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# CRIMINAL LAW

## "LAW AND ORDER" AND THE CRIMINAL JUSTICE SYSTEM

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The sharp increase in drug-related crimes on the streets of our cities in the past few years has made the phrase "law and order" a household refrain. Every candidate running for public office promises to curb "street crime"[1] by restoring "law and order" in the community. To most of these public office seekers, as well as those already in office, the key to such restoration is greatly increased prison terms, including life sentences, for those involved in the illegal sale of narcotics and for those illegal narcotics users who commit violent crimes. And the crux of these harsh new proposals is that such prison terms should be mandatory. In addition, these proposals would deny persons convicted of narcotics offenses the usual opportunity for parole.[2] Some state legislative proposals have gone so far as to prohibit plea bargaining in such cases.[3] In short, retribution and deterrence, a theory of severe mandatory punishment for law violators, as opposed to any other theory or program for curbing the sale of drugs and decreasing drug-related crimes, has seized the day.

The only certain consequence of this oversimplified approach to a multifaceted problem is that the judge alone, of all those involved in the administration of criminal justice, would be entirely stripped of his or her discretion in dealing with narcotics sellers and narcotics-related offenders.[4] A bar to plea bargaining would circumscribe the prosecutor's discretion in this one area. The remainder of the prosecutor's broad discretion as well as the discretion of all other principals in the criminal justice system—the police, the jury, the jailer—would remain intact. The prohibition against parole would mean that the parole board stage of the criminal justice process would be completely eliminated with respect to narcotics crimes. And all other crimes, except those few carrying mandatory penalties, would remain subject to a wide, largely unrestrained discretion which the law reposes in the prosecutor, the trial judge and the parole board.[5] In other words, there is another, perhaps even more significant, "law and order" problem in our system of criminal justice of which the public is not so aware. Needless to say, this is a problem which deserves as much attention, if not more, than crime in the streets. For those who have been all the way through our criminal justice system, including prison, the lawlessness of the system must be a major contributing factor to their inability to accept lawful conduct as a meaningful alternative way of life.[6]

Our criminal justice system, from beginning to end, lacks "law and order" to a substantial degree. As noted before, officials at each critical stage of

* District Judge, United States District Court for the Southern District of New York. This article is an adaptation of a speech delivered by Judge Motley as part of The Rosenthal Foundation Lecture Series at Northwestern University School of Law in April, 1973 and will be published by Northwestern University Press sometime in the future as part of the Rosenthal series.

[1] New York Times, Jan. 26, 1973, at 18, col. 1.

[2] *See, e.g.*, New York State Senate Bill No. 1365 (identical to N.Y. Assembly Bill No. 1556) which was described by Governor Rockefeller in a speech before the New York State Legislature on January 3, 1973. The proposal contained harsh mandatory sentences for certain drug offenses and, in § 3 of the bill, made certain drug offenders ineligible for parole. On April 13, 1973, the Governor announced that he was modifying the proposed bill to permit parole even in cases of mandatory life sentences after a required minimum period of imprisonment. The mandatory period would vary with the degree of the offense.

[3] New York State Senate Bill No. 1365, §§ 12–13. Governor Rockefeller also modified this approach in his message of April 13, 1973.

[4] *See generally* M. FRANKEL, CRIMINAL SENTENCES (1972); Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV, 904, 916 (1962).

[5] Governor Rockefeller recently amended his proposal to extend minimum mandatory penalties to other crimes including arson, burglary, rape, and robbery.

[6] S. RUBIN, H. WEIHOFEN, G. EDWARDS & S. ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 132 (1963); McCleery, *Authoritarianism and the Belief Systems of Incorrigibles*, in THE PRISON 260, 268–69 (D. Cressey ed. 1961); Kirby, *Doubts About the Indeterminate Sentence*, 53 JUDICATURE 63 (1969).

the criminal justice process have and exercise discretion. Too often it is a wide, largely uncontrolled discretion or one which is inadequately guided.[7] The current proposals relating to the narcotics epidemic mindlessly seek to strip or control only certain officials in the exercise of their discretion in this limited area;[8] whereas, the real need today is for the development of clearly articulated standards which will more effectively control, rather than abolish, the exercise of discretion by all those officials to whom society has delegated the authority to determine whether an individual shall be deprived of his or her liberty.

My plan is to examine first the various stages in our criminal justice system with a view toward elucidating the problem of the lack of adequate standards to guide the exercise of discretion by officials as they function at the various stages of our criminal justice process. Then I shall present one view as to how more law and order may be brought to bear on the sentencing phase of the criminal justice process, the stage with which I am most familiar.

## The Six Stages of the Criminal Justice Process

It is now a criminal justice axiom that very, very few persons who actually violate the law are caught, still fewer are actually arrested, and even fewer are prosecuted and convicted. Thus, a minute percentage of all those guilty of some infraction of the law are actually imprisoned.[9] But for those who are, the criminal justice system may be fairly divided into six parts: the arrest, the indictment, the trial, the sentence, prison, and then parole.

