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BOOK REVIEW


I. INTRODUCTION

In Fear of Judging: Sentencing Guidelines in the Federal Courts, authors Kate Stith and Jose A. Cabranes attempt to answer the question of whether federal sentencing reform has failed. The authors ultimately conclude that the rigid and complex Guidelines, which have governed criminal sentencing in the federal courts for over a decade, have been less than a qualified success. Both authors, one a veteran federal criminal prosecutor and esteemed professor of law at Yale University, and the other a long time federal district court judge who currently serves on the United States Court of Appeals for the Second Circuit, are well steeped in the practical realities of criminal sentencing in the federal system. As one might expect, Fear of Judging is an artfully written and well-documented scholarly treatment of criminal sentencing in the federal courts, both before and after imposition of the Federal Sentencing Guidelines. The

2. See id.
3. Professor Kate Stith is a distinguished criminal legal scholar and practitioner. She served as Assistant United States Attorney for the Southern District of New York and as a Special Assistant to the head of the Criminal Division of the United States Department of Justice before coming to Yale Law School to teach courses in criminal law. Professor Stith has also authored several law review articles critical of the Sentencing Guidelines. Segments of these articles have been reproduced in Fear of Judging. See, e.g., Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 WAKE FOREST L. REV. 223 (1993); Kate Stith & Jose A. Cabranes, Judging Under the Federal Sentencing Guidelines, 91 Nw. U. L. REV. 1247 (1997).
4. The Honorable Jose A. Cabranes was a United States District Court Judge in Connecticut for 15 years. He has first hand experience imposing criminal sentences both before and after the Guidelines. As a court of appeals judge in the Second Circuit, he now regularly reviews Guidelines sentences that district court judges have imposed. See STITH & CABRANES, supra note 1, at 1.
5. See id.
6. Stith and Cabranes discuss this in great detail in chapter 2 of their book, entitled "Invention of the Sentencing Guidelines." On October 12, 1984, President Ronald Reagan signed the Comprehensive Crime Control bill into law, which included the Sentencing Re-
authors' combined wealth of practical experience strengthens their pragmatic critique of a sentencing process that has become concerned more about compliance with a complex system of bureaucratic rules than the exercise of informed judicial discretion.  

Accordingly, Stith and Cabranes charge that the advent of the United States Sentencing Commission and the resultant Guidelines sounded the death knell of the "traditional ritual of sentencing" in the federal courts. This "venerable ritual"—characteristic of the pre-Guideline regime—necessarily included the sentencing judge's power to weigh each and every circumstance of a particular case and to consider "all of the purposes of criminal punishment"—"acknowledg[ing] the moral personhood of the defendant and the moral dimension of crime and punishment." Thus, the Guidelines replace informed case by case deliberation with the overly mechanized sentencing prescription of a distant federal agency. The new regime replaces "judging" in the traditional sense with a type of mathematical calculus, forcing the judge to fit the defendant's conduct into a grid based on a list of factors the Commission deems relevant.

*Fear of Judging* is the most prominent recent book on sentencing guidelines in the federal courts. In the first half of the book, Stith and Cabranes take on the formidable task of describing in detail the philosophical underpinnings and practical realities of criminal sentencing in the federal system, both before and after introduction of the Guidelines. The authors then proceed with a forceful critique of sentencing procedure under the Guidelines, concluding with a pragmatic recommendation for reform.

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7. Stith and Cabranes provide several appendices that graphically illustrate the incredible complexity of the Sentencing Guidelines. *See STITH & CABRANES, supra* note 1, at 179-93.

8. *Id.* at 78.

9. *Id.*

10. See chapter 3 for an explanation of the sentencing process under the Federal Sentencing Guidelines. *See generally* *id.* at 78-103 and Appendix A at 179.

11. *See generally* *id.* at 9-104.

12. In the final chapter of the book, entitled "Prospects for the Future," Stith and
Stith and Cabranes contend that the old system of independent and discretionary sentencing on a case by case basis—although by no means perfect—may not have been as fatally flawed as the architects of the Sentencing Reform Act of 1984 would have one believe. Specifically, the authors argue that many of the problems associated with unfettered judicial discretion, characteristic of the pre-Guidelines era, could have been more effectively resolved if Congress had only imposed mandatory appellate review of sentencing procedures for abuse of discretion. The development of a common law of federal sentencing would have helped eliminate the problem of arbitrary and inconsistent results without stripping federal judges of virtually all discretion in sentencing. Accordingly, Stith and Cabranes argue that mandatory appellate review would have adequately served Congress's purposes. Thus, there was no need to create a daunting system of substantive Guidelines comparable to the Internal Revenue Code in its complexity. Cabranes propose what is best described as a two-tier recommendation for reform. First, they concede that because the Guidelines have become so entrenched it may be unrealistic to believe that they can or will be completely abolished in the near future. See id. at 143-48. Therefore, the authors propose some workable reforms to the current system that will give judges more discretion while better safeguarding the defendant's interest in appropriate process, as well as the government and society's interests in greater justice through appropriate case-specific sentencing. In the final pages of the book, Stith and Cabranes recommend a second phase of reform which would abolish the Sentencing Commission, replacing it with a type of advisory committee that would compile statistics on sentencing and conduct seminars and training programs for federal judges. However, this more revolutionary reform seems to presuppose the elimination of the substantively complex and restrictive "mandatory" Guidelines Stith and Cabranes so staunchly criticize. See id. at 175-77. This proposal is evaluated in parts IV & VI of this book review.

