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## Doing Injustice: Exchanging One “Arbitrary, Cruel, and Reckless” Sentencing System for Another

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# Doing Injustice: Exchanging One “Arbitrary, Cruel, and Reckless” Sentencing System for Another

Marvin Frankel suffered neither from lack of self-confidence nor from excessive modesty. Even so, if he's paying attention, he must be surprised that the little book he liked to say was dashed off during a few weeks of summer vacation at the beach is having a Golden Jubilee celebration. I am one among many who were invited to write something about *Criminal Sentences—Law without Order* for this double issue of *Federal Sentencing Reporter*, probably because I knew Frankel, have been writing about sentencing for nearly a half-century, and was for several decades involved in federal and state “reform” initiatives. *FSR*, it warrants mention, would not exist but for Marvin Frankel.<sup>1</sup> Since I assume others provide detailed exegeses of the book, I touch only lightly on its core proposals and mainly discuss two other subjects: the intellectual and political soil from which Frankel's ideas emerged and with hindsight what he got right and what wrong.

Probably I'm one of only a handful of people who remember reading *Criminal Sentences* when it appeared in 1973. That was not because I had a particular interest in sentencing—that came later—but because I had read an admiring review in the *New York Review of Books*. Within a few years, however, Norval Morris, then dean of the University of Chicago Law School, persuaded me that sentencing law and policy were virgin territories in which a beginning law professor if lucky might make a mark. By 1978, I had published my first article on sentencing policy and with Norval established a proto-sentencing commission project to pretest Frankel's ideas. He participated, as did other worthies including U.S. Deputy Attorney General Harold Tyler, U.S. Bureau of Prisons director Norm Carlson, U.S. Parole Commission research director Peter Hoffman, and the U.S. Department of Justice's criminal law reform guru Ronald Gainer. The group met a number of times and—even in a simulation—ran into the problems of outsized egos and intellectual rigidity that bedeviled the U.S. Sentencing Commission's early years.<sup>2</sup> Later yet, on the twentieth anniversary of the publication of *Criminal Sentences*, I published an appreciation entitled “The Success of Judge Frankel's Sentencing Commission.”

I provide that autobiographical detail on the rationale that anyone who has read this far, and is considering reading further, would benefit from knowing what kind of person wrote this article, and from what perspectives. Here

is what, fifty years on, I think about *Criminal Sentences—Law without Order*.

Frankel's characterization of American sentencing remarkably successfully distilled ideas that were in the air and emerging. His main proposals—a sentencing commission, sentencing rules, requirements that judges explain their decisions, and meaningful appellate sentence review—would in a better America go a long way toward establishing the kind of rational, humane, and just process he imagined. Despite some early, partial successes, however, Frankel's proposals remain largely untested. In retrospect, he underestimated, misunderstood, or chose to ignore formidable political impediments to serious sentencing reform in late-twentieth-century America. He also largely ignored two intractable problems: America's extraordinarily long maximum and often—his word—bizarre authorized prison sentences and the overweening powers, then and more now, of American prosecutors. Despite all that, *Criminal Sentences—Law without Order* is a remarkable accomplishment. The ideas were ahead of their time. The writing is simple, clear, often witty, sometimes eloquent, an exemplar of good writing for lay people about legal subjects. In some gentler, kinder future its proposals may show the way to creation of American sentencing systems that take justice and human dignity seriously.

## I. The Climate of the Times

*Criminal Sentences* appeared at the cusp of what we now recognize as a paradigm shift away from the indeterminate sentencing systems that took shape in the final third of the nineteenth century and by the 1930s blanketed the United States. Judges decided who among people convicted of crimes received probation, fines, or short stays in local jails, and who went to prison. Judges usually could set minimum or maximum prison terms, or both, but almost all prison sentences were indeterminate. Parole boards decided when prisoners got out. The creators of indeterminate sentencing wrote and apparently believed that most crimes were products of adverse social and economic circumstances in offenders' lives or of their psychological or mental health difficulties and that the primary function of the prison was to address those problems (e.g., Wines 1880; Brockway 1912). By the 1930s, a near consensus existed that the prison's primary missions were to rehabilitate most



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offenders and incapacitate the unsalvageable few (e.g., Glueck 1928; Michael and Adler 1932; Michael and Wechsler 1937, 1940). That view long endured and suffused the *Model Penal Code* (American Law Institute 1962). Herbert Wechsler, then America's preeminent criminal law scholar and the *Code's* primary draftsman, made its premise clear in 1961: "The rehabilitation of an individual who has incurred the moral condemnation of the law is in itself a social value of importance, a value, it is well to note, that is and ought to be the prime goal" (p. 468).

