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CRIMINAL LAW SANCTIONS IN TWO CIVIL RIGHTS CASES—A BRIEF COMPARISON

KENNETH L. PENEGAR*

In October 1964 nine white men pleaded no contest to a charge of bombing three Negro homes in McComb, Mississippi. In April of the same year four young men, three white and one Negro, also pleaded *nolo contendere* in a North Carolina court to charges of blocking a Chapel Hill public street (by sitting in it) and resisting arrest. The judge in the Mississippi cases awarded suspended sentences of up to fifteen years. These were felonies that the defendants had committed, and life imprisonment or the death penalty could have been imposed. Although fines were imposed, the Mississippi trial judge declined to impose any active sentence because, in his view, the defendants had been "unduly provoked" by civil rights workers in the area and deserved a second chance.¹

In the North Carolina cases where the misdemeanor charges (about which there are some doubts as to the maximum allowable punishment) were sustained by the Superior Court for Orange County, the trial judge imposed active sentences of six months each for two of the defendants and a year each for the two remaining ones.² In addition the sentencing judge assessed fines which had to be paid before the expiration of the active terms in prison. And in one of these cases the judge stipulated that a further two year sentence could be invoked at any time within the court's discretion for the next five years.³

These cases are instructive in the way they remind us of the power the sentencing judge has under our existing set of statutes and judicial procedures for disposing of criminal cases in which guilt has been determined. They are also instructive in calling to mind to what extent this vital phase of the criminal process, sentencing,

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¹ N.Y. Times, Oct. 24, 1964, p. 1, col. 4.

² State v. Cusick, Criminal No. 4188, Super. Ct. N.C., April 23, 1964; State v. Baker, Criminal No. 4132, Super. Ct. N.C., April 23, 1964; State v. Dunne, Criminal No. 3881, Super. Ct. N.C., April 24, 1964; State v. Calhoun, Criminal No. 3824, Super. Ct. N.C., April 24, 1964.

³ State v. Dunne, *supra* note 2.

has been consistently ignored by the legal profession and society. As lawyers in the Anglo-American tradition, we like to think of our processes by which we deprive fellow citizens of their liberty and fortune (and sometimes their lives) as rationally conceived to fulfill the goals of a democratic society and as functioning fairly, impartially, and intelligently to the same ends.

Let us examine in the context of these cases, principally the ones from this jurisdiction, how compatible are our assumptions about these processes with the trend of decision observed in practice.

What are the commonly held expectations in our society about the aims, the purposes which the judge serves when he undertakes to sentence one who has been convicted of crime? In a sense the question goes to the most fundamental ideas about the power residing in the state to protect the whole range of values which are important to the society served by the state. In large part this power is channeled through the system we call Criminal Law. One response might be that it is expected that the criminal will be *prevented* from doing again what he has just been found to have done. Of course ultimate prevention in individual cases is possible only by applying the death sentence; but we do attempt something short of this in most cases. Another response might be that it is expected that others will be *deterred* by example from doing what the person convicted has done. A more typical lay response might be that the criminal should be "punished" for what he has done, "taught a lesson." A more thoughtful layman might say that society should endeavor to *rehabilitate* the offender, make a useful citizen out of him. We would have in such responses, with allowances for style of expression, the goals which have been deliberately articulated by many modern professional sources: viz., *rehabilitation* of the convicted offender into a noncriminal member of society; *isolation* of the offender from society to prevent criminal conduct during the individual's confinement; *deterrence* both of other members of the community who might have inclinations like those of the convicted member and of the offender himself following his release from confinement; and *retribution* (although this one is not often explicitly admitted) or emotional satisfaction gained from awarding a hurt equivalent to the one perpetrated by the offender; and *public con-*

denmation of the wrong which the offender committed, reaffirming the accepted norms of the community.⁴

These goals are pursued, whether always consciously or not, every time the legislature of one of our states or the Congress enacts statutes providing for prison terms and other forms of confinement for enumerated offenses. Likewise they are pursued when such bodies enact statutes providing for probation and suspended sentences, for partial confinement and partial freedom under supervision (such as North Carolina's "work release" program). These goals are also pursued when the individual sentencing judge decides to employ one or more of these sanctions in a particular case. Thus it is a responsibility which society reposes in a number of decision-makers or persons in authority. Unfortunately in the typical common law jurisdiction there are few clear guidelines articulated by those in charge of the legislative phase of the process to those others who will apply community policy as defined in these general terms. The point is, in other words, that the sentencing judge is allowed wide discretion in which to make a disposition of each case. *Discretion*, however, is not a synonym of *whimsy* or *caprice*. The power each decision-maker has must be exercised in consonance with over-riding community goals. The difficulty is that because of the poor communication or lack of dialogue between the prescribing authorities (in the legislature) and the applying authorities (on trial court benches), the relevance of any particular sanction applied in any particular case depends (inside the broadest limits, such as maximum and/or minimum terms, fines, probation, etc.) almost exclusively on the predispositions of the sentencing judge.⁵ It is not off the mark then to call this decision-maker acting in such a role the "conscience of

⁴ See, e.g., MODEL PENAL CODE § 1.02 (Proposed Final Draft No. 1, 1961); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958); Wechsler, *Sentencing, Correction and the Model Penal Code*, 109 U. PA. L. REV. 465 (1961); Note, 69 YALE L.J. 1453, 1455 (1960).

