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DOUBLE JEOPARDY, THE FEDERAL SENTENCING GUIDELINES, AND THE SUBSEQUENT-PROSECUTION DILEMMA

*Elizabeth T. Lear**

INTRODUCTION

The choice to embrace a real-offense regime probably constitutes the single most controversial decision made by the Federal Sentencing Commission in drafting the Federal Sentencing Guidelines ("Guidelines").¹ Real-offense sentencing

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¹ In 1984, Congress passed the Sentencing Reform Act, which created the United States Sentencing Commission (the "Commission") to design sentencing guidelines for the federal courts ("Guidelines"). See Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3586; 28 U.S.C. §§ 991-998. The resulting guidelines became law on November 1, 1987. See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL 1 (1992) [hereinafter U.S.S.G.].

The Guidelines rely on a real-offense as opposed to a charge-offense model. "Real-offense" sentencing refers to a system that is theoretically unconstrained by the offense of conviction or indictment and that bases the sentence on what "actually" happened as determined by the sentencing court. In the pre-Guidelines era, the real-offense inquiry was quite broad, encompassing a variety of factors, including the circumstances of the offense of conviction, nonconviction offenses committed before, during or after the conviction offense, and a host of biographic components such as good works and employment history. See Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 526-28 (1993). And although the Guidelines technically adopt a modified real-offense system by excluding much unrelated criminal activity and other information from the sentencing inquiry, a vast range of conduct remains "relevant" under the Guidelines regime.

The decision to sweep unadjudicated offenses, and other criminal acts outside of the offense of conviction into the sentencing inquiry has provoked an enormous and almost uniformly hostile body of literature. See, e.g., Gerald W. Heaney, *No End to Disparity*, 28 AM. CRIM. L. REV. 161, 185-225 (1991); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179 (1993); Boyce F. Martin, *The Cor-*

bases punishment on a defendant's actual conduct as opposed to the offense of conviction. The Guidelines sweep a variety of factors into the sentencing inquiry, including criminal offenses for which no conviction has been obtained. Under the Guidelines, therefore, prosecutorial charging decisions and even verdicts of acquittal after jury trial may have little impact at sentencing.

Long before the adoption of the Guidelines, courts bent on rationalizing the real-offense regime devised a convenient yet dangerous fiction in the form of the "punishment-enhancement" distinction. According to this theory, a sentence enhancement does not constitute punishment. Thus, challenges to the use of nonconviction offenses² to increase sentence length are easily answered: a defendant is not punished for the unadjudicated offense; the sentence for the offense of conviction is merely enhanced on the basis of the extraneous criminal conduct.

The distinction is particularly convenient in the double jeopardy setting. According to the Supreme Court's "favorite saying,"³ double jeopardy "protects against a second prosecution for the same offense after acquittal[,] . . . a second prosecution for the same offense after conviction[, and] . . . against multiple punishments for the same offense."⁴ Because a defendant whose sentence is "enhanced" for an unadjudicated crime is neither "punished" nor tried for that offense, the Double Jeopardy Clause is not technically implicated.

Recent opinions in the courts of appeals have reopened the punishment-enhancement debate in the double jeopardy arena.

nerstone Has No Foundation: Relevant Conduct in Sentencing and the Requirements of Due Process, 3 SETON HALL CONST. L.J. 25 (1993); Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENT. REP. 355 (1992); David Yellen, *Illusion, Illogic and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 433-54 (1993).

² The terms "nonconviction offense," "nonconviction crime," "unadjudicated offense," and "unadjudicated crime" are used interchangeably to refer to conduct that has never been the subject of a conviction but is defined as criminal by statute. "Acquittal conduct" and "acquittal offense" refer to crimes of which the defendant has been acquitted.

³ George C. Thomas, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 830.

⁴ *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Double Jeopardy Clause states in relevant part: "nor shall any person subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

In *United States v. McCormick*,⁵ the Second Circuit joined the Tenth Circuit⁶ in holding that the Guidelines' use of unadjudicated crimes to increase sentence length constitutes punishment and that subsequent attempts to formally prosecute those offenses are barred by the Double Jeopardy Clause. Interestingly, both courts found the punishment question reasonably straightforward, even though the punishment-enhancement fiction forms one of the central premises of twentieth-century sentencing jurisprudence.

The Second Circuit's break with tradition in *McCormick* provides an opportunity to reevaluate the punishment-enhancement distinction in the context of the Federal Sentencing Guidelines. The punishment-enhancement fiction was originally embraced to repulse double jeopardy challenges to early recidivist statutes.⁷ Defendants claimed that the harsher penalties imposed as a result of a prior conviction constituted a second punishment for the prior offense. The Supreme Court rejected this theory, reasoning that the existence of the previous conviction made the second transgression of the law more serious.⁸

Over time this innocent pronouncement was extended well beyond the prior-conviction or double jeopardy sphere. In response to relentless attacks on the Guidelines' real-offense regime, the federal courts have repeatedly invoked the punishment-enhancement distinction, buttressing the position by analogizing unadjudicated crimes to prior convictions. According to the courts, the use of prior convictions and the use of nonconviction offenses at sentencing rest upon the same constitutional theory. Thus, if one rejects the punishment-enhancement rationale, one must similarly reject the use of prior

⁵ 992 F.2d 437 (2d Cir. 1993).

⁶ See *United States v. Koonce*, 945 F.2d 1145 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992).

⁷ See, e.g., *McDonald v. Massachusetts*, 180 U.S. 311, 312 (1901) ("The statute under which [defendant's sentence] was rendered is aimed at habitual criminals; and simply imposes a heavy penalty upon conviction of a felony . . . by one who had been twice convicted."); *Chenoweth v. Commonwealth*, 12 S.W. 585, 585 (Ky. 1889) ("The increased punishment is not for the former offenses; but the previous convictions merely aggravate the last offense, and add to its punishment."); *Kelley v. People*, 4 N.E. 644, 645 (Ill. 1886) ("There is no trial twice for the same offense, but twice for two crimes committed at different times.").

⁸ *McDonald*, 180 U.S. at 312.

convictions to justify more severe sentences.⁹

This Article takes issue with the "prior-conviction analogy," rejecting the notion that prior convictions and unadjudicated crimes are sufficiently similar to warrant equal treatment under the Constitution. Part I of this Article uses *McCormick* to illustrate the subsequent-prosecution dilemma under the Guidelines, describes the Second Circuit's solution, and discusses the traditional response to the problem. Part II questions the prior-conviction analogy, concluding that prior-conviction enhancements are entirely consistent with the history and underlying values of the Double Jeopardy Clause. The same cannot be said for unadjudicated-offense enhancements, which strike at the heart of the double jeopardy protection, wholly offending the central purposes of the Clause. Thus, Part II concludes that the Second Circuit was correct in holding that relevant conduct enhancements¹⁰ under the Guidelines comprise constitutionally cognizable punishment.

Part III recognizes, however, that accurately characterizing a sentence enhancement as punishment does not automatically catapult the subsequent prosecution into a double jeopardy violation. Traditional double jeopardy jurisprudence does not conform gracefully to the sentencing context. In fact, a close analysis of the Second Circuit's approach suggests that the lack of a conviction for the relevant conduct offense in the original proceeding renders the Double Jeopardy Clause incompetent to protect its central purposes.

Part IV concludes that the Second Circuit chose the wrong constitutional remedy. The Double Jeopardy Clause is not designed to address the subsequent-prosecution problem in the sentencing context. It is the Due Process Clause that forbids enhancement in the absence of conviction in the first place. Part IV therefore urges the courts and the Federal Sentencing Commission to abandon the real-offense model once and for all.¹¹

⁹ See, e.g., *United States v. Carey*, 943 F.2d 44 (11th Cir. 1991), cert. denied, 112 S. Ct. 1676 (1992); *United States v. Mack*, 938 F.2d 678 (6th Cir. 1991).

¹⁰ The relevant conduct provision, see U.S.S.G. § 1B1.3, is discussed in detail *infra* at notes at 16-20 and accompanying text.

¹¹ This Article recognizes that abandoning the real-offense regime may eliminate a central difficulty with the Guidelines, but will create a whole new series of issues that will need to be addressed. The major hurdle in designing a conviction-

I. THE SUBSEQUENT-PROSECUTION PROBLEM

A. A Guidelines Primer

For the uninitiated, the following discussion provides an abbreviated explanation of the operation of the Federal Sentencing Guidelines.¹² Inside the back cover of the *Federal Sentencing Guidelines Manual* lies a deceptively simple-looking numerical grid with "Criminal History" categories on one axis and "Offense Levels" on the other.¹³ To arrive at the appropriate Guidelines sentence, one merely calculates the defendant's criminal history score and offense level, locates the point at which the two scores intersect, and reads off the applicable range. The difficulty, of course, lies with arriving at the appropriate scores in the first instance.

To assure uniformity among "similarly situated offenders," the Guidelines embrace a real-offense model,¹⁴ basing punishment decisions upon the defendant's actual conduct as opposed to simply the offense of conviction.¹⁵ The Guidelines therefore

offense system will be to determine the type of information that should be used to differentiate between offenders convicted of the same crime. The large number of overlapping offenses set forth in the federal criminal code may make inevitable the consideration of some conduct prohibited by a separate statute. See *infra* notes 138-40 and accompanying text. Delineating the extent to which "real factors," as opposed to unadjudicated offenses, should be used at sentencing is beyond the scope of this Article. For thoughtful approaches to this problem, see Reitz, *supra* note 1, at 565-71; Yellen, *supra* note 1, at 454-60.

¹² This description is intentionally oversimplified and is designed to allow a reader unfamiliar with the intricacies of Guidelines sentencing to evaluate the double jeopardy difficulties inspired by the subsequent prosecution of relevant conduct offenses.

¹³ See Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 599-600 (1992) (suggesting that a simpler, more informative grid is both possible and preferable to the 258-box, 43-level version adopted by the Commission).

¹⁴ It was through the real-offense mechanism that the Commission sought to prevent prosecutors from "circumventing" the Guidelines by charge bargaining. See Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 234 (1989). By insisting that an offender be punished for all his criminal acts without regard to whether he has been charged or convicted of these offenses, the Guidelines theoretically eliminate the impact of prosecutorial decisions to drop charges.

¹⁵ The explanation for the choice to embrace a real- as opposed to conviction-offense scheme is set forth in Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-12 (1988) and Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal*

require a court to account for certain related crimes in the offense-level computation, regardless of whether such offenses have been the subject of a conviction. The relevant conduct provision¹⁶ constitutes the major, though not exclusive, means by which unadjudicated offenses are included in the sentencing calculus.¹⁷ Section 1B1.3 extends the sentencing inquiry to all acts jointly or individually undertaken by the defendant before,

Sentencing Guidelines, 80 J. CRIM. L. & CRIMINOLOGY 883, 925-26 (1990).

¹⁶ The relevant conduct provision, crowned the "cornerstone" of the Guidelines by former Commission Chairman William Wilkins, see William W. Wilkins Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 525 (1990), provides in pertinent part:

(a) *Chapter Two (Offense Conduct) and Three (Adjustments)*. Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
- (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; . . .

U.S.S.G. § 1B1.3(a).

