Frankel at 50
A Half-Century’s Perspective on
Criminal Sentences: Law Without Order

Monday, April 24, 2023
8:30 am - 5:30 pm

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Address: 42 W 44th St, New York, NY 10036

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8:30 am – 9:00 am
Check-In/Welcome Breakfast

9:00 am - 9:15 am
Welcome Remarks

SPEAKERS:
Gary P. Naftalis, Kramer Levin Naftalis & Frankel LLP
Barry Berke, Kramer Levin Naftalis & Frankel LLP

9:15 am - 10:15 am
Historical Review and Lessons for Today

SPEAKERS:
Judge Nancy Gertner (retired), Senior Lecturer on Law, Harvard Law
Ronald Weich, Dean, Professor of Law, University of Baltimore School of Law
Al Alschuler, Julius Kreeger Professor Emeritus of Law and Criminology, The University of Chicago Law School
Judge Gerald Lynch, Senior U.S. Circuit Judge, U.S. Court of Appeals for the Second Circuit

MODERATOR:
Steven L. Chanenson, Professor of Law, Faculty Director, The David F. and Constance B. Girard-diCarlo Center for Ethics, Integrity and Compliance, Villanova University Charles Widger School of Law

Published in 1973, Criminal Sentences: Law without Order was a small monograph with massive impact. In this book, Marvin Frankel, drawing on his experiences as a federal district judge, assailed many aspects of prevailing sentencing practices. He lamented sentencing judges and parole officials exercising broad discretion “effectively subject to no law at all,” and advocated for the creation of a “commission on sentencing” to develop guidelines for “the numerous factors affecting the length or severity of sentences.” Judge Frankel’s book paved the modern sentencing reform path in state and federal systems. This opening panel will discuss the problems that Judge Frankel identified and his account of the potential benefits of creating commissions to help develop sentencing laws. It will also review how Judge Frankel’s work found expression in the Sentencing Reform Act of 1984 and its lessons for sentencing throughout the United States a half-century later.
10:15 am - 11:15 am
**Troubles with Guidelines’ Substance: Inputs and Outputs (CLE: 1 Credit Professional Practice)**

**SPEAKERS:**
- **Douglas Berman**, Newton D. Baker-Baker & Hostetler Chair in Law; Executive Director of the Drug Enforcement and Policy Center, Moritz College of Law at The Ohio State University
- **Magistrate Judge Jennifer Willis**, U.S. District Court, Southern District of New York
- **David Patton**, Executive Director, Federal Defenders of New York for the Southern and Eastern Districts of New York

**MODERATOR:**
- **Jelani Jefferson Exum**, Dean, School of Law, Philip J. McElroy Professor of Law, University of Detroit Mercy

Criminal Sentences: Law without Order called for the development of a code of sentencing law to guide judges at sentencing, but Judge Frankel did not provide extensive details about what ideal sentencing law might look like. Now, sentencing is replete with law as legislatures have enacted an array of elaborate mandatory sentencing statutes, and sentencing commissions have created intricate systems of detailed sentencing guidelines. But does modern sentencing law incorporate and weigh sentencing “inputs” effectively and appropriately? Criminal Sentences: Law without Order also expressed deep concerns about disparities and potential discrimination in sentencing decision-making and about the potential misuse or over-reliance on prison punishments. But the data on sentencing patterns and incarceration levels suggest continued reasons to worry about disparities in sentencing and excessive use of prison punishments. Do guideline structures reduce or actually aggravate racial disparities, and have they significantly contributed to sentencing severity and mass incarceration?

11:15 am - 11:30 am
**Coffee Break**

11:30 am - 12:30 pm
**Concurrent Session A - The Purposes of Sentencing: Then and Now**

**SPEAKERS:**
- **Judge Lynn Adelman**, United States District Court, Eastern District of Wisconsin
- **Judge Nancy Gertner (retired)**, Senior Lecturer on Law, Harvard Law
- **Jelani Jefferson Exum**, Dean, School of Law, Philip J. McElroy Professor of Law, University of Detroit Mercy

**MODERATOR:**
- **Douglas Berman**, Newton D. Baker-Baker & Hostetler Chair in Law; Executive Director of the Drug Enforcement and Policy Center, Moritz College of Law at The Ohio State University
Criminal Sentences: Law without Order was authored during evolving views on the purposes of punishment and use of incarceration. For most of the 20th Century, sentencing was structured around the “rehabilitative ideal,” which called for giving sentencing judges and parole authorities broad discretion to adjust sentences based on the perceived rehabilitative prospects of an offender. But when Judge Frankel was writing his book, academics and advocates were expressing concerns about disparities resulting from discretionary sentencing practices and about the efficacy of the rehabilitative model of punishment and corrections. Advocacy for new laws seeking greater consistency and certainty at sentencing referenced various theories of punishment, and explicit or implicit accounts of who should and who should not be subject to particular terms of imprisonment. This panel will discuss how these issues found expression in Judge Frankel’s writings and in the adoption of sentencing laws and guidelines that contributed to the transformation of the purposes of sentencing.

