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The Untold Story of America's First Sentencing Commission

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Norval Morris bubbled with ideas, many of them involving work for other people to do. This article tells the story of one of Norval's good ideas which, alas, came to naught, but which, had its lessons been heeded, might have helped makers of sentencing policy, especially federal policy, avoid what are now widely seen as major mistakes, including some that led to the Federal Guidelines' eventual implosion.

In the 1970s, Norval and Hans W. Mattick directed the University of Chicago Law School's Center for Studies in Criminal Justice. Frank Zimring was "associate" director (later he became the director). I put Frank's title in quotes because he claimed the role obliged him to do no administrative work but only to associate with the directors and the people they assembled. In December 1971, I began working at the center.

From my earliest days there, Hans and Frank warned that anyone having lunch with Norval risked leaving the table with work to do concerning one of Norval's good ideas. That happened to me a fair number of times including, a half dozen years later, in 1977, when Norval suggested that we attempt a trial run of the work of a sentencing commission. Judge Marvin Frankel's proposal first appeared in writing in 1972, but no jurisdiction acted on it until Minnesota created its commission in 1978. Late in 1975, Senator Edward Kennedy had introduced Senate Bill 2699, the first legislative proposal for creation of a sentencing commission, but in 1977 the commission remained mostly a gleam in Judge Frankel's eyes.

The mock sentencing commission self-destructed after three meetings. We met in Chicago at several month intervals and worked through agendas, with some issues new each time, and some second or third looks at subjects preciously canvassed. "Staff issues papers," which I wrote, and packets of photocopied background materials were distributed.

Some of what later went disastrously wrong with the U.S. Sentencing Commission could have been predicted from the exercise. Many federal judges, for example, suffer from an exaggerated deference to what they consider to be expressions of legislative policy, and this bedeviled both the mock and the federal commissions. The intimidating and off-putting forty-three-level federal grid is one result.

The mock commission, like the later federal one, recognized the problems prosecutorial powers presented to a meaningful system of guidelines; the mock commission ducked; the federal commission acted, but unwisely. The "relevant conduct" and "acceptance of responsibility" provisions are results.

The mock commission, taking seriously Frankel's call for an administrative agency led by experts, prominently included academics among its members; both in the exercise and in life, this proved disastrous. The Federal Guidelines' excruciating detail and their ambition to micromanage complex local processes from Washington are among the results.

The mock commission exercise demonstrated that a commission's task was much more difficult than Marvin Frankel (or anyone else) recognized. In retrospect, enactment of the federal legislation, despite its ten-year gestation, was premature. It came much too soon, before the experiments in Brandeis's state laboratories had shown what commissions and guidelines could and could not do. It is possible, of course, that a federal commission with better members, less fractious and containing fewer people angling for higher federal offices, would have done a better job, but I am skeptical about that. Many more early state commissions failed than succeeded. In the political pressure cooker that Washington was (and is), chances are slim that any group of commissioners would have behaved as the nonpartisan technocratic body of semi-politically-insulated experts Frankel envisioned.

I tell the story in three parts. The first describes the mock sentencing commission project. The second describes the results. The third considers the question whether, in light of the mock project's results, the grosser errors of the federal commission could have been avoided. That answer is no.

I. The Mock Sentencing Commission Project

The Federal Guidelines have been around for nearly a quarter century. Most sentencing law scholars began paying attention to the subject in the mid-1990s or more recently with the boom in interest dating from *Blakely* and *Booker*. Few now active are likely to remember the state of sentencing law and policy as they existed before 1980.

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Some reminders are a necessary backdrop to my story. From the early 1930s until 1975, when Maine abolished parole release, every U.S. jurisdiction had a roughly similar system of individualized, indeterminate sentencing. Before 1975, judges had near unlimited discretion over who went to jail or prison, and if to prison over nominal minimum and maximum sentences.[1] I wrote *nominal* because statutes sometimes set minimum sentences for every offense at one year, because parole boards determined actual release dates (sometimes constrained by judges' decisions about minimums and maximums), and because prison officials could reduce maximum and sometimes minimum sentences by a third to a half through award and removal of time off for good behavior.

