

Law Without Order

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BOOK REVIEW

Law Without Order. MARVIN E. FRANKEL. New York: Hill & Wang, 1973. Pp. x, 124. \$5.95.

Deeply moved by his experience in a federal district court, Judge Frankel presents a compelling criticism of the unreviewable sentencing power now lodged in a single judge. This largely uncharted power exercised by one person finds no counterpart in the administration of justice, yet the resulting sentences have far greater consequences to the individual sentenced, to others indirectly affected, and to the community, than much less important judicial decisions reviewable under legal principles or upon an open record. Statutes may confine the sentencer within a permissible range of imprisonment or fines, but no legal principles guide the choice within the range. Moreover, the discretion thus exercised is untrained, for the judge's qualifications do not embrace the sentencing function. Any assumption to the contrary is shattered by the inequalities in sentences imposed by judges of comparable legal accomplishments.

The judge does have the light afforded by the trial over which he has presided and usually a presentence report is prepared for him by probation or like officials. These reports, designed to include a variety of information about the defendant, are indispensable. But here too a grave defect afflicts the system; the reports often contain derogatory information of which neither the defendant nor his counsel is advised. This practice of nondisclosure is defended by some as necessary to protect confidential sources. As Judge Frankel says, there is "the intolerable risk of error when we rely for grave decisions of law upon untested hearsay and rumor."¹ He reaches a sound position as follows: "[D]isclosure ought to be the preferred and presumed rule, subject only to exceptions for rare and unique cases where the judge perceives specific dangers or injuries to be avoided."²

The actual sentencing, after the defendant and his counsel have been accorded the right to address the court, is usually a swift announcement unexplained by any legal guides and well-nigh unre-

¹ P. 32.

² P. 31. I took the position in an opinion for our court that, "in a matter of such importance, whether information which the informer is unwilling to have disclosed to the person principally affected should be used in the sentencing process," raises a question. *United States v. Bryant*, 442 F.2d 775 (D.C. Cir 1971), *cert. denied*, 402 U.S. 932 (1971).

viewable as to its fitness.³ Judge Frankel reasonably characterizes this situation as one "of fundamental lawlessness."⁴ The basic problem is the absence of rational ordering—"the unbridled power of the sentencers to be arbitrary and discriminatory."⁵ There follow the no less silent walls of confinement. Even the parole authorities who may then consider the sentence are relieved of the necessity of giving reasons for acting or not acting, and they almost never do give reasons.

Nevertheless, Judge Frankel would not remove the sentencing responsibility from the legal profession. The contribution of other disciplines should be made within the wide range of relationships which are the heritage of the law.⁶ It is the law which should fashion controls for the exercise of the tremendous sentencing power. Some ameliorating techniques are presently available. These include the Sentencing Institutes.⁷ Of potentially greater value, but little used, are voluntary Sentencing Councils of Judges, which enable the judge in each case to have the help of two colleagues. The author gives these councils high praise, yet they are used in only three places—the Southern Districts of Michigan and New York and the Northern District of Illinois. The rock bottom need, however, is for appellate court review of sentences, the lack of which is well-nigh incredible in a system of law. "[I]n no other area of our law does one man exercise such unrestricted power [as the trial judge's unreviewable sentencing power]. No other country in the free world permits this condition to exist."⁸ Sentences, like the exercise of discretion elsewhere, should be

³ Contrast the special provisions applicable to federal youth offenders under 18 U.S.C. §§ 5001-37 (1970), the subject of several recent opinions of my court. *See* *United States v. Reed & Hoston*, 476 F.2d 1145 (en banc) (D.C. Cir. 1973); *United States v. Coefield*, 476 F.2d 1152 (en banc) (D.C. Cir. 1973); *United States v. Ward*, 454 F.2d 992 (D.C. Cir. 1971); *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970).

⁴ P. 49.

⁵ *Id.*

⁶ Proceeding in this direction, the author interpolates that our sentences are the most severe of any industrialized nation and that too many are in prison who ought to be on probation, on work release, in halfway houses, fined, or handled under other possible alternatives to be imaginatively explored.

⁷ These Institutes are authorized by statute to aid the judge in "studying, discussing, and formulating objectives, policies, standards, and criteria for sentencing those convicted of crimes and offenses in courts of the United States." 28 U.S.C. § 334 (1970).

