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THE OFFENDER AND THE COURT¹

A STATISTICAL ANALYSIS OF THE SENTENCING OF DELINQUENTS

Emil Frankel²

"The imposition of sentences in criminal cases is so important to the community at large that it ought to be constantly acquainted not only with the procedure involved but with the type of sentence itself." This comment was made by the four judges of the Essex County (New Jersey) Court of Common Pleas on a statistical analysis of their sentencing practices presented by one of the nation's leading newspapers—the Newark *Evening News*.³ The analysis was stimulated by this newspaper and made by the New Jersey State Department of Institutions and Agencies with the cooperation of the judges, the clerk of court, and the county probation department.

The analysis covered sentences which the four judges imposed on 4,029 adult males during three selected years (1932, 1935 and 1939). Of the total number of cases Judge A had 38.3 per cent, Judge B 35.4 per cent, Judge C 17 per cent and Judge D 9.3 per cent. A comparison of the offenses of the individuals sentenced shows a fairly even distribution among the four judges; and likewise the proportion of the individuals before the court with single and multiple charges did not differ materially.

As stated by the Newark *Evening News*: "Aspects studied included varia-

tions in sentences among the judges, tendencies in penalties as these relate to different crimes, preferences of a judge for use of special rehabilitative or punitive measures, case loads handled by each judge, the increasing practice of recalling prisoners and giving a lighter sentence, and comparisons of the treatment of wholesale offenders with treatment of single offenders."

It is the practice of the four judges to announce penalties to the offenders in open court. The type of punishment to be applied usually has been worked out in private conference earlier, the judge having conferred with the chief probation officer or one of his assistants regarding the history of the case and the penalty it is desirable to impose.

Statistical Summary

In Table 1 are presented the essential facts concerning the types of punishment imposed by the four judges concerned, considering all the individuals sentenced as a group, irrespective of the particular offense for which they were sentenced or how many charges were laid against them.

There are to be noted considerable differences in the types of punishment imposed by the four judges. For example:

Judge D used probation in 29.6 per

¹ Paper presented before the American Prison Congress, Cincinnati, Ohio, October 21, 1940.

² Director Division of Statistics and Research

New Jersey Department of Institutions and Agencies.

³ See issues of April 1, 2, 3, and 4, 1940.

TABLE 1

Type of punishment imposed	All judges	Judge A	Judge B	Judge C	Judge D
Number of defendants sentenced..	4029	1544	1424	686	375
Per cent of these receiving					
Suspended sentence	5.3%	5.3%	6.5%	3.2%	4.2%
Fine	1.5	1.4	1.9	1.8	0.3
Probation	38.2	39.1	38.6	40.5	29.6
Without money payment...	3.9	3.7	5.4	2.0	2.9
With money payment.....	34.3	35.4	33.2	38.5	26.7
County Jail Commitment.....	7.1	5.3	11.9	2.2	4.0
Time awaiting sentence ^a ...	3.2	4.7	3.0	1.6	...
Sentenced	3.9	0.6	8.9	0.6	4.0
County Penitentiary					
Commitment ^b	26.9	31.2	20.6	28.3	30.1
State Institutions					
Commitment ^c	21.0	17.7	20.5	24.0	31.8
Annandale Reformatory ...	7.8	6.8	6.4	10.2	13.1
Rahway Reformatory	3.2	1.9	3.1	5.2	5.1
State Prison	10.0	9.0	11.0	8.6	13.6

^a Time spent in detention pending trial and/or sentence may be deducted from sentence at discretion of judge.

^b Optional place of imprisonment instead of state prison for persons 16 to 21, or, for those whose sentence does not exceed 18 months.

^c Annandale Reformatory: Minimum security for males between 16 and 26 years of age who have not been previously sentenced to a reformatory or prison and who will benefit by a correlated academic, vocational, and agricultural program.

Rahway Reformatory: Maximum and limited security for the industrial type of male prisoner between 16 and 31 years of age.

State Prison: Maximum security detention for older and more serious male offenders with poor records and long sentences.

cent of the cases while Judge C used it in 40.5 per cent of the cases. Judge B committed 11.9 per cent to the county jail, Judge C only 2.2 per cent. Judge A committed 31.2 per cent of the defendants to the County Penitentiary, Judge B only 20.6 per cent. Commitments to state penal and correctional institutions amount 31.8 per cent in

the cases of Judge D and to only 17.7 per cent in the cases of Judge A.

