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THE SUCCESS OF JUDGE FRANKEL'S SENTENCING COMMISSION

MICHAEL TONRY*

Judge Marvin Frankel's proposal that specialized administrative agencies be established and charged to set standards for sentencing, prescribed as a means to reduce the "lawlessness" in sentencing that Judge Frankel argues characterizes America's indeterminate sentencing systems,¹ has been tested and been validated. Sentencing commissions in some jurisdictions have operated much as Judge Frankel hoped they would. Some commissions have achieved and sustained specialized institutional competence, insulated sentencing policy from short-term "crime of the week" political pressures, and maintained a focus on comprehensive system-wide policymaking. Guidelines promulgated by commissions have altered sentencing patterns and practices, reduced sentencing disparities and gender and race effects, and shown that sentencing policies can be linked to correctional and other resources, thereby enhancing governmental accountability and protecting the public purse.

Many readers may be surprised by the preceding summary of experience with sentencing commissions and their guidelines. The disastrous experience of the best known commission, the United States Sentencing Commission, is well known.² How, a reader might reasonably ask, can the commission idea be a success if its most prominent example is a failure?

The experience of the federal commission is misleading in two ways. First, as elaborated below, the federal commission is but one of a dozen or more. In some states, notably Delaware, Minnesota, Oregon, Pennsylvania, and Washington, the experience has been much happier. Second, and more important for assessment of the viability of Judge Frankel's proposal, the evidence supporting the substantive failure of the federal guidelines also demonstrates the institutional capacity of sentencing commissions to establish system-wide sentencing policies, to change sentencing

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1. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

2. For a recent review of the evidence and arguments, see Michael Tonry, *The Failure of the U.S. Sentencing Commission's Guidelines*, 39 *CRIME AND DELINQ.* 131 (1993).

practices, and to structure the discretion of sentencing judges.

This commentary has three sections. The first section explains why the federal commission, though patently a failure from the perspective of responsible policymaking, nonetheless shows that commissions can be the effective policy machines Judge Frankel envisioned. The second canvasses state experience with sentencing commissions to show that some sentencing commissions have successfully established and implemented responsible sentencing policies. The third briefly introduces major issues now on the agendas of state sentencing commissions.

I. THE INSTITUTIONAL "SUCCESS" OF THE FEDERAL SENTENCING COMMISSION

Judge Frankel proposed establishment of an administrative agency called a sentencing commission which, through guidelines it would promulgate, would bring the rule of law to sentencing. The crux of the proposal concerns the institutional capacities of administrative agencies. Rulemaking authority has been delegated by legislatures to countless state and federal administrative agencies on the bases that—far better than any legislature—they can achieve and maintain specialized competence concerning complex subjects, have some degree of insulation from short-term political emotions and pressures, and can adopt a comprehensive systems approach to policymaking.

From that perspective, the federal sentencing commission has been at least a partial success. No one can doubt that it has achieved specialized competence. Through its rulemaking processes, it has proposed and promulgated hundreds of changes to its guidelines, policy statements, and supporting commentary in efforts to restrain what it perceives as wilfully noncompliant judges, and to fine-tune its policies.³ Through its monitoring and evaluation staffs, the commission has assembled mountains of data and published numerous annual and evaluation reports—at least some of which, notably its report on mandatory penalties,⁴ demonstrate high levels of technical competence and policy sophistication.

The commission has taken a comprehensive systems approach to policymaking, as is evidenced by its efforts to devise guidelines

3. See, e.g., U.S. SENTENCING COMMISSION, ANNUAL REPORT—1991 (1992) [hereinafter ANNUAL REPORT 1991]; U.S. SENTENCING COMMISSION, ANNUAL REPORT—1990 (1991).

4. U.S. SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM (1991) [hereinafter MANDATORY PENALTIES].

for all federal offenses, to monitor the guidelines' implementation, to counterbalance the plea bargaining strategies of prosecutors and defense counsel, and to train probation officers to serve as guardians of the guidelines.

