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Marvin Frankel: A Reformer Reassessed



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Legal scholars and critics contribute to the development of law in many ways: the comprehensive treatise, the heavily footnoted law review article, the closely reasoned philosophical essay, the econometric model, the theoretical discourse, the bar association or American Law Institute law reform project, among many others. Law professors dedicate whole careers to perfecting one or more of these forms. But few can claim to have had the impact on the law, the system of criminal justice, and the lives of hundreds of thousands of criminal defendants that Marvin Frankel had with one thin volume addressed to “literate citizens—not primarily lawyers and judges, but not excluding them.”¹ The book, of course, was *Criminal Sentences: Law without Order*. My paperback copy, purchased when I was a law student shortly after it came out, runs only to 124 pages, but it spurred a movement that ultimately affected sentencing practice across America.²

It’s worth taking a minute to remind younger readers who Marvin Frankel was,³ because who he was has a lot to do with the nature and success of his book. Frankel was what used to be called a “lion of the bar”—a lawyer with a distinguished and varied career, much of it devoted to the lucrative private practice of law combined with leadership in establishment law reform activities. Like many great lawyers, he first made his mark as a brilliant student: after growing up in Philip Roth’s Newark, working his way through Queens College, and serving in the military during World War II, he was a star student at Columbia Law School, and editor in chief of the *Columbia Law Review*.⁴

His distinguished résumé included a stint in the Solicitor General’s Office, a period as a legal academic, a relatively short tenure as a federal district judge, and the private practice of law in two major New York law firms, one of which still carries his name.⁵ He wrote a number of books and many articles on legal topics, and was always a thoughtful commentator on legal issues, but he was not primarily a professional scholar. In fact, his time as a full-time tenured faculty member at Columbia Law School lasted only three years, before he was appointed to the federal bench on the recommendation of Senator Robert Kennedy in 1965. His production while a professor was decidedly quirky: his maiden scholarly venture was a study

of ten years’ worth of the contents of the official journal of the Alabama state bar.⁶

Though Frankel’s academic sojourn, penchant for writing, and fierce intelligence marked him as an intellectual among lawyers, he spent the bulk of his life in the world, as lawyer and judge. Even the federal bench proved insufficiently challenging to hold him; after thirteen years on the bench, he resigned to return to the practice of law, where he spent the rest of his long career. Having litigated an appellate case against him, I can attest that he was a shrewd and persuasive advocate, but you needn’t take my word for it: Frankel argued more than twenty cases in the United States Supreme Court, the first as a young assistant solicitor general in 1952⁷ and the last, from the wheelchair to which advanced-stage cancer confined him, almost exactly fifty years later, just eleven days before he died in March 2002.⁸

Frankel, then, was a legal polymath. But certain unifying characteristics of his career came together in his book on sentencing. Frankel was not only very smart, but—despite a lifetime at the heart of the legal establishment—he possessed an outsider’s willingness to challenge the conventional wisdom. Lawyers, being trained to operate within the existing legal system, are professionally conservative and disinclined to radical change. Frankel, however, combined the intellectual’s commitment to rigorous analysis with the tough skepticism of a kid from the streets of New York’s periphery.

The result, as his protégé, coauthor, and eventual partner Gary Naftalis reminds us, was a series of books that “never reflexively accepted the status quo, [but] scrutinized legal institutions with a thoughtful and skeptical eye.”⁹ Challenging the sentencing system, the grand jury,¹⁰ and the adversarial system itself,¹¹ Frankel was not one to accept that things should be done a certain way simply because no one could remember a time when they were done otherwise, or because ritual praise for the existing order is a persistent convention of the existing order. For all his skepticism, however, Frankel was also an idealist, who believed that the purpose of law was to secure justice and that the role of lawyers was to advance the rule of law.

Nevertheless, Frankel was not just an intellectual, but a practitioner deeply grounded in the way things were done.