In Table 2 consideration is given to the principal types of punishment imposed upon those who were before the judges having only one charge against them and those having two or more charges against them. The figures are presented for only two of the judges

TABLE 2

Per cent of these receiving specified type of punishment

Judge and charge	Total individual defendants	Suspended sentence or fine	Probation without and with money payment	County institution commitment	State institution commitment
Judge A					
Single charge	1271	7.0%	42.0%	38.4%	12.6%
Multiple charges...	273	5.1	25.2	28.3	41.4
Judge B					
Single charge	1150	8.5	42.1	35.3	14.1
Multiple charges...	274	8.1	24.1	21.1	46.7

having a large enough number of cases to make the findings significant.

There are no striking differences to be noted between Judges A and B in the figures of this table. Judge B used suspended sentences or fines a little more often than did Judge A and used them relatively more frequently on defendants having multiple charges. There is striking agreement among the two judges in the use of probation. In the use of incarceration as a punishment Judge A was inclined to use the county penal institutions more fre-

quently for those having multiple charges, while Judge B leaned more heavily toward the use of state penal and correctional institutions.

A comparison of the types of punishment imposed by the judges has more significance if that comparison is based upon defendants being before the judge on fairly identical charges. This comparison is made in Table 3. Two judges only were selected having a sufficient number of cases to make valid comparisons.

TABLE 3

Per cent of these receiving specified type of punishment

<i>Offense and judge</i>	<i>Total individual defendants</i>	<i>Suspended sentence or fine</i>	<i>Probation without and with money payment</i>	<i>County institution commitment</i>	<i>State institution commitment</i>
<i>Robbery</i>					
Judge A	120	9.2%	15.8%	26.7%	48.3%
Judge B	131	13.7	18.3	17.6	50.4
<i>Assault</i>					
Judge A	179	4.4	20.7	62.6	12.3
Judge B	155	8.4	25.8	57.4	8.4
<i>Burglary</i>					
Judge A	275	5.1	29.5	33.8	31.6
Judge B	278	6.1	36.7	23.0	34.2
<i>Larceny</i>					
Judge A	469	6.8	53.7	27.3	12.2
Judge B	377	6.6	48.0	26.5	18.9
<i>Sex Offenses</i>					
Judge A	100	2.0	37.0	40.0	21.0
Judge B	81	11.1	30.9	37.0	21.0
<i>Liquor Laws</i>					
Judge A	89	12.4	28.1	59.5
Judge B	96	14.6	16.7	68.7
<i>Gambling</i>					
Judge A	127	8.7	64.6	26.0	0.7
Judge B	111	5.4	77.5	15.3	1.8

Here again it is to be noted that the relative proportion of the types of punishment imposed by the two judges in the seven offense categories considered are not too dissimilar.

A Newspaper Interprets Sentencing

The statistical information presented here somewhat in detail was highly condensed in the articles printed in the Newark Evening News. Along with it

some cogent comments were presented to interpret the figures. It is the purpose to give here excerpts of these comments so as to permit the reader to catch some of the pungent newspaper flavor.

THE DAY OF JUDGMENT. Criminal Sentences and How Essex Judges Arrive at Them Shown in Survey. It is sentence day at the Essex County Court House. Trying to show no emotion, the prisoner stands before the bar. Guilty as charged, he awaits his fate. Eyes in the court room are turned on him. He keeps his face toward the black-robed judge. Then, splitting the prisoner's benumbed senses, comes the sentence of the court.

Because of a multitude of factors the judgments society passes through the agency of its four Essex judges show variations. In some cases they are the kind that would be expected. In others they are variations that surprise even the judges themselves. For the prisoner up for sentence these variations are of vital importance.

It means that if he is a lottery offender his chances for light sentence are better with one judge than the three others. It means that if he is to be sentenced on a serious charge he is more likely to get a state prison term with one judge than another, that there is a real variation in his chances of getting a suspended sentence or for that matter probation.

Two of the judges hear lawyers' pleas and sometimes those of friends and family and the prisoner himself in open court before announcing sentence. The other two judges hear lawyers in chambers. There is much

informality. A probation officer, one or two court attendants, a newspaperman or two, are present. Lawyers come in singly, without their clients. Often the same lawyers are there week after week, often one lawyer speaking for several clients. Some lawyers specialize in certain groups of offenders.

