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2023

### Be Careful What You Wish For

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# Be Careful What You Wish For

*Albert W. Alschuler\**

[A]ny change in sentencing practices is likely to be an improvement.

Judge Marvin Frankel in 1973<sup>1</sup>

Fifty years ago, Marvin E. Frankel published an elegant, timely, and extraordinarily influential book, *Criminal Sentences: Law Without Order*. Four years after this book called for the appellate review of sentences and for greatly limiting the discretion of both sentencing judges and parole boards, California became the first state to limit sharply judicial sentencing discretion and abolish parole.<sup>2</sup>

Twenty other states joined the reform movement before Congress embraced the move from individualized to wholesale sentencing in 1984.<sup>3</sup> The Sentencing Reform Act of that year<sup>4</sup> abolished parole, created the United States Sentencing Commission, and directed this body to create mandatory sentencing guidelines<sup>5</sup> in which “the maximum of the range established for [every term of imprisonment] shall not exceed the minimum

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<sup>1</sup> MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 55 (Hill & Wang 1973) (hereinafter *CRIMINAL SENTENCES*). Frankel’s prediction may rank with that of the manager of the Grand Ole Opry who told Elvis Presley: “You ain’t goin’ nowhere, son—you ought to back to drivin’ a truck.” See Victor Navasky, *Tomorrow Never Knows*, N.Y. TIMES MAG. (Sept. 29, 1996), <http://www.nytimes.com/1996/09/29/magazine/tomorrow-never-knows.html>. Things rarely are so bad they can’t be made worse, and, as Michael Tonry wrote 43 years after the appearance of *Criminal Sentences*: “No one admires American sentencing systems. They are arbitrary and unjust, they are much too severe, they ruin countless lives, and they have produced a shameful system of mass incarceration.” MICHAEL TONRY, *SENTENCING REFORM: PENAL REFORM IN AMERICA, 1975-2025* at vii (Oxford 2016).

<sup>2</sup> See PHILLIP E. JOHNSON & SHELDON I. MESSINGER, *CALIFORNIA’S DETERMINATE SENTENCING LAW: HISTORY AND ISSUES* (1978).

<sup>3</sup> See SANDRA SHANE-DUBOW, ALICE P. BROWN & ERIK OLSEN, *SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT* (1985) (state-by-state survey); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. & CRIM. 1550, 1551 (1981).

<sup>4</sup> Sentencing Reform Act, Pub L. No. 98-473, 98 Stat. 1987 (1984), codified in part at 18 U.S.C. §§ 3551–3625. If my math is correct, 1984—the year of George Orwell’s prophesy—came eleven years after the publication of *Criminal Sentences*.

<sup>5</sup> Ponder the oxymoron “mandatory sentencing guidelines.” A Supreme Court ruling in 2005 concerning the constitutional right to jury trial rendered the federal guidelines discretionary. *United States v. Booker*, 543 U.S. 220 (2005).

. . . by more than the greater of 25 percent or six months.”<sup>6</sup> Judge Frankel wasn’t alone in urging a major restructuring of American sentencing,<sup>7</sup> but he merited the title Senator Ted Kennedy bestowed on him: the “father of sentencing reform.”<sup>8</sup>

Frankel was as wise and generous a friend as I’ve had<sup>9</sup>—a superb role model for me and many others.<sup>10</sup> But I was skeptical of his proposals 50 years ago, and I haven’t changed my mind.

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<sup>6</sup> See 28 U.S.C. §§ 994(b)(2).

<sup>7</sup> See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (Farrar Straus & Giroux 1971).

<sup>8</sup> See KATE STITH AND JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 35 (U. of Chicago Press 1998).

<sup>9</sup> I recall in particular a lunch I had with Frankel as I was agonizing about whether to accept a job offer from a school more prestigious than the one at which I was teaching. After I’d recited a long list of personal considerations, Frankel said: “Just think about where you’d be happier to see your co-workers when you arrive at work on Monday morning.” That might have been the best advice I ever received, and of course I failed to follow it.

<sup>10</sup> Marvin Frankel, the son of a salesman and a beautician, was born in 1920. After graduating from Weequahic High School in Newark at age 16, he joined the Civilian Conservation Corps. Frankel later drove taxis and ice cream trucks and pushed garment-district clothes racks while earning an undergraduate degree at Queens College. In 1942, before he received his diploma, Frankel enlisted in the army, and he spent much of World War II as a staff sergeant doing supply work in Africa. After the war, he attended the Columbia Law School, where he graduated in two years. He was editor-in-chief of the *Columbia Law Review*. Frankel then joined the Solicitor General’s office. He made his first argument before the Supreme Court at age 32. After several years in the SG’s office and several in private practice, he joined the Columbia Law School faculty in 1962. As part of a team led by his legendary teacher and colleague Herbert Wechsler, he helped craft the prevailing argument in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

On the advice of Senator Robert Kennedy, President Lyndon Johnson appointed Frankel to the U.S. District Court for the Southern District of New York in 1965. (I’ll describe his most prominent sentencing decision later.) After leaving that post in 1978, Frankel practiced law. For 15 years, he also served as chair of the Lawyers Committee for Human Rights. In that role, he traveled to South Africa to protest apartheid, to the USSR to object to the repression of Jews, to Israel to protest the living conditions of political prisoners, to Argentina and Zaire to publicize the murders and kidnappings perpetrated by those nations’ governments, and to Kenya, where he was briefly jailed after protesting the death of an opposition leader in police custody.

In addition to *Criminal Sentences*, Frankel’s books included *Faith and Freedom: Religious Liberty in America* (1995) (a seminal study of the freedom of religion); *Out of the Shadows of the Night: The Struggle for International Human Rights* (with Ellen Saideman) (1989) (a history of the international human rights movement); *Partisan Justice* (1980) (an examination of the adversary system that included a proposal to limit the attorney-client privilege); and *The Grand Jury: An Institution on Trial* (with Gary P. Naftalis) (1977) (offering proposals for improving grand-jury procedures that led to reform in several states).

