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Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months


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NEGOTIATED PLEAS UNDER THE FEDERAL SENTENCING GUIDELINES: THE FIRST FIFTEEN MONTHS

Stephen J. Schulhofer and Ilene H. Nagel*

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I. INTRODUCTION

A. *The Purpose of the Article*

This Article explores the relationship between the Federal Sentencing Guidelines and plea negotiation practices during the fifteen month period that preceded the Supreme Court's decision in *Mistretta v. United States*.¹ We conclude that the Guidelines have brought a significant order and consistency to the prosecutorial charging and bargaining decisions that have an effect on sentencing. This result is particularly remarkable considering the disarray which characterized the federal system before the *Mistretta* decision. Having noted this achievement, it is nevertheless important to recognize the sentencing discretion which remains in prosecutorial hands. If abused and unchecked, this discretion has the potential to create the disparities that sentencing reform was intended to prevent.

Our exploratory interview data from four non-randomly selected jurisdictions suggest that in the majority of cases, even during the pre-*Mistretta* period, compliance with the Guideline system was the predominant pattern. However, the Guidelines were still circumvented in an identifiable minority of cases. When circumvention occurred, it was accomplished through date bargaining, charge bargaining, fact bargaining or Guideline factor bargaining. Importantly, such circumvention contradicted the Guideline structure and specific Guideline policy.

In the post-*Mistretta* period, it will be critical to evaluate the impact the Federal Sentencing Guidelines will have on charging and plea practices. The interrelationship between sentencing discretion and prosecutorial discretion cannot be ignored when exploring the success of sentencing reform. The data presented here, despite their non-random character, can provide at least some measure of comparison between the periods before and after *Mistretta*. Moreover, as observations, they can serve to stimulate the derivation of hypotheses which may quantitatively be tested when the Guidelines have been fully implemented across the United States. Finally, the discussions presented here set the stage for future research by explicating the nature of the relationship between plea negotiation and sentencing under the structure of the Federal Sentencing Guidelines which were first promulgated.

B. *Outline of the Article*

A new era in federal criminal practice was inaugurated on November 1, 1987, when the Sentencing Guidelines promulgated by the United States Sentencing Commission (the Commission) formally took effect. The Guidelines unquestionably revolutionize the sentencing process for defendants convicted at

1. 109 S. Ct. 647 (1989).

trial. The Guidelines' effect on federal charging and plea negotiation practices, however, may be even more important.² Equally important, and especially mysterious, is the reverse effect that charging and plea negotiation processes can have on the Guidelines process, and on the overall goals of federal reform.³

This Article analyzes the interconnections between sentencing and the negotiated plea process within the context of the new federal sentencing system, and presents an exploratory study of sentences resulting from negotiated plea agreements formulated during the earliest months of Guideline implementation.

The background of state and federal sentencing in the United States is complex. Although it is acknowledged that plea bargaining poses a major stumbling block to the success of sentencing reform⁴ in both the state and federal

2. Some 85% of federal criminal convictions result from guilty pleas. UNITED STATES SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 48 (June 18, 1987).

3. For one commentator's analysis of the potential impact of plea practice on the Federal Sentencing Guidelines, see Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459 (1988) (exhorting judges to use their power to limit adverse effects of prosecutorial discretion).

The general desirability of plea bargaining has been the subject of exhaustive debate. Some commentators have argued that plea bargaining is or could become a desirable method of disposition. See, e.g., Enker, *Perspectives on Plea Bargaining*, reprinted in, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 112 (1967) (discussing administrative efficiency and maximization of accurate verdicts); P. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* 127-48 (1978) (discussing inner dynamics of negotiated system of justice); Church, *In Defense of "Bargain Justice"*, 13 LAW & SOC'Y REV. 509, 513-16 (1979) (suggesting plea bargaining need not be unfair either to defendant or public).

Others view plea bargaining as unjust in principle, or in its practical effects. See, e.g., Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 652 (1981) (arguing plea bargaining is inherently unfair and irrational process); Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1087-1106 (1984) (offering bench trial model as preferable alternative to plea bargaining); Schulhofer, *No Job Too Small: Justice Without Bargaining in the Lower Criminal Courts*, 1985 AM. B. FOUND. RES. J. 519, 582-591 (1985) (arguing plea bargaining is not inevitable); Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 618-27 (1987) (advocating abolition of plea bargaining).

4. See Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 563-76 (1978) (discussing detrimental effect of prosecutor's extensive power to formulate changes and bargain for guilty pleas upon success of fixed or presumptive sentencing schemes); Casper & Brereton, *Evaluating Criminal Justice Reforms*, 18 LAW & SOC'Y REV. 121, 123-38 (1984) (discussing some major problems involved in analyzing policy implementation); J. Coffee & M. Tonry, *Hard Choices: Critical Trade-offs in the Implementation of Sentencing Reform Through Guidelines*, reprinted in REFORM AND PUNISHMENT: ESSAYS IN CRIMINAL SENTENCING 155, 157-61 (M. Tonry & F. Zimring eds. 1983) (considering problems of eliciting compliance with major changes in substantive sentencing policies); Church, *Plea-Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment*, 10 LAW & SOC'Y REV. 377, 381-97 (1976) (analyzing potential effect a "no bargain" policy might have on court systems); Heumann & Loftin, *Mandatory Sentencing and the Abolition of Plea-Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOC'Y REV. 393, 407-24 (1979) (discussing effect of mandatory sentences coupled with policy forbidding plea bargaining).

systems, few legislative initiatives even addressed this problem.⁵ Washington appears to be the only jurisdiction that did not fall prey to this lack of legislative directive. The Washington legislature required its Sentencing Commission to promulgate "prosecuting standards" to prevent the disparities in plea negotiation practice from undermining the uniform application of its guidelines. The standards adopted, however, are so open-ended⁶ that they may leave no basis for effective review.⁷

A three-year evaluation of the Minnesota experience, published in 1984, concluded that "the power of prosecutors unquestionably increased" after the guidelines.⁸ The study also concluded that even though the overall guilty plea rate remained unchanged, there was a substantial shift in the form of guilty plea negotiations. From 1978 to 1982, sentence bargains fell from 60 percent to 26 percent of all cases, but charge bargains rose from 21 percent to 31 percent of all cases.⁹ This change indicates a shift to a form of bargaining which is not subject to Guideline controls on disparity. The extent of this shift depended heavily on the policies followed by individual district attorneys. In Minnesota's largest county, for example, changes in the form of plea negotiations were minimal, but in the second-largest county, sentence negotiations "almost disappeared," with the rate of charge bargaining tripling.¹⁰

A 1987 study of the Pennsylvania Sentencing Guidelines showed an increase in the frequency of convictions involving the dropping of counts and the reduction of offense seriousness levels, as compared to the pre-guidelines period.¹¹ This decrease in the offense seriousness levels of charges and convictions was more significant in urban areas than in rural areas. Since guideline severity levels were likely to be more severe than past practice in urban jurisdictions, this finding indicates that plea practices in urban areas had been altered as a means of circumventing guideline severity levels that were intended to apply uniformly across the state.¹²

5. See RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1 (A. Blumstein, J. Cohen, S. Martin & M. Tonry eds. 1983) (collection of essays evaluating guidelines system); Alschuler, *supra* note 4, at 551 (sentencing reform will not be effective without way to check prosecutorial discretion); McCoy, *Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California*, 9 JUST. SYS. J. 256, 272-74 (1984) (evaluating effect of determinate sentencing and plea bargaining limitation on prison overcrowding); S. Verdun, Jones & D. Cousineau, *The Impact of Plea Bargaining Upon the Implementation of Sentencing Reform* (Nov. 13-16, 1985) (unpublished manuscript).

6. See WASH. REV. CODE §§ 9.94A .430 to 9.94A .460 (1989) (recommending prosecuting standards for Sentencing Reform Act of 1981).

7. See, e.g., D. BOERNER, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981 (1985).

8. MINNESOTA SENTENCING GUIDELINES COMM'N, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION 71 (1984).

9. *Id.* at 72.

10. *Id.* See generally D. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (1988).

11. R. LUBITZ & C. KEMPINEN, THE IMPACT OF THE PENNSYLVANIA SENTENCING GUIDELINES: AN ANALYSIS OF SYSTEM ADJUSTMENTS TO SENTENCING REFORM 5 (1987).

12. *Id.* at 7.

The federal Guidelines system, in contrast, includes a unique package of rules and practices intended to address the problem of prosecutorial discretion. Its effort to regulate the guilty plea process is more ambitious and aggressive than anything attempted or even imagined at the state level. Yet, by any absolute standard, the federal effort is itself quite cautious and incomplete.¹³ This Article attempts to describe the contours of the federal approach to this vexing problem, and to assess its results during the initial period of partial Guideline implementation.

Part I briefly describes the structure and goals of federal sentencing reform, and acknowledges the concern that negotiated pleas might subvert the goals of sentencing reform. Part I then outlines the actions taken by Congress, the United States Sentencing Commission and the Justice Department in reaction to the potential difficulties these institutions perceived. Part II describes the methodology employed to investigate anticipated and unanticipated effects of early plea negotiation practices under the Guidelines. Part III presents the findings of this exploratory research, while Part IV speculates about future prospects and discusses our conclusions.

Federal sentencing reform, even during this early period, has succeeded in bringing considerable order and consistency to prosecutorial charging and bargaining decisions that have implications for sentencing. Nonetheless, the sentencing discretion that remains in prosecutorial hands, for practical purposes, is enormous. The important but incomplete plea bargaining restrictions written into the first iteration of the new Federal Sentencing Guidelines¹⁴ ultimately may be inadequate to guide the sentencing aspects of the discretion prosecutors have in charging and bargaining. Apart from the deficiencies in these plea bargaining restrictions, the limited restrictions themselves are sometimes disregarded in practice. In Part V we elaborate on these conclusions and discuss possible remedies for the problems discovered in the course of our preliminary research.

II. THE SENTENCING GUIDELINES SYSTEM

A. *The Legislative Background*

The Sentencing Reform Act of 1984 created the United States Sentencing Commission, an independent agency in the judicial branch, and instructed the Commission to promulgate guidelines for federal judges to use while imposing criminal sentences. The statute contains general guidance about the construction of the guidelines, along with many specific directives for dealing with particular issues.¹⁵ In general, the statute contemplates that the Commission

13. See *infra* notes 20-41 and accompanying text (discussing sentencing under new federal Guidelines).

14. UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL §§ 6B1.1 - 6B1.4 (Nov. 1, 1987) [hereinafter GUIDELINES].

15. 28 U.S.C. § 994 (1988).

will establish categories of offenses and offenders, and that it will set a narrow range of sentences for each combination of offense and offender characteristics. Where the guidelines call for imprisonment, the statute prescribes that the maximum term of imprisonment cannot exceed the minimum set by the guidelines by more than 25 percent or six months, whichever is greater.¹⁶ This mandate dictates that similarly situated offenders convicted of similar offenses should have imprisonment sentences that differ by no more than 25 percent. This limitation sets the parameters of acceptable disparity within the guideline system. Moreover, although the statute theoretically leaves the Commission with freedom to determine the amount of reliance on these general categories, the 25 percent limitation on the width of the guideline range in practice leaves the Commission obliged to use rather refined distinctions, and to develop detailed offense and offender categories.¹⁷

The statute connects the Commission's guidelines to actual sentencing decisions by imposing constraints on judicial sentencing discretion for the first time. The judge is no longer free to select any sentence within a very wide range typically authorized by federal criminal statutes.¹⁸ The judge is also prohibited from imposing a sentence without giving reasons for the decision, since he must explicitly state his reasons for imposing a particular sentence.¹⁹ Under the Sentencing Reform Act, the judge is required to determine, on the basis of a combination of the offense and offender characteristics, the applicable guideline range. He is instructed next to select a sentence from within that range, unless there are aggravating or mitigating factors that were not adequately considered by the Commission in formulating the guidelines and which justify a sentence other than that which the guidelines prescribe.²⁰ Moreover, the identification of the applicable guideline and the decision whether to depart from it are both made subject to appellate review.²¹

16. 28 U.S.C. § 994(b)(2).

17. By contrast, the statutory categories are generally quite broad. The federal bank robbery statute, for example, encompasses

[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . .'

18. U.S.C. § 2113(a). This definition makes no accommodation for several relevant sentencing factors, including whether the perpetrator carried and/or used a weapon, the degree of planning involved, whether and to what degree personal injury resulted from the robbery, and the amount of property taken.

19. The federal bank robbery statute authorizes imprisonment from anywhere between zero and 20 years. *Id.*

20. 18 U.S.C. § 3553(c). The judge must provide reasons for the imposition of a particular sentence if he or she departs from the guideline range, or if the sentence is within the range but that range exceeds two years. *Id.*

21. 18 U.S.C. § 3553(b).

21. 18 U.S.C. § 3742.

One additional facet of sentencing discretion is addressed in the Sentencing Reform Act. Prior to the Act, federal offenders sentenced to prison served terms set by the judge, but these terms were later adjusted by the United States Parole Commission, in the exercise of its function of determining when prisoners could be released on parole. The Parole Commission had developed its own guidelines for setting release dates. In practice, many offenders served only about one-third of the term imposed by the judge.²² The Sentencing Reform Act abolished early release on parole, shifting entirely to a real time system. With the exception of a modest potential for sentence reduction attributable to the defendant's good behavior,²³ the sentence pronounced under the new Federal Sentencing Guidelines is the time to be fully served.

The overriding goal of this reform was to reduce unwarranted disparities in the federal sentencing process.²⁴ Congress had seen compelling evidence of wide variation in the punishments imposed on similarly situated offenders.²⁵ The variations occurred not only from one district to another, but also among judges within a single district, and sometimes among similar cases sentenced by the same judge.²⁶ These disparities not only fostered undue optimism among offenders who hoped to "beat the rap," they also undermined deterrence and crime control objectives. At the same time, disparities fed prisoner resentment and impeded rehabilitation.²⁷ In addition, much of the public saw disparity as simply unfair, especially when disparity was synonymous with discrimination on the basis of sex, race or social class.²⁸ Liberals and conservatives in Congress agreed,²⁹ though for different reasons,³⁰ that discretion must be controlled and unwarranted disparities reduced or eliminated. The Act

22. See 18 U.S.C. §§ 4163, 4164 & 4205 (repealed 1984) (good conduct credits and parole eligibility after serving one-third of court-imposed sentence).

23. 18 U.S.C. § 3624(b).

24. S. REP. NO. 225, 98th Cong., 1st Sess. 52 (1983).

25. *Id.* at 41-50.

26. See generally Austin & Williams, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. CRIM. L. C. & P. S. 306 (1977); Diamond & Zeisel, *Sentencing Councils: A Study of Sentencing Disparity and its Reduction*, 43 U. CHI. L. REV. 109 (1975); A. PARTRIDGE & W.B. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES* (1974); Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163 (1973).

27. The official report on the 1971 Attica prison riots in New York indicates that uncertainty of release dates was a major cause of the riots. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 31 n.11 (1976) (citing NEW YORK SPECIAL COMMISSION ON ATTICA, *ATTICA* (1972)).

28. See generally Nagel & Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, 4 CRIME & JUST. 91 (1983); Howard, *Racial Discrimination in Sentencing*, 59 JUD. 121 (1975); Hopkins, *Is There Class Bias in Criminal Sentencing?*, 42 AM. SOC. REV. 176 (1977).

29. The Sentencing Reform Act of 1984 was co-sponsored by Senators Edward Kennedy, a liberal Democrat, and Strom Thurmond, a conservative Republican. Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & ADMIN. NEWS, 98 Stat. 3220 (codified at 18 U.S.C. § 3551).

30. Liberals viewed judicial sentencing discretion as a vehicle for invidious discrimination, while conservatives sought to curtail what they perceived to be inadequate sentences meted out by a liberal judiciary.

passed by a vote of 316 to 91 in the House, and 91 to 1 in the Senate.³¹

Despite good intentions, Congress' plan to reduce these disparities contained one crucial gap. Congress had eliminated parole release discretion, and had dramatically curtailed judicial sentencing discretion. Prosecutorial discretion, however, remained. Sentences would be set uniformly and predictably on the basis of the applicable offense and offender categories as defined in the guidelines. However, the prosecutor's charging and plea negotiation decisions could determine these offense and offender categories³² — especially if the guideline system was tied to the offense for which the defendant was convicted. In the absence of procedures to assure uniformity and factual accuracy in prosecutorial bargaining practices, disparity could continue. While the Commission and the judges would tailor the sentence to the supposed offense, in reality, the prosecutor could tailor the supposed offense to the desired sentence. If this occurred, disparity, dishonesty, and pockets of excessive leniency would remain.

Concern that plea bargaining could thwart the goals of sentencing reform surfaced early in the congressional debates. Virtually no one denied the existence of the problem. Yet, there were two schools of thought about its significance. One maintained that, at worst, plea bargaining might initially *limit* the gains to be realized by sentencing reform.³³ Reform would produce unequivocal improvement in cases sentenced after trial. It would also encourage uniformity in guilty plea cases by making post-trial punishments more predictable, and the bargaining parameters clearer. On this basis, incrementalists (and perhaps others who saw plea bargaining as a protection against potentially severe guideline sentences) favored tackling the relatively manageable issue of judicial sentencing discretion first, and addressing the guilty plea process later. They did not want to hold sentencing reform hostage to the potentially intractable problems of plea bargaining.³⁴

Those adhering to the other school of thought were more pessimistic. While incrementalists assumed that guidelines sentencing might somewhat mitigate the extant problems, or at worst leave them unaffected, those in this second school of thought argued that sentencing reform could actually *increase* the extent of unwarranted sentencing disparities for defendants convicted by plea.³⁵

Even before sentencing reform, prosecutors enjoyed vast discretion to manipulate charges and to structure plea agreements.³⁶ The powers of the judge

31. See Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & ADMIN. NEWS, 98 Stat. 3182-3717 (codified at 18 U.S.C. § 3551) (legislative history).

32. E.g., Alschuler, *supra* note 4, at 573.

33. THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 26-27 (1976).

34. *Id.*

35. See generally Alschuler, *Departures and Plea Agreements*, *supra* note 3; ZIMRING, A CONSUMER'S GUIDE TO SENTENCING REFORM: MAKING THE PUNISHMENT FIT THE CRIME, HASTING CENTER REPORT, INSTITUTE OF SOCIETY, ETHICS & LIFE SCIENCES 16 (1976).

