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Fifteen Years of Federal Guidelines Reviewed at the Yale Conference: What Would Success Mean?

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This Issue consists largely of FSR's first publication of the proceedings of a major conference on the federal sentencing guidelines and summaries of the papers presented. The Federal Sentencing Guidelines Symposium took place on November 8, 2002 at the Yale Law School in New Haven, CT, and attracted a substantial number of federal judges, members of the U.S. Sentencing Commission and its staff, probation officers, public defenders, private defense counsel, U.S. attorneys and assistants, academics, and law students.

Prior to the meeting, the conference organizers—a group of Yale faculty members (Dennis Curtis, Daniel Freed, Judge Nancy Gertner, Kate Stith) and law students enrolled in the sentencing seminar—provided summaries and copies of the papers to be presented on the Yale website. The summaries are included in this Issue. Most of the papers can still be accessed in their entirety at www.law.yale.edu/outside/html/Centers/cen-sentencing.htm; a few are already published and are available through Westlaw or Lexis.

The summaries of the panel discussion were expertly prepared for FSR by the group of students—Cassidy Kesler, Susan Lin, Katherine Tang Newberger, Laura Provinzino, Michelle Schwartz and Sofia Yakren—responsible for much of the conference planning. A number of them—Cassidy Kesler, Katherine Tang Newberger, Sofia Yakren—also presented their own research and participated as discussants, together with another current Yale law student—Michael Yaeger—and two former students—Laura Storto and Max Schanzenbach.

Commissioner O'Neill opened the November conference by asking whether the guidelines were actually working. It was a timely question because organizers of the conference, agreeing that guideline success was a central issue, had structured four panels to debate the antecedent question: how is "success" being defined?

For the past 15 years, and during the equivalent period prior to guidelines as well, sentencing reform has focused on judges and judicial discretion. In light of Congress's expressed 1984 goal to reduce unwarranted disparity, the conference was structured to test whether *judicial* determinations have achieved that goal. To the surprise of few, the four panel discussions at the conference raised serious doubts whether the decisions of judges *alone* can be isolated as an adequate measure of guideline success.

The panels looked at the question of guideline success from different perspectives: The morning panels focused on disparity in sentencing. While the first panel looked at race and gender disparity, the second considered the effects of region and prosecutorial policies. Inevitably, the two different elements of disparity influence each other, as the same prosecutorial policies may have a dramatically different racial impact in different parts of the country, for example.

The afternoon panels considered purposes of sentencing. This topic is often viewed as highly academic—and there were some charges to that effect—but the presenters tied the purposes discussion closely to the construction of the guidelines. Both panels, in different ways, revisited the question of what purposes the guidelines do and should pursue. The first panel focused on the philosophical premises underlying the federal sentencing guidelines. The answer to this question would illuminate also the issue of disparity. Selection of a particular purpose, such as incapacitation, might explain some otherwise inexplicable sentencing differentials. The second panel

discussed criminal history in light of the Commission staff's recidivism study and risk assessment tools used in Virginia.

I. Unwarranted Disparity

A. Research Design and Measurement: Gender, Race and Class

Panel I revisited some of the crucial themes surrounding disparity. Since it is not disparity but rather "unwarranted disparity" that the 1984 Sentencing Reform Act attempted to remedy, one must determine when sentencing disparities are warranted rather than unwarranted. Are the only warranted disparities those based on the offense committed and the offender's criminal history? Even if that were the approach taken, what elements of the offense should count to determine equality in sanctioning? If other factors are to be considered, which should be relevant? Should it matter whether the defendant has minor children or a community of patients depending on her? Should it matter that the offender will lose her job and be barred permanently from working in her area of expertise and training?

There appears to be general agreement that disparity based on race or gender is unwarranted. The studies conducted by the presenters on Panel I showed that while judge-related racial biases have declined since 1987, racial and gender disparities persist. As the research done by Kevin Blackwell and Dr. Paul Hofer, two senior researchers on the Commission's staff, indicates, women continue to receive substantially shorter imprisonment sentences than men. But does this necessarily mean individual judges or the system discriminate in favor of women? Women are often situated differently from men with regard to their participation in the offense. For example, women are more likely to play minor roles in drug offenses, in which they participate often under substantial pressure of husbands or boyfriends. This produces lower sentences for women than men because role in the offense under §3B1.2 is a guideline sentencing factor. Women also tend not to have any criminal record, a fact which judges may consider at sentencing, even though they are not supposed to depart based on that factor.[1]

[I]n evaluating the recidivism study that is currently being prepared by its staff, the Commission should consider how the creation of a new criminal history category for offenders with no prior involvement with the criminal justice system would affect women and the apparent gender differential in sentencing.

