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Book Reviews

BOOK REVIEWS

Criminal Sentences Law Without Order. By Marvin E. Frankel. New York: Hill and Wang. 1972. Pp. x, 124. $5.95.

> The sentencing powers of the judges are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all. Everyone with the least training in law would be prompt to denounce a statute that merely said the penalty for crimes "shall be any term the judge sees fit to impose".[1]

In *Criminal Sentences Law Without Order*, a book both timely and trenchant, United States District Court Judge Marvin Frankel, former law school professor at Columbia, serving on the court for the past seven years, examines one of the most pressing problems facing all those who have a sincere concern for America's criminal justice system—be they judges, legislators, lawyers, convicts or concerned laymen.

In a brief, yet comprehensive manner, Judge Frankel discusses the crucial issues involved with sentencing. He is frank and, at times, harshly critical of the method by which we sentence offenders. His book is divided into two sections. The first part deals with the method (or lack of method) by which criminal defendants are sentenced. The second part outlines possible remedies for the problem. While some of these remedies are already practiced, all are in the realm of the possible, relying for their implementation more upon a change in attitude than a change in our laws.

Much concern has been raised over the horrors of our American prisons and of the faults and flaws in correctional services. Many of these concerns are justified. If we are to get to the root of these concerns—a starting point where there is a chance of correcting them—it is imperative that we rethink our varied and inconsistent policies with regard to sentencing. In quoting a "distinguished committee of federal judges," the author acknowledges " 'the incompetency of certain types of judges to impose sentence.' "[2] Moreover, he states, "our procedures for selecting judges do not improve the prospects of sensitive, knowledgeable sentencing."[3]

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1. M. FRANKEL, CRIMINAL SENTENCES LAW WITHOUT ORDER 8 (1972).
2. *Id.* at 16, *quoting from* JUD. CONF. OF SENIOR CIRCUIT JUDGES, REPORT OF THE COMMITTEE ON PUNISHMENT FOR CRIME 26-27 (1942).
3. FRANKEL, *supra* note 1, at 14.

Judge Frankel argues that it is incredible that the rights of those who stand trial are paramount before sentence is pronounced, and yet once adjudged guilty, the procedure for deciding where and how long the offender should serve is relegated to one man investing "in sum, less than an hour in all . . . ."[4] To be sure, there is simply no question as to the need to safeguard the rights of the accused before and during trial, but to neglect the critical part of imposing sentence is to safeguard in fact only partial rights.

Judge Frankel points out that in a society that professes devotion to the rule of law, it appears inconsistent that we allow the absolute and unchecked power of sentencing to rest in the hands of one man. "One need not be a revolutionist or an enemy of the judiciary to predict that untrained, untested, unsupervised men armed with great power will perpetrate abuses."[5] The Constitution provides that every man has life and liberty guaranteed to him, and that this may not be denied, except by due process of law. Yet the wide differences in treatment and punishment of defendants whose crimes look very similar makes the author wonder whether the guarantee of "equal protection" is being enforced. It is to be expected that judges, like all men, hold varying opinions on many things (wiretapping, legalized gambling, etc.), but it is neither expected nor should it be permitted that only one opinion be followed when it comes to severity or length of sentence. There is "compelling evidence that widely unequal sentences are imposed every day in great numbers for crimes and criminals not essentially distinguishable from each other."[6]

In the majority of federal criminal cases, the sentence varies within a given range. Since the determination of the sentence is left to the discretion of the judge, the defendant does not know, nor can he predict, the exact sentence to be imposed. The result is a disarray of sentences without the consistency which would appear to be demanded by our American ideal of equal justice for all men.