36. See, e.g., *United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("[w]hether to prosecute and what charge to file or bring before the grand jury are decisions that generally rest in the prosecutor's discretion").

and the Parole Commission could, however, temper the sentencing consequences of this discretion. In the past, a pyramid of authority forced the sentencing decisions of numerous prosecutors to be reviewed by several hundred federal sentencing judges, with the sentences imposed by these judges later reviewed by the Parole Commission. A new, decentralized system could leave sentencing to the virtually unreviewable, invisible discretion of thousands of relatively autonomous Assistant United States Attorneys. An increase in disparity for cases resolved by a negotiated guilty plea could overwhelm any reduction in disparity for cases resolved by trial. This potential prompted Professor Franklin Zimring to muse that, with respect to sentencing, three discretions might be preferable to one.³⁷

In response to these concerns, the Federal Judicial Center (FJC) began a study in 1978 to assess the validity of the incrementalists' hopes and the pessimists' fears.³⁸ The FJC study stressed two points. First, guilty pleas and plea bargaining have a significant impact on the sentence imposed in federal criminal cases. Second, *the sentencing judge* decides the extent of this impact.³⁹

The sources of judicial control over guilty plea sentencing were a function of the different forms of plea agreements available under Rule 11 of the Federal Rules of Criminal Procedure. Bargains for a specific sentence under Rule 11(e)(1)(C) give maximum sentencing control to the litigants, but, as Judge Jon Newman has pointed out, such plea agreements were very rare in the federal system.⁴⁰ Many judges made clear that such bargains should not even be attempted in their courts, absent unusual circumstances. Many courts also expressed disfavor with bargains involving a recommended sentence. Where such bargains were used, however, judges frequently followed the recommended sentence, suggesting an important *de facto* sentencing role for the prosecutors.

The actual distribution of sentencing influence in such instances was complex, since judges could easily and lucidly convey their sentencing expectations, and prosecutors in a given court usually would not agree to recommend a sentence that they knew the judge would reject.⁴¹ Probably the most common form of plea agreement was the charge bargain. Although plea negotiation and unilateral prosecutorial charging discretion played central roles in determining the charges to which a guilty plea would be entered, the authorized terms of imprisonment under most federal penal statutes are so broad that, for practical purposes, a charge reduction plea agreement rarely constrained the judge's ability to consider all the background circumstances of the "real offense," and to set an appropriate sentence accordingly.⁴² In short, the single most important feature of the plea agreement process in federal courts, prior to the Fed-

37. See generally Zimring, *Principles of Criminal Sentencing, Plain and Fancy*, 82 Nw. U.L. Rev. 73 (1987).

38. S. SCHULHOFER, PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM, REPORT FOR THE FEDERAL JUDICIAL CENTER (August 1979) [hereinafter FJC REPORT].

39. *Id.* at 8-13.

40. Newman, *Federal Sentencing Guidelines: A Risk Worth Taking*, 5 THE BROOKINGS REVIEW 29, 32 (1987).

41. FJC REPORT, *supra* note 38, at 10-11.

42. *Id.* at 10.

eral Sentencing Guidelines, was the judge's principal role of fixing the sentence after the guilty plea.

This finding had important implications for the debate between incrementalists and pessimists. It suggested that sentencing reform might not reduce discretion, but instead *transfer* discretion from judges to prosecutors, the latter being uniformly younger and less experienced.⁴³ Moreover, the exercise of prosecutorial discretion would be less visible, and would, at best, be subject only to supervision within each office. The formal review the Parole Commission provided for the length of prison sentences in the pre-Guidelines system would be lost. Disparity would be more difficult to detect and less amenable to correction by judges and the Parole Commission. The FJC Report heightened Congressional concern that, without attention to plea bargaining, sentencing reform could actually increase disparities in the federal sentencing process.

The FJC Report, however, did not recommend preserving the status quo. It argued that the goals of reform could be achieved if the pending bills were amended to provide constraints on *both* judicial and prosecutorial discretion.⁴⁴ The Report also suggested a mechanism for implementing this solution.⁴⁵

Previous critics of plea bargaining had urged reliance upon in-house prosecutorial guidelines for the charging and bargaining process.⁴⁶ The FJC Report rejected this approach as intrinsically amorphous and unworkable.⁴⁷ Instead, the Report proposed that the newly constituted United States Sentencing Commission be required to promulgate guidelines for the judge to use in deciding whether to accept a guilty plea.⁴⁸ Central to the Report's analysis was its suggestion that efforts to contain the effects of plea bargaining should shift their focus from *prosecutorial* discretion, which eludes effective and legitimate outside regulation, to *judicial* discretion, which is inherent in a court's decision whether to accept or reject a plea agreement.⁴⁹ The Report noted that this judicial discretion under Rule 11(e) of the Federal Rules of Criminal Procedure would become the locus of effective sentencing authority in a reformed sentencing system.⁵⁰ The Report proposed that this discretion should also be structured by guidelines.⁵¹

43. *Id.* at 1-3.

44. *Id.* at 5-7.

45. *Id.* at 114-32.

46. *See, e.g.,* Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L. J. 651, 678-83 (1976) (legislatures should require prosecutors to issue public guidelines on charging policy); Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 28 (1971) ("feasible and desirable" for prosecutors to develop policy statements); Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48, 61 (1975) (District Attorney's memorandum outlining guidelines); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 453-62 (1971) (suggesting creation of "executive prosecutors" to negotiate plea bargains, with discretion limited by detailed guidelines).

47. FJC REPORT, *supra* note 38, at 47-48.

48. *Id.* at 114-32.

49. *Id.* at 5, 48-49.

50. *Id.* at 123. In a study of judicial participation in the plea negotiation process in North Carolina state courts, Professor Allen Anderson found that the implementation of determinate

Shortly after receiving the FJC Report, the Senate Judiciary Committee responded directly by amending the pending legislation to incorporate the approach developed in the FJC Report, with only slight modification.⁵² The amendment, which became section 994(a)(2)(E), states that the Commission shall promulgate "general policy statements regarding . . . the appropriate use of . . . the authority granted under [R]ule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to [R]ule 11(e)(1)." The legislative history illustrates that both the House and Senate viewed this provision as crucial to the success of the sentencing reform effort. Indeed, this provision reflects Congress' express rejection of the incrementalist view. Citing the FJC Report and its concern that guidelines could "simply shift discretion from judges to prosecutors," and enable prosecutors to "use the plea bargaining process to circumvent the guidelines,"⁵³ the principal Committee Report on the legislation singles out section 994(a)(2)(E) for special attention in its short introductory discussion of the bill.⁵⁴ The Report notes that under this provision the Commission is "directed to issue policy statements for consideration by Federal judges in deciding whether to accept a plea agreement," and states that "[t]his guidance will assure that judges can examine plea agreements to *make certain* that prosecutors have not used plea bargaining to undermine the sentencing guidelines."⁵⁵

sentencing in the state was a factor which prompted some judges to take a more active role in plea bargain discussions. Anderson, *Judicial Participation in the Plea Negotiation Process: Some Frequencies and Disposing Factors*, 10 *HAMLIN J. PUB. L. & POL'Y* 39, 54-57 (1989). In North Carolina, judicial participation in plea discussions is expressly authorized by statute. N.C. GEN. STAT. § 15A.1021(a) (1989). Such an active judicial role is prohibited in federal courts. FED. R. CRIM. P. 11(e)(1). Nevertheless, the importance of judicial oversight of plea agreements in a determinate sentencing realm cannot be overemphasized. As Anderson notes,

[w]hat can be said with certainty at this juncture is that active judges place themselves in a posture that allows them to better scrutinize the actions of the prosecution. Without this scrutiny, prosecutorial discretion is, by-and-large, unchecked. Certainly the vast majority of cases go unchallenged by the more active judges, but at least the appropriateness of the bargained disposition has been validated — the proper check and balance has been exercised.

10 *HAMLIN J. PUB. L. & POL'Y* at 57.

51. FJC REPORT, *supra* note 38, at 123.

52. The Judiciary Committee incorporated the FJC Report recommendations by issuing a directive to the Commission to promulgate *policy statements* governing the use of Rule 11(e)(2) to regulate plea agreements as opposed to *guidelines*. S. REP. No. 225, *supra* note 24, at 167. The shift in mandate to the Commission — to write policy statements rather than guidelines — reflected a slight weakening of resolve, because guidelines are binding on the courts and policy statements are not. It was not, however, a compromise that automatically portended a weak solution. Indeed, the Committee report states that its addition of section 994(a)(2)(E) to the statute "is intended to implement" the proposal of the FJC Report. *Id.*

53. S. REP. No. 225, *supra* note 24, at 63.

54. *Id.* In the version of the bill discussed in the Committee Report, the provision relating to plea agreements was denominated section 994(a)(2)(D). It appears as section 994(a)(2)(E) in the current statute.

55. *Id.* (emphasis added).

B. *The Sentencing Commission's Initial Product*

The Guidelines Manual published by the Commission in April 1987 and put into effect in November 1987 deals with the guilty plea process in both its general "Introduction" (Chapter One), and in its more specific guidelines and policy statements (Chapter Six). We will discuss the general and specific treatments separately, since they are not entirely consistent.

1. The "Introduction"

The Commission's introductory chapter, in what may be the most important sentence of the Guidelines Manual relating to this issue, states: "The Commission has decided that these initial [G]uidelines will not, in general, make significant changes in current plea agreement practices."⁵⁶

The decision to defer attention to the plea bargaining problem in the first edition of the Commission's Guidelines seems at odds with section 994(a)(2)(E) of Title 28 of the United States Code and Congress' direct rejection of the incrementalist view. Both the 1984 Act and its legislative history reflect Congress' conclusion that a failure to structure the judge's plea acceptance decision simultaneously with other aspects of the sentencing process would *aggravate* the disparity problem. As section 994(a)(2)(E) indicates, Congress expected the Commission to promulgate policy statements regulating the plea acceptance process, along with its initial set of Guidelines. Nonetheless, the Commission's cautious, judicious approach, as articulated in the Introduction to the Guidelines, may reflect a well-reasoned accommodation to the enormity of the task it faced,⁵⁷ the short time allocated for the drafting of the first Guidelines, the storm of controversy awaiting the Guidelines from judges, defense attorneys and other constituent groups, and the knowledge the Commission could acquire if it waited for additional experiential data to become available. The Commission also may not have wanted to risk losing the support of the Justice Department and its cadre of United States Attorneys before Congressional adoption of its first Guidelines was assured.⁵⁸

The basic problem, however, runs deeper, since the maintenance of pre-Guideline plea agreement practices may be impossible. What precisely is the status quo that the Commission cautiously chose to leave undisturbed? Before the Guidelines, plea agreement practices had two salient features. First, the prosecutor, in agreement with the defense, specified the offense of conviction and the relevant background circumstances relating to this offense. This al-

56. GUIDELINES, *supra* note 14, at 1.8.

57. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY, 883, 913-39 (1990); Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-14, 18-20, 28-31 (1988).

58. Under the Sentencing Reform Act of 1984, Congress had six months to approve the Guidelines after their submission by the Sentencing Commission. Pub. L. No. 98-473, tit. II, c. II, sec. 235(a)(1) (1984). Given the proposed bill to delay implementation of the initial Guidelines while votes were curried to rescind the enabling legislation, it may have been critical for the Commission to keep the support of the Attorney General and the Justice Department.

lowed relatively unrestricted party control over the facts and the charges.⁵⁹ Second, the trial judge retained great discretion to tailor the punishment to all the facts of the case. There was judicial control over the sentence. These practices constituted the status quo prior to the Guidelines.⁶⁰

How does one preserve this status quo in the context of the Guidelines sentencing system? Paradoxically, it *cannot* be preserved. In a guidelines system, whoever controls the relevant facts and charges controls the sentence. One cannot simultaneously have party control over the facts and charges, and judicial control over the sentence. As a result, upsetting the status quo is unavoidable. Either judges will no longer set sentences in guilty plea cases, or prosecutors will no longer control the relevant facts and charges without judicial oversight. The seemingly sensible and attractive notion of preserving the status quo turns out to be an unrealizable aspiration.

The Commission itself was of at least two minds about the notion of preserving the status quo.⁶¹ While the Introduction to the Guidelines speaks of preserving the status quo,⁶² the more specific portions of the Guidelines Manual, especially Chapter Six, seek to make many significant changes in plea agreement practices. In one sense, the general theme sounded in the Introduction is simply out of touch with the directives included in the content of the Manual itself. In another sense, however, the Introduction perfectly captures the Commission's ambivalence as to *which* features of the status quo to preserve, and how far to go toward extensive reform in its first Guideline iteration. This ambivalence surfaces again in many of the more specific provisions. This inconsistent response reflects the kind of compromise which is common in legislative schemes.

2. Specific Provisions

Five sets of Guideline provisions are particularly relevant to the problem of negotiated plea agreements. They are the provisions relating to acceptance of responsibility (section 3E1.1), substantial assistance (section 5K1.1), the offense of conviction (sections 2A1.1 to 2X5.1), the other offense circumstances (Chapters 2-3) and the plea acceptance procedures (section 6B1.1-1.4).

Acceptance of responsibility. The Guidelines afford no automatic discount for the guilty plea. However, section 3E1.1 provides for a reduction of the offense severity by two levels, "[i]f the defendant clearly demonstrates a rec-

59. In theory, additional information might surface in the presentence report. Probation officers, however, relied heavily on prosecutors to provide information about the offense, and Rule 32 permitted defendants, with the court's permission, to waive the presentence report. FED. R. CRIM. P. 32 (c)(1).

60. See generally FJC REPORT, *supra* note 38, at 8-13.

61. Given the fact that the Commission is a seven member, bipartisan body comprised of judges and non-judges, lawyers and non-lawyers, social scientists and non-social scientists, academics and practitioners, incrementalists and pessimists, it is surprising that only two perspectives are reflected.

62. GUIDELINES, *supra* note 14, at 1.8.

ognition and affirmative acceptance of personal responsibility for his criminal conduct."⁶³

A question arises as to whether this provision constitutes a guilty plea discount. The Guideline is explicit that "[a] defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury."⁶⁴ Conversely, a defendant who pleads guilty is "not entitled to a sentencing reduction under this section as a matter of right."⁶⁵ A cynic might dismiss these caveats as smoke screens designed to avoid the constitutional questions that could result from making the guilty plea discount explicit.⁶⁶ Alternatively, these qualifications and disclaimers may reflect another compromise among reasonable persons of diverse views. Regardless, these qualifications and disclaimers exist. If trial judges do take them seriously, by granting the discount to defendants convicted at trial or by denying it to defendants who plead guilty, plea practices, and especially the incentive to forgo trial, may be greatly affected.

A second important question relates to the size of the acceptance of responsibility discount: how important is a reduction of "two levels"? When a defendant is charged with a level forty offense (with a sentence range of 24 1/2 to 30 1/2 years), a two-level reduction to level thirty-eight (with a sentence range of 19 1/2 to 24 1/2 years) may not seem like a significant reduction or a momentous inducement. To understand the implications of a two-level reduction, however, it is necessary to appreciate the way the Commission constructed the Guideline ranges.

Generally, each offense level provides a 25 percent spread in the range of authorized prison terms. There is approximately a 12.5 percent increase in the maximum and minimum of each range with each jump of one offense severity level.⁶⁷ As a result, a reduction from offense level twenty to offense level

63. GUIDELINES, *supra* note 14, § 3E1.1(a).

64. *Id.* § 3E1.1(b).

65. *Id.* § 3E1.1(c) (emphasis added). Some observers have suggested that judges are granting the acceptance of responsibility discount to a substantial number of defendants adjudicated guilty after trial. P. Maloney, Deputy Assistant Attorney General, Remarks before the United States Sentencing Commission (March 15, 1990) (available at the Commission); J. Brown, United States Attorney for the Middle District of Tennessee, Remarks before the United States Sentencing Commission (March 15, 1990) (available at the Commission). Preliminary data based on a small sample of 59 cases which went to trial lends some support to the testimony of Maloney and Brown, since between 17 and 32 percent received or may have received the two-level reduction for acceptance of responsibility after trial (unpublished data available at the Commission).

66. Under *United States v. Jackson*, 390 U.S. 570, 581-83 (1968), it could be argued that granting an explicit sentencing discount for pleading guilty constituted an impermissible burden on the sixth amendment right to trial. However, more recent decisions, especially *Corbett v. New Jersey*, 439 U.S. 212, 216-18 (1978), suggest that an explicit guilty plea discount would not be unconstitutional. For discussion of this problem, see Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 780-86 (1980).

67. At very low offense levels, there are larger jumps. For example, the increase in the minimum of the range from level eight to nine is 100 percent (from two months to four months), while the increase in the maximum is 25 percent (from eight months to ten months). GUIDELINES, *supra* note 14, at 5.2 (Sentencing Table).

eighteen carries the same approximate percentage reduction in prison exposure as a reduction from level forty to level thirty-eight. In each case, maximum exposure is reduced by about 25 percent. The reduction from the maximum of the higher range (a risk for the defendant who goes to trial) to the minimum of the reduced range (a reasonable hope for the defendant who pleads guilty) is approximately 35 percent in both cases. Thus, a reduction of "only" two levels can be substantial; in fact, the reduction can be as much as 130 months, even for the defendant charged with a level forty offense.⁶⁸

The size of the "acceptance" discount on paper may not, however, be equal to its actual attractiveness to defendants confronted with real world choices. For a defendant facing the virtual certainty of twenty years in prison without parole (i.e., the bottom end of the level thirty-eight range), the additional 130 months that could result from conviction after trial may seem like a rather speculative and incidental disability. The economic concept of discounting to present value⁶⁹ provides one way of thinking about this problem. The psychological impact and physical mortality of the long-term prison population provides another perspective. The defendant may doubt his capacity to survive even the minimum twenty-year term that he faces under a plea. Under these circumstances, he may feel he has everything to gain and literally nothing to lose by taking his chances at trial.

At the lower end of the Guideline table, an analogous problem arises for the defendant who wants to avoid prison at all costs. If the two-level discount is inadequate to bring him within the range of offense levels which render probation or non-traditional confinement a possibility,⁷⁰ he may feel that he has no significant incentive to forego trial. In all these respects, the significance of the "acceptance" discount needs to be tested against actual experience.⁷¹

68. For a level 40 offender with a Category I criminal history, receiving a two level reduction and the minimum of the lower range results in a reduction of sentence exposure from 365 to 235 months. GUIDELINES, *supra* note 14, at 5.2 (Sentencing Table).