¹⁷ Unadjudicated crimes may also form the basis for a specific offense characteristic, see, e.g., U.S.S.G. § 2D1.1(b)(1) (requiring a two-level increase if a dangerous weapon was possessed during a drug offense, even though 21 U.S.C. § 924(c) prohibits use of a gun during the commission of a drug offense), an obstruction adjustment, see, e.g., U.S.S.G. § 3C1.1 comment. n.3(b) (requiring a two-level increase if defendant obstructed the prosecution by committing perjury, even though perjury is a separately punishable crime by statute), or departure. See, e.g., *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990) (allowing departure on the basis of defendant's uncharged terrorist activities).

during or after the conviction offense,¹⁸ to acts that were "part of the common course of conduct or common scheme or plan" as the conviction offense,¹⁹ as well as to any harm resulting from the preceding acts.²⁰

Thus, to determine a defendant's offense level, one begins with the statutory offense of conviction.²¹ Appendix A of the Sentencing Guidelines provides a handy list of federal offenses complete with the corresponding Guidelines provisions. After locating the applicable guideline, the sentencer uses the conviction-offense conduct and all other acts deemed relevant under section 1B1.3 to calculate a base offense level. This calculation may then be adjusted for other factors, such as the defendant's role in the offense²² or her acceptance of responsibility.²³

After the offense level is calculated, the sentencer moves on to determine the offender's criminal history category.²⁴ The criminal history score is calculated on the basis of criminal convictions reaching back as far as fifteen years.²⁵ Once the criminal history category is obtained, it is plotted against the offense level to yield a "sentencing range." At this point the judge may impose a prison term within the range, or "depart" if "there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission,"²⁶ or if the government has moved for a depar-

¹⁸ U.S.S.G. § 1B1.3(a)(1)(b).

¹⁹ U.S.S.G. § 1B1.3(a)(2).

²⁰ U.S.S.G. § 1B1.3(a)(3).

²¹ The Guidelines usually are referred to as a "modified" real-offense system because to some degree they hinge punishment on the offense of conviction and because the Guidelines real-offense regime encompasses a narrower range of conduct than the pre-Guidelines rehabilitative model. See Nagel, *supra* note 15, at 926-27; Wilkins Jr. & Steer, *supra* note 16, at 497.

²² See, e.g., U.S.S.G. § 3B1.1(a) (requiring a four-level increase in offense level "[i]f the defendant was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive").

²³ See U.S.S.G. § 3E1.1(a), 1.1(b) (allowing a two-level decrease in offense level if "defendant clearly demonstrates acceptance of responsibility for his offense," and an additional one-level decrease if defendant affirmatively assisted the investigation or prosecution of his offense).

²⁴ See generally U.S.S.G. Ch.4.

²⁵ See U.S.S.G. § 4A1.2(e). In limited instances where a defendant's criminal-history score seriously underrepresents the true extent of his past criminal behavior, § 4A1.3 authorizes a departure from the applicable criminal history category.

²⁶ 18 U.S.C. § 3553(b) (1988). The Commission adopted policy statements regarding the propriety of using certain types of conduct or offender characteristics as the basis for departure. See U.S.S.G. §§ 5H1.1-12, 5K2.0-16. For more in-depth

ture to reward a defendant's "substantial assistance."²⁷

The impact of facts determined at sentencing can be dramatic. For example, in *United States v. Rivera-Lopez*,²⁸ the defendant was convicted of possession with intent to distribute two kilograms of cocaine, but was acquitted by the same jury of a second drug-possession count.²⁹ At sentencing, the district court found under section 1B1.3(a)(2) that the acquittal conduct formed part of the "same course of conduct" as the crime of conviction. Consequently, the court added the two kilograms possessed as part of the conviction offense to the three kilograms attributable to the acquittal conduct to arrive at defendant's base offense level.³⁰ The inclusion of the acquittal conduct increased the defendant's maximum sentencing expo-

information regarding departures in practice and criticism of the Commission's attitudes toward departure innovations, see generally Karin Bornstein, *5K2.0 Departures for 5H Individual Characteristics: A Backdoor Out of the Federal Sentencing Guidelines*, 24 COLUM. HUM. RTS. L. REV. 135 (1993); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1715 (1991) (discussing the Commission's hostility to individual factors as a basis for judicial departures); Aaron J. Rappaport, *Reviewing Departures: The First Circuit's New Rivera Rule*, 6 FED. SENT. REP. 43 (1993); Jean H. Shuttleworth, *Childhood Abuse as a Mitigating Factor in Federal Sentencing: The Ninth Circuit Versus the United States Sentencing Commission*, 46 VAND. L. REV. 1333 (1993); Kirk D. Houser, Comment, *Downward Departures: The Lower Envelope of the Federal Sentencing Guidelines*, 31 DUQ. L. REV. 361 (1993).

²⁷ See U.S.S.G. § 5K1.1 (permitting a court to depart from even mandatory minimum sentences upon a motion from the government stating that defendant has provided substantial assistance to the investigation or prosecution of another person). Critics have identified a number of problems with a government motion requirement. First, the provision encourages disparity among similar offenders because prosecutors do not use identical standards to determine when and whether to move for departure. See Note, *Prosecutorial Discretion and Substantial Assistance: The Power and Authority of Judicial Review*, 15 CAMPBELL L. REV. 263, 273 n.72 (1993). Second, § 5K1.1 motions create disparity among co-defendants. Professor Freed cites the examples in drug cases, where minor offenders such as drug couriers receive heavy sentences because they have little assistance to offer, while kingpins receive lighter sentences after divulging information. See Freed, *supra* note 26, at 1705; see also Antoinette M. Tease, *Downward Departures For Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Co-Defendants*, 53 MONT. L. REV. 75 (1992).

The Supreme Court settled one thorny issue in this area in *United States v. Wade*, 112 S. Ct. 1840 (1992), by holding that the statutory requirement of a government motion before departure under § 5K1.1 could be overcome by a "substantial threshold showing" that the prosecutor acted in bad faith in withholding the motion. *Id.* at 1844.

²⁸ 928 F.2d 372 (11th Cir. 1991).

²⁹ *Id.* at 372.

³⁰ *Id.* at 372-73.

sure from 97 months to 151 months.

Even though facts found at sentencing are of great importance to the defendant, sentencing hearings remain informal events conducted with little regard for procedural fairness or accuracy.³¹ Sentencing facts need only be proven by a preponderance of the evidence.³² Neither the Federal Rules of Evidence³³ nor the Confrontation Clause apply.³⁴ And although defendants technically have a due process right to be sentenced only upon reliable information,³⁵ offenders are routine-

³¹ The literature attacking the procedures at sentencing is extensive. See, e.g., Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 208-25 (1991); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 323-43 (1992); Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299 (1994); Joseph P. Sargent, Comment, *The Standard of Proof Under the Federal Sentencing Guidelines: Raising the Standard to Beyond a Reasonable Doubt*, 28 WAKE FOREST L. REV. 463 (1993).

³² See, e.g., *United States v. Nyhuis*, 8 F.3d 731, 744 (11th Cir. 1994), cert. denied, 63 U.S.L.W. 3257 (U.S. Oct. 4, 1994); *United States v. Restrepo*, 903 F.2d 648 (9th Cir. 1990), cert. denied, 112 S. Ct. 1564 (1992); *United States v. Dawn*, 897 F.2d 1444, 1449-50 (8th Cir. 1990), cert. denied, 498 U.S. 960 (1990). A number of commentators have criticized the preponderance standard at sentencing as inadequate. See, e.g., Richard Hussein, Note, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387 (1990); Sargent, *supra* note 31, at 471-77.

³³ See *United States v. Prescott*, 920 F.2d 139, 144 (2d Cir. 1990) (allowing use of hearsay statements at sentencing); *United States v. Jarrett*, 705 F.2d 198, 208 (7th Cir. 1983) (allowing suspension of best evidence rule at sentencing), cert. denied, 465 U.S. 1004 (1984). Several commentators have offered excellent arguments for the application of the Federal Rules of Evidence at the sentencing hearing. See generally Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 885-91 (1992); Randolph N. Jonakait, *Insuring Reliable Fact Finding in Guidelines Sentencing: Why Not Real Evidence Rules?*, 22 CAP. U. L. REV. 31 (1993); Young, *supra* note 31, at 301.

³⁴ See, e.g., *United States v. Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990) (refusing to "superimpose the jurisprudence of the confrontation clause upon the sentencing phase"). For a thoughtful argument that the Confrontation Clause should apply at sentencing, see Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880, 1888-98 (1992).

³⁵ See *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948); David McGovern et al., Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals, 1992-1993*, 82 GEO. L.J. 597, 1188 (1994) ("Due process forbids the judge from relying on materially false or unreliable information").

ly condemned to spend years behind bars on the basis of double or triple hearsay and questionable drug quantity estimates.³⁶

B. The Subsequent-Prosecution Problem Under the Federal Sentencing Guidelines

*United States v. McCormick*³⁷ provides a simple example of the subsequent-prosecution problem under the Federal Sentencing Guidelines. McCormick was indicted in the District of Connecticut for bank fraud and related crimes involving losses of approximately \$75,000.³⁸ Some three months later, McCormick was again indicted, but this time in the District of Vermont. According to the Vermont indictment, McCormick had engaged in a series of successful and unsuccessful attempts to defraud banks and financing companies in Vermont, as well as obstruction of justice during the investigation of those offenses. The estimated loss attributable to the Vermont crimes exceeded \$4,000,000.³⁹ The Connecticut prosecution proceeded to trial first, and McCormick was convicted on all counts.⁴⁰

When the district court calculated McCormick's Guidelines' sentence, it properly considered both the fraudulent acts for

³⁶ See, e.g., *United States v. Easterling*, 921 F.2d 1073, 1077-78 (10th Cir. 1990) (To determine the relevant drug quantity for sentencing, the district court relied on the testimony of a government agent who claimed that two unidentified informants estimated purchasing "approximately two pounds each" of methamphetamine from the defendant. The court added four pounds to the .08 grams of which defendant had been convicted of distributing to arrive at the base offense level.), cert. denied, 500 U.S. 937 (1991).

The use of drug quantities to determine punishment levels has proven extremely controversial. See Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 921-22 (1991); Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187; Thomas J. Meir, Comment, *A Proposal to Resolve the Interpretation of "Mixture or Substance" Under the Federal Sentencing Guidelines*, 84 J. CRIM. L. & CRIMINOLOGY 377 (1993); Douglas J. Quivey, Note, *Market-Oriented Approach to Determining Drug Quantity Under the Federal Sentencing Guidelines*, 1993 U. ILL. L. REV. 653.

³⁷ 992 F.2d 437 (2d Cir. 1993).

³⁸ *Id.* at 438.

³⁹ *Id.*

⁴⁰ *Id.*

which McCormick was convicted and those offenses set forth in the pending Vermont indictment.⁴¹ Section 2F1.1(b)(1), the applicable guideline for bank fraud, keys punishment to the amount of money stolen.⁴² Thus, the inclusion of the Vermont frauds generated a seven-level increase in McCormick's base offense level and extended his maximum sentencing exposure from twenty-one to forty-six months.⁴³

⁴¹ *Id.* McCormick's counsel objected to the inclusion of the Vermont conduct, then the subject of a pending indictment. *United States v. McCormick*, 798 F. Supp. 203, 206 (D. Vt. 1992), *aff'd*, 992 F.2d 437 (2d Cir. 1993). In a letter to the court, the government responded by claiming that "[a] sentence based in part on the Vermont conduct will have the effect of barring further prosecution on the Vermont charges. The United States Attorney's office for the District of Vermont would have no objection to such a sentence if the court sentences within the Guidelines range appropriate to the combined total losses of all the defendant's known fraudulent schemes." Joint Appendix, at A134 (quoting letter of Oct. 30, 1991, to Judge Nevas from Assistant U.S. Attorney Hutchison of the District of Connecticut). At the sentencing hearing, the government "clarified" the position of the District of Vermont, pointing out that "it is unclear to them that they are barred from further prosecution whether or not—if the Court sentences on the Vermont fraud. It would appear that they would not be likely to pursue their charges, but I don't want to represent to the Court that that conclusion has been reached by them at this point." Joint Appendix, at A137 (quoting transcript of sentencing hearing before Judge Nevas on November 5, 1991). After exploring the ramifications of including the Vermont losses, the district court adopted the government's position. *McCormick*, 798 F. Supp. at 206.