In addition to the failure of Congress and state legislatures to impose knowledgeable limits on judges, criminal codes often are illogical and bizarre. Before considering various procedural remedies, legislators should pause and reflect upon statutes that are not,

4. *Id.* at 15.
5. *Id.* at 17.
6. *Id.* at 8.

in any way, coordinated. For example:

> [A] Colorado statute providing a ten-year maximum for stealing a dog, while another Colorado statute prescribed six months and a $500 fine for killing a dog; in Iowa, burning an empty building could lead to as much as a twenty-year sentence, but burning a church or school carried a maximum of ten; breaking into a car to steal from its glove compartment could result in up to fifteen years in California, while stealing the entire car carried a maximum of ten.[7]

It is easily seen that the results of such inconsistency are a mish mash of harsh anomalies which are almost inevitable. Judge Frankel therefore urges that a set of legislative standards be set up declaring definite sentences. Judge Frankel also proposes that this life and death power should be shared, and that a system of checks and balances be instituted. He suggests that any defendant regardless of the crime charged receive a fair and equitable sentence, handed down by a judge who has weighed the particular circumstances, and explored the various alternatives. The judge's decision should then be subject to a review of his peers (other magistrates). Furthermore, he argues that judges should give a written statement as to why they chose that particular length or type of sentence. This would open the way for intelligent scrutiny on appeal, since an appellate court can function usefully only when it knows the grounds of the decision brought to it for review.

Substantial resources, talent and attention are needed to improve other aspects of the present system. These include parole procedures, establishment of institutions as alternatives to prisons, and more meaningful lines of communication between all departments having an interest in the criminal justice system.

Finally, Judge Frankel feels that a "Commission on Sentencing" should be established. This Commission

> would be a permanent agency responsible for (1) the study of sentencing, corrections and parole; (2) the formulation of laws and rules to which the studies pointed; and (3) *the actual enactment of rules*, subject to traditional checks by Congress and the courts.[8]

Far too often we have chosen to segment the various functions of the criminal justice system; to see them as disjointed rather than as various parts working together to produce a concerted whole.

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7. *Id.* at 8-9.
8. *Id.* at 119.

Many, if not most, issues track across the system. Clearly, to concentrate our attention on any one issue no matter how perceptive or innovative the recommended change may be is to lose sight of this symbiotic relationship and to invite disaster. Judge Frankel has avoided this pitfall. He clearly and articulately discusses and illuminates the issues—issues such as discretion and accountability.

The proposals by Judge Frankel provide an excellent starting point for a great deal of research and study in this critical area. Yet, as the judge points out, until the American judicial system and indeed society itself defines its goals in terms of what it hopes to achieve through incarceration, little real reform will result.[9]

For anyone who has a sincere interest in improving our criminal justice system, the book is well worth reading.

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9. *Id.* at viii, 105-11.

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Super Tenant. By John M. Striker and Andrew O. Shapiro. New York: Brownstone Publishers, Inc. 1973. Pp. xii, 268. $2.95 Paper.

The position of tenants *vis-a-vis* their landlords has improved considerably in the last ten years, primarily as a result of neighborhood legal service offices funded by the Office of Economic Opportunity. These offices have provided lawyers, in the poverty communities, to represent tenants in landlord and tenant court, and when necessary, to take appeals from unfavorable decisions. With this kind of day-to-day aggressive legal representation available, the few rights already afforded to tenants by statute were made a reality. For example, in 1964 when Mobilization for Youth lawyers went into court in New York City raising the defense of section 755[1] (a 1939 statute) in rent strike cases, most of the judges had never heard of the defense. Presently, a section 755 defense is common and routine. In addition, by raising legal concepts which have long been available in commercial contract cases, litigants in landlord and tenant cases are slowly reshaping the law through case decisions. As a result, concepts such as failure of consideration, breach of the implied warranty of habitability, the unenforceability of an illegal contract and the right to mitigate damages by making repairs and charging the landlord for them are beginning to be recognized as legitimate defenses or counterclaims in landlord and tenant cases.

Along with this considerable development through case decisions, there has also been an increasing emphasis on providing tenant rights through legislation. Following a long winter of organized rent strike activity in 1963-64 in New York City, the state legislature provided three significant remedies for tenants who are not able to obtain repairs from their landlord.[2]

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1. N.Y. REAL PROP. ACTIONS LAW § 755 (McKinney Supp. 1973) [hereinafter referred to as section 755]. Section 755 provides for a stay of proceedings for eviction for non-payment of rent, or for any action for rent, when such proceedings are instituted by the landlord. There are two alternative sections, 1(a) and 1(b), under which a tenant may move for a stay of the proceedings. Which section the tenant uses is dependent upon whether the housing violations or nuisances alleged have been made a matter of record.