So-called street crime today takes many forms: there is the teenage pocketbook snatcher, the mugger, the addict with a knife, the small narcotics pusher, the addict pusher, the small soft-drug pusher, the addict who steals social security and welfare checks from hallway mailboxes, as well as the major narcotics and soft-drug pushers. Generally speaking, it is expected that the policemen on the beat will arrest these and other street criminals. These are the offenders against whom the public's rage is presently directed. The fact that hundreds of millions of dollars worth of securities have been and are being stolen, that securities frauds now are astronomical, that the market may be flooded with dangerous drugs and adulterated foods, that consumer frauds may be "out of sight," and that government at every level may be losing the battle against corruption has not generated nearly as much rage. We do not hear, for example, any proposals for the imposition of severe minimum mandatory prison terms upon those convicted of involvement in a two hundred million dollar securities fraud. Consequently, for those who are involved in the administration of justice, the reality is that the present harsh proposals are designed to deal only with one segment of the criminal society. And the full force of this new criminal justice mandate will come to bear only on those few who are unlucky enough to be arrested, prosecuted and convicted.

As previously mentioned, these new proposals for severe minimum mandatory prison sentences will completely strip only the judge, who has the duty to impose sentence, of his or her discretion. Of course, if the proposed "no parole" provisions are also enacted into law, the parole board will also lose its discretion in the sense that such convicted persons will not be eligible for parole. The elimination of plea bargaining will deprive the prosecutor of only a part of his wide discretion. But all other principals in the criminal justice process will emerge with their discretion intact, but, nevertheless, greatly influenced in exercising such discretion by the existence of such severe mandatory penalties.

Consider the policeman on the beat who must make street arrests of narcotics pushers large and small. Unless the officer actually witnessed the commission of the crime, he will be acting in many instances upon information supplied to him by informers. Based upon the information received, the officer has the discretionary power to arrest, and to conduct a limited search incident to an

[7] *See* M. Frankel, *supra* note 4; Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. Rev. 785 (1970); Kadish, *supra* note 4.

[8] New York State Judge Irwin Brownstein recently sentenced two youths to a life sentence with a mandatory minimum of fifteen years for acting as carriers of a quantity of heroin. As Judge Brownstein pointed out in a public statement, if the quantity had been just a little less, he could have given the defendants a lesser sentence as he desired to do, since the defendants claimed that they did not know what was in the package.

[9] U.S. Justice Dept. F.B.I., Uniform Crime Reports (1971). Of the 2,928,865 offenses reported during 1971 and included in the Reports, 574,584 (19 percent) were cleared (a crime is cleared when the police identify the offender, have sufficient evidence to charge him, and take him into custody). Considering the offenses indexed during 1971, 141,726 (4.8 percent of all index offenses reported) persons were found quilty as charged.

arrest.[10] The officer is told that he may only make such an arrest if he has "probable cause" to believe that a crime has been or is being committed.

In *United States v. Harris*[11] the "Burger Court" considered for the first time what the new Chief Justice called "the recurring question of what showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the report of an informant known to the police, but not identified to the magistrate, who purports to relate his personal knowledge of criminal activity." [12]

The sufficiency of the affidavit before the magistrate in that case was upheld 5 to 4, with no majority opinion. Since the same standards are applied to determine whether a police officer had "probable cause" to make a street arrest in the first place and search incident thereto, it must be said of the Court's opinion in *Harris* that police officers, as well as the lower courts, are presently without a Supreme Court opinion setting forth clearly defined guidelines for crediting the information of an informer. As a result, the police will often be wrong in making or not making an arrest. In the former event, the policeman's basis for arrest is reviewable by the judge. In the latter event, it is not.

When a policeman fails to make an arrest he should have made, it can be said that the police officer improperly exercised his discretion in favor of an accused person and against the interests of society. In the former case, where an improper arrest is made, it can be said that the officer exercised his discretion against both the interests of the accused and society. The individual will have a record of arrest. Society's interests are clearly not served by having persons improperly arrested. However, in both cases, it can be said that the officer's faulty actions stemmed from the fact that he was inadequately guided in exercising his discretion. In both cases it is possible that one for whom the severe penalties were intended will have escaped.

Those involved in law enforcement have long recognized that even when certain crimes have been committed in a police officer's presence he sometimes exercises an assumed official discretion not to arrest.[13] The juvenile or young teenager who puts a brick through a suburban school window may be taken home by the police to his parents and punished by school or family. The ghetto child whose family cannot afford to pay to repair a similarly broken school window is more likely to receive the punishment of a juvenile or youth court. From that policeman's point of view the suburban child may be a troublemaker, the ghetto teenager a juvenile delinquent. It may be a good thing for a policeman to have such discretion, but who has attempted to guide him in its exercise? A policeman is obviously more tempted to assume a discretion if the youngster will be facing a severe minimum mandatory sentence for the offense committed in the officer's presence.

