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FRANK O. BOWMAN, III

TO TELL THE TRUTH: THE PROBLEM OF PROSECUTORIAL "MANIPULATION" OF SENTENCING FACTS

Frank O. Bowman, III*

In January of this year, Francesca Bowman, Chair of Probation Officers Advisory Group, sent a letter to Judge Richard P. Conaboy, Chairman of the Sentencing Commission, summarizing the results of a survey sent to probation officers in eighty-five districts.¹ It expresses the concern that, in the view of some probation officers, the government "usually" is cooperative in supplying information to probation officers preparing presentence investigation reports, but that there appear to be exceptions "when the government wants to protect a plea agreement."²

I will leave discussion of the methodological merits or demerits of the survey to others. Suffice it to say that I doubt even the survey's authors would hold it out as containing reliable quantitative data on the frequency with which prosecutors withhold from probation officers information relevant to sentencing, or as embodying reliable quantitative information on the frequency with which probation officers *think* such information is being withheld. Nonetheless, the survey raises once again the spectre of prosecutorial "manipulation" of the guidelines. It is to that general question, rather than to the specifics of the survey, that the balance of these remarks is directed.

I. Assessing "Manipulation"

A. The Critical Perspective

I have no doubt that Francesca Bowman's letter will be greeted among guideline critics as confirmation of an article of faith—namely that the guidelines scheme represents a dramatic transfer of sentencing discretion from judges to prosecutors. The claim that prosecutors in pursuit of plea agreements commonly manipulate or selectively withhold facts from the sentencing court is essential to the critics' creed because, if it turns out that prosecutors do not manipulate facts, if they honestly present to the sentencing court all the information at their disposal, then the "power" prosecutors exercise over sentencing outcomes derives primarily from the circumstance that prosecutors have greater access to facts than the other participants in the fact-driven guidelines system. It is only if prosecutors can be shown to

influence outcomes by suppressing information that they can convincingly be portrayed as having inherited from a supposedly disenfranchised bench any dramatically increased degree of "discretion."

(There is, of course, no doubt that prosecutorial *charging* decisions also influence sentencing outcomes. But the existence of such discretion does not vitiate the general point that most claims of absolute prosecutorial domination of the guidelines system rest on the claim that prosecutors produce or withhold sentencing facts at will to produce desired outcomes. Moreover, given that so many guideline battles are fought over drug sentences, it bears emphasis that the real points of contention are typically the quantity-driven minimum sentences prescribed by either statute or guideline. In those cases, the sentence is based largely on drug quantity, a fact known to the prosecutor and critical to sentencing, but not directly relevant to the charging decision. A similar situation exists in fraud cases where the primary sentence determinant is not the crime of conviction, but the amount of the "loss"—a fact determined at sentencing.)

There is, of course, considerable irony suffusing the ongoing argument about prosecutorial "manipulation" of the guidelines. It stems from the fact that prosecutorial "manipulation," to the degree it occurs, involves the withholding of *inculpatory* evidence, which if presented would *increase* a defendant's sentence. No critic to my knowledge has ever alleged that federal prosecutors make a practice of withholding exculpatory or mitigating evidence from the sentencing court.³ Therefore, the argument is that prosecutors are illegitimately exercising a power to produce lower sentences than the facts of the case, vigorously presented, would require. This is a contention which fits oddly in the mouths of those who commonly make it—commentators whose fundamental view of the guidelines is that sentencing levels are too high and that there is too little room for discretionary mitigation of punishment. The real position of such critics is not that prosecutors should not have the discretion to mitigate punishment, but that other actors, primarily judges, should have such discretion as well.

Nonetheless, despite the motivations of the critics, the criticism of prosecutorial manipulation is not an insubstantial one. If prosecutors do indeed routinely and selectively withhold evidence to achieve desired sentencing outcomes, then the pre-guidelines regime of unfettered judicial sentencing discretion will in fact have been replaced by nearly untrammelled prosecutorial control.

B. The Absence of Data

The somewhat troubling truth is that no one really knows how often prosecutors "manipulate" the guidelines, either by agreeing with defense counsel to keep facts away from the probation office and the

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judge or by other potentially available means. The probation officer survey tells us no more than that some probation officers think some Assistant U.S. Attorneys sometimes do not reveal information that might endanger a plea.