We know in retrospect that indeterminate sentencing's foundations were crumbling when Frankel wrote *Criminal Sentences*, but it was far from obvious. Proposals for improvement of indeterminate sentencing, not its abandonment, were made by the President's Commission on Law Enforcement and Administration of Justice in 1967, the National Commission on Reform of Federal Criminal Laws in 1971, the Advisory Council of Judges of the National Council on Crime and Delinquency in 1972, and the National Advisory Commission on Criminal Justice Standards and Goals in 1973.

Frankel called for abandonment, with possible narrow exceptions, grudgingly conceded, for incapacitation of some seemingly incorrigible offenders and rehabilitation of a few small groups for whom effective treatments were or might become available. Otherwise he proposed a regime of fixed sentences imposed under published standards, fully explained by the sentencing judge, and subject to a meaningful system of appellate sentence review.

Wow, was he ever ahead of his time. Within a couple of years a handful of academics offered somewhat similar proposals (Norval Morris in 1974, Andrew von Hirsch in 1976, and Alan Dershowitz also in 1976), but not so comprehensively, and traveling in Frankel's wake.

Frankel had been a federal district court judge since 1965 when he wrote *Criminal Sentences* and before that a commercial law litigator with a New York City law firm. Unlike the others I mentioned, he was not an academic. His had been a career composed of real, full-time jobs, and yet he somehow distilled from the air awareness of a series of intellectual and cultural changes that were not yet widely recognized.

Looking back it is clear that the case for indeterminate sentencing had long been crumbling. C. S. Lewis, in 1949 in an article in an obscure Australian journal, and Anthony Burgess in 1962 in *A Clockwork Orange*, offered powerful critiques of the morality of indeterminate sentencing and of the state messing with people's lives, minds, and souls. Among philosophers, John Rawls in America in 1955 and H.L.A. Hart in England in 1959 proposed that assessments of moral culpability and deserved punishment should be at least part of the judge's sentencing calculus; rehabilitative considerations alone were not enough. Criminal law professor Francis Allen in 1959 in an article, "Legal Values and the Rehabilitative Ideal," offered a powerful critique of the ineffectiveness, nonfeasibility, and defective operation of correctional rehabilitation efforts. In 1969, administrative

law professor Kenneth Culp Davis in *Discretionary Justice* launched a powerful attack on the unfettered discretions of prosecutors and parole boards and urged instead that their decisions be guided by rules and subject to appeals. Don M. Gottfredson and Leslie T. Wilkins of the National Council on Crime and Delinquency, recognizing the injustices of unconstrained parole board discretion, began working with the U.S. Parole Board in 1969 to develop enforceable guidelines for release decisions (U.S. Parole Commission 2003, pp. 17–19). In 1971, Gene Kassebaum and colleagues published the first major empirical critique of the ineffectiveness of rehabilitative programs. Finally, also in 1971, a committee of the American Friends Service Committee in *Struggle for Justice* decried the gross disparities indeterminate sentencing inevitably produced and emphasized the risks and realities of racial discrimination and judicial caprice that its broad discretions enabled.

All of those developments were in the intellectual ether. How aware of them Frankel was is unknowable. He alludes in passing to Kenneth Culp Davis's book and a book by Francis Allen (1964) that reprints the 1959 article. Probably he had read and surely he knew of *A Clockwork Orange*; the then controversial film appeared in 1971. He offered a harsh critique of parole board processes without mentioning the nascent federal guidelines; presumably he was unaware that Gottfredson and Wilkins were working on them (they also led development of the first, "voluntary," sentencing guidelines in the mid-1970s; Gottfredson, Wilkins, and Hoffman [1978]). Whatever Frankel may have read or known, *Criminal Sentences* resonates to almost all those developments and critiques—disparities, the limits and realities of rehabilitation, the absence of rules for decisions, lack of accountability of decision makers, and countless injustices.