Frankel died at age 81 in 2002, leaving his wife Alice, two daughters, two step-children, and six grandchildren. Eleven days before his death, suffering from advanced pancreatic cancer and speaking from a wheelchair, he made the last of his 22 arguments to the Supreme Court. See Steven Greenhouse, *Marvin Frankel, Federal Judge and Pioneer*

## I. FRANKEL'S INDICTMENT OF INDIVIDUALIZED SENTENCES

Part of Frankel's influence stemmed from his graceful, forceful, and arresting prose. Rather than summarize his criticism of the procedures he sought to improve, I'll indicate the flavor of *Criminal Sentences* by quoting some of his *noncriminal* sentences:

Some writers have quibbled about the definitiveness of the evidence showing disparity. It is among the least substantial of quibbles.<sup>11</sup>

Conditioned in the direction of authoritarianism by his daily life in court, . . . the trial judge is not discouraged from venting any tendencies to righteous arrogance.<sup>12</sup>

[T]he wretch sentenced by Judge X never knew, because he was never told, how the fifth year of his term came to be added.<sup>13</sup>

With varying limits of time, energy, and concern for potential injury to people and relationships, the [probation officer] will make inquiries of schools, employers, associates, neighbors, pastors, friends, enemies.<sup>14</sup>

The swift ukase, without explanation, is the tyrant's way. The despot is not bound by rules.<sup>15</sup>

The baleful results are aggravated when prisoners come to compare their unexplained sentences and perceive intimately what the scholars mean by disparity.<sup>16</sup>

Parole boards don't explain. They confer miracles or they refuse.<sup>17</sup>

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*of Sentencing Guidelines, Dies at 81*, N.Y. TIMES (Mar. 5, 2002), <https://www.nytimes.com/2002/03/05/nyregion/marvin-frankel-federal-judge-and-pioneer-of-sentencing-guidelines-dies-at-81.html>; *Marvin E. Frankel*, WIKIPEDIA (last visited Feb. 28, 2023); Gerard E. Lynch, *Marvin Frankel: A Reformer Reassessed*, 21 FED. SENT. REP. 235 (2009); David A. Anderson, *Wechsler's Triumph*, 55 ALA. L. REV. 229, 233 (2014); *Marvin Frankel Recognized as International Year of Volunteers Honoree*, KRAMER LEVIN ANNOUNCEMENTS (Spring 2001), <https://www.kramerlevin.com/en/perspectives-search/marvin-frankel-recognized-as-international-year-of-volunteers-honoree.html>.

<sup>11</sup> CRIMINAL SENTENCES at 21.

<sup>12</sup> *Id.* at 17.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 29.

<sup>15</sup> *Id.* at 39.

<sup>16</sup> *Id.* at 43.

<sup>17</sup> *Id.* at 48.

[T]he loss of the sentencing power would be for many judges wonderfully bearable.<sup>18</sup>

Consider that a civil judgment for \$2,000 is reviewable in every state at least once, possibly on two appellate levels. Then consider the unreviewability of a sentence of twenty years in prison and a fine of \$10,000.<sup>19</sup>

In this state of blissfully ignorant cruelty, we dump into our generally huge prisons unsorted varieties of prisoners—the few who may need treatment we know how to supply, the many we don't know how to treat, whatever they may need, and the many more who evidence no perceptible need for treatment, existing or imagined. This is the macabre but not astonishing culmination of an indeterminate-sentencing process that rests mainly upon fiction and absentmindedness.<sup>20</sup>

The “rehabilitative ideal” . . . is genetically flawed and malformed.<sup>21</sup>

## II. THE UNMENTIONED ELEPHANT

I applaud these sentences and most of the rest of *Criminal Sentences*. What the book doesn't say, however, has made me a critic. Frankel's preface notes: “[T]he great majority (ranging in some jurisdictions to around 90 percent) of those formally charged with crimes plead guilty.”<sup>22</sup> But *Criminal Sentences* says nothing—not a word—about the bargaining process that lies behind this figure or about the power of the official who largely determines most criminal sentences, the prosecutor. *Criminal Sentences* proclaims: “Our practice in this country . . . is to leave [the ultimate question of how long or severe the sentence will be] to the wide, largely unguided, unstandardized, usually unreviewable judgment of a single official, the trial judge.”<sup>23</sup>

You've probably seen the famed 1976 *New Yorker* cover by Saul Steinberg depicting the New Yorker's view of the world.<sup>24</sup> Once one passes the Hudson River, the United States appears to consist of a single city block containing “Jersey,” Kansas City, Texas, Chicago, Las Vegas, Utah, and

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<sup>18</sup> *Id.* at 54.

<sup>19</sup> *Id.* at 76-77.

<sup>20</sup> *Id.* at 92-93.

<sup>21</sup> *Id.* at 89.

<sup>22</sup> *Id.* at vii.

<sup>23</sup> *Id.* at 112. That would have been a wonderful sentence if only Frankel had changed the last two words.

<sup>24</sup> *View of the World from 9th Avenue*, WIKIPEDIA, [https://en.wikipedia.org/wiki/View\\_of\\_the\\_World\\_from\\_9th\\_Avenue](https://en.wikipedia.org/wiki/View_of_the_World_from_9th_Avenue) (last visited Feb. 28, 2023).

Los Angeles. Beyond this block, one glimpses the Pacific Ocean. *Criminal Sentences* depicts a similarly myopic view of the criminal punishment system by a judge who believed he exercised absolute power and failed to notice that he exercised this power only within the interstices prosecutors had left him.