⁵ Judges come to the bench with a wide variety of experience and background. These differences are reflected in the dispositions made in criminal cases . . . It is not an easy matter for an individual to see clearly his own intellectual and emotional biases, biases of which few persons are free. More than any other professional, a judge is in a position to impose the pattern of his personal reactions on the individuals over whom he has some control. A sentencing judge, particularly, risks the danger of becoming convinced that both as a man and as an official he is omniscient and omnipotent. Moderation and objectivity should be his goals. Advisory Council of Judges of the NPPA, *Guides for Sentencing* 8 (1957), in DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 374, 375 (1962).

the community." This of course is merely an epigrammatic way of saying that the judge is expected to decide the case justly and in accordance with widely held values safeguarded in a free society by the institutions erected for the purpose. But epigrams can be applied to other distinctive phases of the whole criminal law process such as the legislature as "keeper of our morals," the executive (be it governor, mayor, or President) as "custodian of force" and so on. They are no more helpful in appraising the proper functioning of any one part of government than another. In other words it does not end the inquiry merely to remind ourselves that judges are accorded a large measure of authority over our lives. So it is with a number of other decision-makers. The point is not that judges are powerful. This is a characteristic shared with others. Rather it is the differences in the public execution of the respective power accorded which is of significance for us here.

I. LOW VISIBILITY OF SENTENCING

Unlike the application of substantive rules of law in the trial proper, where counsel for both sides are alert to any misstatement and for which either might appeal to a reviewing higher court, application of the sanctions of the criminal law in the sentencing phase is rarely the subject of such review.⁶ Furthermore the sentencing judge is not required to publish his reasons for awarding any particular sentence. This means that there is no systematic way for the legal profession itself to keep abreast of the practices of the judges before whom they appear. And it is to the whole profession the public rightfully looks to superintend the prevailing practices and procedures which govern their system of law—especially where statute and court rule leave such matters to the day-to-day operation of the system by its major participants. To the extent that the lay public are informed at all it is done through the haphazard reporting by the press. And in many routine cases, in many inferior courts this means almost no reporting at all. Equally significant is the absence of any commonly understood criteria by which to appraise those sentences which are reported to the public in the press. Indeed even the lawyers reading such accounts often have real diffi-

⁶ For egregious errors in exceeding statutory maxima, for example, the sentence may be vacated. "Abuse of discretion" is otherwise the only predicate available, and it is of course a very slippery concept to manipulate. See, *e.g.*, *United States v. UMW*, 330 U.S. 258 (1947) (contempt case).

culty in making any intelligent appraisal where there is no recital of relevant case detail set in meaningful context of conditions. The absence of any complete reporting means, moreover, that courts are insulated from the regular commentary of the law reviews and other professional journals. In summary then it may be seen that judgments in criminal cases are (1) not published, (2) not subject to appellate review, (3) not subject to professional "review." It should be noted of course that other features of the criminal law processes are of similar "low-visibility"—for example, the decision not to invoke the whole process by making a formal charge but where some deprivation of liberty has occurred.⁷ But increasingly the abuses which occur in these low-visibility situations are coming under the effective supervision of courts—at least where a prosecution has been commenced and there are claims of unlawful arrest, search, or seizure; and the use of the habeas corpus hearing has probably had some salutary effect on the arbitrary use of the arrest power without prosecution. Control of sentencing, though, is already within the courts. This may to a large extent explain why nowhere near the same amount of attention has been focused on it by writers within and without the profession as on these administrative or police practices.

II. INFORMALITY OF SENTENCING

It is equally true of the sentencing phase that it is subject to the widest kind of variation in form and content. There may be a probation officer's report or other case-worker type report disclosing many background details of the defendant's past life; there may be a psychiatrist's evaluation, and a résumé of employment and/or educational data. Or, there may be only the few bare words of the defendant himself declaring that he has nothing to say in response to the judge's inquiry. Counsel may say little or nothing during the entire proceeding; or he may offer well-meant pleas of mercy for his misled but unfortunate client. Or, he may elicit from "character witnesses" a variety of details of the defendant's life, some of them seemingly relevant to questions about the prospects of the defendant's resumption of a law-abiding life. But very often the basic questions are never explicitly posed. Again in part we may

⁷ See Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955).

attribute this to a failure of communication, this time between counsel and the court. What is it the judge wants to know before he passes sentence? What principal alternatives is he considering? What criteria will he employ in choosing between or among them? What factors must be present in the case for him to award the highly preferred disposition of probation?⁸ What evidence will he take, insist upon as proof of such factors? What initiative will the judge take in finding answers to his own questions? All such questions would seem to require at least rudimentary answers before counsel could meaningfully participate in the proceeding. And they should be answered in advance of the time set aside for the hearing itself unless endless delays and interruptions are to be permitted.⁹

III. NEED FOR EXPLICITNESS ABOUT GOALS AND JUDICIAL PREDISPOSITIONS

Vengeance, emotion, prejudice have no place in the judge's thinking. Neither the transient mood nor the functioning of the judge's digestion has or should have anything to do with the sentence. The sentence is not an automatic application of a fixed and arbitrary schedule of fines and prison terms. It is or should be the rational result of a search for information and a measuring of facts in a delicate balancing of certain important principles.¹⁰

Without now going into the matter of how the legislature arrives at meaningful solutions to the problems of what maximum and minimum active terms may be imposed for what felonies, for what misdemeanors, what fines may be imposed, and in what general

⁸ Federal judges in their 1959 Pilot Institute on Sentencing agreed that "probation should generally be utilized unless commitment appears advisable as a deterrent, or for the protection of the public, or because no hope of rehabilitation is evident." Bryan & Sheehy, *Summary of the Institute*, 26 F.R.D. 379-81 (Proceedings of Pilot Institute on Sentencing 1959). See also Van Dusen, *Trends in Sentencing Since 1957*, 35 F.R.D. 395 (Institute on Sentencing for United States District Judges 1964).