There were two important ideas in the air that he discussed only obliquely. The first is the significance of offenders' moral responsibility and culpability; he might reply by saying that they were implicit in what he wrote. Retributivism, popularized a few years later as "just deserts" (von Hirsch 1976), has for centuries been contrasted to the utilitarianism, in our time "consequentialism," that undergirded indeterminate sentencing. C. S. Lewis and Anthony Burgess in stronger versions, and John Rawls and H. L. A. Hart in weaker ones, had all urged that moral culpability is a necessary consideration in thinking about justice in punishment of people convicted of crimes. My guess is that Frankel was unaware of the philosophers' writings. He several times referred vaguely and dismissively to theories of punishment, but let it go at that. No doubt he was sensitive to the issues. They were implicit in his proposal for creation of rules for sentencing. Almost inevitably a system of rules would relate the offenses of which individuals are convicted to the punishments they should receive. It is possible, I suppose, to imagine sentencing rules based only on rehabilitative or incapacitative considerations, but given Frankel's

denunciation of rehabilitation and his skepticism about incapacitation he unlikely had these in mind.

The other under-developed subject is race. Frankel provided a number of examples of gross racial injustice in sentencing decisions, so the subject is clearly one he recognized and was troubled by. The 1971 Attica prison massacre (that's not polemic; it's what it was) occurred in New York while he was writing *Criminal Sentences*, or just before, and he refers to Bob McKay who chaired the New York State Official Commission on Attica (1972). Were Frankel alive, I'd want to ask him why he gave so much attention and lineage to disparities simpliciter and so little to racial bias, discrimination, and disparity.

## II. Roads Not Taken

*Criminal Sentences* is, as a concrete set of proposals to remedy real-world problems, surprisingly incomplete. Two fundamental complications—political realities and prosecutorial powers—go unmentioned, and a third, statutory sentence maximums, is introduced in the first few pages as an important problem but does not reappear in his proposals. In practice, law and order politics stymied most efforts to implement Frankel's ideas. Prosecutorial actions and crazy quilts of inconsistent and ornately severe sentence maximums fundamentally undermined them.

### A. Politics

It may or may not be a bad rap to criticize Frankel for failing to discuss political realities and how they might have been addressed. In retrospect, they hamstrung the work of the U.S. Sentencing Commission, which should have and—in terms of visibility and resources—could have been, the embodiment of Frankel's proposals. Its devastating failure had by the early 1990s become the principal barrier, seldom overcome, to establishment of state sentencing commissions and guidelines. Kevin Reitz, at the founding meeting in 1993 of the National Association of Sentencing Commissions, explained why the American Bar Association's Standards for Sentencing, of which he was a co-reporter, described its mission as “structuring sentencing” rather than “developing sentencing guidelines” (Reitz 1993). The federal guidelines were so controversial and disliked that state policymakers, who often had no knowledge of the successful state systems in Minnesota, Washington, and Oregon, typically opposed guidelines on the assumption they would resemble the discredited federal example (Reitz and Reitz 1993, pp. 70–71).

None of us have crystal balls. Frankel cannot fairly be blamed for what happened, but even so he was politically savvy and might have been expected to worry about unintended consequences. Frank Zimring (1977) a few years later warned that numerical standards for sentences can easily be undermined by perverse political changes. Numbers written on a blackboard in a legislative committee room can be changed with an eraser and chalk. That happened in the federal system and in many states.

Conservatives in the U.S. Senate larded the *Sentencing Reform Act of 1984* with provisions intended to assure severe punishments; the U.S. Sentencing Commission's initial members rigorously applied them. That its two most politically influential members, federal judges William Wilkins and Stephen Breyer, were angling respectively for the FBI directorship and eventual appointment to the U.S. Supreme Court may not have been irrelevant.<sup>3</sup> The Congress and many states, preeminently Oregon, enacted mandatory minimum sentence laws that trumped the guidelines and undermined achievement of their goals of consistency and fairness. Conservatives in Minnesota, long and rightly regarded as having most successfully implemented Frankel's proposals, reacting to a couple of notorious murders in the early 1990s, doubled many presumptive sentence lengths in Minnesota's guidelines.<sup>4</sup>

It's unknowable why Frankel did not discuss the foreseeable political difficulties involved in trying to improve American sentencing. Optimists will have been aware that the U.S. Congress in 1970 repealed most federal mandatory minimum sentence laws then in effect, and that America's imprisonment rate had been declining since the early 1960s. Pessimists, however, will have noted that “crime in the streets” became and remained a Republican mantra after Barry Goldwater introduced it in the 1964 presidential election, that President Lyndon Johnson's Law Enforcement Assistance Administration devoted most of its attention to police innovation, that President Richard Nixon launched wars on drugs and crime before Frankel started writing, and that conservatives condemned and vowed to reverse the Warren Court's criminal procedure decisions.

