BOOK REVIEW

CRIMINAL SENTENCES: LAW WITHOUT ORDER. By Marvin E. Frankel.[1] New York: Hill & Wang. 1973. Pp. x, 124. $5.95.

Reviewed by Peter W. Low [2]

The basic premise of Judge Frankel's book is as simple and straightforward as it is important and right. He argues, as many have before him but too few have come to accept, that the problem of sentencing in criminal cases is one that can be made to respond to ordinary processes of law.

Traditionally, of course, quite the opposite has been the case. Sentences are generally thought to be the special prerogative of the trial judge or, in some states, the trial jury. Principle, in the form of stated norms to guide or control individual decisions, is nowhere to be found in traditional legal sources. Reasoned judgment, normally the special hallmark of the judicial process, is replaced by a system in which unexplained, intuitive reactions are applied to each case as it arises. The irony of such a casual treatment of the sentencing decision is particularly striking when one focuses upon the range of decision open to the sentencer in the serious criminal case and the importance of the sentence to the effective functioning of the criminal process.

The irony is even clearer upon examination of the extent to which the procedural and institutional constraints of judging apply to the sentencing decision. Typically, the proceeding at which sentence is imposed has little or no influence on what the sentence will be. Information to guide the decision will have been developed prior to the formal court proceeding, mainly through the presentence investigation and report; and the parties seldom have an opportunity to contest the accuracy of this information, since they are generally denied notice of the contents of the report, both prior to and during the sentencing hearing. The extent to which the parties are kept in the dark about the sentencing process is further exacerbated by the failure of most judges to give reasons for the particular sentence imposed. Moreover, most sentences will be conclusively determined at the trial stage; appeal of the decision will typically be met by the disclaimer that sentencing is a matter of "discretion" and that appellate courts have no function to play in determining the propriety of the particular decision or in developing principles on which future decisions can be based.

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The extent to which propositions such as these can be advanced is effectively demonstrated by the first of the two parts of Judge Frankel's book. The importance of this segment of the book lies not so much in what the Judge has to say — for many have said the same things before [3] — but in the fact that it is being said by a sentencing judge. To be sure, judges have spoken out before. Judge Sobeloff of the Fourth Circuit was a champion for many years of appellate review of sentences and other reforms that would make the sentence more responsive to law; [4] Judge Weigel, of the federal district court in San Francisco, has spoken out on the same subject; [5] and of course there have been others. By and large, however, neither federal nor state judges have exerted the kind of leadership that seems so necessary. Indeed, perhaps this is the ultimate irony — that the judges themselves, the one identifiable group most responsible for the maintenance of the rule of law in our society, have so long tolerated abdication of law in so important a part of their daily lives. That Judge Frankel is now to be counted among those who will actively seek change is therefore a matter of the first importance.

While exposure of the need for improvement is of course a necessary beginning of the inquiry, the serious questions that remain involve precisely what kinds of changes will produce the desired reform. Part two of the book is devoted to this issue, and it is fair to say that Judge Frankel has significantly contributed to the debate, although, as he recognizes, his discussion falls short of a complete treatment of any of the matters he chooses to raise. Thus, although he deals extensively with appellate review of sentences (pp. 75–85), he does not consider the most difficult question that inevitably arises in that connection — the extent to which appellate courts should be authorized to increase sentences which all would agree are too short. And although he clearly is in favor of mixed sentencing tribunals of the sort that Professor Glueck has advocated,[6] his discussion of that point (pp. 74–75) is too short to come to grips with the difficulties which the idea suggests.

[3] *See, e.g.*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (Approved Draft, 1968); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 200–76 (Approved Draft, 1968) [hereinafter cited as ABA SENTENCING ALTERNATIVES]. Both of these documents contain extensive reference to additional literature on these issues.

[4] Perhaps Judge Sobeloff's major effort in this regard was as Chairman of the American Bar Association Advisory Committee on Sentencing and Review.

[5] Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 STAN. L. REV. 405 (1968).

[6] S. GLUECK, CRIME AND JUSTICE 225–26 (1936). The mixed sentencing tribunal would contain a psychiatrist or psychologist and a sociologist or educator in addition to the trial judge.

This is not an important criticism, however, for it is not the Judge's objective to lay to rest, even in his own mind, the precise contours of future reform. He is content, as he should be, to focus attention on the problems and to draw broad outlines of the types of reform that offer hope as a remedy to the situation he so effectively criticizes and so sincerely deplores.