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He could see through the ritual praise not only because he had a skeptical, inquiring mind but also because he was familiar with how the system actually worked, on a day-to-day level, and not merely with the platitudes or theories of those who described its ideal form. And, finally, Frankel was a superb advocate. Having arrived at a diagnosis of what was wrong with the system and a prescription for its cure, he could bring together his arguments in elegant and forceful prose that would sweep away opposition.

Which brings us to his little book. By now, the substance of his argument is familiar. When Frankel wrote, judges were accorded broad and uncontrolled discretion over sentencing. That discretion was the product of a rehabilitationist penal philosophy with roots deep in the early Republic, but which came to full fruition in the progressive era. Criminal punishment was designed largely for the utilitarian end of reducing crime, by incapacitating dangerous offenders until they could be reformed and made safe to return to society.

If this was the goal, however, the particular offense for which a defendant stood to be punished was at best indirectly relevant to the sentencing process. A murderer likely should receive a longer sentence than a shoplifter, but more because his crime showed him more likely to be dangerous than because he committed a greater wrong. The true determinant of any offender's sentence should be a prediction of how long he needed to be incarcerated in order to be reformed, not the seriousness of his offense per se, and such a prediction logically had to be based on a variety of often intangible factors about his background and character, in which the specific criminal conduct of which he had been convicted was merely one among many considerations. To properly tailor punishment to the offender, sentences had to be discretionary rather than mandatory, to enable the judge to select a correct sentence rather than to impose by rote a tariff attached to a particular crime, and largely indeterminate in form, to give the penal authorities the ability to adjust the sentence to account for the prisoner's actual, as opposed to predicted, progress in rehabilitation.

But if this was the theory of the system, Frankel's eye for reality enabled him to see that its practical implementation created deep problems. Lack of resources and the absence of an effective technology of character reformation made the goal of reforming prisoners elusive; the rehabilitationist rhetoric of the system often masked more nakedly punitive practices. Moreover, and this was Frankel's central observation, the open-ended discretion given to judges meant that no effective legal rules governed the sentences imposed. Penal statutes typically specified extremely harsh maximum sentences, but no minimums, so that anything from probation to twenty-five years in prison was a legal sentence for an armed bank robber under federal law.

The law did not require judges even to state reasons for their sentences, and there was essentially no appellate review of the reasonableness of the sentencing judge's

choice. If a judge did bother to state reasons for his sentence, virtually any reason short of overt invidious discrimination would do; while the rehabilitationist philosophy may have dictated the design of the system, no individual judge was required to subscribe to it, and many did not. Judges could, and did, vary considerably in whether they were tough or lenient; in the extent to which they believed in reform or retribution; in their views on whether they believed that particular offenses were grave or minor; and in whether they regarded such factors as poverty or drug addiction as extenuating circumstances or markers of likely recidivism.

Frankel was horrified by these aspects of the system, and rightly so. He argued forcefully that "a government of laws, not of men" deserved better.¹² His basic point was impossible to argue with: "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."¹³ He then proceeded to make that point in a devastating forty-five-page brief. The basic building blocks of his argument are simple, and, once assembled, obvious.

Penal codes criminalize too wide a range of behavior and prescribe wide ranges of potential punishment for offenses (and often are themselves internally inconsistent and irrational with respect to the maximum sentences prescribed for different offenses). Judges are not selected for any expertise relevant to sentencing, vary widely both in their qualities of mind and heart and in their philosophies and approaches to punishment, and are conditioned by the absence of binding legal principles to spend less time and intellectual energy on sentencing than on other legal issues. The procedures applicable at sentencing, with facts collected by probation officers from hearsay sources, an absence of legal standards and controls, and the injection of irrelevant or culturally biased material, create unreliable and discriminatory results. The absence of a requirement that reasons be stated removes any possibility of criticizing or even understanding what is happening, and removes any possibility of transparency, accountability, or rationality from the process.

