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**THE U.S. SENTENCING GUIDELINES:
WHERE DO WE GO FROM HERE?**

JOSÉ A. CABRANES*

The question today is *not* whether the federal system of Guidelines Sentencing is better or worse than the system of unguided discretion that it replaced. There is well-nigh universal agreement that the general outlines of the current system are here to stay. All of us have acknowledged that Congress is not likely in the near future to repeal those portions of the Sentencing Reform Act that mandated the creation of the Federal Sentencing Guidelines. The Guidelines have become deeply entrenched. More than half of active federal judges have been appointed since the Guidelines became effective in November of 1987. Few federal probation officers, and fewer Assistant United States Attorneys, have labored under any other regime of federal sentencing. Moreover, completely abolishing the Sentencing Guidelines would involve repealing not only most of the Sentencing Reform Act, but numerous other statutory provisions; over twenty criminal statutes enacted in the last decade explicitly refer to the Sentencing Guidelines, generally by instructing the Commission to provide a sentence “enhancement” for certain offenders.

In light of the entrenchment of the Guidelines, we should have no illusion that they will be easily discarded or supplanted in the near future. The question, therefore, is whether the present system should be modified or reformed to achieve greater coherence, consistency, accountability, and, ultimately, a higher level of justice. At stake here is the very legitimacy of our system of criminal justice.

I propose three reforms that could be undertaken without amendment of the Sentencing Reform Act or other congressional action—that is, by exercise of the authority of the Sentencing Commission or of the Advisory Committee on the Federal Rules of Criminal Procedure. These three reforms would, I believe, at least ameliorate certain of the Guidelines’ most troubling shortcomings. I hope that these proposals will be entertained by a range of policy-makers with widely divergent views of the Guidelines as a whole.

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Apart from a general plea for simplification of the structure and text of the Guidelines, I have only one recommendation relating to the substance of the Guidelines; the two others basically accept the substance and try to make the procedures fairer, more coherent, and more workable.

I. TREAT SOME “REAL OFFENSE” FACTORS AS BASES FOR “GUIDED” DEPARTURES

My substantive recommendation is that the Commission should treat some “real offense” factors not as bases for mandatory adjustment of the sentencing range, but as bases for “guided departures”—that is, departures guided by the Commission’s advice.

Reducing reliance on precise and complex mandatory sentencing instructions, and making greater use of guided departures instead, would fortify the moral dimension of sentencing, would reduce the robotics of judging under the Guidelines, would increase the comprehensibility of the Guidelines—thereby enhancing their legitimacy in the eyes of the public—and would respond to due process concerns, about which more anon.

Much of the complexity and seeming arbitrariness of the present Guidelines is a result of the attempt to specify the exact degree of each sentencing factor that warrants an additional one-point adjustment in Offense Level or criminal history score. What I suggest instead is that the Commission identify each factor warranting an adjustment and then allow the sentencing judge a range within which he or she would determine the appropriate value of the adjustment in the case at hand. The Commission could make the range large or small.

Making greater use of guided departures may be especially appropriate with respect to “real offense” (that is, non-statutory) factors that, as the Guidelines are currently written, always greatly affect the defendant’s final sentencing range—in particular, “special offense characteristics” involving only quantity of harm, the principle of “relevant conduct,” and the weight accorded to criminal history.

These are the areas where the lack of countervailing judicial authority is most troubling, both in terms of checks and balances on prosecutorial power and in terms of due process for the defendant. More generally, the Commission might provide guidance to judges, encouraging departures within some range where the judge is able to demonstrate that a particular adjustment required by the Guidelines is either too large or too small in relation to individual culpability. Of course, all departures (“guided” by the Commission or otherwise) would have to be explained by the sentencing judge and would continue to be reviewed by the appellate courts under the statutory standard of “reasonable[ness].”

II. ENHANCE THE PROCEDURAL PROTECTIONS AT SENTENCING

As for procedural aspects of the Guidelines, I propose that the Judicial Conference of the United States, the administrative governing board of the federal courts, reassess the procedural protections that are available, or should be available, at sentencing.

This assessment could be carried out by the Advisory Committee on the Federal Rules of Criminal Procedure or perhaps by a committee appointed for this purpose. Whatever committee undertakes this study should reexamine both the Federal Rules of Criminal Procedure *and* the Guideline Manual's Chapter Six policy statements on sentencing procedures. As matters now stand, some of the rules governing sentencing hearings are spelled out in the Guidelines Manual, while others are stated in the Criminal Rules.

To its credit, the Sentencing Commission devoted substantial attention to the procedural aspects of sentencing even before these issues were taken up in the Federal Rules. The "Policy Statements" in Chapter Six recognize that fact-finding under a mandatory sentencing regime is of critical importance. They instruct judges to permit both parties "an adequate opportunity" to dispute any factors relevant to sentencing under the Guidelines, and they encourage "reliable" fact-finding (albeit under a "preponderance" standard).

