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AMERICAN LAW INSTITUTE

III. Sentencing Function of the Judge

GERALD F. FLOOD

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Mr. Wechsler and his associates who are drafting the Institute's Model Criminal Code propose to leave the sentencing function with the Judge. It is significant that in earlier suggestions for reform the proponents of sentencing boards have almost universally left with the judge the most important part of the sentencing function—the determination as to whether the defendant shall be sent to an institution or placed upon probation. As far ahead as we can see, I believe that some part of the sentencing function will remain with the judge, and in most jurisdictions the major part will be his.

When the trial is over or the evidence on the guilty plea has been heard, and the judge reaches the point of sentence, upon what does he make his determination? We may assume that he lays aside motives of public vengeance, although, of course, they are never wholly laid aside, human nature being what it is. We may assume that so far as making the punishment suit the crime, we are moving toward a system of statutorily fixed minima and maxima, such as is proposed by Professor Wechsler, and the judge's problem will be reduced to whether probation shall be allowed or where, between the fixed minimum and maximum, the sentence shall be. We may assume, too, that we shall advance to the point where, after sentence, the choice of institution shall be committed to an administrative board of members all possessing wisdom equal to that of Mr. James V. Bennett.

This leaves to the judge the determination of two very important matters: (1) whether to put a man on probation or send him to prison and (2) if to prison, for how long. What help can be given to the judge in making these decisions?

I think the criteria proposed in the Model Criminal Code which this Institute has been considering will be very helpful. Many of the criteria for deciding between probation and imprisonment have to do with the criminal rather than the crime, a consideration of the individual—his criminal history, particularly his recent criminal history; his age and physical condition, his character and attitudes. The same is true of the criteria for determining whether to sentence to an extended term of imprisonment. Here we have to consider whether defendant is a persistent offender, a professional criminal or a dangerous, mentally abnormal person.

When the judge has such criteria before him on the bench in the form of a statute as he sentences, his sentencing will be better done, I am convinced, and these criteria will tend to make sentencing more uniform and more rational. But even under the Code sentencing will remain a very difficult task. These criteria are all qualitative, not quantitative. Shall one previous conviction bar probation, as it used to in Pennsylvania? The draftsmen have left this to the discretion of the judge. The same thing is true as to what traits of character or what attitudes may warrant probation. With some limitation the judge has discretion in determining whether the defendant is a persistent offender or a professional criminal.

I think the Model Code does about the best that can be done with the knowledge which we now have, but isn't it time to expand that knowledge? The sad and startling fact is that we know nothing about the result of what we do with criminals.

It is hard to believe that at this late day there are no reliable statistics to tell us of the relative efficacy of probation and imprisonment. There are those who say probation is merely coddling and an invitation to further law-breaking. There are others who say that all prisons are crime-schools and no one should be sent there. Most of us take positions somewhere between. But nobody knows. No one knows what percentage of probationers never come back to the courts. No one knows what percentage of first offenders who are put on probation come back. No one knows what percentage of first offenders who commit crimes against property without violence come back. No one, so far as I know, knows what percentage of those who are supervised during probation come back, or of those who are unsupervised. And, of course, no one knows whether the percentage is higher for those over 18 or under 18, or over 21 or under 21.

Of course, there are figures as to recidivism by probationers during the period when they are actually on probation. But this is usually a relatively short period, and doesn't prove very much to me, although they are the figures often produced by those who are advocating more probation. The deficiencies in these figures, and the obvious and large gaps in them, make them a very unreliable index of the value of probation, and because of their deficiencies they all too often weaken the cause they are used to support. And in any event, the percentage of undifferentiated probationers who commit or do not commit crimes while on probation is of little help to us. There have been a few special studies which are also far short of what we need, and which I shall mention later.

When a judge uses probation unsuccessfully somebody in the community suffers. And the judge's prime job in sentencing is to protect the community. Our procedure strikes me as similar to that of a doctor who would use a drug on a patient when there was as yet no record as to how it had affected others. As a last resort he would use it, no doubt—at least, if he felt it would not do more harm than the possible good expected. But can you conceive of his not making a careful record of the result? Or can you conceive of doctors all over the country using that drug for years without getting accurate records as to the percentage of cures effected on the one hand, the percentage of those who were allergic or harmfully affected on the other, and the percentage of those to whom it did neither good nor ill? Yet we have been using probation for over a half century and we have nothing but opinions and hunches as to its value.

If we used the methods which have been so successful in the medical profession, and had the money which has been contributed so lavishly to medical research, we would by now know not only what percentage of first offenders would not again offend if placed on probation, but what the percentage would be in the case of first offenders whose offense was petty theft, and of these, what the percentage would be in the case of offenders under 18 when they committed their first theft, and of this group, what the percentage would be in the case of delinquents whose IQ is under 90, and what the percentage in the case of products of broken homes, with one parent either deserted or dead, or of members of families on relief, or of children of illiterate parents. In short, if we used the doctors' methods and had the doctors' money, the statistics would be available, they would have considerable precision and refinement and they would be illuminating. We would not know any better than they do whether what we prescribe is right for the individual before us, but we could, like them, realistically assess the chances and the risk.