Frankel does not stop, however, with a critique of the system. He proposes not a "solution" to the "problem" identified in the first part of the book, but a series of "palliatives, remedies, and directions of hope."¹⁴ He begins, characteristically, by noting that, for all their deficiencies, sentencing must remain the province of judges and lawyers, and that a large part of the solution must be the application of *law* to the sentencing process.¹⁵ The problem with the system is not its domination by lawyers, but the failure of lawyers to make use of their characteristic virtues of principle and reason. The problem with traditional sentencing, in substantial part, is that these features are absent: "The judgment is swift because the process of reaching it is not reflective or orderly. The court renders no 'opinion' because it has not followed the rational steps required to create one."¹⁶ That must change. Judges must

begin to think rationally about sentencing, according to rules and principles.

The idiosyncratic and impulsive qualities of sentencing fostered by excessive discretion can perhaps be countered by "sentencing institutes," in which judges speak to each other about sentencing practices, or by shifting sentencing from individual judges to sentencing panels or mixed tribunals. A requirement that sentencing judges state their reasons, coupled with appellate review of sentencing decisions, could begin to develop a principled approach to sentencing by traditional common-law methods.¹⁷ But these palliatives, while improvements on the system then in place, are not sufficient. Legislative action is required, and more dramatic change is necessary.¹⁸

As one rereads the book today, in light of the dramatic changes that it ultimately brought about, particularly in the federal system, it is remarkable to remember that the proposal for sentencing guidelines comes only at the very end of the book and is put forward in rather a modest way. Frankel begins with an indictment of the indeterminate sentence, in the sense of "a prison sentence for which the precise term of confinement is not known on the day of judgment but will be subject within a substantial range to the later decision of a parole board or some comparable agency."¹⁹ While indeterminate sentencing and judicial discretion are related in their connection to rehabilitationist penal philosophy and in their reliance on the discretion of officials (parole boards and judges, respectively), the institution of parole is analytically independent of the *judicial* discretion that had been the primary focus of Frankel's criticism in the first part of the book: a jurisdiction could have determinate sentences selected by judges exercising discretion within a wide range of alternatives. But the attack on parole and indeterminacy was to play an important role in the overall pattern of sentencing reform that Frankel successfully advocated. Like the attack on judicial discretion, the attack on parole discretion was based on Frankel's belief in orderly, predictable outcomes based on rules designed to control discriminatory and arbitrary decision makers.

Finally, in the last twenty pages of the book, come Frankel's most far-reaching prescriptive recommendations. The legislature should take control of sentencing, defining more clearly the purposes to be served by sentencing,²⁰ reducing the availability of indeterminate sentences,²¹ better defining the procedures to be followed at sentencing (including provision for appellate review),²² and codifying the factors that should be considered aggravating or mitigating in particular cases.²³ It is this last proposal that generates the most concrete consequence of Frankel's critique, for it is here that the concept of "guidelines" for sentencing first appears.

Frankel argued that the law, and not the preferences of individual judges, should determine what factors are material to the assessment of the severity of crimes, and that the legislature therefore should "prescribe guidelines for the application and assessment of these factors."²⁴ "I

have in mind," Frankel says, "the creation eventually of a detailed chart or calculus to be used (1) by the sentencing judge in weighing the many elements that go into the sentence; (2) by lawyers, probation officers and others undertaking to persuade or enlighten the judge; and (3) by appellate courts in reviewing what the judge has done."²⁵ These guidelines should be formulated by a sentencing commission, an expert administrative agency that should study the field of sentencing and corrections, and enact binding rules, "subject to traditional checks by Congress and the courts."²⁶ And there we have it: the model of guidelines and sentencing commissions that was to be endorsed by the American Bar Association and the American Law Institute, adopted by a substantial number of states, and most famously legislated by the federal Sentencing Reform Act of 1984.