In 1993, moreover, the Commission added to its "Commentary" on plea agreements a paragraph that "encourages" prosecutors to disclose to the defendant prior to any plea of guilty those "facts and circumstances . . . that are relevant to the application" of the Guidelines. This 1993 amendment implicitly acknowledges the unfairness of having a defendant plead guilty before he is advised of the punishment that the mandatory system of sentencing has in store for him.

Until now, however, the Commission has not been prepared to go very far in prescribing adjudicatory procedures at sentencing, despite its recognition of the fully adjudicatory nature of the Guidelines sentencing process. Moreover, the Commission's Policy Statements have not set forth a realistic or workable approach to fact-finding by probation officers and to plea agreements. The dominant concern of the Sentencing Commission in Chapter Six of the Guidelines Manual has been to discourage evasion of the Guidelines by the parties and the judge.

That, of course, is a perfectly reasonable concern of the Commission. But it is by no means clear that the Sentencing Commission is the most appropriate place to address issues of sentencing procedure. To be sure, the Commission is authorized by the Sentencing Reform Act to promulgate "Policy Statements" on procedures for implementation of the Sentencing Guidelines. Some case-law, however, suggests that these policies may not actually be binding on federal judges in the way that formal Guidelines are. In any event, I have never heard anyone argue that Sentencing Commission "Policy Statements"

should or would prevail over conflicting provisions adopted in the Federal Rules of Criminal Procedure.

Let me suggest that the Federal Rules of Criminal Procedure are the most appropriate forum (indeed, the obvious forum) in which to address matters of sentencing procedure. The process provided in the Rules Enabling Act is far more open and thorough than the process provided in the Sentencing Reform Act. The Sentencing Commission issues a variety of proposed Guidelines amendments for public comment (and sometimes holds public hearings), then issues those it desires as final amendments. Thereafter, it awaits the 180-day period during which Congress may review the amendments. There have been few congressional hearings on the Commission's proposals, and only once has Congress rejected an amendment proposed by the Commission. Moreover, under the terms of the Sentencing Reform Act, the Commission need not even abide by these procedural requirements in issuing Policy Statements, since the statutory requirements of public notice and of congressional review apply only to formal "Guidelines."

The process by which amendments are made to the Federal Rules of Criminal Procedure is far more exhaustive, and that process is more likely to be responsive to a variety of perspectives and concerns. I will not go into the specifics of the Rules Enabling process here, except to note that it is multi-step; nothing happens unless it is approved by several different groups. And here too, Congress always has the final opportunity to review and revise.

For the most part, the Federal Rules of Criminal Procedure were written in the pre-Guidelines era. With the notable exception of Rule 32, pertaining to the sentencing hearing itself, these Rules barely acknowledge the existence of the Federal Sentencing Guidelines. The Sentencing Commission, not the Judicial Conference, has played the leading role with respect to sentencing practice and procedure in the age of the Guidelines. This is so despite the fact that, for the last fifty years, the Judicial Conference has insisted that the Rules Enabling process is the best way to address evidentiary and procedural issues in both civil and criminal litigation.

As I have noted, the sentencing hearing itself is governed by a combination of Rule 32 of the Federal Rules of Criminal Procedure and the Policy Statements in Chapter Six of the Sentencing Manual. Pursuant to these requirements, the procedural protections afforded to a defendant at a sentencing hearing are not nearly as substantial as those available in other adjudicatory settings. Most importantly, the rules of evidence do not apply, the standard of proof is "preponderance of the evidence," and there is no right to confrontation of adverse witnesses.

Some individual judges and other commentators—including, perhaps most notably, Chief Judge Edward Becker of the Third Circuit—have urged the implementation of greater procedural safeguards at the sentencing hearing. One proposal is that the standard of proof applied by the judge at sentencing

hearings under the Guidelines be raised from the low “preponderance” standard to a heightened standard such as “clear and convincing evidence,” perhaps even to the standard at criminal trials of “proof beyond a reasonable doubt.” Another proposal is that certain of the Federal Rules of Evidence, especially those relating to hearsay, be made applicable to sentencing hearings.

Others have proposed that the Federal Rule governing plea hearings, Rule 11, be amended to require the Government to file a notice of sentencing facts prior to the entry of a plea of guilty. As Rule 11 is now written, it does not attempt to prescribe the information that has to be given to a defendant about the mandatory consequences flowing from the Guidelines. (Indeed, district judges often—and understandably—tell defendants at a change of plea hearing that *no one*, at that point, knows with any certainty or confidence where the projected sentencing calculus will lead.) It is not until *after* a defendant pleads guilty that he must be advised of the allegations against him regarding relevant conduct and other “real offense” factors that may dramatically increase the sentencing range prescribed by the Guidelines. Requiring notice of sentencing facts prior to the defendant’s plea of guilty would simply make mandatory what the Sentencing Commission has already “encouraged” in its 1993 amendment to the Guidelines.