The prosecutor's power poses no obstacle to improving judicial sentencing within the interstices by making it better informed, more collaborative, and better guided. With Frankel, I applaud the appellate review of sentences.<sup>25</sup> Like him, I cheer sentencing councils in which two of a sentencing judge's colleagues confer with her after all three have read the presentence investigation report.<sup>26</sup> (These councils were never common, and my guess is that they vanished when guidelines appeared.)

A sentencing commission could help if it were to focus on particular situations and challenging, recurring sentencing issues. Should a clearly alcoholic drunk driver be sentenced differently from someone who drives home drunk after a party? Do traffic safety or anger management classes make a difference? How should society punish or treat a chronic shoplifter? Or a murderer who was once law abiding and responsible but who was devastated when a spouse or lover abandoned him or her for someone else? Trial judges shouldn't be required to confront issues like these anew, alone, and on the fly. But rather than focus on tough questions like these, sentencing commissions generally started with the statutory definitions of offenses, made adjustments for criminal history and other measurable things, put every case in a box, and forbade or discouraged judges from leaving the box. At the same time, they permitted prosecutors to disregard the box and go as low as they liked for defendants who waived their rights.

Three observations: First, measures that restrict the discretion of judges but not prosecutors can't notably advance the goal of greater certainty in sentencing. They won't solve the problem they address. Second, tying the hands of judges and not prosecutors concentrates discretion in the hands of a single official, one who is less likely to exercise her discretion wisely than the official whose power has been limited. And third, this regime increases the pressure on defendants to sacrifice their rights. Guidelines set the stage for the "good-cop, bad-cop" stratagem on a large scale. A sentencing commission plays the role of the bad cop while a prosecutor promises to save the defendant from the guidelines-prescribed sentence if only she'll agree to abandon the right to trial and cooperate. In this system, substantial discretion remains except for the minority of defendants who resist the prosecutor's will.

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<sup>25</sup> CRIMINAL SENTENCES at 75-85.

<sup>26</sup> *Id.* at 69-74.

Here's a passage I wrote in 1978:

There is hardly any objection to judicial sentencing discretion that does not apply in full measure to prosecutorial sentencing discretion. As much as judicial discretion, the discretion of prosecutors lends itself to inequalities and disparities of treatment. . . .

[Moreover, t]here are . . . objections to prosecutorial discretion that do not apply with nearly so much force to judicial discretion. The exercise of prosecutorial discretion is more frequently made contingent upon a waiver of constitutional rights. It is generally exercised less openly. It is more likely to be influenced by considerations of friendship and by reciprocal favors of a dubious character. It is commonly exercised for the purpose of obtaining convictions in cases in which guilt could not be proven at trial. It is usually exercised by people of less experience and objectivity than judges. It is commonly exercised on the basis of less information than judges possess. Indeed, its exercise may depend less upon considerations of desert, deterrence and reformation than upon a desire to avoid the hard work of preparing and trying cases. In short, prosecutorial discretion has the same faults as judicial discretion and more.<sup>27</sup>

### III. SENTENCE SEVERITY AND MASS INCARCERATION

Twenty years after Frankel's book appeared, he considered how the reforms he championed had affected plea bargaining. In a dialogue with Leonard Orland,<sup>28</sup> he conceded that Orland and other critics had "made a prima facie case for the proposition that guidelines enhance the prosecutor's power in plea bargaining."<sup>29</sup> He noted, however: "The rate of guilty pleas continues pretty much unchanged in all the guidelines jurisdictions."<sup>30</sup> And he called for further study.

I'd predicted earlier that the power conferred upon prosecutors by sentencing guidelines wouldn't significantly change the rate of guilty pleas. When the federal guidelines were new, I wrote: "Guilty plea rates are currently so high that even substantial increases in prosecutorial bargaining power cannot yield great increases in these rates."<sup>31</sup> But prosecutorial power

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<sup>27</sup> Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 564 (1978).

<sup>28</sup> Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655 (1993).

<sup>29</sup> *Id.* at 669-70.

<sup>30</sup> *Id.* at 666.

<sup>31</sup> Albert W. Alschuler, *The Selling of the Sentencing Guidelines*, in THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE 49, 91 n.4 (Dean J. Champion ed. 1989).

has other uses—for example, increasing sentences. Even if a small, hard-core group of defendants refuse to plead guilty so that plea rates remain the same, other defendants may accept offers requiring tougher sentences than they would have approved if a greater chance existed that a judge would sentence less severely than the guidelines now require or suggest. Guidelines tend to give prosecutors a monopoly on leniency. They create a regime in which mercy no longer is given but only is sold.<sup>32</sup>

The power of prosecutors also can be used to exact a broader waiver of rights. With enhanced power, a prosecutor may demand a waiver not only of the right to trial but also of the right to appeal, the right to the disclosure of exculpatory evidence, and the right to the effective assistance of counsel. So far, bargains haven't included a waiver of the right to read the Qur'an, but the "autonomy" principle thought to justify plea bargaining knows no limit.

Finally, increased bargaining leverage can make it possible to charge suspects whom prosecutors would have not found it worthwhile to charge earlier. Suppose that, in a particular jurisdiction, both the number of crimes and the number of arrests are down but criminal filings in court are up. Imagine that the likelihood of prosecution following an arrest has doubled. When prosecutors can achieve equal success with weaker cases—when they can keep guilty plea rates and sentences constant—it's a reasonable inference that their bargaining power has increased. This enhanced power can lead to a higher incarceration rate even when it does not produce a higher guilty plea rate or an increase in average sentences. Prosecutors can spend their bargaining currency as they like, and they sleep wherever they want.

I'll speak in a moment about which of these things happened, but first consider some history. The rate of imprisonment in the U.S. varied little from the late nineteenth century until 1972.<sup>33</sup> Indeed, in the 1960s, as the crime rate more than doubled,<sup>34</sup> the populations of both state and federal prisons declined.<sup>35</sup> (Warren Court decisions increasing the bargaining power of defense attorneys might have had something to do with it.<sup>36</sup>)

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<sup>32</sup> See Lynn Adelman & John Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239, 246 (2008) ("Only judges can protect defendants from being punished excessively as a result of prosecutorial decisions . . . No other realistic check on prosecutorial power exists.").