13. In chapter 4, entitled "The Battle Cry of Disparity," Stith and Cabranes artfully discount several key studies which had been lauded as the empirical justification for the new Guidelines regime. The authors argue that these studies did not reveal significant disparities in sentencing for similar crimes perpetrated by offenders with similar backgrounds, and ultimately conclude that the reformers' misplaced emphasis on perceived disparity in treatment led to the development of a regime that effectively removed moral judgment from the sentencing equation. See STITH & CABRANES, supra note 1, at 106-12.

14. In the introductory chapters of the book, the authors hint that this should have been the reformers' goal. However, acknowledging the entrenchment of the Guidelines regime in the final chapter, the authors ultimately propose an initial solution that stops short of abolishing the Guidelines. The Stith and Cabranes approach would permit greater opportunity for judicial departure from the Guidelines, hoping that a common law of sentencing could develop as a result of mandatory appellate review of such principled departures. See id. at 166-68. See also infra Part IV.

15. See generally id. at 22-37.

16. See id. at 3 (noting that "[a]s of 1997, the Commission's much-amended Guidelines Manual consists (including appendices) of more than nine hundred pages of technical regulations and amendments, weighing close to five pounds—which may be usefully compared to, for example, the Internal Revenue Code, which weighs in at just under four pounds." Id.).
Additionally, Stith and Cabranes are critical of the current regime because “the Sentencing Guidelines are based on a fundamental misconception about the administration of justice: the belief that just outcomes can be defined by a comprehensive code applicable in all circumstances.”\(^{17}\) The Sentencing Reform Act of 1984 created precisely this type of comprehensive code, which “yields a quantitative measure of justice more easily generated by a computer then by a human being.”\(^{18}\)

Thus, the authors disagree with the Act in principle, and are troubled by the Guidelines’ seemingly misplaced emphasis on national uniformity at any cost. Such an emphasis on uniformity, in their view, does not always ensure a fair and just result because the Guidelines cannot and do not take every possible contingency into account.\(^{19}\) For these reasons, strict application of the Guidelines does not deliver principled, case-specific justice in most instances.\(^{20}\) Accordingly, a number of “arbitrary, unreasonable or inexplicable” sentences are inevitable under the current regime.\(^{21}\)

Insightful observations such as these make *Fear of Judging: Sentencing Guidelines in the Federal Courts* a seminal piece of analytical scholarship worthy of careful consideration by lawyers, judges, and policy makers alike. Stith and Cabranes offer an informed perspective to the ongoing debate over the appropriate administration of criminal justice in the federal system.

The following review and essay explores these important themes further, opening with a summary of the authors’ key conclusions followed by a critical evaluation of the book.

II. JUDGING BEFORE THE FEDERAL GUIDELINES: THE MOVEMENT FOR REFORM

*Fear of Judging* closely tracks the historical development of sentencing reform in the federal system. Stith and Cabranes open with a discussion of sentencing reform in its proper historical context—highlighting the philosophical transformation that took place when reform

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18. Id. at 169.
19. See id. at 172. Stith and Cabranes note that “our foremost goal” should be “the avoidance of sentences that are arbitrary, unreasonable, or inexplicable in context, not the achievement of national uniformities devised by persons deliberately alien to the case at hand.” Id.
20. See generally id. at 112-26 (explaining why the Guidelines have not eliminated unwarranted disparities).
21. See id. at 172.
efforts to substantially limit judicial discretion culminated in the Sentencing Reform Act of 1984.  

"[I]ndividual federal judge[s] exercised extraordinarily broad discretion over the nature and magnitude of a sentence" under the pre-Guideline regime. While they often took the recommendations of prosecutors and defense attorneys into account, neither these recommendations nor any other set of criteria were binding in every case. In fact, the discretion to determine precisely which factors to take into account and how much weight to accord each was the hallmark of the traditional sentencing ritual. This discretionary model was the natural means by which the federal judiciary sought to achieve the rehabilitative goals of criminal punishment in the era before the Guidelines.  

Stith and Cabranes acknowledge a connection between changing attitudes about the appropriate purpose of criminal sentencing and the movement for greater uniformity. Because retribution became a more politically popular goal, the traditional discretionary sentencing ritual, in which the judge tailored each sentence to the unique circumstances of a given case in order to enhance the prospect of rehabilitation, fell out of favor.  

Advocates of retributive justice were not the only supporters of sweeping reform, however. Concerned that sentencing disparity meant sentencing inequality, many liberals seeking increased procedural protections for criminal defendants supported uniform sentencing guidelines as the most appropriate way to curb abuse of judicial discretion in

22. See id. at 9-37 (chapter 1 entitled "Sentencing Reform in Historical Perspective").  
23. Id. at 170.  
24. See chapter 1 of Fear of Judging for a detailed discussion of judging before the Guidelines. See id. at 9-37.  
26. See STITH & CABRANES, supra note 1, at 14-22 (discussing the rise of the "rehabilitative ideal" in criminal sentencing and its relationship to judging under the pre-Guidelines regime).  
27. See id. at 25-37 (describing the "revolt against discretionary sentencing" and the ultimate "collapse of the rehabilitative ideal").  
28. As Stith and Cabranes discuss in chapter 2, entitled "The Invention of the Sentencing Guidelines," this quest for retribution through sentencing in the federal courts became, and to a large extent remains, the political battle cry of sentencing reformers on the right. See generally id. at 43-48 (discussing the politics of the 1980s and how "tough on crime" politics helped sentencing reform pass through Congress).
the form of discriminatory sentences. However, Stith and Cabranes argue that this position proceeds from the false assumption that uniform sentencing furthers equality and justice. A decade's worth of experience under the Guidelines regime has substantially undermined this premise. In later chapters Stith and Cabranes go to great pains to illustrate this point by identifying numerous circumstances in which sentencing under the Guidelines has led to arbitrary and varied results.

