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# The Partial Success of Judge Frankel's Sentencing Commission, Fifty Years On



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Judge Marvin Frankel's 1972 law review article<sup>1</sup> and his better-known 1973 book<sup>2</sup> inspired sentencing reforms that led to the adoption of sentencing guidelines written by commissions in twenty-two<sup>3</sup> state and federal jurisdictions.<sup>4</sup> Commission-drafted guidelines were also strongly endorsed by the American Bar Association and the American Law Institute.<sup>5</sup> Judge Frankel's guidelines proposal was short on detail, but by the late 1970s it had been substantially filled out by other writers and reformers. The idea then found favor with the legislatures in Minnesota and Pennsylvania, resulting in the implementation of guidelines in 1980 and 1982, respectively. The federal guidelines, which went into effect in 1987, have been much criticized, and rightly so. But most state guidelines have been accepted by judges and other practitioners and observers.

This essay tells the story of how Judge Frankel's proposal evolved, where and how it was adopted, and how well it has stood the test of time.<sup>6</sup> Part I describes the commission-based sentencing guidelines reform briefly outlined in Judge Frankel's article and book, and the ways in which actual guideline reforms were influenced by other writers and reformers. The point of the latter summary is not only to give credit where credit is due but also to show that the commission-drafted sentencing guidelines model as we have come to know it was not the creation of a single mind; it was the product of many minds, reflecting multiple perspectives.<sup>7</sup> Part II summarizes two basic guideline models that were subsequently implemented, one in Minnesota and one in Pennsylvania, while noting several mixed models and numerous other variations across guideline systems. Part III examines the opposing policy arguments in favor of, and opposed to, commission-based sentencing guidelines. The concluding section returns to and endorses Judge Frankel's articulate critique of unregulated judicial and parole discretion. It further argues that well-developed guidelines, based on Frankel's elaborated proposal and as implemented in several states, provide the best and indeed the only proven way to meaningfully address the problems of sentencing and prison-release discretion. This section also suggests a number of changes, any of which would improve even the best state guideline systems.

### I. The Reforms Judge Frankel Proposed, or Inspired

Judge Frankel is rightly credited with making the first proposal for something like the sentencing guidelines and

guideline commissions first established in Minnesota and Pennsylvania. But as he himself admitted, his proposal was tentative and incomplete (1972, p. 41; 1973, p. 105). The first section in this part summarizes the reforms Judge Frankel proposed; the second section shows how his proposals were fleshed out by others.

#### A. Frankel's Proposals

Judge Frankel's proposed sentencing commission and its work were only vaguely described. His most specific suggestions related to the commission's makeup—it could include “lawyers, judges, penologists . . . criminologists . . . sociologists, psychologists, business people, artists, [and] former or present prison inmates” (1972, p. 51; 1973, p. 120). By contrast, actual sentencing commissions rarely include most of the listed experts; they do, however, often include a variety of other members: law enforcement officers, correctional officials, top legislative leaders, and/or crime victims and other members of the public.<sup>8</sup>

Frankel suggested that the sentencing commission's responsibilities should include “(1) the study of sentencing, corrections, and parole;” (2) “formulation of laws and rules” based on such study; and (3) putting such rules into effect (1972, p. 51; 1973, pp. 119, 122). Although Frankel stipulated that legislators should determine “basic principles and purposes of punishment,” such issues would also be “among the matters for continuous scrutiny by the Commission” (1972, p. 52). The sentencing rules to be formulated by the commission would include “factors that should be weighed in mitigation and aggravation of prison sentences” (1972, p. 53; 1973, pp. 112–15, 121). More broadly, “[t]he Commission's interests would extend inevitably to prisons, other institutions or forms of treatment, and parole,” and the study of custodial institutions would extend to their size, nature, and justification, including whether to use them at all and whether they should the only continue to be operated within the executive branch (1972, p. 53). (Few if any actual guideline commissions have adopted such a broad policymaking perspective.)

Frankel made brief reference to long-standing, rules-drafting administrative agencies dealing with complex issues of public policy regarding securities law, transportation, and communications (1973, p. 122), and he assumed that the new commission's rules, like those promulgated by administrative agencies, would be subject to legislative

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override or modification (by contrast, a number of state guideline reforms require affirmative legislative approval before a commission's guidelines can go into effect; also, actual sentencing commission rules are rarely if ever subject to standard administrative law oversight by courts<sup>9</sup>). Frankel also suggested that the commission's rulemaking could be compared to court-drafted rules of civil and criminal procedure (1972, p. 53). However, such rules are generally subject to legislative overruling only when they affect substantive rights.<sup>10</sup> And rules of procedure are written for and by courts, whereas sentencing guidelines are directed at members of the judicial branch but are often written by a legislatively created agency.

Although Judge Frankel wanted sentencing commissions to develop "rules,"<sup>11</sup> he did not expressly recognize a critically important concept that would soon be recognized in parole guidelines, court-developed sentencing guidelines, and legislatively drafted presumptive-sentence laws, and that later became an essential feature of commission-drafted guidelines—under each of these reforms, recommended sentences assume a typical case, and are subject to departure when offense and/or offender circumstances are atypical. Although Frankel did propose that his new sentencing commission would articulate allowed and disallowed factors for sentence aggravation and mitigation, and standards for weighting such factors, his model did not specify that the commission would also promulgate presumptive starting points for such adjustments. One reason he did not do so could be that he believed a judge should first decide what purpose or purposes of punishment each sentence is designed to achieve (and that the legislature and/or the sentencing commission should clearly state which purposes are allowed and which are not) (1972, pp. 43, 47; 1973, pp. 107–8). Of course, such a procedure guarantees very substantial continuing disparity since judges often disagree about the application of sentencing purposes. Perhaps for that reason, and/or under the influence of growing support for retributive goals and skepticism about rehabilitation, most guideline reforms recommend sentences or sentence ranges that are not specific to any given sentencing purpose(s).