Influential objections were made to indeterminate sentencing beginning in the late 1950s[2] and were offered with increasing vigor thereafter. Some people, including Judge Frankel, were concerned about the broad discretion of judges and parole boards, the inevitability of unwarranted disparities, the risks of arbitrariness and caprice, and the dangers of conscious racial bias and unconscious racial stereotypes. Some were concerned about procedural fairness, some about the effectiveness, feasibility, and morality of correctional treatment programs, and some about the absence from sentencing of concerns for proportionality and retribution.[3]

Justice Frankel's proposals were first offered in an article in the *University of Cincinnati Law Review*[4] and were more fully elaborated in his *Criminal Sentences—Law without Order*.[5] Yale Law School professor Daniel J. Freed convened a seminar to consider Judge Frankel's proposal and flesh it out. The fruits of those discussions became the basis of Senator Kennedy's Senate Bill 2699 and were eventually published.[6]

Frankel's proposal contained five main elements: establishment of a nonpartisan administrative agency called a sentencing commission; recognition of the commission as an expert body largely insulated from short-term political influence; appointment to the commission of a distinguished group of practitioners, policy makers, and academics; promulgation by the commission of law-like rules or guidelines; and provision for appellate review of sentences imposed other than as authorized by applicable guidelines.

By 1977, Senator Kennedy's bill had put the idea of a commission before Congress. But since no jurisdiction had established or operated a sentencing commission, Norval proposed over lunch that we try to simulate the work of such a body in hopes of informing the work of real commissions when and if any were established. Frank and I thought that a capital idea. It might be fun, could do no harm, and might even prove useful. Funding was obtained from the National Institute of Corrections, then headed by Allen Breed, a career corrections professional who had recently completed a decade as head of the California Youth Authority. Norval was the ersatz chair, I was the ersatz staff, and Frank associated with us.

We took Frankel's call for a distinguished membership seriously. Here is the group we assembled:

Norman Carlson (Director, U.S. Bureau of Prisons)

Ronald Gainer (senior career official in the U.S. Department of Justice responsible for congressional liaison concerning a proposed federal criminal code)

Marvin Frankel (federal District Court judge)

Andrew von Hirsch (author of *Doing Justice*[7] and soon to join the faculty of the Rutgers University Graduate School of Criminal Justice)

Peter Hoffman (Research Director, U.S. Parole Commission, and one of the pioneers in development of parole and voluntary sentencing guidelines[8])

Harold "Ace" Tyler (in private practice but formerly a federal Court of Appeals judge and Deputy U.S. Attorney General)

Hans Zeisel (sociologist and statistician at the University of Chicago Law School; best-known for his work on the Chicago Jury Project[9])

Franklin Zimring (enfant terrible, University of Chicago Law School)

In addition, Norman Carlson was accompanied at each meeting by his senior assistant and eventual successor Michael Quinlan.

The group thus included a federal trial judge (Frankel), a former federal appellate judge (Tyler), senior Department of Justice officials (Tyler and Gainer), a senior prison official (Carlson), and a senior parole official (Hoffman). It included someone already deeply versed in guidelines development (Hoffman), well-known sentencing reform advocates (Frankel, von Hirsch, Morris), a distinguished statistician (Zeisel), and a well-known lawyer/social scientist (Zimring). All the then-conventional bases were covered except for criminal defense.[10] No legislators were included; one of Frankel's principal arguments for a politically insulated specialized commission is that legislatures are institutionally ill-suited to develop and oversee sentencing policy. The stage was set.

II. The Results: Strike Three . . .

Like the federal sentencing commission nearly a decade later, we wildly underestimated the work involved. The mock commission met three times and was so badly divided on basic issues that we abandoned the venture. We were not alone in this; subsequent commissions in New Mexico, Maine, and New York also decided the job was undoable or not worth doing. The Pennsylvania commission's first proposed guidelines were rejected by the legislature. Other early commissions, notably in Minnesota and Washington, blessed with remarkable leadership,[11] were much more successful.[12]

As the mock commission's sole staff member, I prepared background papers for each meeting.[13] In retrospect, they were not half bad. The first one offered a

tour d'horizon of contemporaneous sentencing policy developments and set out an agenda of issues to be addressed. It highlighted the need to structure the exercise of prosecutorial discretion as a component of any meaningful sentencing reform. The background papers for the subsequent meetings offered analyses and set out options concerning issues discussed at earlier meetings. The rest of this section discusses the issues over which we stumbled.