Thus, by placing the Sentencing Reform Act in its proper historical perspective, chapter 1 artfully contrasts over two hundred years of judicial discretion with the complex structure of the current regime, revealing the inherently radical nature of the Sentencing Reform Act of 1984.

III. JUDGING UNDER THE FEDERAL GUIDELINES: THE DEATH OF INDETERMINACY

This radical shift in policy becomes strikingly clear in subsequent chapters describing and criticizing judging under the Sentencing Guidelines. As Stith and Cabranes explain, the Sentencing Reform Act of

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29. In the 1970s, numerous studies were published purporting to show rampant irrational variation in judicial sentencing and parole practices. In the wake of these studies came Judge Marvin E. Frankel's scathing indictment of discretionary sentencing, entitled Criminal Sentences: Law Without Order. As distrust of the federal judiciary subsequently grew, sentencing reform, as Judge Frankel had envisioned, became a key part of the congressional agenda. Soon Senator Edward Kennedy took up sponsorship of what became the Sentencing Reform Act of 1984. See STITH & CABRANES, supra note 1, at 34-37.

30. Stith and Cabranes acknowledge that "[u]niform treatment ought to be one objective of sentencing, to be sure, but not the sole or overriding objective." Id. at 105. Accordingly, they "reject the premise of sentencing reformers that uniform treatment means equal treatment, and thus that judicial discretion—insofar as it undermines uniformity—necessarily denies justice." Id.

31. In chapter 4, entitled "The Battle Cry of Disparity," for example, Stith and Cabranes point out several fundamental flaws in studies that purport to measure the level of sentencing disparity before the Guidelines. The authors go on to describe how the Guidelines themselves have been unsuccessful in eliminating unwarranted disparity, highlighting the high instance of inconsistent application and inter-judge disparity. They acknowledge that much of this disparity was probably inevitable since "portions of the Guidelines are inordinately difficult to apply uniformly because of their abstractness, complexity, and ambiguity." See id. at 118. However, they also posit that much of the unwarranted disparity is attributable to increased prosecutorial discretion. See generally id. at 106-18.

32. The authors point out that despite the fact that modern sentencing reform finds its philosophical home in enlightenment thinking of the eighteenth century, virtually unfettered judicial discretion remained the norm from the time of the founding until the landmark Sentencing Reform Act of 1984. See id. at 11-14 (discussing the nature of early disagreement over the proper scope of judicial authority in sentencing).

1984 stripped federal judges of virtually all discretion. This necessarily meant that any discretion afforded under the Guidelines resided in the hands of other, and arguably less impartial, actors such as the prosecutor and probation officer.

"[T]he federal trial judge in today's sentencing ritual has little or no opportunity to consider the overall culpability of the defendant before him." This is because "[t]he Guidelines themselves determine not only which factors are relevant (and irrelevant) to criminal punishment, but also, in most circumstances, the precise quantitative relevance of each factor." As such, the Guidelines remove the judge's authority to apply general principles of law to specific facts.

The Guidelines themselves consist of an elaborate "Sentencing Table." The horizontal axis of this 258 box grid—entitled "Criminal History Category"—"adjusts severity on the basis of the offender's past conviction record." The vertical axis—entitled "Offense Level"—"reflects a base severity score for the crime committed, adjusted for those characteristics of the defendant's behavior that the Sentencing Commission has deemed relevant ...." The Guidelines even instruct the judge on exactly how to calculate the relevant points in a given case.

Accordingly, if a prosecutor or a defendant desires a result not readily calculated under the Guideline's "real offense" requirement, they may attempt to cut "fact deals" in order to get around the Guidelines. Specifically, prosecutors and offenders may fact bargain around the

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34. See STITH & CABRANES, supra note 1, at 82 (noting that "[t]he Guidelines have replaced the traditional judicial role of deliberation and moral judgment with complex quantitative calculations that convey the impression of scientific precision and objectivity").
35. See id. at 85-90.
36. Id. at 82-83.
37. Id. at 83.
38. See id.
39. Id. at 3.
40. Id.
41. Id.
42. See id. at 3.
43. See id. at 132. ("Real Offense" sentencing is a primary goal of the Federal Sentencing Guidelines. This means that the Guidelines do not sentence on the basis of the charge filed, but on the basis of the actual offense committed. Specifically, the Guidelines ask what was the precise nature of the offender's criminal conduct, rather than how the conduct was defined by the offense for which he was convicted. Thus, the Guidelines require that a separate set of facts be found in order to determine the "real offense" for the purpose of sentencing. Because "charge" plea bargaining may not help the defendant get a more lenient sentence, the focus has shifted to "Guidelines bargaining" around the "real offense" requirement. For further elaboration on the "real offense" requirement, see id. at 66-77.)
Guideline's real offense requirement by "plea bargaining over guidelines characterizations and computations." This type of bargaining is technically proscribed under the Guidelines, however, it persists—an inevitable consequence of a regime that requires sentencing courts to apply literally hundreds upon hundreds of definitional terms and factual specifications.