69. "Discounting means that the prospect of twenty years' imprisonment is not twice as onerous as the prospect of ten years' imprisonment. If the discount rate is 10 percent, the prospect of twenty years' imprisonment is twice as serious as the prospect of 5.82 years in jail." Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 294-95 (1983).

70. Probation is a sentencing option, if the minimum term of imprisonment in the range specified by the Sentencing Table is zero months. For an offender in Criminal History Category I, this would include conduct with a total offense level of six or less. GUIDELINES, *supra* note 14, at § 5B1.1.

71. According to the Commission, the decision to set the acceptance of responsibility discount at 25 to 35 percent reflected the fact that the research staff estimated 25 to 35 percent to be the average difference between defendants convicted after trial and defendants convicted as a result of pleading guilty. There may be numerous limitations, however, in using such an estimate. First, the difference for defendants convicted after trial versus defendants who entered pleas of guilty may vary by the nature of the offense, the defendant's criminal record, the judge before whom the defendant appeared, etc. Second, the difference in the sentence between a case that goes to trial and one that is resolved by a plea will vary greatly, depending on whether the defendant pleads to the full indictment or to reduced charges. Third, there are a host of other variables (e.g., the prosecutor's caseload pressure, trial experience and strength of evidence) that may affect the fa-

Substantial assistance. Guideline section 5K1.1 provides that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person . . . , the court may depart from the [G]uidelines."⁷² Although analytically distinct from sentencing benefits granted in exchange for either a guilty plea or acceptance of responsibility, the departure for substantial assistance offers a vehicle for achieving some of the same purposes. The first iteration of the Guidelines, however, contained no benchmarks for determining the extent of the sentencing reward. Although prosecutors and judges could conceivably develop uniform standards for determining the kind of assistance that warrants departure, as well as the extent of departure warranted under various circumstances, the potential for uneven treatment of cooperating defendants is obvious. With the absence of a definition of substantial assistance, the discretion to make the motion is unfettered and may vary from prosecutor to prosecutor, jurisdiction to jurisdiction, and case to case. The substantial assistance departure could even become a vehicle for avoiding the Guidelines whenever prosecution or defense has a tactical reason for such circumvention. As an unreviewable motion, the provision opens a potential path to disparity.

The offense. The Guidelines explicitly state that the starting point for determining the offense level is always the formal offense of conviction, not the "real" offense.⁷³ Predicating sentencing on the convicted offense can make prosecutorial charging and charge reduction plea agreements the controlling step in the sentencing process. It heightens the risk that existing disparities will be aggravated, unless the exercise of those decisions can be structured and controlled.

Offense circumstances. Almost all of the offense Guidelines include, along with a "base offense level" for the offense of conviction, one or more "specific offense characteristics" (i.e., aggravating or mitigating circumstances, such as use of a weapon, infliction of injury, amounts of property taken), that produce specified increases or decreases in the applicable offense level. Unlike the base offense, which is determined by the formal offense of conviction, the

vorability of the negotiated plea. An undifferentiated, unweighted average, insensitive to these sources of variance, may not be consistent with past practice for all cases.

72. Prior to the November 1, 1989 amendment to section 5K1.1, the section read as follows: "Upon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person . . . , the court may depart from the Guidelines." UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL 5.35 (Oct. 15, 1988).

73. GUIDELINES, *supra* note 14, at 1.5-1.6. The Commission wrestled with the problem of choosing between a "real offense" system and a "charge offense" system. Breyer, *supra* note 57, at 8-12; Nagel, *supra* note 57, at 925-27. Commissioner Paul H. Robinson's July 10, 1986, Guidelines draft provided for a highly detailed system with aggravated punishments for every harm an offender caused and a corresponding approach for mitigating factors. This "real offense" system met with widespread criticism and was ultimately rejected by the Commission. The Commission's final draft was a compromise, employing the offense charged as a base level and modifying that level with "real" aggravating or mitigating factors. Nagel, *supra* note 57, at 926; Breyer, *supra* note 57, at 11-12.

specific offense characteristics are determined by the actual offense conduct, as reflected in the information available to the court.⁷⁴ Thus, prospects for manipulation of the sentence through bargaining are theoretically reduced.⁷⁵

Of course, the court must obtain its information from somewhere. Bargaining over specific offense characteristics could be replaced by bargaining over stipulations or bargaining over the sources of information to be made available to the court. As a result, if the prosecutor opts not to provide evidence to support a specific offense characteristic, the judge's hands are tied, despite the "real offense" principle that governs Guideline determinations. Strategic behavior would simply shift from one form to another, without any change in the substantive result. The extent of disparity in the process of ascertaining specific offense characteristics accordingly warrants scrutiny.

Plea agreement procedure. The Guidelines Manual considers guilty plea practice in several policy statements issued pursuant to section 994(a)(2)(E). Two policy statements discuss the procedural mechanisms that a judge must follow when a plea is offered.⁷⁶ Another addresses the substantive standards the judge must use in deciding whether to accept the plea,⁷⁷ and a fourth statement discusses factual stipulations.⁷⁸

These provisions establish three important principles. First, factual stipulations must be accurate, complete and not misleading.⁷⁹ Second, in the case of plea agreements including a binding or non-binding recommendation to depart from the applicable Guideline range, a judge may only accept the recommendation if there are "justifiable reasons" for the departure.⁸⁰ Third, in the case of a plea agreement to dismiss charges or to withhold potential charges, the judge may accept the agreement only 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."⁸¹

74. GUIDELINES, *supra* note 14, § 1B1.3.

75. Some courts and commentators have suggested that the "real offense" elements of the Guidelines could mitigate the disparate effects of charge bargaining. See *United States v. Fernandez*, 877 F.2d 1138, 1144-45 (2d Cir. 1989) ("rigid adherence to 'real offense' sentencing under the Guidelines may undercut this form of plea bargaining (known as 'charge bargaining')"); *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989) ("charge-type" plea bargains . . . may no longer prove of much value to defendants in drug cases"); see generally Schwartz, *Options in Constructing a Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony*, 67 VA. L. REV. 637, 680-81 (1981) (discussing foundation for "real offense" guidelines); Schulhofer, *supra* note 66 at 770-71.

In addition, judges may feel compelled to allow the withdrawal of a guilty plea where the counter-factual plea agreement significantly underestimates the actual Guideline range. See *United States v. Bennett*, 716 F. Supp. 1137, 1147 (N.D. Ind. 1989) (judge allows two defendants to withdraw their pleas where plea agreements underestimated amount of drugs for which they were responsible); Schulhofer, *supra* note 66, at 770-71..

76. GUIDELINES, *supra* note 14, §§ 6B1.1, 6B1.3.

77. *Id.* § 6B1.2.

78. *Id.* § 6B1.4.

79. *Id.* § 6B1.4.

80. *Id.* §§ 6B1.2(b)(2), 6B1.2(c)(2).

81. *Id.* § 6B1.2(a).

The provision requiring accurate factual stipulations has the potential to partially ensure the integrity of the Guidelines system. It also represents a substantial change in the status quo. In pre-Guidelines plea practice, counter-factual stipulations entered solely for purposes of the litigation, and without an intention to mislead the court, were not viewed as impermissible or unethical. The stipulation provisions, together with their supporting commentary, indicate the Commission's determination to ensure that plea negotiations not distort the application of the Guidelines, or reintroduce through fact bargaining the disparities the Guidelines were intended to eliminate. The Commission, in this case, opted unequivocally for preserving judicial control over sentencing rather than preserving the tradition of party control over the parameters of plea negotiation.

The specification of the criteria judges will use when deciding whether to accept or reject a plea agreement poses a different situation. With respect to charge-reduction agreements, the Commission requires that the charges to which the defendant pleads "adequately reflect the seriousness of the actual offense behavior."⁸² A defendant should not be allowed to plead to a charge with substantially less sentence exposure than the offense committed merely for saving the government the expense of trial. For example, when the defendant possessed a large quantity of narcotics with intent to distribute, a plea to a misdemeanor for simple possession of the narcotics would not adequately reflect the seriousness of the actual offense behavior.

Though such pleas were not unheard of prior to the Guidelines, to accept them in the context of the Guidelines system would allow a sentencing concession on grounds that the Commission explicitly rejected.⁸³ This kind of compromise would also distort the substantive judgments underlying the basic offense Guidelines, and reintroduce disparity due to uneven practices in negotiating agreements of this kind. Thus, the Commission's decision to require charges to reflect adequately the seriousness of the underlying conduct illustrates a decision to change the form of existing practice in order to preserve the substance of judicial control over sentencing in guilty cases — a departure from the status quo.

The potential ambiguity of the word "adequately" raises a question about the Commission's charge-reduction standard. If by "adequate" the Commission means that the remaining charges must *fully* reflect the seriousness of the actual offense behavior, then charge manipulation is excluded. Consistent with the Commission's "truth-in-sentencing" approach to factual stipulations, the offense pleaded to would have to be the offense the defendant committed, and any departure or plea concession would have to be justified independently. The Commission's published commentary to section 6B1.2 conveys something

82. *Id.*

83. See *id.* § 3E1.1 (entrance of guilty plea alone does not entitle defendant to sentencing reduction, but offense level should be reduced two levels if defendant clearly demonstrates acceptance of responsibility).

of this flavor; it explains that the judge can accept the charge-reduction agreement, "if the remaining charges reflect the seriousness of the actual offense behavior."⁸⁴

The language of the formal policy statement itself is less clear. "[A]dequately reflect" may not mean "fully reflect" or even "reflect." In that event, prosecutors and defense counsel are left with some definite but undefinable (and unpredictable) room to maneuver. If the formal charges only need to be "close enough" to the actual offense behavior, then charge bargaining may provide an effective vehicle for sentencing concessions that could not otherwise be justified within the Guidelines framework.⁸⁵ The Commission's policy statement plugs most of the loopholes that charge bargaining practices present, but it curiously stops short of an unequivocal insistence on "truth-in-sentencing" in this area. The ambiguities in the "adequacy" requirement are unlikely to be tested or resolved in the appellate courts, because the charge bargaining area involves agreements accepted by both parties. Much of the effectiveness of the Guidelines system could turn on the term's interpretation by counsel and judges at the trial level.

The Commission's approach to other forms of plea agreements raises other difficult issues. In a policy statement entitled "Standards for Acceptance of Plea Agreements," the Commission informs judges that they may accept binding or non-binding agreements to depart from the Guideline range only for "justifiable reasons."⁸⁶ In its original form, this directive was not terribly helpful. The Commission rectified this ambiguity in an amendment effective November 1, 1989.⁸⁷ This amendment added language to the commentary of the Guideline which makes clear that a departure from the applicable Guideline range for "justifiable reasons" must conform with the general departure standard; there must exist "an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the [G]uideline,"⁸⁸ and which factor justifies a sentence other than the guideline prescribed sentence.

Though its initial vagueness invited criticism, the "justifiable reasons" language accomplished two important goals, one substantive and one procedural. First, it emphasized that the decision whether to depart in a case adjudicated by plea is a *judicial* decision, and, in the final analysis, the judge must take responsibility for the resulting sentence. Second, by treating such plea sentences as "departures," the Commission required the judge to state explicitly the reasons for accepting the divergent sentence. As a result, a mechanism was

84. GUIDELINES, *supra* note 14, at 6.6.

85. The court's determination that the charges do "adequately" reflect the seriousness of the actual offense behavior must be stated on the record. GUIDELINES, *supra* note 14, § 6B1.2(a).

86. *Id.* §§ 6B1.2(b)(2), 6B1.2(c)(2).

87. This amendment added language to the commentary of section 6B1.2, which defines "justifiable reasons" in a parenthetical as follows: "i.e., that such departure is authorized by 18 U.S.C. § 3553(b)" (emphasis in original). UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 6B1.2 (Nov. 1, 1989) [hereinafter 1989 GUIDELINES].

88. 18 U.S.C. § 3553(b) (cross-referenced in the commentary to § 6B1.2 of the November 1989 Guidelines).

created for collecting and analyzing the reasons for which judges depart in the plea context. As more is learned about the process in the six years that Congress allotted for revision, refinement and modification of the initially promulgated Guidelines,⁸⁹ the Commission can identify areas in which unwarranted disparity has occurred as a result of the plea negotiation process, and then structure those reasons found to have empirical acceptance and validity.⁹⁰

A pragmatic problem may result from this approach because of the human factors at work in the context of the plea acceptance hearing. Except in the most unusual cases, all the parties want the hearing to proceed smoothly and quickly. Real-world dynamics raise serious doubt about whether the parties will structure the plea agreement in a way that will candidly highlight for the Commission and other outside observers the exact nature of the plea concessions and the unusual or problematic nature of any departure from the normal Guidelines sentence. While the Commission's forcefully expressed preference for "truth-in-sentencing" strikes the right tone, whether the plea process will conform to the Commission's aspirations remains a question for critical study.

3. Summary of the Commission's approach

The Commission's approach to the plea bargaining problem in its first iteration of the Guidelines is ambitious. However, the approach is also ambiguous and inconsistent, because the Commission never squarely resolved the difference between two irreconcilable conceptions regarding the nature of the problem and its appropriate solution. One conception, the incrementalist view, saw the plea bargaining problem as separable from the other areas of sentencing disparity. It assumed that the plea bargaining process could be left unregulated for the time being. Within the Commission, some incrementalists even preferred to leave the plea process unregulated indefinitely, trusting the "market"-like features of plea negotiation to achieve uniformity and "efficiency."⁹¹ The second conception, the systemic view, saw the structuring of discretion in the plea process as essential to the success of the sentencing reform effort.

In many places, the Guidelines side unequivocally with the systemic conception that the enabling legislation itself adopts. Clear examples in the Guidelines include the treatment of factual stipulations, the emphasis on the judicial

89. Congress gave the Commission six years to study the Guidelines in their implementation, and then remedy any problems discovered. 28 U.S.C. §§ 994(o), 992(c).

90. GUIDELINES, *supra* note 14, at 1.8; *see also*, Breyer, *supra* note 57, at 31 ("[b]y collecting the reasons that judges give for accepting plea agreements, the Commission will be able to study the plea bargaining practice systematically and make whatever changes it believes appropriate in future years").

91. Guidelines, *supra* note 14, at 1.8; *see generally* Easterbrook, *supra* note 69, at 308-22 (discussing plea bargaining from economic perspective). The incrementalist-market view ignores the threats to fairness and efficiency that result from agency costs (conflicts of interest) and the many other sources of market failure, together with the absence in criminal procedure of the equilibrium mechanisms that give markets their efficiency properties. *See* Schulhofer, *Criminal Procedure as a Regulatory System*, 17 J. LEGAL STUD. 43, 47-66 (1988) (examining criminal justice discretion from perspective offered by economic analysis).

role in deciding whether to accept a plea, and the "truth-in-sentencing" approach that requires an explicit statement of the judge's conclusions about the "adequacy" of reduced charges and the "justifiable reasons" for plea-related departures. Permeating many of the relevant provisions, however, is a decision to proceed incrementally in order to preserve flexibility. It is as if a decision for strict control was made, and then advocates of other positions kept watering down the language reflecting that decision; the result is a position that straddles the fence. Some Commissioners were undoubtedly worried about rocking the prosecutorial boat and the guilty plea system upon which criminal justice administration is thought to depend, while other Commissioners worried that, absent a systemic approach, the reform effort might fail with its half-hearted remedy.⁹²

Viewed as a compromise, by no means an unusual circumstance in a multi-member government agency, the Commission's first product may have struck a plausible balance between the incrementalist and systemic views. Although adherents of the systemic approach lost some ground they had apparently won at the congressional level, the Commission's attack on the plea problem is still far more aggressive and comprehensive than any approach attempted in any other sentencing reform effort of the past two decades. If the Commission's first set of Guidelines were only the first in an iterative, evolutionary process of developing Guideline structures, half a loaf may be better than none.

Unfortunately, when concerns center on the dangers of circumvention, manipulation and the exploitation of loopholes, the "half-a-loaf" analogy may not be apt. From a practitioner's point of view, half a loophole may be just as good (or just as dangerous, depending on your perspective) as a whole loophole. For good reason, the notion of "half a hole" is conceptually and linguistically nonexistent. To the extent that the immediate parties to the plea negotiation process all have an interest in avoiding the thrust of constraining Guidelines and regulations,⁹³ the survival of any significant loophole poses a threat to the integrity of a Guidelines system. The guilty plea problem has been so daunting precisely because so little can be accomplished without tackling all aspects of the problem at once.

Under these circumstances, the Commission's initial product raises two concerns that require attention throughout the process of Guideline implementation. The first is whether the goals of the Sentencing Reform Act and its Guideline requirements are being evaded through covert, unsanctioned forms of plea negotiation, and if so how and why. The second is whether such eva-

92. See, e.g., Paul H. Robinson, Commissioner, Dissenting View on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18, 121 (1987); Nagel, *supra* note 57, at 935-38.

93. Contrary to popular lore, the plea process often is not truly adversarial. See Schulhofer, *supra* note 3, at 1041-43. Because of time and resource restraints, and the egos of Assistant United States Attorneys, both the prosecution and the defense stand to benefit from the avoidance of trial. The Assistant may be willing to negotiate a sentence that comports with his or her sense of justice, regardless of the Guidelines. Since conviction is a higher priority for the Assistant than the sentence, there is ample incentive to settle cases and avoid trials over the Guidelines.

sions, to the extent they occur, result in merely technical disrespect for Guideline procedures, or whether they instead seriously subvert the statute's substantive goals of honesty and uniformity in sentencing. A description of the way in which these concerns have figured in the Justice Department's official response to the Guideline requirements follows. The remainder of this Article explores these issues empirically.

C. *The Justice Department's Guidelines for Prosecutors*

On the day the Guidelines went into effect, the Department of Justice issued the hundred-page "Prosecutor's Handbook on Sentencing Guidelines," known colloquially as "the Redbook."⁹⁴ The Redbook details guidelines for prosecutors to follow when they make charging and bargaining decisions that affect (and are affected by) the Sentencing Guidelines.⁹⁵

The Justice Department may have been expected to guard jealously its prerogatives against excessive interference by the Commission and the courts. Instead, the Department chose, for the most part, to side with the Commission and Congress in urging openness, uniformity and deference to judicial sentencing primacy. In one important respect, the Department actually went further than the Commission in precluding prosecutorial bargaining outside the Guidelines framework.⁹⁶

Senior officials of the Department understood that plea bargaining must be controlled to make the entire Guidelines process work. Although their commitment to sentencing reform, like the commitment of conservatives in Congress, may have stemmed more from a desire to curb undue leniency than from a fervor for equal treatment, these officials (Trott, Weld, and later Thornburgh) were largely dedicated to plugging loopholes to every extent possible. The opposing forces, those who favored the preservation of discretion, were not primarily at the senior levels of the Department in Washington, but were principally the trial-level attorneys in United States Attorneys' offices around

94. United States Department of Justice, *Prosecutor's Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984* (Nov. 1, 1987) [hereinafter REDBOOK]. Subsequent to the publication of the Redbook, the Associate Attorney General and the Attorney General issued separate memoranda paralleling the Redbook which outlined official plea practice policy under the Guidelines. See Stephen S. Trott, Assistant Attorney General, Memorandum to All Litigating Division Heads and All United States Attorneys (Nov. 3, 1987) (available at the Commission); Richard Thornburgh, Attorney General, Memorandum to Federal Prosecutors (Mar. 13, 1989) (available at the Commission).

