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Completing the Sentencing Revolution: Reconsidering Sentencing Procedure in the Guidelines Era

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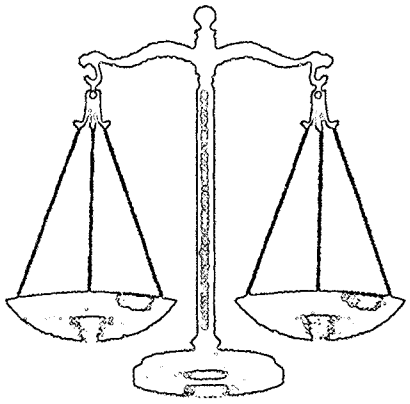

The central innovation of the guidelines sentencing revolution has been the creation of a regime in which facts other than those required for conviction have necessary consequences at sentencing. In days of yore, judges mulling a sentence were entitled to receive information from virtually any source on virtually any subject, but they were never obliged to pass public judgment on the truth or falsity of what they heard because no finding of fact could constrain their discretion to set a sentence anywhere within the boundaries set by statutory maxima and minima. No more. The project of the original United States Sentencing Commission was to identify those facts that *ought* to influence sentencing outcomes and then to create a set of rules embodying the command that sentences *would* be affected whenever the identified facts were found. The idea was to bring law to a region of the criminal justice system thought to be lawless by making sentencing a more adjudicatory and less discretionary process.

Few revolutions, however sweeping, eradicate all traces of the *ancien regime*. The sentencing revolution razed the old church of discretionary, rehabilitative sentencing, and erected on its site a new temple in which rules designed by an expert commission and ratified by the elected legislature would be applied based on judicial findings of fact. However, the architects of the revolution, enmeshed in the details of their soaring new legal edifice, seemingly forgot to check the sub-basement. They built the new superstructure of substantive sentencing law right over the procedural foundation of the old discretionary, non-adjudicatory system.

In consequence, although guidelines sentencing requires extensive factfinding, the procedural rules governing the sentencing hearing are but little changed from the pre-guidelines era. Although judges must now make findings of fact as an integral part of the task of guidelines application, those findings are the product of a process in which the government's burden of proof is only a preponderance of the evidence, defendants have limited rights to discovery of evidence germane to sentencing factors, much of the true fact-finding is done (at least preliminarily) by probation officers without the benefit of any formal evidentiary presentation, and the sentencing hearing itself is not subject to the rules of evidence. Unsurprisingly, this odd discontinuity between the mandatory and fact-dependent character of substantive federal sentencing law and the extreme informality of federal sentencing procedure has been a source of discontent with the new system since its inception. Yet little has changed in the thirteen years since the Guidelines went into effect.

In the last few years, however, the debate over sentencing procedure has heated up. Various observers have suggested that the guidelines sentencing system has changed the very way in which "crimes" are defined. If the definition of a crime is a list of factual elements that, when proven, produce a specified range of punitive sanctions, then one can fairly argue that the Sentencing Guidelines are now the true federal criminal code, and that adjudication of "Guidelines crimes" occurs, not at trial or by plea, but at sentencing. Some have questioned whether this new state of affairs is consistent with constitutional jury trial and due process guarantees. The U.S. Supreme Court is in the midst of considering a series of cases that attempt to define the issues that must be adjudicated in a trial before a jury and those that may properly be decided by a judge alone in the procedurally informal setting of a sentencing hearing. In 1999, the Supreme Court suggested in a footnote that the Sixth Amendment requires a jury determination of any statutorily enunciated fact that might increase the maximum sentence of a defendant.[1] As this issue of FSR goes to press, the Court has just decided *Castillo v. United States*,[2] a challenge to 18 U.S.C. § 924(c)(1), which increased the maximum sentence for using or carrying of a "firearm" in relation to a crime of violence when the weapon was a

"machinegun." The Court did not reach the constitutional question of whether the existence of a fact that would raise a maximum penalty must always be a jury question. Rather, it concluded as a matter of statutory interpretation that § 924(c)(1) did not create a sentencing factor, but used the word "machinegun" to state an element of a separate, aggravated crime. A decision is expected any day in *Apprendi v. New Jersey*,[3] which considers whether a state statute increasing a defendant's maximum sentence on a post-conviction judicial finding of racial motivation can be squared with the Sixth Amendment right of jury trial.

On the constitutional level, we are pleased to host a stimulating exchange between Jacqueline Ross, a former Assistant U.S. Attorney from the Northern District of Illinois, and Professor Richard Singer and his co-author Mark Knoll on the merits and broader implications of the element vs. sentencing factor debate. Lacking both the forecasting talents and the intrepidity of our contributors, however, I have eschewed comment on the constitutional debate in these Editor's Observations. Regardless of the outcome of *Apprendi*, difficult policy questions will remain about the best procedure for adjudicating sentencing facts. Should the burden of proof for sentencing enhancements be increased? Should the sentencing hearing become more like a trial, with full rights to confrontation, cross-examination, and the screening of evidence through the Federal Rules of Evidence? These remarks will focus on the sub-constitutional questions of whether, and if so how, procedural rules should be modified in whatever sphere the Supreme Court finally reserves for the sentencing judge.