It is rare that an academic reform proposal has such a far-reaching and fundamental impact on long-established legal traditions.²⁷ Moreover, Frankel was not only politically successful but also fundamentally correct both about his critique of the system he observed in operation and about the basic direction that reform should take. At the same time, however, the style and rhetoric of Frankel's book has something to do with the excesses that the sentencing guideline movement created, particularly in the federal system with which Frankel was most familiar, and to which he devoted the greatest attention.

Despite those excesses, it seems to me unquestionable that Frankel's basic point was right. One need not be a critic of judges or of discretion to recognize that a system that allows thousands of individual judges to make decisions that will deprive people of their liberty within ranges as wide as zero to ten or twenty-five years or beyond without the slightest direction or guidance, without any further review, and without even a requirement of giving reasons, is not healthy. Such a system can create neither the appearance nor the reality of fairness.

Such a system is also completely incompatible with the existence of any coherent penal policy. One may not like the direction that American penal policy has taken in the generation since Frankel wrote. Frankel himself certainly did not: he wrote of his "firm conviction that we in this country send far too many people to prison for terms that are far too long. . . . the United States probably has the longest sentences by a wide margin of any industrialized nation."²⁸ He wrote that in 1972, when the total number of incarcerated persons in the United States was well under 500,000.²⁹ Today the number is over 2,300,000.³⁰ But it is impossible to have any penal policy at all if the officials responsible for deciding who goes to prison and for how long are randomly divided between "Maximum Johns" and "Turn-'Em-Loose-Bruces," each free to pursue his or her own preferred approach to criminology.

The same is true at the micro level of sentencing factors. As Frankel said, "It is a proposition of law to say that pleading guilty, rather than insisting upon the right to stand trial, will (or will not) be deemed a mitigating

factor.”³¹ That may be a question, like many other questions about propositions of law, about which reasonable people may disagree. But with most such questions, our approach is and should be to debate the issue and then adopt by legislation or common law the answer that appears best to an authoritative decision maker with democratic legitimacy, not simply to leave it to assorted putatively reasonable officials to adopt either answer as seems best to them at the time.

Providing binding instructions on policy questions is not incompatible with flexibility and a reasonable degree of discretion. We can recognize that sentencing in individual cases involves a large number of variables, and seeks to accomplish a number of not-always-compatible goals, and still provide meaningful guidance to judges. Frankel recognized this, noting that “‘gravity of offense’ does not lend itself to weighing with the mechanical simplicity of grocery or jewelers’ scales.”³² But this does not mean that we should throw up our hands and provide no binding instructions at all.

It is one thing to say that a judge needs the freedom to assess factors that may be unique to particular cases and to vary generally applicable principles to meet the needs of particular cases. (Of course, to say this ought to imply, as Frankel insisted, that the judge would have to explain her rulings, and probably as well that the reasons given would have to survive some degree of appellate scrutiny, like most other decisions that judges make.) It is another to say that different judges should be free to apply their own views of whether imprisoning drug dealers for a long period of time is desirable, or that when two judges agree that a particular defendant should be treated leniently, it is perfectly OK for one judge to think *leniently* means probation rather than the one-year sentence he typically gives to offenders who committed that crime, while the other thinks that leniency is a matter of giving two years rather than the usual five.

The actual products of the sentencing guideline movement have varied considerably in approach and success. Some state guidelines, such as those in North Carolina, have been widely hailed for bringing order and logic to state sentencing, and even for sharply reducing prison populations. Others, such as the Federal Guidelines, have been criticized as unnecessarily rigid, unduly complex, and extremely harsh. Judge Jon Newman, himself a wise judge and thoughtful student of sentencing, defended Frankel in these pages, shortly after his death, from responsibility for the worst results of the movement he unleashed.³³ Judge Newman rightly pointed out that Frankel advocated

not a chart that would prescribe a precise sentence range for every defendant[, but] a “checklist of factors” that would be relevant to sentencing and a very rough assignment of values to grade at least some of the relevant factors. For example, he suggested “that ‘gravity of the offense’ could be graded along a scale from, perhaps, 1 to 5.” Wisely cautioning his readers not to “accept delusions of precision,” he pointed out “that

numerical statements may serve, for obviously non-quantifiable subjects, as useful implements for clarification of thought, comparisons, and criticism.” As an example, he referred to “[t]he physician who speaks of a grade-three heart murmur”: his measurement might not be precise, “[b]ut he says a meaningful thing that informs and guides others professionally trained.”³⁴