95. REDBOOK, *supra* note 94, at 33-50.

96. During the debate about how the Commission should handle the plea process in policy statements, the Justice Department urged that the strongest position be taken to prevent plea negotiations from undercutting the purposes of Guidelines. In fact, in the minds of some Commissioners, the issuance of the Trott memorandum and the Redbook were prompted by the Department's disappointment that the Commission did not go far enough in limiting the open-ended plea process. For Commissioners who favored the systemic approach, the Redbook was considered an integral part of the Guideline system's package. In contrast, those who favored the incrementalist or status quo approach regarded with suspicion the Redbook's limits on fact-bargaining and charge-bargaining.

the country. The Redbook must, therefore, be understood in the context of an effort by those at the pinnacle of the criminal justice pyramid (Congress, the Commission, and the Department of Justice) to get those on the diffuse lower ranks, who have potentially conflicting interests and agendas, to comply with centrally determined policies.

The Redbook addresses, among other topics, charging policy, permissible sources of plea inducements, plea agreements, acceptance of responsibility and departures, including departures for substantial assistance.⁹⁷ Consistent with the Guidelines, the Redbook notes that prosecutors may offer to recommend a sentence at the bottom of the Guideline range and the two-level acceptance of responsibility discount, provided that this discount is consistent with the given facts.⁹⁸ It outlines special requirements of review and approval for certain particularly sensitive types of prosecutorial actions.⁹⁹ With respect to the important area of departure recommendations based on substantial assistance in other prosecutions, the Redbook provides no firm guidelines or standards, and notes only that the determination whether a defendant has rendered sufficient assistance to warrant this benefit "will necessarily be somewhat subjective and will vary from case to case."¹⁰⁰ The Justice Department approach to sentence recommendation agreements and charge reduction agreements, however, provides the greatest general interest and importance.¹⁰¹

The Redbook's discussion of sentence recommendations stresses the undesirable effects of bargaining over recommendations to depart from the Guidelines. Although recognizing that the Commission's policy statement on this subject authorizes departures for "justifiable reasons," the Redbook concludes that this standard "*is at variance with the more restrictive departure language of 18 U.S.C. [section] 3553(b) and that, consequently, these policy statements should not be used as a basis for recommending a sentence that departs from*

97. REDBOOK, *supra* note 94, at 33-53.

98. *Id.* at 43.

99. Approval of the United States Attorney or a designated supervisory official (or in a Criminal Division case, the appropriate section chief) is required:

- (1) to recommend to a court a departure from the Guidelines based on a factor other than substantial assistance in the prosecution of other parties;
- (2) to enter into a plea agreement that includes a specific sentence (as opposed to an agreement to recommend a sentence); and
- (3) to depart from any of the policies set forth in the Redbook.

Id. at 49-50. Moreover, in no event, are charges involving the principal administrator of a continuing criminal enterprise or involving use of a firearm in the commission of a crime of violence or drug-related offense not to be pursued, unless they cannot be "readily proven" or unless absolutely necessary to enable imposition of an appropriate sentence on someone who has rendered substantial assistance to the government, and then only with the consent of the Assistant Attorney General, Criminal Division, as to continuing criminal enterprise charges or the United States Attorney as to use of firearm charges. *Id.* at 50 (referring to 21 U.S.C. § 848 (Continuing Criminal Enterprise) and 18 U.S.C. § 924(c) (use of firearm in commission of violent crime or drug-related offense)).

100. *Id.* at 52.

101. *Id.* at 41-53.

the [G]uidelines.”¹⁰² The Redbook explains that substantial plea inducements can be offered, *within* the Guidelines framework, by recommending a sentence at the lower end of the applicable range together with the two-level reduction for acceptance of responsibility. The total reduction in that case would be about 35 percent or more in the applicable sentence.¹⁰³

The Justice Department’s explanation of the policy considerations underlying its position is worth particular attention:

The basic reason for rejecting the Commission’s policy statements on sentence bargains and treating sentences which are the subject of a sentence bargain in the same manner as sentences which result from conviction after trial is that any other result could seriously thwart the purpose of the SRA to reduce unwarranted disparity in sentencing. It should be remembered that the purposes of the Sentencing Commission include providing “certainty and fairness in meeting the purposes of sentencing, [and] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct” 28 U.S.C. [section] 991(b)(1)(B). Since the vast majority of federal criminal cases are disposed of by guilty pleas obtained through plea negotiations, a system that excepted such cases from the reforms included in the new law would be seriously deficient. Congress could not have expressed the concerns reflected in the SRA and the legislative history with unwarranted disparity and uncertainty in sentencing but have intended the reforms enacted to be limited to the small percentage of cases that go to trial.¹⁰⁴

Curiously, the Redbook’s treatment of charge bargaining is radically different from its uncompromising attitude toward sentence bargaining. Although the discussion of charge bargaining begins by emphasizing “Congress’s concern that plea bargaining not undermine the purposes of sentencing applies to charge bargains as well as to sentence bargains,”¹⁰⁵ the Department does not question the Commission’s requirement that charge bargains need only “adequately” reflect the seriousness of the actual offense behavior. Hence, the Department concludes that “moderately greater flexibility” attaches to charge bargains than to sentence bargains.¹⁰⁶ Going a step further than the Commission, the Redbook also includes an interpretation of the meaning of the “adequacy” requirement. The Redbook concludes that this requirement “translates into a requirement that *readily provable* serious charges should *not* be bar-

102. *Id.* at 43 (emphasis in original). The Justice Department recognized that following its policy on this interpretation was especially important because judges would often adhere to the policy statement in practice if urged to do so by the government. Moreover, it would be unlikely for departure to be tested on appeal.

103. *Id.*

104. *Id.* at 44.

105. *Id.* at 45.

106. *Id.* at 46.

gained away. The sole legitimate ground for agreeing not to pursue a charge . . . is the existence of real doubt as to the ultimate provability of the charge."¹⁰⁷

The Department's position can be seen as unobjectionable. It excludes charge bargains based on factors other than the weakness of the case (such as caseload pressure),¹⁰⁸ and it correctly underscores the propriety of dismissing unprovable charges.

The difficulty arises in deciding whether there is a difference between charges that are unprovable (and *must* be dismissed), and charges that are "readily" provable (and *must not* be dismissed). If there is a distinction, then there are charges that may or may not be dismissed, depending on the unfettered discretion of the prosecutor. That discretion, of course, is the discretion to determine the sentence, unguided and uncontrolled.

The Redbook does contemplate a space between the unprovable and the readily provable. While the precise breadth of this space is an empirical question, in practice it could conceivably encompass almost all the charges a prosecutor files. In fact, just in case the Department's trial attorneys missed this point, the next sentence of the Redbook notes:

[T]he prosecutor is in the best position to assess the strength of the government's case and enjoys broad discretion in making judgments as to which charges are most likely to result in conviction on the basis of the available evidence. For this reason, the prosecutor entering into a charge bargain may enjoy a degree of latitude that is not present when the plea bargain addresses only sentencing aspects.¹⁰⁹

The Redbook closes this discussion of charge bargaining with even less subtlety. It argues that *because* prosecutors will have greater leeway and freedom from judicial supervision when charge bargaining than when sentence bargaining, "prosecutors may wish to give greater consideration to charge bargaining . . . than in the past."¹¹⁰ In support of this recommendation, the Redbook refers to a finding that, in Minnesota, the introduction of sentencing guidelines was followed by an increase in charge bargaining and a decrease in sentence bargaining.¹¹¹ Ironically, a study that should have alerted the Department to the potential for Guideline evasion was instead used to encourage use of the charge bargaining loophole.

The Department's decision to back off from the stance of strict opposition to Guideline circumvention that it articulated in connection with sentence recommendations remains a mystery. For sentence recommendations, the Depart-

107. *Id.* at 46-47 (emphasis in original).

108. Attorney General Thornburgh did allow for charge bargaining in cases where the caseload pressure was the primary motivation. Thornburgh memorandum, *supra* note 94, at 4.

109. *Id.* at 47.

110. *Id.*

111. *Id.*

ment had stressed the necessity for "treating sentences which are the subject of a sentence bargain in the same manner as sentences which result from conviction after trial," because "any other result could seriously thwart the purpose of the [statute] to reduce unwarranted disparity."¹¹² However, the Department could not have failed to appreciate that the same policy concern applies with as much force to charge bargains as to sentence bargains.¹¹³

The concern may even apply *more* strongly to charge bargains. The sentence recommendations that the Department so strongly deplored would at least produce a record of the "justifiable reasons" for the sentence; accountability and Commission review would be available. The Redbook firmly condemns this approach, and instead encourages prosecutors to use an alternative which will obscure the reasons for departure and give prosecutorial assessments the maximum freedom from scrutiny. The Department uses the fact that in charge dismissals prosecutorial discretion (with immunity from oversight) "is at its zenith"¹¹⁴ as support for its preference for the charge-bargaining route to guilty plea concessions.

All told, the Redbook reflects much of the same inconsistency and ambivalence that plagues the Commission's own Guidelines. Its treatment of sentence recommendations is structured to vigorously plug potential loopholes in an attempt to prevent disparity, and restrict guilty plea concessions to the 35 percent discount made available by the acceptance of responsibility provision and the width of the authorized Guideline range. In contrast, its treatment of charge bargaining provides a definition of "adequacy" that could expand a potential loophole and encourage prosecutors to take advantage of it. This treatment could increase disparity and add unlimited possibilities for guilty plea concessions beyond the authorized 35 to 50 percent discount. As an integral part of the overall Guideline system, the Justice Department's Redbook reinforces some of the necessary systemic controls, but it provides additional openings for bargaining at the cost of increased prosecutorial sentencing power. The problem of assessing the manner in which these competing tendencies play themselves out in practice was the subject of our exploratory study.

III. THE RESEARCH DESIGN

The Guideline system described above raises four categories of research questions concerning the relationship between plea negotiation and the goals of sentencing reform. First, how well do the stated Guideline requirements work when applied in good faith? Second, are these requirements being avoided by covert, unsanctioned forms of plea negotiation? Third, if this circumvention exists, how does it occur and why? Finally, does such avoidance, to the extent it occurs, result in merely technical disrespect for Guideline procedures, or

112. *Id.* at 44.

113. Perhaps this inconsistent stance reflects disagreement in the Department, or among United States Attorneys or Assistant United States Attorneys, just as the Commission's chapters one and six, with their different messages, reflect a lack of consensus among its members.

114. REDBOOK, *supra* note 94, at 47.

does it seriously compromise the statute's goals of honesty, uniformity and substantive fairness¹¹⁵ in criminal sentencing?

These broad issues produce specific questions regarding the implementation of the Guidelines. These questions include:

(1) Under what circumstances are acceptance of responsibility discounts being afforded or withheld?

(2) What conditions are necessary to qualify for a substantial assistance departure, the extent of such departures, and the uniformity of decisions about these matters?

(3) How often, under what circumstances, and with what impact do plea agreements recommend or result in sentences different from those required by the applicable sentencing Guidelines? How often and for what reasons do judges accept such recommendations to depart?

(4) How often, under what circumstances, and with what impact do prosecutors dismiss charges in return for a plea agreement? What makes a charge not "readily provable," and what determines whether the remaining charges are "adequate"?

(5) What is the sentencing impact of charge dismissals, and to what extent are they accepted or challenged by the sentencing judge?

(6) To what extent are factual stipulations used, and what is their level of accuracy? Are sentencing facts presented to the judge in other forms, and to what extent are these forms reliable?

(7) To what extent are prosecutors' decisions about such matters reviewed by supervisors or governed *effectively* by uniform policies within each office? To what extent do such policies differ from one district to another?

(8) What is the role of the probation officer in determining the offense conduct and other facts relevant to the Guideline determination? Can the probation officer prevent the presentation of incomplete or misleading facts to the sentencing judge?

In designing a study to address these questions, we considered the advantages and disadvantages of an early start. The inevitable difficulties of any shakedown period were radically compounded for the Federal Sentencing Guidelines by widespread doubts about their constitutionality and the refusal of many judges to apply them.¹¹⁶ This situation, in turn, aggravated the problem of low case volume which existed in many districts; the Guidelines only apply to conduct occurring after November 1, 1987, and, as the post-Novem-

115. See S. REP. NO. 225, *supra* note 24, at 50-58 (outlining goals of Guidelines as comprehensiveness, consistency and fairness in sentencing, and certainty of release dates).

116. See, e.g., *United States v. Allen*, 685 F. Supp. 827, 830 (N.D. Ala. 1988) (holding Guidelines unconstitutional); *United States v. Lopez-Barron*, 685 F. Supp. 725, 727-28 (S.D. Cal. 1988) (same); *United States v. Russell*, 685 F. Supp. 1245, 1251 (N.D. Ga. 1988) (same); *United States v. Martinez-Ortega*, 684 F. Supp. 634, 636 (D. Idaho 1988) (same); *United States v. Bolding*, 683 F. Supp. 1003, 1005 (D. Md. 1988) (same); *United States v. Horton*, 685 F. Supp. 1479, 1487 (D. Minn. 1988) (same); *United States v. Molander*, 683 F. Supp. 701, 707-08 (W.D. Wis. 1988) (same). In all, over 200 district court judges held the Guidelines unconstitutional, while some 120 judges reached the opposite result.

ber cases started to ripen, many cases were deferred pending resolution of the constitutional issues. The constitutional challenges also heightened the considerable reluctance of many judges and attorneys to accept the non-trivial burden of learning the Guidelines. Many simply hoped (or prayed) that the Guidelines would disappear.

On the other hand, it was important to have available for comparison a baseline of pre-existing practices and perceptions, as well as an understanding of the process by which attorneys learned the Guidelines, and how these attorneys worked with and around them. Therefore, we decided to conduct a qualitative study to provide a picture of the situation at the beginning stage of Guideline implementation. We recognized that any conclusions reached with respect to this stage would not necessarily generalize to the period of full implementation, when the constitutional issues had been laid to rest.

We must also emphasize that our exploratory effort was aimed at identifying problems, not discovering successes. Our interest was focused on ascertaining whether there is Guideline manipulation throughout the plea process, and, if so, how this manipulation occurs and under what circumstances. Thus, the study must not be misconstrued as an indictment of the Guideline system. That result would chill the initiation of research efforts to explore imperfections and seek improvements. Moreover, it would be particularly inappropriate on the basis of this research, because the research was conducted pre-*Mistretta*, and before the Guideline system had had an opportunity to work out its kinks. By virtue of the Commission's status as a judicial branch agency, any attempt to control these policies must be handled delicately due to separation of powers considerations.

In view of the exploratory nature of our inquiry, we chose to focus on four federal districts, which were regionally diverse, and not selected randomly — two large districts, one medium-sized and one small. The sample was chosen from among the jurisdictions that had a significant number of Guideline cases, so it excluded districts where most of the judges had declared the Guidelines unconstitutional. Given this factor and other biases inevitable in the construction of such a small sample, the research sites studied are not representative. We can only hope to describe the situation in these districts, and to identify certain common patterns. At the same time, to the extent that similar patterns emerge in these four districts, a preliminary picture of the underlying processes can be formulated.

We visited the four sites over a five-month period from September 1988 to January 1989. In each jurisdiction, we interviewed the United States Attorney and some of his principal criminal assistants, the Chief of the Probation Office and several probation officers, numerous trial level prosecutors, and at least one of the judges. Since our primary focus was on the exercise of prosecutorial discretion, we did not, except in one jurisdiction, interview defense counsel, and we did not extensively interview the judges.

Early in the process, we discovered that probation officers and prosecutors were by far the most knowledgeable officials regarding the relationships between charging, plea negotiating and sentencing. In every instance, judges at

this stage simply did not have access to the behind-the-scenes dynamics that were the focus of our research questions. While this finding is significant, we did not attempt to document it in greater depth, but instead spent our time on issues more central to the focus of our research. The omission of defense counsel in three of the four districts was unfortunate in principle, but it had little bearing on the specific issues that were ripe for investigation at this initial stage. Careful analysis of the perspectives of defense counsel and judges will undoubtedly be warranted in more comprehensive follow-up studies.¹¹⁷ In all, we interviewed thirty-four federal prosecutors, ten probation officers, and two federal district court judges.¹¹⁸

All interviews were taped and transcribed, except in the few instances where the subject objected. We promised and maintained strict confidentiality. Since our questions not only explored compliance with the Commission's Guidelines, but also studied adherence to Justice Department directives and internal office policies, it was especially important to preserve confidentiality throughout the project. Our findings are reported in detail, but particular jurisdictions and individuals are not identified.

In preparation for our site visits, we devised a detailed interview schedule permitting us to systematically cover all dimensions of the problem. After the first few interviews, however, we reconsidered our commitment to this approach and proceeded less formally. Our decision to move from a structured to an unstructured interview format was based on our observation that abstract questions (e.g., "Would you ever decide to drop a gun count? When?") seldom elicited anything other than the "correct" answer. It proved impossible to probe into the workings of the system without turning to an unstructured discussion of particular cases and how they had unfolded. As such, we simply asked AUSAs to tell us about their most recent cases. Before each trip, we also reviewed a sample of case files submitted by probation officers from the relevant jurisdiction to the Commission, and later asked particular AUSAs to

117. The authors are currently involved in a 10-jurisdiction follow-up study of federal plea practices after *Mistretta*. For this study, the authors have conducted extensive interviews with judges and defense counsel (both public and private).