Frankel stated that the commission's sentencing rules would be "binding" on courts and other government agencies (1973, p. 123). This apparently meant that such rules would be enforceable by defense and prosecution appeals (in other parts of his article and book, Frankel expressed strong support for appellate review of sentences).

## **B. How Frankel's Proposals Were Filled Out by Other Writers and Reformers**

This short essay cannot provide a full intellectual history of the evolution of the commission-based sentencing guideline reforms that began with Frankel's book, but here is a summary of some major post-1973 developments that appear to have strongly influenced the emerging guidelines model that began to find legislative approval in the late 1970s.

**1. Parole release guidelines.** Parole guidelines were used experimentally by federal parole officials as early as 1972 and were formally proposed by the U.S. parole commission in late 1973.<sup>12</sup> By the time the Minnesota and Pennsylvania commissions began work in 1978 and 1979, parole guidelines had been implemented in the federal system and in several states.<sup>13</sup> Such guidelines usually employed a two-dimensional grid (offense score by offender score), as did the earliest sentencing guidelines (and most later guidelines as well). Frankel didn't mention the federal parole guidelines project, although he may have known it was in the works by the time his 1973 book was published. In any case, he would most likely not have favored parole guidelines since he was generally opposed to parole release discretion itself—he would allow it only where the prison sentence was expressly, and with demonstrated justification, based on the goals of rehabilitation and/or incapacitation (1972, pp. 42–44; 1973, pp. 108–11). In all other cases, he believed that prison time served should be based on general deterrence and/or retribution, and that judges can and should assess those matters at the time of sentencing (*id.*). Early parole guidelines (perhaps already reflecting the shift toward more offense-based sentencing, *infra*) were based on conviction-offense severity and the offender's estimated recidivism risk. But, Frankel argued, offense severity is entirely knowable at the time of sentencing; to a great extent, so is recidivism risk since risk predictions are heavily influenced by the offender's prior record.

**2. Court-developed guidelines for sentencing judges.** These voluntary (not legally binding) guidelines were developed and implemented by court officials in several state and local jurisdictions, based on existing sentencing norms ("historical" or "descriptive" guidelines); many were part of an LEAA-funded project that began in 1974.<sup>14</sup> Such guidelines inspired at least one key Minnesota legislative reformer.<sup>15</sup>

**3. Just-deserts punishment models.** Although Judge Frankel expressed some reservations about retributive sentencing goals, he did not rule them out (1972, p. 42n140; 1973, pp. 106–7, 109). But just a few years later, sentencing models strongly or even exclusively based on retributive principles began to be proposed by several academics and study commissions<sup>16</sup> These desert-based models supported a shift from offender- to offense-based sentencing, and strongly influenced reformers in Minnesota and several other guideline states.<sup>17</sup> Some guideline reforms may have also been influenced by the "limiting retributive" model first elaborated in Norval Morris's 1974 book *The Future of Imprisonment*, under which retributive values place upper and occasionally lower limits on sanction severity, within which crime-control goals may be pursued. That model, in turn, strongly influenced the revised ABA sentencing standards approved in 1979 (discussed below) (and later strongly influenced the ALI's revised Model Penal Code sentencing provisions). Although Morris's book may not have directly influenced guideline reforms, such reforms are much more consistent with Morris's limiting

retributive model than with any purely retributive just-deserts model.<sup>18</sup>

**4. The Yale Law School sentencing reform project.** A project directed by Yale professor Dan Freed sought to flesh out Frankel's commission proposals, and the project's work led directly to provisions in the first bill to create the U.S. Sentencing Commission, introduced by Senator Edward Kennedy in November of 1975.<sup>19</sup>

**5. Early determinate sentencing reforms and reform proposals.** In 1976, California and Maine abolished discretionary parole release.<sup>20</sup> Like parole guidelines and court-developed sentencing guidelines, the California reform law embodied the concept of typical-case presumptive sentences subject to departure based on aggravating or mitigating circumstances.<sup>21</sup> By 1979, at least seven other states had implemented similar presumptive sentencing reforms.<sup>22</sup>

In 1978, the National Conference of Commissioners on Uniform State Laws recommended commission-based guidelines, parole abolition, and appellate review of sentences.<sup>23</sup> In 1979, the American Bar Association recommended commission-based guidelines enforced by appellate review, but retained parole discretion; the ABA standards also strongly endorsed Morris's Limiting Retributive Model.<sup>24</sup>

## II. How Frankel's Fleshed-Out Model Was Implemented in State and Federal Systems

There is no single, or even most-common, sentencing guidelines model. Although one system (usually, the Minnesota or the federal system) is often seen as typical, great diversity prevails among U.S. guidelines and guidelines commissions.<sup>25</sup>

### A. Two Widely Adopted Guideline Models

One of the most important variations across U.S. jurisdictions relates to the punishment decisions governed by the guidelines, in particular: whether the guidelines apply only to court-imposed sentences (prison versus nonprison; maximum and minimum prison time), or whether they also govern actual prison time served and replace traditional parole release decisions. Another very important variation involves the degree to which guideline rules are legally binding on judges, in particular: whether the rules are enforced by appellate courts, or whether the rules are, expressly or de facto, purely advisory and nonbinding.