A. Prosecutorial Discretion

I was pleased with the way I had taken the "hydraulic theory of discretion" seriously in the first backgrounder and shown that any meaningfully constraining system of sentencing guidelines would shift power to prosecutors. This, given prosecutors' advocacy role and the political dimensions of their work, seemed an obviously bad idea. I suggested a number of ways the commission might address the problem (e.g., explicit guilty plea discounts of various kinds, guidelines for charging and plea negotiation).[14]

No one was persuaded. The judges (Frankel, Tyler wearing both his hats) were adamant that separation of powers considerations precluded commission development of prosecutorial guidelines. Others thought that realpolitik considerations would make development of enforceable prosecution guidelines politically impossible. My proposals were abandoned. One state, Washington, later in its sentencing commission enabling legislation authorized development of prosecutorial guidelines. Those that were developed were vague and general in their phrasing and explicitly provided that their nonapplication did not raise appealable issues.

If only the U.S. Sentencing Commission had reached the same conclusion as the mock commission. The federal commission tried indirectly to counterbalance increased prosecutorial powers. In my view, the resulting relevant conduct provisions requiring judges to impose sentences on the basis of "actual offense behavior" found on the basis of a civil law standard, even when charges had not been filed, had been dismissed, or had resulted in an acquittal, undermined the Federal Guidelines' moral force and legitimacy more than any other mistake the federal commission made.[15] The relevant conduct provision, however, had multiple objectives and cannot solely be explained by reference to efforts to constrain prosecutorial powers. I explain below the other reason why the commission made that fatal mistake.

B. Structural Formalism

My first staff paper proposed a number of formats that guidelines might take. Partly these were based on various grid formats used in earlier parole and voluntary sentencing guidelines systems, and partly I made them up (e.g., "telephone book" guidelines in which numbers are expressed in narrative form, like those later developed in Delaware and elsewhere).[16]

The mock commission made no progress on this subject, largely because of the position adamantly taken by Judge Tyler and Ronald Gainer that any guidelines had explicitly to authorize the full range of sentences provided by statute for particular offenses. If statutes authorized a thirty-year sentence for a particular offense, the guidelines, they reasoned, must specify what kinds of cases should receive sentences at various points within that range, including at its upper bound. Other members were just as adamantly of the view that such detailed guidelines were inadvisable and would prove unworkable.

Most state guidelines subsequently took the position that guidelines should specify ranges of presumptive (or advisory) sentences for normal or typical cases and, to provide for especially serious cases, authorized upward departures for which reasons must be given. Judge Tyler would not accept that as an adequate way to recognize Congress's implicit intention. Perhaps his view would have been different if systems like those in Minnesota, Pennsylvania, and Washington (the first three state systems) had then been available to demonstrate a different approach. In any case, though the subject was addressed at each meeting, no agreement was ever reached.

To my bewilderment, at the time and since, and despite the availability as models of state systems of the sort just described, Judge Tyler's argument resurfaced in the 1985–87 deliberations of the U.S. Sentencing Commission. Both (then) First Circuit Court of Appeals judge Stephen Breyer and Second Circuit judge Jon Newman, an especially active and influential kibitzer, were adamantly of the view that the guidelines must explicitly (e.g., not by way of ad hoc upward departures) authorize sentences filling in the full range of statutorily authorized sentences. The result, given the statutory requirement that the upper limit of a guideline range not exceed the lower limit by more than 25 percent, was a federal grid with forty-three levels, many more than in any state system.[17] The "sentencing machine" problem, that overly complex, nonintuitive guidelines would lack surface logic and for that reason be seen as illegitimate as a device for dispensing justice to individuals, was already well-known.[18]

C. An Elite Commission

No real sentencing commission has come close to matching the distinction of membership of our mock commission. The federal commission, with its mix of federal judges (William Wilkins, Stephen Breyer, George MacKinnon), a retired corrections official (Helen Corrothers), and three academics (Paul Robinson, Michael Block, Ilene Nagel), came closest.