118. In each jurisdiction, we contacted the United States Attorney. After securing his permission to conduct the interviews, under a promise of full confidentiality and no attribution for responses, by district or by individual, we arranged for 60 to 90 minute interviews with key supervisory Assistant United States Attorneys (AUSAs) in the Criminal Division (e.g., the First Assistant, the head of the Narcotics, Fraud, and General Crimes Sections). Additionally, we requested 60 to 90 minute interviews with approximately seven to ten additional AUSAs, preferably those who had prosecuted cases under the Guidelines. In those instances where we had read a file that raised questions we wished to pursue, such as why a mandatory section 924(c) gun count had been dismissed, we requested interviews with the AUSAs handling those cases. For the most part, the AUSAs we interviewed were chosen by the United States Attorney, resulting in an over-representation of those with supervisory authority. While this method had the potential of introducing a bias for finding the Guidelines successful, we were willing to accept this in a pilot study; we needed to secure full cooperation, and those designated for interviews tended to have more Guideline experience. Some balance may have been introduced by our requests for certain AUSAs, when a file we reviewed left questions open.

explain some of the seemingly problematic cases they had handled. We found that this procedure produced markedly different results. The same interview subjects who had "correctly" responded that they would never drop a gun count without approval later described ostensibly exceptional, but actually recurrent, situations in which they had done just that.

The pursuit of questions raised by specific case files was illuminating for the more candid responses it generated, and the picture it provided of the plea process. The Commission maintains a case file for every Guidelines case. That file, when complete, contains a copy of the presentence report, the judgment and commitment order, the plea agreement (if written), and the judge's statement of reasons for the sentence.¹¹⁹ Since our study took place in the earliest phase of Guideline implementation, and the constitutional issues had yet to be resolved, the submission of data to the Commission was haphazard and often incomplete. With this substantial limitation, we read all the Guideline files available for each jurisdiction visited in order to discern charge and plea practices.

Since our procedures entailed the largely informal exploration of an amorphous territory that resists quantitative rigor, our findings center more on possibilities and patterns than on estimates of specific frequencies or proportions. Viewed in this context, they may still help identify the scope of any problems, and the steps that might be taken in the future, both in terms of empirical study and social policy.

IV. PRELIMINARY FINDINGS: CHARGING AND PLEA PRACTICES IN THE PRE-MISTRETТА STAGE OF GUIDELINE IMPLEMENTATION

A. Overview

Our first set of findings concerns the context in which the earliest stages of Guideline sentencing occurred. In each jurisdiction, we found that Guideline implementation was incomplete, and occurred in an environment of confusion and hostility. Participants seldom understood how the Guidelines had been drafted, the role of past practice data in the drafting,¹²⁰ how they were in-

119. See L. Ralph Mecham, Director, Administrative Office of the United States Courts, Memorandum to All Federal Judges, Chief Probation Officers and Other Judicial Officials (March 7, 1988) (available at the Commission) (outlining documentation to be sent to Commission by probation office of each district court); see generally 28 U.S.C. § 994(v) (1988) (judge or officer required to submit to Commission report on sentence, including offense and "information regarding factors made relevant by the [G]uidelines").

120. Congress directed the Commission to ascertain and consider the average sentence imposed in the past for each category of offense "as a starting point in the development of the initial sets of [G]uidelines for particular categories of cases . . ." 28 U.S.C. § 994(m). However, Congress also noted that "[t]he Commission shall ensure that the Guidelines reflect the fact that, in many cases, current sentences do not adequately reflect the seriousness of the offense." *Id.* This language makes clear that Congress never meant to bind the Commission to past practice. In drafting the Guidelines, the Commission heeded the congressional directive, always cognizant of past prac-

tended to be applied, and the intentions of the Justice Department in their "Redbook."

In assessing the long-term significance of our more substantive findings, these environmental limitations must be recognized. First, since *Mistretta* had not yet been decided,¹²¹ the majority of judges refused to apply the Guidelines, or were willing to hold them unconstitutional whenever the defense chose to present a challenge. Except at one research site, where the circuit court of appeals had required all district courts to treat the Guidelines as constitutional, Guideline implementation was partial and to some extent unpredictable. Attorneys might not know if they had a "Guidelines" case until it was assigned to a judge for trial. Moreover, the defense might not raise a constitutional challenge in all Guideline cases.¹²²

Second, ignorance about the Guidelines was rampant. Probation officers generally had mastered the Guidelines, but many prosecutors only had a sketchy acquaintance with them, and many others were either uninformed or misinformed. Some public defenders and prosecutors were beginning to learn the intricacies of the Guidelines, but others were said to be largely unfamiliar with them. The private defense bar was just beginning to become aware of them. Most notably, lawyers, whether for prosecution or defense, generally did not like the Guidelines and resisted learning them. Many practitioners hoped that the Supreme Court would abolish them.

Third, many judges were openly hostile to the Guidelines, because of the alleged complexities involved, the reduction in their discretion, and the new sentencing levels that some thought too severe. Judges were also highly critical of the fact that the use of probation had been substantially restricted. In this environment, many judges either encouraged or tolerated evasive strategems. Parties could negotiate sentences well below the Guideline range, without fear of judicial opposition, even in instances where probation officers might "blow the whistle" by stressing the real facts in the presentence report.

Our substantive findings present a somewhat more optimistic picture, centering on three principal points. First, even in this pre-*Mistretta* period, we found a reasonable, perhaps unexpectedly large number of straightforward, "by-the-book" guilty plea sentences. Many defendants did plead guilty to charges describing their actual offense conduct, with the plea agreement setting forth the

tice but not necessarily adhering to it. See Nagel, *supra* note 57, at 930 ("[i]n the end a decision was made to use estimates of past time served as an anchor for Commission discussions about what should be the base offense sentence . . .") (emphasis in original); Breyer, *supra* note 57, at 7-8 (noting although Commission "by and large" followed typical past practice, it also made "important deviations" from this data).

121. As noted above, we visited the four sites between September 1988 and January 1989. The Supreme Court decided *Mistretta v. United States*, 109 S. Ct. 647 (1989), on January 18, 1989.

122. Defense attorneys rarely raised constitutional challenges in bank robbery cases, because the bank robbery Guidelines were perceived to be lower than previous sentencing practice. GUIDELINES, *supra* note 14, at § 2B.3.1(b)(1). Indeed, of all the cases involving constitutional challenges to the Guidelines, only three were bank robbery cases.

relevant circumstances without factual manipulation, and the sentence imposed falling within the applicable Guideline range. The principal guilty plea inducement (tacitly or explicitly promised in return for the plea) was the two-level acceptance of responsibility discount, and a recommendation by the government for a sentence at the lower end of the Guideline range. In these instances, the Guidelines appear to work well and in the manner intended by the Commission.

Second, we also found a substantial number of negotiated plea agreements which involved some exception to the Guideline sentence that would normally be applicable. Third, these extra-Guideline sentences were almost never handled "by-the-book" — that is, in the open and honest fashion that the Guidelines contemplate as in the departures for plea agreements detailed in Chapter Six of the Guidelines.

Recall that the Guidelines themselves anticipate a need for exceptions to accommodate unusual cases, and provide a procedure for handling exceptions. The judge may depart from the Guidelines on the basis of factors "not adequately considered by the Commission." In addition, when cases involve "substantial assistance," the judge has unlimited freedom to depart upon motion of the prosecutor. Yet, pre-*Mistretta*, in the jurisdictions we visited, we found that the "substantial assistance" provision was seldom invoked, and the other departure mechanisms were rarely used. Instead, during this first phase of Guideline implementation, the parties seemed to prefer to manipulate the facts and charges to produce an acceptable Guideline range. The desired sentence would then fall within the Guideline range that incorrectly appears applicable to the case.

Guideline manipulation appeared, at least during this first phase, to take three basic forms — *charge bargaining*, *Guideline factor bargaining* and *date bargaining*. In *charge bargaining*, provable counts are dropped to induce a plea; sometimes a superseding indictment entirely replaces serious felony counts with a relatively minor offense.¹²³

In *Guideline factor bargaining*, background circumstances that are meant to influence the Guideline computation are manipulated. Circumstances suggesting aggravation for the defendant's abuse of his position of trust, extensive planning, or a defendant's major role in the offense are downplayed, and circum-

123. For example, an AUSA may replace a drug distribution count with a superseding indictment charging the defendant with the use of a communication facility in a drug offense. In other cases, counts are simply dismissed so the judge's ability to take them into account is mooted. The best example of the latter is the typical pattern of indicting an individual for six counts of bank robbery and negotiating a plea to three. Under the pre-Guideline system, the judge might consider the six counts when fashioning his or her sentence, while still giving the defendant the benefit of the plea agreement to the lesser number of counts. Under the Guidelines, however, a decision by the prosecutor to reduce six counts of bank robbery to three effectively precludes the judge from considering the six counts at all, forcing the lower sentence upon him or her. See GUIDELINES, *supra* note 14, at § 6B1.2(a) (requirement of judge to determine if plea agreement not to pursue, or to dismiss charges "adequately reflects the seriousness of the actual offense behavior" does not authorize judge to intrude on prosecutorial charging discretion).

stances suggesting mitigation, such as a minimal role in the offense, are exaggerated. The consequence of this practice is to moot distinctions that were found under past practice studies to differentiate one sentence from another, and thwart the underlying logic of the Guidelines and their goals of proportionality, uniformity and reduced disparity.

Date bargaining, a new technique of plea negotiation, owes its existence to sentencing reform. Recall that the Guidelines only apply to conduct which occurred after November 1, 1987. Federal prosecutors now find it common to confront defendants who have been engaged in fraud, drug trafficking or some other conspiratorial scheme since early 1987 or earlier. After negotiation, an indictment is drawn alleging a conspiracy that ends, miraculously, in October 1987; the Guidelines no longer apply, and the defendant escapes the sentencing range that would otherwise have applied to his conduct. Date bargaining, of course, is merely a transition problem, but its impact on a sentence can be enormous.¹²⁴

A major question, in assessing the effectiveness of the pre-*Mistretta* Guidelines, concerns the proportion of "by-the-book" compared to extra-Guideline case processing. We cannot offer estimates of these crucial numbers. The situations we observed were too fluid to allow for a determination of reliable or useful estimates. We can, however, offer several observations about the processes and outcomes which we observed.

First, the extent of Guideline evasion varied considerably from prosecutor to prosecutor, and district to district. That variability seemed to be influenced by the policies of the United States Attorney, his office's tradition of autonomy from Washington, and the autonomy traditionally granted to individual prosecutors within the office. Also influential was the relationship of prescribed Guideline sentences to the sentencing levels that were customary in the jurisdiction before the Guidelines. The impetus to manipulate and depart downward, overtly or covertly, and judicial tolerance of such manipulations or departures, was much more pronounced where pre-Guideline sentences in that jurisdiction, or before certain judges, had been below the national median.¹²⁵

Second, Guideline evasion as a result of charge and plea practices was, despite the variability just noted, not limited to one or two cases. Some prosecutors negotiated below-Guideline sentences in cases that were not especially unusual. These sentences, however, did not appear on the case record as departures for substantial assistance or for other appropriate stated reasons. Although it is impossible to measure its precise frequency, such evasion was observed in every jurisdiction studied, and was not limited to a particular kind of case. In the remainder of this section, we describe in more detail the pat-

124. This type of bargaining is particularly relevant in white collar cases and drug conspiracies, where the offense tends to incorporate a series of transactions carried out over a long period of time.

125. AUSAs frequently commented that they saw no need to go to trial in a case where the judge would not, in their estimate, give the Guideline sentence. In those cases, the AUSAs merely made life easier for all concerned by negotiating an extra-Guideline sentence.

terms of Guideline manipulation observed, and the factors that seem to drive this manipulation.

B. Bargaining Standards and Procedures

1. The Initial Charging Decision

The parameters of the initial charging decision were fairly uniform across federal jurisdictions, and there seemed to be no substantial change in these decisions after the effective date of the Guidelines. A prosecution memo was prepared outlining the provable charges, and this document was reviewed by a supervisor, usually the United States Attorney or his first assistant. In principle, the prosecutor charged every offense that could be proved. Even inconsequential counts were included, since they provided the prosecutor with something to give away in return for a plea; the defense attorney, in turn, could "win" something for his client. In a case involving a large number of counts, secondary offenses would probably not be charged when they no longer added significant additional sentencing exposure. At site 2, one AUSA said that assistants sometimes would not charge certain counts (e.g., a count carrying a mandatory minimum), and no one would ever find out. AUSAs at site 2 appeared to have considerable autonomy, after their initial training period in the unit responsible for the simplest cases. Nonetheless, this kind of independent charge reduction was unusual at the initial charging stage.

2. Preindictment Contacts with the Defense

Preindictment contacts with the defense varied widely from district to district. At site 1, such contacts were the norm. Office policy required prosecutors to attempt a plea negotiation in every case. As a result, prosecutors routinely contacted defense counsel prior to indictment (if the defendant's counsel was known). In contrast, at site 2, preindictment contacts with defense counsel were rare in drug cases which were numerous in the jurisdiction. Most drug cases were initiated by arrest, and the government had only ten days to indict. Defense attorneys were usually unwilling to negotiate under those circumstances, since many of the judges had struck down the Guidelines, and counsel would not know until after the indictment whether the Guideline sentencing provisions would be applicable. Preindictment negotiations, however, were said to occur in 99 percent of the white collar cases. The prosecutors at site 2 would usually wait for defense counsel to contact them.

At site 4, where every judge applied the Guidelines, preindictment contacts were rare. Except in simple cases, in which prosecutors might have sought consent to proceed by information, negotiations were deferred until after indictment.

The various approaches to preindictment contacts suggested that charge bargaining would be much more obvious in some jurisdictions than in others.

Where preindictment contacts were rare, charge dismissals, superseding indictments and charge reduction plea agreements would illustrate the scope of the bargaining that occurred. In districts such as sites 1 and 2, charge bargaining often occurred through agreements not to file. Such agreements are included within the scope of the bargaining regulated by section 6B1.2(a),¹²⁶ but they do not fall literally within the terms of Rule 11(e)(1)(A) of the Federal Rules of Criminal Procedure,¹²⁷ and they are, in any event, very difficult to determine both qualitatively and statistically.

3. Substantive Criteria for Plea Negotiation

The substantive criteria for plea negotiation varied considerably within the four jurisdictions. Even though AUSAs were encouraged to recommend the acceptance of responsibility discount and the bottom of the Guideline range in all four districts, the policy toward charge reduction varied greatly. The Justice Department's Redbook should be, of course, the principal source of such policy. Prosecutor supervisors seemed to know well the policy directives of the Redbook, and to take its restrictions on the dropping of important counts seriously. However, among trial-level assistants, familiarity with the Redbook was inconsistent. At site 1, the first location visited, many AUSAs admitted they never read the Redbook. Some were barely aware of its existence. Most AUSAs did, however, claim familiarity with the local jurisdictional (internal office) memoranda on Guideline policy for prosecutors. The memos were taken much more seriously than directives from Washington.¹²⁸ Similarly, at site 2, the Redbook appeared to be viewed as a form of naive and unwanted outside interference; it was regarded with a feeling just short of contempt. At site 4, AUSAs also seemed to lack a working knowledge of the

126. GUIDELINES, *supra* note 14, at § 6B1.2(a) (section relating to charge-reduction plea agreements, applies to any "plea agreement that includes the dismissal of any charges or any agreement not to pursue potential charges") (emphasis added). Moreover, the Sentencing Reform Act clearly contemplated that the Commission policy statements on charge bargaining, required to be issued under section 994(a)(2)(E), would address *withholding* of charges as well as dismissal of charges. See S. REP. 225, *supra* note 24, at 167 (this approach was intended to "provide an opportunity for meaningful judicial review of proposed charge-reduction plea agreements"). Indeed, the bill submitted to the Senate included, in a section of technical amendments, a provision to amend Rule 11(e) "to clarify that the rule covers withholding of charges as well as dismissal of charges." *Id.* (emphasis added). Although these technical amendments were not enacted, the legislative history contains no indication that this last-minute modification reflected any change in the intended substantive reach of the Commission's section 994(a)(2)(E) obligation to provide guidance for charge bargaining.

127. Compare S. REP. 225, *supra* note 24, at 166 (consideration of whether to accept or reject plea agreement under Rule 11(e) should be included in Guidelines' policy statements) and GUIDELINES, *supra* note 14, at § 6B1.2(a) (judge should comply fully with Rule 11(e), but must determine if agreement "adequately reflects" defendant's actual conduct) with FED. R. CRIM. P. 11(e)(1)(A) (judge "shall" not participate in any plea discussions).

128. Interview #0204 at 19 ("when someone says 'This is a Justice Department policy,' that stands in stark contrast to 'This is office policy.' If they say its office policy, people will follow it. But if they say its Justice Department policy, they speak volumes by omission, if you know what I mean. Because they're not saying it's *office* policy, they're saying its *Justice* policy").

Redbook standards. Our observations suggest that these directives should more aptly have been titled the "Unread Book."

Apart from Justice Department policies, most offices possessed internal criteria for charge bargaining. At site 1, defendants were expected to plead to the two top counts. At site 2, defendants were expected to plead to half the counts in the indictment, including the most serious charges. At site 4, there were no written or oral policies on the standards to be used in determining the proper extent of a charge reduction bargain. These differences, however, did not seem to have significant sentencing implications. The routine departures from standard office rules of thumb in response to individual circumstances were more important.

4. Procedures for Review of Plea Bargains

The procedures for review of plea bargains also varied widely. At site 1, all plea agreements were required to be in writing, and were reviewed at several levels of the hierarchy. Although the final sign-off by the United States Attorney was in most cases perfunctory, at least one or two supervisors closely examined any given plea agreement.

Conversely, at site 2, plea agreements, except agreements to provide substantial assistance, were never in writing. Supervisors were confident that the trial-level assistants understood office policy and they would strictly adhere to those rules. Supervisors relied on the office's hiring standards and the deterring sanction of immediate dismissal that could result from a deviation from office policy. As a result, supervisors comfortably entrusted AUSAs with virtually complete day-to-day autonomy and freedom from formal oversight. However, based on information garnered during our interviews, this confidence was unwarranted. The study revealed that assistants knowingly deviated from office policy, and consciously failed to inform their superiors of their actions.

Site 4 was unique in terms of intra-office supervision and review. Descriptions of practices were inconsistent. Supervisor #0405 stated that plea agreements were "supposed to be" run by him. In drug task force cases (i.e., major narcotics investigations), approval requests were required to be in writing. In other cases, approvals could be requested orally, but were expected to be sought. In contrast to the supervisor's testimony, trial assistant #0402 reported that AUSAs could drop charges without obtaining higher approval, and permission was required only to drop a case completely. Trial assistant #0408 commented that approval was needed for any charge reduction that would affect the sentence — that is, a decision to reduce a drug distribution count to simple possession would require the approval of the United States Attorney. Finally, trial assistant #0406 said he would probably informally seek the approval of a supervisor, but he did not think this approval was a requirement. He added, "I never really thought about it much. . . . He [my supervisor] is basically aware of what goes on and consequently in most cases I may tell him after the fact what has happened."¹²⁹ It is our impression that this de-

129. Interview #0406 at 22.

scription of informality most closely accorded with the actual situation at site 4, with the important qualification that, in some important cases, superiors apparently were not expressly informed of the AUSA's exercise of discretion, either before or after the case was processed.