Because the precise nature of the sentencing facts found in a particular case dictate the length of a sentence under the current regime, prosecutors have a great deal of influence over the final Guideline's calculation. Thus, despite formal attempts to constrain prosecutorial influence over Guidelines sentencing, fact bargaining and other subtle forms of prosecutorial discretion will persist so long as the Sentencing Commission continues to operate under the following three premises: "First, there are 'actual' facts (known or knowable) that describe the defendant's criminal conduct; second, the probation officer, regardless of his training or professional assets, is able to ascertain these 'actual' facts; and third, the judge has a duty to impose a sentence based on these 'actual' facts." Stith and Cabranes contend that "all . . . [three] premises are doubtful, or at least are so simplistic as to greatly distort and misrepresent the nature of litigation and proof."

The Guidelines also shift greater sentencing discretion to probation officers. The probation officer used to serve simply as an adjunct to the judge, aiding the judge in the sentencing process by providing an accurate version of the respective parties’ theories of the case in the form

44. STITH & CABRANES, supra note 1, at 132.
45. See id. ("Recognizing the potential for 'fact bargaining,' the Commission attempted to avoid the problem by fiat—that is, by proscribing plea agreements that do not reflect the defendant's 'real offense.'" Id.) Interestingly, even though Stith and Cabranes are critical of increased prosecutorial discretion under the Guidelines, they nevertheless include in their reform proposal a provision legalizing fact bargaining. Stith and Cabranes point out that "[b]y failing to acknowledge the plea bargaining that now occurs under the Guidelines, the Commission has driven that bargaining underground, often out of the view of the probation officer and the judge." Stith and Cabranes therefore recommend: "The Sentencing Guidelines should be amended to recognize the authority of the sentencing judge to impose a sentence in accordance with a plea agreement where the judge finds that such a sentence would achieve the purposes of criminal punishment at least as well as a sentence prescribed by the Guidelines." Id. at 165. This proposal formally undermines the "real offense" requirement, so central to the purposes of the Guidelines regime, while officially shifting some discretion back to the judge to approve bargained-for non-Guidelines sentences he believes better serve the "objectives of punishment." Id.
46. Id. at 133.
47. Id.
48. See id. at 79-80 (describing the role of the probation officer under the pre-Guidelines regime).
of a presentence report. The presentence report still exists, but it has taken on much greater significance under the Guidelines. Now the probation officer supplies only one theory of the offense—the version purportedly prescribed by the Guidelines given the facts of the specific case. The probation officer is required to present and support his version of the offense in the presentence report, including his own detailed Guidelines calculus and a sentence recommendation. As a consequence, "the [modern] probation officer [serves both as] 'special master of . . . facts' and the 'primary enforcer of the [substantive] Guidelines.'"

Stith and Cabranes criticize the probation officer's expanded role under the Guidelines, partially because "federal probation officers are generally not trained for criminal investigation," which necessarily includes "the evaluation of the reliability of information and the credibility of witnesses"—functions not previously considered "within their province." "In fact, [because] most federal probation officers have been trained in social work . . . [i]t is therefore ironic . . . that in the new sentencing regime [they] need not devote significant attention to who the offender is (and how he came to be that way)."

Although sentencing judges have the authority to reject a probation officer's Guidelines calculation, in most cases these recommendations go unchallenged—primarily because of the exceedingly technical nature of the report. Therefore, as a practical matter, the judge is left with virtually no power to prescribe a sentence that takes into account factors not specified in the Guidelines or potential "Guidelines facts" not found in the pre-sentencing report.

There are, however, a few very narrow exceptions to this rule. For example, under certain circumstances, a judge may lawfully depart from the Guidelines and impose a discretionary sentence. There are only

49. See STITH & CABRANES, supra note 1, at 86.
50. See id. at 85-86.
51. See id. at 85-91 (describing the probation officer's new expanded role under the Guidelines).
52. See id.
53. See id. at 86.
54. Id.
55. Id. at 86 (citations omitted).
56. See generally id. at 85-91.
57. See generally id. at 78-103 (Chapter 3, entitled "Judging Under the Federal Sentencing Guidelines," describes how the Guidelines significantly restrict judicial discretion.).
58. See id. at 97-103 (discussing the primacy of the Sentencing Commission in determining the nature and scope of "guided departures" from the Guidelines).
59. See id.
two such grounds for departure recognized under the current regime.\textsuperscript{60} The first of these special circumstances exists if "the defendant has provided substantial assistance to law enforcement authorities, with the important caveat that the prosecutor must first file a motion for a below-Guidelines sentence."\textsuperscript{61} In these cases, "[t]he judge cannot sentence a cooperating defendant to a lesser term on his own accord or on the defendant's motion."\textsuperscript{62} Therefore, "[t]he perceived transfer of discretion from the judge to the prosecutor (both in these circumstances and more generally under the Guidelines) is a central reason for judicial discomfort with the new regime."\textsuperscript{63}

The second of these circumstances exists if the judge is able to demonstrate on the record that there are facts or circumstances in the case at hand that are neither expressly nor implicitly factored into the Sentencing Guidelines' rules.\textsuperscript{64} This second exception to the Guidelines appears to give judges an amount of discretion, at least to determine whether a given "factor" is contemplated in the Guidelines.\textsuperscript{65} However, even though decisions to depart are reviewed for abuse of discretion, "[t]he [Supreme] Court has made it clear that the federal appeals courts should not permit departures by sentencing judges on grounds that have been either (a) proscribed by the Sentencing Commission, or (b) already considered by the Commission."\textsuperscript{66} Additionally, the Sentencing Commission itself has significantly limited the scope of permissible departures by forbidding sentencing judges from asserting a defendant's personal history, "including a history of misfortune or disadvantage, service to his country or his community, family responsibilities, and employment history," as a grounds for departure.\textsuperscript{67} This renders the second exception mostly superfluous, as virtually every factor not related to personal history is already accounted for in the Guidelines.\textsuperscript{68} As such, Stith and