<sup>33</sup> JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 1* (2017),

<sup>34</sup> U.S. DEPT. OF JUSTICE, *UNIFORM CRIME REPORTING STATISTICS*, <https://perma.cc/D9JR-9TbE> (showing a growth of 104% in the violent crime rate during the 1960s and a 109% rise in the property crime rate).

<sup>35</sup> MARGARET WERNER CAHALAN, *HISTORICAL CORRECTION STATISTICS IN THE UNITED STATES, 1850-1984* at 29 tbl.3-2 (1986), <https://perma.cc/B2QM-N6GU>.

<sup>36</sup> See Albert W. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 38



In 1972, however, the rate of imprisonment began a sharp ascent. At its peak in 2008, this rate was six times greater than it had been 36 years earlier. Specifically, the imprisonment rate had grown from 93 per 100,000 people in 1972 to 536 per 100,000 people in 2008.<sup>37</sup> The imprisonment rate then turned downward, but only slightly. Covid releases in 2020 produced a substantial drop, and there was a slight further decline in 2021. But the current rate—350 per 100,000 people—remains more than 3½ times what it was 50 years ago.<sup>38</sup> (Adding jail inmates to the imprisonment figures I’ve just recited makes the total incarceration rate in the United States 505 per 100,000 people.<sup>39</sup>)

What happened 50 years ago to spark America’s rush to mass incarceration? Of course, there were multiple causes, and, of course, determining their relative contribution may be impossible. The continuing rise in crime certainly played a part. One expert concludes, however, that increased crime accounts for only about half of the growth in imprisonment that occurred in the 1970s and 1980s.<sup>40</sup> After that, in 1991, the crime rate turned sharply downward while the imprisonment rate continued to grow for another 17 years. Increased crime couldn’t have caused that.<sup>41</sup>

I want to underscore two things that happened 50 years ago—the legitimization of plea bargaining and the embrace of sentencing reform. Plea bargaining was abundant before 1972, but the practice remained so disreputable that, in many courts, bargaining defendants were required to declare on the record that no promises had been made to induce their pleas.<sup>42</sup>

In 1967 and 1968, the American Bar Association and the President’s Commission on Law Enforcement and Administration of Justice concluded that it was time to bring plea bargaining from the shadows and to place plea agreements on the record.<sup>43</sup> Then, in 1970, the Supreme Court upheld the

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(1979) (quoting a statement of Massachusetts prosecutor Donald L. Conn in 1968: “If guilty pleas are cheaper today, it is simply because Supreme Court decisions have given defense attorneys an excellent shot at beating us.”).

<sup>37</sup> See PFAFF, *supra* note 33, at 1-2.

<sup>38</sup> E. Ann Carson, *Prisoners in 2021—Statistical Tables*, BUREAU OF JUSTICE STATISTICS (2022), <https://bjs.ojp.gov/library/publications/prisoners-2021-statistical-tables>; Ashley Nellis, *Mass Incarceration Trends*, THE SENTENCING PROJECT (Jan. 15, 2023), <https://www.sentencingproject.org/reports/mass-incarceration-trends/>.

<sup>39</sup> *United States Incarceration Rate*, WIKIPEDIA, [https://en.wikipedia.org/wiki/United\\_States\\_incarceration\\_rate](https://en.wikipedia.org/wiki/United_States_incarceration_rate) (last visited Mar. 7, 2023).

<sup>40</sup> See PFAFF, *supra* note 33, at 3-4.

<sup>41</sup> See *id.*

<sup>42</sup> See WILLIAM F. McDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 110 (1985) (referring to the “‘pious fraud’ of denying for the record that any promises, threats, or inducements had influence the plea”).

<sup>43</sup> ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS

constitutionality of plea bargaining.<sup>44</sup> A year later, as the prison population was about to burgeon, the Court observed: “Disposition of charges after plea discussions is not only an essential part of the [criminal] process, but a highly desirable part for many reasons.”<sup>45</sup>

The President’s Commission explained more specifically why plea bargaining was desirable: This practice “import[ed] a degree of certainty and flexibility into a rigid, yet frequently erratic system” and could “bring worthwhile flexibility to the disposition of offenders.”<sup>46</sup>

A few years later, Marvin Frankel proclaimed that our legal system had far too much flexibility in the disposition of offenders. Oddly, many of the people who lauded plea bargaining cheered Frankel too. These reformers might have seemed inconsistent, but they weren’t. Their principle was: *flexibility* for prosecutors, *law* for judges.

I wasn’t alone 50 years ago in predicting that the Frankel-proposed reforms would enhance prosecutorial power. When I expressed that view in 1977 at a conference on California’s new Determinate Sentencing Law, Lowell Jensen, the District Attorney of Alameda County, responded in effect: “Yes, of course, professor. Why do you think we DA’s supported the law?”<sup>47</sup> In Congress, Senators Ted Kennedy and Strom Thurmond co-sponsored the act that produced the federal guidelines. At the time, people wondered which one of them was selling the farm. Today we know the answer, and it wasn’t Senator Thurmond.<sup>48</sup>

The theme was similar in 2003 when Congress approved the PROTECT Act—that is, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act.<sup>49</sup> This legislation limited the ability of judges to reduce guidelines sentences. At the same time, it approved fast-track programs that offered sentences far below Guidelines

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RELATING TO PLEA OF GUILTY ((Tent. draft) ed. 1967) (approved by the ABA with minor modifications in 1978, *see* 2 Crim. L. Rep. 2419, 2422 (1968)); PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134-37 (1968).

<sup>44</sup> *Brady v. United States*, 397 U.S. 742 (1970). A century earlier, the Court had declared: “A man may not barter away his life or his freedom, or his substantial rights.” *Insurance Co. v. Morse*, 87 U.S. 445, 451 (1874).