While Judge Newman is right that Frankel’s conception of guidelines, only sketched in his book, appears to have been rather more general and flexible than the eventual Federal Guidelines became, I think it is too easy to absolve Frankel from the charge that his book contributed substantially to the obsessive rigidity of some guidelines regimes. Frankel’s proposal for guidelines may have been modest, but the excessive harshness of his rhetorical condemnation of judicial discretion encouraged the views of those who came to believe that *any* flexibility or discretion in a guideline system was an invitation to abuse, disparity, and lawlessness.

Tongue firmly in cheek, Frankel purported to “yield only to numerous judges in my admiration for those on the bench.”³⁵ But his cool-eyed description of judges is hardly flattering. Judges are poorly educated for purposes of sentencing, selected for the most part “without concern for any of the qualities supposedly wanted in suitable judges,”³⁶ offhand to the point of flippancy about the sentencing process, arrogant, “[c]onditioned in the direction of authoritarianism,”³⁷ and prone to abuses deriving from their “moral or intellectual or physical deficiencies—or from all together.”³⁸ He quotes others mourning the “incompetency of certain types of judges to impose sentences,” or their “senility or a virtually pathological emotional complex” that makes them “arbitrary or even sadistic.”³⁹ Some of these qualities can indeed be found on the bench, and Frankel is (for the most part) careful not to universalize the more extreme aspects of his description. But the picture that emerges from his fine advocate’s hand is something of a caricature. A reader can be forgiven for emerging from his bracing rhetoric with the view that the less these cruel, shallow, ignorant, and biased characters have to do with sentencing, the better.

It is not simply that Frankel’s criticism of judges is excessive: he is right, after all, that judges, like other human beings, are at best fallible and at worst horrendous, and that the whole point of the rule of law is that such fallible creatures should not be vested with the degree of discretion that characterized mid-twentieth-century sentencing practice. The larger problem is that, because he describes the potential abuses of the existing system with such vividness and merely sketches his modest proposals for reform, he makes no effort to analyze the institutional and personal failings that may characterize a guideline system.

If Frankel lacks illusions (to say the least) about judges, he implicitly adopts the New Deal Democrat’s bright-eyed

naïveté about administrative agencies. Taking sentencing authority away from judges and vesting it instead in a battery of expert policy technicians, Frankel implies, promises to usher in a brave new world of enlightened policy and rational decision making. The potential for political interference and excessive bureaucratization is simply ignored. Should we really be surprised that at least one such agency produced a body of guidelines that combined the worst excesses of overregulated inflexibility with the unbridled political exploitation of anticrime rhetoric to produce rigid and extreme sentences?

Frankel's critique, persuasive as it is at the level of theory, at the level of actual description is composed almost entirely of ipse dixit and anecdote. I've been there, Frankel says, and you can trust me that this is how it is, and if you need evidence, here's a horror story or two. Fair enough in a popular work, and hard to avoid even in more scholarly precincts. It is devilishly difficult to quantify sentencing disparity; the multitude of factors to be controlled for and the extent of the tolerable variance make it difficult to know exactly what we are measuring. Unless one radically oversimplifies the task, thus begging the question to be answered by assuming that only the most crudely measurable variables are assessed (a method too common among those who seek to measure the degree to which judges are "compliant" with sentencing guidelines), it is difficult to devise accurate statistics on sentencing variation. And since Frankel's point, after all, was that the total *absence* of controls or even instructions could not help but generate excessive disparity, there may have been no need for more.