C. *Acceptance of Responsibility*

Among defense counsel and prosecutors, and to some extent among probation officers and judges, there was a pervasive perception that the acceptance of responsibility discount was too low.¹³⁰ In part, this perception resulted from the erroneous convention of viewing the discount as "only two points," when, in reality, it could mean a discount of 25 percent for most defendants.¹³¹ Many AUSAs failed to appreciate the width of the discount. Nonetheless, they vigorously pushed the "only two points" argument.

Several related factors combined to reinforce the perception that the two-level reduction, even if understood as a 35 to 50 percent discount, was not large enough. White collar offenders who could realistically hope for and expect probation before the Guidelines, were said to believe that if the two-level reduction was insufficient to bring them within the range for which probation was authorized, they would pass up the 35 to 50 percent discount, seeking to avoid prison at all costs. Unless a bargain involving probation was offered, they could be expected to take their chances for acquittal at trial.

At the other end of the spectrum, where offenders faced terms that would keep them in prison with no hope of parole for fifteen to twenty years, the possibility of getting out three to five years earlier was thought to be an insignificant inducement. Such offenders reportedly would take their chances for acquittal at trial, unless offered a much greater discount.

In addition, in the early months of Guideline implementation, it was reported that there was routine granting of the acceptance of responsibility discount, coupled with the low end of the Guideline range, to defendants convicted after trial, provided they testified truthfully and gave some indication of remorse. This practice seemed especially prevalent at sites 1 and 2, where sentencing judges were inclined to view Guideline sentences as longer than those they were accustomed to imposing prior to the Guidelines. To the extent that a convicted defendant can expect to receive a two-level reduction after trial by merely voicing remorse, the acceptance of responsibility discount obviously affords scant incentive to plead guilty.

Complaints about the inadequacy of the two-level reduction led many AUSAs and some probation officers to predict a massive increase in the number of trials. To date, however, this increase has not occurred. The Commission's

130. In a letter to the Chairman of the Sentencing Commission from a judge who shall remain anonymous, the judge wrote that he "felt from the inception of the Guidelines and . . . even more strongly today that the *fixed* two level reduction for 'acceptance of responsibility' . . . is inadequate for the great majority of cases." (emphasis in original).

131. When combined with a sentence at the lower end of the Guideline range, the discount could translate into a 35-50 percent discount.

Annual Report for 1988 indicates that, during that period, 90 percent of the defendants sentenced under the Guidelines had pleaded guilty — a figure not significantly different from the pre-Guidelines guilty plea rate.¹³² However, we cannot be certain whether the relative stability of the guilty plea rate indicates that the “acceptance” discount is set at an appropriate level, or whether the system has found alternative ways to grant guilty plea inducements. Possibly, both statements are true.

D. Substantial Assistance

Section 5K1.1 used to state that “upon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person . . . the court may depart from the [G]uidelines.”¹³³ Subsequent to our site visits, an amendment, effective November 1, 1989,¹³⁴ deleted the “good faith effort” language. Pursuant to the amendment, assistance of actual value became a predicate for the motion to depart. Both the old formulation and the new formulation leave to prosecutorial discretion the decision whether to request such a departure, and, if so, under what circumstances.¹³⁵

Cooperation agreements outline the assistance a defendant is expected to provide, and the sentence recommendation the government may make in exchange. In all four jurisdictions, cooperation agreements were always in writing, and were always reviewed at one or more supervisory levels. In other areas relating to cooperation, however, there were significant differences in policies and practices.

Prosecutors at site 1 quickly became comfortable with the substantial assistance provision, and were using it frequently in cases involving significant cooperation. As a rule of thumb, defendants who made an early offer of cooperation and delivered successfully on their commitment earned a 50 percent reduction from the prescribed Guideline sentence. This “first-in, best-out” approach afforded prosecutors great leverage in implementing divide-and-conquer tactics. Generally, prosecutors at site 1 would not offer to make departure motions unless a defendant’s efforts to assist bore fruit.

Prosecutors’ principal concern at site 1 was to assure that the judge did not go too low in imposing a sentence, once the section 5K1.1 motion released him or her from the Guidelines and any applicable statutory minimum. Because prosecutors in that jurisdiction viewed many of their judges as exces-

132. UNITED STATES SENTENCING COMM’N, 1988 ANNUAL REPORT 23 (1989).

133. GUIDELINES, *supra* note 14, § 5K1.1.

134. 1989 GUIDELINES, *supra* note 87, § 5K1.1.

135. The Commission’s decision to tie section 5K1.1 to a government motion parallel the statutory language relating to the authority to impose a sentence below a statutory minimum. *See* 18 U.S.C. § 3553(e) (“upon motion of the Government the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant’s substantial assistance . . .”). The Commission decided to extend the “substantial assistance” benefit to all cases, not just those involving mandatory minimum sentences.

sively lenient sentencers, they were reluctant to leave them with a totally free hand in sentencing. Accordingly, this concern was usually addressed by linking the departure motion to a plea agreement for a definite sentence, or by not moving to waive, when possible, one charge with a statutory mandatory minimum.

At the other research sites, prosecutors had reported no explicit rules of thumb concerning the appropriate reward for cooperation, and derided the notion that any general standard, such as the 50 percent discount principle used at site 1, could cover the diversity of cases. At site 2, prosecutors did not attempt to work out the cooperation discount, even on a case-by-case basis. When a defendant performed satisfactorily, prosecutors would make the departure motion and write the court a letter outlining the extent of the defendant's assistance, using strong language in cases of highly valuable cooperation. The extent of the departure, however, was left to the court.

At site 3, where cooperation agreements were required to be in writing, the office relied on a form letter not tailored to any individual case. In effect, defendants agreed to provide whatever the prosecutor requested and to take their chances on his evaluation of their compliance. Unlike the situation at site 1, which predicated departure motions on the likely end results of a defendant's assistance, cooperation agreements at site 3 only required "good faith efforts." Some assistants felt that defendants should not be "punished" for having limited knowledge; therefore, a good faith effort was considered sufficient. A unit chief stressed, however, that the office would enter into a cooperation agreement only if the defendant's proffer of assistance was likely to be of use.

The existence of standards, more or less definite, and review procedures for departure motions based on cooperation suggests a more orderly system than we found in practice. Not only were the criteria and boundaries of prosecutorial policy under section 5K1.1 quite fluid, but when AUSAs found themselves bumping up against those boundaries, they also devised ways to reward cooperation indirectly — contravening both the Guidelines and their own office's policies. In addition, even in substantial assistance cases that could easily qualify under section 5K1.1, prosecutors sought other ways to reward cooperation — using vehicles not within the Guidelines framework.

A few prosecutors in every jurisdiction, excluding site 1, expressed resistance to using the formal section 5K1.1 procedure. The primary complaint was that the departure procedure provided insufficient certainty for both the prosecution and the defense. Although a section 5K1.1 motion frees the judge from the Guidelines and any statutory minimum, such a motion does not *guarantee* that the judge will depart, nor does it ensure that any departure will afford the defense a truly substantial benefit. Several prosecutors reported experiences in which defendants insisted on knowing the exact quid pro quo before agreeing to wear a body wire or provide other potentially life endangering forms of cooperation. Conversely, prosecutors sometimes feared that judges, once free to depart, would give a far greater sentencing concession than the prosecutors themselves thought warranted. In both instances, prosecutors sought other

means to extend the "right" benefit. Usually, this meant restructuring the charges to guarantee the defendant a lower sentence, while keeping the judge oriented toward the framework of a specific Guideline range. Examples of this sort of charge manipulation are discussed below in connection with charge bargaining practices.

Of even greater concern were situations in which prosecutors used extra-Guideline tactics to reward cooperation that did not qualify as "substantial assistance" under section 5K1.1. A common situation presenting this problem was found in cases involving so called "skells" (i.e., addict-sellers who deal in small quantities of drugs to support their own habits). Since these defendants often have a substantial record of prior narcotics convictions, they face long prison terms, even when charged with distribution of small quantities.¹³⁶ The incentive for cooperation accordingly is strong, and "skells" often try hard to offer substantial assistance. Typically, however, they have little to offer.¹³⁷

Such defendants cannot qualify for a section 5K1.1 motion. Under the Guideline principles, their limited and ineffectual cooperation is not a criterion for a reduced sentence. Often, however, prosecutors in the field did not view matters in this light. Some prosecutors found ways to reward cooperation without making a formal section 5K1.1 motion, and sometimes did not even consult or inform their superiors of this reward. Prosecutors did this partly because the statute and Guidelines mandate a sentence more severe than they thought warranted for such a case, and partly because they thought a defendant who badly *wanted* to cooperate should not be "penalized" for his lack of information.¹³⁸ Such rewards could take the form of significant charge reduction, such as dropping a "schoolhouse" count,¹³⁹ or charging only simple possession.¹⁴⁰

In other instances, the office may have chosen simply to ignore its policy on cooperation. One such instance came to light due to the vigilance of the judge. At sentencing, the prosecutor made an oral motion for a section 5K1.1 departure allegedly based on substantial assistance, but provided little detail. In an exercise of caution, the judge adjourned the hearing and insisted that the government file a formal written motion for departure.¹⁴¹ In response, the

136. For example, consider a defendant who is convicted of distributing less than five grams of cocaine base (crack) under 21 U.S.C. section 841. Assume he has two prior convictions for distributing equally small amounts of crack and that he is at least eighteen years old. Because he has two prior controlled substance convictions, the defendant falls under the "Career Offender" provision in the Guidelines. GUIDELINES, *supra* note 14, at § 4B1.1; 28 U.S.C. § 994(h). Under this provision, the defendant is faced with a Guideline range of 262 to 327 months, or roughly 22 to 27 years.

137. Interview #0204 at 6. "Middle-level dealers . . . are not stupid. They know a guy like this will roll the minute that he is grabbed, so he doesn't have access to much information." *Id.*

138. Interview #0109 at 22.

139. 21 U.S.C. § 845(a) (providing that anyone violating 21 U.S.C. § 841(a)(1) or 21 U.S.C. § 856 by manufacturing or distributing a controlled substance within 1,000 feet of a school is punishable by up to twice imprisonment authorized by 21 U.S.C. § 841(b)).

140. 21 U.S.C. § 844 (maximum penalty of one year imprisonment, absent prior record).

141. Section 5K1.1 itself does not require that the departure motion be in writing. GUIDELINES, *supra* note 14, § 5K1.1.

prosecutor wrote the judge a letter requesting, but not formally moving for, departure and cited the defendant's willingness not to contest a forfeiture proceeding and other insubstantial reasons.¹⁴² The absence of a formal motion for departure may have been the prosecutor's compromise with an office policy that plainly would not have found substantial assistance on these facts. Indeed, the judge indignantly refused the invitation to depart.

Situations like the one described above are neither common nor rare. They reflect an individual prosecutor's desire to deviate from Guideline principles. In the present case, the prosecutor's motives evidently included a desire to mitigate a sentence he or she judged too harsh for a seemingly sympathetic defendant, a desire to sweeten a plea inducement to avoid contested guilt and forfeiture proceedings, and a desire to reward a cooperative attitude falling far short of substantial assistance. Although the effort to encourage departure failed in this case, it is too early to determine to what extent judges will succeed in detecting and rebuffing these kinds of efforts.

Similarly, neither unusual nor typical was the articulated desire by some government attorneys to reduce the sentence of a defendant who wishes to cooperate, but for a variety of reasons has nothing of value to offer. While rewards for cooperation historically grew out of prosecutorial needs, especially in complex cases, some AUSAs lamented their inability to assist the hapless defendant who merely expressed a desire to cooperate. When the legitimate section 5K1.1 motion failed to present itself, they searched for other means to accomplish the same goal, or went ahead and filed the section 5K1.1 motion with full knowledge that no substantial assistance had been provided.

E. Other Vehicles for Negotiation

1. Date Bargaining

Date bargaining occurs when the AUSA agrees, in return for a plea, to charge only pre-Guidelines conduct. The procedure was especially frequent at site 1, where sentencing judges generally viewed the Guidelines as more severe than they preferred, especially since the Guidelines mandate sentences above the average sentences that were meted out in this district prior to the Guidelines.¹⁴³ The prospect of escaping the Guidelines was therefore attractive for the defense, and could result in large sentence reductions. For example, a defendant charged in a very extensive heroin, cocaine and marijuana distribution scheme (#0108) was allowed to plead to eighty-four pre-Guideline counts and received a twelve-year sentence, with eligibility for parole. If charged as a

142. The commentary to section 5K1.1 indicates that "substantial assistance is directed to the investigation and prosecution of criminal activities by persons *other than the defendant*..." GUIDELINES, *supra* note 14, at 5.41.

143. Indeed, interview subjects in site 1 reported that judges in that district generally sentenced below the national average before the Guidelines. Interview #0102 at 10.

post-Guideline conspiracy, the case would have drawn a sentence range of twenty to twenty-four years, with no eligibility for parole. Even AUSAs who had ethical reservations about fact bargaining expressed no qualms about indicting only for pre-November conduct. An AUSA said that to charge less than the full amount of a fraud would involve misleading the court, but to charge only pre-November conduct would not involve misrepresentation.¹⁴⁴

2. Guideline Factor Bargaining

a. Scope of the problem. Nearly all the offense Guidelines specify, in addition to a "base offense level," certain "specific offense characteristics" that aggravate or mitigate the seriousness of the offense, and require increases or decreases in the offense level. In addition, Chapter 3 of the Guidelines specifies upward and downward adjustments based on factors such as the defendant's role in the offense, and vulnerability of the victim. The Guidelines and accompanying policy statements make clear that the existence of these factors is to be determined on the basis of all the relevant facts of the case. Parties are not to create artificial or non-existent Guideline factors by factually inaccurate stipulations or any other form of misrepresentation.¹⁴⁵ Nonetheless, in more than a few cases, the real facts were changed.

We do not want to exaggerate the extent of this problem. We feel confident that in large numbers of cases, no effort was made to distort drug quantities, amounts of property loss or other Guideline factors. In other cases, although the litigants may have minimized certain factors, the presentence report made the true situation clear, and the judge determined the sentence on that basis. Nonetheless, we did encounter cases in every jurisdiction in which offense level adjustments had been based on inaccurate facts, or where prosecutorial concessions on factual issues could have been resolved differently if decided on the merits at a sentencing hearing.

In response to direct questions about fact-bargaining, most AUSAs and nearly all supervisors flatly denied its existence. A few AUSAs warned that, despite this official story, "realistically, there is" fact-bargaining.¹⁴⁶ When the facts of specific cases were reviewed in detail, numerous AUSAs acknowledged instances of downplaying crucial facts.

Several examples of fact-bargaining could be cited. A few illustrations will suggest the nature of the problem:

(1) In a drug conspiracy case, defendants told an undercover agent that they planned to break into a car to get "six bricks" of cocaine. Although the car contained six kilograms of the drug, the defendants claimed that they had expected to get six *pounds*, a difference that took them out of the statutory mandatory minimum sentence and reduced the Guideline offense by four levels. The AUSA accepted the defendants' version in order to induce the plea,

144. Interview #0102 at 2.

145. GUIDELINES, *supra* note 14, §§ 6B1.4(a), 6B1.4(d).

146. Interview #0101 at 11; Interview #0104 at 4.

noting, however, with considerable candor, that had there been a trial, six kilograms would have been readily provable.¹⁴⁷

(2) Two defendants were indicted in a conspiracy to distribute ten kilograms of cocaine. One, who had participated in delivering the supply to a courier in Ecuador, and then took personal possession of part of the shipment in the United States, was given a two-level reduction for having played a "minor role" in the offense, apparently on the grounds that his codefendant was the boss in the endeavor. That codefendant, because he had *not* taken personal possession of the drugs, had a "mere presence" defense, and was allowed to plead to a superceding indictment charging only conspiracy to commit simple possession (which provided a statutory maximum of one year in prison, and reduced the applicable Guideline range from seventy-eight to ninety-seven months to zero to six months).¹⁴⁸

(3) Defendant, arrested at the scene of a large cocaine buy, admitted to possessing a gun found in the back seat of his car. The defendant argued, however, that the presence of the gun at the time of the offense was fortuitous; he claimed that the gun was not working properly and was being "taken in for repairs." An ATF test confirmed "some problems" in firing the gun, but the defendant's story, even if plausible, was not necessarily decisive under section 2D1.1(b)(1), which requires a two-level enhancement for any firearm "possessed during the commission of the offense." Nonetheless, in order to get the plea, the AUSA agreed both to drop the section 924(c) count,¹⁴⁹ and not to assert the Guideline enhancement for the weapon.¹⁵⁰

(4) In another drug case, a weapon was found in the trunk of the defendant's car at the time of a large buy. The AUSA agreed to drop the section 924(c) count and not to seek the Guideline enhancement for the weapon, because the defendant argued that the presence of the weapon was accidental. He claimed that he always carried the weapon in the trunk, and did not expect to use his car for this drug deal.¹⁵¹

Several reported cases reveal a similar dynamic. In *United States v. Fiterman*,¹⁵² for example, a search of a large suburban home uncovered over 600 pounds of marijuana. The homeowner, a middle aged woman, was charged as a conspirator, but the AUSA agreed to a four-level reduction for the defendant's minimal role allegedly on the grounds that she had merely permitted one of her workers to store the marijuana at her home in return for rather modest payments. At sentencing, the government left the impression that the drugs had been stored in the garage. The judge discovered, however, by carefully reading the file, that officers executing the search warrant had found the marijuana in the defendant's bedroom closet. The judge noted that this was

147. Interview #0109 at 13-17.

148. Interview #0404 at 19.

149. 18 U.S.C. § 924(c) (providing for a mandatory five-year consecutive sentence).

150. Interview #0107 at 4.

151. Interview #0110 at 14.

152. No. 89 CR 176-1 (N.D. Ill. June 23, 1989) (LEXIS, Genfed library, Dist. file).

scarcely suggestive of the "minimal role" painted by the government, but felt constrained to grant the four-level reduction in the end, because of the lack of proof put on by the government, and the need to grant the defendant the benefit of the doubt.