⁴² Under U.S.S.G. § 2F1.1(b), for example, a loss of under \$2000 yields a base offense level of 6, while losses between \$40,000 and \$70,000 provoke a five-level increase, yielding a base offense level of 11.

⁴³ To calculate McCormick's sentence, one must first turn to U.S.S.G. § 2F1.1, which keys the base offense level to the amount of money stolen. But remember the relevant conduct provision requires the sentencer to consider acts outside the offense of conviction. *See supra* note 16 and accompanying text. Consequently, § 1B1.3 should be consulted to determine the scope of activity to be included in the inquiry. In this case, § 1B1.3(a)(2) provides the proper starting point. This section incorporates yet another Guidelines provision—§ 3D1.2(d)—which treats offenses as a "group" if they rely on either drug or money quantities to determine punishment levels. Since § 2F1.1 is keyed to the amount of money stolen, § 1B1.3(a)(2) requires the court to consider monies obtained as "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). The similarities in the schemes employed to defraud the Vermont and Connecticut financial institutions justify the inclusion of the losses attributable to the Vermont frauds in the base offense-level calculation. Adding the \$75,000 in losses stemming from McCormick's actions in Connecticut to the Vermont losses yields a total of \$ 4,180,000. *See* 798 F. Supp. at 210 n.7. Under § 2F1.1(b), this amount warrants a base offense level of 19. In addition, § 2F1.1(b)(2) requires a two-level increase for more than minimal planning, resulting in an offense level of 21. Because McCormick had no prior convictions, he fell into criminal history category I. His sentencing ranges was therefore 37 to 46 months. In the absence of

Most of the conduct contained in the Vermont indictment was accounted for in McCormick's Connecticut sentence, yet the U.S. Attorney's office for the District of Vermont declined to forego the second prosecution, thus provoking what I term the "subsequent-prosecution dilemma." After an unsuccessful appeal challenging the inclusion of the pending Vermont offenses as relevant conduct, McCormick filed a motion to dismiss the Vermont indictment on double jeopardy grounds. The district court granted McCormick's motion as to all counts alleging conduct that was actually used to increase the length of McCormick's Connecticut sentence.⁴⁴

1. *The Second Circuit Solution*

The Second Circuit affirmed, agreeing that the prosecution of the Vermont offenses would violate the "multiple punishment" prong of the Double Jeopardy Clause.⁴⁵ To reach this conclusion, the court relied on a three-part analysis developed by the Tenth Circuit in *United States v. Koonce*.⁴⁶ Pursuant to the *Koonce* approach, the court considered the following issues: (1) whether increasing the offense level for the conduct at issue in the initial sentencing proceeding constituted punishment within the meaning of the Double Jeopardy Clause; (2) whether Congress intended to allow a second punishment for that conduct; and (3) whether the imposition of concurrent rather than consecutive sentences would avoid the double jeopardy problem.⁴⁷

The Second Circuit found the punishment inquiry

the Vermont offenses, McCormick's sentencing range would have been 15 to 21 months. McCormick was sentenced to 46 months of imprisonment. See 798 F. Supp. at 206.

⁴⁴ Most of the acts set forth in the Vermont indictment were included in the Connecticut sentencing memorandum, but not all of the acts had resulted in an actual loss to the victim and a corresponding increase in base offense level under U.S.S.G. § 2F1.1. Because those offenses did not technically increase McCormick's sentence, the district court concluded that no multiple punishment issue was presented under the Double Jeopardy Clause. *McCormick*, 798 F.2d at 210-12.

⁴⁵ *McCormick*, 992 F.2d 437 (2d Cir. 1993). For a brief discussion of the multiple punishment prong of the Double Jeopardy Clause, see *infra* notes 120-29 and accompanying text.

⁴⁶ 945 F.2d 1145 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992).

⁴⁷ *McCormick*, 992 F.2d at 439.

"straight-forward," concluding that

McCormick was punished for the Vermont conduct that was taken into account by the Connecticut court when it determined the amount of loss for which McCormick was responsible. The government requested that the court take this conduct into account, the court explicitly stated that it was taking the conduct into account, and the ultimate sentence reflects part of McCormick's Vermont conduct.⁴⁸

The *McCormick* court divined no intent on the part of Congress to authorize a second punishment for the conduct at issue. The court pointed out that the Guidelines were enacted to alleviate disparity among sentences "imposed for similar criminal offenses committed by similar offenders."⁴⁹ Permitting a second punishment for the relevant conduct offenses would allow the government to evade this goal through piecemeal prosecution.⁵⁰

Lastly, the *McCormick* court considered whether concurrent sentences would avoid the double jeopardy problem. According to *Ball v. United States*,⁵¹ an additional conviction produces adverse collateral consequences, such as enhanced punishment pursuant to recidivist statutes, "possible delays in parole eligibility, and [general] societal stigma,"⁵² which cannot be eliminated through concurrent sentencing. Consequently, the Second Circuit rejected the notion that concurrent sentences would cure the double jeopardy defect in *McCormick*.⁵³

⁴⁸ *Id.* The court of appeals agreed with the district court that conduct that had not actually contributed to an increase in McCormick's base offense level in the original proceeding had not been punished and was, therefore, outside the scope of the double jeopardy bar. *Id.* at 439-40.

⁴⁹ *Id.* at 440 (quoting U.S.S.G. Ch.1, Pt.A(3), p.s.).

⁵⁰ *Id.* at 440-41.

⁵¹ 470 U.S. 856 (1985).

⁵² *McCormick*, 798 F. Supp. 203, 209.

⁵³ *McCormick*, 992 F.2d at 441. The decision drew a stinging dissent from Judge Mahoney, who complained that the majority had ignored the operation of Guidelines § 5G1.3(b), which was drafted specifically to deal with the instant problem. *Id.* at 443 n.2 (Mahoney, J., concurring & dissenting in part). Section 5G1.3 provides in pertinent part: "If . . . the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." *Id.* at 443. According to commentary quoted by the dissent the "guideline is intended to result in an appropriate incremental punishment for the instant offense that most

2. *The Traditional Approach*

Although the Second Circuit sought to downplay the renegade nature of the decision,⁵⁴ the *McCormick* approach arguably runs counter to nearly a century of sentencing jurisprudence. Courts typically have avoided the reach of the Double Jeopardy Clause by refusing to acknowledge that a sentence enhancement based upon the existence of an unadjudicated offense constitutes punishment for that offense. This punishment-enhancement distinction derives from the early Supreme Court case of *McDonald v. Massachusetts*,⁵⁵ in which the va-

nearly approximates the sentence that would have been imposed had all the sentences been imposed at the same time." *Id.* (quoting U.S.S.G. § 5G1.3 comment. (backg'd)). Thus, according to the dissent, no issue regarding congressional intent to allow double punishment ever arises because § 5G1.3 "recognizes and explicitly addresses the sentencing problem posed by successive prosecutions in which an overall course of conduct is segmented into separate criminal charges, but § 1B1.3 requires that the entire relevant conduct nonetheless be addressed in sentencing at both proceedings." 992 F.2d at 443.

Judge Mahoney technically filed an opinion concurring in part and dissenting in part. *Id.* at 442. The opinion dissents from the majority's double jeopardy holding, concurring only with the decision not to block the prosecution of the Vermont acts that had no effect on the Connecticut sentence. *See id.*

⁵⁴ In *McCormick*, Judge Oakes dedicated only two paragraphs to distinguish cases upholding "conviction and punishment for conduct that was previously used to enhance a defendant's sentence for other conduct." 992 F.2d at 441. Citing pre- and post-Guidelines cases that arguably conflict with the *McCormick* holding in a footnote, *Id.* at 441 n.5, he explained that "[t]he critical distinction between these other cases and *McCormick*'s case is found in our analysis of congressional intent. If Congress intends to allow the same conduct to be used to enhance a sentence and to serve as the basis for a separate prosecution, the Double Jeopardy Clause does not stand in the way." *Id.* at 442.

In *United States v. Koonce*, the Tenth Circuit also distinguished several Guidelines cases that had allowed a subsequent conviction and punishment for conduct initially used for enhancement purposes. 945 F.2d 1145, 1152 (10th Cir. 1991) (discussing *United States v. Mack*, 938 F.2d 678 (6th Cir. 1991)), *cert. denied*, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992); *United States v. Williams*, 935 F.2d 1531 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1189 (1992); *United States v. Garcia*, 919 F.2d 881 (3d Cir. 1990)). The distinguishing feature seemed to be that these cases did not involve relevant conduct enhancements. Rather, each case involved an enhancement made pursuant to the Guidelines' Chapter Three adjustments, which take into account conduct such as obstruction of justice and failure to appear at sentencing. Although the court did not explain why the point at which the unadjudicated offense is accounted for in the Guidelines calculation would make a difference, it implied that congressional intent to provide additional punishment for these offenses might be different from that regarding relevant conduct. *Koonce*, 945 F.2d at 1153.

⁵⁵ 180 U.S. 311 (1901).

lidity of an enhancement based upon a prior conviction was upheld against a double jeopardy challenge. In a terse decision, the Court concluded that the prior-conviction enhancement did not constitute a second punishment for the earlier offense; rather, the existence of the former conviction amplified the seriousness of the current offense, thus justifying a more extreme sentence.⁵⁶

Sentencing decisions both before and after the adoption of the Guidelines have relied on the *McDonald* punishment-enhancement rationale to defend the use of acquittal offenses and

⁵⁶ The *McDonald* holding probably came as no surprise to the legal community of the day. Even prior to 1901, the state courts uniformly defended double jeopardy challenges to recidivist statutes on the theory that the prior transgression of the law warranted a harsher penalty than would otherwise be required. *See, e.g., Kelley v. People*, 4 N.E. 644, 645 (Ill. 1886) ("There is no trial twice for the same offense, but twice for two crimes committed at different times."); *Chenoweth v. Commonwealth*, 12 S.W. 585, 585 (Ky. 1889) ("The increased punishment is not for the former offenses; but the previous convictions merely aggravate the last offense, and add to its punishment."). This rationale has been repeatedly upheld in the recidivist statute context. *See Gryger v. Burke*, 334 U.S. 728, 732 (1948).

McDonald acted as a springboard for other decisions rationalizing the real-offense regime. The *McDonald* punishment-enhancement theory dovetailed nicely with the rehabilitative model embraced by the Court in *Williams v. New York*, 337 U.S. 241 (1949). Under the rehabilitative model, any information relevant to a defendant's prospects for rehabilitation formed a legitimate object for inquiry at sentencing. As a result, judges relied on uncharged criminal conduct as well as a wide range of moral and social information about the defendant to devise the appropriate sentence. For more information about the history of the rehabilitative system, see generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981); Nagel, *supra* note 15, at 893-95; see also Reitz, *supra* note 1, at 528-31.

It was not too long after *Williams v. New York* that the Court, in *Williams v. Oklahoma*, 358 U.S. 576 (1969), upheld the use of a murder conviction to justify the imposition of the death penalty for a related kidnapping charge. The double jeopardy analysis in *Williams v. Oklahoma* was again short and to the point, noting only that *Williams v. New York* sanctioned the use of any information relevant to defendant's "prospects for rehabilitation," *id.* at 584, and that the defendant was not punished twice for the murder, only more severely for the kidnapping at issue. *Id.* at 587.