But his critique of an entirely lawless system was too easily taken as a mandate for an entirely nondiscretionary system. It may do to dismiss concerns about "the definitiveness of the evidence of disparity" (none of which Frankel actually cites) as "the least substantial of quibbles"⁴⁰ if the issue is whether at least some guidance should be provided. If the issue, however, is *how much* control should be exerted, we need to know more about the costs and benefits of different degrees of discretion than Frankel provides.

Like many liberals of the time, moreover, Frankel was also naive about the political direction that sentencing reform was likely to take. As noted above, Frankel believed that American penal practice, as it stood thirty-five years ago, was excessively harsh. His favored quotations from more extreme critics of the judiciary point to sadism and cruelty rather than excessive softness. (Contemporary politicians like Richard Nixon and George Wallace also strongly criticized judges, but from a very different direction.) And his vivid specific anecdotes of abusive sentencing almost always identify sentences or arguments that resulted in overly harsh treatment of offenders. Frankel's book is implicitly addressed to well-meaning liberals who believe in the rule of law and assume that the elimination of the reflexively punitive responses of a judicial elite will usher in a more enlightened criminal justice system.

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, with their claims that coddling of criminals by activist judges was responsible for an increase in crime. Frankel's view of the substance of the errors made by judges may have been exactly opposite to the views of the emerging conservative movement, but his rhetorical attack on judicial discretion fit their agenda perfectly. The results are plain to see. Increased political control of sentencing policy has resulted in a far more fiercely punitive criminal justice system than Frankel could have imagined.

At the end of the day, however, Frankel's accomplishment is real and lasting. No one today advocates a return to the unbridled discretion and total indeterminacy that characterized sentencing in the 1950s and 1960s. The politicization of criminal justice policy has had unfortunate results, with the proliferation of mandatory minimum sentences, three-strikes laws, and rigidified guidelines, but the guideline movement is at most only a contributor to a political force that almost certainly would have resulted in a harsher sentencing regime had Frankel's reforms never been proposed or adopted. Judges, after all, are less unpredictable, and more reliably reflective of social attitudes, than their critics imagine, and the popular groundswell for tough responses to increased crime from the 1960s through the 1980s would have found an outlet one way or another. Democrats (with a capital or a small *d*) ultimately cannot disagree that the direction of penal policy ought ultimately to be made by the democratic branches of government, and that judges should not be free to disregard that policy.

The political and intellectual pendulum on sentencing has to some extent begun to swing back from the extremes that Frankel never advocated but that his rhetoric perhaps encouraged. The severity of Frankel's critique, after all, concerned a system that is gone forever. The bitterness and extremity of that critique was perhaps necessary to call attention to a serious but largely unacknowledged problem. If the momentum generated by that critique may have helped propel the pendulum to the opposite extreme, at least in the federal courts, perhaps it is time now to recall the modesty of the "palliatives" that Frankel actually advocated. It is now to be hoped that the federal system has achieved, by somewhat awkward means, a sentencing regime that combines genuine guidance with considerable discretion.⁴¹ The system of advisory guidelines that resulted from *United States v. Booker*⁴² may well be more consistent with Frankel's vision of a simple checklist of factors lacking in "delusions of precision"⁴³ than the rigid system of mandatory rules that actually resulted from his initiative.⁴⁴ Perhaps it is time, moreover, to revisit the strict renunciation of indeterminate sentencing that characterizes federal law today. As Frankel recognized, while a fully indeterminate system may have overestimated the

role and the practicability of rehabilitation in sentencing, extremely long sentences designed in substantial part to protect the public from offenders believed dangerous and incorrigible may well require a second look at some point, to counteract the tendency at the time of sentencing to err in the direction of protection, based on character assessments and behavioral predictions that the passage of time may call into question.