The most powerful evidence that the federal commission has succeeded institutionally is that federal sentencing practices have been radically altered. Sentencing patterns have changed as the commission intended: the proportion of cases sentenced to probation has declined greatly and average prison terms for many offenses have lengthened.⁵

In a 1991 self-evaluation, the commission reported that the percentage of convicted federal offenders sentenced to probation declined from 52 percent in late 1984 to 35 percent in June 1990.⁶ The commission's evaluation data, however, overstate current use of probation, presumably by counting as "probation" sentences that include a period of incarceration as a condition. The commission's 1991 annual report shows that only 14.5 percent of offenders in 1991 received "probation-only" sentences.⁷ When 1985 probation-only rates for selected offenses are compared with 1991 rates, the following patterns appear: robbery—18 percent (1985), .3 percent (1991); fraud—59 percent, 22 percent; and immigration offenses 41 percent, 16.8 percent.⁸

The severity of prison sentences similarly increased. The commission found that the mean "expected to be served" sentence for all offenders increased from twenty-four months in July 1984 to forty-six months in June 1990. Sentence lengths for drug offenses increased by 248 percent from 1984 to 1990.⁹

None of this is to argue that the federal guidelines have been a substantive success. They are, and deserve to be, deeply disliked. Of hundreds of people who testified about them before the Federal Courts Study Committee, only four, then-Attorney General Richard Thornburgh and three members of the commission, supported the guidelines.¹⁰

5. II U.S. SENTENCING COMMISSION, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING (1991) [hereinafter SELF-EVALUATION].

6. *Id.* at 378.

7. *Id.* at tbl. 3.

8. U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL GUIDELINES AND POLICY STATEMENTS 68 (1987); ANNUAL REPORT 1991, *supra* note 3, at tbl. 23.

9. SELF-EVALUATION, *supra* note 5, at 378.

10. FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE U.S., REPORT

The guidelines, which took effect on November 1, 1987, are the most controversial and disliked sentencing reform initiative in this century. They are commonly criticized on policy grounds (that they unduly narrowly limit judicial discretion and unduly shift discretion to prosecutors), on process grounds (that they foreseeably cause circumvention by judges and prosecutors), on technocratic grounds (that they are too complex and difficult to apply accurately), on fairness grounds (that by taking only offense elements and prior convictions into account, they require that very different defendants receive the same sentence), and on normative grounds (that they have greatly increased the proportion of offenders receiving prison sentences and are generally too harsh).¹¹

Within two years of taking effect, "more than two hundred district judges invalidated the guidelines and all or part of the Sentence Reform Act."¹² Those decisions were necessarily couched in constitutional terms, but the number of cases and the vehemence of the opinions suggest that the underlying problem was the judges' deep antipathy to the guidelines themselves. In *Mistretta v. United States*,¹³ an eight to one decision of the United States Supreme Court upheld the constitutionality of the federal commission, the guidelines, and the Sentencing Reform Act of 1984.

At day's end, no matter how misguided the federal guidelines, and despite their inability to win support from the people who must implement them (which means they will fail in the long-term), the guidelines have succeeded in recasting federal sentencing.

Where Judge Frankel's model failed in the federal system is in respect of political insulation. Most proponents of guidelines have seen its capacity to resist short-term emotions and politics as a great strength. The federal commission, by contrast, made no effort to insulate its policies from politics and superficial emotion. One sign of this is a mantra-like invocation by the commission of "reduction of undue leniency" in sentencing as one of the guide-

OF THE FEDERAL COURTS STUDY COMMITTEE 142 (1990) [hereinafter FEDERAL COURTS STUDY COMMITTEE].

11. For full citation and summaries of evidence on each point, see Gerald W. Heaney, *The Reality of Guideline Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 YALE L.J. 1681 (1992); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Tonry, *supra* note 2.