Later Supreme Court decisions such as *United States v. Grayson*, 438 U.S. 41 (1978), and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), further contorted the punishment-enhancement premise, extending it well beyond the realm of the prior-conviction enhancement. Many scholars have attacked the faulty due process theory upon which *Williams v. New York*, *McMillan* and *Grayson* are premised. *See Herman, supra* note 31, at 319-21, 325-37; Lear, *supra* note 1, at 1209-14. Rather than rehash this argument, this Article reevaluates the original explanation for the punishment-enhancement fiction and the extension of this reasoning beyond the prior-conviction context.

nonconviction crimes at sentencing.⁵⁷ For example, in a decision arguably inconsistent with *McCormick*,⁵⁸ the Second Circuit invoked the punishment-enhancement fiction to reject a double jeopardy challenge to an enhancement for acquittal conduct. According to *United States v. Rodriguez-Gonzalez*,⁵⁹ "the district court 'was not relying on facts disclosed at trial to punish the defendant for the extraneous offense, but to justify the heavier penalties for the offenses for which he was convicted.'" ⁶⁰ In a dubious attempt to justify the fiction, the court added: "Of course, from the point of view of the defendant receiving added prison time because of the presence of a gun, the distinction may be academic. But the analysis is crucial in considering the double jeopardy argument."⁶¹

Although *Rodriguez-Gonzalez* involved an acquittal enhancement, the majority of the courts of appeals have rejected the *McCormick* holding in the subsequent-prosecution context as well.⁶² For example, the Sixth Circuit rejected a challenge to a subsequent conviction for failure to appear at sentencing, noting that

⁵⁷ See, e.g., *United States v. Cruce*, 21 F.3d 70 (5th Cir. 1994) (post-Guidelines acquittal for nonconviction offense), *cert. denied*, 63 U.S.L.W. 3262 (U.S. Oct. 4, 1994); *United States v. Juarez-Ortega*, 866 F.2d 747, 748-49 (5th Cir. 1989) (post-Guidelines enhancement for acquittal conduct); *Sekou v. Blackburn*, 796 F.2d 108, 111 (5th Cir. 1986) (pre-Guidelines enhancement for uncharged offense); *United States v. Sweig*, 454 F.2d 181, 184 (2d Cir. 1972) (pre-Guidelines enhancement for acquittal offense).

⁵⁸ 992 F.2d 437 (2d Cir. 1993).

⁵⁹ 899 F.2d 177 (2d Cir.), *cert. denied*, 498 U.S. 844 (1990).

⁶⁰ *Id.* at 181 (quoting *United States v. Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989) (per curiam)).

⁶¹ *Id.*

⁶² See, e.g., *Williams v. Oklahoma*, 358 U.S. at 584-86; *Cruce*, 21 F.3d at 74; *United States v. Carey*, 943 F.2d 44, 46-47 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1676 (1992); *United States v. Mack*, 938 F.2d 678, 681 (6th Cir. 1991); *United States v. Williams*, 935 F.2d 1531, 1539 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1189 (1992); *United States v. Garcia*, 919 F.2d 881, 887 (3d Cir. 1990).

In *Cruce*, the Fifth Circuit confronted a subsequent-prosecution situation almost identical to that in *McCormick*. Like the defendant in *McCormick*, *Cruce* argued that the Double Jeopardy Clause barred prosecution for an offense already accounted for through relevant conduct at sentencing. The Fifth Circuit, however, had no trouble rejecting the double jeopardy claim. According to the *Cruce* court, defendant's argument "misconceive[d] the focal point of the double jeopardy protection against a second punishment as the conduct considered in setting the . . . sentence, instead of the conviction offense that prompted the . . . sentence." 21 F.3d at 74. In other words, the defendant was not punished for the relevant conduct offense, he was punished for the offense of conviction.

[The Guidelines] simply memorialize[] a long standing practice of trial judges. Prior convictions . . . are routinely used to determine the quantity of sentence. *If Appellant is correct, then any consideration [of extraneous offenses] is a second punishment and therefore is a violation of the Double Jeopardy Clause.*⁶³

Similarly, the Eleventh Circuit defended the punishment-enhancement premise by explaining that an enhancement

is not considered "punishment" for that conduct in the double jeopardy context because the court is sentencing the defendant only for the instant offense, which is considered more serious because of the defendant's other criminal conduct. *For this reason, the defendant's prior criminal convictions also may be used to impose a harsher sentence.*⁶⁴

II. PUNISHMENT, ENHANCEMENT AND THE PRIOR-CONVICTION ANALOGY

The punishment-enhancement distinction forms one of the mainstays of the real-offense regime, yet as the cases demonstrate, courts seldom subject the theoretical underpinnings of the doctrine to critical analysis. Courts apparently assume that the punishment-enhancement distinction applies with equal force to enhancements for prior convictions and those involving unadjudicated offenses. But a conviction obtained after a fair trial, and an accusation made in the absence of even the most basic constitutional protections, are not the same.⁶⁵ To treat them equally speaks volumes about the lackluster analysis to which sentencing issues are characteristically subjected.

Although the existence of a prior conviction is instinctively relevant to a subsequent punishment decision, the reasoning set forth by the Supreme Court in *McDonald* and similar cases explains only why we might *want* to increase punishment upon proof of a second conviction; it does not explain why the Constitution allows us to do so. A close review of the *McDonald* rationale demonstrates that the Court reasoned in reverse. The Court assumed that if it acknowledged that the prior offense

⁶³ *Mack*, 938 F.2d at 681 (emphasis added).

⁶⁴ *United States v. Carey*, 943 F.2d 44, 46 n.4 (11th Cir. 1991) (emphasis added), *cert. denied*, 112 S. Ct. 1676 (1992).

⁶⁵ See *supra* notes 31-36 and accompanying text.

was indeed punished by the harsher penalty at sentencing a double jeopardy violation would automatically follow. Because such a result was both intuitively and politically unpalatable, the Court simply avoided the double jeopardy question altogether by refusing to accept the punishment description.⁶⁶

Had the *McDonald* Court simply accepted the defendant's punishment premise, the flaws in the prior-conviction analogy would have been immediately apparent. Construing a prior-conviction enhancement as punishment does not alter the *McDonald* result—a second punishment is entirely consistent with the structure and purposes of the Double Jeopardy Clause. Punishment for nonconviction crimes, on the other hand, is not authorized by the Double Jeopardy Clause, is incompatible with the affirmative commands of other constitutional provisions,⁶⁷ and is wholly at odds with the basic values of the double jeopardy protection.

The Double Jeopardy Clause was intended to be "declaratory of the law as it . . . stood" and "to conform to universal practice in Great Britain and this country."⁶⁸ As many scholars have noted, the scope of the double jeopardy protection was no clearer in 1791 than it is today.⁶⁹ History suggests, however, that punishment for prior convictions at sentencing was presumed by the language of the Double Jeopardy Clause itself.

According to Professor Jay Sigler,

the law during the reign of Henry I provided that the punishment *upon a second conviction* was death or mutilation for almost any offense. Similar provisions are to be found as far back as the laws of Cnut and Ethelred. *Only a few crimes were punishable by death or mutilation on the conviction of the first offense.*⁷⁰

Thus, the phrase "life or limb" used in the final version of the

⁶⁶ *McDonald v. Massachusetts*, 180 U.S. 311, 312 (1901).

⁶⁷ Real-offense sentencing allows the government to obtain punishment for a criminal offense without adhering to the affirmative commands of the Fifth and Sixth Amendments. See Lear, *supra* note 1, at 1221, 1223-37.

⁶⁸ Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEG. HIST. 283, 298 (1963) (citing Note, 53 NW. U. L. REV. 521 (1958)).

⁶⁹ *Id.*; Thomas, *supra* note 3, at 827-28.

⁷⁰ Sigler, *supra* note 68, at 285 (quoting 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 58-59 (1883) (emphasis added)). During this time, "[a]ll crimes were punishable, instead, by . . . systems of compensation to be made to the victims' relations or to the king or local lord." *Id.* at 285.

Fifth Amendment "ha[d] a literal meaning in English history,"⁷¹ it referred to the practice of punishing an offender more severely upon proof of a second offense.⁷² This practice was followed in the American colonies, where the death penalty was applicable to a wide variety of first offenses, and also was used to punish the repeat offender.⁷³ Perhaps, then, the Double Jeopardy Clause, by including the "life or limb" qualification,⁷⁴ can be read quite literally to authorize additional punishment for previously adjudicated offenses upon conviction of a subsequent crime.⁷⁵

The legitimacy of exempting prior convictions from the reach of the double jeopardy prohibition draws further support

⁷¹ Sigler, *supra* note 68, at 285.

⁷² For example, "in Ethelred's laws it [was] said of an accused that *upon a second conviction* 'let him be smitten so that his neck break.'" Sigler, *supra* note 68, at 285 (emphasis added).

⁷³ Sigler, *supra* note 68, at 303.

⁷⁴ See *supra* note 4.

⁷⁵ Two difficulties with this analysis become immediately obvious. First, the practice in ancient England and the American colonies is equally consistent with the notion that the Constitution does not view harsher penalties upon a second conviction as punishment for the original offense. Thus, the history can be read to support the *McDonald* Court's reasoning, and that of a large number of early decisions upholding recidivist statutes. See, e.g., *Carlesi v. New York*, 233 U.S. 51 (1914) (upholding conviction under New York recidivist statute notwithstanding executive pardon); *Graham v. West Virginia*, 224 U.S. 616 (1912) (upholding West Virginia recidivist statute); *Moore v. Missouri*, 159 U.S. 673 (1895) (upholding recidivist statute). My point, however, is not that the *McDonald* Court was disingenuous or incorrect; rather, I am attempting to demonstrate that the *McDonald* Court's choice of words was completely irrelevant in the prior-conviction context. It is only when that word choice is adapted to the nonconviction-offense scenario that the punishment-enhancement designation becomes important.

Second, the Court has always treated the "life or limb" language as defining the offenses to which the Double Jeopardy Clause should extend. Although a literal interpretation of the constitutional language would restrict double jeopardy protection to cases involving capital or corporal punishment, the Supreme Court long ago rejected this position. In *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170 (1873), the Court held that double jeopardy protection extended to all crimes, not simply serious ones. See generally George C. Thomas III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195 (1991) (questioning whether some of the definitional difficulties with the same offense language might be avoided by limiting the scope of double jeopardy protection under the "life or limb" formula). I do not dispute the logic of treating "life or limb" as defining the class of cases to which the Double Jeopardy Clause should apply, but neither do I suppose that the phrase must be restricted to one use or the other. Treating it as enshrining a well-established exception to multiple punishment for prior convictions does not preclude it from delineating the types of crimes to which the Clause should extend.

from the underlying values of the Double Jeopardy Clause. Scholars have yet to agree on a single unifying theory of double jeopardy.⁷⁶ At base, however, the Double Jeopardy Clause was designed to protect the individual and the "legal system itself."⁷⁷ From the defendant's perspective, Justice Black's oft-quoted statement from *United States v. Green* eloquently sums up the purposes of the Double Jeopardy Clause:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.⁷⁸

Punishment for prior convictions at sentencing is completely consistent with these goals. Prior-conviction enhancements do not expose a defendant to embarrassment or expense beyond that already incurred. There is no question regarding the defendant's legal innocence. Her status has long been determined; the judgment has been entered. Using that conviction does not ask the defendant to defend the charge again, nor does it give the government a chance to perfect its presentation of the case.

Juxtapose this against punishment for an unadjudicated offense. A defendant may be forced to respond to a single allegation numerous times.⁷⁹ And what Professor Friedland con-

⁷⁶ See Thomas, *supra* note 3, at 828-34 (noting that "the proliferation of case law and commentary has not produced a coherent theory to date," and identifying three competing double jeopardy theories: "traditional analysis, the Rehnquist-O'Connor government oppression theory, and the verdict finality theory").

⁷⁷ MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 4 (1969).