The exercise of an inadequately guided discretion in effecting arrests is much more common at the local than at the federal level. The reason for this is the difference in types of crimes which are prosecuted within each area. City policemen must deal with street crime and family offenses where on-the-spot decisions are the rule.[14] In the federal system, most prosecutions are the result of intensive investigations by administrative agencies such as the SEC, and law enforcement agencies like the FBI. Therefore, it is often agency personnel who exercise discretion in determining, after investigation, which cases are to be referred for possible criminal prosecution to the United States Attorney. Federal narcotics arrests generally follow investigation and surveillance of the accused by Special Agents of the Bureau of Narcotics and Dangerous Drugs (BNDD) to whom the contraband is sold. The limitations of staff and money make widescale prosecution of offenders impractical. Therefore, administrative agencies, as well as the BNDD and FBI, tend to focus on what are considered "key" or "strategic" cases or those involving the most notorious or dangerous law violators. The boundary between a "key" case and a "not-so-key" case is obviously a very subjective matter.

The fact that a person has been properly arrested or charged with a crime does not mean that

[10] *See generally* Adams v. Williams, 407 U.S. 143 (1972); Chimel v. California, 395 U.S. 752 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Draper v. United States, 358 U.S. 307 (1959).

[11] 403 U.S. 573 (1971).

[12] *Id.* at 574.

[13] LAFAVE, ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY 63 (1965); Goldstein, *Police Discretion Not to Invoke The Criminal Process; Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 547 (1960); Kadish, *supra* note 4; Parnas, *Police Discretion and Diversion of Incidents of Intra-Family Violence*, 36 LAW AND CONTEMPORARY PROBLEMS 539 (1971).

[14] Parnas, *supra* note 15.

he will be prosecuted. A prosecutor has a wide discretion in deciding in every category of crime who will be prosecuted and who will not. The average prosecutor's favorite discretionary device for securing convictions in narcotics cases, as in other types of criminal cases, is to use an arrestee as an informant in exchange for a promise that the arrestee will not be prosecuted, at least not for the crime with which he has been charged. Federal and state narcotics agents who make arrests often use this discretionary device. Another device is to name the arrestee as a co-conspirator but not a defendant in the indictment. The co-conspirator, as everyone in law enforcement knows, is the one who is going to get everyone else convicted by testifying for the government.

Recently, the head of the Criminal Division in the office of the United States Attorney for the Southern District of New York issued a memorandum to all Assistant United States Attorneys in that office which provides that government attorneys have the discretion to permit a drug addict to enter the Treatment Alternative to Street Crime (TASC) program.[15] In addition, the memorandum describes the procedure to be followed by one admitted to the program. If one admitted to the treatment program is found in "satisfactory status" after a year, the complaint against him is dismissed. If, however, a defendant violates any of the conditions of his release, the defendant is rearraigned. Such deferred prosecutions apply to all narcotics addicts.

Deferred prosecutions have long been afforded juveniles arrested for any federal law violation. The Probation Manual issued by the Administrative Office of the United States Courts sets forth the Deferred Prosecution Plan with respect to juveniles.[16] The plan permits the government attorney to defer prosecution of a "carefully selected" juvenile and place him under the informal supervision of a probation officer for a definite period of time. The Judicial Conference has said that the philosophy underlying the plan of deferred prosecution,

> ... is based on the belief that very often it is wiser not to prosecute juveniles at all, even as juvenile delinquents; that in many instances, offenders are capable of correction without prosecution; and that if prior to trial and conviction such juveniles are placed under supervision, prosecution becomes unnecessary.... By such a procedure, the juvenile is not stigmatized by a court record of any kind.[17]

The Judicial Conference report found a patent flaw in the deferred prosecution approach. The plan was not codified and, as a result, allowed prosecutors wide discretion in determining when to initiate a deferred prosecution procedure.[18]

To quote a 1967 Presidential Commission's Task Force Report on prosecutors:

> ... the system for making the charge decision remains generally inadequate. Prosecutors act without the benefit of direction or guidelines from either the legislature or higher levels of administration; their decisions are almost entirely free from judicial supervision. Decisions are to a great extent fortuitous because they are made on inadequate information about the offense, the offender, and the alternatives [to prosecution of the offender which are] available.... Often cases are prosecuted that should not be. Often offenders in need of treatment, supervision, or discipline are set free without being referred to appropriate community agencies or followed up in any way.[19]

Thus, the arrest of a suspect and the decision to prosecute him are the first points of the criminal process where authority is exercised largely without rules. This same undisciplined exercise of authority continues after prosecution of the accused begins. He remains subject to it until his final release from the criminal justice system.

After a defendant is arrested and charged with a crime, a determination is made as to whether he shall be released on bail pending trial. Here again some official's unguided or inadequately guided discretion takes hold. Even under the present federal Bail Reform Act,[20] wide discretion still resides in the magistrate or the trial judge in determining what conditions of release are to be set for a defendant who is not released on his own recognizance or on an unsecured appearance bond. The judicial officer may consider such things as

[15] United States Attorney's Office, Southern District of New York, Criminal Division Memo. No. 9 (January 29, 1973), superseding in part Memo. No. 2 dated April 26, 1971 (available in the offices of the J. CRIM. L. & C.).

[16] Probation Manual, Chapter 9, PO-9.11 (December 1, 1961).

[17] JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE COMMITTEE ON PROBATION WITH SPECIAL REFERENCE TO JUVENILE DELINQUENCY (August 21, 1947).

[18] *Id.* at 7.

[19] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE—TASK FORCE REPORT: THE COURTS 7 (1967).