There are, however, three difficulties of a more serious nature that deserve brief comment. To a large extent they all involve Judge Frankel's failure to take account of the work of others who have been as concerned as he about reform of the sentencing process. The level of sensitivity to the problems of which the book speaks has increased markedly in recent years, primarily because of the work of the American Law Institute in its development of the Model Penal Code. Recent reform efforts have expressed a number of ideas that seem more realistic and hopeful than some of Judge Frankel's suggestions.[7] Moreover, they have reflected a sensitivity to political realities which the book seems to neglect. It is thus unfortunate that Judge Frankel did not incorporate and build upon these ideas.

By far the most serious of the difficulties concerns the book's heated attack on the desirability of indeterminate sentences (pp. 86–102). Judge Frankel makes some very good points in the process of building his case. He is right, for example, that we have shown ourselves capable of great cruelty in the name of the myth of rehabilitation (pp. 88–94). He is also right that there is powerful evidence that confinement is a deteriorating process, and that long term imprisonment can act to the detriment of society by making released prisoners "poorer risks and lesser people" (p. 93). And he correctly observes that there are some sentences, perhaps many, which have exemplary objectives as their main justification and which could be seen as leaving "no relevant questions a parole board could ask" in determining whether early release is appropriate (p. 94).

But the problem with Judge Frankel's use of these points to mount a wholesale attack on the system of indeterminate sentences is that he does not fully explore the implications of the conclusion he draws. His proposal (p. 98) is that "definite"

[7] Collection of these ideas in one place was an objective of the American Bar Association Standards Project. In addition to preparing the two reports cited in note 3, *supra*, the Project also dealt with the subject of probation. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION (Approved Draft, 1970). The Model Penal Code has stimulated efforts for comprehensive statutory reform in most states, *see* ALI, ANNUAL REPORT 18–19, 23 (1973); often, the background papers supporting these legislative efforts contain discussions of such ideas for reform. *See, e.g.*, 2 U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1245–337 (1970).

sentences — sentences that admit of no parole eligibility — should presumptively be used in all cases, and that "indeterminate" sentences — sentences that leave some room for parole board discretion to release [8] — should be used only after satisfaction of a burden of justification and some assurance that a concrete program of rehabilitation awaits the offender. The problem with this thesis is that it would lead to monstrous results if enacted within presently authorized ranges of prison sentences: the imposition of definite sentences of life imprisonment, or of ten, fifteen, or twenty years, is unthinkable as the basic staple of our sentencing structure. It is the feature of indeterminacy in our present use of long sentences that makes them tolerable. Any suggestion that indeterminacy be abandoned for most sentences is thus seriously deficient if it does not also contemplate drastic reduction in sentence lengths.

Judge Frankel elsewhere states (pp. 58–59) his conviction that we rely too much in this country on the use of long sentences, as well as the use of prison sentences in general. And he does qualify his proposal by observing parenthetically that definite sentences should "probably [be] much shorter than our sentences tend to run" (p. 98). But he does not directly confront the implications of his attack on the question of authorized length of sentences and, more specifically, does not set forth the ranges he has in mind to confine the appropriate length of a definite sentence. Necessarily, therefore, he does not take into account many of the problems that are generated by the suggestion that our present sentencing structure should be modified by restricting the use of long prison sentences to the exceptional case where rehabilitation is a meaningful and realistic prospect. Not the least of these is the political reality that even if such a system is thought to be desirable, it is not among the feasible alternatives which Congress or the typical state legislature is likely to take seriously in today's political climate or, indeed, in any political climate that can reasonably be foreseen. If confined to an attack on our excessive use of long prison sentences, there would be much merit in what Judge Frankel has to say. But he goes too far in drawing the conclusion that indeterminacy should be abandoned in most cases.[9]

[8] A terminological problem in the use of the words "definite" and "indeterminate" must be recognized in order to avoid confusion. Both words are now in wide usage to describe a number of different and inconsistent ideas. Accordingly, the terms are defined in the text in the manner in which Judge Frankel uses them. For a general discussion of the terminological problems, see ABA SENTENCING ALTERNATIVES 130–31.