That mixed picture continued throughout the 1970s after which it became, and remains, relentlessly grim. During the 1970s, forty-nine states enacted mandatory minimum sentence laws, mostly modest, calling for weekend jail terms for drunk drivers, or one- or two-year minimums for other offenses (Shane-DuBow, Brown, and Olsen 1985), but almost as many experimented with voluntary systems of sentencing guidelines (Blumstein et al. 1983). California in 1976 enacted its Uniform Determinate Sentencing Law, the first widely publicized state sentencing reform legislation; it built rudimentary sentencing standards into its criminal code. The legislative histories emphasize that both conservatives and liberals supported the new law, but with mixed and different goals (Parnas and Salerno 1978; Messinger and Johnson 1978). Liberals wanted to reduce disparities and bias and make procedures fairer, conservatives to reduce judicial discretion and make sentences more severe. In California, and generally in the United States, conservatives' aims were much more often achieved.

Alfred Blumstein of Carnegie-Mellon University often developed that theme in public lectures and private conversations. Liberals won symbolic victories, conservatives substantive ones. Liberals, for example, “achieved” juvenile court reforms that made processes fairer, but conservatives obtained reductions in the courts' jurisdictional age,

expanded prosecutorial powers to prosecute young people in adult courts, and enacted laws providing that anyone charged with particular crimes, whatever their age, be tried and punished in adult criminal courts. Liberals in a handful of states “achieved” enactment of legislation creating sentencing commissions and authorizing presumptive guidelines, but most conservatives saw to it that guidelines specified sentences of unprecedented severity. That is not what Frankel wanted: “We in this country send far too many people to prison for terms that are far too long. . . . It is my belief that prison terms ought on the whole to be much shorter. Also, that some considerable percentage of those we send to prison ought not to be so confined” (1973, pp. 58–59).

Whether sentencing in America would today be fairer and more just had commissions and guidelines not been created is unknowable. In 2013, I wrote an article on Canadian sentencing reform entitled “‘Nothing’ Works: Sentencing ‘Reform’ in Canada and the United States” that explored this question. The Canadian Sentencing Commission in 1987, the year federal U.S. guidelines took effect, proposed legislation to establish a permanent commission and promulgate guidelines. It was never enacted. Smaller piecemeal laws were enacted, such as specifying governing purposes for sentencing, but nothing comprehensive or transformative. Canadian sentencing laws and processes are little different in 2023 than they were fifty years ago. It is probably not coincidental that Canada’s imprisonment rate has fluctuated around 100 per 100,000 population since 1973 (83 in 2020) and America’s rate in 2021 (530) was four times higher than in 1973.

## B. Prosecutors

Prosecutors and plea bargaining are conspicuously absent from *Criminal Sentences*. That is astonishing. After seven years as a federal district court judge, Frankel knew that prosecutors control charging generally, that they alone decide whether to file charges subject to mandatory minimums, and that the vast majority of cases are resolved through plea bargaining. He must have foreseen that guidelines that meaningfully restrained sentencing discretion, thereby making decisions more predictable, would enable prosecutors to charge and bargain to the guidelines. Guidelines would in effect become semi-mandatory. He moved in circles where he would have been aware of the American Bar Foundation’s decade-long empirical studies of state criminal courts that documented prosecutors’ charging powers, especially concerning mandatorys (Dawson 1969; Remington 1969). Lloyd Ohlin and Frank Remington, director of the ABF project, published an article in *Law and Contemporary Problems* in 1958 that gave rise to what in the 1970s became known as the hydraulic theory of sentencing discretion. Discretion exists; removing it from one official, or reducing it, shifts it someplace else. Frankel knew that. The federal guidelines since the day they took effect have been disparaged for transferring effective control of sentencing from judges to prosecutors.

We know that what Remington and Ohlin described is what happened, in a strong form in the federal guidelines system and less strongly in the states. As Second Circuit Court of Appeals judge Gerald Lynch famously observed:

The prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant and his counsel not in a court, but to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty. Mitigating information, similarly, is argued not to the judge, but to the prosecutor, who decides what sentence the defendant should be given in exchange for his plea. (Lynch 2003, pp. 1403–4)

I have no idea what Frankel was thinking. The issue arose in the first meeting of our sentencing commission simulation. I wrote a “key issues” background paper and with Norval Morris set the agenda. Prosecutorial discretion ranked high among the issues for discussion. Norval and I argued that the mock commission should develop and propose guidelines for prosecutors lest they be able always to game the system. Harold Tyler, the Deputy Attorney General, was adamant that prosecutorial guidelines was an inappropriate subject for discussion. Frankel agreed. No discussion ensued.