Two sets of theoretical issues fractured the mock commission and particularly its academics. Andrew von Hirsch and I both believed the exercise should begin with selection of a set of normative principles to guide the commission's policy work. We were sure we were right. Others were just as sure we were wrong and being a bit pointy-headed. Ronald Gainer in particular strongly believed that

guidelines should take account of the utilitarian purposes particular sentences should serve and that the guidelines should specify how that might be done. Judges, in his model, would be required to indicate the fractions of a prison sentence predicated on retributive, incapacitative, and deterrent considerations. Resolution of the issue was deferred at the ends of the first and second meetings and became irrelevant when we disbanded after the third.

More spirited and irresolvable disagreements broke out between Hans Zeisel (with Marvin Frankel in support) and Frank Zimring over technical issues relating to the development of baseline data on past sentencing practices to inform guideline development. I cannot remember what the issues were, suggesting that they may not have been absolutely central to guidelines development.

No matter. The disagreements though adamant were not acrimonious, perhaps because we all realized we were playing a game. Norval, whose (warranted) reputation as a gracious host matched his scholarly recognition, tried his best to bridge the gaps. Most of the meetings began with dinners at his house the night before, and all contained lots of time for schmoozing. To no avail. The key point may be that leading so talented and self-confident a group is, to use the academic cliché, a bit like herding cats.

Similar problems bedeviled the federal commission. Some of the differences that divided the initial commission proved irresolvable, and the disagreements, perhaps because the people involved were not playing a game, were acrimonious. Two of the academic members, (then) Rutgers University law professor Paul Robinson and University of Arizona econometrician Michael Block, and Ronald Gainer, the Department of Justice's ex officio member, resigned over issues of principle (though different principles). Robinson resigned because he believed the initial guidelines were insufficiently detailed and prescriptive to encompass culpability distinctions that a principled sentencing system should recognize. Block, a political conservative who believed that increased prison populations are neither a human rights nor a significant financial problem, nonetheless resigned because, he said, the commission in revising its initial guidelines did so for political rather than for evidence-based reasons. Gainer's explanation was similar.

The killer conflict, which laid the foundation for the Federal Guidelines' ultimate evisceration, occurred because the chairman, Judge William Wilkins, for reasons that presumably only he could explain, created two commission working groups charged to develop draft guidelines. One, headed by Paul Robinson, created exquisitely detailed "desert" guidelines that took nuanced account of offense characteristics relating to offenders' culpability and the harms they risked or inflicted.[19]

The other, led by econometrician Michael Block and sociologist Ilene Nagel, attempted to develop "crime control" guidelines based on empirical evidence relating to the deterrent, incapacitative, and rehabilitative effects of sanctions. Block and Nagel in time concluded that adequate empirical evidence to formulate such guidelines did not exist, and their group abandoned the effort.

That left the work of Robinson's committee. A discussion set of draft culpability-based guidelines was distributed for comment to selected federal judges and some other people. Among other things, in order meaningfully to take proportionate account of financial losses and harms, it called for calculations of square roots for losses above one specified threshold, and cube roots for losses above another.[20] Robinson's proposals did not win wide favor, and he eventually resigned because the guidelines the commission promulgated were insufficiently detailed.

However, because Robinson's were the only draft guidelines around, they served as the basis for those ultimately promulgated. The square and cube roots disappeared, as did some of the detail, but three critical features remained. First, the Federal Guidelines were by orders of magnitude more detailed than any state guideline system before or since; this dovetailed nicely with the forty-three-level grid since the details of weapons use, victim injury, property loss, and offense roles provided the mechanism to move offenses up the grid (and a few other details provided some opportunities to move downward). Second, the details were far more refined than offense elements defined in federal criminal law; the answer was to direct judges to find "sentencing facts" according to a civil law evidentiary standard. Third, if the details found by judges were to determine sentence lengths, the problem of increased prosecutorial powers would loom even larger. The result was the relevant conduct rule.

Only in Norval's mock sentencing commission project and the federal commission were academics assigned major policy roles to play, and only there did they comprise a large fraction of the commissions' members. Other commissions have occasionally had academic members, but they have seldom been major players.