⁷⁸ *Green v. United States*, 355 U.S. 184, 187-88 (1957).

⁷⁹ Under prevailing double jeopardy jurisprudence, a single, criminal episode may spawn a series of prosecutions for overlapping statutory violations. For example the sale of a controlled substance might provoke separate prosecutions for conspiracy, use of a telephone in connection with a drug transaction, distribution within 1000 feet of a school, and several other drug-related offenses. The quantity of drugs attributable to the conviction offense would be determined pursuant to the relevant conduct provision in each proceeding. See U.S.S.G. § 5G1.3(b) (discussed *supra* note 53 and accompanying text). Thus, although the defendant is never formally charged, he may be forced to respond repeatedly to the same allegations.

tends is the "core of the problem"—the possibility that an innocent person may be convicted of a crime after repeated dry runs by the government⁸⁰—becomes a very real possibility under the punishment-enhancement premise.

When the government alleges at sentencing that a defendant committed crimes in addition to the conviction offense, the defendant is afforded an opportunity to contest the accusation and to present evidence on the point.⁸¹ As previously pointed out, however, the sentencing hearing operates outside the ambit of the Federal Rules of Evidence and the Confrontation Clause, and seldom demands more than merely proof by a preponderance of the evidence to support government accusations.⁸² Extensive enhancements based upon double and triple hearsay are common.⁸³ Because the government's burden of proof at sentencing is so slight, the defendant essentially faces an affirmative-defense situation. The government need only raise the issue while the defendant must create sufficient doubt to undermine the court's acceptance of the government's accusations.

The government may therefore receive an important preview of the defendant's evidence regarding a disputed issue while disclosing very little of its own evidence. But because the proceeding has been excluded from double jeopardy protection, a finding in the defendant's favor affords the defendant no relief. Having had the "dress rehearsal," the government may simply prepare a more effective presentation for the next sentencing hearing or trial. This is especially troubling in the subsequent-prosecution scenario because the defendant's testimony at sentencing or that of a witness will be admissible in a later trial, whether or not the defendant elects to testify at the subsequent proceeding.⁸⁴

Of course, the traditional practice under the Guidelines

⁸⁰ FRIEDLAND, *supra* note 77, at 4.

⁸¹ See U.S.S.G. § 6A1.3(a) (requiring that parties be "given an adequate opportunity to present information to the court regarding" disputed allegations at sentencing).

⁸² See *supra* text accompanying notes 31-36.

⁸³ See, e.g., *United States v. Easterling*, 921 F.2d 1073 (10th Cir. 1990), *cert. denied*, 500 U.S. 937 (1991); see also *Heaney*, *supra* note 31, at 210; *Young*, *supra* note 31, at 342-46.

⁸⁴ See FED. R. EVID. 801(d)(2).

provides a defendant with little incentive to proceed to trial once an offense has been accounted for in the original sentencing hearing. An acquittal saves little beyond a more extensive record. For many defendants not wealthy enough to afford multiple trials and not poor enough to qualify for a federal defender, avoiding such collateral consequences may not be worth the expense.

In addition to protecting the individual, the Double Jeopardy Clause safeguards important systemic finality goals.⁸⁵ The Clause preserves the sanctity of judicial decisions, thus conserving precious judicial resources and ensuring that "court proceedings . . . 'command the respect and confidence of the public.'"⁸⁶ "By preventing harassment and inconsistent results," the Double Jeopardy Clause protects the criminal justice system itself.⁸⁷

Prior-conviction enhancements are entirely consistent with the finality of the original verdict. The verdict is in no way disturbed; facts found by judge or jury remain intact. It is the fact of the first conviction, as opposed to the underlying events leading to it, that merits additional punishment. System-wide efficiency and consistency goals are not implicated.

In the case of the unadjudicated-offense enhancement, the finality value is wholly offended. The punishment-enhancement premise exposes the system to successive revisions of findings of fact. The significance of events comprising relevant conduct may be repeatedly relitigated. The Guidelines require all relevant conduct to be accounted for at sentencing regardless of whether the unadjudicated conduct has been the subject of enhancement at another proceeding.⁸⁸ Thus, one district court may reject entirely the government's accusations, while another may accept the same information with little investigation. Under the Guidelines, such revisions are not restricted to the relatively ad hoc judgments at sentencing but extend to judgments of acquittal after a full and fair jury trial.⁸⁹ Not

⁸⁵ See FRIEDLAND, *supra* note 77; Thomas, *supra* note 3, at 869.

⁸⁶ FRIEDLAND, *supra* note 77, at 4 (quoting *Connelly v. D.P.P.*, 1964 App. Cas. 1254, 1353 (appeal taken from Criminal Ct. of Appeals)).

⁸⁷ FRIEDLAND, *supra* note 77, at 4.

⁸⁸ See U.S.S.G. § 5G1.3 comment.

⁸⁹ The now-famous colloquy between the district judge and defense counsel in *United States v. Juarez-Ortega*, 866 F.2d 747, 748-49 (5th Cir. 1989), provides the

only does this erode the credibility of the judiciary, but it further subverts the efficiency of a badly overtaxed system.⁹⁰

It is time to abandon the fictional view of punishment

most fascinating (and horrifying) illustration of the dangers of acquittal enhancements. In *Juarez-Ortega*, the defendant was acquitted of use of a firearm in connection with a drug offense, but the district court justified an upward departure on the basis of the gun use. For the benefit of those unfamiliar with the passage, it is reprinted below:

The Court: The jury could not have made—the jury could not have listened to the instructions.

[Counsel]: Your Honor,—

The Court: The testimony was so strong. The gun was even in the apartment. That's all they needed. There was no dispute of that fact. The mere fact that that gun was in the apartment, being used in association with—he didn't have to have it on his person.

[Counsel]: They perhaps didn't believe it was being used in association with drug-related activity, your Honor.

The Court: Well, I'll tell you something: I have been disappointed in jury verdicts before, but that's one of the most important ones, because what it did, it set up a disparity in result between the two defendants. Your client was consistently selling cocaine from his apartment and using a firearm. The fact is that the officers came in and testified that it was in your clients waistband and described, had an officer on the stand, a man who is an ATF agent, who is capable and knows what a firearm looks like, telling them, "This is what I saw."

There is no reason for him not to have seen that, since its undisputed that the firearm was in the apartment and its undisputed that the firearm was used in connection with drug sales and used [for] the purpose of protecting drug sales. And then here in number twelve, there is no doubt at all that the firearm was brought for him. It's all a pattern. This firearm was used. They had to absolutely disregard the testimony of a government agent for no reason—no reason.

[Counsel]: Perhaps they considered the testimony of the other agent who testified that he couldn't be sure, your Honor.

The Court: Well, you can take it up with an appellate court because I've made my findings on the record.

Id. at 749. On appeal, the Fifth Circuit found nothing objectionable about the judge's decision. *Id.*

⁹⁰ During the years between 1980 and 1990, criminal prosecutions in the federal courts for drug offenses increased by 258%. U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 1992, at 485 (Kathleen McGuire et al. eds.). In 1991, each district court had an average of 71 pending cases. *Id.* at 485. In addition, a post-Guidelines survey revealed that 50% of federal judges responding estimated a 25% increase in time devoted to sentencing and one-third of those surveyed reported an increase of 50%. See FEDERAL COURTS STUDY COMMISSION, REPORT OF THE FEDERAL COURTS STUDY COMMISSION 137 (1990).

adopted to explain the use of prior convictions at sentencing. The glare of the Guidelines exposes the flaws in the approach. Both prior-conviction enhancements and enhancements for unadjudicated crimes punish the defendant by causing her sentence to be longer than it otherwise would be. But the rejection of unadjudicated offenses at sentencing does not require us to ignore criminal history. Additional punishment upon a second conviction is consistent with the language, history and underlying values of the Double Jeopardy Clause. Significantly, enhancements for unadjudicated crimes have no such heritage, are explicitly prohibited by affirmative requirements in other clauses of the Constitution,⁹¹ and are wholly inconsistent with the most basic goals of the double jeopardy provision. *McCormick* was correct in shunning precedent and identifying related offense enhancements as punishment.

III. DOUBLE JEOPARDY AND THE SUBSEQUENT-PROSECUTION DILEMMA

Jettisoning the punishment-enhancement distinction does not magically transform the Double Jeopardy Clause into a powerful weapon at sentencing. In fact, a close analysis of the Second Circuit's attempt to apply prevailing double jeopardy doctrine to the subsequent-prosecution scenario demonstrates the extent to which that doctrine must be perverted to achieve even a moderate degree of justice. The major difficulty stems from the fact that double jeopardy jurisprudence is predicated upon the existence of a triggering event: a second trial after conviction, acquittal or mistrial; or a second punishment after an earlier conviction. Real-offense sentencing evades the trial and conviction requirements, thereby positioning punishment at sentencing outside the literal scope of the Double Jeopardy Clause.

Double jeopardy challenges typically are characterized as either "multiple punishment" or "successive prosecution" claims⁹² because a defendant may neither be punished nor

⁹¹ See *infra* text accompanying notes 130-35; Lear, *supra* note 1, at 1223-37.

⁹² See *United States v. Dixon*, 113 S. Ct. 2849, 2881 (1993) (Souter, J., concurring and dissenting in part) (explaining that the Double Jeopardy Clause protects against "multiple punishment" and "successive prosecution").

prosecuted more than once for the same offense. Although the Court has flirted with a broader "offence" definition under the Double Jeopardy Clause,⁹³ the *Blockburger* test supplies the classic method for determining whether two offenses are in fact the same.⁹⁴ Under the *Blockburger* formula, a subsequent prosecution is constitutionally acceptable so long as each statutory offense "requires proof of a fact which the other does not."⁹⁵

Moreover, in the case of a multiple punishment claim, even "the *Blockburger* test will not prevent multiple punishment where legislative intent to the contrary is clear."⁹⁶ According to the Supreme Court in *Missouri v. Hunter*, "[w]here . . . a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes proscribe the same conduct under *Blockburger*, a court's task of statutory construction is at an end and the [government may obtain] cumulative punishment under such statutes in a single trial."⁹⁷ Thus, although the *Blockburger* test will prevent the government from imposing a second punishment for the same offense in a subsequent prosecution, the government may in a single proceeding impose multiple punishment for the "same offense" so long as legislative intent to do so is absolutely clear. Absent a plain expression of intent, however, the Double Jeopardy Clause prohibits the imposition of additional punishment for that offense regardless of whether the new sentence runs concurrently with the one originally imposed.⁹⁸ In *Ball v. United States*, the Court rejected concurrent sentences as a remedy for multiple punishment violations on the ground that an additional conviction carries with it the

⁹³ See *Grady v. Corbin*, 495 U.S. 508 (1990) (adopting conduct-based offense definition); *Dixon*, 113 S. Ct. at 2860 (overruling *Grady* and adopting the *Blockburger* test to determine if offenses are the "same").

⁹⁴ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

⁹⁵ *Dixon*, 113 S. Ct. at 2866 (Rehnquist, C.J., concurring and dissenting in part) (quoting *Blockburger*, 284 U.S. at 304).

⁹⁶ *Id.* at 2882.

⁹⁷ 459 U.S. 359, 368-69 (1983).