It’s a mystery. What Judge Lynch described was foreseen and happened.

## C. Maximums

Given that judges’ sentencing authority is defined by criminal code provisions specifying authorized punishments, and those provisions are often inconsistent and sometimes bizarre, why didn’t Frankel propose rationalization? I’ve no idea. I’ve long been proposing that (e.g., Tonry 1982, 1988, 2016). The following long quotation makes it clear beyond peradventure of doubt that Frankel understood the problem.

Let me recall only a few examples [of indefensible authorized punishment provisions] from the federal criminal code, with which I work. An assault upon a federal officer may be punishable by a fine and imprisonment for “not more than” ten years. The federal kidnapping law authorizes “imprisonment for any term of years or for life.” Rape, which (believe it or not) may be a federal offense, leads to “death, or imprisonment for any term of years or for life.” To take some of our most common federal crimes—driving a stolen car across state lines may result in a term of “not more than five years,” robbing a federally insured bank “not more than twenty-five years,” and a postal employee’s theft of a letter “not more than five years.” The key phrase is, of course, the “not more than.” It proclaims that federal trial judges, answerable only to their varieties of

consciences, may and do send people to prison for terms that may vary in any given case from none at all up to five, ten, thirty, or more years. This means in the great majority of federal criminal cases that a defendant who comes up for sentencing has no way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between. (Frankel 1973, pp. 5–6)

Enormous lengths of authorized prison sentences and the remarkably broad ranges of sentences they permit pose problems Frankel recognized, and rued. In the federal guidelines system, those lengths led to two of the guidelines' many major problems—the 43-level grid and the extraordinarily long presumptive sentences they specified. Federal Court of Appeals judges Stephen Breyer, a commission member, and Jon Newman, an advisor, for reasons they may remember but I have never understood or been able to imagine, successfully persuaded the original commission that guidelines should specify presumptive sentences up to the authorized statutory maximums. Given that the 1984 Act required that guideline ranges be relatively narrow (the top exceeding the bottom by no more than 25 percent), the 43-level grid and exorbitantly lengthy prison terms were necessary mathematical results. The only reason for the judges' view I've ever heard is that the aim was to respect congressional intent in specifying the maximums. That is a strange argument since it assumes that statutory maximums are products of rational calculations, which they often are not. Statutes specifying maximum sentences for particular crimes are, instead, enacted one by one over decades or centuries, often catalyzed by notorious crimes that legislators of the moment want emphatically to denounce. Frankel: "Many of our criminal laws are enacted in an excess of righteous indignation, with legislators fervidly outshouting each other, with little thought or attention given to the large numbers of years inserted as maximum penalties" (1973, p. 9). That is one reason why the *Model Penal Code* (and with modifications state codes based on it) classified all felonies into three classes, each bearing a single set of authorized punishments. Federal offenses have never been classified in that way.

Here's another long quotation that describes a second set of authorized punishment problems that Breyer recognized but for which he proposed no solution:

Beyond their failure to impose meaningful limits upon the judges, our criminal codes have displayed bizarre qualities of illogic and incongruity. Studies in the recent past revealed such things as these: a Colorado statute providing a ten-year maximum for stealing a dog, while another Colorado statute prescribed six months and a \$500 fine for killing a dog; in Iowa, burning an empty building could lead to as much as a twenty-year sentence, but burning a church or school carried a maximum of ten; breaking into a car

to steal from its glove compartment could result in up to fifteen years in California, while stealing the entire car carried a maximum of ten. Examples like these could be multiplied. (Frankel 1973, pp. 8–9)

Those "bizarre qualities of illogic and incongruity" are why Judges Breyer's and Newman's insistence that guidelines fill in all the spaces created by maximum sentence provisions was also bizarre. Just about everyone who has considered the subject, including, for example, the National Commission on Reform of Federal Criminal Law (1971), has recognized this and like the *Model Penal Code* proposed rationalization of offense classifications and authorized punishments. Frankel recognized the problem but did not offer a solution.

Bizarre inconsistencies in maximum authorized sentences are almost inevitable in jurisdictions such as the U.S. federal system that have never adopted a comprehensive criminal code. The National Commission on Reform of Federal Criminal Law proposed one. Numerous federal code bills were introduced in the 1970s. The effort was abandoned in the early 1980s.

