Federal Sentencing Guidelines Symposium
Yale Law School, November 8, 2002

Opening Remarks

Professor Kate Stith:
On behalf of Yale Law School, I welcome you. We appreciate that so many busy and distinguished people—from Sentencing Commissioners to practitioners, professors, and law school students—have been able to come together to examine some of the issues and research on the first fifteen years of the Federal Sentencing Guidelines.

We especially appreciate the help and participation of members and staff of the Sentencing Commission. At the last moment Commissioner Sessions sent his great regrets that he could not be here because of a trial he is presiding over. But we are most pleased to welcome Commissioners Sterling Johnson, Michael O’Neill, and John Steer, as well as Parole Commission Chairman Edward Reilly and Justice Department counselor Eric Jaso, who sit as ex officio members of the Commission. Indeed, Commissioner, Professor (and Yale Law School graduate) Mike O’Neill was half of the inspiration for our holding this Conference—a conference whose papers, presentations, and discussions would be helpful to the Commission as it conducts its own, in-depth fifteen year review of the Guidelines. The other source of inspiration was Judge Nancy Gertner, who for over a year has been urging that we hold a sentencing conference at Yale.

It is appropriate that Yale Law School is the site of a Conference assessing the impact of the federal Sentencing Guidelines. Indulge me for a moment while I recite some of the highlights of Yale’s long involvement with sentencing reform. The involvement of the Law School dates back to at least 1974, when Professor Daniel Freed convened a workshop to examine federal criminal sentencing. Among the topics examined in the workshop were the feasibility of an administrative commission that would develop guidelines for the sentencing of criminal defendants, such as Judge Marvin Frankel of the Southern District of New York had recently proposed in his book Criminal Sentences: Law Without Order (1972).

The participants in the workshop included, in addition to Professor Freed and Yale Law School students, my colleague Professor Dennis Curtis, Judge Frankel and Judge Jon O. Newman, then a district judge in Connecticut, who would become an early judicial supporter of the concept of sentencing guidelines. Also participating in the workshop were Parole Board Chairman Maurice Sigler and Ronald Gainer, a career official at the U.S. Department of Justice who years later would become the Department’s ex officio representative on the Sentencing Commission when the Commission drafted the first set of Guidelines.

Out of the workshop came two publications that would greatly affect the course of sentencing reform. First, Peter Goldberger (who is with us today), Vicki Jackson, and William Genego published a long article in 1975 in the Yale Law Journal, entitled Parole Release Decisionmaking and the Sentencing Process. The article hailed the Board of Parole’s recent promulgation of a nationwide, detailed Guideline Table. The new Table had two axes, one assessing the severity of the offense, and the other assessing the seriousness of the inmate’s prior criminal record. The box where the axes met set a narrow range within which the inmate presumptively would be released. The authors of the Yale Law Journal piece wrote that this new approach attempted “to minimize sentencing disparity” and promised to provide “a scientific and objective means of structuring and institutionalizing discretion in parole release decision-making.”

The workshop also produced draft legislation for what the draft styled the “U.S. Commission on Sentencing.” Senator Edward Kennedy later explained that he used this draft legislation as the basis for the bill he first introduced in November 1977, which provided for establishment of a United States Sentencing Commission. The draft legislation was refined and explained in a book published in 1977 by Professor Curtis, along with Pierce O’Donnell and Michael Churgin. Their book was entitled Toward a Just and Effective Sentencing System: Agenda for Legislative Reform. Senator Kennedy wrote the Foreword to the book, which was, appropriately, dedicated to Judge Frankel.

As we all know, Senator Kennedy garnered additional supporters and continued adding provisions to his sentencing bill over the course of four Congresses, and it was ultimately passed and signed into law by President Reagan in late 1984 as part of an omnibus crime bill.

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Also in the year 1984, Professor Freed and Professor Jay Pottenger of Yale inaugurated a new series of collaborative workshops on sentencing here at the Law School. The workshops brought law students and sentencing judges together to examine the principles on which judges exercise discretion in formulating sentences in state and federal courts, and to examine the impact of sentencing commissions on discretion, disparity, prison populations, and rationality in sentencing. After the members of the U.S. Sentencing Commission were appointed in late 1985, five of the original seven members of the Commission participated in these workshops.

Many, many articles, many books—and, dare I say, many judicial opinions—have grown out of Dan’s sentencing workshops and related hallway conversations and discussions. Two books were published in the workshop’s first few years. In 1988, Dale G. Parent published *Structuring Criminal Sentences: The Evolution of Minnesota’s Sentencing Guidelines*. In that same year, Professor Stanton Wheeler of Yale Law School published two books that would become the seminal works on federal sentencing in the pre-Guidelines era: first, *Sitting in Judgment: The Sentencing of White Collar Criminals* and then a few years later, in 1991, *Crimes of the Middle Classes: White Collar Criminals in the Federal Courts*.