⁹ For a very thoughtful approach offered by one trial judge towards achieving "a generally uniform philosophy of sentencing," see Parsons, *Aids in Sentencing*, 35 F.R.D. 423 (Institute on Sentencing for United States District Judges 1964). Judge Parsons enumerates phases in which the judge can formulate a proper sentence. These are (1) the preliminary hearing on sentence, (2) the court in study, and (3) the sentencing "ceremony."

¹⁰ Pharr, *On Sentencing: What a Judge Expects from Defense Counsel*, *Prac. Law.*, Oct. 1955, p. 76.

categories (if any) probation is authorized,¹¹ we may profitably turn to examine existing statutory guides given to the judge—first in broad terms, including the division traditionally made between felonies and misdemeanors. In North Carolina the core of the legislature's general directions concerning confinement and probation is contained in four short sections of the General Statutes. In section 14-2 it is provided that where no specific punishment is prescribed for felonies, then imprisonment "in the county jail or State prison not exceeding two years" shall be imposed.¹² In section 14-3 it is provided that "misdemeanors, where a specific punishment is not prescribed shall be punished as misdemeanors at common law"¹³ Thus for misdemeanors there is no legislatively prescribed limitation on length of confinement or amount of fine which may be imposed, although it seems now fairly well established by decisions of the North Carolina Supreme Court that anything beyond two years confinement will be held "cruel and unusual punishment."¹⁴ And by virtue of section 14-4 violation of

¹¹ This may bear separate analysis, calling for discussion at the state level of what behavior *should*, in the context of our contemporary society, be formally classified as deviant and subject to the negative sanctions which it is the criminal law's special province to administer. See, *e.g.*, Remington & Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481.

¹² N.C. GEN. STAT. § 14-2 (1953).

¹³ N.C. GEN. STAT. § 14-3 (1953), which further provides that

if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a felony and punished by imprisonment in the county jail or State prison for not less than four months nor more than ten years, or shall be fined.

Thus some misdemeanors are really felonies; for while N.C. GEN. STAT. § 14-1 (1953) bids us distinguish felonies from other crimes as being those crimes which are punishable by death or imprisonment in State prison, some misdemeanors are by § 14-3 punishable by prison confinement as well. And according to the North Carolina Supreme Court the way to determine whether any particular misdemeanor is "an infamous crime" and hence punishable *as a felony* is not by the period of confinement allowable but by the "degrading nature of the offense." *State v. Surles*, 230 N.C. 272, 276, 52 S.E.2d 880, 883 (1949). The lack of clarity here is discussed in 28 N.C.L. REV. 103 (1949).

¹⁴ See, *e.g.*, the reference by way of dictum in *State v. Fox*, 262 N.C. 193, 194, 136 S.E.2d 761, 762 (1964). For older cases, see *State v. Farrington*, 141 N.C. 844, 53 S.E. 954 (1906); *State v. Driver*, 78 N.C. 423 (1878). There appears never to have been any deliberate attempt to impose upper limits on this power to punish misdemeanors either by the legislature, by judicial conference, or bar groups. The ancestry of this power is also obscure if not quite doubtful. Blackstone tells us, for example, that as the

a city ordinance is a misdemeanor for which the maximum fine is fifty dollars, the maximum imprisonment thirty days. The fourth key statute is section 15-197 concerning "suspension of sentence and probation." Under this section the judge, except in crimes punishable by death or life imprisonment,

may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation. All conditional releases by way of suspension of rendition of sentence, suspension of execution

early penalties for all crimes in English law were so severe—death, forfeiture, attainder—the practice of "benefit of clergy" grew up whereby at first members of religious orders could escape the common law and be turned over to the ecclesiastical courts and then those who could read could by invoking this doctrine escape severest punishment. Then in 1575 Parliament enacted a statute which attempted to regulate the benefit of clergy, so that one who invoked the doctrine was not set free or turned over to the "ordinary" but could be "if the judge . . . thinks fit" branded in the hand and kept in jail for "any time not exceeding a year." 4 BLACKSTONE, COMMENTARIES *369. A subsequent statute in 1706 allowed the granting of benefit of clergy to all those who asked for it, whether they could read or not; it also provided that "when anyone is convicted of any theft or larceny, and burned in the hand for the same, he shall also, at the discretion of the judge, be committed to the house of correction or public workhouse . . . for any time not less than six months, and not exceeding two years" *Id.* at *370. After cataloguing the various punishments available as of his time, including not only branding, hanging, exile, transportation (to America or other colonies), confiscation, disability from holding office, but also imprisonment, Blackstone was moved to remark:

Disgusting as this catalogue may seem, it will afford pleasure to an English reader . . . to compare it with that shocking apparatus of death and torment to be met with in the criminal codes of almost every other nation in Europe. It is moreover one of the glories of our English law that the species, though not always the quantity or degree, of punishment is ascertained for every offense, and that it is not left in the breast of any judge . . . to alter that judgment which the law has beforehand ordained For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates, and would live in society without knowing exactly the conditions and obligations which it lays them under.