⁹⁸ See *Whalen v. United States*, 445 U.S. 684, 694-95 (1980); Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1031-32 (1980); Kenneth G. Schuler, Note, *Continuing Criminal Enterprise Conspiracy and the Multiple Punishment Doctrine*, 91 MICH. L. REV. 2220, 2226-27, 2232 (1993).

possibility of "adverse collateral consequences."⁹⁹

A. McCormick's *Multiple Punishment Theory*

Although the second and third prongs of the *McCormick* approach seem significantly less controversial than the first, they illustrate the serious difficulties with invoking the double jeopardy prohibition in the sentencing setting.¹⁰⁰ Following a classic multiple punishment analysis, the second step of the *McCormick* test asks whether Congress intended for a defendant to be punished once through relevant conduct enhancements, and again after conviction in a subsequent prosecution. The question itself is flawed, however, because the court assumes that Congress may authorize cumulative punishments for offenses deemed the same under the *Blockburger* test to be administered in successive proceedings.¹⁰¹ To date, the Supreme Court has limited cumulative punishment for "overlapping" offenses to a single trial setting.¹⁰² Even if the legislature permits multiple punishment for the same offense, the multiple prosecution component of the Double Jeopardy Clause bars multiple trials for offenses failing the *Blockburger* test. But because courts have refused to equate the sentencing hearing with a prosecution,¹⁰³ the multiple prosecution protection does not provide the usual limit on the legislature's power in this context. Thus, under the *McCormick* approach, the legislature is free to prescribe cumulative punishment for the same offense through a series of sentencing hearings or trials.

Also troubling is the fact that the Second Circuit reviewed the Guidelines themselves for evidence of congressional intent rather than the Sentencing Reform Act. Although cumulative punishment may be authorized by the legislature, such autho-

⁹⁹ 470 U.S. 856, 865 (1985). These collateral consequences include "social stigma," "parole ineligibility," "impeachment of character in a future proceeding," and "possible increased sentence pursuant to a recidivist statute." *Id.*

¹⁰⁰ See *supra* text accompanying notes 45-53.

¹⁰¹ *United States v. McCormick*, 992 F.2d 437, 439 (2d. Cir. 1993).

¹⁰² See *Missouri v. Hunter*, 459 U.S. 359, 369 (1983).

¹⁰³ See, e.g., *United States v. Koonce*, 885 F.2d 720, 722 (10th Cir. 1989) (Although defendant had arguably been punished for the unadjudicated offense at sentencing, he had not been charged with the offense at issue and the multiple prosecution prohibition was therefore not implicated.), *cert. denied*, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992).

rization must be unequivocally clear.¹⁰⁴ Absent evidence of such intent, the rule of lenity requires courts "to resolve doubts in the enforcement of a penal code against the imposition of harsher punishment."¹⁰⁵ Realistically, the Guidelines represent the intent of the Sentencing Commission rather than of Congress. Congress takes no affirmative steps regarding the content of the Federal Sentencing Guidelines. The Guidelines themselves are drafted by the Commission and become law automatically, absent congressional disapproval.¹⁰⁶

A review of the Sentencing Reform Act¹⁰⁷ confirms that the legislation sought to eliminate "unwarranted sentence disparities among defendants with similar records . . . [convicted] of similar crimes."¹⁰⁸ The Act also stressed "the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of . . . multiple offenses committed in the same course of conduct."¹⁰⁹ On the other hand, 18 U.S.C. § 3584 authorizes the imposition of consecutive or concurrent sentences in cases where the defendant "is already subject to an undischarged term of imprisonment," and seems to require consecutive sentences when "multiple terms of imprisonment are imposed at different times" unless otherwise ordered by the court.¹¹⁰ This general authorizing language seems a bit vague to overcome the presumption in favor of noncumulative punishment, but had the Commission embraced a consecutive-sentence approach, it would at least be arguable that Congress had authorized such a result. Under the Second Circuit's approach, then, a Commission decision to authorize cumulative punishment for offenses punished through relevant conduct and later prosecuted in a separate proceeding, would be respected even though current multiple punishment doctrine forbids cumulative punishment in succes-

¹⁰⁴ See Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 119-20; Schuler, *supra* note 98, at 2232.

¹⁰⁵ *Bell v. United States*, 349 U.S. 81, 83-84 (1955); Westen & Drubel, *supra* note 104, at 117-18.

¹⁰⁶ 28 U.S.C. § 994 (1988).

¹⁰⁷ Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3586 (1988), 28 U.S.C. §§ 991-998 (1988).

¹⁰⁸ 18 U.S.C. § 3553(a)(6) (1988); S. REP. NO. 225, 98th Cong., 1st Sess. 38 (1984).

¹⁰⁹ 28 U.S.C. § 994(l)(1)(A).

¹¹⁰ 18 U.S.C. § 3584(a).

sive proceedings.

More to the point, however, I do not read the Guidelines to authorize cumulative punishment in the *McCormick* situation. As the dissent in *McCormick* pointed out, section 5G1.3, entitled "Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment," theoretically avoids disparity in sentences brought about by piecemeal prosecution. The relevant subsection for our purposes is section 5G1.3(b), which provides

If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.¹¹¹

According to the background commentary, the "guideline is intended to result in an appropriate incremental punishment for the instant offenses that most nearly approximates the sentence that would have been imposed had all the sentences been imposed at the same time."¹¹² The guideline and accompanying commentary are hardly models of clarity.¹¹³ The "fully taken into account" language is somewhat obscure; however, the application notes suggest that it is limited to situations involving related offenses factored in as part of relevant conduct.¹¹⁴ Related offenses accounted for as specific offense

¹¹¹ U.S.S.G. § 5G1.3(b). Note that subsection (b) applies only if subsection (a) does not. Subsection 5G1.3(a) applies to offenses committed while defendant was "serving a term of imprisonment . . . or after sentencing for, but before commencing service of, such term of imprisonment." In such a case, the Guideline requires that the sentence for the instant offense be "imposed to run consecutively to the undischarged term of imprisonment." U.S.S.G. § 5G1.3(a). Subsection 5G1.3(c) is a policy statement that allows consecutive sentences in cases not covered by (a) or (b), to the extent "necessary to achieve a reasonable incremental punishment for the instant offense."

¹¹² See U.S.S.G. § 5G1.3, comment. (backg'd).

¹¹³ The guideline has been amended four times since it was first promulgated in 1987. On several of these occasions it was deleted its entirety and replaced with a new guideline dealing with the same issue.

¹¹⁴ Application Note 2 provides in pertinent part: "Subsection (b) . . . addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under § 1B1.3 ([r]elevant conduct) in determining the offense level for the instant offense. U.S.S.G. § 5G1.3, comment. (n.2)." It is not at all clear that subsection (b) requires concurrent sentences when related offense have been considered via relevant conduct, but the full force of the offense has been limited by the statutory maximum for the offense of conviction. In such

characteristics,¹¹⁵ or through another adjustment to the offense level, do not appear to be included. Such enhancements are not generally equivalent in length to the sentence that would have followed a conviction for that offense. These offenses would therefore not be "fully take[n] into account" in an original sentence.

A fair reading of section 5G1.3 in the *McCormick* case should have produced a sentence that, when combined with the earlier sentence, would have roughly approximated the total sentence the defendant would have received had he been tried on all counts in one proceeding. The application notes appear to require the district court to (1) calculate the guidelines sentence using all relevant conduct, including conduct for which a conviction has been obtained; (2) calculate the sentence for the instant offense; (3) subtract from this number the amount of time already served for the related offense; and (4) enter a sentence that runs concurrently with the remaining time left on the first sentence.¹¹⁶

Thus, assuming that McCormick had been convicted on all forty-one counts of the Vermont indictment, the court should have used the Connecticut frauds to determine the base offense level, added in the appropriate adjustments, and chosen a sentence. Assuming for our purposes that McCormick had served six months of his forty-six-month sentence, the Vermont court should have subtracted six months from the total Ver-

situations, subsection (c) appears to allow an appropriate consecutive sentence.

Relevant conduct is not the only method by which related offenses are accounted for at sentencing. Section 5G1.3 does not appear to demand concurrent sentences for offenses taken into account as specific offense characteristics, as the basis of an obstruction enhancement, see U.S.S.G. § 3C1.1, or through other offense-level adjustments. Adjustments of this sort normally do not yield offense level increases equal in length to the sentence that would have followed a formal conviction for that offense. Thus, unadjudicated crimes included as specific offense characteristics or through other adjustment provisions do not satisfy the "fully take[n] into account" requirement in § 5G1.3(b).

¹¹⁵ For example, under U.S.S.G. § 2D1.1(b)(1) the base offense level of a defendant convicted of distributing a controlled substance should reflect a two-level increase if a dangerous weapon was possessed as part of the drug transaction. Use of a gun during a drug transaction constitutes a separate criminal offense under 18 U.S.C. § 924(c). Because the application of § 5G1.3(b) appears to be restricted to relevant conduct enhancements, a sentence based upon a subsequent conviction for the gun offense would run consecutively and would not credit the prison time attributable to the gun enhancement.

¹¹⁶ See U.S.S.G. § 5G1.3(b) comment. (n.2).

mont sentence and entered a concurrent sentence as to the rest. The result should have equaled the aggregate prison term McCormick would have received had the Connecticut and Vermont counts been joined in a single indictment.

The *McCormick* panel, however, concluded that the subsequent prosecution, if successful, would impose an additional punishment unauthorized by Congress, and went on to consider whether concurrent sentencing (like that potentially authorized by section 5G1.3) would avoid the double jeopardy bar. In *Ball v. United States*, the Supreme Court acknowledged that a defendant convicted of multiple, overlapping offense could suffer "adverse collateral consequences."¹¹⁷ Such consequences included the possibility that the additional conviction would be used to enhance his sentence under a recidivist statute, impeach his testimony at a later proceeding, or affect a parole decision.¹¹⁸

Here again the traditional multiple punishment analysis breaks down in the sentencing setting. All of the adverse collateral consequences contemplated in *Ball* derive from the existence of the additional conviction for the same offense, as opposed to any additional punishment. In the *McCormick* scenario, however, there is no second conviction from which the collateral consequences might flow. Although the same conduct could conceivably be used against the defendant at any number of sentencing hearings, only one conviction (as opposed to punishment) can constitutionally be imposed for that offense. In the recidivist statute example, a defendant who commits a subsequent state offense might suffer recidivist treatment if that state counts only the number of convictions to determine recidivist status.¹¹⁹ But the federal government could constitutionally have prosecuted the offenses at separate proceedings in the first instance. Unless we are prepared to say that such collateral consequences present a double jeopardy bar to separate prosecutions of related offenses, it seems odd to suggest that concurrent sentences in *McCormick* give rise to such a

¹¹⁷ See *Ball v. United States*, 470 U.S. 856, 865 (1985). For a discussion of "collateral consequences," see Schuler, *supra* note 98, at 2227.

¹¹⁸ *Ball*, 470 U.S. at 865; Schuler, *supra* note 98, at 2227.

¹¹⁹ See Schuler, *supra* note 98, at 2228 n.59 (listing state statutes). In the federal system, the Guidelines count concurrent sentences arising from related offenses only once for criminal history purposes. U.S.S.G. § 4A1.2(a)(2).

bar.

B. *Double Jeopardy Blues*

Singling out the multiple punishment prong of the Double Jeopardy Clause for application at sentencing raises other serious doctrinal difficulties. If the punishment finding is limited to subsequent-prosecution scenarios like that in *McCormick*,¹²⁰ we find ourselves in an extremely awkward position regarding acquittals: the *McCormick* solution attributes greater preclusive effect to the use of an unadjudicated offense at sentencing than it does to an acquittal returned by a jury after a full and fair trial. Thus, under the *McCormick* approach, the multiple punishment prohibition would preclude the prosecution of an offense used at sentencing that has never been the subject of an indictment and trial, but would create no bar to punishment for acquittal conduct.