Certainly, we would all do well to listen to the voice of compassion that questioned the American tendency to respond with unthinking brutality to offenders. And equally certainly, we can always benefit from Marvin Frankel's all-too-rare ability to look beyond the self-congratulatory acceptance of traditional practices and see what we are actually doing, and how we could do it better.

Notes

- ¹ MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973), vii. Frankel did not ignore the professional audience. In fact, his argument was first made in a series of lectures delivered at the University of Cincinnati Law School in 1971, and published in its law review. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972). But it was the book that made the difference.
- ² More than a decade ago, Professor Kevin Reitz, a leading scholar of sentencing in his own right and an important figure in sentencing reform, described Frankel's book as perhaps "the single most influential work of criminal scholarship in the last 20 years. It stands as the best indictment of traditional, indeterminate sentencing practices in the literature. Its proposals have charted the general outline of sentencing reform through the 1980s and into the 1990s." Kevin R. Reitz, *Sentencing Reform in the United States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645, 650 n.21 (1993).
- ³ Legal fame is transient. As the old joke (told about many other professions as well) has it, a successful legal career has four stages: (1) Who's Frankel? (2) I want Frankel. (3) Get me someone like Frankel, only younger and cheaper. (4) Who's Frankel?
- ⁴ As editor in chief, he presided over an administrative board that included Jack B. Weinstein, himself to become the leading evidence scholar of the last half of the twentieth century, a great federal judge—and one of the most thoughtful students and practitioners of sentencing.
- ⁵ Further details of Frankel's career can be found in his *NEW YORK TIMES* obituary and in a tribute from his friend and classmate, Professor Arthur Murphy, from which much of this summary is drawn. See Steven Greenhouse, *Marvin Frankel, Federal Judge and Pioneer of Sentencing Guidelines, Dies at 81*, *NEW YORK TIMES* (Mar. 5, 2002); Arthur W. Murphy, *Marvin Frankel: A Lawyer-Scholar*, 102 COLUM. L. REV. 1750 (2002).
- ⁶ Marvin E. Frankel, *The Alabama Lawyer, 1954-1964: Has the Official Organ Atrophied?*, 64 COLUM. L. REV. 1243 (1964). Quirky, yes, particularly when you realize that it was originally intended for publication not in a major law review but in *The Alabama Lawyer* itself—which rejected it. But quirky does not mean *trivial*. Frankel's article traces the response of the Alabama Bar to *Brown v. Board of Education* and the civil rights movement, and castigates the failure of the Alabama legal establishment to rise above its prejudices and speak up for human rights. Its content presages Frankel's lifelong commitment to human rights and his passionate belief that lawyers have an obligation to advance the cause of justice. Its

methodology, distinctly odd for its time, could be seen as a precursor of the rising school of young legal historians who delve into such unusual material for micro-histories that reveal the legal culture of a past time and place.

