the totality of the circumstances test for determining whether a statement is voluntary); *supra* notes 84-89 and accompanying text. Still, it is noteworthy that courts have held that judicial threats of a longer sentence render a guilty plea involuntary. *See, e.g.,* Barnes v. State, 70 Md. App. 694, 523 A.2d 635 (1987) (judge's threat of longer sentence if defendant went to trial rendered guilty plea involuntary); State v. Benfield, 264 N.C. 75, 140 S.E.2d 706 (1965) (same); State v. Byrd, 63 Ohio St. 2d 288, 294, 407 N.E.2d 1384, 1388-89 (1980) ("The undisputed evidence in the case at bar shows that the judge's conduct in all probability led appellant to believe he could not get a fair trial. . . . Any belief that a fair trial could not be had was strengthened by the judge's remarks regarding sentencing and the problems involved in having a jury trial." Thus, it is likely that judicial threats to give a defendant a longer sentence, by not awarding a two-offense-level reduction pursuant to the Guidelines' acceptance-of-responsibility section, unless the defendant confessed to conduct beyond that contained in the offense of conviction would render those statements involuntary because they are the product of judicial coercion. In *Perez-Franco*, there was also the issue of whether statements made by a defendant to a probation officer are admissible. 873 F.2d at 456-63. Based on the above analysis, such statements would likely be involuntary if the sentencing court had established a policy of not granting a two-offense-level sentence reduction pursuant to the Guidelines to defendants who refused to provide information about the real-offense behavior to a probation officer. In that case, the probation officer would simply be acting as an agent of the court and the same arguments relating to the coercive power of sentencing judges would apply. Obviously, whether a defendant's statement to a probation officer is voluntary depends on the totality of the circumstances. See *supra* notes 84-89 and accompanying text.

Moreover, section 1B1.8(a) of the guidelines may provide an additional ground for excluding information elicited by a court seeking a defendant's acknowledgement of responsibility for conduct beyond that contained in the offense of conviction. In United States v. Shorteeth, 887 F.2d 253 (10th Cir. 1989), the Tenth Circuit held that section 1B1.8(a) of the Guidelines prevents information that a guilty-pleading defendant provides to the government under assurances it will not be used against her from being used by a judge during sentencing, unless the plea agreement explicitly says otherwise. The logical extension of this analysis is that such information can't be used by a judge in a later case.
against oneself does not bar judges from questioning offenders about real-offense behavior.

VI. CONCLUSION

This article has argued that federal district courts have the authority under the Guidelines to ask defendants to explain their real-offense behavior before deciding whether to grant a two-offense-level reduction pursuant to the acceptance-of-responsibility section. Federal district judges should protect the integrity of the Guidelines, which has the central goal of reducing sentence disparities among offenders who have committed the same real offense, by refusing to grant a sentence reduction pursuant to the acceptance-of-responsibility section, where the conviction offense does not adequately reflect the seriousness of the real criminal conduct. When the Commission wrote the Guidelines, it clearly intended that the maximum benefit for pleading guilty should be a two-offense-level reduction pursuant to the acceptance-of-responsibility section and that judges should make that decision, not prosecutors.96 Accordingly, federal district courts should be able to question defendants about their real-offense behavior to prevent prosecutors from subverting the Guidelines through charge bargaining.97

96. See supra notes 60-65; 74-80 and accompanying text.
97. Id.