Id. at *377. In point of historical fact it does not seem possible to say with any particularity what practice with respect to terms of imprisonment actually prevailed in England at the time of the American Revolution. Indeed such prisons as there were seemed more used for detention rather than punishment. Not only was the substantive criminal law "chaotic" but also "punishments were sometimes barbarous, quite unsystematic, and, by reason of their frequent mitigation (caused to a large extent by their undue severity) so uncertain in their operation that they were ineffective to accomplish the only end at which they aimed—deterrence." 11 HOLDSWORTH, A HISTORY OF ENGLISH LAW 581 (1938).

of sentence, or otherwise may be modified as is provided by the terms of this article.¹⁵

We find little in these prescriptions to give clear guidance to the sentencing judge, and it is fair to conclude, as Professor Kadish of Michigan has written recently: "There is, in this area, nothing resembling legal rules which require a given disposition on a showing of a given set of facts."¹⁶ "Yet," he quickly adds, "unless the judgments are to be regarded as totally whimsical, they must be made with more or less consistency in response to some conceptions or principles which transcend the subjective feelings generated by the circumstances of the particular case."¹⁷ One such conception is that the sanctions of the criminal law applied in a given case are designed to serve at least one, perhaps more, of the major purposes of the criminal law—viz., rehabilitation, prevention, deterrence, etc., mentioned above. Another is that the "punishment (sanction) should fit the crime"¹⁸—if by that we mean there should be some appropriateness in severity between sanction and the crime perpetrated. A more modern principle, following close on the heels of the preceding, is the ideal of fitting the sanction to the individual offender.¹⁹

The recently proposed Penal Law of New York is an example of how this kind of piecemeal approach to the problem of sentencing can be overhauled, and a systematic and explicit approach taken. Under this proposed code,²⁰ now pending before the legislature of

¹⁵ N.C. GEN. STAT. § 15-197 (Supp. 1963). While the authority to grant probation is broadly given if but simply stated, a good deal more deliberation has been built into the authority to terminate the probation. See N.C. GEN. STAT. §§ 15-200, -200.1 (Supp. 1963). There is also included in the statutes a long list of conditions which the judge may impose on the probationer, such as to avoid "injurious or vicious habits," to support one's dependents, to work faithfully, to violate no penal law of the state or the federal government. N.C. GEN. STAT. § 15-199 (Supp. 1963). Beyond these, however, the judge, if we may take the statute at face value, may impose "any other" condition without explicit limitation as to appropriateness to the features of the case before him.

¹⁶ Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 831 (1961).

¹⁷ *Ibid.* See also Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904 (1962).

¹⁸ Gilbert and Sullivan thought they were being facetious. *The Mikado*.

¹⁹ The primacy of this principle can scarcely be doubted in the face of so many recent trends. The separation of prisoners by age is one such development; probation itself attests to the same trend. The work release program is also illustrative.

²⁰ The PROPOSED N.Y. PENAL LAW was introduced in the 1964 New York legislature for purpose of study as Senate Int. 3918 and Assembly

New York,* "offenses" are first divided into "crimes" (consisting of felonies and misdemeanors) and "violations."²¹ Felonies, then, are divided into fixed categories of decreasing severity of sentence from life imprisonment (except for certain designated capital crimes) down to a maximum term of four years for the fifth class.²² And by a separate section of the code²³ misdemeanors are put under definite limitations. A "class A" misdemeanor may be punished by a definite sentence of no more than one year, a "class B" misdemeanor by a term of no more than three months, and an "unclassified misdemeanor" in accordance with the sentence specified "in the law or ordinance that defines the crime." Imprisonment for a "violation" may not exceed fifteen days.²⁴

In proposing this code to the New York legislature, the State Commission on Revision of the Penal Law and Criminal Code commented on the sentences of imprisonment sections in these terms:

The sentences of imprisonment . . . are designed to serve three basic objectives: (1) deterrence; (2) incapacitation, *i.e.*, removal of dangerous or harmful persons from the community; and (3) rehabilitation of such persons. The relative importance of each of these objectives depends upon the particular type of crime involved and—when sentencing—the particular offender.²⁵

Thus the drafters placed themselves well in mid-channel of the main stream of current penological thinking, recognizing fully, however, the substantial professional doubts about the efficacy of imprisonment as an instrument of prevention or deterrence.²⁶ But, as the drafters stated, "the controversies in this area do not involve the validity of these objectives: they involve the manner in

Int. 5376. It was drafted and recommended by the Temporary State Commission on Revision of the Penal Law and Criminal Code. Copies of the proposed law are printed and distributed by the Edward Thompson Co.

* After this was written, the proposed code (in all pertinent respects) was enacted to become effective September 1, 1967. N.Y. Times, July 23, 1965, p. 1, col. 7.

²¹ PROPOSED N.Y. PENAL LAW § 15.00 (1964).

²² PROPOSED N.Y. PENAL LAW § 30.00 (1964). It is expressly required that a sentence for a felony shall be an indeterminate sentence unless probation is awarded or the offender is a persistent felon. Compare N.C. GEN. STAT. § 148-42 (1964).

²³ PROPOSED N.Y. PENAL LAW § 30.15 (1964).

²⁴ In the Minnesota Criminal Code of 1963 felonies without specific limits are punishable by imprisonment of up to five years, "gross misdemeanors" by one year, misdemeanors by not more than ninety days. MINN. STAT. ANN. § 609.3 (1964).

²⁵ PROPOSED N.Y. PENAL LAW, Commission Staff Notes art. 30, at 270 (1964).