[20] Bail Reform Act, 18 U.S.C. §§ 3146–52 (1971).

the defendant's family ties, his character and mental condition, and his length of residence in the community.[21]

Recent New York state proposals have included a provision that with respect to persons arrested and charged with narcotics law violations or the use of violence while under the influence of drugs, there shall be no plea bargaining or very strictly limited plea bargaining.[22] If such provisions should become law, they would indeed "cramp" the prosecutor's "style" for securing many convictions.

In the plea bargaining process, which ends in the conviction of the defendant, there are no rules or standards to govern the prosecutor's conduct, other than the tactical and strategic considerations which surround the performance of any difficult job.[23] In other words, the prosecutor's discretion in negotiating plea bargains is virtually without limit. However this discretion is exercised may depend on the nature of the evidence and the time constraints on the prosecutor's office rather than on considerations of justice and fairness.

There are two other important dimensions to the plea bargaining process which are worthy of attention. First, successful plea bargaining bypasses the trial process altogether. The courts, more out of necessity than conviction, countenance the waiver of basic constitutional rights by pleading defendants. The effect which no trial has upon sentencing can be tremendous. During the course of a trial the government's proof as to all charges is revealed to court and jury. The nature and extent of defendant's involvement usually is fully disclosed. The seriousness of the crime or crimes committed by a defendant are put in perspective. In the case of a guilty plea, the judge usually hears only a brief summary of the prosecutor's version of the facts.

The other important dimension of the plea bargaining process is its effect as a sentencing decision. Generally, it is thought, and legislatures have so provided, that sentences should be imposed by judges.[24] However, in most plea bargaining arrangements, prosecutors exercise this very function.[25] The reduction of charges, which is the quid pro quo for the defendant's plea of guilty, often effects a reduction in the maximum penalty which may be imposed on the defendant by the judge. In the Federal District Court for the Southern District of New York, this is generally the only effect of the plea bargain, since prosecutors are not given an opportunity to make specific sentencing recommendations. In the state courts, it is often otherwise. That is, a plea bargain may be a trade of a guilty plea for a specific sentencing disposition with which the state judge will normally concur. Of course, where, as is often the case in state courts, a defendant fails to make bail and remains in prison for a substantial amount of time pending trial, trial and sentencing become unnecessary altogether. At a certain point, the defendant's guilty plea to reduced charges will mean a sentence for the time he has already served. In such situations, it is at the original bail hearing that the sentencing decision is effectively made. Thus, since it is the prosecutor who decides whether or not to reach a plea bargain with each individual defendant, it is the prosecutor who controls to a great extent the harshness of the sentence.

The federal system protects a defendant on trial in a criminal case fairly effectively from arbitrariness during the trial by providing for appeal in every criminal case.[26] However, jurors can and do exercise their virtually unfettered power, which is not subject to review, to protect defendants from what the jurors believe may be excessively harsh punishment under the law. The Court of Appeals for the Second Circuit recently reminded us that "... the jury has 'power to bring in a verdict in the teeth of both law and facts.' "[27] Although jury acquittals in narcotics cases in our court are uncommon, minimum mandatory penalties of ten years or life in prison can only have the effect of making such acquittals more frequent. The disparate circumstances of each case and the varying quantities of narcotics involved make it clear that the jury is more likely than not to consider such penalties too harsh in

[21] Bail Reform Act, 18 U.S.C. §3146 (b) (1971).

[22] *See* note 2 *supra.*

[23] *See generally* D. NEWMAN, CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54 (1968); Note, *Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956).

[24] FED. R. CRIM. P., 32 (a); CAL. PENAL CODE § 1193 (West 1970); ILL. REV. STAT. ch. 38, § 1005-5-3 (1973).

[25] D. NEWMAN, *supra* note 24, at 188–92; Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509, 513 (1971); Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167 (1962).

[26] FED. R. CRIM. P., 37.

[27] United States v. Marchese, 438 F.2d 452, 455 (2d Cir.), *cert. denied*, 402 U.S. 1012 (1971). The Court quoted Horning v. District of Columbia, 254 U.S. 135, 138 (1920).

those cases involving mitigating circumstances and small quantities of narcotics.

Presently under federal law a person convicted of selling heroin or cocaine may be sentenced by the trial judge to a term of imprisonment up to fifteen years.[28] In addition, a fine up to $25,000 may be imposed. The sentence may be suspended. And the defendant sentenced to prison under the federal statute is eligible for parole after he has served one-third of his sentence, just as in the case of all other federal sentences.[29] If a prison term is imposed and not suspended, the judge must impose a parole term of not less than three years to follow any such term. In the case of any second or subsequent offense, where a prison term is imposed, the judge must impose a special parole term of not less than six years.[30]

On April 3, 1973, the Senate passed a bill which would require a judge to impose in the case of a second narcotics offender a minimum mandatory sentence of ten years.[31] He could impose more than ten years. The proposed maximum provided by the bill is thirty years. The minimum mandatory sentence of ten years must be imposed in addition to the sentence of up to fifteen years which may be imposed for that second offense. Such a double sentence is to be imposed in those cases where the defendant had been previously convicted, on or after the effective date of the proposed new law, of illegally manufacturing, distributing or dispensing one-tenth of an ounce of pure heroin or morphine, or its equivalent, and who, at the time he committed such violation, was not an addict. A person who had been so previously convicted is declared a "public menace." The statute further provides that if a person is found guilty of a third narcotics violation and has been previously convicted of selling one-tenth of an ounce of pure heroin or morphine and previously sentenced as a public menace, such defendant shall be sentenced, in addition to the sentence imposed of up to fifteen years, to life imprisonment. The imposition and execution of any such additional sentence may not be suspended and probation shall not be granted. However, any persons sentenced to life imprisonment may be released on parole after serving not less than thirty years of his life sentence. Moreover, in no case shall any such additional term of imprisonment, including a life sentence imposed pursuant to these proposed provisions, run concurrently with any term of imprisonment imposed for such violation.