There are many gradations of each of the two dimensions identified above (and each really represents a continuum, not a dichotomy).<sup>26</sup> But the opposite poles of each dimension correspond to the two most common types of guidelines—those first implemented in Minnesota, and those first implemented in Pennsylvania. The Minnesota model combines abolition of parole release discretion with legally binding presumptive sentences enforced by substantial defense and prosecution appeal rights. The Pennsylvania model does the opposite—parole discretion is retained,<sup>27</sup> and there is very limited appellate review.<sup>28</sup>

Versions of the Minnesota model (1980) were adopted in Florida (1983), Washington (1984), the federal courts (1987), Oregon (1987), Kansas (1993), North Carolina (1994), and Ohio (1996).<sup>29</sup>

Versions of the Pennsylvania model (1982) were adopted in Maryland (1983), Wisconsin (1985–1995), Louisiana (1992–1995), Arkansas (1994), Massachusetts (1996), Missouri (1997–2012), Utah (1998), and Alabama (2006).<sup>30</sup>

Five other guideline states adopted a mixed approach. In Delaware (1987), Virginia (1995), and Washington, DC (2004), parole discretion was abolished, but there is no appellate review of guideline sentences. In Tennessee (1989–2005) and Michigan (1999–2015), parole discretion was retained while substantive appellate review of guideline sentences was initially allowed (in both states, however, appellate review was later mostly abolished, in response to the *Blakely* line of cases).

### Summary

Despite arguments in favor of the Pennsylvania model,<sup>31</sup> the ABA standards and the revised ALI code opted for the Minnesota model, and in my view, this is the better choice. Retention of parole discretion means that a commission's guidelines are not addressing one of the most important causes of punishment disparities.<sup>32</sup> Lack of effective appellate review of sentences means that judicial sentencing disparities are unlikely to be significantly reduced, and that sentencing rules will not be clarified in case law. Judge Frankel would agree on both points: he opposed parole release discretion except under limited circumstances, and strongly favored appellate review of sentences.

### B. Other Major Variations across Guideline Systems

Besides the two major variations noted above, U.S. guidelines differ in many other important ways:

- Most guidelines apply only to felonies, but some guidelines also cover misdemeanor crimes.
- Most guidelines regulate only decisions on prison versus nonprison, and the duration of imprisonment, not the details of nonprison sentences (e.g., probation conditions, including jail terms; length of the probation term; and revocation or other sanctions for violations of probation conditions).
- Most guidelines use one or more two-dimensional grids to display recommended typical-case sentences. But Alabama, Florida, and Virginia use worksheets; the Delaware guidelines provide sentence ranges and a few adjustments for each statutory offense class and subclass (violent; nonviolent); and Ohio statutes give judges nonnumeric standards to help them decide between prison and probation and select a maximum prison duration.
- In most grid systems, the prison terms shown on the grid represent the maximum terms those offenders should serve, but in Michigan, North Carolina, and Pennsylvania, the prison terms shown are minimum

terms assuming the inmate is released at the earliest allowable time (the maximum time to serve is determined by other rules).

- Guideline criminal history scoring rules are extremely diverse in terms of which convictions and other prior record factors are counted, their weighting, and how much a high score increases recommended sentence severity.<sup>33</sup>
- The federal guidelines are more complex than almost all state guidelines, and in many ways are more punitive. The federal guidelines require the offender's offense severity level to be increased or decreased by specified amounts based on listed factors for each crime, plus generally applicable adjustments for circumstances such as the defendant's role in a multi-offender crime; unlike all state guidelines, the federal rules often require sentence severity to be enhanced based on crimes that did not result in conviction because they were dismissed, acquitted, or never charged; weighting of prior convictions depends on the severity of the *sentence* imposed (not on the type or legal classification of the prior crime), and a prior sentence of more than thirteen months (even if fully suspended) receives the maximum weight (3 points); resource-impact and potential prison overcrowding are not seriously considered when drafting or modifying federal guideline rules; many federal offenders are subject to statutory mandatory-minimum prison terms, and guideline sentences build up from those terms (rather than, as in state systems, being set independently and superseded when the mandatory is higher); and federal plea bargaining concessions are limited by several rules not found in state guideline systems.<sup>34</sup> As a result of these punitive guideline rules, federal prison population increases under the guidelines were much greater than occurred in most states, with or without guidelines.<sup>35</sup>

### III. Proven Advantages, and Supposed Disadvantages, of Sentencing Guidelines

Although commission-based guidelines have been implemented in twenty-two U.S. state and federal jurisdictions and strongly endorsed by the ABA and the ALI, such guidelines were subsequently repealed in three states (Louisiana, Missouri, and Wisconsin); moreover, guidelines were cut back in several other states, and were considered but rejected in at least fifteen states.<sup>36</sup> Why is Judge Frankel's sentencing model controversial? What are the pros and cons?

#### A. Why Well-Designed Guidelines Are a Very Good Idea

As Judge Frankel so forcefully argued, an offender's sentence should not depend on the fortuity of which judge happens to be assigned to the case. Such sentencing disparities are particularly odious when they are not just random but rather are associated with offender race, ethnicity, gender, and/or social class. Even when they are random,

such disparities bear little or no relationship to accepted purposes of punishment, and they are the antithesis of justice under the rule of law. Yet such disparities are inevitable when judges have unfettered discretion to choose any sentence up to the statutory maximum (which in U.S. jurisdictions is often quite high, for many crimes). All judges should at least be given a common starting point and a common set of principles and procedures to apply when deciding whether and how much to depart from that starting point based on case-specific facts and circumstances. Such starting points and departure rules are the essence of sentencing guidelines.