The academic literature to date is likewise of little help. In 1992, Professor Schulhofer estimated that guideline manipulation by the parties occurs "in twenty to thirty-five percent of all guilty plea cases."⁴ This figure is often quoted, primarily because it is the only numerical estimate in existence.⁵ But Schulhofer's estimate is a tenuous cornerstone on which to build much of an edifice.

In the first place, the 20-35% figure is *not* an estimate of the prevalence of so-called "fact bargaining," but appears to lump together the author's estimates of the incidence of various techniques of circumventing a strict application of the guidelines, such as charging offenses with low statutory maximums and recommending substantial assistance departures for defendants whose assistance was not in truth very useful.⁶ Schulhofer says of pure fact manipulation that, "My own sense . . . [is that] there are few cases, *perhaps five percent of the total*, in which relevant facts are hidden from probation."⁷

Second, although in fairness it is difficult to know how they could be improved upon, the best that can be said of Professor Schulhofer's estimates is that they are subjective and imprecise. They are based on Schulhofer's personal interpretation of a series of interviews with Assistant U.S. Attorneys as part of a study of plea bargaining he did with then-Sentencing Commissioner Ilene Nagel.⁸ Indeed, Schulhofer himself is so uncertain of the accuracy of his 20-35% number that he said of it:

This figure is a rough estimate and reflects a national average; the data makes clear that guideline manipulation varies widely among districts. *Unfortunately, I cannot begin, in this space, to defend the accuracy of this estimate. Those with different intuitions are entitled to retain their own view until a detailed analysis can be presented.*⁹

So far as I can determine, no further "detailed analysis" of the Nagel-Schulhofer data on this particular point has ever been published.¹⁰

Perhaps the most important point about the Schulhofer estimates is that they suggest that manipulation is not a rampant problem. If the estimates are reasonably accurate, the probation office receives complete information *95% of the time*, and there is no attempt of any sort to manipulate the guidelines *in 65 to 80% of the cases*. That is not an inconsiderable success rate.¹¹

II. Addressing the Prosecutor's Role

Even if manipulation is not, at present, a significant problem, the probation department survey should nonetheless set off some alarm bells. I recently completed an eight-month stint as Special Counsel to

the Sentencing Commission on detail from the U.S. Attorney's Office in Miami. As part of that assignment, I was privileged to participate in discussions in and around the Sentencing Commission and with participants in the Department of Justice policy-making process concerning the guidelines. The probation officers survey has been the subject of a number of those discussions. Without revealing any confidences, it is plain from the disparate reactions of experienced Justice Department lawyers that there exists a wide spectrum of opinion about what Department policy is on the appropriate limits of plea bargaining under the guidelines, and what it ought to be.

The one point on which there is universal agreement is that a federal prosecutor may not affirmatively misrepresent facts to the court.¹² Beyond that rudimentary principle, however, there is little consensus. Based on my conversations with various U.S. Attorneys and experienced AUSAs, there is no dissent from the general policy expressed in the Principles of Federal Prosecution, and reinforced by Attorney General Reno in her 1993 Memorandum,¹³ that prosecutors are to provide all requested information to the probation officer whenever possible so that an accurate and complete presentence report can be prepared.¹⁴

This apparent unanimity actually comes loaded with a series of caveats. It is not clear that all prosecutors feel bound to turn over material for which they are not asked where such material might defeat a plea agreement. Likewise, the "whenever possible" reservation might, under certain circumstances, permit a real, or perhaps conveniently inflated, concern for the security of sources or ongoing investigations to raise an obstacle to disclosure of inculpatory information inconsistent with a plea arrangement.