As these examples indicate, some of the gender differences in sentencing reflect not judicial bias but choices made by Congress and the Commission. For these reasons, in evaluating the recidivism study that is currently being prepared by its staff,[2] the Commission should consider how the creation of a new criminal history category for offenders with no prior involvement with the criminal justice system would affect women and the apparent gender differential in sentencing.

Even though the different sentence lengths for men and women is starker than that between racial groups, it is the latter that has attracted the most concern. Hofer and Blackwell's research indicates that while race continues to play a role even under the guidelines, its influence is likely to have decreased, and Black and Hispanic offenders are now sentenced to two more months in prison than whites. This finding tracks the perception of individual judges as expressed in the recent judicial survey conducted by the U.S. Sentencing Commission.[3] Most district and appellate judges believed that there was "almost always" race neutrality. While this is a positive result, one third of the judges who responded considered guideline sentences not always racially neutral. Whether it is the guidelines or changed social mores that have contributed most to greater race equality, might be a question that can never be resolved. Mandatory minimums — and Congress — may largely be blamed for racial inequality at sentencing.

While most research on race and ethnic disparity has focused on imprisonment, Max Schanzenbach and Michael Yaeger looked at differences in fines. They found that the length of the prison sentence is tied to the fine assessed and paid, and that class status may explain resulting racial disparity. Schanzenbach and Yaeger are not the only ones concerned about the impact of class on sentencing, the judicial survey indicates that almost half of the judges who responded are concerned that socioeconomic class differentials remain pronounced under the guidelines. While there is much more research to be done, it might be time to focus not only on race differences in sentencing studies but to look at class disparities. While such research is substantially more challenging, as income levels and net worth are more difficult to assess than race, the result might be a rethinking of our sentencing structure. Schanzenbach and Yaeger, for example, suggest consideration of the European day-fine concept where fines are assessed based on an individual's income level. While this model

would diverge from our formalistic equal-treatment approach, it might lead to a substantially more equal result, and even begin to undermine racial differences. Such an approach might become ever more important with growing class differences and an increasing disparity between the richest and the poorest in this country.

None of the studies presented attempted to combine the different considerations to see how race, gender and class interacted, not only at sentencing but also in pre-sentence decision-making. Whether the guidelines are successful in reducing racial, gender and class disparity depends on whether policy-makers are looking solely at judge bias or are also concerned with pre-sentence decisions – arrests, prosecutorial charging decisions, guideline and non-guideline sentencing rules – that tend disproportionately to disadvantage or favor particular members of the community.

B. One National Sentencing System, or Many Localized Regimes?

The presentations in Panel II, which dealt largely with geographic differences, showed that divergent prosecutorial policies across the country explain some sentence disparity. Concerns about inter-district disparity and the extent to which individual prosecutors should be allowed to make different prosecutorial decisions dominated the discussion.

Professor Michael O'Hear argued that national uniformity should not be the overriding goal of federal sentencing in all cases. He suggested that when crimes lack a multi-district dimension and involve purely local offenses, local or intra-state uniformity should be accorded higher priority.

The caseload study presented by Katherine Tang Newberger indicated that the goal of national uniformity is giving way to local case pressure in many districts. Regional variations found among prosecutorial declination and charging policies often account for inter-district sentencing disparity. Disparities are caused at least in part by the way each U.S. Attorney's office deals with particular crime patterns prevalent in its district; resource constraints; community concerns; the comparative advantage of federal authorities over their state counterparts; and the choice of venue where the harshest penalty is available. Whether policy-makers believe prosecutors should take such factors into account ought to determine whether sentencing disparities created by prosecutors are permissible, and whether guidelines are proving successful in reducing unwarranted disparity.