Guidelines developed and monitored by an independent sentencing commission have several other important policy advantages. Guidelines make sentences more predictable, and an adequately resourced sentencing commission has the staff and expertise to forecast the impacts that particular sentencing policies and rules will have. Such predictions permit a jurisdiction to make more effective and defensible use of limited and expensive correctional resources, thereby avoiding excessive use of prison sentences, preventing overcrowding, and setting priorities—which kinds of offenders most need to be in prison, and which can be given community-based sanctions? Impact forecasting can also assess, and take steps to mitigate, the extent to which existing or proposed sentencing policies and rules will cause or worsen racial and other invidious disparities. An independent, well-balanced sentencing commission can also take a comprehensive approach to sentencing policy-making, setting typical-case penalties for all crimes, considering long-term public costs and benefits, and making these judgments with at least some degree of insulation from short-term political and media pressures.

Of course, whether the advantages summarized above are achieved in practice is not guaranteed and may depend critically on how a guidelines system is designed and implemented. But research shows that commission-based guidelines are generally effective in all of the ways hypothesized above<sup>37</sup>—reducing racial, gender, and other disparities; controlling growth in prison populations;<sup>38</sup> avoiding prison overcrowding; and developing the institutional expertise, balanced approach, and long-term perspective needed to gain the respect and support of judges and other practitioners and succeed as administrative agencies.

#### B. Arguments against Sentencing Guidelines

Many common critiques of commission-based guideline reforms are based on misconceptions, although most of these critiques are valid when applied to the federal guidelines.

Some critics blame guidelines for the exceptionally harsh sentencing outcomes found in most U.S. jurisdictions. But in the recent era of widespread mass incarceration, prison populations in most U.S. guideline systems grew slower than in non-guideline systems.<sup>39</sup> This is largely due to resource-management procedures (based on

accurate prison-bed impact predictions) that become possible with commission-designed structured sentencing (but which have not been seriously employed in the federal system).

Although one of the major policy goals of sentencing guidelines is to reduce racial disparities, several guideline states have persistently high rates of racial disproportionality in their prison and jail populations,<sup>40</sup> and some critics may blame the guidelines for this problem. But prison disproportionality occurs at least as often in non-guideline states; a much better predictor of prison disproportionality is a state's incarceration rate—states with low incarceration rates tend to have high rates of prison disproportionality, and vice versa, a pattern that seems to be caused by differences in state incarceration priorities interacting with racial differences in offense patterns.<sup>41</sup>

Another frequent criticism of sentencing guidelines, especially those employing a grid format, is that they are rigid, simplistic, inhuman, and lacking sufficient flexibility.<sup>42</sup> Those critiques are valid when applied to the federal guidelines, particularly in the pre-*Booker* era when those guidelines were legally binding. But in state guideline systems, even those with active appellate review, judges retain substantial power to tailor the sentence to specific offense and offender circumstances. Moreover, to the extent that grid-based or other formulaic rules are simpler, this has an important practical advantage—simpler rules reduce errors and disparities in application and are less costly. For these reasons, simplicity of application was an expressed drafting principle in Minnesota and several other guideline states.<sup>43</sup> Grid-based rules are also much more transparent, which promotes better public and offender understanding of sentencing policies and decisions.

Legally binding guideline rules are another common target of guideline critics; as a result, about half of U.S. guideline systems use only advisory rules, with limited if any substantive appellate review. But evidence is scant that nonbinding rules actually constrain judges and limit disparity in any meaningful sense.<sup>44</sup> Moreover, any real loss of case-level judicial discretion, under legally binding guidelines, is arguably a necessity in the context of U.S. sentencing, where the potentials for shockingly high levels of disparity, in both absolute and relative terms, are elevated by such factors as unreasonably high statutory maxima, elected or politically appointed judges and prosecutors, and the racialized legacies of slavery, oppressive Jim Crow laws, and de facto segregation.

Critics have also argued that when guidelines are based on convicted offenses (as guidelines should be, and all state guidelines are<sup>45</sup>), prosecutors can use their unregulated charging powers to effectively determine the sentence, thereby allowing partisan advocates to exercise sentencing authority, and producing penalties that are either more severe or less severe than a neutral judge would have imposed.<sup>46</sup> But this critique breaks down in practice. Prosecutors are advocates; they are not inclined to undercharge unless they are corrupt or lack adequate resources, both of

which are problems with or without guidelines. As for overcharging, that is limited by legal proof requirements unless defense counsel is incompetent or lacks adequate resources, both of which, again, are problems with or without guidelines. In addition, both under- and overcharging are kept within limits when judges have, as they do in all state guideline systems, adequate scope to depart from guideline recommended sentences, and are not frequently constrained by mandatory-sentence laws.

Some opponents of guideline reforms seem to reject the premise—underlying virtually all systems of structured sentencing—that for any given offense there are many “typical” cases; defenders of unstructured sentencing seem to believe that “every case is different.” But the typical-cases premise is strongly supported by empirical research—average sentences, reflecting established sentencing norms and customs, appear to exist in every system (although there is substantial variation around those averages, much of it justified, much of it not). Typical-case norms can be used to give all judges a common starting point. Without that kind of structure, an offender's sentence depends on who the judge is (or even on what day or hour the judge imposes sentence).