[9] Judge Frankel's proposal is not unlike the sentencing system that has prevailed in England. It is fair to say, though it is seriously oversimplifying matters, that

A second difficulty with Judge Frankel's suggested solutions also deserves brief comment. Judge Frankel recommends that the legislature should address itself to the lawful purposes of sanctions (pp. 105–11) and that the legislature should explore the eventual creation of a detailed calculus of weights and measures which, by assigning values to relevant factors, could be used to aid the sentencing judgment (pp. 111–15). Both suggestions, particularly the first, are presented at such a high level of generalization that they are unlikely to be effective. If the purpose is to generate judicial consideration of sentencing criteria, that purpose would be accomplished more effectively by requirements that reasons be stated for specific sentences and that the reasons be subjected to appellate review.

More significantly, both of Judge Frankel's suggestions fail to reflect a major insight of recent reform efforts: that the development of sentencing criteria is more likely to succeed if it focuses on sentences which can be said to be different in kind rather than different in degree. In other words, the factors that go into the question of probation as opposed to a prison sentence, or a long sentence as opposed to a short one, would seem more capable of rational articulation than the factors that go into the question of imprisonment for two years rather than three or a fine of $5,000 rather than $7,000. This is a focus which the Model Penal Code has utilized,[10] as have many other recent efforts, and which has led to the development of specific criteria for legislative enactment. Moreover, one of the points at which such work has been aimed is confining the range of sentencing authority within much shorter limits for most cases by providing criteria for those occasions when long term imprisonment is deemed to be useful.[11] Hence, Judge Frankel's failure to reflect this work in his discussion is a missed opportunity both to particularize his suggestions for the development of criteria in a more meaningful manner and to develop a concrete proposal to deal with his concern about the length of sentences.

The final difficulty that should be mentioned relates to the book's proposal of a permanent "Commission on Sentencing" charged with study of the sentencing, correctional, and parole process, with the formulation of laws and rules about such mat-

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England relies mainly on short definite sentences, with the length fixed by many of the same considerations that go to the determination of the parole eligibility date in this country. For discussion of the different implications which the English and American contexts suggest for sentencing reform, see Low, *Reform of the Sentencing Process*, 1971 CAMB. L.J. 237.

[10] *See, e.g.*, MODEL PENAL CODE §§ 7.01–.04, 210.6, 301.3(2) (Proposed Official Draft 1962).

[11] *See, e.g.*, ABA SENTENCING ALTERNATIVES 82–107.

ters, and with the actual enactment of regulations to bind sentencing discretion (pp. 118–24). It is fairly open to debate whether now is the time for the creation of such an agency and whether it is likely to achieve any more success than other national commissions which have been established in recent years to examine some of our society's more sensitive problems. Furthermore, there is the question of whether such an approach is likely to produce any long-range answers about the wise use of judicial sentencing authority. This is not to say that there is no need for research, nor is it to suggest that there are no matters on which uniform answers can and should be given. There is great danger, however, in the codification of rigid rules before we have the answers that justify them and before we have the political sensitivity to allow rational response to overcome the mythology that now so dominates our national approach to sentencing.[12]

There is much that we can presently do towards constructive solution of the problems to which Judge Frankel refers. Revision of our criminal codes along lines previously suggested by others [13] can produce a logical sentencing structure within which the courts can act. Perhaps in the end the answer lies with the courts themselves, and in the basic conception that the sentencing decision is a legal decision, subject to normal development in the best of the common law tradition. The normal processes of judicial decisionmaking — the articulation of reasons, meaningful appellate review, and some rectification of the abandonment of procedural due process at the sentencing stage — can do as much as anything to further this development. That the courts have failed in the past is neither a reason why they must do so in the future nor a reason to search for some new institutional arrangement. But if the courts are to provide the answer, there must be a wider judicial perception of the fundamental premise upon which Judge Frankel's book is based. That Judge Frankel's perceptions in this regard are accurate, that he has made the effort to articulate them, and, most importantly, that he is himself a sentencing judge are the main reasons that his book is an important and valuable contribution.

[12] Judge Frankel's awareness of such political difficulties, though unfortunately not reflected in his book, has since been demonstrated in an incisive article. *See* Frankel, *An Opinion By One of Those Soft-headed Judges*, N.Y. Times, May 13, 1973, § 6 (Magazine), at 41.

[13] ALI, ANNUAL REPORT 18–19, 23 (1973) (reporting the status of reform efforts at state and federal levels as of April, 1973).