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Two Cheers for a Tale of Three Cities

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COMMENT

TWO CHEERS FOR *A TALE OF THREE CITIES*

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I. INTRODUCTION

In *A Tale of Three Cities,* Commissioner Ilene Nagel and Professor Stephen Schulhofer present the results of the second phase of their study of plea bargaining practices under the federal sentencing guidelines,[1] providing a revealing portrait of charging and bargaining practices in three judicial districts. The authors examine the forces that shape plea bargaining, the roles of the various participants in the process, and the methods and devices these participants employ. Nagel and Schulhofer conclude that plea bargaining practices have become more uniform under the guidelines and that the guidelines have probably succeeded in reducing unwarranted sentencing disparity between similarly situated defendants.

This summary of *A Tale of Three Cities'* conclusions suggests that the article is the slightly qualified endorsement of the guidelines' success that one might expect from a project involving a sitting member of and sponsored by the Sentencing Commission. But this summary more accurately describes the authors' article on the first phase of their study, another interesting and important work, in which Nagel and Schulhofer

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1. For the results of the first phase of the authors' study, see Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months,* 27 AM. CRIM. L. REV. 231 (1989) (examining plea negotiation practices under the federal sentencing guidelines prior to *Mistretta*).

identified a number of problems with plea bargaining under the guidelines but tended toward a Panglossian view of the process.[2]

Nagel and Schulhofer may have modified their views, or perhaps the evidence available during the first study was simply too preliminary to support such sanguine conclusions. In any event, the authors' candor and their willinguess to confront some of the guidelines' shortcomings in *A Tale of Three Cities* are noteworthy and commendable. The authors acknowledge that in a significant minority of cases plea bargaining is used to manipulate or circumvent the guidelines and that this circumvention poses "a risk to the overall success of the federal guidelines effort."[3] Most significantly, Nagel and Schulhofer do not suggest that the plea bargaining process must be "fixed" or its loopholes "plugged." Rather, they conclude that because the guidelines are being circumvented, causing disparity, some important revisions in the guidelines must be considered.

In these brief comments, I make several points. First, despite my admiration for the study and its conclusions, I believe the authors understate the seriousness and extent of the problems revealed by their research. Further, Nagel and Schulhofer fail to address a number of additional problems with plea bargaining and other sources of sentencing disparity. Nonetheless, the authors develop a very credible set of recommendations. In fact, because Nagel and Schulhofer may have underestimated the problems with plea bargaining and disparity under the guidelines, their suggested changes in the guidelines, however tentatively endorsed, may actually be more beneficial than the authors suggest. This study represents something of a landmark in that a sitting member of the Sentencing Commission has acknowledged and addressed serious problems with the guidelines. The authors' proposals, if expanded upon and implemented, could lead to the first real improvement of the guidelines during their troubled tenure.

2. Schulhofer and Nagel concluded that "the Guidelines have brought a significant order and consistency to the prosecutorial charging and bargaining decisions that have an effect on sentencing." *Id.* at 232.

3. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 560 (1992).

II. THE UNDERSTATED CONTRIBUTION OF PLEA BARGAINING TO GUIDELINE CIRCUMVENTION, DISPARITY, AND UNFAIRNESS IN THE SENTENCING PROCESS

Nagel and Schulhofer understate in several ways the true scope of the problems their study exposes. First, there is probably significantly more guideline circumvention and manipulation through plea bargaining, and consequently more disparity, than the authors suggest. Second, because the authors focus exclusively on plea bargaining, the study does not adequately address the many other sources of sentencing disparity under the guidelines. Finally, plea bargaining under the guidelines leads to serious fairness problems unrelated to circumvention or disparity. My purpose is not to criticize the scope of the study, but to offer further support for the reforms the authors propose as well as to suggest why additional changes in the guidelines are needed.

A. Is There More Guideline Manipulation to Be Uncovered?

This study, like its predecessor, seems carefully designed and executed. One suspects, however, that at least some of the Assistant U.S. Attorneys and probation officers interviewed may not have been completely candid with the authors. As Professor Milton Heumann has pointed out in connection with the authors' first study, Commissioner Nagel's participation may have caused interview subjects to fear that they were being or might in the future be subjected to an "audit" of their plea negotiation practices.[4] The responses of AUSAs may be particularly suspect, because they were asked, in effect, to admit to violations of Department of Justice policies. Some may therefore have been less than completely forthcoming about the extent to which they deviate from the guidelines requirements or Department of Justice policies. In fairness, the authors acknowledge the AUSAs' lack of candor when discussing whether and why they dismiss § 924(c) counts.[5]

The authors also detect a considerable amount of preindictment plea bargaining.[6] This type of bargaining is almost completely shielded from

4. *See* Milton Heumann, *The Federal Sentencing Guidelines and Negotiated Justice*, 3 FED. SENTENCING REP. 223, 224 (1991).