<sup>45</sup> *Santobello v. New York*, 404 U.S. 257, 261 (1971).

<sup>46</sup> *Id.* at 135.

<sup>47</sup> *See* Alschuler, *supra* note 27, at 574 n.70. Jensen later became Deputy Attorney General of the United States and then a federal district judge.

<sup>48</sup> I’ve used that line before more than once. *See, e.g.*, Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 116 (2005).

<sup>49</sup> PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

levels to immigration and drug defendants who waived nearly all their procedural rights.<sup>50</sup>

When legislators jeer the disparity created by judges and cheer the disparity created by prosecutors, it's evident that their concern isn't disparity at all. Judge Frankel and many academics were easy marks for reformers whose goal was a system of harsh penalties controlled by prosecutors in which almost every defendant, if sane, would bend to the prosecutors' will. For many reformers, disparity was just a code word.<sup>51</sup>

As promised, I'll describe how prosecutors used their enhanced power. Did they obtain more guilty pleas, insist on broader waivers of rights, charge more people, or demand higher sentences? My answer won't surprise you: all of the above.

*More guilty pleas.* I erred when I said in 1989 that guilty plea rates were already so high they couldn't go much higher. Guilty pleas, which accounted for 87% of all federal convictions in the years before the Guidelines,<sup>52</sup> now account for 98%.<sup>53</sup> Indeed, more than a decade ago, fast track programs produced an "Ivory Snow" guilty plea rate of 99.4% in immigration cases.<sup>54</sup> An ABA task force on plea bargaining recently noted: "In the last decade, states like New York, Pennsylvania and Texas have all had trial rates of less than 3%. Some jurisdictions . . . report not having had a criminal trial in years."<sup>55</sup> Marc Miller remarks that guidelines "achieved the virtual elimination of trials in the federal system."<sup>56</sup>

*More sweeping waivers.* Before imprisonment rates began their ascent, agreements that included waivers of the right to appeal were rare or

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<sup>50</sup> See Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIM. 295, 295-97 (2004).

<sup>51</sup> Compare Lynch, *supra* note 10 at 239 ("It is hard to believe that Frankel could have been deaf to the ways in which his harsh description of judges as out of touch and incompetent to determine criminal justice policy echoed the political themes of the Nixon and Wallace presidential campaigns.").

<sup>52</sup> U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 30 (2004), <https://perma.cc/88AD-9VTP>.

<sup>53</sup> U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL 2021 at 30 (2022), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf).

<sup>54</sup> Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 203 (2014).

<sup>55</sup> ABA CRIMINAL JUSTICE SECTION, 2023 PLEA BARGAIN TASK FORCE REPORT 36 n.2 (2023), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf>.

<sup>56</sup> Marc L. Miller, *The Foundations of Law: Sentencing Equality Pathology*, 54 EMORY L.J. 271, 277 (2005).

nonexistent.<sup>57</sup> By 2003, however, nearly two-thirds of the plea agreements in a federal court sample included waivers of the right to appeal.<sup>58</sup> Prosecutors also routinely included a provision in fast-track agreements requiring defendants to waive their right to receive impeachment evidence. In 2002, the Supreme Court upheld these boilerplate waivers.<sup>59</sup> Although the Justice Department currently instructs prosecutors not to seek waivers of the right to the effective assistance of counsel, it has concluded that these waivers are “both legal and ethical.”<sup>60</sup>

*More prosecutions.* A study by John Pfaff concludes: “The primary driver of incarceration is increased prosecutorial toughness when it comes to charging people, not longer sentences.”<sup>61</sup> Pfaff reports that, as the likelihood of prosecution for a felony following an arrest doubled in a large group of states over a 14-year period, the likelihood that a felony charge would lead to conviction remained constant. Although the period Pfaff studied was one of declining crime and fewer arrests, the result was a 40% increase in the number of people sent to prison.<sup>62</sup> Other scholars have noted that studying a different period would have revealed a greater role for increased sentences and that using a different data set would have shown a smaller increase in felony filings.<sup>63</sup> The best judgment is probably that burgeoning incarceration rates should be “attributed about equally to . . . prison commitments per arrest and time served.”<sup>64</sup>

The story is somewhat different in the federal courts where a refusal to file felony charges often leads, not to prosecution for a misdemeanor or a trip home, but to prosecution in a different jurisdiction (and perhaps to a lower-than-federal felony sentence in a state prison). As Mona Lynch

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<sup>57</sup> See Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 128-29 (1995) (declaring that appeal waivers “emerged” “in recent years” and citing decisions in 1982 and 1986 that called these waivers “uncommon” and “not a widespread practice”).

<sup>58</sup> Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005).

<sup>59</sup> *United States v. Ruiz*, 536 U.S. 622 (2002); see *United States v. Mezenatto*, 513 U.S. 196 (1995) (upholding a waiver of the right to exclude from evidence statements made during plea negotiations).

<sup>60</sup> MEMORANDUM FROM DEPUTY ATTORNEY GENERAL JAMES M. COLE: DEPARTMENT POLICY ON WAIVERS OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL (Oct. 14, 2014), available at <https://www.justice.gov/opa/pr/attorney-general-holder-announces-new-policy-enhance-justice-departments-commitment-support>.

<sup>61</sup> PFAFF, *supra* note 33, at 6.

<sup>62</sup> *Id.*

<sup>63</sup> See Katherine Beckett, *Mass Incarceration and its Discontents*, 47 CONTEMP. SOC. 11, 17 (2018); Jeffrey Bellin, *Reassessing Prosecutorial Power through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 841 (2018); but see John F. Pfaff, *Prosecutors Matter: A Response to Bellin’s Review of Locked In*, 116 MICH. L. REV. ONLINE 165 (2018).