In England and Wales, which likewise has never enacted a comprehensive criminal code despite many proposals, the Advisory Council on the Penal System (1978) proposed a solution. Maximum sanctions for ordinary offenses should be set, in effect presumptive guidelines, well below the authorized maximums; those lower limits could be exceeded only if the judge made designated findings of fact relating to special dangers to the public. This is close to the system proposed in the *Model Penal Code*, which specified upper limits for most cases well below the statutory maximums; those lower limits could be exceeded only if special findings were made concerning dangerousness or organized crime.

Frankel would have been familiar with the *Model Penal Code* and that many states, including New York where he lived and practiced, were then enacting new codes based on it. He could easily have offered its approach as a partial solution to the bizarre maximums problem. By 1973, when *Criminal Sentences* appeared, it was clear that the proposal to enact a federal criminal code was controversial and faced powerful opposition. He would have known that, which meant he could not assume that federal law would contain a rational system of offense classes when and if a sentencing commission was created. He either didn't think about how sentencing rules would relate to statutory maximums, or for some reason chose to ignore the problem. Another mystery.

### III. "Arbitrary, Cruel, and Reckless"

That's how Frankel described American sentencing practices as they were when he wrote *Criminal Sentences*. His proposals were intended, he said, to offer a path toward something much better. Experience in Minnesota, Washington, and Oregon in the 1980s showed that his core proposals of a commission, guidelines, reasons requirements, and appellate review could achieve much of what he hoped for.

Those commissions exercised their authority responsibly, judges by and large complied with guidelines, sentencing disparities generally and racial disparities in particular declined, and appellate courts began to develop a jurisdictional jurisprudence of sentencing.

Fortunately, Frankel lived to see those successes and no doubt believed his sacrifice of beach time back in 1971 had been justified. In the longer term the story is less rosy. The federal guidelines experience was and remains a disaster. There was lots of backsliding in the successful pioneering states, some of which I've mentioned. States that adopted guidelines after the 1980s did so primarily in hopes of saving money, not of improving the quality of justice in sentencing.

Frankel's proposal didn't fail. America changed. Earlier I observed that the time was right for the book he wrote. Indeterminate sentencing was in fatal decline, though this was not yet widely recognized. "Determinative" sentencing was about to emerge. That happened. In one way or another—voluntary sentencing guidelines, presumptive guidelines, parole guidelines, abolition of parole release—efforts were made in every state in the 1970s to replace some or all of their indeterminate sentencing systems. A handful of states—Colorado, Arizona, Illinois, Indiana, North Carolina—followed California's lead and built rudimentary sentencing standards into their criminal codes. Senator Kennedy in 1975 introduced Senate Bill 2699 to establish a federal commission and guidelines. Minnesota and Pennsylvania in 1978 enacted the first sentencing commission legislation. Even the forty-nine states that enacted mandatory minimum sentencing laws in the 1970s can be comfortably counted as part of the sentencing reform enthusiasm of the time for fixed sentences. Mandatory weekend terms for DUI offenders and one- and two-year minimums for other offenses fit comfortably with Frankel's call for fixed sentences.

The determinate sentencing period, however, didn't last long. America was at another, more fundamental cusp, from what Herbert Packer in 1968 described as a due process model of criminal justice to a politicized crime control model. By the mid-1980s, the ideas and ideals that motivated Frankel, and concern about sentencing disparities and procedural fairness, largely disappeared in American legislatures. Conservatives hijacked the federal commission and created the harshest, most rigid and mechanistic sentencing system that has ever existed anywhere. State and federal legislators began enacting mandatory minimum sentence laws setting terms of five, ten, and twenty years and sometimes more. Three strikes, truth-in-sentencing, lengthier mandatory minimum, and a slew of life without parole laws followed in the 1990s. None of these developments reflected Frankel's themes of fair procedures, accountability, and reduced disparities.

Frankel and his proposals bear no responsibility for what happened. Although an argument could be made that mandatory minimum, three strikes, and truth-in-sentencing laws are simply variations on his theme of fixed sentencing, they would have happened whether or not he wrote

*Criminal Sentences*. Indeterminate sentencing was collapsing and would have collapsed in any case. The shift away from sentencing nominally based on rehabilitative considerations and toward punishments based largely on the offenses of which people are convicted was happening before Frankel wrote. Guidelines that attached numbers to parole release standards and sentencing were emerging and would have continued to develop. The relatively benign mandatory minimums of the 1970s provided a base on which their malign successors were built. The tragedy of *Criminal Sentencing* is that it creatively distilled the ideas immanent in the cusp of change from indeterminate sentencing to something else and succumbed at the cusp of change from due process conceptions of criminal justice to an "arbitrary, cruel, and reckless" conception of politicized crime control.