I. Enhancing Procedural Protections for Defendants at Sentencing

Contributors to this issue have made four basic suggestions for modifying federal sentencing procedures: (1) Require the government to provide the defendant notice of all sentencing factors that would increase a defendant's punishment which it intends to argue for at sentencing; (2) Create discovery procedures giving defendants a right of prior access to all information and evidence relevant to sentencing; (3) Increase the burden of proof at sentencing from the present preponderance of the evidence standard to either "clear and convincing evidence" or "beyond a reasonable doubt;" and (4) Raise the quality of evidence considered at sentencing by (a) changing the standard of admissibility for sentencing evidence, and (b) making some or all of the Federal Rules of Evidence applicable to sentencing hearings. Implicit in the comments of several contributors has been an additional concern about the role of probation officers in sentencing adjudication. What follows are some thoughts on the four basic suggestions of the other authors, with some particular comments on the necessity of understanding the role of probation officers when crafting reforms of federal sentencing procedure.

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A. Notice

Professor Richard Singer and his co-author Mark Knoll urge that the government be required to give notice in the charging instrument (either indictment or information) of at least those factors that would increase the statutory maximum sentence. They would prefer that this early notice requirement also be extended to "all *statutorily enunciated* factors upon which the prosecutor seeks to rely."[4] Judge Cabranes suggests that Rule 11 of the Federal Rules of Criminal Procedure be amended "to require the Government to file a notice of sentencing facts prior to the entry of a plea of guilty."[5] Both proposals are premised on the argument that defendants ought to know, in advance and with reasonable particularity, the likely sentencing consequences of an agreement to plead guilty or a choice to contest the case at trial.

The idea of requiring the government to provide defendants with pre-disposition notice of facts that would increase punishment sounds like nothing more than fair play. But a requirement of notice either in the charging instrument or during the Rule 11 plea colloquy may not be quite as desirable as it sounds. Professor Steven Clymer points out that the government often has incomplete information about the defendant at the time of plea. He suggests that barring proof of all sentencing factors not noticed under Rule 11 would result in frequent undeserved sentencing windfalls for defendants, as well as complicating the resolution of complex multi-defendant investigations because the government would be reluctant to enter into agreements with potential cooperators until complete information on the background and participation of such persons was available.[6]

In addition to these concerns, there is another, more fundamental, difficulty. As innocuous

as the notice requirement sounds, in practice it would largely nullify the "real offense" features of the Sentencing Guidelines and confer even greater control over sentencing on prosecutors. This dramatic consequence flows from the remedy necessary to make a notice requirement meaningful – the prohibition against the government seeking a sentence increase based on a factor about which it failed to give notice. Under the Singer-Knoll proposal, since no significant sentencing factor unmentioned in the indictment or information could be considered at sentencing, the government would have unreviewable discretion to expand or contract a defendant's sentencing exposure by altering the contents of the charging instrument. Under the Cabranes variation, the government would be able to defer its choice until later in the case, but it would nonetheless retain absolute control over what sentencing factors a judge could consider by virtue of its control over the contents of its Rule 11 "notice of sentencing facts." Under both proposals, the relevant conduct provisions of the Guidelines would be trumped by the government's drafting decisions in the charging document and the Rule 11 notice. Prosecutors would be at liberty to manipulate sentencing outcomes through the notice rules either unilaterally or in order to effectuate a plea agreement. In effect, because of the exclusionary remedy necessary to enforce them, these "notice" rules would convert the Guidelines from a modified real offense system into either a charged offense system (Singer-Knoll) or an offense-of-conviction system (Cabranes), *at the option of the prosecutor.*

One response to this concern might be to observe that the added prosecutorial power could be exercised only downward, that is by *omitting* from indictments or Rule 11 notices facts that tended to increase a defendant's sentence. Prosecutors, it might be argued, can be relied upon not to consent to underpunishment of the guilty. Or one might contend that prosecutors will most often use the new notice rules to manipulate sentences to effectuate a negotiated plea agreement, and therefore that the justice system ought not be concerned about overseeing the disposition agreed to by the parties. Both arguments would have greater force if we were dealing with bilateral civil litigation over the private disputes of private persons. In such civil actions, the law usually presumes that the parties are the best judges of their own interests, and it is thus loath to second-guess negotiated settlements of private civil controversies. In criminal cases, by contrast, the defendant and the prosecutor are not the only interested parties. Victims of crime and the society at large have interests in the criminal sentencing process that may be only imperfectly represented by the prosecutor's office. Those public interests include the concerns that guilty defendants be neither underpunished nor punished disparately in comparison with others similarly situated. The Guidelines were in large measure the fruit of a perception that prosecutors and judges were merchants in the plea bargaining bazaar, ignoring broader interests in the frenzied pursuit of time-saving deals. It could fairly be argued that the notice proposals broached in this issue of FSR would root sentencing more firmly than ever before in the culture of the deal.