Situations like these present four distinct problems. First, the judgment about offense seriousness and the appropriate sentence made by the Commission is replaced by the individual judgment of the AUSA (with little effective opportunity for oversight by the judge). Second, uniform sentencing is compromised, because some AUSAs refuse such adjustments and others make them in a more limited (or in more generous) fashion. Third, the inducement to plead guilty becomes overwhelmingly powerful; the plea offer we have just described could appear irresistible, even for the defendant with a legitimate legal defense, or the factually innocent defendant with a substantial likelihood of acquittal at trial. Finally, the defendant who pleads to a reduced charge, because of doubts as to factual innocence, may be sentenced *as if* he were guilty of the *greater* charge, since the government may be able to avoid revealing the weakness of its case on the original, more severe charges.¹⁵³

b. *Control of fact-bargaining.* The Guidelines were formulated with full awareness of the need for procedures to guard against factual distortion. Not only are inaccurate and misleading factual stipulations specifically prohibited, but the Guidelines, along with Rule 32 of the Federal Rules of Criminal Procedure, also prohibit waiver of the presentence report.¹⁵⁴ As a result, the judge should have, prior to sentencing, the probation officer's independent assessment of the facts relevant to sentencing. In order to ensure that the judge's sentencing freedom is not constrained by agreement of the parties, the Guidelines further provide that whenever the parties tender a plea agreement that would have this effect (i.e., a plea agreement for a definite sentence or for dismissal of charges), the judge *must* defer the decision whether to accept that agreement until after the presentence report has been prepared and considered.¹⁵⁵ These procedures are often adequate to prevent factual manipulation.

153. Consider the situation in which a key prosecution witness becomes unavailable (or some other problem of proof arises) after the defendant has been indicted. The government might then agree to allow the defendant to plead guilty to a lesser charge in a superseding indictment. If the government does not inform the judge of its reason for dropping the original charges, the government may be able to persuade the judge to depart upwards based on the circumstances underlying the more serious counts. As the D.C. Circuit cautioned in a recent opinion:

[I]n cases where the government enters a plea for lack of proof of the more serious offense, unless it informs the sentencing judge of the reasons for its willingness to offer the plea, the government has an unfair advantage: It locks in a Guidelines sentence with the potential for upward departure based on facts it merely has to proffer at a plea hearing rather than prove at trial.

United States v. Adonis, 891 F.2d 300, 304 (D.C. Cir. 1989).

154. Rule 32(c)(1) does permit the judge to dispense with a presentence report, only after explaining, on the record, why sufficient information is already available under Rule 32(c)(1). See also GUIDELINES, *supra* note 14, § 6A1.1 (Commentary).

155. GUIDELINES, *supra* note 14, § 6B1.1(c).

In the early days of Guideline implementation, defense counsel and AUSAs were sometimes surprised to discover that their agreements to understate drug quantities or amounts lost through fraud were defeated by accurate presentence reports that the judges felt obliged to follow.¹⁵⁶ Most attorneys now appreciate that outright misrepresentation, especially in relation to drug quantities, will simply not work, because the probation officer will learn the true facts and report them to the judge. As a result, attempts at factual distortion are now more unusual, and necessarily are more subtle when they occur.

One might ask how factual distortion can succeed at all? The answer is complex: a function of the resources of the Probation Office, the ambiguity of the Probation Officer's role, the attitude of the AUSA, the policies and attitudes of the judge, and the nature of the factual issues to be addressed.

A crucial item in the presentence investigation is the "Government Version of the Offense," a statement usually prepared by the AUSA in charge of the case and submitted to the probation officer in writing. In the past, this document was the probation officer's principal (perhaps sole) source of information about the offense, and it is still heavily relied upon. In some of our jurisdictions (although not everywhere), probation officers reported a remarkable change in the character of these "Government Versions." Prior to the Guidelines, these statements contained elaborately detailed, even lurid, descriptions of the offense circumstances and the defendant's multiple associations with the world of crime. In contrast, with the advent of the Guidelines, the "Government Version" suddenly became a model of concise, no-nonsense prose — just the immediate circumstances of the charged offense, with few embellishments. Probation officers at site 1¹⁵⁷ felt especially strongly that prosecutors were choosing their words carefully to avoid transmitting any information that might trigger an offense-level aggravator, and upset a negotiated plea.

Under the Guidelines, it is obviously important for probation officers to avoid total dependence on the "Government Version." Probation officers reported a practice of trying to talk to the AUSA and/or review his file. In drug cases, they may also have tried to interview the Drug Enforcement Agency (DEA) case agent.

Cooperation with the probation officer was somewhat uneven, but generally good. Probation officers reported scattered difficulties in getting the information they sought, but usually attributed problems to the personality and time constraints of individual prosecutors rather than to any systemic cover-up effort. Probation officers have little recourse if an AUSA is determined to keep certain facts of the case from view, but this kind of factual manipulation rarely happened, as far as we observed.

156. One probation officer reported that in the early period of Guideline implementation, the government and the defense stipulated to reductions in the offense levels and the judges often felt bound to accept the agreement. Interview #0304 at 11. According to the probation officer, at that time, judges were not deferring acceptances of plea agreements. *Id.*

157. Interview #0104 at 5.

The dynamic of the presentence investigation can work, in other ways, to obscure or minimize the real facts. In drug cases, quantities are all important. The crucial determinations may require careful study of tape recorded surveillance, but the conspirators often speak in a foreign language, heavily laced with jargon and code. Transcription is therefore laborious; there are many reasons why the DEA and prosecutors may choose at some point to consider the case complete. The determination of the drug quantity to be charged can be quite arbitrary in such cases.

An additional difficulty arose at site 4. Here the judges in one outlying division instructed the Probation Office not to include in its presentence reports any reference to drug quantities for which the defendant had not been convicted.¹⁵⁸ Although this directive was plainly illegal under the Guidelines, the Probation Officers felt that, as officers of the court, they had no choice but to comply. In order not to antagonize the judges, the United States Attorney decided not to challenge this policy by appeal. This situation appeared to be an isolated one, but it illustrates the potential depth of systemic resistance to "truth-in-sentencing."¹⁵⁹

Far more common as a means of fact manipulation was the use of ambiguities of proof. More so than in the past, AUSAs were likely in guilty plea cases to limit their "Government Version" to unambiguous facts on which the opposing counsel had agreed. Other potentially aggravating circumstances were not affirmatively hidden or misrepresented; they were just not mentioned if they fell outside the scope of the negotiated deal.

It was not uncommon in such situations for the probation officer to have picked up the omitted details from the file or other sources — the presence of a weapon at the time of the offense, circumstances suggesting a major role, an abuse of trust or additional property lost. In more than a few cases, probation officers reported their reliance on such information to support Guideline calculations higher than those agreed by the parties. Prosecutors were seldom troubled by such developments. They could easily fall back on alleged difficulties of proof. At sentencing, the defense would challenge the probation officer's assessment, and the AUSA would support the defense's more conservative version. The AUSA need not have said that the probation officer's facts were wrong. The formula was simply, "Your Honor what we can prove is" As another prosecutor told us:

You just say that the evidence we would have offered at trial would have been X, Y and Z. In other words, it would not have supported what the Probation Officer is saying.¹⁶⁰

158. In a follow-up study, we came upon an even more striking illustration in a jurisdiction not included within our sample. There, a judge ordered the probation officer to "include the stipulation of facts as the statement of the circumstances . . . of the offense . . . without conducting any independent investigation." Interview #0904 at 9.

159. Also at site 4, we were told that prosecution and defense routinely agreed to waive the presentence report when a defendant pled guilty in a "simple" immigration case. Interview #0401 at 2; see FED. R. CRIM. P. 32(c)(1). Judges acquiesce in this procedure in order to expedite the process, even though such waivers are expressly prohibited by this rule.

160. Interview #0101 at 18.

Despite their reliance on a formula designed to avoid outright misrepresentation, the prosecutor in these cases was not being candid with the court. The Guidelines require that factual ambiguities be disclosed for judicial resolution, not bargained away.¹⁶¹ When we asked prosecutors what their position would have been *if the case went to trial*, the problems of proof suddenly evaporated or assumed much less importance. Repeatedly, prosecutors conceded that, in the event of trial, they would have taken the same position as the probation officer.¹⁶² Sometimes they would have had no difficulty disparaging as frivolous the same defense objections they had been willing to honor for the sake of a plea.¹⁶³

In these situations, the probation officer was left out in the cold. None of the attorneys was willing to defend his position in court. The judge was hesitant to find facts denied by both sides, and, in any event, the probation officer was, like counsel, not anxious to force a trial of the case. Not only would the judge rule against the probation officer's position, but the probation officer also felt out of step and uncomfortable to be regarded as the troublemaker:

So there we were, the lone voice in the wilderness with everybody else against us saying "that can't be." And the Probation Officer . . . can't possibly have any better fix on this than . . . all of these smart people who have been to law school, so you end up having your position shot out of the window. You end up walking out of there thinking, "Well, I guess I'm the only fool in that courtroom because everyone else had the answer . . ." [T]he officers are getting a little demoralized.¹⁶⁴

As experience under the Guidelines accumulates, it is likely that judges will become more sensitive to the probation officer's dilemma and more willing to make independent factual determinations with the officer's help.¹⁶⁵ It is also

161. GUIDELINES, *supra* note 14, § 6B1.4(b). The commentary to this section provides as follows:

[T]he overriding principle is full disclosure of the circumstances of the actual offense and the agreement of the parties. The stipulation should identify all areas of agreement, disagreement and uncertainty that may be relevant to the determination of sentence. Similarly, it is not appropriate for the parties to stipulate to misleading or non-existent facts, even when both parties are willing to assume the existence of such "facts" for purposes of the litigation.

Id. at 6.8.

162. Interview #0109 at 17; interview #0111 at 18-19.

163. Interview #0109 at 17.

164. Interview #0304 at 8.

165. Addressing federal judges at a recent Federal Judicial Center workshop, Judge A. David Mazzone of the District of Massachusetts emphasized that judges "owe it to [probation officers] to understand and to appreciate the rather vigorous cross currents that are currently affecting the probation service." A.D. Mazzone, Remarks at the Federal Judicial Center Workshop for Judges of the First, Fourth and District of Columbia Circuits (April 29, 1989) (available at the Commis-

possible, however, that probation officers will learn the futility of their attempts to override the AUSA, and will defer so heavily to the government's assessment of facts and proof that fact manipulation of the kind we have described will become less visible.

While instances of fact manipulation were found in diverse areas of the Guideline computation process, they seemed more frequent in situations relating to drug quantities, the presence of a weapon in a drug case, abuse of trust, and the defendant's role in the offense. The last two categories are especially subjective, and, therefore, are especially vulnerable to manipulation.

Greater specificity of definition would not eliminate all problems, given the techniques of manipulation used, but it might help narrow the scope of the problem. With respect to role in the offense, the consequences of factual distortion can be severe, since the potential adjustment spans a range of eight levels.¹⁶⁶ For example, the potential for disparity is substantial in the case of an organizer of a complex conspiracy. The nature of the organizer's involvement is often unclear since he usually participates in the crime from a distance. In this case, a major leadership role could easily become a "minimal" role, if viewed in a more sympathetic light as the result of a plea negotiation.

3. Charge Bargaining

As in the case of fact bargaining, charge bargaining occurred in more than a few cases; its potential for introducing disparity is likewise substantial. Neither the Guidelines nor Justice Department policy absolutely prohibits charge bargaining;¹⁶⁷ thus, the environment inhibits the use of the charge bargaining technique even less than it restrains the use of fact bargaining.¹⁶⁸ The Justice Department permits prosecutors to drop charges that are not "readily provable;" the Guidelines permit charge bargains as long as the remaining charges "adequately reflect the seriousness of the actual offense behavior."¹⁶⁹ On the other hand, local United States Attorney's office policies toward certain recurring charges offer more potential for developing customary rules of thumb and possibilities for oversight than the amorphous factual assessments relating to role in the offense, for example.

sion). In particular, Mazzone urged judges "to make it clear that you expect [probation officers] to stand their ground in the face of unreasonable complaints from counsel and that you will stand behind them." *Id.*

166. See GUIDELINES, *supra* note 14, §§ 3B1.1(a), 3B1.2(a) (setting out increase of four for major "organizer or leader" and decrease of four for "minimal participant").

167. See *supra* notes 73 & 100 and accompanying text (discussing requirements of valid charges under Guidelines).

168. Because the Commission is in the judicial branch, the separation of powers doctrine prevents the Commission from directly controlling charge bargaining. The Commission could eliminate charge bargaining indirectly by moving the Guidelines towards a pure real offense system. This approach would create a number of problems. See Breyer, *supra* note 57, at 10-11 (noting procedural and fairness concerns; Nagel, *supra* note 57, at 925 n.228 (same)).

169. GUIDELINES, *supra* note 14, § 6B1.2(a).

To begin an assessment of the charge bargaining question, we need to distinguish charge bargains that affect the Guideline sentencing calculus from those which do not. For example, a defendant charged with five counts of fraud may plead guilty to the first two counts in return for dismissal of the others. Since the Guideline sentence will be based on the total value of the fraud, the dismissal of three counts will not have a substantial effect on the applicable Guideline range, at least in the absence of a factual dispute relating to these counts. Such a charge bargain has limited value to the defense, but defense counsel apparently view such a deal as valuable, nonetheless, to the extent that it reduces the client's theoretical maximum outer exposure or enables them to present an apparent concession to their client.

A slightly different situation can be presented in cases involving drug quantities. If a defendant is charged in two counts with selling one kilogram of cocaine on two occasions, the case is like the previous example, and dismissal of one of the counts is largely inconsequential. The situation changes, however, if the defendant is charged with possession with intent to distribute in excess of five kilograms of cocaine, and pleads guilty to possession with intent to distribute 500 grams. Here the reduction in quantities charged avoids the ten-year *statutory* minimum sentence that would kick in at the five-kilogram level.¹⁷⁰ Although the Guideline sentencing computation is identical, avoidance of the statutory minimum offers substantial benefits for the defense —reductions for acceptance of responsibility and minor or minimal role become available, along with the possibility of a downward departure. Such adjustments could bring the defendant well below the minimum mandatory sentence available in the absence of charge dismissal.

The mandatory minimums become problematic for three reasons. First, minimums that Congress considered appropriate for a major drug distributor, or even for the "typical" case, can be disproportionate to the culpability of a peripheral participant in a large drug conspiracy. Second, some prosecutors choose to mitigate perceived severity by moderation in charging. Such willingness to soften the impact of mandatory minimums varied widely among offices and prosecutors, however, and sharp sentencing disparities resulted. Third, when the Guideline calculus would produce a much lower sentence than an available statutory minimum, the prosecutor's discretion to invoke the mandatory minimum provided a powerful vehicle for inducing a guilty plea. That leverage would prove especially useful if a defendant could raise plausible claims of innocence.

Nonetheless, the dismissal of consequential mandatory minimum counts is not impermissible under the Guidelines. The drug statutes do not forbid the exercise of prosecutorial discretion in invoking the mandatory minimums. Although the Redbook seems to forbid the dismissal of "readily provable" charges, subsequent Justice Department directives contemplate exceptions. Following the Guidelines themselves, a calculated sentence would by hypothesis "adequately reflect" the seriousness of the actual offense behavior, provided

170. 21 U.S.C. § 841(b)(1)(A).

that the Guidelines factors are respected in calculating the applicable range.

The situation is quite different when charge bargaining affects the Guideline sentencing computation. Despite the Guidelines' general focus on actual quantities and other real circumstances, there are some circumstances in which the formal charges can make a major difference. In cases of several bank robberies, for example, unlike multiple counts of fraud, the multiple count rules lead to enhanced punishment only for formal convictions. Thus, robbery counts that are dismissed (and the corresponding amounts stolen) are not considered in the sentencing calculation. Similarly, in drug cases, if the defendant is offered a plea to a conviction offense of simple possession, use of a communication facility in a drug transaction, or knowingly controlling a location where drugs are distributed or stored, the real offense quantity enhancement tables are inapplicable and relatively low offense levels apply. There is always the possibility of replacing serious drug, robbery or fraud charges with some factually unrelated misdemeanor.¹⁷¹

Several situations of this kind have already surfaced in the case reports. In *United States v. Restrepo*,¹⁷² defendants were charged with possession with intent to distribute thirty kilos of cocaine, an offense with a ten-year minimum, and a Guideline sentence calculated at 188 months. The defendants were allowed to plead guilty, however, to maintaining a room for the purpose of storing a controlled substance, an offense with no mandatory minimum, and Guideline range maximums of thirty-three to twenty-seven months.¹⁷³ The judge accepted the plea agreement, finding that the reduced charge "adequately reflect[s] the seriousness of the actual offense behavior" under section 6B1.2(a).¹⁷⁴ He then departed upward from the low Guideline ranges, finding that these ranges did *not* adequately reflect the seriousness of the actual offense behavior because it involved storage of a large quantity of drugs with intent to sell.¹⁷⁵ The result was a sentence of sixty months for each defendant, roughly double the severity of the Guideline sentence for the offense of conviction, but only one-third the Guideline sentence for the offense originally charged.¹⁷⁶

In *United States v. Brodie*,¹⁷⁷ two defendants facing mandatory minimums of ten and fifteen years respectively for drug and weapons offenses were allowed to plead to reduced charges carrying no statutory minimum, and a Guideline range of twenty-one to twenty-seven months. Meanwhile, a third

171. In situations where charge bargaining affects the Guideline computation, the judge may decide to depart upwards in order to compensate for the prosecutor's charging decision and to approach the "true" Guideline range. In this context, the judge's action is not really an "upward" departure at all.

172. 698 F. Supp. 563 (E.D. Pa. 1988).

173. *Id.* at 564, 566.

174. *Id.* at 565.

175. *Id.* at 566-67.

176. *Id.*

177. 686 F. Supp. 941 (D.C. 1988).

codefendant (Lugg), who was charged only with conspiracy, and, hence, faced no mandatory minimum, went to trial on that charge and was convicted. As a result, he faced a Guideline range of 210 to 262 months. Although Lugg's actual offense behavior was less serious than that of his codefendants, his Guideline sentence was roughly *ten times longer*, as a result of prosecutorial charge bargaining.