Prior to enactment of the present law[32] in October, 1970 providing for the sentencing of narcotics law violators, *i.e.* sellers and distributors, to a term of imprisonment of up to fifteen years, federal law provided for the imposition of minimum mandatory sentences in such cases—five years for the first offense and ten years for the second or any subsequent offense.[33] The harshness of the mandatory feature of those old provisions, together with the "no suspension–no parole" features led judges and law reform groups to seek more flexibility. In opposing the bill which was passed by the Senate on April 3, 1973, and which seeks to reinstitute minimum mandatory penalties for second and third offenders, Senator Ervin of North Carolina had this to say:

> I am opposed to this amendment for two reasons. In the first place, I do not believe that the institution of mandatory minimum sentences will be effective in deterring these crimes or insuring proper punishment for the guilty. Experience shows and logic demonstrates that mandatory sentences in some cases actually encourage prosecutors to dismiss or break down charges to lesser offenses and encourage judges and juries to acquit the guilty. If a judge or jury believes the mandatory sentence does not fit the defendant under the circumstances, acquittal will be a great temptation.
>
> The second objection I have to mandatory minimum sentences is the unfortunate restrictions they place upon the discretion of judges. Although, like other Americans, I do not always agree with the way in which judges exercise their traditional discretion in sentencing, I strongly believe in preserving this flexibility built into our system of criminal justice. It is the trial judge, not Congress, which hears all of the evidence, observes firsthand the particular defendant, and becomes acquainted with his background through the presentencing report. Mandatory sentences deprive trial judges of discretion to make the punishment fit the crime and the criminal.[34]

[28] Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a) (1972).

[29] 18 U.S.C.A. § 4202 (1969).

[30] Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a) (1972).

[31] S.800, *as amended*, 93rd Cong., 1st Sess. § 601 (1973), reproduced at 119 CONG. REC. S6565 (1973).

[32] Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841 (1972).

[33] Opium Poppy Control Act of 1942, ch. 720, § 13, 56 Stat. 1045.

[34] 119 CONG. REC. S6549 (1973) (Remarks of Senator Ervin).

I believe that the sentencing of criminals is the most significant decision made by judges. Here, as my colleague, the Honorable Judge Marvin E. Frankel, has so brilliantly discussed in his book *Criminal Sentences*,[35] there are virtually no standards to guide the judge's decision. In the federal system, there is presently no review of sentences. Yet the sentence decision has an effect which is more tangible and significant to the defendant than any other decision in the criminal process. Being arrested may have varying consequences for a person. Even being prosecuted may not in the end substantially change a person's life. But being sentenced to prison for a substantial period of time must have for the condemned a finality second only to death. The difference between receiving a suspended sentence with no prison term and going to prison for ten years is capable of conception only by the man who has been sentenced to such a term knowing that another person similarly convicted received two years or even a suspended sentence. Ten years is most often the maximum range of a sentence which a federal trial judge may impose. Narcotics cases are among the exceptions. And except for the maximum as defined by statute, the decision may be more or less an arbitrary one.

The presentence report[36] is supposed to aid the judge in determining what the sentence shall be, but apart from advising the judge of the defendant's prior criminal record, the report usually furnishes no other truly objective guides to sentencing. A defendant's background, family life, hobbies, employment record, and military record, may be guides, but they are personal value judgments in the sentencing process. The weight to be given these vague attributes will vary from judge to judge. The seriousness of the crime committed is manifestly a major consideration in any sentence, but what may be serious to a judge in Kansas may not be equally serious to a judge in New York and vice versa. Likewise, even judges in the same court may disagree as to the seriousness of a particular offense.

In June 1972, a Senate Committee on Criminal Law and Procedure was furnished a study of sentences in federal courts over a four-year period, 1967–1970, which showed considerable variation in length of sentences both within and between judicial districts. It also showed some interesting variations in length of sentences as between whites and blacks. In interstate theft cases, for example, 28 percent of white defendants received prison sentences as opposed to 48 percent for blacks. In postal theft cases it was 39 percent for whites as opposed to 48 percent for blacks.[37] For fiscal year 1970 the Federal Bureau of Prisons reported that the average length of sentences for white federal prisoners was 42.9 months as compared to 57.5 months for blacks.[38]

Last year, the United States Attorney for the Southern District of New York made a study of sentences over a six-month period, May-October 1972, in the Southern District court. Although he found no differentiation in sentencing in that court as between blacks and whites, he did find that only 36 percent of the white collar criminals who were convicted went to jail as opposed to 53 percent of those convicted for non-violent common crimes.[39]

There is another reason, as I have suggested, why the sentencing function of judges is so significant. The fact is that few of those who are charged with crime actually go to trial. Indeed, only a small minority of defendants assert their constitutional right to a jury trial. The vast majority enter pleas of guilty. Consequently, the only substantial role of a judge in a case where the defendant pleads guilty is at the time of sentencing.