There is usually a word or greeting between judge and advocate, a few facts about the offense and mitigating circumstances. The judge indicates whether a jail sentence or probation is in store. The lawyer sometimes agrees, but often there is bargaining. The judge goes on the bench, after all lawyers have been heard, and reads off the penalties while each prisoner stands as called.

JUSTICE IN LENIENT MOOD. Essex Court Survey Indicates Tendency to Reduce Penalties After Sentencing. The tendency to reduce penalties within a week or so after the original sentence is one of the characteristics of the four Essex Common Pleas judges. Inquire in official Essex court circles for an explanation of the extensive use of lowered sentences and you are asked to consider the effect of such circumstances as these:

A prisoner has been sent away to serve a term in an institution. He comes from a poverty-stricken family. His wife and children go on relief. The taxpayers must not only support him in jail, but his family while he is away. Pressure is exerted upon the judge either to let him out or reduce the time he is in jail. The judge complies.

Or, again, a man has been sent away. His family and friends have been able to locate a job for him, but

always it is imperative that he start work at once or the opportunity will be lost. The judge ponders. Perhaps this will rehabilitate him and that is the paramount object.

Most of those who are resentenced are in the middle class among criminals. Usually they are neither first offenders nor are they hardened professional criminals. Frequently they are that class referred to as "no good but not vicious."

Many are in jail not for the seriousness of their crime, but for the repetition of the same offense. They are the "small fry" of the lottery business, who, having been caught once, have gotten into the racket again. They are youths, who, having stolen an automobile for a "joy ride," try it again.

The court calls the prisoner before him again. He exacts a promise that there will be no more infractions of the law. Then he reduces the time the prisoner must serve or he places him on probation with supervision and a weekly monetary payment.

Since this is done quietly without public notification, there have been instances where unscrupulous persons have traded on the ignorance of prisoners and cashed in on the reduced sentence, regardless of the fact that their influence had nothing to do with the change.

MANY GET OFF LIGHTLY. Survey Shows 46.2 Per cent of Offenders Before Essex Judges Escape Imprisonment. They have received suspended sentence, fine or probation.

Suspended sentences were given to 7 per cent of all prisoners. The study

of suspended sentences showed that offenders with multiple charges against them fared somewhat better in this respect than did offenders convicted of only one crime. That is 7.2 per cent of the multiple offenders got off with suspended sentences while only 6.9 per cent of those with single crimes were thus let off.

SOCIAL FACTOR IN JUSTICE. Influence of Probation Department Shown in Survey of Essex Court Sentences. Behind criminal sentences in Essex County, both as an influence on the penalties the Common Pleas judges hand out and as an agency to which 37.7 per cent of all prisoners are given for rehabilitative treatment, stands the probation department.

The probation department acts both in an investigatory and recommendatory capacity to the judges and as a supervisory agency for prisoners. Such prisoners, though free to go about their business, must report at given intervals and account regularly to probation officers for their conduct. Probation officers also visit them in their homes to learn something about their environment.

The supervisory function of the probation department is well known to the public, but it is in the other capacity, as conferee with individual judges before sentence is passed, that the department is least known, and, yet the most influential.

Judges' Attitude Toward Study

The sentencing practices survey had the most cordial cooperation of the four judges⁴ of the Court of Common Pleas

⁴ Judges Daniel J. Brennan, Dallas Flannagan, Richard Hartshorne and Walter D. Van

Riper.

and their reaction to it was given in a prepared statement as follows:

"The Newark News has rendered a real service, a service both to the public and to the judges who impose these sentences. It has been a service to the public because it is the first time that the statistical information contained in these articles has been compiled and presented in such a detailed manner. The imposition of sentences in criminal cases is so important to the community at large that it ought to be constantly acquainted not only with the procedure involved but with the type of sentence itself. It has been a service to the judges because there has never before been available to us this factual information in such detailed form.

"These articles have been presented objectively and without an attempt to do other than make known the facts as they actually exist. It is our hope that their publication has aroused sufficient public interest in that branch of our work involving criminal cases, to arouse a portion of the public, at least, to interest themselves in the social and economic conditions which exist in our community and which fundamentally are the cause of this large number of criminal cases.