12. U.S. SENTENCING COMMISSION, ANNUAL REPORT—1989, at 11 (1990).

13. 488 U.S. 361 (1989).

lines' primary objectives,¹⁴ even though the Sentencing Reform Act of 1984 includes no equivalent language among its enumerated statutory purposes.¹⁵ The commission apparently decided that the Department of Justice and the most law-and-order members of the United States Congress were its primary constituency and it established and attempted to enforce policies that pleased that constituency. This is presumably why the commission ignored a statutory directive to tie its policies to available correctional resources,¹⁶ why it chose to ignore a statutory presumption against incarceration of first offenders not convicted of violent or other serious crimes,¹⁷ and why it reacted to harsh mandatory minimum penalty provisions for many drug offenses by making the guidelines even harsher.¹⁸

Thus the federal experience shows that, as an institution, a sentencing commission can operate like administrative agencies do on other subjects. The state experience supports that conclusion but also shows that commissions can develop successful sentencing policies that win the support of practitioners, tie policy to resource allocation, and achieve substantively sound sentencing policies.

II. THE SUBSTANTIVE SUCCESS OF THE STATE SENTENCING COMMISSIONS

Were there not a federal sentencing commission, no one would question that Judge Frankel's proposed new approach to formulation of sentencing policies has been markedly successful, both institutionally and substantively. In 1978, just a few years after the appearance of Judge Frankel's book and long before passage of the Sentencing Reform Act of 1984, Minnesota and Pennsylvania enacted sentencing commission legislation and, in 1980 and 1982 respectively, guidelines took effect in both states.¹⁹ Since then,

14. See, e.g., MANDATORY PENALTIES, *supra* note 4, at i ("The goals of the Sentencing Reform Act of 1984 were to reduce unwarranted disparity, increase certainty and severity, and correct past patterns of undue leniency.").

15. 18 U.S.C. § 3553(a)(2) (1988); 28 U.S.C. § 1991(b) (1988).

16. 28 U.S.C. § 994(g) (1988): "The Commission in promulgating guidelines . . . shall take into account the nature and capacity of the penal, correctional, and other services and facilities available. . . . The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons."

17. 28 U.S.C. § 994(j): "The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which a defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."

18. See Michael Tonry, *Salvaging The Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENTENCING REP. 355 (1992).

19. On Pennsylvania, see John Kramer, *The Evolution of Pennsylvania's Sentencing*

guidelines developed by sentencing commissions have taken effect in Washington,²⁰ Oregon,²¹ and Louisiana.²² Guidelines will take effect in Kansas early in 1993.²³

Of the guidelines now in effect, those in Minnesota, Pennsylvania, Washington, and Oregon have been in operation long enough that evidence concerning their operation is available. State commissions have achieved Judge Frankel's institutional purposes. They have established and sustained specialized technical competence. In all four states, the commissions have survived to serve as their state's principal forum for sentencing policy proposals. Each commission has developed a monitoring system and has considered or implemented guidelines changes to respond to implementation problems revealed by monitoring programs. Each commission conducts regular training sessions and publishes annual statistical reports. Minnesota's commission in 1984 prepared the most sophisticated evaluation of a state sentencing initiative ever published.²⁴ All four commissions are wrestling with current policy issues. Pennsylvania, in particular, is now considering a major overhaul of its guidelines and some of their underlying policy premises.

To some extent, the state commissions have served to insulate sentencing policy from short-term emotionalism and law-and-order sloganeering. Throughout most of the 1980s, Minnesota defied the national pattern of rapidly rising prison populations, as did Washington for five years after guidelines implementation, and as has Oregon since its guidelines were implemented in 1989. Eventually, in both Minnesota and Washington, sentencing policies did change to reflect the law-and-order politics of the 1980s;²⁵ perhaps it is no coincidence that penalties in both states were increased substantially in 1989, only months after Willie Horton's voter-galvanizing appearance in the 1988 presidential campaign.

Guidelines, OVERCROWDED TIMES, Aug. 1992, at 6; on Minnesota, see Debra L. Dailey, *Minnesota's Sentencing Guidelines—Past and Future*, OVERCROWDED TIMES, Feb. 1992, at 4.