<sup>64</sup> ALLEN J. BECK & ALFRED BLUMSTEIN, TRENDS IN U.S. INCARCERATION RATES 1980-2010, at 27 (2012).

reports, however, an increase in the number of assistant U.S. Attorneys employed as prosecutors from 1636 (in 1980) to 3107 (in 1990), to 4938 (in 2000), and to 6,075 (in 2010) caused “exponentially more defendants . . . to be charged under federal statutes.”<sup>65</sup>

*Tougher sentences.* Between 1988 and 2012, the average time served by federal prison inmates more than doubled—from 17.9 to 37.5 months.<sup>66</sup> Mandatory minimum sentences and other tough-on-crime measures obviously contributed to this increase.<sup>67</sup> In addition, the fact that sentencing guidelines made every offer of a below-guidelines sentence appear to be a bargain probably enabled prosecutors to reduce the discounts they offered for guilty pleas. Moreover, the sentences set by sentencing commissions themselves tended to be harsher than those set by judges.

For example, the U.S. Sentencing Commission inserted the drug quantities specified by Congress’s mandatory minimum sentencing laws into a 17-level gradation of quantities and so imposed many sentences above the mandatory minimums. To bureaucrats who saw their jobs as judging drug cases wholesale rather than retail, this scheme was attractive because it avoided “cliffs.” The Sentencing Commission later reported: “About 25 percent, or eighteen months, of the average expected prison time of 73 month for drug offenders . . . can be attributed to guideline increases above the mandatory minimum penalty levels.”<sup>68</sup>

The lowest guidelines sentence on the federal Commission’s 258-box sentencing grid is a sentence of zero to six months. When a case lands in one of the boxes authorizing this sentence, a judge can comply with the guidelines without ordering incarceration. The guidelines, however, never require or presume that a judge should impose a non-incarcerative sentence. The Sentencing Commission, mindful that the criminal law is expected to deter, didn’t want to advertise in advance that some offenders wouldn’t be locked up. But it’s difficult for authorities to bark harder than they want to

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<sup>65</sup> MONA LYNCH, *HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT* [ch. 2 at n.48] (Russel Sage 2016); see Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 252 Tbl. 1 (2003) (showing that, in the seven years from 1994 through 2000, a period of declining crime, criminal filings in the federal district courts increased steadily from 50,802 to 73,090 while the percentage of matters presented by federal law-enforcement officers that prosecutors declined to prosecute fell from 36% to 26%).

<sup>66</sup> PEW, *PRISON TIME SURGES FOR FEDERAL INMATES: AVERAGE PERIOD OF CONFINEMENT DOUBLES, COSTING TAXPAYERS \$2.7 BILLION PER YEAR* (2015), <https://perma.cc/P4P2-BE4R>.

<sup>67</sup> See Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURVEY OF AM. L. 205, 223-25 (2021) (noting that the impact of mandatory minimum sentences came less from implementing them according to their terms than from their augmentation of prosecutorial bargaining power).

<sup>68</sup> U.S. SENTENCING COMM’N, *supra* note 52, at 54.

bite in a system of guidelines sentencing. Prior to the guidelines, about half of all federal offenders received non-incarcerative sentences. Today the figure is 10%.<sup>69</sup>

The Sentencing Commission claimed to base most of its guidelines on past sentencing practices. When it calculated past averages, however, it left out the sentences of offenders sentenced to probation, making its averages considerably higher than they would have been if these offenders had been included.<sup>70</sup> The guidelines thus gave America not merely sentencing by computer but methodologically flawed sentencing by computer.<sup>71</sup>

The concept of sentencing guidelines may not itself imply a penal philosophy, but describing the appropriate influence of personal and situational characteristics on punishment is difficult. Guidelines became crime tariffs primarily because it was easier to write them that way. Sentencing commissions counted the dollars, weighed the drugs, and forgot about more important things.

Aggregated sentences imposed at a distance by bureaucrats probably tend to be more severe than those imposed by officials familiar with the circumstances of individual cases. Sentencing “in the large” is usually tougher than sentencing “in the specific.”<sup>72</sup>

Moreover, it’s difficult for a sentencing commission to foresee how its aggravators and mitigators will overlap, interact, and compare with one another. When a commission approves one enhancement for brandishing a firearm and another for abducting a victim, it may not notice that, when these enhancements are combined, the prescribed punishment exceeds that set for someone who’s inflicted a life-threatening injury. Similarly, the commission may not notice that the sentencing range it’s set for someone who laundered stolen money exceeds the range it’s set for the thief herself, or that the punishment it’s specified for someone who sent a computer

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<sup>69</sup> PEW, MORE PRISON, LESS PROBATION FOR FEDERAL OFFENDERS (2016), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders>.

<sup>70</sup> The Commission had before it estimates of the percentage of offenders in each offense category who hadn’t been sentenced to prison, and it could lower its sentencing range when this percentage was high.

<sup>71</sup> See UNITED STATES SENTENCING COMMISSION, DISSENTING VIEW OF COMMISSIONER PAUL H. ROBINSON ON THE PROMULGATION OF SENTENCING GUIDELINES BY THE UNITED STATES SENTENCING COMMISSION 5 (May 1, 1987), available at <https://www.ojp.gov/pdffiles1/Digitization/105693NCJRS.pdf>; UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 21-39 (June 18, 1987), available at [https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987\\_Supplementary\\_Report\\_Initial\\_Sentencing\\_Guidelines.pdf](https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf).

<sup>72</sup> I developed this point in Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 937-38 (1991).

image of virtual child pornography (an image made without using an actual child) exceeds the range it's set for someone who raped a child.<sup>73</sup> Paradoxically, a human being who simply assesses “desert” in one case after another may be more likely to avoid moral errors and inequalities than a commission charged with ensuring equal treatment that approves aggravators because each of them sounds appropriate when viewed in isolation.