Once a defendant is convicted and then sentenced by a judge, the defendant enters another stage of the criminal justice system: prison life. Here the criminal defendant is once again at the mercy of officials who exercise power and authority largely without rules.

The subjection of prisoners to arbitrary decisions of prison officials was well illustrated in the case of *Sostre v. Rockefeller*,[40] which was before me three years ago, and in the case of *Morales v. Schmidt*,[41] which was before Federal Judge Doyle

[35] *See* M. FRANKEL, *supra* note 4.

[36] FED. R. CRIM. P., 32(c)(2).

[37] REPORT OF THE NATIONAL INSTITUTE FOR LAW ENFORCEMENT AND CRIMINAL JUSTICE, as summarized in "Southern District of New York Sentencing Study" at 3–4 (Memorandum from United States Attorney, Southern District of New York, to Judges of the Second Circuit and Southern District of New York, Mimeograph dated January 10, 1973) (available from the offices of the J. CRIM. L. & C.).

[38] STATISTICAL REPORT FOR FISCAL YEAR 1970, as quoted in "Southern District of New York Sentencing Study," *supra* note 38.

[39] "Southern District of New York Sentencing Study," *supra* note 38.

[40] 312 F. Supp. 863 (S.D.N.Y. 1970), *aff'd., modified, and rev'd* in part *sub. nom.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (En banc), *cert. denied*, 404 U.S. 1049 (1972).

[41] 340 F. Supp. 544 (W.D. Wis. 1972), *rev'd. and remanded*, ___ F.2d ___ (7th Cir. 1973).

of the Western District of Wisconsin last year. Sostre petitioned my court for release from solitary confinement which he had endured for over a year. The evidence established that Sostre was treated in this way "not because of any serious infraction of the rules of prison discipline, or even for any minor infraction, but because Sostre was being punished specially by the Warden" for his legal and political activities and beliefs.[42]

There was little difficulty in finding an ostensibly legitimate excuse for sending Sostre into solitary confinement. The Warden could rely on such broad prison rules as the following—that an inmate obey orders "promptly and fully." Another rule provided that inmates answer all questions put to them by prison officials "fully and truthfully." [43] The New York Correction Law at the time authorized wardens to commit prisoners to solitary confinement in their absolutely unfettered discretion,[44] when necessary to produce the prisoner's entire submission and obedience. The prisoner could be kept there "until he shall [have been] reduced to submission." The statute was changed in 1970 without really affecting the scope of the warden's discretion. Now wardens "may keep any inmate confined . . . [separately] . . . for such period as may be necessary for maintenance of order or discipline." [45]

The decision to punish a prisoner in this way may be made by a prison warden without formal proceedings. The warden is only required to afford the prisoner a "reasonable opportunity to explain his actions." [46] And this is the case despite the fact that the placement of a prisoner in solitary confinement is often "dehumanizing in the sense that it is needlessly degrading." [47]

In *Morales*, Judge Doyle said:

> With respect to the intrinsic importance of the challenges [*i.e.*, to the prison system], I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational.[48]

Aside from the vagaries of prison life, prisoners are also subject to the totally unguided discretion of parole officials. In the parole system, we again find the exercise of authority without rules or standards to channel the decision-making function. At a First and Second Circuit Sentencing Institute in January, 1973, a member of the United States Board of Parole frankly admitted that he knew of no specific criteria by which the Board made its determinations.

It is therefore easy to understand the description which the federal parole board has given of its operations in one of its official booklets:

> Voting is done on an individual basis by each member and the Board does not sit as a group for this purpose. Each member studies the prisoner's file and places his name on the official order form to signify whether he wishes to grant or deny parole. The reasoning and thought which led to his vote are not made a part of the order, and it is therefore impossible to state precisely why a particular prisoner was or was not granted parole.[49]

Of course, there is no way to explain disparities in results, when there are no definable standards by which specific results are reached.

## Some Views on Bringing Law and Order to the Sentencing Process

The preceding observations bring us to the second part of this analysis—some views on what might be done to bring more law and order to the sentencing process. It is said that criminal penalties are imposed by society for any one or more of five purposes:[50]

1) for retribution or revenge against the wrongdoer;

2) for preventive detention—to restrain the wrongdoer during his confinement;

3) for specific or individual deterrence—that is, to discourage the wrongdoer from committing crimes after his release;

4) for general deterrence—to deter others from the same illegal conduct; and

5) to rehabilitate or reform the wrongdoer.

Our present system of sentencing is concededly rather ineffective in accomplishing the latter three purposes. The first two—retribution against and detention of a very small minority of wrongdoers—the system does seem to be accomplishing.

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[42] 312 F. Supp. at 869.

[43] *Id.* at 871.

[44] Correction Law, § 140 (McKinney 1970).

[45] Correction Law, § 137 (McKinney 1972).