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That said, the issue of notice of potential sentence enhancements is not a trivial concern. The question is whether the concern is rooted in real, rather than theoretical, defects in the current system, and if so, whether current rules can be modified to fix or ameliorate the defects without performing a sub rosa transformation of the entire Guidelines system. In answering this question, it is important to recognize that notice of sentencing factors is important at two different stages of the criminal adjudicatory process for two different reasons.

The first stage is the one Singer, Knoll, and Judge Cabranes have focused on, the point at which a defendant is weighing the potential sentencing consequences as he decides whether to plead guilty. Traditionally, it has been thought sufficient for a voluntary plea to ensure that a defendant is advised of the statutory maximum sentence for the offenses to which he is pleading guilty, as well as any applicable mandatory minimum penalty. Notice of these facts is already required as part of the Rule 11(c)(1) plea colloquy. As for factors important to setting the sentencing level between the statutory maximum and minimum, the combination of Rule 16 discovery, the defendant's own knowledge of the facts, and consultation with counsel should bring the vast majority of potential sentencing issues into sharp relief. This will be particularly true in the 93% of federal cases resolved by plea[7] – after all, the objective of plea discussions is to identify the range of potential sentencing consequences arising from defendant's conduct and negotiate a favorable a resolution of disputed questions. In short, while defendants and their counsel would undoubtedly find it helpful to receive a formal detailed

advisement of all potentially applicable sentencing factors at or before the disposition of the case, it is not clear that imposition of a formal notice requirement would provide competently represented defendants much more information than they receive under present arrangements. More importantly, the rather speculative advantages of such a requirement are likely outweighed by the practical difficulties of collecting complete sentencing information pre-indictment, or even pre-plea, and the subversive effect on the Guidelines scheme of excluding from consideration any factor of which the prosecution does not give formal notice.

The second, and arguably more important, stage at which notice is essential to sentencing comes after the adjudication of guilt. What a convicted defendant really needs – and deserves as a matter of fairness and due process of law – is notice of the factors on which his sentence will be based sufficiently in advance of sentencing to investigate, and where appropriate prepare to present or contest, evidence relevant to each sentencing factor. Note the distinction between sentencing *factors* and the *evidence* necessary to determine the existence of such factors. Quantity of drugs and amount of loss are sentencing factors. The testimony of a DEA chemist or a forensic accountant would be part of the evidence used to ascertain values for those sentencing factors. As matters now stand, the probation officer's Pre-Sentence Investigation Report (PSI) provides complete notice of potentially relevant sentencing *factors*. The debatable questions are: (1) whether the PSI gives defendants enough information about the *evidence* known to the probation officer, and (2) whether the PSI serves its notice function *early enough* to permit defendants a meaningful opportunity to dispute contested sentencing factors. I will return to these points below in the section on pre-sentencing discovery.

The PSI is ... the centerpiece of the sentencing process.

B. The Role of Probation Officers and the PSI in Sentencing Adjudication

If the PSI were merely a vehicle for giving notice of potential sentencing factors and relevant evidence, it would merit little further discussion. However, the PSI is not an inconsequential documentary preliminary to sentencing, but is rather, as Benjamin Coleman observes, "the centerpiece of the sentencing process."[8] Probation officers drafting PSI's are neither clerks nor shorthand reporters gathering and regurgitating unfiltered information. Instead, they act as a species of minor league magistrate. They not only collect and collate information, but make both factual and legal judgments about offense conduct, criminal history, and guidelines application. Hence, the probation officer's conclusions on all these questions, memorialized as the PSI, become, in effect, "the preliminary 'findings' of the court."[9] Just as with a magistrate's report and recommendation, the parties are given a specified period (14 days) within which to file objections to the PSI, and the probation officer may amend the report after considering such objections.[10] Absent a timely objection, the court may, and almost invariably will, accept the probation officer's conclusions as its own findings of fact.[11] Even as to disputed facts, as Ben Coleman reminds us, judges give the probation officer's views great weight.

In short, by the time the PSI has been released to the parties for their first inspection, the probation officer has already performed what can only be termed a preliminary adjudication of every factual and legal issue in the sentencing, an adjudication that will be transmitted to the judge with, in most cases, only minor adjustments responsive to the parties' objections. The question of whether probation officers should have this role has been often discussed, but is beyond the scope of these remarks. The point for present purposes is that they do, and because they do, any comprehensive reexamination of sentencing procedures must take account of that reality. For example, while it is true that the PSI provides a defendant with comprehensive notice of the factors that will be adjudicated at sentencing, as well as with substantial information about the available evidence relating to those factors, this notice arrives only after the probation officer has preliminarily adjudicated every guideline issue. Common sense (and, I think it fair to say, the experience of most federal criminal trial lawyers) suggests that it is far more difficult to dislodge a conclusion formalized by being written into a PSI than it is to influence the formation of that conclusion in the first place.