To summarize: common criticisms of guideline reforms are mostly overstated, based on misconceptions, or mainly applicable to certain poorly designed guideline reforms. And although it might be assumed that judges are uniformly opposed to legally binding limits on their discretion, the reality is that judges in most states with such guidelines appear to have largely accepted structured sentencing. This is partly because most guideline recommendations are based on historical sentencing practices, thus building on sentencing norms that judges have already endorsed. And in several states with non-historical guidelines, influential judges on the sentencing commission worked to effectively build broader judicial support for the new rules.<sup>47</sup>

## Conclusion

Judge Frankel's critique of unregulated judicial and parole discretion was, and is, correct—such lawless, haphazard deprivation of offenders' liberty and life chances is unacceptable in any legal system claiming to be governed by the rule of law. Unstructured discretion

- guarantees frequent and often shocking disparities, including along racial and ethnic lines;
- fails to prevent uncontrolled growth in prison populations and dangerous levels of prison overcrowding; and
- fails to set rational priorities in the use of limited and expensive prison and other correctional resources.

Judge Frankel's sentencing reform model, as fleshed out by later writers and reformers, addresses all of these problems of discretion, and has stood the test of time—well-developed state guideline systems provide the best sentencing reform model, the one that is most likely to create

and maintain a fair, balanced, and cost-effective punishment system.

Frankel's guidelines model is not only the best alternative to replace the traditional, unstructured sentencing and prison-release regime that still exists in over half of U.S. states—it's the only realistic alternative. Various other reforms were tried prior to commission-based guidelines but were found to have very limited impact. These included sentencing councils to discuss each judge's pending cases; appellate review of sentences (without guidelines); purely advisory guidelines by and for judges; mandatory sentences; recommended sentences drafted by legislators without input from an independent commission; attempts to abolish or sharply limit plea bargaining; parole guidelines; and abolition of parole discretion without guidelines.<sup>48</sup> Each of these alternatives has some value, but they all represent partial solutions to the problems of disparity, lack of transparency, and poor resource management; commission-based guidelines provide a more complete solution to these problems. And in the period since such guidelines began to be used, no better solutions have been tried, or even seriously proposed. Judge Frankel's commission-based sentencing guidelines represent the only successful comprehensive sentencing reform effort in modern times.

Still, none of the existing state guideline systems is perfect. The most fully developed systems (e.g., those in Kansas and Minnesota)<sup>49</sup> would be even better with the following changes:

- coverage of non-petty misdemeanors, not just felony-level crimes;<sup>50</sup>
- structuring rules for the conditions of community-based (nonprison) sentences, especially local jail and other custodial penalties;<sup>51</sup>
- state subsidies to help local jurisdiction create and expand community-based sentencing alternatives, thereby encouraging greater use of such sanctions and keeping offenders out of state prisons who don't need to be there;<sup>52</sup>
- structuring rules for decisions to revoke probation and post-prison supervision;
- structuring rules for sentencing of multiple current offenses (most U.S. guidelines leave judges broad discretion to impose fully consecutive, partially consecutive, or fully concurrent sentences<sup>53</sup>);
- prior-conviction enhancements that maintain conviction-offense proportionality, cease counting older priors, and in other ways set stricter limits on such enhancements than in most U.S. guideline systems;<sup>54</sup>
- limited use of major "prescriptive" changes in existing sentencing norms;<sup>55</sup>
- regular recalibration of guideline recommendations based on departure patterns and newer policy thinking.<sup>56</sup> Some U.S. guideline systems have done this (e.g., Washington and Pennsylvania), but all systems need to do more;

- guideline rules and/or principles that encourage judges to take into account any substantial adverse collateral consequences of conviction;<sup>57</sup>
- a legislative mandate encouraging the sentencing commission to study and propose strategies for reducing the prison population (decarceration), especially in jurisdictions with incarceration rates above the national average.<sup>58</sup> California's experience under "realignment" shows that states can substantially reduce their prison populations without causing increased crime rates;<sup>59</sup>
- legislative or commission rules and standards to structure the use of various pre-conviction diversion alternatives;<sup>60</sup>
- better data on prosecutorial decisions. Although this is not a serious problem in a well-balanced guideline system (i.e., one with reasonable levels of sentence severity, limited use of mandatory penalties, and adequate scope for judges to depart), disparities resulting from prosecution decisions need at least to be made more visible and assessed, for example, by creating databases allowing prosecution supervisors to identify charging outliers;<sup>61</sup>
- limits on pretrial detention, especially for less serious crimes—such detention should not exceed the custodial sentence, if any, likely to be imposed under the guidelines;<sup>62</sup> and
- "second look" procedures permitting early release of prisoners due to infirmity, prison overcrowding, or other important changed circumstances.<sup>63</sup>

Judge Frankel's writing inspired sentencing scholars, reformers, and practitioners to address the lawlessness of unregulated sentencing and prison-release discretion. The best state guideline systems embody Frankel's optimistic vision. But he would not be fully satisfied; he would want and expect even the best guideline systems to continue to evolve, thoughtfully and steadily coming closer to the shared goal of just and effective sentencing.

## Notes

- <sup>1</sup> Marvin Frankel, "Lawlessness in Sentencing," *Cincinnati Law Review* 41 (1972): 1 (hereinafter: 1972).
- <sup>2</sup> Marvin Frankel, *Criminal Sentences, Law without Order* (1973) (hereinafter: 1973). See also Marvin Frankel and Leonard Orland, "Sentencing Commissions and Guidelines," *Georgetown Law Journal* 73 (1984): 225.
- <sup>3</sup> As further discussed below, nineteen jurisdictions were still using some form of guidelines as of December 2022. See also Richard S. Frase, *Four Decades of American Sentencing Guidelines: What Have We Learned?* Crime & Justice 48 (2019): 79 (hereinafter: Frase, *Four Decades*).
- <sup>4</sup> This essay updates and expands upon Michael Tonry's 1993 essay with a similar title. Michael Tonry, "The Success of Judge Frankel's Sentencing Commission," *Colorado Law Review* 64 (1993): 713.
- <sup>5</sup> American Bar Association, *Standards for Criminal Justice: Sentencing*, 3rd ed. (1993); American Law Institute, *Model Penal Code: Sentencing, Report* (2003) (overall project plan); American Law Institute, *Model Penal Code: Sentencing* (2017) (final approved provisions).