[46] Sostre v. McGinnis, 442 F.2d 178,198 (2d Cir. 1971) (En banc), *cert. denied.*, 404 U.S. 1049 (1972).

[47] 312 F. Supp. at 868.

[48] Morales v. Schmidt, 340 F. Supp. 544, 548–49 (W.D. Wis. 1972), *rev'd. and remanded*, — F.2d — (7th Cir. 1973).

[49] Functions of the United States Board of Parole 4–5 (1964).

[50] M. Frankel, *supra* note 4, at 106.

The reason that the sentencing system has such limited effectiveness in curbing crime seems to be that our society has not and will not commit the required resources to ameliorate the social conditions which breed criminal conduct and to "habilitate" or "rehabilitate" major law violators. Indeed, it does appear that no amount of money for improving social conditions will be effective as long as crime pays so well.

This is particularly true of the narcotics traffic. The convictions of narcotics agents and police officers for selling hard drugs tell us that no amount of money spent on better housing and better schools and better prisons will reduce the number of narcotics sellers as long as there are millions to be made in a society where it appears that only money counts. The problem of the illegal sale of narcotics is not to be solved by harsher and harsher penalties for pushers but by taking the profit out of selling narcotics. Our energies should therefore be devoted to finding ways to accomplish this end. If we find this solution, then one problem which has moved us frantically back to the severe minimum mandatory penalties concept will have vanished.

We will, nevertheless, be left with the realization that our society is not committed to a more rapid elimination of the crime breeding syndrome or the remaking of a criminal. With this in mind, it seems to me that we should candidly face the fact that the only purposes that a sentence serves are retribution, preventive detention, and sometimes individual deterrence. If this is correct, if these are the only purposes, then the mandatory sentence advocates have won a new adherent. However, my agreement with the mandatory penalty school is very limited and is forced by the disheartening reality which I have cited.

First, I believe that mandatory penalties should be graduated, relatively short, and imposed only in conjunction with a system which grants every first offender a suspended sentence and an appropriate period of probation, with an exception for certain particularly heinous offenses such as premeditated murder and consumer poisoning. In the case of monetary frauds, first offenders should, in addition, be required to make restitution. After the first offense, a short mandatory prison term of up to one year, which has been legislatively defined for each crime, would be imposed. If there are exceptional or unusual mitigating circumstances, such as the imminent death of the defendant or his providing crucial testimony for the government, a suspended sentence may be recommended by the sentencing judge whose written recommendation and reasons therefor must receive the approval of a reviewing panel. For the third offense, a much longer mandatory sentence of up to three years for each crime would be legislatively provided, with the same provisions for a suspended sentence. For the fourth offense, again, a longer mandatory sentence of five years would be provided, with the same provisions for suspended sentence. The fifth offender would be mandatorily sentenced to a term of five years. A similar mandatory sentence of five years would then be imposed for every offense thereafter.

For heinous crimes like murder, first offenders would receive a mandatory sentence which would vary according to the category of crime committed. Second offenders would receive very long mandatory sentences, depending on the crimes involved. Again, sentences could be suspended by the sentencing judge, but such suspensions would be subject to review.

This system contemplates that parole boards would continue to exist only for the release of prisoners for a compelling humanitarian reason. Of course, those who are judged mentally incompetent would be referred for treatment or confined in institutions if they can not be treated and are dangerous to themselves or others.

Juveniles, youth offenders, and young adult offenders up to the age of twenty-six would continue to be treated the way they presently are treated in the federal system.[51] The judge would continue to have the power to treat young people as such, suspend the sentences up to the age of twenty-six, and commit them for study and treatment.[52]

This system also contemplates that all victimless crimes such as alcoholism, drug use, and non-organized prostitution would be removed from the criminal justice system entirely and placed within a treatment system. It also contemplates that all gambling would be legalized.

In sum, we must take a fresh look at our criminal sentences to rationalize their purpose, to bring order to the system, and to eliminate meaningless disparities.

The proposal which I have just made may be restated in a simplified manner like this:

First, no person should be sentenced to prison

[51] 18 U.S.C. § 4209 (1969).
[52] Federal Youth Correction Act, 18 U.S.C. §§ 5005-26 (1970).

for a first offense, except for the most blameworthy offenses, such as premeditated murder.

Second, judges should have no discretion, except as indicated, in actually sentencing defendants to prison. The sentence should be specifically prescribed in each case by the legislature.

Third, suspended sentences should be strictly limited and subject to review.

Fourth, the length of sentence should depend exclusively on the number of times a person has been convicted of a crime and the seriousness of those crimes.

Fifth, after the first offense, imprisonment should be for a short, definite term, perhaps six months on the average and for a maximum of one year depending on the seriousness of the crime, with increasingly longer sentences to be imposed after the second offense.

Sixth, victimless crimes would not be dealt with by the traditional criminal justice system.

Since punishment and individual deterrence are the purposes of the sentence, all other punishment, such as the imposition of lawless punishment on prisoners and the denial of employment to them after their release, should be eliminated.