"This is to the end that public thought and attention may be directed toward bringing about some betterment of the unsound conditions which contribute so largely to the delinquency of our youth, which has its culmination in a sentence for a criminal offense."

The Judge and Sentencing

The use of the statistical method in comparing the sentencing practices of the four judges would seem to be entirely valid only if a representative number of cases handled by each of the judges is considered and if the distribution as to the types of offenses for which they are tried and the severity of these offenses are practically identical. In that event one would be dealing with a constant factor against

which the particular sentencing practices of the individual judges can be laid and measured. Should the types of punishment and sentence imposed vary widely, it can be assumed that the legal provisions upon which the sentences are based do not play as important a part as the peculiar personal approaches to sentencing on the part of the different judges.

As this study does not meet these statistical requirements in all respects, the results presented here must therefore be viewed with some reservations. There is, however, the following to be considered which gives the "constant" factor to the judges' approach to sentencing and therefore a measure of unity to the sentencing process.

In order to determine the type of punishment which would reflect the court's judgment of the offender and the offense, the judges depend to a very large extent on data covering the individuals' background, history, attitudes, mental processes, habits, and motives. This material is compiled and made available by the probation office as an agent of the court.

In the opinion of the chief probation officer "many other considerations, however, motivate judges at the time of deciding the question of sentence." The Newark *Evening News* has summarized these as follows:

"Within the judge himself are such factors as background, tradition, outlook, prejudices, nationality, hereditary influences, emotional makeup, theory of punishment and behavior as affecting various crimes and the current attitude of the public toward such crimes.

"As affecting the offense itself, the judge is likely to be influenced by such factors as gravity of the crime, loss or

damages or injuries suffered by complainant, methods used in the crime, provocation encountered by offender, responsibility, social implications, attitude of the complainant and police assistance rendered in unearthing the crime, and so on.

"Toward the offender himself the judge is likely to be influenced by age and sex, past record, mental or physical condition, habits, attitude toward the prevailing social order, home life, neighborhood influences, possibility of reformation, personality and reputation, economic usefulness, ability to make restitution and family background."

The desire for uniformity in sentencing is a reflection of our sense of fair-play which prompts us to ask that in selecting the type and severity of punishment to be imposed upon the offender by the judge the utmost impartiality obtain and that two offenders before the court for the same offense receive the same punishment. This notion implies, however, that it is possible to determine with exactitude the degree of the particular offense of one individual and lay it against the particular offense of another individual for the purpose of imposing the absolutely appropriate punishment. What is more, advanced criminologists are likely to question the desirability of absolute uniformity in choosing the type and severity of punishment to be imposed for it runs counter to the idea of individualizing punishment and the rehabilitative process.

The four judges whose sentencing practices were studied here, show certain predilections in sentencing, but there is a certain "corrective" method

at work since the judge weighs the question of sentence upon detailed reports of the probation office and in consultation with the probation officer or his representative gives consideration to the following:

"Does the offense or offender require institutional sentence? If so, shall this be the type of treatment provided in the state prison, the reformatories or the penitentiary? What should be the length of sentence if commitment to the state prison or penitentiary is indicated? Would such a sentence adequately protect the public? If an institutional sentence is not warranted, do the facts call for a fine, probation or suspension of sentence without probation? Can the defendant be safely released in the community under the control of the court through the probation department? Is he reformable? Would he respond to persuasive control? Does his home environment warrant his release?"

It must also be remembered that the judge is bound by certain legal restrictions. The "Crimes Act" of New Jersey enumerates 395 statutory crimes, of which 265 are classed as misdemeanors punishable by an imprisonment for a maximum term of three years and 111 are classed as high misdemeanors punishable by imprisonment for a maximum term of seven years.⁵ The judge has discretionary powers, however, for "when it shall appear that the best interest of the public as well as of the defendant will subserve thereby" the court may suspend the imposition or execution of sentence, and/or place the defendant on probation for a period of not less than one year and not more than five years.

⁵ The New Jersey statutes provide for additional punishment for repeated offenses at the

judge's discretion. (R.S. 2:103-7, 8, 9, 10).

Newark Evening News' Conclusions

A summary of the conclusions reached by the Newark *Evening News* concerning the sentencing practices study reported upon could be formulated thus:

1. Much valuable information on the administration of criminal justice has been brought to light. Although correlation of the data concerning thousands of sentences was no small task, what was learned proved the effort eminently worth while. Held up to each of the judges was a perfect mirror affording him a full-length reflection of his own record. In no other way could the need for certain changes have been so definitely established.