- 6 For more detailed summaries of the history and varieties of U.S. guidelines, see Frase, *Four Decades*.
- 7 As Michael Tonry's essay in this issue reminds us, many writers before Judge Frankel (likewise reflecting multiple perspectives) had also strongly criticized the prevailing indeterminate sentencing model, with its uncontrolled judicial and parole discretions, and resulting disparities.
- 8 See Alexis Watts, *The Composition of Sentencing Commissions*, 2016. <https://robinainstitute.umn.edu/articles/composition-sentencing-commissions>
- 9 Gerard E. Lynch, "Marvin Frankel: A Reformer Reassessed," *Federal Sentencing Reporter* 21 (2009): 235, 237n26. For an analysis of sentencing commissions as administrative agencies, see Rachel E. Barkow, "Administering Crime," *UCLA Law Review* 52 (2005): 715.
- 10 See, e.g., 28 U.S.C. Sec. 2072(b); Minn. Stat. Sec. 480.051.
- 11 Frankel referred briefly to "guidelines" elsewhere in the book (1973, 113), but he did not use that term when speaking of the commission's rules.
- 12 See Leslie T. Wilkins et al., *Sentencing Guidelines: Structuring Judicial Discretion* 5 (1978).
- 13 See, e.g., Frase 2013, *supra*, and Dale G. Parent, *Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines* 20 (1988). Parole guidelines also strongly influenced the Yale project described below. See Pierce O'Donnell, Michael J. Churgin & Dennis E. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* (1977), chap. 3, "Parole Release Guidelines: A Partial Model for Sentencing Reform." For further discussion of how grid-based parole guidelines led to widespread adoption of grid-based sentencing guidelines, see Rhys Hester, "Punishing for the Past (Sometimes): Judicial Perspectives on Criminal History Enhancements," *The Prison Journal* 101 (2021): 443.
- 14 See generally, Wilkins et al., *supra*.
- 15 Parent, *supra*, at 26 (discussing Rep. Arnold Kempe's guidelines commission proposal).
- 16 See, e.g., David Fogel, "... We Are the Living Proof..." *The Justice Model for Corrections* (1975); Richard G. Singer, *Just Deserts: Sentencing Based on Equality and Desert* (1979); Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* (1976); Ernest van den Haag, *Punishing Criminals* (1975); Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (1976).
- 17 Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System* (2013).
- 18 Morris's Limiting Retributive punishment model is elaborated, defended, and compared to the explicit and implicit models adopted in Minnesota and other guideline systems, in Richard S. Frase, "Sentencing Principles in Theory and Practice," *Crime & Justice* 22 (1997): 363. See also Richard S. Frase, "Limiting Retributivism," in *The Future of Imprisonment* (Michael Tonry, ed.) (2004), and Frase 2013, *supra*.
- 19 An early draft of a book summarizing the Yale project was shown to Senator Kennedy and other federal officials in autumn 1975. See Kate Stith & Steven Y. Koh, "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines," *Wake Forest Law Review* 28 (1993): 223, 229–30. The book itself was published in 1977; O'Donnell et al., *supra*. For critical reviews of that book, see Michael E. Smith, "Book Review," *Harvard Law Review* 91 (1978): 896; and Robert O. Dawson, "Sentencing Reform: The Current Round," *Yale Law Journal* 440 (1978): 88.
- 20 Dawson, *supra*, at nn. 4–5.
- 21 Dawson, *supra*, at 445–56.
- 22 Frase 2013, *supra*, at 167–68.
- 23 National Conference of Commissioners on Uniform State Laws, *Model Sentencing and Corrections Act* (1978).
- 24 American Bar Association, *Standards Relating to the Administration of Criminal Justice: Sentencing Alternatives and Procedures*. 2nd ed. (1979); Richard S. Frase, "Norval Morris's Contributions to Sentencing Structures, Theory, and Practice," *Federal Sentencing Reporter* 21 (2009): 254.
- 25 Except as otherwise noted, the source for the summary below is the University of Minnesota's Sentencing Guidelines Resource Center, <https://robinainstitute.umn.edu/sentencing-guidelines-resource-center>. See also Frase, *Four Decades*.
- 26 Parole discretion can be abolished for some, most, or almost all crimes; likewise, the degree of binding force of guideline rules can range from virtually none to very substantial. See Richard S. Frase, *Varying Binding Effects of Guidelines—the Mandatory-to-Advisory Continuum* (2015), <https://robinainstitute.umn.edu/articles/varying-binding-effects-guidelines-mandatory-advisory-continuum>. Furthermore, even the extreme ends of each of these two continua are more varied than might be supposed: parole abolition still allows prison time-served to be reduced (sometimes by 50 percent or more) via good-conduct credits. And in state systems, "mandatory" guidelines—even when they are enforced by active appellate review—still leave judges with substantial room for departure in atypical cases (by contrast, mandatory-minimum statutes rarely give judges any departure power). A given system's location on the mandatory-advisory continuum depends not only on the extent to which guideline rules are actively enforced by appellate review but also on such factors as whether a departure standard is provided (and if so, how strict it is); what procedural requirements apply to departure (e.g., a statement of reasons); and what other factors are present in that jurisdiction (e.g., publication of judge-specific departure rates) that tend to encourage compliance.
- 27 The Pennsylvania Commission on Sentencing recently completed work on legislatively mandated parole guidelines, which went into effect in 2022 (<https://pcs.la.psu.edu/guidelines-statutes/state-parole>). The guidelines apply two main factors: recidivism risk and "preparedness" for release.
- 28 Aside from procedural errors (e.g., no reasons given for departure), sentences can be reversed on substantive grounds only for abuse of discretion. See Robina Sentencing Guidelines Resource Center, *Case Law Summary: Pennsylvania*, <https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-05/Pennsylvania%20SGRC%20Case%20Law%20Summary%202018.pdf>. See also Kevin R. Reitz, "Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experience," *Northwestern University Law Review* 91 (1997): 1441.
- 29 Some of these systems diverged from the Minnesota model in important ways, however, especially over time. The Florida and Ohio guidelines were never stated in a grid format (Alabama, Delaware, and Virginia likewise have non-grid guidelines); Ohio's guidelines have nothing equivalent to a criminal history score; in Florida, the commission's guidelines were replaced by a new punishment code, and limits were removed on upward departures; and in response to the constitutional requirements imposed by *Blakely v. Washington* and subsequent cases, appellate review of guideline sentences was greatly limited in the federal system and in Ohio (this change also occurred in Michigan and Tennessee).
- 30 From 2003 to 2007, Wisconsin had voluntary guidelines combined with parole abolition. And in 2013 Alabama switched to legally binding guidelines for most nonviolent felonies.
- 31 See, e.g., Steven L. Chanenson, "The Next Era of Sentencing Reform," *Emory Law Journal* 54 (2005): 377.
- 32 Separate guidelines for parole release are helpful, but they should be written and monitored by a sentencing