Thus, if the PSI is envisioned as the primary vehicle for giving notice to defendants of sentencing issues and evidence, the notice comes too late because it arrives in the very document that announces the probation officer's conclusions on the issues in dispute. If, on the other hand, the PSI is recognized for what it is – not so much a notice of sentencing issues as a presumptive resolution of them – then procedural reformers ought to focus either on reducing

the adjudicative role of probation officers, or on enhancing defendants' participation in the decisional process by which the probation officer produces the PSI.

C. Discovery

A hallmark of a fair adjudicatory process is a right to the discovery of evidence that will be considered by the fact-finder. One of the most apparent vestiges of the pre-guidelines procedural model in Guidelines sentencing practice is the absence of any rules governing the discovery of evidence relevant to sentencing. Sentencing Guidelines Policy Statement 6A1.2 opines that courts "should adopt procedures to provide for the timely disclosure of the presentence report." And U.S.S.G. § 6A1.3 goes on to declare that parties "shall be given an adequate opportunity to present information to the court." But the Guidelines nowhere require disclosure of the evidence on which the probation officer relies in preparing the PSI, or advance disclosure to the defense of the "information" the government intends to "present ... to the court." This gap is not so devastating to a defendant's ability to litigate sentencing issues as one might think. First, at least until disposition of the case by trial or plea, the defendant will receive discovery required by Fed. R. Crim. P. 16 and other discovery rules. Although the facts necessary to proof of guilt are not identical to those at issue in a guidelines sentencing, there is obviously substantial overlap. Even after the plea or guilty verdict, *Brady v. Maryland*[12] imposes a continuing obligation to disclose evidence favorable to the defendant on issues of punishment, and Fed. R. Crim P. 26.2 requires disclosure of the statements of government witnesses at sentencing to the same extent as would be the case at trial.[13] Moreover, Fed. R. Crim. P. 7 subpoenas remain available to obtain evidence from third parties and to compel attendance of witnesses at the sentencing. Finally, skillful defense counsel will usually be able to secure access to most anything else the government has (and the defense knows enough about to ask for) through a combination of diplomacy, arm-twisting, and complaints to the judge.

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Still, the availability of trial discovery, even supplemented by Rule 17 subpoenas, *Brady* and *Jencks* material, and the fruit of informal discovery avenues, does not entirely answer a defendant's sentencing needs. The government's Rule 16 obligations end with entry of the plea or return of the verdict. In cases resolved by plea, discovery is likely to have been far less exhaustive than would be true in a case tried to a verdict. More importantly, evidence probative of at least some sentencing factors (notable examples being the amount of loss in fraud cases, or the precise quantity of drugs in narcotics cases) may not be covered by Rule 16 or any other trial discovery rule because, although the disputed fact is critical to sentencing, it may not be essential to the proof of any element of substantive guilt.

On these important questions, *Brady* is of limited assistance. It obliges the government to disclose *exculpatory* evidence on sentencing issues, but imposes no requirement that the government reveal the *inculpatory* evidence on which the prosecutor will rely in seeking to raise defendant's sentence. The efficacy of Rule 17 subpoenas and of informal discovery avenues depends on reasonably detailed foreknowledge of what one is looking for, as well as a reasonably cooperative spirit on the part of the prosecutor. The U.S. Attorney's Manual states as a matter of Department of Justice policy that government counsel "should disclose to defense counsel, reasonably in advance of the sentencing hearing, any factual material not reflected in the presentence investigation report that he/she intends to bring to the attention of the court."[14] But, as is well-known, the obiter dicta of the U.S. Attorney's Manual are not enforceable against the government. (Nonetheless, the Manual is an important window into official Justice Department policy. We have reprinted the section of the U.S. Attorney's Manual dealing with sentencing practice beginning at page 233 of this issue of FSR.) In any case, even scrupulous governmental adherence to the requirements of the Manual imposes no disclosure obligation until *after* the PSI has already been drafted and disseminated to the parties for comment.

In short, there will be occasions when existing discovery arrangements will prove inadequate. In a system expressly designed to constrain judicial discretion by linking sentencing range to factual findings, a defendant should not be obliged to rely for discovery on a patchwork array of rules created to facilitate trial preparation, supplemented by an unenforceable obligation of fair play by prosecutors. So what should discovery rules for sentencing look like?