2. The day or night before sentence, the chief probation officer or one of his assistants goes over the data in each case with the judge to sit next day. Tentative sentences are worked out. Anywhere from 50 to 100 cases must be digested at such a sitting and sentenced next day. No official involved pretends that detailed or extensive consideration can be given to the facts behind any single prisoner because of the volume of work heaped suddenly on a single judge for the day.

3. The yardstick in sentencing offenders is that of the probation department's participation but the judges vary this use of the measure. They do not sit as a unit, do not confer with each other on sentences, but sentence individually and each according to his own philosophy of sentencing.

4. Differences of background, personality, experience and philosophy tend to operate as a constant to create variations in the sentence record of the four judges.

5. For a long time there has been criticism by the court of the large number of minor cases which come before it. The judges believe that many of these cases could be handled in police courts with a minimum of expense.

6. There long has been a feeling within the court that a better arrangement might be achieved if the four judges exercised responsibility already theirs as to assignment and imposed a more business-like procedure upon all concerned, up and down the line.

Sentencing Courts or Boards

In the findings of the Newark *Evening News* is implied the desirability of the four judges of the court acting as a unit in imposing sentences. In doing so it is assumed that whatever widely different sentencing tendencies among the four judges might exist, these would be "equalized" and the collective judgment of the justices brought to bear upon the basic data concerning the delinquent, the delinquency, etc., made available by the probation department to the end that both the interest of society might be carefully protected and the treatment decided upon for the offender be of such a nature as to give the most promise of his rehabilitation.

This idea of the entire court acting in unison when deciding upon the punishment and treatment to be meted out to the offender, and in so doing utilizing allied professional services, is in line with the recommendations generally made by progressive students of the administration of criminal justice who are advocating special sentencing boards or disposition tribunals.

In a nation-wide survey of this aspect of the administration of criminal justice made by the National Commission on Law Observance and Enforcement⁶ the conclusion is drawn that

⁶"Report on Prosecution" No. 4, April 1931. See also recent Proceedings of the Annual Congress of the American Prison Association in which the subject of sentencing boards is

discussed. Particular attention is called to the Presidential Address of Dr. William J. Ellis appearing in 1937 Proceedings.

there is "a realization that the disposition of the offender is a matter of such nature that the classical conception of a schedule of punishment to fit the crime is no longer in vogue nor responsive to our contemporary knowledge about human behavior. One problem, therefore, is that of building up such a judicial organization and equipment, with such a system or procedure, as will include and provide technically qualified and equipped tribunals and careful and just procedure for the determination of punishment or other dispositions based increasingly on the record, character, mentality, and personality of the offender; and some of the surveys indicate that for this purpose special tribunals, separate from those which try the cases, should come to be established."

This matter of establishing sentencing boards or tribunals still is somewhat in the realm of theory, although a precedent may be found in the "classification" idea now firmly rooted in the correctional policies of a number of states and by the Federal Government. In New Jersey it has been recognized that effective and economical institutional treatment must be based upon accurate information concerning the abilities, disabilities, needs, peculiarities and general characteristics of the individual being treated.

Through the established classification procedure the institutional classification committee (composed of the su-

perintendent, physician, psychologist, teacher, head of industries, chaplain, disciplinary officer, psychiatrist and the like) pools all available information concerning the individual, plans his life within the institution, and submits recommendations concerning release or parole.

The success of the principle of classification in this field, has resulted in an increasing consideration of its application to the court's sentencing function. Proponents of this view advance the plan of a classification board as an adjunct to the court. Under such a plan the court's essential function would be that of determining the guilt or innocence of the accused. The classification board would, after a thorough examination of the individual offender, determine the type of punitive or therapeutic treatment to be instituted.

A step toward the use of the classification principle by the judiciary was taken by New Jersey in 1935. In that year a law (Chapter 241) was enacted which provides that ". . . every judge, before imposing sentence upon a defendant, may order an examination of the mental and physical condition of such defendant and an investigation of his, or her environment by a clinic organized in the county wherein such sentence is to be imposed or may send the defendant to an appropriate institution within this State for examination, study and classification."