5. Nagel & Schulhofer, *supra* note 3, at 552. The authors contrast these responses with what they view as striking candor on most other topics. *Id.*

6. *See, e.g., id.* at 516 (discussing District D); *see also id.* at 540 (concluding that in District G, the "most commonly employed method of extraguideline inducement is 'paring down' charges

view and leaves AUSAs enormous discretion. Preindictment bargaining can permit a desired result that might be more difficult to obtain once charges have been filed.[7] Neither the Department of Justice policies[8] nor the guidelines[9] effectively limit such preindictment bargaining practices. The authors do not systematically explore preindictment bargaining practices, but it is likely that this type of bargaining has increased under the guidelines, as prosecutors have more thoroughly explored their sources of discretion in the plea bargaining process.[10] The authors concede that "[p]reindictment charge bargaining makes it difficult to discern the extent and nature of guideline circumvention."[11] The existence of and increase in preindictment plea bargaining almost certainly contributes to guideline circumvention and hidden sentencing disparity.[12]

The authors identify an impressive array of additional techniques for manipulating and circumventing the guidelines through plea bargaining. These include count, fact, date, and guideline-factor bargaining and expansive use of section 5K1.1 substantial-assistance departure

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before indictment" and that "[t]his approach avoids the review committee and helps prevent an increase in alleged drug quantity through 'relevant conduct.' ").

7. For example, in District G the authors found that AUSAs only rarely drop a § 924(c) count to induce a plea, but more frequently they refrain from bringing such a charge in cases they expect to result in a quick plea. *Id.* at 541.

8. The Thornburgh memorandum states that prosecutors should charge "the most serious, readily provable offense or offenses consistent with the defendant's conduct." Memorandum from Attorney General Richard Thornburgh to Federal Prosecutors, Plea Bargaining Under the Sentencing Reform Act (Mar. 13, 1989), *reprinted in* THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 622 supp. app. 12 (1989). *See also* Memorandum from Attorney General Robert H. Edmunds, Jr., to Federal Prosecutors, Bluesheet in Plea Bargaining (Feb. 7, 1992), *reprinted in* 4 FED. SENTENCING REP. 349 (1992) (setting forth additional plea bargaining regulations). However, as Nagel and Schulhofer found, prosecutors retain largely unfettered discretion in making their initial charging decisions. For example, Nagel and Schulhofer state that "line AUSAs are given complete control over charging decisions" in District D. Nagel & Schulhofer, *supra* note 3, at 516. They further note that in District E, although the supervisor "leaves to [AUSAs] the judgment as to what is 'readily provable,' " supervisory approval is technically required for a failure to charge a "readily provable" count that would affect the sentence. *Id.* at 527.

9. The policy statements in chapter 6 do not address initial charging decisions. In theory, a judge could, applying § 6B1.2(a), refuse to accept a plea to all of the charges in an indictment (if the agreement included the government's promise not to pursue potential charges) if such a plea did not "adequately reflect the seriousness of the actual offense behavior." U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 6B1.2(a) (1992) [hereinafter U.S.S.G.]. However, judges are extremely unlikely to interfere in this way with prosecutors' traditional charging discretion.

10. The ability to shift to preindictment bargaining is one reason why efforts to clamp down on guideline circumvention through plea bargaining would probably fail.

11. Nagel & Schulhofer, *supra* note 3, at 516.

12. The Sentencing Commission has also noted the impact of preindictment bargaining. *See* U.S.S.G., *supra* note 9, at 410.

motions.[13] It is, of course, impossible to identify precisely the extent of this conduct. Nagel and Schulhofer estimate the overall frequency of guideline circumvention in the three districts examined at between six and twenty percent.[14]

Whatever the precise rate, the extent of guideline circumvention is clearly substantial. Moreover, manipulative plea bargaining will probably increase over time. During these first few years of practice under the sentencing guidelines, the Department of Justice policies have demonstrated the Department's significant, although by no means unabridged, commitment to the goals of the guidelines.[15] However, this institutional commitment is unlikely to increase over time and may actually decline. Similarly, control mechanisms in individual U.S. Attorney's offices may also atrophy, at least as long as case pressures remain at very high levels. Given that line prosecutors are more concerned with obtaining convictions and with individual case equities than with consistent sentencing policy,[16] the guidelines will likely be increasingly manipulated and circumvented as centralized control and supervision decrease.[17]