The federal commission's failures cannot all be discredited to its academic members. The Reagan administration predictably undermined any hope that the commission would act as a politically insulated, nonpartisan body by appointing highly political people as members. Chairman William Wilkins had been a senior staffer for Republican Senator Strom Thurman, and Stephen Breyer had been a senior assistant to Senator Edward Kennedy. Both had been appointed to the federal bench. Wilkins unsuccessfully sought appointment as FBI director, and both sought (and in due course obtained) appointments to higher courts, effectively ensuring that the commission would, during their periods of involvement, be highly sensitive to political issues and politicians' preferences. Not much was left of Judge Frankel's notion of a politically insulated expert body that would handle the details of sentencing policy in much the ways that the Federal Reserve Board handled fiscal policy and the Securities and Exchange Commission in some periods (though not recently) handled regulation of the securities industry.

III. Was the Federal Disaster Inevitable?

The rationale for the mock sentencing commission project was that real commissions might be able to learn something useful from the experience of their pretend predecessor. That was a reasonable rationale in the mid-1970s. Judge Frankel's idea had evolved from a law review article to a book to a fuller model developed by the Yale Law School group to bills introduced in the Congress. Elaboration of the model through a simulation that would in turn influence the work of a real commission seemed like a logical next step in a rational process. It is natural to wonder whether, had it not self-destructed, the mock commission's experience might have influenced the real commission's work.

I am certain the mock commission's experience did not influence the federal commission's work, and reasonably certain it could not have. Because nothing was ever published about the mock commission project, and since the federal commission did not begin work until 1985, more than seven years later, those may seem self-evident conclusions. That, however, is not why the mock commission project had no influence. Nearly all the people principally involved in the mock commission were in the mid-1980s alive and active in sentencing and corrections policy issues. Frankel continued to promote his proposal; Hoffman, Carlson, and Gainer continued in their senior roles; Morris, von Hirsch, and I acted as advisers to the early state commissions.

What changed was the political climate. When Frankel first made his proposal, and for a decade afterward, criminal justice policy making was largely an exercise in bureaucratic rationality. The idea of creating a politically insulated expert body to develop sentencing policies was not especially controversial (though sentencing guidelines were, especially among judges).

When the federal guidelines commission was appointed, however, the policy climate was radically different. Law-and-order sentiment was rampant. The Reagan administration made no effort to insulate the commission from political influence. The appointment of ambitious former senior staffers to Senators Thurman and Kennedy to lead the commission ensured that the commission would be highly sensitive to political pressures. The appointment of two conservative judges (Wilkins and MacKinnon) and three conservative academics (Robinson, Nagel, Block) to a seven-member commission ensured that the group would lack political or ideological balance, as did the absence of anyone with a criminal defense background. The failure to appoint any commissioner with sentencing policy experience and later the commission's decision that it had nothing to learn from the successful state commissions meant that it was starting from scratch, as if there were not already fifteen years' thinking and (in Minnesota) six years' experience to draw on.

The Reagan administration was apparently not much interested in sentencing reform and waited nearly a year after enactment of the enabling legislation in 1984 to nominate people to serve as commissioners. The backgrounds of those nominated showed that relevant experience had little to do with the selection criteria. Although three members were judges, none had recent trial experience and two (Wilkins and Breyer) were appointed primarily because of their political connections (Robinson also was a former Senate staffer). Breyer had been appointed directly to the First Circuit, so never worked as a trial judge. Wilkins had served as a trial judge only for a few years, and George MacKinnon, in his eighties when appointed, was a retired court of appeals judge. None of the three academics had experience as a criminal court or criminal justice practitioner. Only Helen Corrothers, a former parole board member, had any firsthand practice experience in the corrections system. So much for Judge Frankel's ideas about political insulation and about an "expert" commission. It seems unlikely that any other group of commissioners the Reagan administration might have appointed would have resembled Frankel's model much more closely.

Policy making about sentencing ought to be rational, strategic, and cumulative, and in some American states it was through the end of the 1980s. In some American states it is again. The federal commission and guidelines, however, have never recovered from the blunders made in the 1980s. Norval's initiative to test-drive a sentencing commission was a good one. Had the federal commission been institutionally capable of paying attention, the federal sentencing system of the past twenty years might have been much less awful.