Concurrent Session B - The Structures of Sentencing: Law and Policymaking

SPEAKERS:
Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division of the U.S. Department of Justice
Cecelia Klingele, Associate Professor of Law, University of Wisconsin, School of Law
Rachel Barkow, Charles Seligson Professor of Law

MODERATOR:
Adam Gelb, President and CEO, Council on Criminal Justice

Criminal Sentences: Law without Order advocated for jurisdictions to create a new agency, a “commission on sentencing,” to help study sentencing decision-making practice and to help develop sentencing guidelines and other tools for aiding the work of sentencing judges. When Congress created the U.S. Sentencing Commission, many lower courts ruled that this commission was constitutionally suspect, though the Supreme Court ultimately held otherwise in Mistretta v. United States. How legislatures and commissions should define their roles in the development of sentencing law and policy remains a matter of robust debate, and it is only one piece of who develops sentencing law and policy. This panel will explore the place for judges, prosecutors and parole boards in the never-ending discussion of the rules and practices for sentencing decision-making.

12:30 pm - 1:30 pm
Networking Lunch
AGENDA

1:30 pm - 2:30 pm
Concurrent Session A - Second Looks in the Courtroom (CLE: 1 Credit Professional Practice)

SPEAKERS:
Sean Hecker, Litigation partner, Kaplan Hecker & Fink LLP
Judge John Gleeson, Debevoise & Plimpton LLP; former United States District Court Judge, Eastern District of New York
Norman Reimer, Global CEO, Fair Trials
Louis Reed, Criminal Justice Reform Strategist and Advocate

MODERATOR:
Nora Demleitner, President of St. John’s College

Criminal Sentences: Law without Order was written when every jurisdiction had a parole board and even the most serious offenders would be parole eligible. In the federal system, nearly all prisoners were eligible for parole after serving 1/3 of the sentence imposed and data indicated most offenders served only about 50% of their original term. Judge Frankel complained about uncertainties that parole produced, and Congress responded by eliminating parole in the federal system through the Sentencing Reform Act of 1984. In that same Act, Congress provided a limited mechanism for judges to reconsider sentences that came to be known colloquially as “compassionate release,” but that mechanism was significantly expanded by the First Step Act of 2018. This panel will explore whether Judge Frankel might have been supportive of robust judicial second look sentencing mechanisms and whether second-look mechanisms might reduce or increase disparities and sentencing uncertainties.

Concurrent Session B - Sentencing Information for Modern Judges (CLE: 1 Credit Professional Practice)

SPEAKERS:
Senior District Judge Charles Breyer, United States District Court, Northern District of California
Mark Bergstrom, Associate Teaching Professor of Sociology and Criminology; Executive Director of the Pennsylvania Commission on Sentencing
Chief Justice Tina Nadeau, New Hampshire Superior Court

MODERATOR:
Steven L. Chanenson, Professor of Law, Faculty Director, The David F. and Constance B. Girard-diCarlo Center for Ethics, Integrity and Compliance, Villanova University Charles Widger School of Law
In the closing chapter of *Criminal Sentences: Law without Order*, Judge Frankel presciently imagined “the possibility of using computers as an aid toward orderly thought in sentencing.” That notion is quite real as justice systems consider whether and how sentencing decision-making should include consideration of computer-generated risk assessment tools. In the federal system, the U.S. Sentencing Commission has recently unveiled a data-driven tool known as JSIN designed to enable judges to see how other federal judges have sentenced comparable federal defendants. These tools raise pressing questions such as whether these tools should be stressed in (or left out of) presentencing reports and whether they make traditional guideline systems less important for consistent sentencing decision-making.

2:30 pm - 2:45 pm
Coffee Break

2:45 pm - 3:45 pm
*The Future of Structured Sentencing (CLE: 1 Credit Professional Practice)*

Reflecting on Judge Frankel’s book a half-century later can provide profound insight and perspectives on how modern sentencing has evolved and where it should be headed. This panel will explore issues such as whether the guideline movement “stalled” (and if so, why and is that good or bad); how changes in sentencing systems can now evolve and whether “expert” bodies are viable in modern America as change agents in criminal justice more generally; and whether reforms are likely to be more effective if focused in one particular area such as drug sentencing or eliminating excessive long sentences.

**SPEAKERS:**
**Bennett Capers,** John D. Feerick Research Professor of Law, and Director, Center on Race, Law, and Justice, Fordham University  
**Jonathan Wroblewski,** Director of the Office of Policy and Legislation, Criminal Division of the U.S. Department of Justice  
**John Maki,** CCJ Long Sentences Task Force  
**Marta Nelson,** Director of Government Strategy, Advocacy and Partnerships, Vera Institute for Justice
3:45 pm - 4:30 pm
Fireside Chat: Reflections and Reactions from Past Chairs of the US Sentencing Commission

Many aspects of Judge Frankel’s *Criminal Sentences: Law without Order* remain timely and describe enduring, seemingly intractable, concerns about sentencing practices. This panel involves a discussion with three former Chairs of the U.S. Sentencing Commission, all of whom are also sitting U.S. District Judges with sentencing responsibilities, as was Judge Frankel. This discussion will explore the judges’ experiences both in sentencing individuals and in leading the federal agency tasked with seeking to improve how judges sentence.

**SPEAKERS:**
- **Senior District Judge Charles Breyer**, United States District Court, Northern District of California
- **Judge Ricardo Hinojosa**, United States District Court, Southern District of Texas
- **Judge Patti Saris**, United States District Court, District of Massachusetts

**MODERATOR:**
**Douglas Berman**, Newton D. Baker-Baker & Hostetler Chair in Law; Executive Director of the Drug Enforcement and Policy Center, Moritz College of Law at The Ohio State University

4:30 pm - 5:30 pm
Closing Remarks and Networking Reception

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