We could say to the community that doubts the wisdom of the procedure: "Statistics have shown that in this type of crime with this type of criminal, if we use probation, only 20 percent repeat the offense, whereas following a prison sentence 60 percent repeat, and therefore even though such a man will be incapacitated from committing further crime while he is in prison, yet the greater likelihood that he will repeat on his release indicates that the community will be best served by putting him on probation."

Please do not think I am trying to prove that probation should always be used on first offenders. On the contrary, while I believe it should be used more than it is, upon the condition that we get good probation supervision, yet I feel also that there are some first offenders as to whom a short term of imprisonment would be of more benefit not only to the community but to themselves. But the point is that, as a judge, my feeling on this matter is now very important, because it determines whether some of the people before me are going to jail or not. My mere opinion should not be so important. We can, I think, with sufficient effort and expenditure, get the figures as to the chances of success in either method, leaving no room for judge's feelings except in borderline cases. There will, of course, be many of these borderline cases, and the judge's discretion will continue to be of extreme importance in all the close cases. I am not foolish enough to expect a mechanical formula, any more than we would expect a doctor to use his figures mechanically. There will be plenty of room left, and plenty of need, in the sentencing process, for the analytical skill, the human wisdom, and the professional competence in assessing complex situations, which the judge has developed during his years at the bar and on the bench. We are still dealing with human beings, each of whom differs from the next in character, mentality and background. But it seems obvious to me that our work in this field would be much more effective if we had the knowledge as to the effectiveness of what had been done before.

Those who do not work in this field may be surprised to learn that the most useful work that has been done has to do with the effectiveness of prison sentences or the rate of recidivism among those who have spent time in certain penal institutions. It is here that we have the outstanding work of the Gluecks—Sheldon and Eleanor—

whose researches have thrown so much light on what breeds criminals and how likely they are to repeat after they have been in the institutions studied. But the great value of their work, it seems to me, is in their investigation of the causes of crime rather than in the value of various types of treatment. They have, for instance, studied probationers only incidentally insofar as they later formed part of the prisoner group investigated. I am not so ambitious as to expect to learn the causes of crime in this lifetime. Nor do I expect to find its cure. I shall continue to believe that religion, psychiatry, education, understanding personal help and some other things will do more to cure it than prison, but I do not expect to know. I do want to know, in terms of percentages and probabilities, what will be the result of the use of the relatively few tools I have to work with as sentencing judge. Particularly I want to know what are the chances of recidivism when I put Joe Lawbreaker on probation, and when I send him to prison?

Is it impossible to get this information? I think not. Difficult, yes, but not impossible. Strangely, back in the twenties there was a flurry of official activity in this area, which for a generation was not renewed. In 1920, the New York State Probation Commission published a survey of the after-conduct of 200 probationers in Erie County, N. Y. In 1924, Massachusetts published a similar report of 383 cases. In 1927, Mr. J. M. Hepbron, Director of Baltimore Criminal Justice Commission, published a study of 305 persons placed on probation in Baltimore. Somewhere about the same time, I believe, there was a study made of about the same number in Chicago. A pitifully small number of cases and all of them from thirty years ago. If there were others, I have found no report of them in the most recent books on criminology by Sutherland, Tappan and Barnes and Teeters.¹ Doctor Thorsten Sellin tells me, however, that three local studies have been made or commenced since 1950. I think none, or very few, of my colleagues of the bench have found any such figures to guide them. The article in Paul Tappan's *Contemporary Correction* by Henry D. Sheldon, the Chief of Institutional Statistics in the Census Bureau, points out that the greatest need for additional statistics lies in the field of recidivism.

Most of those statistics of the twenties were compiled by public bodies, but apparently one private organization, the Baltimore Crime Commission, joined in. It appears to me that this work might be most efficiently done by joint efforts of public bodies and private organizations or foundations. The available statistics on recidivism, with few exceptions, are not sufficiently refined or complete to permit valid comparisons from one jurisdiction to another. After the States have sufficiently refined their statistics, to make them of the greatest value some other body, public or private, must co-ordinate them. Some private body may perhaps have to gather at least representative statistics in those States which do not compile their own satisfactorily.

Perhaps the Bureau of the Census should do this. Mr. Sheldon points out significantly that the collection of information on recidivism in the annual survey of prisoners in state and Federal prisons and reformatories conducted by the Bureau of the Census was discontinued in 1946 because the lack of comparability from state

¹ EDWIN H. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY*; PAUL W. TAPPAN, *CONTEMPORARY CORRECTION*; ELMER E. BARNES AND NEGLEY TEETERS, *NEW HORIZONS IN CRIMINOLOGY*.

to state was such as to raise serious doubts about the usefulness of the resulting statistics. The curious lethargy of public bodies in this area suggests that perhaps interested private organizations should take the lead in the hope that the States will follow.