## Notes

- <sup>1</sup> No doubt an obscure assertion to the 99-plus percent of possible readers who were not federal sentencing reform insiders in the 1970s and 1980s. Here's the story. Daniel S. Freed, then Guggenheim Professor at Yale Law School, organized seminars, in which Frankel participated, to work out the details of a concrete proposal for a federal sentencing commission (memorialized in O'Donnell, Curtis, and Churgin 1977). That proposal was the basis for Senate Bill 2699 introduced in 1975 by Senator Edward Kennedy, the first of a long series of sentencing commission bills that culminated in the *Sentencing Reform Act of 1984*. Freed, who long served as chair of the board of directors of the Vera Institute of Justice, remained extensively involved in federal sentencing reform initiatives for the rest of his life. He and Michael E. Smith, Vera's longtime director, developed the *FSR* idea and sold it to University of California Press. Vera in the early years provided staff and funding. But for Frankel's book...
- <sup>2</sup> *FSR* much later published a brief summary of what we learned (Tonry 2009).
- <sup>3</sup> Wilkins, a Strom Thurmond protégé, did not get the directorship but was promoted to a federal Court of Appeals. Breyer achieved his ambition under President Bill Clinton.
- <sup>4</sup> Details are provided in Tonry (1996, 2016) and Frase (2013).

## References

- Advisory Council of Judges, National Council on Crime and Delinquency. 1972. *Model Sentencing Act*, 2nd ed. Hackensack, NJ: National Council on Crime and Delinquency.
- Advisory Council on the Penal System. 1978. *Sentences of Imprisonment: A Review of Maximum Penalties*. London: Home Office.
- Allen, Francis A. 1959. "Legal Values and the Rehabilitative Ideal." *Journal of Criminal Law, Criminology, and Police Science* 50: 226-32.
- Allen, Francis A. 1964. "Legal Values and the Rehabilitative Ideal." In *The Borderland of Criminal Justice: Essays in Law and Criminology*. Chicago: University of Chicago Press.
- American Friends Service Committee. 1971. *Struggle for Justice: A Report on Crime and Punishment in America*. New York: Hill & Wang.
- American Law Institute. 1962. *Model Penal Code—Proposed Official Draft*. Philadelphia: American Law Institute.
- Blumstein, Alfred, Jacqueline Cohen, Susan E. Martin, and Michael Tonry, eds. 1983. *Research on Sentencing: The Search for Reform*. 2 vols. Washington, DC: National Academy Press.
- Brockway, Zebulon Reed. 1912. *Fifty Years of Prison Service: An Autobiography*. New York: Charities Publications.