Professor Frank Bowman and U.S. Attorney Bill Mercer argued that while marginal district differences may be tolerable, gross disparities such as those created by the fast-track programs instituted in the border districts are anathema to guideline success. Others took a different view. Defining "success" requires policy-makers to determine first (1) what degree of disparity among sentences in similar cases is tolerable and (2) how concerned the system ought to be about disparities created by sentencing actors *other than* judges. Neither the Commission nor Congress has to date openly examined and explicitly resolved these questions.

Equally important is the question of whether process or result matter most. Laura Storto's study indicated that despite different charging practices, two sets of otherwise similar districts imposed similar sentences on similarly situated defendants. Do the differences in how the ultimate sentences were reached constitute disparity about which the Commission should be concerned? Does such disparity create the appearance of injustice, even if the ultimate sentences are virtually identical? Will the inmates of federal prisons compare sentence lengths, or the way in which their sentences were computed? After all, they are the group of individuals Judge Frankel, whose concern with unwarranted disparities set us on the course to more structured sentencing, would have presumably focused on in determining whether unwarranted disparity exists.

Despite studies such as Storto's much of the concern about regional disparity centers on departures. U.S. Attorney Bill Mercer presented examples of dramatic downward departures for white-collar offenders. However, these anecdotal accounts differ markedly from the judicial survey in which judges bemoaned the sentences for white-collar offenders as too lenient.[4] Even if judges as a group sentenced white-collar offenders below the applicable guideline range, is this not a message the Commission and Congress should hear? To what extent should the federal judiciary be relevant in developing sentencing practices? Ultimately, this leads into a broader discussion of the role of the judiciary, as compared to the

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role of the legislature and the executive, in sentencing.

Complaints about insufficient sentences for white-collar offenders, raised by prosecutors and Congress, question the appropriate valuation of such crimes. Why should the sentences of white-collar offenders be raised? Does their crime merit a heavier sentence because of the harm it has inflicted on its victims and society? Or, does the public need to be protected from the offender? Is incarceration required to deter others from committing similar crimes? Or is the sentence increase designed to justify long prison terms for drug offenders because it is perceived as creating greater equity? As these questions indicate, sentence severity is connected closely to the issue of what purpose(s) the guidelines serve.

II. A New Purposes Discussion

Panel III focused on the proposition that policy-makers cannot determine whether the guidelines have been successful without first determining what the purposes of sentencing should be. The original Commission did not clearly distinguish among the four sentencing purposes spelled out in the Sentencing Reform Act of 1984. This makes it very difficult to evaluate the guidelines today.

Dr. Paul Hofer and Professor Aaron Rappaport proposed quite similar methods – rational reconstruction – for discerning guideline purposes but arrived at very different conclusions about the goals of sentencing in today's system. Rappaport and Hofer also disagreed about who – Congress, the Commission, the courts – should determine which philosophy governs and at what point such a determination should be made. In the discussion little attention was paid to the purposes prosecutors might view as crucial in federal sentencing. In his closing comments, Eric Jaso, the Justice Department's ex office member of the Commission, implied that deterrence was the guiding philosophy.

The unresolved issue of purposes continues to haunt the development, application and assessment of the guidelines. It also facilitates Congress's continued micro-managing of federal sentencing through the passage of mandatory minimums and other yet more direct intervention in guideline development.

While Hofer and Rappaport agreed on the value of having an overarching sentencing philosophy because it would reduce unwarranted disparity, the other panelists were more dubious. They questioned its relevance in judicial decision-making and feared it might add to, rather than decrease, disparity.

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The purposes discussion continued with the last panel which focused on criminal history. Drs. Linda Maxfield and Miles Harer, both senior researchers on the Commission's staff, unveiled preliminary findings of a Commission staff recidivism study. The initial findings validate the current overall set-up of the criminal history category and indicate that recidivism appears to be connected to offense type. They also tentatively suggest that some sentences are harsher than necessary for first-time non-violent offenders who have no prior arrests. The preliminary study demonstrated commendable candor by the Commission staff in conceding that the guidelines may be imperfect and need some improvement.