²⁶ *Id.* at 271.

which the principles are to be applied.”²⁷ How, in other words, are all three principles to be accommodated in particular cases? The drafters suggested that the tendency to favor either the more coercive or the more persuasive alternatives in sentencing (from longest prison terms to probation and conditional discharge) is attended by certain risks. Thus, “failure to impose a sentence of imprisonment involves a risk to the community, and the use of imprisonment involves the risk of destroying an individual—indeed, many times, a family.”²⁸ Nevertheless a balance can be struck, the commission felt, when the harmfulness of the particular criminal conduct is weighed against the fact that the offender will have to return to the community some time and the fact of the high cost of maintaining a prisoner.²⁹ Of course precision or a high degree of accuracy in predicting what persons are most suitable for incarceration, what persons least likely to repeat their offenses if allowed to resume their normal lives but under supervision cannot be guaranteed by any structure or system. “The best that can be done with our present knowledge and practical limitations is to construct a system that allows adequate scope for the accomplishment of [all] these objectives.”³⁰ In other words while the gravity of the offense is a starting point for determining what disposition is appropriate in particular cases, such a factor governs only the length and nature of the disposition and at the same time represents the legislative involvement in the whole process (expressing society’s concern); and the framing of the particularized sentence thereafter is apportioned among both judicial and executive agencies to exercise their authority in terms of factors lying within their special areas of competence.³¹

Allowing “adequate scope” for all objectives or goals of the criminal sanctioning process today of course means more than a rational set of rules about imprisonment; it also comprehends a high priority for probation. The New York approach would be—if the proposed code is adopted—to allow the sentencing judge to

²⁷ *Ibid.*

²⁸ *Id.* at 271-72.

²⁹ *Id.* at 272. It is reported that in New York the approximate cost of maintaining a prisoner in state prison is \$7.00 as against \$1.00 per day in supervising a person on probation. *Id.* at 272 n.10.

³⁰ *Id.* at 272.

³¹ *E.g.*, probation officer’s view of relevant background at time of sentencing; parole and prison officers’ view of prisoners’ behavior some time after sentencing.

"sentence a person to a period of probation upon conviction of any crime other than a class A felony" ³² Instead of stopping there, however, the new code would go on to require that the judge consider "the nature and circumstances of the crime and . . . the history, character and condition of the defendant" ³³ And then, having considered these factors, the judge may grant probation if he "is of the opinion that: (a) Institutional confinement of the defendant is not necessary for the protection of the public; (b) The defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision; and (c) Such disposition is not inconsistent with the ends of justice." ³⁴

If probation is awarded, the judge must specify the conditions under which it is to be served. And while some of the conditions listed in the applicable code section ³⁵ are traditional ones like avoid injurious habits, refrain from frequenting disreputable places, work faithfully at suitable employment or pursue a course of study, support family, make restitution, it is also provided that the judge may require the probationer to "undergo available medical or psychiatric treatment and remain in a specified institution, when required for that purpose" ³⁶ More significant, however, is the legislative admonition in the first paragraph of this section that the conditions of probation (or conditional discharge) be "reasonably necessary to insure that the defendant will lead a law abiding life or to assist him to do so." ³⁷ And instead of giving the judge unlimited discretion to impose "any other" condition than the ones specifically enumerated, as the current North Carolina statute does, ³⁸ this proposed New York code provision specifies "any other conditions *reasonably related to his rehabilitation*." ³⁹

Similar developments have occurred in other jurisdictions. Illinois, for example, in its recently enacted Code of Criminal Procedure has put into statutory form the criteria to be used in deciding to grant or award probation. ⁴⁰ The proposed Model Penal Code of

³² PROPOSED N.Y. PENAL LAW § 25.00(1) (1964).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ PROPOSED N.Y. PENAL LAW § 25.10 (1964).

³⁶ PROPOSED N.Y. PENAL LAW § 25.10(2)(d) (1964).

³⁷ PROPOSED N.Y. PENAL LAW § 25.10(1) (1964).

³⁸ N.C. GEN. STAT. § 15-199 (Supp. 1963).

³⁹ PROPOSED N.Y. PENAL LAW § 25.10(2)(i) (1964). (Emphasis added.)

⁴⁰ ILL. ANN STAT., ch. 38, § 117-1 (1964). Of interest here, too, is the added provision that the "judgment of guilty entered prior to the admission

the American Law Institute contains by far the most complete set of guides to rational choice between imprisonment and probation.⁴¹ At the outset the code is explicit in placing probation in a position of preference. If the judge is of the opinion, considering the nature and circumstances of the crime and the history, character and condition of the defendant, that the defendant's imprisonment is "necessary for protection of the public," then of course probation is not to be awarded. But this opinion must have its foundation in one or more of certain criteria.⁴² Next, the code specifies eleven grounds which, while not controlling the judge's discretion, "shall be accorded weight in favor of withholding sentence of imprisonment . . ."⁴³ One leading writer, commenting on the Model Code in this respect, has said the "Code provision would articulate and ratify what the best practice already has achieved . . .,"⁴⁴ for "no other mode of sentence serves as many of the [relevant] values"—condemnation of the defendant's wrong by society's representative, provision of an environment favorable to rehabilitation, avoidance of negative influence of prison and the accompanying loss of usefulness, of the defendant to probation shall be a final judgment subject to review . . ." This represents a substantial change in the older Illinois law, under which a probationer who accepted probation was deemed to have waived his right to appeal from the finding of guilty. *People v. Stover*, 317 Ill. 191, 148 N.E. 67 (1925).