⁸ The quotation is from the report of the American Bar Association Project on Minimum Standards for Criminal Justice, approved by the ABA House of Delegates in 1968. ABA SPECIAL COMM. ON MINIMUM STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 77 (1968).

Judge Frankel's study also affords strong support for the recent bill introduced by several Senators, including Senators Hruska, McClellan, and Burdick, which would go part way in granting the courts of appeals jurisdiction to review unreasonable sentences imposed by district court judges. It has been described as similar to but broader in scope than the proposal of the National Commission on Reform of Federal Criminal Law.

reviewable to determine the proper application of relevant factors prescribed by law and for abuse of discretion. Judge Frankel does not ignore the problems this added duty would create for appellate courts. He is at pains to consider them, but concludes: "[A]bandoning all the permutations the future may bring, I stump here for appellate review of sentences as one step toward the rule of law in a quarter where lawless and unchecked power has reigned for too long."⁹

A separate chapter is devoted to the widely-used indeterminate sentences, carrying the possibility of mitigating disparities in prison terms through the action of parole boards which share responsibility with the sentencing judge. Judge Frankel would not eliminate these sentences, which are hopefully designed to fit the individual, but he persuasively advances the position that their general use cannot be justified. Advantages are overbalanced by the inequalities and injustices which result, gravely impeding the rehabilitating expectations of the system—expectations largely unfulfilled. There also inheres in these sentences a basic flaw; those who supervise the sentences after their imposition are without legal guides. The presumption in any event should favor definiteness, with indefiniteness required to be justified in particular cases. The latter might well include, for example, some sex and drug offenses, those of youth offenders and also, crimes of the "dangerous-offender" whose disorder is the generating factor of his danger. A rehabilitative quality inheres in definiteness if the sentencing is unaccompanied by an explained purpose which is related to the character of the sentence. The fact is that as presently administered the indeterminate sentence simply reflects the differences in judges rather than differences in the needs of the individuals sentenced in that manner.

Judge Frankel envisages a future in which law itself develops the objective that a particular sentence is chosen to serve, that is, whether it is imposed as retribution, deterrence, denunciation, incapacitation, or rehabilitation. This is a matter in which the law should guide the sentencer. Moreover, the sentencing judge should be required to state at the time the sentence is imposed "which among the allowable purposes were the supporting bases for each particular sentence,"¹⁰ with the inherent rehabilitative quality which resides in the knowledge thus conveyed.

I have long been convinced of the need for review of sentences, although not so thoroughly convinced it should be by the courts of appeals rather than by some other body composed for the purpose. I do believe, however, the first most feasible step toward review to be by the courts of appeals.

⁹ P. 85.

¹⁰ P. 108.

While the need for immediate remedies, such as appellate court review, is urgent, Judge Frankel's impressive treatment of the subject leads him inevitably to the projection of means of accomplishing change. The required research for improving the manner in which we deprive persons of liberty and thus seek to protect and promote the common good calls for the creation of a sentencing commission perhaps composed of judges, lawyers, penologists, psychologists, criminologists, business people, artists, and former prisoners. I would add the ministry. Among the tasks of the commission would be to seek agreement on factors to be considered in sentencing and a procedure for weighing these factors. The imposition of the sentence would be accompanied by an explanatory profile of the elements which entered into it. Rule-making authority, as well as the responsibility for research and study, similar to that reposed in other agencies of government, should be delegated to the commission. Action taken would be subject to judicial confinement to the authority delegated. The commission's powers would also be subject to legislative delineation of the basic principles and purposes of sanctions, the permissible range for particular offenses, methods of treatment, and kinds of facilities.

The author's deeply felt and persuasive plea for progress along the above lines reflects the basic ambition of his impressive study; we must no longer acquiesce in the "monstrous evils perpetrated daily for all of us The need for change is clear."¹¹ Although eschewing constitutional controversy, there is the hint of serious questions which cast a shadow of illegality upon the operations of the present system. Judge Frankel seeks constructive development in the common good. His appeal is compelling. His voice should also be our own, the more so because he speaks for the voiceless as well as for us all.

*Charles Fahy**

¹¹ P. 124.

* Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.