I have suggested to the American Foundation, which is interested in penology, that this may well be one of the most promising avenues for improvement of the administration of the criminal law. I should like to persuade the American Bar Association study to give this problem a high priority on its agenda. The private compilation of statistics under the leadership of someone with the perceptiveness of the Gluecks, upon a relatively extensive basis, might, I think, in a relatively few years turn up data which would enable a judge to act with considerable confidence in making his choice of probation or prison sentence in any case. It should also stimulate public bodies to take up the same work so that eventually our figures would cover tens of thousands of cases, as the doctors' do, and they would be quite detailed and refined. The end result should be a much more rational method of sentencing, replacing the present method of choosing probation or not, even in the rare case where we have pretrial investigation, upon hunch—upon personal appearance, upon pleas of tearful but unwise parents and other irrelevant considerations.

The statistical approach in this area seems to me to offer so much more promise than any other that I have spent most of my time on it but it is, of course, only one of many ways of attacking the judge's problem of sentencing.

Certainly we should endeavor to reach the point where we have a pretrial investigation in every case where a sentence to imprisonment may be imposed upon the offender. Any statistics must, of course, yield to the court's judgment based upon information about the individual prisoner.

The help of the psychiatrist often solves our problem in the individual case. But not so often as many people think. So much progress has been made during the twentieth century in the diagnosis and treatment of the mentally ill that some of us assume that similar progress is also being made on the criminal. The fact that we now talk about psychopaths, or about even more refined categories of abnormal and criminal behavior, is apt to make us think that we know as much about the psychopathic criminal as we do about the paranoid or schizophrenic. Nothing could be farther from the truth. There is nothing in our criminal law comparable to the shock treatment which we now know will cure, or greatly facilitate the cure of a certain percentage of the mentally ill. No method of treatment now known cures any certain percentage of our criminals. At least we have no reliable evidence to prove it.

So far as we judges can see, diagnosis is in no better situation. The symptoms that constitute the psychopathic state are so vague that they are of little help to us and as for the various subdivisions of that state we constantly see the psychiatrists disagree as to the category into which any defendant falls. Beyond this, we have the fact that probably most criminals numerically do not fall within the psychopathic class, no matter how that term is defined.

The psychiatrists have moved slowly on the problem of the psychopath both in the refinement of diagnosis and in developing methods of curing these victims or alleviating their symptoms. I assume the problem is more difficult than that of the

other mental diseases. But it is also clear that the money available for psychiatric research has almost all been spent for the investigation and cure of other types of mental aberrations. The alleviation of the plight of the good people who suffer from mental diseases is much more appealing to the donor of funds or the management of foundations than the study of the criminals who, to most of the community, seem to be quite normal except that they are wicked persons whose misfortunes are all their own fault. My psychiatrist friends tell me that only a very small amount is spent upon all research in mental illness compared with that devoted to the various physical ailments. If, as they say, only an infinitesimal portion of that relatively small sum goes to the study of the psychopathic criminal, it is little wonder that progress is slow.

What would be very useful to us judges would be research to divide and break down this group of psychopaths, because I understand that we are dealing with a number of different kinds of abnormalities. From this refinement of diagnosis perhaps some cures will result. Only recently, at the meeting last October, of the American Penal Congress, a Canadian neurologist told of experiments which indicate that individual brain-wave patterns, such as those existing in epilepsy, are found among psychopaths. He did not find this in all cases and one of the psychiatrists present, skilled in the treatment of criminals, differed strongly with him and argued that there was no evidence that there was any organic basis for the psychopathic state, which in the objector's opinion is entirely functional, arising out of traumatic experiences of the defendant, either at about the time of the crime or perhaps in early childhood and long forgotten. If anything like the amount of research is put upon this problem as has been put upon other types of disease in the last half century I am sure it would enable us to deal much more effectively with this large and most dangerous group of the criminal population.

I have been sentencing criminals too long to be ignorant of the fact that we are dealing with a most complex problem, which will never yield to exact scientific analysis. Every individual differs from others in his constitution, in his background, in the temptation to which he was exposed. No generalizations will take the place of a clinical and social study of the individual criminal or delinquent.

But the battle for individualization of our treatment of criminals is far from won and it cannot be won until we have a great deal more knowledge. We still make the punishment fit the crime more often than the criminal, and even Herbert Wechsler and his very forward-looking associates have felt the necessity in the present state of our knowledge to grade punishments according to the crime committed, albeit they grade them much more sensibly. We now talk of the dictates of humanity in keeping down the punishment for certain offences, but obviously this is only the other and less ugly side of the same old garment. Since the legal profession, in the person of the judges, must administer the criminal law at the point of sentence, the bar now is beginning to recognize its obligation to make the sentencing process more rational and less emotional. My effort here has been to suggest one or two things which I think offer some promise of help toward that goal within the foreseeable future.