First, as noted above, the responsibility for sentencing adjudication under the Guidelines

is shared by the probation officer and the district judge who reviews the officer's conclusions in light of the parties' objections. Thus, a meaningful right of discovery would necessarily: (1) give defendants access to all the evidence that the fact-finder sees relevant to Guidelines sentencing factors; (2) ensure such access sufficiently early in the process that the defendant can engage in meaningful advocacy to the probation officer *before* the officer encases his preliminary adjudication in the PSI; and (3) impose a continuing obligation of disclosure by both the probation officer and the government during the period between the initial promulgation of the PSI and the sentencing hearing.

I therefore concur in the recommendation of Richard Smith-Monahan that Rule 16 of the Federal Rules of Criminal Procedure be amended to add provisions related to discovery at sentencing. I also agree with Smith-Monahan that the amended Rule 16 should require the government "prior to the sentencing hearing, to disclose information and evidence which it intended to introduce against a defendant to prove guideline enhancements."[15] After all, such a rule would do no more than codify the obligation the Department of Justice imposes on its prosecutors as a matter of policy in the U.S. Attorney's Manual. I would, however, go somewhat further than Smith-Monahan. Because the probation officer's preliminary adjudication of sentencing facts in the first draft of the PSI is so important, the government ought to be required to make *simultaneous* disclosure to the defense of all information it provides or makes available to the probation officer. Only in this way will the defendant have a fair opportunity to use the tools of advocacy to influence the probation officer's views in their critical formative stages.

[T]he government ought to be required to make simultaneous *disclosure to the defense of all information it provides or makes available to the probation officer.*

I also concur in Smith-Monahan's suggestion that Rule 32 be amended to require disclosure by the probation officer, not only of the PSI, but also of the evidence and information *relied upon* by the probation officer in preparing the PSI. As matters stand, Rule 32 is an uneasy compromise between the needs of Guidelines adjudication and the pre-Guidelines medical model of sentencing in which the PSI was envisioned as a sort of diagnostic document containing potentially privileged information to which the defendant had only incomplete rights of access. We should complete the transition from the old to the new regime by installing procedural rules that recognize that sentencing is an adversarial adjudicatory process, not the diagnosis and treatment of a patient. Thus, a defendant should have early access not only to information given to the probation officer by prosecutors, but to information the probation officer obtains independently from other sources. In no other setting would we allow a fact-finder associated (as is the probation officer) with the judicial branch to conduct an independent investigation and arrive at legally consequential conclusions in reliance on the results of the investigation, without disclosing those results to the affected party.

Some may argue that complete disclosure of absolutely everything a probation officer discovers is both unnecessary and a potential impediment to obtaining a complete picture of the defendant's life and character. For example, friends, family members, and business associates of a defendant might be discouraged from speaking candidly if they knew that the full text of their remarks to a probation officer were discoverable as a matter of right. In general, one is disposed to conclude that any potential chill on witnesses is outweighed by the right of a defendant to fair adjudicatory procedures. Nonetheless, perhaps a revised Rule 32 could strike a balance by distinguishing between evidence and information in a probation officer's possession that is relevant to a sentencing factor enumerated in the Guidelines, and information relevant only to fully discretionary judicial choices such as where to sentence a defendant within applicable guideline range. Information and evidence in the former category would be subject to mandatory disclosure; information in the latter category would not. In this way, defendants would be guaranteed access to all information upon which a judge might rely in making a finding of fact required by statute or the Guidelines, without requiring judicial disclosure of every bit of information used in making discretionary choices that are, in any event, effectively unreviewable by any higher court.

Treating discovery of information relevant to "adjudicatory" and "non-adjudicatory" facts differently makes logical sense in that it require the application of formal adjudicatory rules only to sentencing issues that the present system requires to be adjudicated, while retaining the old informal process for decisions in which judges retain their former discretionary authority. On the other hand, making the theoretically neat distinction between adjudicatory and non-adjudicatory facts might prove unworkably complex in practice. And a forceful argu-

ment can be made that defense counsel cannot properly represent their clients at sentencing without knowledge of the whole range of information available to the sentencing judge.

D. Changing the Burden of Proof and Bringing the Rules of Evidence to Sentencing

Judge Cabranes, Singer and Knoll, and Federal Defenders Benjamin Coleman and Richard Smith-Monahan all contend forcefully that the burden of proof for some or all sentencing factors should be increased from the present "preponderance of the evidence" standard to something greater, either "clear and convincing evidence" or perhaps even "beyond a reasonable doubt." Professor Steven Clymer and former Assistant U.S. Attorney Jacqueline Ross discuss some of the purported advantages of such a change. I have only two points to add.