The frequency with which charge manipulation distorts the Guidelines is impossible to assess. The charging patterns in many cases appeared straightforward and legitimate. For example, at the sites visited, no instances of armed bank robbery cases being charged as "theft" were found. Nonetheless, in every jurisdiction visited, some cases of troublesome charge manipulation were found, especially in cases involving drug and weapons charges. Several examples are cited to convey the nature of the problem:

(1) A defendant present at the scene of a three-kilogram cocaine transaction denied his involvement, and told a DEA agent at the scene that he did not know the principals. He was charged with conspiracy to distribute — a level twenty-eight offense — but was allowed to plead guilty to making a false statement to a federal officer — a level six offense. The AUSA told us she was satisfied that the defendant was not involved in the deal. We doubt that she really believed this, since she was quite definite about wanting to ensure that the defendant was convicted of something. She also admitted that she had been able to get the plea to the false statement count, which by itself was scarcely a prosecutable offense on these facts, only by threatening to prosecute on the drug distribution charge.¹⁷⁸ The prosecutor probably believed that the defendant was guilty of drug distribution, but her behavior would be just as troublesome, though for different reasons, if she did not believe he was guilty.

(2) In two cases previously described, guns present at the scene of a drug transaction were ostensibly disregarded in the guideline factor calculus because of alleged problems of proof.¹⁷⁹ In both cases, the AUSAs agreed to drop the corresponding weapons count under section 924(c), which carries a mandatory five-year consecutive sentence. Although there were arguably some problems of proof in these cases,¹⁸⁰ both assistants admitted that they would have pressed the section 924(c) counts in the absence of a plea.

(3) A section 924(c) count was dropped in a case that admittedly presented no problems of proof. The AUSA gave three reasons: the defendant agreed not to appeal the denial of a motion to suppress; he had "cooperated" (though not to the extent required to support a substantial assistance departure); and "He'd agreed not to take me to trial."¹⁸¹

178. Interview #0106 at 1-4.

179. See *supra* notes 149-51 and accompanying text (detailing cases where possession of weapon was not used in Guideline computation, although weapon was present).

180. The statute applies only if the defendant uses or carries a firearm "during and *in relation* to any crime of violence or drug trafficking crime" 18 U.S.C. § 924(c) (emphasis added). This language allows the defendant to argue that a gun found at the scene of the crime had nothing to do with the underlying offense.

181. Interview #0109 at 20.

(4) A provision of the drug statutes specifies a sharply enhanced penalty when an offense occurs within 1,000 feet of a school.¹⁸² In many urban areas, this provision can easily come into play for offenses having no relation to school children. It is customary in some jurisdictions to charge automatically the "schoolhouse" count where it applies. AUSA #0204 admitted that he dropped such a count (and cut the penalties roughly in half) in order to get a plea. His rationale was that the defendant has sold only "a few vials," and was facing a seventeen-year sentence due to his criminal history. The prosecutor dropped the charge not only to get the plea, but to bring the sentence more closely in line with his personal assessment of the appropriate punishment. According to the AUSA, he did not ask his supervisor to approve this arrangement because he knew she would not.¹⁸³

(5) Another prosecutor at site 2 dropped both a gun count and a mandatory minimum drug charge in exchange for a defendant's proffer of assistance in other cases. The AUSA did not want to use the section 5K1.1 substantial assistance departure provisions, because the defendant insisted on limiting his exposure up front. Contrary to office policy, the prosecutor dropped the charge, without getting the approval of his supervisor.¹⁸⁴

(6) In a case handled by AUSA #0404, the defendant, originally indicted on charges of attempted possession with intent to distribute in excess of five kilograms of cocaine (an offense carrying a mandatory ten-year minimum) was allowed to plead guilty to conspiracy to commit simple possession. The effect of the plea agreement was to reduce the Guideline range from seventy-eight to ninety-seven months down to zero to four months, with a one-year statutory maximum. The AUSA conceded that the reduced charge did not "adequately reflect" the seriousness of the actual offense behavior. He attributed the sharp reduction in the charges to two problems of proof — the defendant had a "mere presence" defense, and there was allegedly a chain-of-custody problem affecting the prosecutor's ability to prove the amount of drugs involved.¹⁸⁵

In situations like those above, the decision whether to press a particular charge has great sentencing consequences. That decision gives the prosecutor leverage to induce a plea from an innocent defendant. It also serves, in effect, to transfer the actual decision about the appropriate amount of punishment to the unguided and unstructured discretion of the individual prosecutor. Difficulties of proof, together with general caseload pressures, the intensity of the individual prosecutor's desire to avoid trial, his need for assistance in other cases, and his personal assessment of both the defendant's guilt and fair social policy, may play more of a role in determining the punishment than the Commission's Sentencing Guidelines.¹⁸⁶

182. See *supra* note 139 (citing 21 U.S.C. §§ 841(a)(1), 856 which discuss the manufacture or distribution of controlled substances within 1,000 feet of a school).

183. Interview #0204 at 18.

184. Interview #0204 at 14.

185. Interview #0404 at 16.

186. While charge bargaining always existed before the Guidelines, it stands out as an area of

F. Reasons for Bargaining

The preceding sections suggest many of the reasons why bargaining occurred — not only within the boundaries of the Guidelines, but also in contravention of those boundaries. The principal factors that appeared to be at work are summarized below. Since some rather broad observations are offered, we reemphasize that we cannot at this time establish reliable estimates of frequency for the phenomena described. It seems likely that many of them occurred only in a minority of situations. Nonetheless, the factors mentioned could represent, cumulatively, a significant source of pressure for Guideline distortion in virtually any case.

The major reasons for bargaining include:

(1) Prosecutors focused upon maximizing their conviction rate, but were not oriented toward maximizing the severity of the sentences they obtained. Furthermore, they resented having to try a case or go through a contested sentencing hearing, when a plea bargain would ensure “a sentence I can live with.” Their standard for what is an acceptable sentence is derived locally. National uniformity, certainty or reduced disparity are not goals which they embrace.

(2) Bargaining was used to reward assistance in other prosecutions. Extra-Guideline distortion of facts and charges was sometimes preferred to the Guidelines more honest framework for departure in cases of substantial assistance, either because prosecutors wished to reward a desire to cooperate that would not have risen to the level of substantial assistance under section 5K1.1, or because they wanted more certainty than the section 5K1.1 procedure allows.

(3) The acceptance of responsibility discount was perceived as an inadequate inducement for the defense to waive trial.

(4) In weak cases, prosecutors wanted to ensure conviction on at least one charge, but the Guidelines do not recognize “problems of proof” as a legitimate reason for reducing the offense severity level. Nor, presumably, would such problems have provided a legitimate ground for a downward departure.¹⁸⁷

(5) Prosecutors viewed some Guideline sentences as too severe. They granted sentencing concessions not because they were obligated to do so in this bargaining situation, but because of their own sense of the equities — equities

concern in a regime of sentencing reform aimed at reducing disparity and increasing certainty in sentencing. Importantly, the Guidelines did not create the problem of prosecutorial discretion. The problem only seems more incongruous now, especially since Congress has restricted judicial discretion. Because Congress chose to direct its attention to judges and not prosecutors, the former have experienced some understandable frustration under the Guidelines system. This is especially true with respect to those portions of the Guidelines that are driven more by a conviction charge offense theory than a real offense theory (bank robbery, for example). See *infra* note 168 (Guideline § 6B1.2(a)).

187. See, e.g., Interview #0301 at 9 (proof problems not viewed as reason for downward departure under Guidelines).

which may partly reflect the likely sentence in their jurisdiction before the Guidelines.¹⁸⁸

(6) There were a variety of more elusive and partially interrelated reasons why prosecutors reportedly offered additional inducements to avoid trial:

- (a) Caseload pressures in the office;¹⁸⁹
- (b) A desire to preserve credibility with the judge;¹⁹⁰
- (c) A desire not to irritate the judge;¹⁹¹ and
- (d) A desire to avoid trial for personal reasons.¹⁹²

It is too soon to assess the policy implications of the various views just described, especially since the prevalence of such views is unknown. In any event, some of them may be a product of familiarity with previous ways of doing business, and may, therefore, gradually change as Guideline experience accumulates. Other views (especially those related to substantial assistance and acceptance of responsibility) seem to reflect misunderstandings about how the Guidelines are supposed to work. In this area, training and experience may change perceptions, or the Guidelines themselves may require either clarification or substantive change. Finally, many of the perceptions raise complex policy dilemmas that will not diminish with time or incremental Guideline revision. Particularly worth mention in this regard are the views related to case pressure, weak cases and punishment severity levels.

G. Summary of Research Findings

Seven salient points emerge from our preliminary research:

First, even during the pre-*Mistretta* period, there was a considerable degree of compliance with Guideline requirements in guilty plea cases. The result was

188. See, e.g., Interview #0105 at 10 (bargains often determined by pre-Guideline sentences in district); Interview #0204 at 6 (same); Interview #0307 at 4 (same).

189. "[T]hose boys are swamped now. They have not got time to fool around. That has always been in my mind a legitimate reason for a reduction — when you just don't have the time." Interview #0404 at 3. "[M]ost assistants feel strongly, whether they say it or not, that they have too much work to take a case like this [defendant sold "two bottles" of crack] to trial and they will be damned if they will let the Guidelines force a case like this to trial. So that's what leads to subversion [H]ere we do a certain amount of 'triage'. . . . I think all U.S. Attorney offices do." Interview #0204 at 5, 13; see generally Interview #0301 at 9.

190. "You don't try your bad case and plead your good ones If you keep bringing raggedy cases like that before the judge, maybe he can't tell the difference between a raggedy case and a good one next time." Interview #0404 at 18; see generally Interview #0405 at 14.

191. In minor drug cases, such as street-level sales by small dealers, "[y]ou have the occasional trial, which infuriates the judges. They would be mad at us for reasons I don't understand. 'It is still a crime, your Honor, for God's sakes — it's a federal crime.'" Interview #0204 at 13.

192. Despite protestations that "I came here to try cases," or "I love to try cases," some prosecutors really did *not* want to try most cases. Prosecutors resented having to try simple cases, but they also wanted to avoid wasting time and resources (theirs, their office's and the court's) in trying cases that are complex. They had little enthusiasm for trying a case involving a delicate problem of proof.

One AUSA explained an unusually attractive extra-Guideline plea offer in part on the basis that "I didn't want him to *take me to trial*." Interview #0109 at 20 (emphasis added).

usually systematic, uniform sentencing based on a fair assessment of the real facts and charges.

Second, even in cases of full Guideline compliance, inappropriate disparity sometimes resulted. Such disparity was partly a function of ambiguity in the language of the Guidelines and policy statements, especially the requirements that plea agreement departures be supported by "justifiable reasons" and that remaining charges "adequately reflect" actual offense seriousness. Significant disparity resulted from inconsistent practice with respect to awarding the acceptance of responsibility discount and initiating the departure mechanism in cases of substantial assistance. This phenomenon will have to be studied, in more jurisdictions, during the post-*Mistretta* period.

Third, there is little doubt that there was some degree of Guideline evasion, with sentences based on a distorted or artificial version of the facts and charges. We are not in a position to estimate the frequency of this phenomenon. While it most likely did not exist in *most* guilty plea cases, such evasion probably occurred in a significant minority of the cases. The patterns of Guideline circumvention described existed at all the research sites, and happened in an array of cases.

Fourth, Guideline circumvention took three principal forms: charge bargaining, date bargaining and Guideline factor bargaining.

Fifth, the principal sources of pressure for Guideline circumvention seemed to be: (1) perceived inadequacies in the substantial assistance departure mechanism and in the acceptance of responsibility discount; (2) a perception among attorneys trained in investigation and trial techniques that sentencing is not a prosecutorial function, or that their sentencing role (like their charging role) is not fully adversarial, resulting in commitment to the prosecutor's own conception of a fair sentence rather than to full enforcement of the law; (3) substantive dissatisfaction on the part of prosecutors (with the encouragement or acquiescence of judges) with Guideline sentences perceived as too severe or not worth the extra effort to negotiate or mete out; (4) a genuine lack of interest on the part of prosecutors in uniformity, certainty or reduction of disparity; (5) the lack of a Guideline vehicle for considering case pressures and proof problems as a justification for sentencing concessions; and (6) miscellaneous personal and environmental pressures to avoid trial.

Sixth, the mechanisms for preventing and exposing Guideline circumvention are incomplete and often ineffective. Some United States Attorneys offices consciously delegated great independence to trial assistants or had only informal, largely ineffective procedures for supervision and review. Probation officers were dependent on prosecutors not only for providing essential historical facts, but also for supporting the officer's appraisal of the legal significance of facts in the file. Although probation officers often succeeded in "keeping the system honest," they sometimes reported feeling isolated and unsupported. Judicial attitudes could reinforce this problem. Judges, on whom the Guidelines rely as the ultimate guarantors of "truth-in-sentencing," sometimes acquiesced to Guideline evasion. Far from encouraging diligent skepticism on the part of the probation officers, judges may have failed to support the officer

or even discouraged his or her efforts in an attempt to moderate a sentence that was more severe than was given in the past or thought necessary, or to save a plea agreement and avoid the risk of a trial.

The seventh and last point emerges from the previous ones, and can serve as our principal conclusion. The Guideline system has taken a large step toward controlling disparity in guilty plea cases; its ambitious efforts, far exceeding anything attempted in previous sentencing reform initiatives, have already begun to bear fruit. Nonetheless, the regulatory system contains weaknesses and some potentially large holes. These shortcomings, should they continue in the post-*Mistretta* period, pose a potential threat to the ultimate success of the Guidelines reform effort.

V. FUTURE PROSPECTS

This Article unfortunately must align itself with that frustrating genre which ends with a call for more research. We have identified certain potential problem areas and some common patterns of behavior. We do not know to what extent the phenomena we encountered in the pre-*Mistretta* period will be permanent or widespread. With this caveat in mind, several areas that are likely to deserve special attention in any consideration of remedies for problems we have addressed can be mentioned.

Rewards to defendants who provide *substantial assistance in other prosecutions* could be structured to provide more uniform standards, both in terms of the assistance sufficient to qualify, and the extent of the appropriate reward. Such standards could be promulgated by each United States Attorney office, the Justice Department, the Commission, or some combination of the three. Apart from standards applicable across the board, the departure mechanism may need alteration to afford each side some certainty about what the reward will be in any given case.

The *acceptance of responsibility* concept may need to be restructured. If understood to require true contrition prior to apprehension or very early in the prosecution, few defendants can qualify even among those who plead guilty. On the other hand, if very early expressions of remorse are not essential, many defendants will be eligible even after conviction at trial. In either event, the acceptance of responsibility concept may not provide a sufficient basis for distinguishing the defendant who pleads guilty from the one who does not. Does the concept include any sentence discount to reward the defendant *because* he has saved society the expense of trial? Divergent interpretations of the acceptance of responsibility provision may virtually guarantee disparity, at least to the extent of the two-level adjustment. If the Guidelines are clarified to reinforce the present provision's implication that there is no discount for the guilty plea alone, then pressure to find such a discount elsewhere may continue. One prosecutor stated:

[I]t's not fair for someone who pleads guilty and saves the government the expense of trial and the possibility that you might not win—it's not fair for that person to get the same two points as the

person who makes the government show their proof, goes through a trial, comes out and then finally at sentencing says, "Golly gee, I'm sorry for this." That's not fair.¹⁹³

For present purposes, we need not not accept or reject this view. We merely suggest that the Commission could either accommodate it, or find a way to address it. The Commission could then either alter the discount or control the kind of sentiment it reflects.

Even if the "acceptance" discount implies some guilty plea inducement, case pressure is certainly not a legitimate ground for an additional offense level reduction under the present Guidelines. Nor would case pressure justify a judge in accepting a plea to a charge that does not "adequately reflect the seriousness of the actual offense behavior."¹⁹⁴ Nonetheless, under pre-Guideline practice, some attorneys and judges seemed to give this consideration great weight. Indeed, the Thornburgh memorandum expressly grants Justice Department approval of the practice of charge manipulation in response to case pressure concerns.¹⁹⁵

The case pressure variable, as evaluated by individual prosecutors, contains almost unbounded potential for perpetuating sentence disparities. If the Commission remains committed to preventing case pressure distortion, a large project of reaffirmation and education lies ahead. If instead the Commission is persuaded that some concession to current practice is warranted, it will face the daunting task of finding a way to structure prosecutorial responses to case pressure considerations.

Much of what has been said about the case pressure dilemma applies as well to the question of *proof problems*. The Guidelines do not permit sentencing concessions due to evidentiary problems, but many attorneys and judges have long taken that practice for granted in plea bargaining. Again, the potential for disparity is clear. Although few cases that reach the indictment stage are seriously weak, existing custom and Justice Department policy sanction concessions not only in truly weak cases, but also whenever the case is not "readily provable."¹⁹⁶ The category for negotiation, therefore, encompasses not just weak cases but any cases that are *not strong*.

An exception for "non-ironclad" cases is enormously consequential. Problems of proof are probably more the rule than the exception, and an imaginative attorney can probably find a way to take almost any case out of the Justice Department's "readily provable" category. Once this happens, the prosecutor is free to negotiate on the basis of his individual conception of an equitable sentence, without regard to Guideline principles. As with the case

193. Interview #0302 at 7.

194. GUIDELINES, *supra* note 14, § 6B1.2(a).

195. Thornburgh Memorandum, *supra* note 94, at 4 ("approval to drop charges in a particular case might be given because the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office").

196. REDBOOK, *supra* note 94, at 46-7.

pressure question, the Commission will face operational difficulties regardless of whether it seeks to modify current practice, or to accommodate the practice and bring it under control. The substantive implications of either choice are complex and controversial, touching on the propriety of compromise, the need to facilitate conviction of the guilty, the threat to the constitutional rights to trial and to proof beyond a reasonable doubt, and the serious risks of convicting the innocent.

Finally, the Commission cannot escape, and hopefully will never wish to escape, the substantive question of *appropriate severity*. What punishment is fair, just and effective for offense categories and for individual cases? The issue is not only of obvious importance in its own right, but it seems intimately connected to the goals of uniform sentencing and consistency in the guilty plea process. Especially in drug cases, where statutory changes require punishment levels more severe than past practice in much of the country, the Commission can draw on experience from the field to identify the kinds of equities which must play a role in setting appropriate severity levels and in carving out situations for which less severe treatment may be warranted.

While it is too early to pronounce the Commission's efforts in the guilty plea area a success, continued attention to the problems we have canvassed could provide a basis for shoring up the potential weaknesses. Unwarranted disparities in guilty plea sentencing could continue, but they can be brought under control if their dynamics are continuously monitored, understood and addressed in depth by an active, reflective Commission.