⁴¹ MODEL PENAL CODE § 7.01 (Proposed Final Draft No. 1, 1961).

⁴² These are three in number and resemble the New York ones discussed above, viz.: (1) whether there is an undue risk that during the period of a suspended sentence or probation the defendant will commit another crime, or (2) whether the defendant is in need of correctional treatment which can be most effectively provided by an institution, or (3) whether a lesser sentence will depreciate the seriousness of the defendant's crime. MODEL PENAL CODE § 7.01(1) (Proposed Final Draft No. 1, 1961).

⁴³ These are specifically: (1) the defendant's criminal conduct neither caused nor threatened serious harm; (2) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm; (3) the defendant acted under strong provocation; (4) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense; (5) the victim of the defendant's criminal conduct induced or facilitated its commission; (6) the defendant has compensated or will compensate the victim; (7) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime; (8) the defendant's criminal conduct was the result of circumstances unlikely to recur; (9) the character and attitudes of the defendant indicate that he is unlikely to commit another crime; (10) the defendant is particularly likely to respond affirmatively to probationary treatment; (11) the imprisonment of the defendant would entail excessive hardship to himself or his dependents. MODEL PENAL CODE § 7.01(2) (Proposed Final Draft No. 1, 1961).

⁴⁴ Wechsler, *Sentencing, Correction and the Model Penal Code*, 109 U. PA. L. REV. 465, 472 (1961).

and a reduction of the public burden which institutionalization imposes.⁴⁵

The most obvious point raised by the foregoing review of new statutory material, some enacted and some proposed, is that there is nothing really novel in it—except its explicitness. No one could quarrel with what is essentially a demand for fundamental fairness in the sentencing process. Nor should there be any objection to trying to achieve a higher degree of rationality between aims and procedures by which the aims are pursued. This is all that more recent statutory reform is designed to do. While it is no indictment of judges per se, it does involve recognition that all human decision-makers are more or less encumbered (or endowed) with subjective predispositions.⁴⁶ And the less room we give predispositions not supportive of over-all community aims, the more we achieve the ideal of fair, objective, and rationally conceived sanctioning in a democratic community.⁴⁷ As one administrator has recently put it:

[E]xperience has taught us a paradoxical but sad lesson, that reliance on the humanitarian motivation or sense of conscience of the judge is not enough to insure the most appropriate disposition of the offender. For that reason we must include within the framework of the penal codes such devices and techniques as will contribute most effectively toward the individualizing the sentencing process.⁴⁸

⁴⁵ *Id.* at 471. There have of course been critical voices raised about the changes that such a code would bring about. Some judges, for example, have questioned whether the listing of criteria might not encourage unnecessary litigation, might make for a mechanical application, might exclude some cases otherwise appropriate for probation, etc. For a collection of such comments, see Turnbladh, *A Critique of the Model Penal Code Sentencing Proposals*, 23 LAW & CONTEMP. PROB. 544 (1958). In a recent conference of North Carolina superior court judges opinion was divided on whether probation should occupy the preferred position in sentencing alternatives. Many of these judges had less doubts about such a proposition, however, when application excluded crimes of violence. Other limiting factors were felt to be present, too, which made the judges cautious about an unqualified commitment—e.g., the fact that oftentimes background data were not complete as of time of sentencing or if it were, then something about the defendant's home or neighborhood environment made the judge reluctant to send him back into it. Judicial Conference of North Carolina Superior Court Judges, in Chapel Hill, N. C., at the Institute of Government, June, 1964. These criticisms are not lightly to be ignored, but they go more to allocation of resources than to the merits of procedural reform.

⁴⁶ See note 5 *supra*.

⁴⁷ A community in which power is widely shared and there is a widespread commitment to human dignity as an overriding goal.

⁴⁸ Bennett, *The Sentence—Its Relation to Crime and Rehabilitation*, 1960 U. ILL. L.F. 500, 503.

IV. FAIRNESS AND RATIONALITY IN THE CASES NOTED— WERE THEY ACHIEVED?

The first question which arises in connection with the road or street sit-in cases from North Carolina relates to the manner in which the sentencing judge sought to have his conscience informed as to relevant information before sentencing. The case of Quinton Baker, a leader in the local civil rights protest movement, is illustrative. When the defendant was called forward, the judge asked the solicitor if Baker was "a leader or a follower." The solicitor responded that "if this were a TV western, they would call him ramrod." The judge reassured himself by addressing the defense attorney: "I take it he is informing me he is one of the leaders." The defense attorney subsequently addressed the court, asking that consideration be given to the defendant's need to finish college and to the fact that the street sit-ins were motivated by a desire to call attention of the public to the plight of the Negro. The judge then said that his motive could not be for any other purpose than to "terrorize the community."⁴⁹ This phase of the hearing was concluded by the judge's question to the defendant as to whether he had anything to say or evidence to present, which was answered in the negative. Defendant was then sentenced to serve six months in prison and pay a fine of 150 dollars plus court costs before being discharged from prison. This was on one charge of resisting arrest; no judgment for the street obstruction charge was entered.

Evidently the judge had other means of informing himself about the cases he was trying and sentencing that month, for three days earlier the judge had appeared before a civic group to make a speech and in the course of it he reported that the "demonstrators lying down in Chapel Hill streets some weeks ago . . . were sent there to help enlighten the sinful south and that they were paid \$6 per day from northern funds."⁵⁰ It must be assumed that the judge believed what he said; but there is no explicit encounter shown in the record about the judge's attempt to have this information verified—*i.e.*, that the defendant was the paid hireling of someone else. Nor does it appear in what way the judge thought this element, if it were

⁴⁹ Trial Record, *State v. Baker*, Criminal No. 4132, Super. Ct. N.C., April 23, 1964 (not generally available but reported in EHLE, *THE FREE MEN* 273 (1965)).