20. On Washington, see Roxanne Lieb, *Washington State: A Decade of Sentencing Reform*, OVERCROWDED TIMES, July 1991, at 1.

21. On Oregon, see Kathleen M. Bogan, *Sentencing Reform in Oregon*, OVERCROWDED TIMES, Mar. 1991, at 5.

22. LA. REV. STAT. ANN. §§ 15:321 to -29 (West 1992).

23. KAN. STAT. ANN. §§ 74-9101 to -05 (Supp. 1991).

24. KAY A. KNAPP, MINNESOTA SENTENCING GUIDELINES COMMISSION, *THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION* (1984).

25. See Roxanne Lieb, *Washington Prison Population Growth Out of Control*, OVERCROWDED TIMES, Feb. 1993, at 1; Richard S. Frase, *Prison Population Growing Under Minnesota Guidelines*, OVERCROWDED TIMES, Feb. 1993, at 1.

The state sentencing commissions also adopted comprehensive systems approaches to sentencing policy. Minnesota, Washington, and Oregon all fitted their sentencing policies to available or foreseeable prison resources,²⁶ taking the theretofore unknown, but unassailable, position that responsible policymaking requires that states face up to the programmatic and financial implications of the sentencing policies they adopt. Policies can be tailored to fit resources, or resources can be expanded to meet projected needs; one way or the other a "resource constraint" policy requires conscious and responsible decisionmaking, a practice conspicuously absent in the 1980s in most American states, where punishments were repeatedly raised without regard to resources and foreseeably resulted in unprecedented prison overcrowding and federal court intervention. As a result of the resource constraint policy, each of the commissions had to reduce penalties for some crimes when pressures arose to increase penalties for others.²⁷

To this point, the experience of the federal and state commissions is institutionally similar. The experience differs only in the quality of the guidelines the state commissions produced and the success of their implementation. Three points of comparison stand out.

First, unlike the federal guidelines, which remain deeply unpopular with judges and lawyers five years after their implementation, the guidelines in Washington, Delaware, Pennsylvania, Minnesota, and Oregon are generally supported by criminal court practitioners.²⁸ In no state is there heated debate about the guidelines' desirability and legitimacy and in no state is there organized opposition to them.

Second, in all of these states, guidelines successfully shifted sentencing practices toward greater use of state prison punishments for violent offenders and lesser use for property offenders.²⁹ In all of these states, monitoring data has revealed that compliance with guidelines is high. In Minnesota, where both internal and external evaluations have been completed, sentencing disparities were markedly reduced.³⁰ (One can probably infer from high guidelines compliance rates in the other states that disparities in their courts also diminished). By contrast, because of defective research designs

26. See Dailey, *supra* note 19; Lieb, *supra* note 25; Bogan, *supra* note 21.

27. See, e.g., concerning Minnesota, DALE PARENT, *STRUCTURING SENTENCING DISCRETION: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES* (1988).

28. See sources cited *supra* notes 19-20; on Delaware, see Richard S. Gebelein, *Sentencing Reform in Delaware*, *OVERCROWDED TIMES*, Mar. 1991, at 5.

29. See sources cited *supra* notes 19-20; see also Gebelein, *supra* note 28.

30. KNAPP, *supra* note 24.

used in the U.S. Commission's 1991 self-evaluation, no one knows whether federal disparities have declined.³¹

Third, as noted earlier, until legislation compelled Washington and Minnesota sentencing commissions to toughen penalties in 1989, those states successfully maintained prison populations within available capacity and maintained lower than average incarceration rate increases, thereby avoiding out-of-control corrections spending and federal court intervention.³² In Oregon, population control continues. By contrast, the U.S. Commission ignored its statutory directive to link policy to resources and, as a result, the federal prison population grew by sixty percent between year-end 1987 and mid-1992, and the federal prisons are now operating at 158 percent of capacity.³³

To be sure, not all state sentencing commissions have succeeded. Some, like those in New York and South Carolina,³⁴ developed guidelines but could not persuade legislators to adopt them. In Pennsylvania³⁵ and Kansas,³⁶ legislatures rejected initial sets of proposed guidelines and commissions came forth with less ambitious, but salable successors. In some states, for example Florida, the guidelines are not well respected and are of little influence.³⁷ At day's end, however, Judge Frankel's proposal has experienced remarkable success. It has been adopted by Congress and by more than a dozen states, and in many jurisdictions has operated as Judge Frankel envisioned and has accomplished the purposes he aimed to achieve.