- ⁷ *Robertson v. United States*, 343 U.S. 711 (1952) (holding, in accord with Frankel's argument for the government, that a prize awarded to the winner of a symphonic composition contest was taxable income).
- ⁸ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding, over Frankel's opposition, that an Ohio school-voucher program did not violate the Establishment Clause).
- ⁹ Gary P. Naftalis, *A Tribute to Marvin Frankel*, 102 COLUM. L. REV. 1753, 1754 (2002).
- ¹⁰ MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* (1977).
- ¹¹ MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).
- ¹² *CRIMINAL SENTENCES*, *supra*, at 3.
- ¹³ *Id.*, at 5.
- ¹⁴ *Id.*, at 51.
- ¹⁵ *Id.*, at 55-58.
- ¹⁶ *Id.*, at 38.
- ¹⁷ *Id.*, at 61-85.
- ¹⁸ *Id.*, at 84-85.
- ¹⁹ *Id.*, at 86.
- ²⁰ *Id.*, at 105-08.
- ²¹ *Id.*, at 108-11. Interestingly, Frankel does not argue for a totally determinate regime, arguing only that where the legislative or judicial purpose of a particular sentence is deterrence or retribution, rather than incapacitation or retribution, "there should be no occasion for an indeterminate sentence." *Id.*, at 109. The point is an important one that has been lost in much of the sentencing debate: unless one *completely* rejects the protection of the public from dangerous individuals or the hope of reforming offenders as goals of criminal sentencing, the adoption of an exclusively determinate system of punishment is no more rational than the use of exclusively indeterminate sentences in a system that recognizes that some punishment is designed to serve purely punitive or deterrent goals.
- ²² *Id.*, at 115-18.
- ²³ *Id.*, at 111-15.
- ²⁴ *Id.*, at 113.
- ²⁵ *Id.*, 113.
- ²⁶ *Id.*, 119. This last point is also one that federal and state sentencing reforms appear to have missed. Unlike other administrative agency regulations, the pronouncements of the United States Sentencing Commission have not been made subject to the usual review processes of administrative law but have been exclusively under the control of Congress. It is this escape from judicial review for consistency with the broad outlines of the statute that, more than any other feature of the reform, has turned the Sentencing Commission into what Justice Scalia derided as "a junior-varsity Congress." *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). It is also the heavy hand of political control that has kept the Sentencing Commission from acting like the independent, apolitical expert agency that New Deal liberals like Frankel and Justice Breyer (both of whom taught administrative law in their law professor days) anticipated.
- ²⁷ The only comparable twentieth-century example is the Model Penal Code, and that was the product of a century of agitation for codification of the criminal law, capped by a massive, decade-long project enlisting a large segment of the legal and academic establishment to create a specific proposal to respond to a long-acknowledged need. Frankel spoke only for himself, about a problem that few had specifically articulated before.

- ²⁸ CRIMINAL SENTENCES, *supra*, at 58.
- ²⁹ FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT (1991), 22.
- ³⁰ Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, NEW YORK TIMES (Apr. 23, 2008).
- ³¹ CRIMINAL SENTENCES, *supra*, at 112.
- ³² CRIMINAL SENTENCES, *supra*, at 114.
- ³³ Jon O. Newman, *Remembering Marvin Frankel: Sentencing Reform but Not These Guidelines*, 14 FED. SENT. REP. 319 (2002).
- ³⁴ *Id.*, 319 (footnotes omitted), citing CRIMINAL SENTENCES, *supra*, at 114.
- ³⁵ CRIMINAL SENTENCES, *supra*, at 12.
- ³⁶ *Id.*, at 14.
- ³⁷ *Id.*, at 17.
- ³⁸ *Id.*
- ³⁹ *Id.*
- ⁴⁰ *Id.*, at 21.
- ⁴¹ See, e.g., Gerard E. Lynch, *Letting Guidelines Be Guidelines (and Judges Be Judges)*, OSCJL AMICI: VIEWS FROM THE FIELD, at

- <http://osjcl.blogspot.com> (January 2008), reprinted in 5(2) OHIO ST. J. OF CRIM. L. 1 (supp.) (2008).
- ⁴² 543 U.S. 220 (2005).
- ⁴³ CRIMINAL SENTENCES, *supra*, at 114.
- ⁴⁴ Although Frankel himself opposed making the Federal Guidelines advisory, at least at a time when the Guidelines had not yet completely remade the culture of the bench and bar, see Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2050 (1992), it is not clear that he would be dissatisfied with the present regime. As the modesty of his guideline proposal makes clear, Frankel was less committed to some particular brand of sentencing reform than he was urgent about the need for movement in the direction of greater control of judicial discretion. Whether a system of advisory guidelines, coupled with appellate review of sentences, a requirement of stated reasons for deviation, and a culture in which numerical assessment of sentencing factors is accepted by the judiciary, will prove adequate to provide such control would surely for him have been an empirical rather than a *priori* question.