- commission and coordinated with the guideline rules for judges (as Pennsylvania is now doing).
- 33 Prior-record sentence enhancements in guideline systems are extensively described and critiqued in Richard S. Frase & Julian V. Roberts, *Paying For the Past: The Case against Prior Record Sentence Enhancements* (2019).
- 34 Richard S. Frase & Kelly Lyn Mitchell, "Sentencing Guidelines in the U.S.," in *Sentencing Policies and Practices in the 21st Century* (Cassia Spohn & Pauline Brennan, eds., 2019), 54.
- 35 Frase, *Four Decades*, 118.
- 36 Florida and Tennessee kept many guideline rules but abolished their commissions; Florida also switched to "topless" guidelines (subject only to statutory maxima); Ohio, Michigan, and Tennessee switched to advisory guidelines (to avoid *Blakely* proof requirements); Minnesota raised the upper limits of presumptive sentence ranges (to lessen *Blakely* problems); Oregon changed many presumptive minimum prison terms to mandatory minima; and the Washington sentencing commission became a solely advisory body with no staff of its own. States that considered but rejected commission-drafted guidelines include Alaska, Colorado, Connecticut, Georgia, Illinois, Iowa, Maine, Montana, Nevada, New Mexico, New York, Oklahoma, South Carolina, Texas, and West Virginia.
- 37 See, e.g., Richard S. Frase, *Implementing Commission-based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 *Cornell Journal of Law & Public Policy* 2 (1993): 279; Frase, *Just Sentencing*, *supra*; Frase, *Four Decades*, *supra*; Terrence Miethe & Charles Moore, "Socio-economic Disparities under Determinate Sentencing Systems: A Comparison of Pre- and Post-guideline Practices in Minnesota," *Criminology* 23 (1985): 337; Don Steman & Andres F. Rengifo, "Policies and Imprisonment: The Impact of Structured Sentencing on State Incarceration Rates, 1978–2004," *Justice Quarterly* 28 (2011): 174; Tonry (1993) *supra*; Michael Tonry, *Sentencing Matters* (1996); and Robert Weisberg, "How Sentencing Commissions Turned Out to be a Good Idea," *Berkeley Journal of Criminal Law* 12 (2008): 179.
- 38 Not all guideline systems have avoided rapid prison population growth; Pennsylvania and the federal system experienced substantially above-average prison growth compared to other U.S. jurisdictions. See Frase, *Four Decades*. But guideline reforms in those two jurisdictions were never *intended* to limit increases in prison populations. Moreover, Pennsylvania's guidelines are only weakly enforced by appeals, and parole release discretion was retained. As for the federal guidelines, they failed to earn widespread support due to their evident lack of balance combined with the challenges of trying to impose a single set of sentencing norms on highly independent judges and prosecutors operating across the entire nation, and in a jurisdiction unconcerned about fiscal impacts (because the federal budget need not be balanced, and even rapidly rising prison costs remain a tiny fraction of the total budget).
- 39 Frase, *Four Decades*, 107.
- 40 See, e.g., Richard S. Frase, "What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?" *Crime and Justice* 38 (2009): 201.
- 41 Frase & Roberts, *supra*, at 129–31.
- 42 See, e.g., Julian V. Roberts, "The Evolution of Sentencing Guidelines in Minnesota and England and Wales," *Crime & Justice* 48 (2019): 187.
- 43 Frase, *Four Decades*, 119.
- 44 See, e.g., Tonry (1996), *supra*; Steman & Rengifo (2011), *supra*. One study claims that voluntary guidelines are almost as effective as legally binding guidelines in reducing disparities. John F. Pfaff, "The Continued Vitality of Structured Sentencing Following *Blakely*: The Effectiveness of Voluntary Guidelines," *UCLA Law Review* 54 (2006): 235. However, that study examined only seven guideline systems. Four of these (Missouri, Maryland, Michigan, and Tennessee) retained parole release discretion, so those guidelines did not address an important source of disparity. A fifth system (Ohio) provides only general principles, not specific guideline sentences or ranges. So the study was essentially comparing one voluntary system (Virginia) to one legally binding system (Washington).
- 45 Recommended guideline sentences should be based on conviction offenses to avoid undercutting legal standards and safeguards (proof beyond a reasonable doubt, jury trial, etc.). See Richard S. Frase, "The Uncertain Future of Sentencing Guidelines," *Law & Inequality* 12 (1993): 1, 15n74 (citing other authors who have strongly opposed the real-offense sentencing approach embodied in the federal guidelines, whereby sentences are enhanced by alleged crimes that were dismissed, acquitted, or never charged).
- 46 See, e.g., Albert W. Alschuler, "Monarch, Lackey, or Judge," *University of Colorado Law Review* 64 (1993): 723.
- 47 See, e.g., Parent 1988, *supra* (Minnesota); Ronald E. Wright, "Counting the Cost of Sentencing in North Carolina, 1980–2000," *Crime & Justice* 29 (2002): 39.
- 48 For further discussion of these pre-guidelines alternatives, see Richard S. Frase, "After 40 Years of Sentencing Guidelines, Should There be 40 More?," in *Oxford Handbook on Sentencing* (Ryan King, ed.) (forthcoming).
- 49 Each of these states has almost all of the essential features of a model guideline system (Frase, *Four Decades*): a permanent, balanced, independent, and adequately funded sentencing commission; specified typical-case presumptive sentences and departure criteria; a hybrid sentencing theory that harmonizes retributive and crime control purposes; balance between the competing benefits of rules and discretion, maintained by a moderate degree of appellate review of sentences; and guideline recommendations that are informed by resource and racial/ethnic-impact assessments. Both states have also mostly abolished parole release discretion, thereby addressing that major source of penalty disparity while also responding to Truth in Sentencing concerns. Three other states—Oregon, Washington, and North Carolina—also have very well-designed guidelines (*Id.*).
- 50 Coverage of misdemeanors helps to ensure they are usually punished less severely than felonies, and also helps set resource priorities (since local correctional resources are used for both misdemeanor and felony offenders) (Frase, *Four Decades*).
- 51 In most U.S. guideline systems, jail is an allowed condition of probation, and judges often have complete discretion to impose any jail term up to one year, or no jail. It would be much better if, as several systems have done, all guidelines included presumptive ranges or at least upper limits on jail terms, along with exchange rates (e.g., two days of home detention is equivalent to one day in jail) to help judges calibrate (and validate) the degree of punitiveness of various noncustodial penalties such as home detention, residential treatment, community service, fines, and means-based (day-) fines. For a variety of reasons (including limited local correctional resources), judges would still need to have more discretion when imposing community-based sentences than when deciding whether and for how long the offender should go to prison.
- 52 Several guideline states have used such subsidies; see Frase, *Four Decades*.
- 53 See Richard S. Frase et al., *Criminal History Enhancements Sourcebook* (2015), <https://robinainstitute.umn.edu/publications/criminal-history-enhancements-sourcebook>, chap. 10.