The combination of these six considerations would create a sentencing regime with less unguided discretion residing in the trial judge, where the goal in dealing with youths and first offenders would be to reintegrate them into society, rather than to punish or segregate them, where imprisonment for any more than a year would be reserved only for intractable offenders, and where the stated purposes of imprisonment would be to punish the individual offender and to deter him from committing further crimes.

Such a system would have several salutary effects. Most importantly, it would eliminate the lawless discretion which is now exercised by judges. To say that a judge through the exercise of his presently uncharted discretion can in every case fashion punishment to fit not only the crime, but the individual, is to say that a judge is not only ordained by God but that he is God.

Second, it would eliminate gross disparities in sentencing. In nearly all categories of cases, federal judges as a group show little consistency in sentencing practices. The different treatment that similar offenders get has no objective basis in law, nor is it necessarily a reflection of any differences between the offenders or the crimes they have committed. The disparity in sentencing in cases such as draft evasion is purely and simply a function of the judges who impose the sentence. As Judge Frankel has put it, "Sentences [are] not so much in terms of defendants, but mainly in terms of the wide spectrums of character, bias, neurosis, and daily vagary encountered among occupants of the trial bench." [53]

Just like the parole boards which I mentioned a few moments ago, federal judges are not required to articulate the underlying reasons for sentences which they impose. Judges have neither adequate information nor sufficient time or training to make a meaningful disposition of every individual defendant's case. Even with more information and more specific sentencing standards, judges would be acting according to their own predilections in most cases, since the criteria would necessarily be vague and a few factors among many relevant factors could always be cited to support a particular sentencing determination.

There is a more serious flaw in the present system of limitless discretion. Discretion is only exercised usefully when it is exercised to accomplish a particular purpose. In the case of sentencing, discretion is thought to be a salutary tool in the hands of judges because it enables them to decide the appropriate treatment for different offenders. This would make sense if the prison system did anything more than isolate convicts and punish them. In fact, however, this is all the prison system does and, I would venture to say, this is about all that any prison system is ever likely to accomplish. Since punishment and detention are all that prisons can accomplish, there is no sense to allowing discretion in the sentencing process. If the purpose of sentencing discretion is to maximize the goal of individual deterrence, the present system is likewise inappropriate.

Punishment is only an effective device for altering conduct if it is applied fairly and as a direct sanction for the conduct which is sought to be punished. Under the present sentencing system, however, punishment is not dispensed fairly because judges mete out punishment according to their own subjective and undisciplined standards.

Nor is punishment always a direct sanction for illegal conduct under the present sentencing system. Punishment is often imposed not so much for the specific offense which the defendant has committed as because of the defendant's social background, his failure to have a job, or his lack of education. When punishment is imposed in this

[53] M. FRANKEL, *supra* note 4, at 21.

manner, it loses its force as a symbol of society's disapproval of the defendant's criminal conduct. Instead, the punishment tells the defendant that society disapproves of him, that his character is deficient. The defendant knows that the kind of treatment he receives from the criminal process is not primarily a function of the crime which he has committed. It is more likely to be a reflection of the judge's estimate of him as a person.

It is fair to say that the individualized prison sentence is the first blow to a defendant's integrity and self-esteem in a process which, through the prison and parole regime, will deal him many more blows before his release. By punishing the defendant for what he is, rather than for what he has done, some sentencers loosen what may already be a fragile tie between the defendant and society. By the end of a substantial prison term, the tie may be irrevocably broken.

The proposed system, unlike the present one, might even make sense to the offender who then might gain respect for the rule of law. And it might, in the long run, reduce crime by reintegrating offenders into society rather than disintegrating them in our prisons. Any honest observer of the present sentencing process, the prison system, and crime statistics would have to agree that the time for a change of approach has come.

In his book *Criminal Sentences*,[54] Judge Frankel proposes a middle course between the mandatory sentence concept which I have proposed and the present system. His tentative suggestion is to control the judge's discretion without eliminating it entirely. The control mechanisms would include a codification of sentencing factors which the judge would be required to weigh in determining the sentence to be imposed in each individual case. A "detailed chart or calculus" would be used and the sentence would be subject to review by appellate courts.[55] Judge Frankel candidly notes, however, that similar efforts "have been made without notable success in the past." [56] The system as applied by judges might not in the end differ much from the present one. At the same time, it would create virtually insurmountable technical problems and uncertainties, since the calculus being applied would be complex, subjective and constantly under attack by various groups.

I would suggest that if we are to move in a new direction, a truly different approach should be tried. The proposal I have outlined seems to have the virtues of simplicity and easy applicability. It would also bring to the system a certainty of punishment for would-be offenders. The deterrent effect of certainty might also be salutary.

We know very little about how to deal with our crime problem and the American public has made notably little effort to improve the situation by dealing with the realities of the problem. Perhaps, therefore, making the sentencing process fairer and limiting its claimed purposes are the necessary first steps of reform of the criminal justice system. This is one of many steps which are needed. But it is the beginning of a "law and order" approach to the problem of lawlessness in the criminal justice system.

[54] M. FRANKEL, *supra* note 4. For other sentencing proposals, see AM. B. ASS'N. PROJECT ON MINIMUM STANDARDS FOR JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES (1968); NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT (1963).

[55] M. FRANKEL, *supra* note 4, at 113.

[56] *Id.* at 114.