\textsuperscript{60} See STITH & CABRANES, supra note 1, at 4.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} See id. at 4-5 (discussing the departure exceptions).
\textsuperscript{65} See id.
\textsuperscript{66} Id. at 4.
\textsuperscript{67} Id.
\textsuperscript{68} Stith and Cabranes point out that the Guidelines themselves prescribe precise, quantitative sentencing weights for most other circumstances [not related to the defendant's personal history] that have historically been taken into account by judges to mitigate or enhance punishment: the individual defendant's role in the offense, the actual amount of harm caused, and the
Cabranes conclude that "the judges' authority to depart from the Guidelines is notable not because it offers opportunities to individualize a criminal sentence, but because those opportunities are so limited."69

Moreover, Stith and Cabranes persuasively argue that the Federal Sentencing Guidelines have been a failure because they strip knowledgeable and, for the most part impartial, federal judges of virtually all discretion to impose sentences tailored to the unique circumstances of a given case by taking into account such difficult to quantify factors as the defendant's personal history and life challenges.70 More precisely, the authors argue that the architects of modern sentencing reform failed because they premised this new complex system of rules on the false assumption that a comprehensive code can and will be adequate to take into account every potentially important factor in any given case.71

IV. REDISCOVERING JUDICIAL DISCRETION IN FEDERAL CRIMINAL SENTENCING: STITH & CABRANES PROPOSE A "MIDDLE GROUND"

Because every new criminal case poses a unique set of challenges for judges, prosecutors, probation officers, and defense lawyers, it may be more appropriate to construct a federal law of sentencing that affords these actors—the people with intimate knowledge of the facts at hand—discretion to impose fair and just sentences that are individually tailored to each case.72 However, the key adjectives in this proposal are "fair" and "just." The Sentencing Reform Act of 1984 sought to ensure "fair" and "just" sentencing through national uniformity, a premise which Stith and Cabranes skillfully deconstruct and ultimately debunk.73 However, the old discretionary regime had its shortcomings as well, resulting in questionable sentencing disparity which went completely unchecked.74

Recognizing the failings of both regimes, Stith and Cabranes pro-

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69. Id.
70. See generally id. at 39-103.
71. See id. at 168-69.
72. See generally id. (this is the primary thesis of the entire book).
73. See generally id. at 78-177 (describing and criticizing the Guideline's regime for failing to achieve its stated goals).
74. See id. at 104-42 (describing studies that found unwarranted disparity under the pre-Guidelines regime and noting that these studies were not necessarily reliable).
pose a middle ground. 75 Throughout the book, they suggest three different types of reforms. First, in the chapters describing the old regime and criticizing the current one, Stith and Cabranes advocate sentencing reform that mandates appellate review and judicial justification of sentences. 76 The authors contend that requiring a reviewable written sentencing order would have sufficiently reduced the amount of unwarranted disparity by creating a common law of sentencing. 77

However, now that the Sentencing Commission has been in existence for over ten years and the sentencing code has become entrenched, Stith and Cabranes hesitate to recommend sweeping reform that would eliminate the bureaucracy overnight, especially given the current political climate and the significant obstacles to dismantling any federal agency. 78 Hence, in their final chapter, the authors propose a second set of reforms advocating pragmatic modification of the Commission's practices. 79 This proposal would arguably achieve the goal of creating a "common law of sentencing" by permitting greater opportunity for "guided departure" from the Guidelines, 80 thereby giving judges

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75. See STITH & CABRANES, supra note 1, at 143-77 (describing and justifying the authors' reform proposal in this, the final chapter of the book, entitled "Prospects for the Future").

76. This theme runs throughout the book but is first suggested in the introduction and first chapter when Stith and Cabranes argue that the best aspect of the Sentencing Reform Act was mandatory appellate review of written orders. They imply that the reforms should have stopped with these key innovations.

77. See generally id.

78. See id. at 143-45 (explaining that eliminating Guidelines reform would be a formidable task given how entrenched the mandatory approach has become).

79. In the final chapter of Fear of Judging, entitled "Prospects for the Future," Stith and Cabranes carefully describe their intricate recommendation for the next wave of federal sentencing reform. The authors attempt to address each of the criticisms they level at the current regime with a corresponding reform that is both politically feasible and practically appropriate. See id. at 143-77.

80. The authors propose allowing greater opportunity for departure in the interest of striking better balance of power. Stith and Cabranes note:

When judicial discretion is replaced by criminal penalties set ex ante by an administrative agency, the institutional balance of power is shifted. The most notable transfer of power, of course, is from the independent federal judiciary to the agency itself. While the Sentencing Commission is asserted to be "within the judicial branch" of the federal government, it is in fact dominated by nonjudges appointed by the President and confirmed by the Senate for a term of six years. Moreover, this new agency has been accorded great powers. Once the Sentencing Commission decrees that particular statutory offenses shall be punished in a certain way, or that particular mitigating or aggravating factors shall affect the duration of a sentence, or that other factors are not relevant to punishment, these matters are placed generally beyond review by the courts—even though the agency's hard and fast rules may be ar-
the leeway to determine the quantitative significance of certain Guidelines' facts in the final calculation. 81

This second proposal is really the first step in a plan to eventually eliminate the substantive Sentencing Guidelines as we know them. 82 Accordingly, the authors' final recommendation would change both the substance and form of the Sentencing Commission's duties. 83 Specifically, Stith and Cabranes recommend:

bitary and their application may yield sentences that are unduly lenient, unduly severe, or otherwise unreasonable.