B. Beyond Plea Bargaining: The "New Disparity" Under the Guidelines

Nagel and Schulhofer claim that unwarranted sentencing disparity in guilty-plea cases as well as those proceeding to trial has probably been reduced under the guidelines.[18] Unlike the Sentencing Commission, the authors do not try to oversell this point,[19] but it is still an important assertion because it suggests that the guidelines comply with the principal goal of the Sentencing Reform Act of 1984. Other commentators

13. Nagel & Schulhofer, *supra* note 3, at 546-48.

14. *Id.* at 525-26, 533, 541-42.

15. *See id.* at 511-12.

16. *See id.* at 535.

17. One could argue alternatively that guideline manipulation may tend to decrease as judges and prosecutors not schooled in the preguidelines sentencing system are appointed. The U.S. Attorney in District D noted that AUSAs with long periods of service were most resistant to efforts to limit their discretion in plea negotiations. *Id.* at 517.

18. *Id.* at 560.

19. The Sentencing Commission has been criticized for repeatedly asserting that the guidelines are "working well" and have significantly reduced disparity. *See, e.g.*, Katherine Oberlies, *Reviewing the Sentencing Commission's 1989 Annual Report*, 3 Fed. Sentencing Rep. 152 (1990); Michael Tonry, *Are the U.S. Sentencing Commission's Guidelines "Working Well"?*, 2 Fed. Sentencing Rep. 122 (1989).

have disputed this claim that the guidelines have measurably decreased disparity.[20]

The relevance of this debate about disparity is questionable. Unwarranted disparity is extremely difficult to define and measure, and a growing number of commentators, including Professor Schulhofer, forcefully argue that a more severe problem than similar offenders receiving disparate sentences under the guidelines is excessive uniformity and aggregation.[21] Further, those critics who decry both the guidelines' limits on discretion and continued disparity are trying to have it both ways. Wherever there is discretion, there will be disparity. Judges, prosecutors, and probation officers inevitably see things differently on a variety of discretionary decisions under the guidelines. A factor that persuades one judge to depart from the guidelines may not convince another judge faced with an essentially identical defendant. Most people who view the guidelines as seriously flawed are perfectly willing to risk some disparity in order to obtain some additional guided judicial discretion.

I do not intend to wade into the thicket of assessing the comparative disparities in the guideline and preguideline systems.[22] Nevertheless, it is important to note that there are a number of potential sources of disparity under the guidelines in addition to plea bargaining. These include conflicting judicial interpretations of guideline provisions,[23] inconsistent judicial attitudes toward departures,[24] different levels of competence among probation officers and defense attorneys, and manipulation of sentences through undercover government operations.[25] In short, a

20. *See, e.g.*, Gerald Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991).

21. *See, e.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992).

22. The General Accounting Office has noted the difficulty of making such comparisons. *See* U.S. GEN. ACCOUNTING OFFICE, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED 40-61 (1992).

23. The Ninth Circuit, for example, has construed relevant conduct differently from the other circuits. *See, e.g.*, United States v. Fine, 946 F.2d 650 (9th Cir. 1991); United States v. Faulkner, 934 F.2d 190 (9th Cir.), *modified*, 952 F.2d 1066 (9th Cir. 1991); United States v. Brady, 928 F.2d 844 (9th Cir. 1991); United States v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1990). *But see* Steven E. Zipperstein, *Relevant Conduct and Plea Bargaining*, 4 FED. SENTENCING REP. 223 (1992) (criticizing the Ninth Circuit's approach).

24. For example, during fiscal year 1991, departure rates among the judicial districts varied from a low of 3.2% to a high of 46%. *See* U.S. SENTENCING COMM'N, ANNUAL REPORT tbl. 56 (1991).

25. *See, e.g.*, Saul M. Pilchen, *The Underside of Undercover Operations*, LEGAL TIMES, July 15, 1991, at 39.

modified, perhaps diminished but certainly vigorous, "new disparity" exists under the guidelines.