- Burgess, Anthony. 1962. *A Clockwork Orange*. London: Heinemann.
- Canadian Sentencing Commission. 1987. *Sentencing Reform: A Canadian Approach*. Ottawa: Canadian Government Publishing Centre.
- Davis, Kenneth Culp. 1969. *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press.
- Dawson, Robert O. 1969. *Sentencing*. Boston: Little, Brown.
- Dershowitz, Alan. 1976. *Fair and Certain Punishment*. New York: Twentieth Century Fund.
- Frankel, Marvin. 1973. *Criminal Sentences: Law without Order*. New York: Hill & Wang.
- Frase, Richard. 2013. *Just Sentencing: Principles and Procedures for a Workable System*. New York: Oxford University Press.
- Glueck, Sheldon. 1928. "Principles of a Rational Penal Code." *Harvard Law Review* 41.4: 453–82.
- Gottfredson, Don M., Leslie T. Wilkins, and Peter B. Hoffman. 1978. *Guidelines for Parole and Sentencing*. Lanham, MD: Lexington.
- Hart, H.L.A. 1959. "Prolegomenon to the Principles of Punishment." *Proceedings of the Aristotelian Society*, new series, 60: 1–26.
- Hart, H.L.A. 1968. *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford: Oxford University Press.
- Kassebaum, Gene, David Ward, and Daniel Wilner. 1971. *Prison Treatment and Parole Survival: An Empirical Assessment*. New York: John Wiley.
- Lewis, C. S. 1949. "The Humanitarian Theory of Punishment." *20th Century: An Australian Quarterly Review* 3.3: 5–12.
- Lynch, Gerard E. 2003. "Screening versus Plea Bargaining: Exactly What Are We Trading Off?" *Stanford Law Review* 55: 1399–1408.
- Messinger, Sheldon L., and Phillip E. Johnson. 1978. "California's Determinate Sentencing Statute: History and Issues." In *Determinate Sentencing: Reform or Regression*, edited by the National Institute of Justice. Washington, DC: U.S. Government Printing Office.
- Michael, Jerome, and Mortimer Adler. 1933. *Crime, Law, and Social Science*. New York: Harcourt Brace.
- Michael, Jerome, and Herbert Wechsler. 1937. "A Rationale of the Law of Homicide II." *Columbia Law Review* 37: 1261–1325.
- Michael, Jerome, and Herbert Wechsler. 1940. *Criminal Law and Its Administration*. Chicago: Foundation.
- Morris, Norval. 1974. *The Future of Imprisonment*. Chicago: University of Chicago Press.
- National Advisory Commission on Criminal Justice Standards and Goals. 1973. *A National Strategy to Reduce Crime*. Washington, DC: U.S. Government Printing Office.
- National Commission on Reform of Federal Criminal Law. 1971. *Report*. Washington, DC: U.S. Government Printing Office.
- New York State Official Commission on Attica. 1972. *Attica—The Official Report*. New York: Bantam.
- O'Donnell, Pierce, Dennis Curtis, and Michael Churgin. 1977. *Toward a Just and Effective Sentencing System*. New York: Praeger.
- Ohlin, Lloyd E., and Frank J. Remington. 1958. "Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice." *Law and Contemporary Problems* 23.3: 495–507.
- Packer, Herbert L. 1968. *The Limits of the Criminal Sanction*. Redwood City, CA: Stanford University Press.
- Parnas, Raymond I., and Michael B. Salerno. 1978. "The Influence behind, Substance, and Impact of the New Determinate Sentencing Law in California." *University of California at Davis Law Review* 11: 29–41.
- President's Commission on Law Enforcement and Administration of Justice. 1967. *The Challenge of Crime in a Free Society*. Washington, DC: U.S. Government Printing Office.
- Rawls, John. 1955. "Two Concepts of Rules." *Philosophical Review* 44: 3–13.
- Reitz, Kevin R. 1993. "Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium." *University of Colorado Law Review* 64: 645–54.
- Reitz, Kevin R., and Curtis R. Reitz. 1993. "The American Bar Association's New Sentencing Standards." *Federal Sentencing Reporter* 11.3: 169–73.
- Remington, Frank. 1969. "Introduction." In *Sentencing*, edited by Robert Dawson. Boston: Little, Brown.
- Shane-DuBow, Sandra, Alice P. Brown, and Erik Olsen. 1985. *Sentencing Reform in the United States: History, Content, and Effect*. Washington, DC: U.S. Government Printing Office.
- Tonry, Michael. 1982. "Criminal Law—the Missing Element in Sentencing Reform." In *Vanderbilt Law Review* 35: 607–41.
- Tonry, Michael. 1988. "Sentencing Guidelines and the Model Penal Code." In *Rutgers Law Review* 19: 823–48.
- Tonry, Michael. 1993. "The Success of Judge Frankel's Sentencing Commission." *Colorado Law Review* 64: 713–22.
- Tonry, Michael. 1996. *Sentencing Matters*. New York: Oxford University Press.
- Tonry, Michael. 2009. "The Untold Story of America's First Sentencing Commission." *Federal Sentencing Reporter* 21.4: 265–70.
- Tonry, Michael. 2013. "'Nothing' Works: Sentencing 'Reform' in Canada and the United States." *Canadian Journal of Criminology and Criminal Justice* 2013: 465–79.
- Tonry, Michael. 2016. *Sentencing Fragments*. New York: Oxford University Press.
- U.S. Parole Commission. 2003. *History of the Federal Parole System*. Washington, DC: U.S. Department of Justice, U.S. Parole Commission.
- von Hirsch, Andrew. 1976. *Doing Justice*. New York: Hill & Wang.
- Wechsler, Herbert. 1961. "Sentencing, Correction, and the Model Penal Code." *University of Pennsylvania Law Review* 109.4: 465–93.
- Wines, Enoch. 1880. *The State of Prisons and of Child-Saving Institutions in the Civilized World*. Cambridge: Cambridge University Press.
- Zimring, Franklin E. 1977. "Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform." Occasional Papers. Chicago: University of Chicago Law School.