It was also in 1988 that Dan Freed and Professor Marc Miller of Emory, from whom we will hear today, launched the *Federal Sentencing Reporter*, published bimonthly by the University of California Press under the sponsorship of the Vera Institute of Justice. FSR is still going strong at age 14. Many of you have served over the years as editors of FSR, including Doug Berman, Nora Demleitner, Aaron Rappaport, Steve Chansenson, Mark Harris, and Frank Bowman. Others present in this room have served on the Board of Advisors of FSR—including Paul Hofer, Tom Hutchison, Ron Weich, Ron Wright, and Judge Kimba Wood.

Ten years ago, we had a conference at Yale similar in ambition to the conference being held today—well, not quite as ambitious. The titles of the four panels were first, “History and Structure of the Sentencing Guidelines,” second, “Sentencing and the War on Drugs,” third, “The Allocation of Discretion Under the Guidelines,” and, finally, “The Future of the Guidelines.” Among the participants were sentencing commissioners, federal district and appellate judges, prosecutors, defense attorneys, prison officials, and, of course, professors. A summary of the proceedings of that Conference was published in the Yale Law Journal in 1992, in the same Law Journal volume that published Dan Freed’s important article that foresaw many of the questions that we will be examining today.

Meanwhile, in one form or another, Dan’s sentencing workshops have continued through all of these years, and many of the people in this room—Sentencing Commissioners, judges, prosecutors, defense attorneys, former and present students—have participated in them. In addition to the names I’ve already mentioned, those present who have been guests or members of the workshops and related courses include: Judges Janet Arterton, John Gleeson, Michael Mihm, and Alvin Thompson; former students Lisa Farabee, Nick Turner, Michael O’Hear, and Laura Storto, our present students Cassidy Kessler, Susan Lin, Diane Marks, Katherine Newberger, Laura Provinzino, Michelle Schwartz, Michael Yaeger, and Sofia Yakren, and others including Carmen Hernandez, Julie Stewart, and Jack Zeldes. In recent years, Professor Curtis and Judge Nancy Gertner have co-taught the workshop with Dan or, when Dan is on leave, by themselves. I admit to having something of a free-rider, often attending the workshop sessions but only recently and intermittently signing on as a co-teacher.

The Freed sentencing workshops and the Sentencing Conference held here at the Law School in 1992 were what finally got me hooked on the fascinating issues involved in trying to fashion a just system of criminal sentencing—well, I should say Dan’s workshops, the 1992 Yale Conference, and my husband’s dinnertime musings, anecdotes, and expressions of concerns about the sentencings he was conducting every week just down the street. Finally, in the late 1990s, my husband and I published a book about the Guidelines, entitled *Fear of Judging*.

The hardest issue we dealt with in writing that book was explaining the complexities of the role of prosecutorial discretion under the federal Guidelines system—an issue that Senator Kennedy and other legislative sponsors had also grappled with, and that the Commission had sought to address. Let me here begin the substance of our Conference by giving you my 20 second “take” on the issue of prosecutorial discretion and sentencing: Like the question of sentencing “disparity,” the question of prosecutorial influence on sentencing is not, in my view, per se good or per se bad. Let me explain: We all know there is “warranted” as well as “unwarranted” sentencing disparity, though we may disagree as to the factors that belong in each category. Likewise, there is, in my view, both “warranted” and “unwarranted” prosecutorial authority over sentencing outcomes—though we may be uncertain or disagree as to how much prosecutorial authority and what types of prosecutorial authority are “warranted”, and our present system may be far from ideal.

As I have read the papers for today’s conference, I have been struck that while our second panel of the day confronts the issue of prosecutorial discretion most directly, the issue is a recurrent theme of all the panels.

Let me now turn to Commissioner O’Neill and invite him to offer some words of introduction.
Commissioner Michael O'Neill:

The Sentencing Commission has decided to complete a systematic examination of the guidelines to determine—given the many criticisms of and the occasional support for the guidelines—whether the guidelines were actually working. There is much disagreement about this question in the academic community and in the legal profession as a whole. What does it mean that the guidelines are “working”? Certainly they are out there; certainly judges and prosecutors and defense counsel are using the guidelines; certainly defendants are being sentenced under the guidelines. But what does it mean when we say the guidelines are or are not working?

The Sentencing Commission decided to use the organic statute, including the principles and goals of sentencing articulated by Congress, as our yardstick for determining whether the Sentencing Commission and the sentencing guidelines were actually meeting their statutory mandate. One of the original catalysts for the guidelines was a concern that there was a great deal of disparity in sentencing, judge-to-judge and region-to-region. Therefore one of our original goals was to determine whether the guidelines themselves have had any positive impact on reducing disparity or lessening discrimination.