This new disparity calls into question many of the troubling policy choices made by the Sentencing Commission in the name of limiting disparity. Recognition of this new disparity also supports the reforms Nagel and Schulhofer suggest. One of the most important contributions of their study is its identification of concrete evidence supporting the notion that discretion will always exist in the criminal justice system. The critical issues to be addressed are, How much discretion will there be? With whom will it reside? What forms of control will be implemented? Those who oppose revisions designed to make the gnidelines more flexible, such as those suggested by Nagel and Schulhofer, usually frame their arguments in terms of a feared increase in disparity. To the extent that the guidelines do not actually reduce disparity, these arguments make little sense.

C. THE "TRUTH IN BARGAINING" PROBLEM

Guideline circumvention and disparity are not the only troubling issues raised by current plea bargaining practices. Unfairness to defendants pervades plea bargaining under the guidelines. Frequently, defendants who plead guilty lose the supposed benefit of their bargain because of the operation of the gnidelines and strict limitations on withdrawal of guilty pleas.[26] Such matters are beyond the scope of the Nagel and Schulhofer study, but they should be considered as part of the complete picture of plea bargaining as practiced in federal courts under the guidelines.

A few common scenarios illustrate the potential for unfairness. Most defendants who plead guilty receive the two-level reduction for acceptance of responsibility,[27] whereas most defendants convicted after trial do not.[28] This reward has become an integral part of the plea bargaining process. If a judge accepts a plea agreement providing that the defendant will receive the two-level reduction and then departs upward from the applicable guideline range, the reduction may be rendered meaningless because the judge is no longer tied to offense levels in determining the sentence. It is of little consequence to the defendant that the

26. *See* David N. Yellen, *Should Judges Take Seriously the Sentencing Commission's Standards for Accepting Plea Agreements?*, 3 FED. SENTENCING REP. 216 (1991).

27. *See* Nagel & Schulhofer, *supra* note 3, at 549.

28. *Id.*

applicable guideline range that has just been ignored is lower than it might have been in the absence of a plea.[29]

Related fairness problems occur when, for example, (1) the plea agreement provides that the defendant will receive any other level-based reduction, such as that for being a minor participant, and the judge departs above the resulting range; (2) the plea agreement identifies or recommends a particular guideline range and the judge either determines that a different range applies or departs above that range; or (3) the judge accepts a charge bargain and then departs from the resulting gnideline range. In each case the defendant is deprived of a particular reasonably expected benefit of pleading guilty—not a particular sentence, but a particular guideline range or reduction in the appropriate range. Telling the defendant that the sentencing guideline will dictate the sentence he or she receives[30] is an inadequate solution to this problem because, as the authors point out, many defense attorneys, at least outside the Federal Public Defender's offices, have no more than a rudimentary understanding of the guidelines.[31]

Many of these patterns existed before the guidelines were implemented. A defendant who pleaded guilty typically received no assured benefit other than a reduction of the statutory maximum sentence to which the defendant was exposed. Even if the government recommended a sentence, the defendant was not entitled to withdraw the plea if the judge chose not to follow that recommendation. The judge could also base the sentence on virtually anything the judge wished, including uncharged crimes or dismissed counts. It can be argued, therefore, that any unfairness under the guidelines is no worse than that which existed previously.

This argument misses several important differences in the guidelines system that make these practices more unfair today than they were

29. An appellate court may review a departure for reasonableness. 18 U.S.C. § 3742(e)(3) (1988). *See also* Marc Miller & Daniel J. Freed, *The Emerging Proportionality Law for Measuring Departures*, 2 FED. SENTENCING REP. 255 (1990) (discussing appellate courts' approach to review of departures).

30. For example, in one of the districts studied by Nagel and Schulhofer, plea agreements routinely contain a provision stating that the guideline range included in the agreement is only a recommendation and that the defendant will continue to be bound if the judge determines that a different range actually applies. Nagel & Schulhofer, *supra* note 3, at 518.

31. *Id.* at 547-48. *See also* U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 90-93 (1991) (noting that private attorneys' knowledge of guidelines rated fair or poor by most judges, AUSAs, and probation officers).

before the guidelines were implemented. The old system was only a potentially real offense system. Judges could and often did, for various reasons, choose to iguore the "relevant conduct" of the offender. Under the guidelines the judge *must* consider all conduct defined as relevant in section 1B1.3. Although a defendant received no concrete sentence reduction in a preguidelines charge bargain, there was a process of "implicit bargaining"[32] over the sentence. The Sentencing Commission found that a preguidelines defendant who pleaded guilty received, on average, a thirty to forty percent lower sentence than a defendant convicted at trial.[33] In contrast, many defendants under the guidelines scenarios described earlier receive no real benefit for pleading guilty.[34]

Further, the old system did not withhold ascertainable facts from the defendant. The only "fact" left to be determined after the plea was the actual sentence, a decision that was almost entirely discretionary. Under the guidelines a balance is apparently being struck between the defendant's right to know the consequences of pleading guilty and the system's need for efficiency and maintaining a high proportion of guilty pleas. Even assuming that this balance precludes a defendant from being told the ultimate sentence before entering a binding plea, it does not follow that other ascertainable facts, such as the applicable guideline range and whether the judge intends to depart from that range, should be withheld from the defendant as well.