⁵⁰ The quotation is from a newspaper account of the speech. Greensboro Daily News, April 21, 1964, p. 4A, col. 7.

present, should influence his decision about a proper sentence. Is it more reprehensible, more dangerous to block a street for money or from personally held convictions related to social protest? And, furthermore, is it a factor calling for incarceration or a sterner sentence that one is a nonresident of the state or county in which the demonstration was staged? If so, why, in what way is it related to the ends of the criminal sanctioning process reviewed above.⁶¹ If there are no such legitimate relations, then such a factor if made the basis for differences in disposition raises the fundamental problem of the equal protection of the law guaranteed by the fourteenth amendment.

The second major consideration in terms of a rational sentencing process which is presented by the instant cases has to do with the assumption being made by the sentencing judge about how best to serve the ends of criminal justice. In particular cases it may be, as we have indicated above, that both deterrence and rehabilitation can be served by a sentence of limited, qualified probation. Or, it may be that imprisonment is indicated. What was it in the cases of the civil rights workers which called for imprisonment rather than probation only? What was there in the Mississippi bombing cases that called for probation rather than incarceration? Was there, in the words of the Model Penal Code, a need for correctional treatment; would a lesser sentence "depreciate the seriousness of the defendant's crime"?

In the street-blocking cases here noted it would seem that there are at least six, perhaps seven, factors present which under the Model Penal Code⁶² would weigh in favor of withholding sentence of imprisonment, viz.: the defendants' criminal conduct neither caused nor threatened serious harm; the defendants did not contemplate that their conduct would cause or threaten serious harm; there were no victims to be compensated; the defendants had no history of prior delinquency or criminal activity (save other related instances of sitting-in); the character and attitudes of the defendants indicate that they were unlikely to commit another crime; the defendants are particularly likely to respond to probationary treatment; and imprisonment would entail excessive hardship (loss of college status, jobs, etc.).

⁶¹ Defendant Baker was in point of fact a native North Carolinian and a student at North Carolina College in Durham.

⁶² See note 43 *supra* and accompanying text.

On the other hand in the Mississippi bombing cases it hardly seems plausible to argue that the defendants were not contemplating serious harm to others; and indeed their conduct did cause such harm. There was need for compensation, and it does not appear that any offer was made to make amends on this account. And while it is only possible to speculate about "character and attitudes" of those defendants and the likelihood of a recurrence of this kind of conduct, it is fair to say that a predisposition for violence is shown in three distinct home bombings. And where such predisposition is shown, there is a strong argument in favor of a period of de-stigmatizing incarceration.⁵³

In the street blocking cases there was no predisposition toward violence; on the contrary the participants had espoused "non-violence" throughout. In other words the temporary blocking of a public thoroughfare with the expectation of being immediately arrested and even fined for such civil disobedience, while unlawful (either under the state statute or a local ordinance), is not a direct threat to the minimum order and peace of a community in and of itself. Nor would it seem that "going limp" at the point of arrest added to the threat in these circumstances. These were not prank-playing college boys attempting to harrass travelers, nor were they would-be robbers trying to stop a bank truck. The purpose of their demonstration or protest was served merely by the act of staying where they should not have and being carried off to face the disapproval of their society in a court of law. This was accomplished. A reprimand by the judge, perhaps accompanied by a fine, followed by reasonably conditioned suspensions or probation would have been an adequate disposition. The law, minimal as it was,⁵⁴ would have

⁵³ A number of North Carolina superior court judges have indicated their preferences in this regard. See note 45 *supra*.

⁵⁴ It is beyond the scope of this paper to trace the applicable statutory or common law basis for the charges. It is interesting to note, however, the fact that in *State v. Cusick*, Criminal No. 4188, Super. Ct. N.C., April 23, 1964, the *warrant* charges violation of a town ordinance whereas the indictment charges more generally with obstructing a public street but without mentioning any statute. In *State v. Dunne*, Criminal No. 3882, Super. Ct. N.C., April 24, 1964, the *indictment* is specifically under the town ordinance. Perhaps this explains in part why the judge imposed an *active* sentence on Dunne only for the resisting arrest offense. N.C. GEN. STAT. § 14-4 (1953) makes violations of a town ordinance punishable by a fine not exceeding \$50.00 or imprisonment not exceeding thirty days. Even so, in *Dunne*, the judge did award a two year suspended sentence, commitment to issue at any time within five years. Appeals in both cases are pending in the North Carolina Supreme Court.

been properly vindicated but not made into a vengeful mechanism of suppression.⁵⁵

It is interesting to speculate what official response would be if arrests had been made of some college cheerleaders who, thinking only of the next day's big game, had with youthful enthusiasm led their shouting comrades into Chapel Hill streets on a Friday night (as they have done in times past)⁵⁶ and actually stopped traffic for two hours while the crowd milled about. If arrests were made, would there be charges? If so, would there be convictions? If so, would there be active prison sentences awarded? It is difficult to imagine an affirmative answer. Differences in the cases there surely are, but they do not inhere in refinements of what criminal lawyers call *mens rea* (indeed if any, more than "willfulness," is necessary as an element of the misdemeanor of street blocking).⁵⁷ One important difference is the degree to which today's youth are committed to serious personal involvement in social problems. As far as the purposes of the law violated are concerned, society is no more harmed in one than the other situation.