First, I am sympathetic to the notion that if the government seeks to increase the length of time a defendant spends in a cell based on proof of a specified fact, the government ought to be required to make a pretty darn convincing case that the fact at issue exists. On the other hand, I am profoundly skeptical that a change in the form of words used to describe the government's burden of proof will effect meaningful change in the conduct or outcome of very many sentencing hearings. In the first place, the burden now placed on the government is not inconsequential. The implicit suggestion of some observers that a preponderance of the evidence standard somehow denatures sentencing hearings and renders them a non-adversarial walk-over for the government is belied by the forensic fireworks observable every day in every courthouse in America in civil cases tried to precisely that standard. In the improbable event that the burden of proving all sentencing facts were raised to "beyond a reasonable doubt," the myriad and powerful historical associations of that phrase might very well change both procedures and outcomes. But any less demanding formulation seems unlikely to alter very much. I doubt, for example, that judges will often reject a proposed sentence enhancement because they think it was proven by a preponderance of the evidence, but not clearly and convincingly. I doubt that judges, any more than anyone else, parse degrees of evidentiary probability in that hyper-rational way. In my experience, judges enhance sentences when they are confident that the predicate facts are true, and decline to do so when the evidence leaves them unsure. Changing the verbal standard will seldom change the thinking.

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I doubt that any of the contributors to this issue believe that a change in burden of proof alone would be a procedural panacea. But even the most sober pleas for upping the burden seem to rest in part on the assumption that changing the burden will provide a sort of "signal" to judges that the entire character of sentencing hearings should be transformed.[16] For example, Benjamin Coleman bases his argument for an increased burden of proof in part on the conviction that judges applying a heightened standard will necessarily be moved to limit or eliminate hearsay and to begin requiring the government to produce live cross-examinable witnesses. As Coleman says, "An elevated standard of proof commands a more formal process, where traditional types of evidence are actually presented in court by the attorney for the government."[17] In truth, tinkering with the burden of proof seems a roundabout and improbable way of achieving the stated objective. If what one wants is a real adversary hearing on all contested sentencing facts at which the government is obliged to present live witnesses and real evidence, then it seems at least doubtful that the shortest path to that end is to send signals that may or may not be interpreted as one would wish. The surer path would seem to be to change the rules of evidence and criminal procedure (as Judge Cabranes recommends) to require a hearing of the form you desire.

E. Who Makes the Rules?

If changes ought to be made to the procedural rules governing sentencing, who has the legal authority and the policy expertise to draft the new rules? This important question is the subject of a disagreement between Judge Cabranes and Professor Barry Johnson. Judge Cabranes argues forcefully that rules governing court proceedings are within the province of judiciary, and that responsibility for crafting new rules for sentencing hearings should be born by the Judicial Conference and the Advisory Committee on the Federal Rules of Criminal Procedure. Professor Johnson contends with equal warmth that the Sentencing Commission has both the legal mandate and the expertise to change sentencing procedure through guideline amendments.[18]

II. The Prognosis for Procedural Reform

So why don't we do it? Why, indeed, have we not long since changed the form of sentencing hearings to match the Guidelines' design of sentencing based on adjudication of identified facts? The likely answer has little to do with theory, and much to do with the ways in which the principal actors in sentencing perceive their true institutional interests. Some judges, of course, have never thought sentencing ought to be a primarily adjudicative process, and therefore have never felt the need for trial-like rules. Even judges who like or at least accept the Guidelines as a useful innovation, and who want the certainty afforded by fact-based rules, may nonetheless be alarmed by the time that would inevitably be consumed in markedly more formal sentencing hearings. Thus, while many judges may instinctively favor awarding more due process to defendants, their institutional interest in efficiency seems to have kept judicial enthusiasm for truly sweeping procedural reform in check.

The perspective of prosecutors is similar. Prosecutors enjoy an immense advantage in a fact-based sentencing system because they are the masters of the facts.[19] But the present system affords prosecutors this advantage without very often putting them to the inconvenience of a fully adversarial presentation of the facts they urge upon the court. It comes as no surprise that prosecutors are in no hurry to change such a favorable arrangement.

So why don't we do it?

In a way, the most curious position in the sentencing procedure debate has been occupied by the defense bar. Like Sherlock Holmes' famous dog that didn't bark, the defense bar has been most conspicuous by its relative silence. Of course, defense lawyers grumble all the time about procedural unfairness at sentencing, but given the various ways in which the existing process disadvantages defendants, one would have expected an organized effort to amend the Guidelines, the Rules of Criminal Procedure, and the Rules of Evidence to level the playing field. To my knowledge, no such effort has ever been mounted. Why?

Some part of the answer is undoubtedly that the organized defense bar has been more concerned with the substance of the Federal Sentencing Guidelines than the procedures by which they are applied. Part of the answer is certainly that increased procedural formality is not invariably good for defendants. As Jacqueline Ross observes, some of the information defendants want to get before the sentencing judge might not be admissible if the Rules of Evidence were in effect.[20] Perhaps more to the point, defendants will often prefer to provide even technically admissible evidence in the confidential setting of a probation office interview in order to avoid the meticulous government scrutiny such information would attract in a contested hearing. Finally, I suspect defense attorneys think less about sentencing procedure than they might because their constant focus is not on litigating sentencing issues, but on negotiating them. Obviously, when negotiations fail and sentencing issues must be fought out in court, defense counsel would prefer to fight armed with the full arsenal of the adversary system. But because the substantive law of federal sentencing, honestly applied, so often generates such substantial punishments, what defense lawyers usually want is not due process but a deal to avoid the Guidelines and the process.