III. THE COMMISSIONS' FUTURES

The commissions now in operation, both the pioneers and the newcomers, face similar issues.³⁸ First, although no commission in

31. See, e.g., 5 FED. SENTENCING REP. (Nov./Dec. 1992).

32. See sources cited *supra* note 25.

33. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FOUR PERCENT MORE PRISONERS IN FIRST HALF OF 1992 (1992).

34. See ANDREW VON HIRSCH, KAY A. KNAPP & MICHAEL TONRY, THE SENTENCING COMMISSION AND ITS GUIDELINES 24-25 (1987); PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND THE REALITY OF RETRIBUTIVE JUSTICE (1991).

35. Kramer, *supra* note 19.

36. David J. Gottlieb, *A Review and Analysis of the Kansas Sentencing Guidelines*, 39 KAN. L. REV. 65, 67-68 (1991).

37. Michael Tonry, *Structuring Sentencing*, in 10 CRIME AND JUSTICE: A REVIEW OF RESEARCH 294 (Michael Tonry & Norval Morris eds., 1988).

38. See Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679 (1993).

its initial years attempted to develop guidelines for nonincarcerative sentences, in part because development of incarceration guidelines was challenge enough, in part because of the lack of community-based punishments in most jurisdictions, and in part because no one knew how to do it, commissions are currently at work in many states on proposals to integrate intermediate and noncustodial penalties into guidelines and to devise systems of interchangeability between prison and non-prison sanctions.³⁹

Second, the wisdom of the Minnesota-Washington-Oregon decision to tie sentencing policies to corrections resources has become ever clearer and other states are beginning to follow suit. For example, in Pennsylvania, where the link was rejected on policy grounds in the early 1980s, the commission is now revisiting the idea.

Third, no jurisdiction has as yet devised an adequate system for controlling plea bargaining under a sentencing guidelines system. If allowed, sentence bargains can nullify any system of guidelines. Charge, or "fact" bargaining in systems based on conviction offenses, as in Minnesota and Oregon, enables plea bargaining lawyers to pick the applicable guidelines range and thereby greatly limit the judge's options. The federal commission adopted its "relevant conduct" approach to sentencing in order to offset the influence of plea bargaining, but by requiring judges at sentencing to take account of uncharged behavior, and behavior alleged in dropped or acquitted charges, the commission's approach raises difficult issues of principle.⁴⁰ In addition, this approach has not managed to avoid increased prosecutorial influence. Many judges argue that the guidelines have shifted power to the prosecutor.⁴¹

The sentencing commission idea will survive the federal debacle. To be sure, the federal example raises skepticism in many states. In both North Carolina and Texas, for example, commissions at early meetings adopted resolutions expressly repudiating the federal guidelines as a model for anything they might develop.⁴² At a meeting of state sentencing commissions following this symposium, an Ohio representative reported that its commission early in its work resolved that Ohio should not adopt the type of rigid

39. NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION—INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 37-110 (1990).

40. Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 *STAN. L. REV.* 101 (1993).

41. See Heaney, *supra* note 11; FEDERAL COURTS STUDY COMMITTEE, *supra* note 10.

42. See generally Knapp, *supra* note 38, at 680 & n.5.

sentencing guidelines exemplified by the federal guidelines. State policymakers apparently are able to distinguish between the merits and promise of Judge Frankel's proposal and the demerits and failures of the federal experience. As it enters its third decade, Judge Frankel's sentencing commission idea is alive and thriving.