STITH & CABRANES, supra note 1, at 145.

It would not be difficult, however, to modify the structure of the Sentencing Guidelines to achieve a more appropriate balance of sentencing authority among judges, prosecutors, and the Commission. In a nutshell, the Guidelines can be amended to give judges fewer mandates and more choices. One may find in the present Guidelines a few instances in which the Commission has done just that, by enunciating sentencing policies not in the form of mandatory instructions but in the form of "guided departures." In these situations the Commission has simply identified circumstances warranting departure, without attempting to specify the precise magnitude of a departure or conditioning departure on approval of either party.

Id. at 146.

[R]elying less on precise and complex mandatory sentencing instructions and relying more on guided departures would enhance the sentencing authority of judges, permit a greater role for appellate courts, respond to due process concerns associated with "real offense" sentencing, and improve the comprehensibility of the Guidelines—all without abandoning the Sentencing Reform Act's stated objectives of rationalizing sentencing and reducing undue disparity. We therefore recommend: The Commission should treat certain real-offense factors as bases for "guided departure" rather than as bases for mandatory adjustment of Offense Level and Criminal History Score.

Id. at 147-48.

81. See id. at 147-48. This is precisely what Stith and Cabranes mean by "guided departures." The concept of guided departure does not let the judge determine which factors to consider or just how much quantitative weight they should get in the Guideline's calculus. Accordingly, reform of this type could give complete discretion to determine the relative weight of a guideline's factor or just a wider range to consider.

82. Stith and Cabranes might take issue with this characterization. However, if their recommendation for "guided departure" were taken to its logical extreme—if the "Commission made all real offense elements discretionary"—and if it or an act of Congress limited the scope of its authority to data collection and advisement only, a substantial amount of discretion would shift back to the independent federal judiciary. This begs the question of whether the authors' proposal is really the type of modest reform they claim.

83. See id. at 174-75.
The Sentencing Commission should be replaced with a sentencing committee whose members (who need not all be judges) are chosen by the Judicial Conference of the United States, the governing body of the federal courts. The task of this committee would be to develop sentencing procedures and advisory guidelines—true guidelines—that seek to use judicial knowledge and experience, rather than to suppress or replace judgment by judges. Congress would have final authority to approve the committee’s proposed guidelines.  

Basically, the committee would serve as a clearing-house for sentencing data and as an authority on proper sentencing methods. It would also help train federal judges on how to properly impose substantially uniform but case-specific sentences, reintroducing a moral dimension to the sentencing process.

Obviously, if the new committee’s guidelines were made completely discretionary, there would be no need for “guided departure” as the authors describe in the first part of their proposal. It appears that Stith and Cabranes are arguing that permitting greater opportunities for “guided departure” would pave the way for more substantial reform, and ultimately the dissolution of the Sentencing Commission as a source of substantive mandates. Moreover, Stith and Cabranes couch inherently radical reform in pragmatic terms by asking for the gradual transformation of the current mandatory regime into a discretionary one, and permitting the free exercise of reviewable, informed judicial discretion.

V. IN DEFENSE OF THE SYSTEM: IS JUDICIAL DISCRETION UNDER THE CURRENT “MANDATORY” REGIME SUFFICIENT?

This reform proposal presupposes that the degree of judicial discretion available under the current regime is not sufficient to achieve what the authors term the “moral” goals of punishment. However, one might argue that the mandatory Guidelines’ regime has an adequate

84. STITH & CABRANES, supra note 1, at 174-75.
85. See id.
86. See id.
87. See id. at 143-48.
88. See id. at 174-75.
89. See generally id. at 143-77 (describing the proposal for reform) and infra Part VI (characterizing and evaluating the proposal).
90. See id. at 4 (“[A] judge may depart, up or down, from the Guidelines . . . [if the] judge is able to demonstrate on the record that there are factors or circumstances in the case at hand that have not been adequately factored into the Guidelines’ sentencing rules.”).
"built-in" discretionary component because it expressly permits complete departure if the judge can show that the Commission's sentencing prescription does not take into account certain factors that he or she believes are relevant to the final sentencing determination. This, combined with the opportunities for "guided departure" from the "mandated ranges" that the Commission already authorizes, would appear to afford enough room for discretionary determinations in those special cases in which a discretionary sentence would be more just. After all, the Guidelines are extremely comprehensive and actually do account for most factors that a sentencing judge would have considered under the discretionary regime.

Additionally, Stith and Cabranes might have slightly mischaracterized the function and substance of sentencing under the Guidelines. The Guidelines do not remove the moral question from the sentencing equation. Rather, they change who answers the question by replacing independent federal judges with an expert Sentencing Commission. Accordingly, the important policy questions the Commission answers each time it issues a new Guideline are precisely those moral questions about the appropriate scope and goals of criminal punishment that Stith and Cabranes charge have been eliminated from the process altogether.

This change in sentencing process enacts a change in sentencing

91. See Stith & Cabranes, supra note 1, at 4 (acknowledging that the Commission itself has curtailed opportunities for departure by proscribing certain grounds—such as personal history).

92. Id. at 46.

One may find in the present Guidelines a few instances in which the Commission has . . . enunciat[ed] sentencing policies not in the form of mandatory instructions but in the form of . . . "guided departures." In these situations the Commission has simply identified circumstances warranting departure without attempting to specify the precise magnitude of a departure or conditioning a departure on approval of either party. Less often the Commission has recommended particular weights to be accorded to identified grounds for departure.