One point frequently raised by experienced prosecutors seems to rest on confusion about the interaction between Department policy on plea agreements and the obligations of prosecutors to the court. I have several times heard prosecutors whose judgment I respect opine that there is no obligation to turn over to the probation service material concerning conduct or offenses which are "not readily provable." The obvious point of reference is the DOJ charge and plea bargaining policy that prosecutors must charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction,"¹⁵ and that prosecutors may not accept a plea to less than one count of the most serious readily provable offense.¹⁶

But merely because prosecutors may agree to charge or plea bargains involving admissions to less than all of the criminal conduct in which a defendant engaged does not relieve them of the obligation to disclose to the court through the probation department all information relevant to sentencing. A

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criminal act or a relevant sentencing factor may not be "readily provable" *beyond a reasonable doubt* at trial, but there may be ample proof to satisfy the preponderance standard of sentencing proceedings.¹⁷ It is, at a minimum, inconsistent for prosecutors to take advantage of the reduced burden of proof at sentencing to enhance penalties when that result suits their purposes, and then to claim piously that they are entitled to withhold from the court the same type of information to ensure mitigation of punishment when that is thought desirable. I hasten to add that prosecutors need not, and in my view should not, turn over to the probation officer every potentially damaging rumor about a defendant's life and habits. The point is that, based on the burdens of proof considered applicable at sentencing, the quantum of certainty which constitutes the dividing line between what should and need not be disclosed is based on a preponderance rather than a reasonable doubt standard.

Beyond disputes over particular exceptions to the general policy of full disclosure, there is plainly continuing uncertainty about the general effect of the Reno Memo.¹⁸ There are those who view it as no more than a restatement of the preexisting Thornburgh policy of dutiful adherence to guidelines principles couched in a slightly softer tone. Others apparently feel that it represents a major policy shift, particularly insofar as it invites explicit consideration of "the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime." This phrasing can be read as an invitation to increased reliance on charge bargaining and as implicit legitimization of otherwise unjustifiable case dispositions premised on considerations of administrative efficiency and convenience.

My own impression is that there is very little impetus within the Department hierarchy to dispel the current uncertainty about what the Reno Memo means for prosecutors. One suspects that the prevailing view is that a bit of ambiguity is not altogether a bad thing — it soothes external critics and obviates the need for resolving potentially disruptive internal disagreements. There is nonetheless danger to the sentencing guidelines scheme in general, as well as to the Justice Department's narrow self-interest in a policy that fosters uncertainty among line prosecutors and their supervisors about their obligations under the guidelines, or encourages them to believe that they are free to make any bargain which suits their personal sense of justice or local administrative convenience.

III. To Prosecutors: A Call for Disciplined Stewardship

On balance, the guidelines are a boon to prosecutors, albeit not for the conventionally expressed

reason that they bestow unlimited discretionary power on the government. The guidelines are good for prosecutors because they ensure that facts have necessary consequences. Where once no amount of proof of any fact could reliably produce a particular sentence, prosecutors can now do what they do best—present evidence—in the confidence that proven facts will generate predictable results. The price to be paid for the power to influence sentencing outcomes is a surrender of some degree of discretion.

Prosecutors should not forget that the sentencing guidelines arose from long discontent with a prior regime in which both judges and prosecutors were felt, by the general public at least, to collude in the plea bargaining bazaar that produced disparate and unjust outcomes. Moreover, when the Sentencing Commission drafted the guidelines, it created the relevant conduct provisions primarily to ensure that the discretion withdrawn from judges was not merely transferred to prosecutors.¹⁹ To a large extent, the efficacy of the restraint embodied in the relevant conduct concept, as well as the overall integrity of the guidelines process, rests not on any coercive mechanism, but on the conviction that prosecutors will act as faithful stewards, pursuing cases with vigor, advising the court of relevant facts with candor, and letting the sentencing chips fall where the guidelines say they must.

On balance, I am confident that prosecutors have played the role envisioned for them reasonably well.²⁰ Nonetheless, if either through inattention or a policy of studied ambiguity the Department were to foster an institutional culture in which overt prosecutorial manipulation of the guidelines flourished, it is not improbable that Congress, the Commission or both would seek to impose controls on prosecutorial charging and plea bargaining discretion. Such a result would be deeply unfortunate, and not only from the parochial perspective of the Department of Justice.

The guidelines are a tightly jointed system. Unlike many guideline critics, I view this as one of the system's notable advantages. Nonetheless, all human systems need some play in the joints, some room for the operation of discretion and intuitive recognition of exceptions to general rules. One of the lubricants of the guidelines mechanism is the sensible, honest exercise of prosecutorial discretion. Still, the key to prosecutors retaining discretionary power, and the key to the long term health of the guideline enterprise, is the recognition that guidelines are the outcome of a democratic judgment, a judgment to which prosecutors, like federal judges, are duty-bound to submit.