Notes

1 In California and Washington, judges sentenced offenders to a term ranging between one year and the relevant statutory maximum, less good time.

2 Allen reprints classic critical articles, some published in the 1950s. FRANCIS A. ALLEN, THE BORDERLANDS OF CRIMINAL JUSTICE (University of Chicago Press 1964).

3 Blumstein, Cohen, Martin, and Tonry summarize the issues and cite the major literature. ALFRED BLUMSTEIN, JACQUELINE COHEN, SUSAN MARTIN, & MICHAEL TONRY, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM, Chapter 1 (National Academy Press 1983).

4 Marvin Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

5 MARVIN FRANKEL, CRIMINAL SENTENCES—LAW WITHOUT ORDER (Hill & Wang 1973).

6 PIERCE O'DONNELL, DENNIS CURTIS, & M. CHURGIN, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (Praeger 1977).

7 ANDREW VON HIRSCH, DOING JUSTICE (Hill & Wang 1976).

8 *See, e.g.*, DON M. GOTTFREDSON, LESLIE T. WILKINS, & PETER B. HOFFMAN, GUIDELINES FOR PAROLE AND SENTENCING (Lexington Books 1978).

9 HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (Little Brown 1966).

10 I do not remember why we did not include a criminal defense lawyer (no one was then thinking about victim, citizen, or ex-offender representatives; those slots awaited the more politicized 1980s).

11 In Minnesota, member Douglas Amdahl (then a trial judge, later state supreme court chief justice), chair Jan Smaby,

director Dale Parent, research director Kay Knapp; in Washington, chair Norman Maleng (King County prosecutor), director Roxanne Lieb, member (and de facto primary draftsman) David Boerner.

[12] *See* ANDREW VON HIRSCH, KAY A. KNAPP, & MICHAEL TONRY, THE SENTENCING COMMISSION AND ITS GUIDELINES (Northeastern University Press 1987); MICHAEL TONRY, SENTENCING MATTERS (Oxford University Press 1996).

[13] To my knowledge no copies remain; they were moderately widely circulated—to mock commission members and to academics then active in writing or thinking about sentencing reform (e.g., Richard Singer, Daniel J. Freed).

[14] Years later, John C. Coffee and I developed these proposals and others at length. John C. Coffee Jr. & Michael Tonry, *Hard Choices*, in REFORM AND PUNISHMENT (Michael Tonry & Franklin E. Zimring eds., University of Chicago Press 1983).

[15] Although every state commission worried that guidelines might shift power to prosecutors, no state commission adopted the relevant conduct approach or anything like it, for obvious normative reasons. When over two decades I have discussed the federal relevant conduct provision with judges and academics in other countries, astonishment is nearly always the reaction.

[16] Writings by academics have a tendency to recur elsewhere; the typology was adopted by the National Academy of Sciences Panel on Sentencing Research, and the Canadian Sentencing Commission. *See* ALFRED BLUMSTEIN, JACQUELINE COHEN, SUSAN MARTIN, & MICHAEL TONRY, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (National Academy Press 1983); CANADIAN SENTENCING COMMISSION, SENTENCING REFORM: A CANADIAN APPROACH (Canadian Government Publishing Centre 1987).

[17] Washington State for a while considered a thirty-row grid but abandoned it as per se not credible.

[18] *See, e.g.*, ALFRED BLUMSTEIN, JACQUELINE COHEN, SUSAN MARTIN, & MICHAEL TONRY, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (National Academy Press 1983).

[19] This story is told in more detail elsewhere. *See* MICHAEL TONRY, SENTENCING MATTERS 83-89 (Oxford University Press 1996); Andrew von Hirsch, *Federal Sentencing Guidelines: The United States and Canadian Schemes Compared*, 4 OCCASIONAL PAPERS FROM THE CENTER FOR RESEARCH IN CRIME AND JUSTICE (1988).

[20] The logic behind such complex math was that it would address the problem of comparing the penal consequences of common crimes involving hundreds or thousands of dollars and white-collar crimes involving tens or hundreds of millions.