Id at 146.

93. See id. at 3-4.

94. See id. at 78-85 (contrasting the traditional sentencing ritual with the current one, and explaining that the current ritual has taken the moral question out of the sentencing process in the federal courts).

95. See id.

96. Stith and Cabranes argue that a Commission cannot deliver morally appropriate justice, on a case by case basis, because only individualized deliberation can adequately assess all of the factors relevant to a particular sentence. See id.
policy. Moreover, our representatives in Congress arguably endorsed the Sentencing Reform Act of 1984 because they believed that a consensus of the American people desired that the moral question be answered first, so that uniform justice could be doled out without regular exception for individual offenders who had lived disadvantaged lives before facing federal prosecution.\textsuperscript{97} This necessarily creates a source of tension between federal judges and the Commission—placing individual judges who ascribe to the rehabilitative theory of punishment at odds with a Commission that seeks to enact clear \textit{ex ante} sentencing rules—arguably in order to more effectively deter criminal conduct.\textsuperscript{98}

This tension is best illustrated by the Commission’s prohibition against “departure” to consider factors relating to an offender’s personal history.\textsuperscript{99} Arguably, if personal history factors not expressly addressed in the Guidelines were grounds for departure, there would be little need to increase opportunities for “guided departure” from the specified ranges (for the enumerated factors) or for the legalization of Guidelines bargaining—for, as a practical matter, both of these proposals would allow for the indirect consideration of personal history factors.\textsuperscript{100} Thus, Stith and Cabranes advocate achieving indirectly what current political forces probably would not allow them to accomplish directly.\textsuperscript{101}

However, the authors’ indirect approach to substantive guidelines reform does nothing to undermine the force of their critique. In fact, their recommendation reminds us that a revolutionary shift in the balance of power between the three branches of the federal government

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\textsuperscript{97} \textit{See generally STITH & CABRANES, supra} note 1, at 38-77. In chapter 2, entitled “The Invention of the Sentencing Guidelines,” Stith and Cabranes carefully track Congress’s decision-making process in the years and weeks leading up to the Sentencing Reform Act of 1984. They acknowledge that the reform measure did have bipartisan support but that Republicans and Democrats supported it for different reasons.

\textsuperscript{98} According to Stith and Cabranes, this prohibition against sentencing that takes into account personal history factors is a source of great judicial discomfort—for practical as well as philosophical reasons. This motif runs throughout the book.

\textsuperscript{99} \textit{See id.} at 4.

\textsuperscript{100} \textit{See id.} at 145-48 (announcing proposal to increase opportunities for “guided departure”).

\textsuperscript{101} It appears that Stith and Cabranes could have arrived at the same result by simply asking the Commission to lift its prohibition against using personal history factors as a ground for general departure. This assessment may reflect this author’s own lack of expertise in the area of Guidelines Sentencing, but one cannot ignore that the bulk of scholarship that is critical of the Guidelines focuses on the ability to impose a sentence which takes the defendant’s unique personal attributes into account.
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has occurred as a result of the Sentencing Reform Act of 1984.\textsuperscript{102} Congress, a political branch, has created a federal agency, the Sentencing Commission, which Congress charges is part of the judicial branch.\textsuperscript{103} This judicial branch agency is composed of members who are appointed by the President and approved by Congress to serve congressionally mandated terms.\textsuperscript{104} The Commissioners need not be current or former federal judges, and, in fact, most of them are high level bureaucrats with no actual judicial experience.\textsuperscript{105} Moreover, it appears that the Sentencing Commission may be the product of an elaborate congressional scheme to commandeer the independent federal judiciary by requiring them to conform their sentencing ritual to the partisan political dictates of a panel of bureaucrats.\textsuperscript{106} This leads to the question of whether the

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\textsuperscript{102} See, e.g., STITH & CABRANES, supra note 1, at 145-48.
\textsuperscript{103} The authors go on to state:

[S]upporters [of the Sentencing Reform Act] were fearful that the Supreme Court might hold the Sentencing Commission unconstitutional unless it were considered part of the judicial, rather than the executive, branch of government. Moreover, the insistence that the Sentencing Commission was part of the judicial branch made the proposed reforms appear less radical than they were.

\textit{Id.} at 45.
\textsuperscript{104} See generally \textit{id.} at 38-59 (discussing invention of the current Commission).
\textsuperscript{105} For example:

The seven people ultimately nominated by President Reagan to become the first United States Sentencing Commissioners reflected the diverse political forces that had led to enactment of the Sentencing Reform Act, as well as the enduring senatorial role in the making of presidential appointments that require the "advice and consent" of the Senate. While several of the nominees had extensive experience in politics or in social science research, the group as a whole had remarkably little experience in either the practice of criminal law or the sentencing of convicted criminals.