Finally, guidelines invite the use of a device called “Zimring’s eraser.” In 1976, during the dawn of sentencing reform movement, Franklin Zimring observed: “[I]t takes no more than an eraser to make a one-year ‘presumptive sentence’ into a six-year sentence for the same offense.”<sup>74</sup>

#### IV. MEET THE OUTLIER

Of course, the reforms urged by Marvin Frankel weren’t the only things that enhanced prosecutorial power and contributed to burgeoning imprisonment. Influential though Frankel’s book was, it probably didn’t cause the elections of Presidents Reagan and Clinton, the transformation of the Supreme Court, the proliferation of new crimes, the inadequate funding of indigent defense, the increased prosecution of juveniles as adults, the 100-to-1 powder-crack ratio, or any of a number of other misfortunes that befell the U.S. criminal punishment system in the half-century after the book appeared.

Frankel, however, would have been distressed to discover that his work played even a small part in creating America’s record-level imprisonment. Before this cascade of misery began in earnest, he wrote in *Criminal Sentences*: “[W]e in this country send far too many people to prison for terms that are far too long.”<sup>75</sup>

The most noted of Frankel’s judicial decisions was a sentencing decision in what Chicago judges call a “heater” case. This decision showed Frankel’s magnificent integrity, humanity, and courage. It ended all prospects of his appointment to the court of appeals.

Rabbi Bernard Bergman owned a group of nursing homes valued at \$28 million (\$150 million today). Allegations that these facilities were frequent scenes of filth, neglect, and abuse had been the subject of a state legislative hearing, but these allegations played no part in the federal and state criminal charges to which he pleaded guilty. The U.S. Attorney agreed to dismiss nine counts of an eleven-count federal indictment, and a special state

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<sup>73</sup> These illustrations are not hypothetical. See Alschuler, *supra* note 48, at 91-93.

<sup>74</sup> Franklin E. Zimring, *A Consumer’s Guide to Sentencing Reform: Making the Punishment Fit the Crime*, 6 HASTINGS CENTER REPORT 15, 17 (1976).

<sup>75</sup> CRIMINAL SENTENCES at 58.

prosecutor agreed not to seek a state sentence that would extend Bergman's imprisonment beyond whatever punishment the federal court imposed. Bergman pleaded guilty to charges of Medicaid fraud and tax fraud, and Judge Frankel sentenced him to four months in prison.

Frankel published an opinion to explain his sentence.<sup>76</sup> "For all but the profoundly vengeful," he declared, "[this sentence] should not depreciate the seriousness of [Bergman's] offenses."<sup>77</sup> Among the authors the opinion cited in the course of discussing sentencing issues were Immanuel Kant, Oliver Wendell Holmes, H.L.A. Hart, Johannes Andenæs, Norval Morris, Franklin Zimring, and Gordon Hawkins.

The *New York Times* was unimpressed. An editorial indicated that, rather than consult Andenæs, Frankel should have considered a tough-on-crime proposal then before the state legislature: "At a time when the Legislature is moving toward mandatory sentences of three years for juveniles convicted of serious crimes, a four-month sentence for a rich felon, guilty of a million-dollar fraud, can only reinforce cynicism about the realities of equal justice under law."<sup>78</sup> The *Times* added: "Mr. Bergman now joins a parade of formerly respectable white-collar criminal who have received sentences which make the odds on white collar crime look rather good."<sup>79</sup>

The special state prosecutor described Bergman's sentence as "special justice for the privileged." He declared that, as a result of this sentence, "those who lived in one of Bernard Bergman's nursing homes . . . must feel abandoned and alone once again" and that "employees in nursing homes where stealing and abuse is going on even today may now think twice before cooperating with this office."<sup>80</sup>

Judge Frankel's ruling came three years after *Criminal Sentences* called for reigning in outlier judges and reducing the disparate punishment of offenders. It came only a few weeks after Frankel enthusiastically endorsed a bill Senator Kennedy had introduced to create a sentencing commission for the federal courts.<sup>81</sup> Compared to the sentences of prominent white-

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<sup>76</sup> United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976).

<sup>77</sup> *Id.* at 502.

<sup>78</sup> *Equal Justice?*, N.Y. TIMES, June 18, 1976, at A22, available at <https://www.nytimes.com/1976/06/18/archives/equal-justice.html>.

<sup>79</sup> *Id.*

<sup>80</sup> *Excerpts from Court Statement*, N.Y. TIMES, June 18, 1976, at A19, available at <https://www.nytimes.com/1976/06/18/archives/excerpts-from-court-statement-text-of-prosecutors.html>.

<sup>81</sup> See Donald W. Dowd, *Introduction: What Frankel Hath Wrought*, 40 VILLANOVA L. REV. 301, 305-07 (1995). For a description of how Kennedy's bill became the Sentencing Reform Act, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223



collar offenders today, Bergman's four-month sentence is likely to seem appallingly low. Even in 1976, this sentence probably was less severe than those most other judges would have imposed. Somewhat like Pogo, whose 1970 Earth Day message was, "We have met the enemy and he is us,"<sup>82</sup> Frankel had found the enemy, and it was him.

Frankel the reformer now has vanquished Frankel the judge, though not in the way the reformer intended. Federal judges today probably would be astonished that the *Bergman* opinion failed even to mention the circumstance that now dominates fraud sentences under the Federal Sentencing Guidelines—the financial loss caused by the defendant's crime. The indictment in Bergman's case hadn't specified the amount of this loss; Bergman's admissions hadn't specified it; and Frankel sentenced Bergman only for the crimes he admitted.<sup>83</sup> Frankel's opinion did mention Bergman's age and imperfect health and his previously "illustrious public life and works."<sup>84</sup>

Although Frankel's opinion failed to reveal the extent of Bergman's fraud, later state-court proceedings led to an order that Bergman make restitution to the Medicaid program of \$2.5 million.<sup>85</sup> That sum would be \$13 million in today's dollars, and the guidelines' financial loss tables have been revised to take account of inflation.<sup>86</sup> I won't attempt a precise recalculation of Bergman's sentence under today's guidelines. To do so would require, among other things, determining whether Bergman's "means" were "sophisticated"<sup>87</sup> and what weight, if any, his second conviction for a tax offense should have.<sup>88</sup> But the guidelines apparently would set a base offense level of 6 for Bergman's principal crime, direct a 20-level increase for a loss of more than \$9.5 million, and direct an

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(1993).