Attempting to harmonize the acquittal jurisprudence under the double jeopardy rubric opens a Pandora's box of problems. Traditional double jeopardy jurisprudence prohibits a second trial after acquittal. Acquittals are thus protected under the multiple prosecution prong as opposed to the multiple punishment prong of the Double Jeopardy Clause. Certainly the *McCormick* scenario fits easily into the multiple prosecution analysis,¹²¹ directly implicating the values protected un-

¹²⁰ Even adopting the limited exception for successive punishment cases crafted by the Second and Tenth Circuits requires difficult interpretations of the use of conduct at previous sentencing hearings. Consider, for example, *United States v. Garcia*, 919 F.2d 881 (3d Cir. 1990). Simply figuring out whether—and in what manner—the sentencing court in the previous prosecution had used the related offense information required four pages of detailed consideration. *Id.* at 883-87.

Peter Henning suggests that a better approach to the subsequent-prosecution dilemma than that offered in *McCormick* or *Koonce* might be to focus on *Dixon's* lesser-included offense analysis to determine whether the government is proving the same elements that were introduced at sentencing to convict the defendant in the subsequent prosecution. Peter Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1, 30-31 (1993). This requires courts to distinguish between conduct that relates to the quality of the first offense, and conduct that is outside the offense of conviction but is considered to be related to the sentenced criminal activity. *Id.* at 31. If the conduct concerns the quality of the offense, then its use in sentencing does not raise double jeopardy concerns because it will not involve proof of elements that constitute a separate offense. *Id.*

¹²¹ In fact, if one concludes, as I do, that U.S.S.G. § 5G1.3(b) avoids any addi-

der the multiple prosecution prohibition. Though not inspiring the ire of the acquittal cases, prosecutions for offenses already punished as relevant conduct insult the central purposes of the multiple prosecution prohibition. As pointed out earlier, one of the main objects of the Double Jeopardy Clause is to avoid repeated dress rehearsals and the attendant danger that a defendant, though innocent, may be found guilty.¹²² Guidelines sentencing allows the government to punish a criminal offense without the nuisance of indictment or trial, while allowing the prosecution to perfect its case at sentencing.¹²³ Not only does the Guidelines system leave open the real possibility that an innocent person may be punished through relevant conduct, but it enhances the prospect that an innocent person may be convicted at a formal trial after the government has had a "dry run" at sentencing. Such a system strikes at the very heart of the multiple prosecution protection.¹²⁴

But applying the multiple prosecution prong to acquittal enhancements or to the *McCormick* subsequent-prosecution scenario requires courts to equate the sentencing hearing with a trial or prosecution.¹²⁵ For obvious reasons, courts have

tional punishment after the subsequent prosecution, the multiple-prosecution prong is the only means by which the Double Jeopardy Clause conceivably could apply.

¹²² See *Green v. United States*, 355 U.S. 184, 187-88 (1957).

¹²³ In cases involving relevant conduct enhancements, this possibility is foreclosed in the Second and Tenth Circuits.

¹²⁴ The rationale for extending double jeopardy protection to government-provoked mistrials applies with even greater force in the sentencing arena. Jeopardy is held to attach at the beginning of trial, rather than upon conclusion, to prevent the government from avoiding the double jeopardy bar by the simple expedient of provoking a mistrial. Professor Westen and co-author Drubell contend that the mistrial cases are explained by a combination of finality interests and the desire to thwart government manipulation. See Westen & Drubell, *supra* note 104, at 91-97. Under the Guidelines, the government may evade the reach of the Double Jeopardy Clause simply by declining to indict the defendant for the offense at issue. The government's ability to avoid the affirmative obligations of the Fifth and Sixth Amendments likely exposes the system to substantially greater abuse than does manipulation of the mistrial process. The likelihood of an inaccurate conviction after mistrial is negligible compared to the possibility of an erroneous judgment and punishment at sentencing.

¹²⁵ The multiple prosecution prong protects a defendant from a second trial for the same offense after conviction or acquittal. It does not protect the defendant from a second proceeding, nor does it technically protect a defendant from punishment for the acquittal conduct after the acquittal.

Long established constitutional doctrine makes clear that . . . the guarantee against double jeopardy imposes no restrictions upon the length of a

balked at taking such a step.¹²⁶ It would be implausible to suppose that the sentencing hearing could obtain such status for double jeopardy purposes without provoking the application of the entire spectrum of procedural requirements, including trial by jury.¹²⁷

Holding that enhancement equals punishment in the multiple punishment context is equally precarious. No principled method for limiting the "punishment" designation to double jeopardy cases exists. This finding is in direct conflict with precedent in almost every circuit upholding the use of acquittals¹²⁸ and other uncharged conduct.¹²⁹ The question of how the government constitutionally may "punish" anyone for a criminal offense without complying with the Fifth and Sixth Amendments seems certain to follow.

sentence imposed upon reconviction. At least, since 1896, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside. . . . And, at least since 1919, . . . it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction.

North Carolina v. Pearce, 395 U.S. 711, 719-20 (1969) (citations omitted). *But see* William J. Kirchner, *Punishment Despite Acquittal: An Unconstitutional Aspect of the Federal Sentencing Guidelines?*, 34 ARIZ. L. REV. 799, 819 (1992) ("facts relating to a prior acquittal should be seen as a special category that is protected by the Double Jeopardy Clause"). The reason double jeopardy jurisprudence has not encompassed these situations is that the Constitution does not recognize the possibility of their existence. The affirmative commands of the Fifth and Sixth Amendments are not optional; the government acts lawlessly by imposing punishment for particular conduct without first obtaining a conviction for that offense. *See* Lear, *supra* note 1, at 1232.

¹²⁶ *See, e.g.*, United States v. Carey, 943 F.2d 44, 46 (11th Cir. 1991); United States v. Mack, 938 F.2d 678, 681 (6th Cir. 1991); United States v. Koonce, 885 F.2d 720, 722 (10th Cir. 1989).

¹²⁷ *See, e.g.*, United States v. Mobley, 956 F.2d 450, 455 (3d Cir. 1992) (refusing to give a convicted criminal the "full panoply of constitutional rights" afforded to an accused at the trial stage).

¹²⁸ *See, e.g.*, United States v. Rodriguez-Gonzalez, 899 F.2d 177, 182 (2d Cir. 1990); United States v. Mocciala, 891 F.2d 13, 17 (1st Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989).

¹²⁹ *See, e.g.*, United States v. Galloway, 976 F.2d 414, 422-27 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1420 (1993); United States v. Martinez, 924 F.2d 209, 211 (11th Cir. 1991).

IV. REJECTING THE REAL-OFFENSE MODEL

The problem with the *McCormick* approach to the subsequent-prosecution dilemma is that the court chose the wrong remedy to deal with a legitimate constitutional problem. As the foregoing analysis demonstrates, the Double Jeopardy Clause is strangely ill-equipped to deal with the prosecution of offenses already used at sentencing or with the reconsideration of acquittal conduct for enhancement purposes. Instead of contorting double jeopardy jurisprudence to prohibit subsequent-prosecutions, courts should look to the Due Process Clause to prohibit the punishment of unadjudicated crimes in the first instance.

I have argued elsewhere that the systemic imbalance created by the real-offense premise renders the system unconstitutional under the Due Process Clause.¹³⁰ Consider the end result of real-offense sentencing: an individual is punished for an offense of which he has never been convicted. Allowing the government to impose punishment for a criminal offense absent conviction dislodges the jury from its crucial oversight role in the criminal justice system. In our constitutionally created criminal justice regime, any of the three actors—judge, jury (grand or petit) or prosecutor—acting alone may exercise mercy.¹³¹ The reverse is not true. The Constitution requires una-

¹³⁰ See *Lear*, *supra* note 1, at 1186. The premise of the earlier article is that real-offense sentencing is unconstitutional, not because of a change in sentencing approach, but because it was unconstitutional in the first instance. Thus, I contend that *Williams v. New York*, 337 U.S. 241 (1949), the opinion in which the Supreme Court gave its official blessing to real-offense sentencing, was wrongly decided. In addition, though I doubt the Court was correct 45 years later in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which held that the Due Process Clause allows serious sentencing enhancements upon proof by a preponderance of the evidence, I argue that it is the use of the nonconviction offense, rather than the quantum of proof, that renders the *McMillan* scenario unconstitutional.

In questioning the legitimacy of the real-offense system, I join many other scholars writing both before and after the adoption of the Guidelines. See, e.g., Heaney, *supra* note 31, at 185-225; Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 920-24 (1962), reprinted in SANFORD H. KADISH, *BLAME AND PUNISHMENT* 250 (1987); Reitz, *supra* note 1; Stephen J. Schulhofer, *Due Process at Sentencing*, 128 U. PA. L. REV. 733, 757-72 (1980); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550, 1564-85 (1981).

¹³¹ The judge may dismiss the indictment or enter a judgment of acquittal absent the agreement of prosecutor or jury; the prosecutor may refuse to indict in

nimity; all three actors must agree before an individual may be punished for a criminal offense.¹³² At the heart of this system lie the grand and petit juries, hailed by the people as the bulwark of liberty, the soul of American freedom.¹³³ Yet the real-offense system allows the government to obtain punishment without ever presenting the charge for grand jury review, and without ever preparing a case for petit jury scrutiny.¹³⁴ The three-way dialogue so critical to the stability of the criminal justice system becomes linear; punishment decisions are the result of discussions between judge and prosecutor. The affirmative commands of the Fifth and Sixth Amendments become superfluous, and the jury—the crown jewel of our constitutional plan for the administration of justice—is rendered powerless to protect the citizen from the overzealous prosecutor or the unscrupulous judge.¹³⁵

The subsequent-prosecution dilemma under the Guidelines simply provides another example of the systemic dislocation created by the real-offense system. Allowing punishment absent conviction renders the Double Jeopardy Clause incompetent to protect its most basic purposes.¹³⁶ Instead of attempting to revamp various constitutional provisions to inject a

spite of opposition from the grand jury or judge; the grand jury may decline to indict, and the petit jury decline to convict, despite the strength of the government's case or the opinion of judge or prosecutor. See Lear, *supra* note 1, at 1223-24; see also Akhil R. Amar, *The Bill of Rights as Constitution*, 100 YALE L.J. 1131, 1184-85 (1991).

¹³² Amar, *supra* note 131, at 1184-85; Lear, *supra* note 1, at 1224.

¹³³ See FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 21-29 (1951); SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW* 34 (1990); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1779, at 652-53 (Leonard W. Levy ed., Da Capo Press 1970) (1833).

¹³⁴ Many commentators have pointed out that the Guidelines' real-offense system actually makes it much easier for the prosecution to secure punishment for a particular offense at sentencing than to obtain a conviction via trial or guilty plea. For instance, a prosecutor faced with proof problems, either regarding the credibility of an informant or the presence of illegally seized evidence, may decline to seek an indictment or drop the count before trial or plea. If that offense falls within the scope of relevant conduct, she may in many instances obtain the identical sentence for that offense that she would have obtained had the defendant been convicted. See Freed, *supra* note 26, at 1714; Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 774 (1992).

¹³⁵ See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

¹³⁶ See, e.g., *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989) (judge disagreed with jury acquittal and imposed punishment accordingly).

modicum of fairness into sentencing, the courts should reconsider the real-offense regime in its entirety.

In the face of a practice that is demonstrably incompatible with the fundamental principles of our criminal justice system, the federal judiciary steadfastly claims the "discretion" to "enhance" for unadjudicated crimes. The real-offense component of the Guidelines allows prosecutors to avoid the rigors of indictment and trial, is patently unfair, and generates an enormous workload for the courts.¹³⁷ The federal courts lost control over sentencing originally because they allowed an inequitable system to proceed unchecked. The courts should think hard about the consequences of doing that twice.