Research can provide us with the tools of decision-making but cannot answer crucial policy questions. Even if the preliminary results that certain offense types are more likely to lead to recidivism are validated, what policy changes should this finding trigger? Higher sentences for such offenders would be justified if incapacitation is the goal, but not under a retributive regime. As long as the purposes discussion remains unresolved, no coherent answers will emerge from empirical findings.

The first (and only) presenter from a state system, Dr. Kim Hunt, detailed the findings from a Virginia study. Its goal was to select non-violent offenders who had only a small likelihood of re-offending and could therefore be diverted from imprisonment. Hunt indicated that this type of a study was less objectionable than, for example, the assessment of sex offender recidivism for purposes of civil confinement because probation was an otherwise unavailable *benefit* rather than a penalty for the offenders identified by this predictive scheme. Ultimately, predictive schemes will become more reliable as they combine statistical analysis with individual offender data.

As Judge Friedman noted, such studies would be valuable in the federal system if more opportunities for non-incarcerative sentences existed. Here he echoed a concern expressed by almost half of all district court judges who responded to the judicial survey. They asked for

more probationary sentences and split sentencing options, especially for drug trafficking, theft/larceny/embezzlement and fraud offenses.

III. Where Do We Go From Here?

As Commissioner John Steer and Eric Jaso indicated in their closing comments, the conference was a full success insofar as it added substantially to existing knowledge. The panels were successful because they included a mix of academics and/or researchers, judges and other practitioners. The information presented by the former allows the latter to consider issues they might not otherwise think about in their busy practice, and the input from the latter provides the former with crucial information that can go into future research design and output evaluation.

On Panel IV Judge Friedman provided important insights into the practical problems of ascertaining criminal history, and shared his concerns about doing so after a plea has been entered. Judge Mihm on Panel III indicated that some judges would operate in a lawless manner and abuse the opportunity to ascertain the purpose of the guidelines. Both brought much needed realism and insight to the debate. On the other hand, the data provided by Blackwell and Hofer and Kesler in Panel I provided the crucial starting point for a debate about race and gender in sentencing. Without such systemic data, no useful discussion is possible.

Like all academic conferences, this one also suffered from a lack of concern about those who are subject to sentencing policies. As defense attorney Lyle Yurko noted, there was almost no discussion about the impact of a sentence on the victim and the defendant's family. Much of the discussion was restricted to abstract categories of criminal history and offense characteristics. It was the judges mostly who brought in the much needed personal detail.

The conference provided sufficient ideas for future research in the guidelines' area. While understandable for a one-day conference directed at the federal guidelines, the absence of those involved in state sentencing, and especially state guideline sentencing, was regrettable. As Kim Hunt demonstrated, much of interest to the federal system is going on in the states, and there is need for more cross-fertilization between the two. Since the federal system remains much maligned in the states, it might consider learning from the states – or at least defend itself to them.

Finally, in light of direct congressional involvement in sentencing, members of Congress and their staff should participate more in such symposia. This might provide them with a level of understanding and insight not otherwise easily available to them, and also give them much needed exposure to and respect for those dealing with the sentencing of offenders on a daily basis. Greater involvement would make it more difficult for Congress to pass legislation opposed by most of the players in the system, including the federal judiciary, as was the case with the Feeney Amendment.

Ultimately, there might even be an answer to whether the Commission's guidelines are a success: Because the definition of justice and equality is constantly evolving, guidelines themselves must change to reflect the ever-changing needs of society. While Judge Frankel's concern in the early 1970's focused on judicially created unwarranted disparity, especially race-based, we have learned much since then. Our research designs have become more sophisticated, as have our demands for equality. We can only hope that our sense of justice has become as developed.

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Notes

1 §4A1.3. Adequacy of Criminal History Category (Policy Statement).

2 *See infra* discussion of Panel IV. *See also infra* summary of proceedings of Panel IV.

3 *See* Survey of Article III Judges on the Federal Sentencing Guidelines (March 2003), available at www.ussc.gov. *See also* Michael Edmund O'Neill, *Surveying Article III Judges' Perspectives on the Federal Sentencing Guidelines, infra* this Issue.

4 The recent changes in sentencing, brought about by the Commission's implementation of the Sarbanes-Oxley Act, which will be discussed in the next FSR issue, may change this judicial perception.