2. *See* note 1 *supra* and N.Y. REAL PROP. ACTIONS LAW art. 7-A (McKinney Supp. 1973). Used primarily as an emergency provision, Article 7-A is an affirmative proceeding requiring one-third of all tenants in a multiple dwelling to act in concert. Under Article 7-A withheld rents are deposited

On a national scale the American Bar Foundation prepared a model residential landlord and tenant code which was submitted to the National Conference of Commissioners on Uniform State Laws in 1972 to be used as the basis for developing a Uniform Residential Landlord and Tenant Act.[3] The model code has been widely distributed and commented[4] upon, and two states have passed legislation based on it.[5] In other states it will provide the basis for renewed discussion of possible legislative remedies and reforms.

A lawyer reads *Super Tenant* in this context of a gradual development and progress in the law as it affects tenant's rights and finds it rather misleading. It is a very readable book although sometimes a little too "cute." It is filled with descriptions of cases which illustrate the law. Unfortunately, many of the cases are the only one of their kind. The average reader, not recognizing the significance of a one of a kind case (other than a United States Supreme Court decision), will probably come away believing that landlord and tenant law from the tenant's viewpoint is easy. It's just a matter of putting the right facts together, thinking far enough in advance to

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with the court which by the appointment of an administrator uses the deposited funds as operating capital. The administrator is given the power not only to repair the building, but also to rent restored apartments and to re-rent as apartments become available. *See* Oyola v. Combo Creditors, Inc., 64 Misc. 2d 728, 315 N.Y.S.2d 666 (Civ. Ct. 1970). The third remedy is N.Y. MULT. DWELL. LAW § 302(a) (McKinney Supp. 1973) which provides for rent abatement. It covers conditions which constitute a fire hazard or serious threat to the life, health or safety of the occupants. However, notice of the violation must be on file in the municipal department records; notice must have been given to the last registered owner; and such violation must exist for six months from time of notice. For a discussion of the statute see Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. 1971). For a further analysis of tenant remedies see Comment, *Tenant Remedies for a Denial of Essential Services and for Harassment—The New York Approach*, 1 FORDHAM URBAN L.J. 66 (1972).

3. This Act was drafted by the Commissioners on Uniform State Laws. On August 10, 1972 the National Conference of Commissioners on Uniform State Laws approved the Act. Note, 6 IND. L. REV. 741 (1973).

4. *Id.*

5. To date Arizona and Oregon have passed modified versions of the Act. Report of the National Conference of Commissioners on Uniform State Laws (July 1973) (available on request from the American Bar Association).

get the right situation, and generally being very clever. Unfortunately, lawyers who practice every day in landlord and tenant court know this is not the case. Tenant readers who rely too heavily on *Super Tenant's* advice are apt to end up evicted.

The book does, however, have some valuable aspects. The section on rent stabilization[6] is very informative and reads as though the authors have practical experience in that area.[7] There is also a good description of the landlord's liability in tort for damages caused by his negligence in failing to repair[8] and of the tenant's right to repair.[9] The appendix is very helpful since it includes several important informational bulletins not readily available elsewhere.[10]

The description of some of the newer concepts, however, such as warranty of habitability, are much too positive and suggest too strongly that the concepts are regularly recognized, rather than the reality that there are but a few breakthrough cases,[11] several unpassed statutes and lots of wishful talk on the subject.

As an overview, the book is worth reading and owning. It discusses intelligently and in a very informal and readable way, the entire field of tenant's rights. However, one should recognize that it is dangerously misleading as to how far the law has, on a day-to-day basis, moved in the direction of affirmative tenant's rights. It, hopefully, points the way to where we will be in another five years.

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6. J. STRIKER & A. SHAPIRO, SUPER TENANT 106-10, 220-23 (1973) [hereinafter cited as SUPER TENANT].

7. One suspects that they do not in most of the other areas, and that their knowledge comes from reading reported decisions. These decisions, unfortunately, usually reflect a small minority of cases actually decided.

8. SUPER TENANT 184.

9. *Id.* at 147-61.

10. *Id.* at 229-48.

11. *See, e.g.*, Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. 1971); Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct. 1971).

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