NOTES

¹ Letter of Francesca Bowman, Chair, First Circuit, Probation Officers Advisory Group, to Richard P. Conaboy,

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Chairman, United States Sentencing Commission (Jan. 30, 1996). Ms. Bowman is no relation to the author.

² *Id.* at 2.

³ Irrespective of any consideration peculiar to the guidelines, withholding exculpatory or mitigating evidence would be flagrant, sanctionable prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule 16 of the Federal Rules of Criminal Procedure.

⁴ "Preliminary analysis of the qualitative and quantitative data collected by Commissioner Nagel and myself suggests that evasion of the proper Guideline sentence may occur in twenty to thirty-five percent of all guilty plea cases." Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 845 (1992).

⁵ See, e.g., Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1683 n.2 (citing Schulhofer as evidence that an "underground" system of "informal noncompliance" is undermining the guidelines).

⁶ See Schulhofer, *supra* note 4, at 844-46.

⁷ *Id.* at 844 (emphasis added).

⁸ For a description of the methods employed in the study, see Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practice Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 512-16 (1992).

⁹ Schulhofer, *supra* note 4, at 845 (emphasis added).

¹⁰ In their *Three Cities* article, Nagel and Schulhofer eschewed any quantitative estimate at all, saying only that, "In a clear majority of cases AUSAs negotiate plea agreements in compliance with the tenets of the guidelines. . . . It is nonetheless clear that unwarranted manipulation and evasion do occur in a substantial minority of guilty-plea cases." Nagel & Schulhofer, *supra* note 8, at 552. In their 1989 pre-*Mistretta* study, Nagel and Schulhofer were even less definitive. See Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231 (1989). They gave no quantitative estimate of the prevalence of fact bargaining, *id.* at 272, and said of charge bargaining that, "The frequency with which charge manipulation distorts the Guidelines is impossible to assess." *Id.* at 281.

¹¹ Indeed, this seems to have been the point Professor

Schulhofer was trying to make with his 20-35% figure. There Schulhofer wrote, "If we are right, Guideline circumvention is more frequent than supporters of the guidelines would hope, but not so frequent as many critics of the Guidelines fear." Schulhofer, *supra* note 4, at 845.

¹² The Principles of Federal Prosecution state:

[T]he Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. *Stipulations to untrue facts are unethical.*

U.S. Attorney's Manual 9-27.430 (1995) [hereinafter "USAM"] (emphasis added).

¹³ See Memorandum of Janet Reno to Holders of the United States Attorney's Manual, Title 9 (October 12, 1993) [hereinafter "*Reno Memo*"] (emphasizing that one of the purposes of the Principles of Federal Prosecution is to assure that charging and plea bargaining practices do not undermine the Sentencing Reform Act goal of reducing unwarranted sentencing disparity).

¹⁴ USAM 9-27.720.

¹⁵ USAM 9-27.310.

¹⁶ USAM 9-27.410.

¹⁷ See, e.g., *United States v. Salmon*, 948 F.2d 776, 778-79 (D.C. Cir. 1991) (burden of proof as to fact upon which a party seeks to rely at sentencing is preponderance of the evidence).

¹⁸ See, e.g., *Sen. Hatch/AG Reno Correspondence* (1994), 6 Fed. Sent. R. 353 (1994); James K. Bredar & Jeffrey E. Risberg, *The Reno Retreat: New Department of Justice "Bluesheet" DOA*, 6 Fed. Sent. R. 313 (1994).

¹⁹ See William W. Wilkins & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S. C. L. Rev. 495, 499-500 (1990).

²⁰ See e.g., Joe B. Brown, *The Sentencing Guidelines Are Reducing Disparity*, 29 Am. Crim. L. Rev. 875, 880 (1992), in which the author, a former United States Attorney for the Middle District of Tennessee and Chairman of the Attorney General's Advisory Committee Subcommittee on the Sentencing Guidelines states: "From my experience as Chair of the Guidelines Subcommittee, I believe the Department's policy [on adherence to the guidelines] is carried out in the vast majority of cases."