The Commission, too, should reconsider its infatuation with the real-offense model. Conduct forming the underlying basis for a separate statutory offense, or conduct that, when combined with the conviction-offense conduct, would constitute a separate crime,¹³⁸ should be excluded from the sentencing inquiry.¹³⁹ I recognize that this formula is more easily stated than applied. Congress has not neatly defined federal crimes;

¹³⁷ See FEDERAL COURTS STUDY COMMISSION, *supra* note 90, at 137 (reporting that over half of federal judges responding to the survey estimated a 25% increase in time devoted to sentencing and one-third of those surveyed reported an increase of 50%).

¹³⁸ Professors Tonry and Coffee refer to such facts as "legally recognized facts," which they define to be facts that form "elements of substantive offense definitions and constitute the basis for hierarchical distinctions between offenses." Michael Tonry & John C. Coffee, Jr., *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms*, in ANDREW VON HIRSCH ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* 142, 155 (1987). For example, the Guidelines treat the use of a gun in connection with a drug offense as a specific offense characteristic under § 2D1.1(b)(1), even though such conduct is a criminal offense under 18 U.S.C. § 924(c). If a conviction-offense regime were adopted that excluded both nonconviction offenses and "legally cognizable facts," the gun could not be used as a sentencing factor to calculate the appropriate sentence for a drug conviction. Similarly the use of a gun could not be introduced as an aggravating factor against a defendant convicted of robbery in a jurisdiction that has an armed robbery statute. See *id.* at 155-56.

¹³⁹ Professor Reitz proposed the following "working" definition of a conviction-offense system:

"Conviction-offense sentencing" allows punishment based on:

- (1) The current conviction offenses,
- (2) Aggravating and mitigating facts associated with the conviction offenses, excluding facts that have been defined by the legislature as separate offenses or as elements of separate offenses, and
- (3) Prior conviction offenses.

Reitz, *supra* note 1, at 535.

rather, overlapping statutes are the norm, and perhaps we must accept that any rational sentencing system will require the consideration of some extraneous, and arguably criminal, conduct. Delineating the instances in which sentencing factors should encompass criminal conduct outside the offense of conviction will require a more detailed analysis than is possible here. Several commentators have suggested workable models exhibiting greater respect for constitutional values and reflecting more thoughtful policy choices than the Guidelines system.¹⁴⁰

The Commission must recognize that the use of unadjudicated offenses at sentencing likely has contributed to, rather than prevented, unwarranted disparity.¹⁴¹ Too many factual

¹⁴⁰ For example, Professor Reitz outlines a "beginning theory" of sentencing facts and conviction facts in a conviction-offense system. According to Professor Reitz "inquiries with the greatest claim on the sentencing process are those which: (1) are necessary to effectuate a jurisdiction's purposes of punishment and (2) are too detailed or qualitative to be captured in terms of a statute and decided at trial." Reitz, *supra* note 1, at 566. Nonconviction offenses, legally cognizable facts (i.e., facts that form "elements of substantive offense definitions and constitute the basis for hierarchical distinctions between offenses," Tonry & Coffee, Jr., *supra* note 138, at 155), and "noncriminal 'biographic' conduct, separable from the conviction offense" are excluded from the sentencing inquiry. See Reitz, *supra* note 1, at 565-71.

Professor Yellen has proposed a different approach to reform that would require "the Sentencing Commission to reconsider both the weight given to alleged related-offenses and the categories of offenses that receive such treatment." Professor Yellen suggests that the Commission might "strike a different balance," by discounting the penalty associated with a related offense at sentencing. The constitutional problem would remain, albeit in a less offensive form. Professor Yellen also points out that decreasing the weight of related offenses in the sentence calculation might alleviate some of the concerns regarding proportionality and plea bargaining which arise in a pure charge offense system, while making a plea bargain less illusory than it is under the current regime. Yellen, *supra* note 1, at 457-58.

¹⁴¹ The problems generated by the Guidelines system are a much greater threat to uniformity than the evils the Commission sought to avoid. As Professor Yellen explains, "the complexity of the relevant conduct standard . . . contributes to unwarranted disparity. Complexity invites errors in application or inconsistent interpretation of key concepts." See Yellen, *supra* note 1, at 451.

The real-offense components of the Guidelines were included to blunt the effect of prosecutorial charging and bargaining leniency. See Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities*, 66 S. CAL. L. REV. 501, 505 (1992). Relevant conduct and similar innovations combat this problem by assuring appropriate severity. But I remain unconvinced that prosecutorial leniency is a pervasive phenomenon or that charge bargains routinely underrepresent a defendant's true culpability. Federal prosecutors are self-selected to prosecute. They are rewarded not for soft-hearted dispositions of serious cases, but for convictions. See

judgments must be made by too many individual decisionmakers to produce consistent results.¹⁴² District judges use a spectrum of proof requirements.¹⁴³ The personal experience of the district judge undoubtedly influences her acceptance of various types of testimony. One court may routinely reject drug weight approximations based upon hearsay, while another may repose complete confidence in such testimony. In contrast to jury deliberation, eleven other viewpoints do not challenge or refine the decision. And although findings of fact in the district courts generate dramatic fluctuations in sentence lengths, the

Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY (forthcoming 1995). Many politicians began as prosecutors, and the voting public consistently rewards the "tough-on-crime" stance. As such, the threat of the lenient prosecutor is overrated.

Nor does it seem likely that prosecutors routinely agree to plea bargains that seriously underrepresent the defendant's culpability. Years of documented overcharging should undermine that conclusion. Why assume that prosecutors always dismiss easily provable charges rather than offenses that they know will be difficult to prove? Defendants are regularly acquitted in the federal courts; not every indictable offense can be proven at trial. There likely exists a group of cases in which an Assistant U.S. Attorney dismisses or declines to indict an offense because she believes that it cannot be proven at trial. Yet, the Guidelines freely "count" such offenses, thus overriding legitimate exercises of prosecutorial discretion.

¹⁴² See Freed, *supra* note 26, at 1715 (district judges, prosecutors, defenders and probation officers demonstrate widely different attitudes and practices respecting relevant conduct within and across districts); Yellen, *supra* note 1, at 403.

¹⁴³ Although every circuit accepts the notion that most sentencing factors need only be proven by a preponderance of the evidence to warrant enhancement, I doubt seriously that "proof by a preponderance" is sufficiently specific to elicit consistent findings based upon the same evidence across the board. See, e.g., *United States v. Hendricks*, 956 F.2d 1164 (6th Cir. 1992) (requiring "some evidentiary basis beyond mere allegation in an indictment"), *cert. denied*, 113 S. Ct. 139 (1992); *United States v. West*, 948 F.2d 1042, 1045 (6th Cir. 1991) (requiring "evidence of other quantities of drugs involved must have a minimal level of reliability beyond mere allegation"), *cert. denied*, 112 S. Ct. 1209 (1992).

Consider the South Dakota District Court's decision regarding the appropriate drug amount in *United States v. Koonce*. Koonce's customer testified that he had purchased approximately twenty to thirty pounds of methamphetamine during the preceding year. 945 F.2d 1145, 1148 n.2 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992). Naturally suspicious of such an estimate from a cooperating drug defendant, the court held Koonce accountable for only 14.22 pounds. See *id.* The court may well have sentenced Koonce to a much greater term than he deserved because the judge's estimate was inflated, or to a substantially shorter term because the amount underrepresented the true sales. Such decisions are highly unreliable and it seems likely that similarly situated sellers will receive drastically different terms of imprisonment pursuant to such an ad hoc system.

courts of appeals review such decisions for clear error,¹⁴⁴ thus eliminating any possibility of even intra-district consistency.

The entire enterprise demands the vigilance of the probation officer and the cooperation of the prosecutor. But probation officers do not evaluate relevant conduct information consistently.¹⁴⁵ Thus, the sentencing range recommended by the probation department, and often adopted summarily by the court, may vary dramatically depending upon the officer. And probation officers often operate in the dark because prosecutors do not always divulge pertinent information. In addition to withholding critical facts from the probation officer, prosecutors retain a myriad of options through which to manipulate the sentences under the Guidelines. As former Commissioner Nagel and Professor Schulhofer report, prosecutors can and do circumvent the Guidelines through plea bargaining.¹⁴⁶ Prosecutors may shield defendants from the full force of relevant conduct by charging offenses that have low statutory maxima¹⁴⁷ or are outside the scope of the relevant conduct provision.¹⁴⁸ Note also that the definition of "substantial assistance"¹⁴⁹ varies by district¹⁵⁰ and invites further unwarranted disparity. Even if a U.S. Attorney creates a clear and consistent policy regarding substantial assistance motions, the extent of the departure cannot be controlled. The real-offense

¹⁴⁴ See, e.g., *United States v. Koonce*, 884 F.2d 349, 353 (8th Cir. 1989).

¹⁴⁵ See Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of Relevant Conduct Guideline § 1B1.3*, 4 FED. SENT. REP. 330 (1992).

¹⁴⁶ See Nagel & Schulhofer, *supra* note 141, at 557.

¹⁴⁷ See Yellen, *supra* note 1, at 440; Nagel & Schulhofer, *supra* note 141, at 547.

¹⁴⁸ See Yellen, *supra* note 1, at 440.

¹⁴⁹ U.S.S.G. § 5K1.1 authorizes the court to depart for "substantial assistance" to authorities, but only upon a motion by the government.

¹⁵⁰ Nagel & Schulhofer, *supra* note 141, at 550-51. According to the authors,

The use of . . . 5K1.1 substantial-assistance motion varies from jurisdiction to jurisdiction. The motion is subject to supervisory review, at least in theory. There is no limit on the amount of reduction once the motion is submitted. The section 5K1.1 motion is also used to avoid guidelines ranges or mandatory minimum sentences for sympathetic defendants—even when there has been no genuine substantial assistance.

. . . .

. . . [F]ederal defenders . . . often claim that AUSAs refuse to file the 5K1.1 substantial-assistance motion even after a defendant has fully cooperated.

Id.

regime simply creates too many opportunities for ad hoc judgments and manipulation to provide anything approaching legitimate uniformity in sentencing.¹⁵¹

CONCLUSION

McCormick was correct in recognizing enhancement as punishment, but failed to embrace the appropriate constitutional remedy. Instead of preventing the subsequent prosecution of the offense at issue, the court should have prohibited the original sentence enhancement. The real-offense system should be abandoned on constitutional and practical grounds. It encourages the government to circumvent the affirmative commands of the Fifth and Sixth Amendment. In addition, it has spawned enormous administrative difficulties and has not produced the expected benefits. Sentencing remains fraught with inequities. Eliminating the real-offense character of the Guidelines would avoid many of these inequities and bring us closer to our goal of justice in sentencing.

¹⁵¹ The sentencing guidelines were also expected to inject some "honesty" into sentencing. According to the Commission, this was easily achieved by abolishing parole, thereby making the sentence imposed the sentence served. The public, however, remains in the dark. Certainly, as the fact that parole no longer exists filters through the general populace, citizens will begin to recognize that the sentence imposed is "real." Yet, consider that in *McCormick* the sentence resulting from the subsequent prosecution would, for the most part, have been concurrent. While the absence of § 5G1.3(b) would allow prosecutors to evade the uniformity goal, the current approach allows the local U.S. Attorney to obtain "credit" in cases in which the defendant has already been punished for the offense at issue. Few members of the larger populace will understand that the sentence was imposed to run concurrently. And those who do will undoubtedly wonder why government resources were diverted for a redundant prosecution.

In addition, the public now sees defendants convicted of identical crimes who routinely receive vastly different sentences. Though most people expect sentence lengths to vary a bit, the remarkably dissimilar sentences produced by the Guidelines after identical convictions will eventually undermine the credibility of the federal courts. Public confidence is particularly important among groups most likely to come into contact with the criminal justice system. Such groups are also the most likely to suspect that wild fluctuations in sentences for similar crimes are the result of bias and favoritism.