<sup>54</sup> See Frase & Roberts, *supra*; Richard S. Frase, “Criminal Record,” in *Oxford Handbook of Punishment Theory and Philosophy* (Jesper Ryberg, ed.) (forthcoming). See also Hester 2021, *supra*, arguing that early guidelines reforms may have increased the impact of prior record on prison duration, relative to pre-guidelines sentencing.

<sup>55</sup> Experience shows that highly prescriptive (norm-changing) guideline rules are strongly resisted by judges and prosecutors, which causes inconsistent application and undermines respect for the guidelines system as a whole. See Frase 1993, *supra*; Tonry 1996, *supra*. It should also be noted that the two most important pre-guideline attempts to structure sentencing and prison release discretions—parole guidelines and court-developed sentencing guidelines—based their recommended sentences largely or entirely on prior practice. See O’Donnell, *supra*; Wilkens et al., *supra*. And although the Minnesota commission said its guidelines were “prescriptive” rather than “descriptive,” the commission largely complied with the legislative directive to take prior sentencing and

releasing practices “into substantial consideration.” Frase (1993), *supra*.

<sup>56</sup> Wilkins et al., *supra*.

<sup>57</sup> In the revised Model Penal Code, an entire chapter is devoted to collateral consequences. American Law Institute (2017), *supra*.

<sup>58</sup> See Richard S. Frase, “Can Sentencing Guidelines Commissions Help States Substantially Reduce Mass Incarceration?,” *Minnesota Law Review* 104 (2020): 2781.

<sup>59</sup> Robert Weisberg, 2019. “The Wild West of Sentencing Reform: Lessons from California,” *Crime & Justice* 48 (2019): 35.

<sup>60</sup> American Law Institute (2017), *supra*.

<sup>61</sup> See Franklin E. Zimring, *The Insidious Momentum of American Mass Incarceration* (2020); see also Frase (2020), *supra* (reviewing and expanding on Zimring’s proposals for ways in which guideline commissions could reduce mass incarceration).

<sup>62</sup> Frase, *Four Decades*.

<sup>63</sup> American Law Institute (2017), *supra*.