Whatever the reason for the absence of an organized effort to rethink and reform sentencing procedure, perhaps the ferment that will flow from the Supreme Court's decisions in *Jones, Castillo,* and *Apprendi* will ignite a debate. If so, we hope the thoughtful remarks of the authors appearing here will enrich that conversation.

III. An Afterword on Where Judge Cabranes Would Go From Here

Among our commentators on the state of federal sentencing procedure is Judge José A. Cabranes of the Second Circuit. Judge Cabranes makes three proposals for reform of the Guidelines regime, one of which, the suggestion that the Federal Rules of Criminal Procedure and the Federal Rules of Evidence be amended to give defendants various enhanced procedural protections at sentencing, was part of the inspiration for this issue. His other two suggestions are not really about sentencing procedure. First, he urges that some facts which now generate mandatory adjustment of the sentencing range become instead permissible bases for guided departures. Second, he proposes that the Guidelines and 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."[21] Though somewhat outside the theme of this issue, both suggestions are important and deserve serious consideration and a reflective response. Hence this coda.

Judge Cabranes, one of the Guidelines' most prominent critics, opens his piece with the concession that, "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." He then offers his proposals merely as "reforms" that would "ameliorate certain of the Guidelines' most troubling shortcomings."[22] The many admirers of Judge Cabranes' long opposition to the Guidelines should not despair of him. The leopard has not changed his spots, or consented to lie down with the kid.[23] Mildly worded though they are, Judge Cabranes' "guided departure" and plea agreement reforms are both modest proposals to erase central features of the Federal Sentencing Guidelines.

The Judge's first suggestion is that the Commission should move from the present highly structured system to one in which most of the factual determinations that now determine the sentencing range become instead the bases for "guided departures." The Commission would "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." The factors Judge Cabranes would particularly like to see moved into the guided departure category are "'special offense characteristics' involving only quantity of harm, the principle of 'relevant conduct,' and the weight accorded criminal history."[24] Taking this list in reverse order, Judge Cabranes would: (1) make criminal history a departure consideration rather than a sentencing factor – and thus eliminate the horizontal axis of the sentencing grid; (2) convert "relevant conduct" (by which I take him to refer to uncharged, dismissed, or acquitted conduct) into a departure consideration rather than a sentencing factor – and thus convert the Guidelines into a charged-offense, rather than a real-offense system; and (3) transform most special offense characteristics in the Guidelines into departure factors, since most measure "quantity of harm" (e.g., loss in fraud and theft cases, § 2B1.1 and § 2F1.1; bodily injury and amount of loss in robbery, § 2B3.1; revenue loss in tax cases, § 2T1.1, etc.).[25] One might consider a sentencing system with these features an improvement over the Federal Sentencing Guidelines, but in its essentials such a system would no longer *be* the Federal Sentencing Guidelines as we know them.[26]

Judge Cabranes' "guided departure" and plea agreement reforms are both modest proposals to erase central features of the Federal Sentencing Guidelines.

Judge Cabranes' proposal to allow judges to freely accept negotiated sentences in lieu of sentences determined by operation of the Sentencing Guidelines would, in some respects, be even more radically transformative of the current regime. Particularly in light of the fact that 93% of all federal criminal cases are resolved by plea, this measure would render the Guidelines purely advisory, *at the option of the parties.* Under Judge Cabranes' plan, a judge could reject a plea agreement he or she found inconsistent with the interests of justice, but there is little reason to think that judicial rejection of pleas would be significantly more common under such a system than it ever has been – which is to say virtually non-existent. Under this scheme, the *only* defendants for whom the Guidelines would be mandatory would be those who went to trial and lost. The price of exercising one's right to a jury trial would be a Guidelines sentence. Not only does this disparity in sentencing treatment seem odd and unfair (and possibly unconstitutional), but, at least when considered in isolation, the proposal would appear to exacerbate some of the very features of the current system that Judge Cabranes has in the past found most objectionable.