<sup>82</sup> *We Have Met the Enemy and He is Us*, BILLIE IRELAND CARTOON LIBRARY AND MUSEUM, THE OHIO STATE UNIVERSITY, <https://library.osu.edu/site/40stories/2020/01/05/we-have-met-the-enemy/>.

<sup>83</sup> See *Bergman*, 416 F. Supp. at 503 (supplemental sentencing memorandum on adjournment of surrender).

<sup>84</sup> *Id.* at 501; but see U.S. Sent'g Guidelines Manual § 5H1.11 ("[P]rior good works are not ordinarily relevant in determining whether a departure [from the guidelines] is warranted.").

<sup>85</sup> See Ronald Sullivan, *Bernard Bergman, Nursing-Home Figure, is Dead*, N.Y. TIMES, June 24, 1984, at B6, available at <https://www.nytimes.com/1984/06/22/obituaries/bernard-bergman-nursing-home-figure-is-dead.html>.

<sup>86</sup> See U.S. Sent'g Guidelines Manual 2021, Supp. to App. C at 94-102 (Amendment 791, effective Nov. 1, 2015), available at [https://www.uscourts.gov/sites/default/files/pdf/guidelines-manual/2021/APPENDIX\\_C\\_Supplement.pdf](https://www.uscourts.gov/sites/default/files/pdf/guidelines-manual/2021/APPENDIX_C_Supplement.pdf).

<sup>87</sup> See U.S. Sent'g Guidelines Manual § 2B1.1(b)10(C).

<sup>88</sup> See *id.* at § 5G1.2.

additional 3-level increase because the defendant caused a loss of more than \$7 million to a “Government health care program.”<sup>89</sup>

Bergman might not be entitled to a 2-level reduction for “clearly demonstrat[ing] acceptance of responsibility for his offense.”<sup>90</sup> Even after his guilty plea, he blamed his crime primarily on his accountant.<sup>91</sup> If Bergman were to receive this adjustment, however, his offense level would be 27. For a first-offender, that level would yield a guidelines sentencing range of 70 to 87 months. With a sentence 18 to 22 times more severe than the one Judge Frankel imposed in 1976—a sentence 50% longer in years than Frankel imposed in months—the father of sentencing reform would truly be reined in. Should we shout *huzzah*?

Or rather Frankel the judge would be reined in if he followed, or at least was influenced by, guidelines that are now advisory. In some recent years, more than half the federal sentences for theft and fraud offenses have been outside the guideline range,<sup>92</sup> suggesting that these guidelines might have harnessed outliers less than Frankel the reformer hoped. (In 1992, when the guidelines were mandatory, Frankel favored relaxing their standard for downward departure but opposed making the guidelines advisory.<sup>93</sup>)

Evidently, the fraud guidelines don’t get much respect from judges, and some judges have voiced their views vividly. Judge Frederic Block wrote that the fraud guidelines are “a black stain on common sense.”<sup>94</sup> In one opinion, Judge Jed Rakoff called them “patently absurd on their face,”<sup>95</sup> and, in another, he wrote that they appear to be “more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology—thus maximizing the risk of injustice.”<sup>96</sup> In a case in which the defendant participated in a \$200 million fraud but took no payment, Judge Nancy Gertner commented that the guidelines were “of no help.”<sup>97</sup>

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<sup>89</sup> See *id.* at § 2B1.1(b)1 & 7.

<sup>90</sup> See *id.* at § 3E1.1(a).

<sup>91</sup> See John L. Hess, *Bergman Draws a 4-Month Term*, N.Y. TIMES, June 18, 1976, at A1, available at <https://www.nytimes.com/1976/06/18/archives/bergan-given-4-months.html>.

<sup>92</sup> See Mark W. Bennett, Justin D. Levinson & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 989 (2017); UNITED STATES SENTENCING COMMISSION, QUICK FACTS: THEFT, PROPERTY DESTRUCTION, AND FRAUD OFFENSES 2014 at 2, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft\\_Property\\_Destruction\\_Fraud\\_FY17.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft_Property_Destruction_Fraud_FY17.pdf).

<sup>93</sup> Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2050 (1992).

<sup>94</sup> *United States v. Parris*, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008).

<sup>95</sup> *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006).

<sup>96</sup> *United States v. Gupta*, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012).

<sup>97</sup> *United States v. Watt*, 707 F. Supp. 2d 149, 151 (D. Mass. 2010).

Judge Stefan Underhill called them “fundamentally flawed,”<sup>98</sup> “valueless in this case,”<sup>99</sup> and “wholly arbitrary.”<sup>100</sup>

Perhaps these grumblers were all soft on crime. Or perhaps they knew something about the offenders they sentenced and about their crimes, and perhaps that enabled them do a better job of determining punishment than distant bureaucrats who saw their mission as devising crime tariffs.

Judge Frankel concluded *Criminal Sentences* with another elegant sentence I applaud. Everyone else probably embraces it too. But, after 50 years, how best to carry out Frankel’s charge remains uncertain. He wrote: “It is our duty to see that the force of the state, when it is brought to bear through the sentences of our courts, is exerted with the maximum we can muster of rational thought, humanity, and compassion.”

Amen, Marvin, and rest in peace.

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<sup>98</sup> United States v. Corsey, 723 F.3d 366, 377 (2d Cir. 2013) (Underhill, J., dissenting).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 379.