\textit{Id.} at 49.
\textsuperscript{106} Stith and Cabranes acknowledge:

The expectation of Marvin E. Frankel and other advocates of federal sentencing Guidelines was that an administrative agency would be insulated from direct political pressures of the sort that, in their view lead to law-and-order sloganeering and needless harshness in criminal sentencing. Thus insulated, the projected commission would proceed with care and expertise—and with a degree of political anonymity that would reduce the risk of public controversy—to create a just regime of sentencing. Under this new system, like defendants committing like offenses would be treated alike, and arbitrariness, in the form of undue leniency or undue harshness, would be eliminated. In reality, [however], the United States Sentencing Commission from its inception has been highly visible to bar and bench, acutely sensitive to
federal judiciary remains independent. After all, it retains no formal power under the current regime to review the substance of the Commission's actions. ¹⁰⁷

Moreover, the sentencing reform movement of the 1970s and 1980s achieved a formidable goal. It may have constitutionally forced a specific political agenda on the only truly independent branch of government, ensuring that the appointed federal judiciary would comply with an "electoral mandate" for a retributive sentencing policy in the federal courts. ¹⁰⁸ In a sense, Congress, like Stith and Cabranes, used sentencing reform to accomplish indirectly what it was constitutionally prohibited from achieving directly: popular accountability of sentencing judges in the federal courts. ¹⁰⁹

VI. The Stith & Cabranes Proposal: An Incremental Prescription for Revolutionary Change?

For the above-mentioned reasons, Stith and Cabranes's Guidelines reform proposal purports to shift the balance of power back to federal judges by creating a discretionary guidelines regime. The authors would accomplish this initially by permitting increased opportunities for

the political environment in which it operates, and controversial.

Stith & Cabranes, supra note 1, at 48.
107. See id. at 145.
108. Stith and Cabranes point out:

Justice Harry Blackmun's opinion for the majority in Mistretta v. United States [488 U.S. 361], the 1989 case upholding the constitutionality of the Sentencing Reform Act, [depicts] the Commission ... as an "expert body" engaged in a process of "rationalization[,] an essentially neutral endeavor." But the Commission's more fundamental assignment—to identify the proper purposes, or combination of purposes, of criminal sentencing—is inescapably political and ideological. Justice Antonin Scalia's admonition, in dissent in Mistretta, that the Commission is a "junior-varsity Congress," is a recognition of the fundamentally political nature of the Commission and its various statutory mandates.

Id. at 52.

109. An argument can be made that political forces in Congress did not approve of the sentences that appointed federal judges were imposing, so they decided to step in and take over responsibility for sentencing by creating an agency staffed with Commissioners that reflect their own ideological biases. The assumption underlying this reform was simple. Congress had to step in, on behalf of the people they represent, to create a mandatory sentencing regime that better reflected changing attitudes about the purpose of criminal punishment, because the federal judges, who were imposing "inappropriate" sentences, did not stand for election. For discussion of the political debates leading up to passage of the Sentencing Reform Act of 1984 see id. at 38-58.
"guided departure" from the mandated ranges, and ultimately by transforming the current Commission into an advisory committee.\textsuperscript{110} This committee would be appointed by the Judicial Conference of the United States, instead of the President, therefore more closely resembling an arm of the judicial branch than the current Commission.\textsuperscript{111}

The authors also propose several changes in the current sentencing rules that would further reduce prosecutorial influence by transferring an even greater degree of federal sentencing authority from the executive back to the judiciary, where it has historically resided.\textsuperscript{112} Moreover, Stith and Cabranes propose a "modified guidelines regime," reintroducing the best elements of the old discretionary system without discarding the mandatory regime's basic structure.\textsuperscript{113} Precisely because their plan both keeps the substantive Guidelines and installs a modified version of the Sentencing Commission, the authors contend that their recommendation would not require "radical" change.\textsuperscript{114}

This reform may not be as modest as its proponents claim, however. Not only would the plan significantly alter the current institutional balance of power, but it would also create a discretionary regime that would almost certainly undermine the Sentencing Reform Act's primary goal: mandated, uniform, and accountable sentencing in the federal courts.\textsuperscript{115} Moreover, in an effort to be pragmatic, Stith and Cabranes use the language of procedural reform to attempt to describe what are actually significant substantive policy changes.

Despite the authors' reluctance to acknowledge that what they recommend actually amounts to a complete overhaul of the current sys-

\begin{itemize}
  \item \textsuperscript{110} See STITH & CABRANES, supra note 1, at 145-75.
  \item \textsuperscript{111} See id. at 166-77.
  \item \textsuperscript{112} See id. at 160-66.
  \item \textsuperscript{113} See id. at 145-77.
  \item \textsuperscript{114} See id. at 8. ("[I]t is possible, without radical alteration of the Sentencing Commission or its Guidelines, to restore some measure of authority to sentencing judges to consider the totality of the circumstances presented by a case and to serve as a check on possible prosecutorial or legislative overreaching.")
  \item \textsuperscript{115} Stith and Cabranes state: We do not advocate a return to the pre-Guidelines system. Rather, we envision replacing the Sentencing Guidelines as we know them with a system of true guidance for judging. The structure we tentatively outline here [in chapter 5] would retain the most significant accomplishments of the Sentencing Reform Act of 1984—the establishment of written sentencing guidelines, the requirement that judges state the reason for their decisions, and the availability of appeal by either party. Id. at 143.
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tem—transforming a complex mandatory regime into a streamlined discretionary one—it is hard to deny that their proposal carries great persuasive force. After all, it addresses—either directly or indirectly—virtually every criticism leveled at the mandatory Guidelines regime in the balance of the book.

VII. CONCLUSION & RECOMMENDATION

In Fear of Judging, Stith and Cabranes make a compelling case for significant structural reform, concluding with an equally compelling solution in the form of a constructive plan for the incremental transfer of sentencing authority from the Commission back to the independent federal judge. Therefore, anyone—from the most esteemed criminal legal scholar to the layperson—would be well advised to give Fear of Judging: Sentencing Guidelines in the Federal Courts careful consideration.

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116. See generally STITH & CABRANES, supra note 1, at 143-77 (describing their proposal in detail).