The simple fact underlying all of these procedural proposals is this: the sentencing hearing has been transformed by the Guidelines into an adjudicatory proceeding, with fact-finding and application of law to the findings. Yet the procedural rules are vestiges of the previous era of broad judicial discretion, and thus remain distinctly non-adjudicatory. This inconsistency provides an incentive for prosecutors, in the words of a distinguished former Chief Judge of the Court of Appeals for the Sixth Circuit, to “indict for less serious offenses which are easy to prove and then expand them in the probation office.” Prosecutors acting in good faith are tempted to take advantage of a lawful means of bypassing the requirements of indictment and trial found in the Constitution and in the Federal Rules of Criminal Procedure and to seek punishment of a defendant under the less stringent adjudicatory requirements of a sentencing hearing.

III. ALLOW JUDGES TO ACCEPT SENTENCES AGREED UPON BY THE PARTIES

My third and final proposal is a straightforward one: that judges should be given greater leeway in accepting plea bargains. Specifically, I propose that the Sentencing Guidelines and/or the Federal Rules of Criminal Procedure be amended to recognize explicitly the authority of the sentencing judge to impose a sentence in accordance with a plea agreement where the judge finds that the proposed sentence would achieve the purposes of criminal punishment at least as well as the sentence suggested by the Guidelines.

As has been noted by more than one observer of the federal sentencing system, the Guidelines have not acknowledged the extent to which the formal demands of law are inevitably tempered in implementation. Until now, the Guidelines have ignored, or attempted to suppress, the adversarial bargaining that is virtually inherent in litigation. Until now, the Guidelines have driven the process of adjustment underground and hidden from observers the decisions that actually shape a sentence.

Most criminal cases in the federal courts, as in other courts of this country, end in explicit or implicit plea bargains—just as most civil cases are resolved by settlement. Although over ninety percent of federal convictions are obtained by pleas of guilty, rather than by trial, the Guidelines do not clearly acknowledge the legitimacy of settlements based on the parties' agreement on offense conduct and, in turn, a below-Guidelines sentencing range. The result is that prosecutors and defense attorneys, though "officers of the court," are sorely tempted to deny information to both the probation officer and the court that would fully reveal all arguably relevant aspects of the case.

The current Guidelines also place judges in an ethically uncertain position. When an apparently Guidelines-evading plea agreement is brought to a judge, he or she has two options. The judge might, on the one hand, accept the plea-agreement and claim ("for the record") to be applying the Sentencing Guidelines—even though the judge, the prosecutor, the defense attorney, and the probation officer all know that, in fact, the judge is approving an agreement of the parties that has the effect of avoiding an otherwise-applicable Guidelines range. Alternatively, the judge may ignore the agreement of the parties and impose the sentence called for by the Guidelines—not an attractive option when no one in the courtroom (including, quite possibly, the probation officer) believes that the presumptive Guidelines sentence is appropriate in the case at hand.

Neither of these options is particularly attractive to a judge who is committed to the rule of law. The Sentencing Commission's effort to vest probation officers with autonomy from judges, and to direct their activities and responsibilities, has also led to tension and confusion among all the participants in sentencing.

Much, though not all, of the dissimulation, distrust and discomfort generated by the Guidelines could be avoided if judges understood that they are authorized to accept a plea agreement that resolved matters differently from the resolution that would be mandated under the Sentencing Guidelines in the absence of the agreement.¹ Recognition of the legitimacy of such plea

1. This clarification would require no congressional action. The duties of the Sentencing Commission already include promulgation of general policy statements regarding the appropriate use of "the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to

agreements would also clarify the role of the probation officer. Where adverse parties have arrived at an agreement (or partial agreement) that both they and the judge believe is appropriate and achieves the objectives of punishment specified by Congress (including, most importantly, those specified in the Sentencing Reform Act of 1984), we should defer to the judgment of the decision-makers who know the most about the case, rather than to the vagaries of sentencing rules constructed by persons who (by definition) know nothing about the case.

IV. CONCLUSION

The Sentencing Reform Act worked a revolution in federal sentencing. Since, by all appearances, this revolution is here to stay, it is time we moved from general opposition or defense of the Guidelines to more modest proposals for reform. The three proposals I have made herein accept the Guidelines as a fact of life. If implemented, however, these proposals would make sentencing under the Guidelines a fairer and more sensible process.