III. THE NAGEL & SCHULHOFER REFORMS AND BEYOND

What are the implications of this portrayal of plea bargaining under the sentencing guidelines, and how do they differ from the prescription offered by Nagel and Schulhofer?

A. FAIRNESS

I first address the issue of fairness in plea bargaining. There are two straightforward ways for judges to alleviate the potential unfairness that results from plea bargaining under the guidelines. One is to follow the Commission's policy statements on accepting pleas, and the other is to more liberally allow defendants to withdraw their pleas when their plea bargain has been undercut.

32. Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 471 (1988).

33. *See* U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 48 (1987).

34. *See supra* text accompanying notes 27-29.

As I have argued elsewhere,[35] many of the practices described here are seemingly inconsistent with the Commission's policy statements on plea bargaining. Section 6B1.2(a) states that the court may accept a charge bargain if "the remaining charges *adequately reflect* the seriousness of the actual offense behavior and . . . accepting the agreement will not undermine the statutory purposes of sentencing."[36] As noted by Judge Stephen Breyer, a former member of the Sentencing Commission, if a plea agreement adequately reflects the seriousness of the offense, there should ordinarily be no basis for departure.[37] If the agreement does not adequately reflect the seriousness of the offense, the judge can reject the plea.

Further, section 6B1.1(c) requires sentencing judges to review the presentence report before accepting a plea, unless a report is not required under section 6A1.1. This procedure allows the judge to know in advance whether the range suggested by a plea agreement is inappropriate, in which case the judge should reject the plea.[38] For a variety of reasons, judges resist following these procedures. If the judge does not have the presentence report and only later determines that a different range applies or that an upward departure is appropriate, the defendant should be given an opportunity to withdraw the plea.

B. FLEXIBILITY AND SEVERITY

At the end of their article, Nagel and Schulhofer share some observations about how to deal with the guideline circumvention they have identified. In general, they offer tentatively phrased suggestions rather than firm proposals—suggestions that need to be refined, rethought, reexamined, and studied further.[39] This hesitancy is unfortunate because Nagel and Schulhofer's suggestions are sound and worthy of broad support.

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35. *See* Yellen, *supra* note 26, at 216.

36. U.S.S.G. *supra* note 9, § 6B1.2(a) (emphasis added).

37. United States v. Plaza-Garcia, 914 F.2d 345, 348 (1st Cir. 1990).

38. *See* Yellen, *supra* note 26, at 216.

39. A notable exception is their firm conclusion that "mandatory minimums subvert the guidelines process and its underlying goals of uniformity, certainty, and proportionality in sentencing." Nagel & Schulhofer, *supra* note 3, at 560. The Sentencing Commission has also taken a position critical of mandatory minimum penalties. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) [hereinafter MANDATORY MINIMUM REPORT]. For some insightful observations finding the Commission's critique of mandatory minimums equally applicable to the guidelines, see Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission's "Mandatory Guidelines,"* 4 FED. SENTENCING REP. 129 (1991).

Guideline circumvention principally occurs because the participants in the plea bargaining process have both motive and opportunity to circumvent the guidelines. One set of reforms could focus on restricting their opportunity to manipulate the guidelines, by clamping down on the plea bargaining process. The authors wisely reject such an approach as unworkable and unsound. The authors' research shows that prosecutors and defense attorneys will continue to look for and find ways around any new restrictions that are imposed.[40] Preindictment bargaining, as we have seen, is already a large loophole in plea bargaining controls.[41]

The more constructive approach is to examine the parties' motives. Departing from conventional wisdom, Nagel and Schulhofer do not find case pressures to be a pivotal factor in guideline circumvention, at least in two of the three districts they examined.[42] Instead, the widely shared perception that the guidelines are too rigid and too severe appears to account for most of the pressure to evade them. Nagel and Schulhofer begin to confront these issues by offering an interesting set of possible guideline revisions, including (1) reducing reliance on harm-based and quantity-driven specific offense characteristics, such as drug amounts; (2) allowing more consideration of offender characteristics; (3) encouraging more downward departures; and (4) reducing overall severity levels.[43]