For example, Judge Cabranes has been deeply critical of what he views as the transfer of an unjustifiable degree of power over sentencing to prosecutors.[27] Yet permitting the parties to opt out of the Sentencing Guidelines through the plea bargaining process would surely give prosecutors even greater control than they currently exercise. Odder still, the central theme of *Fear of Judging,* the widely-acclaimed book Judge Cabranes authored with Professor Kate Stith, was that the Guidelines defenestrated the sentencing process by taking from judges the responsibility of exercising individual moral judgment in the sentencing of every defendant.[28] But if the proposed rule conferring discretion on the parties to negotiate sentences outside the Guidelines were grafted onto the existing system, the district judge would have but little more occasion to exercise particularized moral judgment than is now the case. Under the new rule, a judge would be obliged either to: (a) accept the negotiated resolution of the parties, or (b) reject their plea agreement, force the case to trial, and (assuming a conviction) apply the "robotics" of the Guidelines; or (c) if unsatisfied with both the plea and the outcome compelled by the Guide-

lines, jawbone the parties into a different plea, thus becoming a participant in plea negotiations in manner prohibited by Federal Rule of Criminal Procedure 11(e)(1). If grafted onto the existing system, such a rule might well prove less a means of reclaiming for judges the responsibility of moral judgment than a mechanism for shifting responsibility for judgment even further onto the shoulders of the lawyers than is now the case.

If, however, Judge Cabranes' plea agreement proposal were adopted as part of a package that included his "guided departure" plan to transform the Guidelines into a system with few fixed points and broad ranges for the operation of judicial discretion, the result would be quite consistent with his long-espoused positions. In this brave new world, a sentencing judge could either accept the parties' bargained resolution of sentencing issues or force a trial in which a guilty verdict would leave the court free to sentence within wide discretionary limits. And *that* sounds like a world Judge Cabranes and many other Guidelines critics could live and delight in.

Notes

[1] *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).
[2] __ U.S. __, 2000 WL 712805 (June 5, 2000).
[3] 731 A.2d 485 (1999), *cert. granted* 120 S. Ct. 525 (1999).
[4] Richard Singer and Mark D. Knoll, *Elements and Sentencing Factors: An Analysis of the Alleged Distinction*, 12 FED. SENT. REP. 203, 206 (2000) (emphasis in the original).
[5] José A. Cabranes, *The U.S. Sentencing Guidelines: Where Do We Go From Here?* 12 FED. SENT. REP. 208, 210 (2000).
[6] Steven D. Clymer, *Assessing Proposals for Mandatory Procedural Protections for Sentencing Under the Guidelines*, 12 FED. SENT. REP. 212, 215 (2000).
[7] United States Sentencing Commission, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 20 (1999).
[8] Benjamin L. Coleman, *In Defense of Hopper: The Burden of Proof for Dramatic Increases Under the Guidelines*, 12 FED. SENT. REP. 225, 226 (2000).
[9] *Id.*
[10] Fed. R. Crim. P. 32(b)(6).
[11] Fed. R. Crim. P. 32(b)(6)(D).
[12] 373 U.S. 83 (1963). *See also, United States v. Bagley*, 473 U.S. 667 (1985).
[13] *United States v. Rosa*, 891 F.2d 1074, 1076–79 and n.3 (3d Cir. 1989).
[14] U.S.A.M. § 9–27.750
[15] Richard Smith-Monahan, *Unfinished Business: The Changes Necessary to Make Guidelines Sentencing Fair*, 12 FED. SENT. REP. 219, 220 (2000).
[16] Coleman, *supra* note 8, at 227 ("[A]n elevated standard of proof signals that presentations by court officers, based on mere out-of-court proffers, will not suffice.")
[17] *Id.*
[18] Barry L. Johnson, *The Role of the United States Sentencing Commission in the Reform of Sentencing Procedures*, 12 FED. SENT. REP. 229 (2000).
[19] Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WISC. L. REV. 679, 726 (1996).
[20] *See*, Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors into Offense Elements: The* Apprendi *Debate*, 12 FED. SENT. REP. 197, 199 (2000).
[21] Cabranes, *supra* note 5, at 210.
[22] *Id.* at 208.
[23] *Jeremiah* 13:23; *Isaiah* 11:6.
[24] Cabranes, *supra* note 5, at 208.
[25] Judge Cabranes may also have been thinking of drug quantity as a "specific offense characteristic" that measures harm. Technically, however, drug quantity is not a "specific offense characteristic" in U.S.S.G. § 2D1.1, but is instead the primary determinant of "base offense level" for narcotics offenses.
[26] Judge Cabranes asserts that his proposal could be enacted without amending the Sentencing Reform Act. *See* Cabranes, *supra* note 5, at 208. The SRA requires the Commission set sentencing ranges in which the top of the range is no more than 25% higher than the bottom. 28 U.S.C. § 994(b)(2). Judge Cabranes obviously envisions broad "guided departure ranges" that would give judges much more discretion than the current narrow ranges. Congress wrote the 25% rule precisely to prevent the Commission from adopting broad ranges for the exercise of judicial discretion. One doubts the Commission could evade § 994(b)(2) by the transparent expedient of renaming sentencing ranges as "guided departure ranges."
[27] *See, e.g.*, José A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y. L.J., Feb. 11, 1992, at 2.
[28] *See* Kate Stith & José A. Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 78–79 (1998).