We also wanted to determine whether the guidelines were acting as any sort of deterrent, one of the sentencing purposes articulated by Congress, and whether the guidelines were treating first time offenders differently from other offenders which goes towards the purpose of retribution. Another purpose of sentencing that Congress had included in the statute, but has been largely ignored by the Sentencing Commission these 15 years, was whether people were receiving appropriate treatment and rehabilitation. That may not be an issue for the Sentencing Commission itself, but it is certainly one of the statutory objectives of Congress.

Our goal in this 15 year review is to do sound empirical work, building both on the work of other academics and on work to be done within the federal government, to determine whether the goals and principles of sentencing as articulated by the United States Congress are being fulfilled by the guidelines. This has been, needless to say, an enormously important and difficult project.

One significant part of this review is the Criminal History Study. We have built a database of cases to assess recidivism among federal offenders. I would like to thank Miles Harer and Linda Maxfield, who are with us today, for their great work in shepherding that study.

Another part of the review, primarily in Lou Reedt’s ambit, is an examination of drug offenses. One of the principal criticisms of the guidelines is the way they treat drug offenders. In fact, I would guess that if the guidelines were changed with respect to drug offenders in particular, many of the criticisms of the guidelines would disappear. There is a general feeling—whether correct or not as an empirical matter I do not know—that perhaps the guidelines are too harsh on many drug offenders. Lou Reedt has done a fabulous job for the Commission in studying the effect of the guidelines on drug offenders, and on organizations as well.

Finally, I would like to give a great deal of thanks and credit to the person who has been shepherding this entire research effort—Paul Hofer. He has been trying to bring together the various and disparate parts of the empirical work we are doing into an overarching project. Hopefully, in about one year we can bring most of these projects to fruition and we will be able to give you information, some of which will be disseminated today, as to whether the guidelines have been functioning and how they have been functioning.

We must remember that sentencing and the guidelines have an important and real impact on people’s lives. It affects those who are using the guidelines to sentence and those who are being sentenced. It affects prosecutors, defense lawyers, judges and lawmakers as well. As we do our empirical work and our research, we can never forget the individual lives that are being shaped and impacted by the guidelines and how they function.

I would like to take a moment and thank my fellow commissioners John Steer, who is here, and also Sterling Johnson who is a District Court Judge in the Eastern District of New York. Judge Johnson, who actually has the job of sentencing defendants, has been consistently cognizant of the impact of the guidelines on individual lives. Commissioner Steer, who has been with the Commission virtually since its inception, understands the nuances and intricacies involved in both drafting the guidelines and in the important and difficult political decisions we have to make.

People often forget that there is no such thing as a truly independent agency. In part, politics is only what one can realistically accomplish—what is really possibly for the Commission to do. Despite the fact that we may be this slightly unconstitutional, quasi-independent body within the judiciary, we have difficulties in that we are often whipsawed between the Department of Justice, Congress, the judiciary, prosecutors (who often times act independently of the Department of Justice), and the defense bar. So I would like to say: It is not easy being us.

Nevertheless we try to uphold the oath that we have taken as Sentencing Commissioners. I think that every individual on the Commission, all seven of us, has tried to do what we have thought was right, was possible, and was the best that we can do to bring justice to the guidelines.

My remarks and welcome come from the Sentencing Commission, but I have an additional statement from...
Judge Diana Murphy, our Chairwoman who has done an exceptionally fine job of guiding the Commission in its work. I have a brief statement she’d like me to read:

She is sorry that she is not able to be here for this meeting. This is court week in the 8th Circuit and she had to be in St. Louis to hear oral argument. She is aware that a number of the Yale faculty is interested in sentencing issues and she appreciates the attention given here to the federal guidelines. She is pleased that several Commissioners are able to be here and that the Commission staff has come to talk about their own research projects which have not been presented to the Commission or acted on by it. In other words, this is our disclaimer.

Although these projects may have been developed in the Commission, they are not necessarily of the Commission. That is academic freedom. This meeting at Yale is an opportunity for the staff to stimulate discussion. It is important to remember that staff remarks should not be taken as the views or the position of the Commission.

Chair Murphy sends her best wishes for an interesting exchange. Perhaps a year from now we can reconvene when the Commission has finished most of its work and released many projects that have been completed by it and the outside academic community.

With that, I turn the program back to Prof. Stith and the first panel.

Notes

1 Lafayette S. Foster Professor, Yale Law School.
2 84 YALE L.J. 810 (1975).
3 Associate Professor, George Mason University, School of Law.