The authors do not go far enough, however, nor do they make the argument for such reforms as strongly as they might. Take, for instance, the guidelines' reliance upon harm-based and quantity-driven specific offense characteristics. This reliance, combined with the guidelines' relevant-conduct approach, which represents the Commission's attempt to compromise between real-offense and charge-offense sentencing, has been a disaster. It has led to punishment of minor players in drug operations that is far in excess of their culpability.[44] It has also shifted sentencing discretion, not just to prosecutors, but to law enforcement agents who, trained by the Commission in the operation of the guidelines, may prolong undercover operations or suggest larger quantities in order to obtain harsher sentences for particular defendants.[45]

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40. *See* Nagel & Schulhofer, *supra* note 3, at 516.

41. *See supra* text accompanying notes 6-12.

42. *See, e.g.*, Nagel & Schulhofer, *supra* note 3, at 526-27, 534-35. *But see id.* at 543 (observing that in District G, "[d]esires to save time and avoid trial seem to be the principal reasons for extraguideline concessions").

43. *See id.* at 559.

44. *See* Alschuler, *supra* note 21, at 921-24.

45. *See* Pilchen, *supra* note 25.

I do not mean to suggest that a modified real-offense system should be jettisoned. A charge-offense system can also lead to particularly disturbing results. Witness, for instance, the evidence of racial disparity in the use of mandatory minimum penalties that is apparently traceable to prosecutorial discretion.[46] However, not only must harm-based and quantity-driven specific offense characteristics be "rethought," a new approach to the entire real-offense/charge-offense dilemma must be developed.

On a related subject, the authors raise the possibility of a more attenuated link between guideline ranges and mandatory minimums.[47] The Commission shonld also consider a more drastic step: rewriting the guidelines with no reference whatever to the mandatory minimums. In other words, the Commission conld establish sentencing ranges based entirely on its view of the appropriate penalty. In cases in which a mandatory minimum applies, the minimum would trump tlie guidelines.

This could be a politically explosive step: Congress might rightly see it as a slap in the face. It would, however, send the strongest possible message to Congress that tlie sentencing guidelines are incompatible with mandatory sentencing laws. It would also allow those defendants who now receive sentences pegged to the mandatory sentencing levels even though they are not legally subject to those provisions to be treated more equitably.[48]

Anotlier useful reform would be to eliminate the requirement that the prosecutor file a substantial-assistance motion before the court can depart from tlie guidelines on tliat basis. This requireinent is not only unfair to defendants forced to rely on prosecutors' good faith, it has also proved to be a common tool for guideline manipulation.[49] The Sentencing Commission recently considered but failed to adopt an amendment reinoving tlie goverument motion requireinent.[50]

46. MANDATORY MINIMUM REPORT, *supra* note 39, at 76, 80-82.

47. Nagel & Schulhofer, *supra* note 3, at 560.

48. It is unclear what effect such a change would have on plea bargaining. Paradoxically, it could shift inore discretion to the prosecutor, as the threat of a inandatory minimum charge would carry more weight if the sentence absent such a charge would be considerably lower. As long as the inandatory sentencing laws exist, such mischief will continue. On the other hand, with fewer defendants subject to harsh inandatory-driven sentences, there would be less incentive to evade the guidelines.

49. *See* Nagel & Schulhofer, *supra* note 3, at 550.

50. The Sentencing Commission proposed deleting this requirement in the draft amendments published in January 1992. 57 Fed. Reg. 112 (1992). The proposal was dropped by the Commission, however, and was not one of the amendments adopted effective November 1, 1992.

These changes could reduce both the incentive and the means to manipulate the guidelines. If circumvention is to be limited, the guidelines must more closely reflect the shared concerns and values of the participants in the criminal justice system. Under the proposed changes, less discretion in the sentencing system would be hidden or "invisible," and some of the unreviewable power now in the hands of prosecutors, probation officers, and law enforcement agents would be placed in the hands of judges, where it could be subject to meaningful appellate review.

Nagel and Schulhofer should be commended for pointing the way, however tentatively, toward a more flexible, less severe set of guidelines. Most observers outside the Commission have urged this move, but until now it has not been expressed along similar lines by anyone within the Commission. One hopes that Commissioner Nagel's colleagues will read this absorbing study and consider its implications carefully.