Finally it is significant that the sentencing judges in these two different sets of cases decided to use the suspended sentence coupled with probation in just the way they did. In the Mississippi cases the judge imposed a long period of court supervision (fifteen years) and deprived the defendants of the dubious privilege of possessing firearms, live ammunition, and dynamite.⁵⁸ Another, and most novel, condition was imposed for the same suspension period—namely that if violence broke out in the town again, *i.e.*, if another such bombing occurred, these defendants would be considered responsible and the suspension would be revoked. This may be an

⁵⁵ Compare the charges of disorderly conduct made against demonstrators who recently sat down for forty minutes in Pennsylvania Avenue, Washington, D. C. N.Y. Times, April 21, 1965, p. 3, col. 2. Trial of these charges, for which the maximum punishment is \$250 fine and/or ninety days in jail, is now pending. The applicable code provision is D.C. CODE § 22-1107 (1961). It is the opinion of the prosecutor in these cases, as of this writing, that if convicted the defendants will receive light fines only. Telephone Interview With Mr. R. M. Werdig, Jr., Assistant Corporation Counsel for the District of Columbia, April 28, 1965. In accord is the sentence that had been imposed by Guilford County Superior Court in *State v. Fox*, 262 N.C. 193, 136 S.E.2d 761 (1964).

⁵⁶ See *Daily Tar Heel*, March 24, 1957, p. 1 (photographs and captions); *id.*, March 26, 1957, p. 1, col. 1; *id.*, Nov. 25, 1953, p. 1, col. 5.

⁵⁷ See, *e.g.*, N.C. GEN. STAT. § 136-90 (1964) (obstructing highways and roads), *State v. Malpass*, 189 N.C. 349, 127 S.E. 248 (1925).

⁵⁸ N.Y. Times, Oct. 24, 1964, p. 1, col. 4.

effective way to prevent or deter *these* defendants from repeating the bombing crimes, but it is difficult to see how others would be sufficiently deterred, save the closest of friends or relatives of the defendants.

In one of the North Carolina cases a period of suspension for five years (the maximum allowed under our statute)⁵⁹ was imposed with conditions such as that the defendant was not to participate in any demonstration.⁶⁰ This in *addition* to the active sentence of imprisonment on the street-blocking charge. It is difficult to see how such a condition is "reasonably related to his rehabilitation"—to borrow the words of the proposed New York code.⁶¹ It does, however, give a clue to the predisposition of the sentencing judge. He was apparently not so much concerned with the substantive offense of street-blocking and the real social harm that flows from it as he was in the purpose of the street-blocking in this instance—*i.e.*, to demonstrate the existing social inequality of the Negro.⁶² In other words if the real offense, in the view of the sentencing judge, was protest, demonstration, and "preaching . . . to the sinful south,"⁶³ then a proper remedy was discontinuance of further such activity. But a parallel between dynamite, firearms, and ammunition on the one hand and words, innocent movement (peaceful picketing), and singing and/or hand-clapping on the other is extremely difficult to draw. Difficult that is if, but only if, one is committed to the modality of persuasion as a proper strategy for change and opposed to intense coercion either as a modality of change or as a suppressive force for the preservation of the *status quo*. Of course it is not being suggested that street blocking is more persuasive than coercive; what is being suggested, and there is need to be explicit, is that the

⁵⁹ N.C. GEN. STAT. § 15-200 (Supp. 1963).

⁶⁰ State v. Cusick, Criminal No. 4189, Super. Ct. N.C., April 23, 1964 (resisting arrest), in which the two year sentence was suspended on condition (among others including the routine ones from the statute) that:

He shall not engage in or be a part of, or physically associate with, any demonstration, or physically accompany any person, or persons, engaged in any demonstration for any cause on any public street, highway or sidewalk or any other public place in North Carolina or in any private establishment.

Signed April 24, 1964, by Judge Raymond B. Mallard.

⁶¹ PROPOSED N.Y. PENAL LAW § 25.10(2)(i).

⁶² In Chapel Hill at that time the immediate stated aim of the civil rights group most vocal—CORE—was the local passage of a public accommodations ordinance. This aim was achieved in a few months after that on a national level.

⁶³ See note 50 *supra*.

probationer could reasonably be enjoined never to block a public thoroughfare again for any reason, but may he, should he, at the same time be deprived of his first amendment right of protest, peaceful assembly, picketing?⁶⁴

V. CONCLUSION

The implications of these two sets of cases, the disposition made in them, the procedures employed, the assumptions made—implicitly and explicitly—are for lawyers and others who are committed to the ideals of a democratic community frightening and discouraging. In broadest formulation the role of law in such a community is at least the maintenance of minimum order—but at minimum sacrifice of other values, values inhering in the dignity of man and the freedom allowed the individual under a system structured the way ours is. In other words we expect that the processes of law will work “economically” and not be wasteful of human values. The criminal law involves a constant balancing of these two considerations. When the balance is greatly off-set, the concern should be that it is not repeated. The balance was greatly upset, I think, in the Mississippi cases when violence was lightly dealt with; it was upset again in the North Carolina cases when social protest went one step too far and transgressed a minor law but never became violent. The response to this infraction was an irrational, heavy-handed response which is out of keeping with the law’s tradition of safeguarding individual values while preserving the peace of the community. It was the response of fear and unreason, of prejudice, and the mores of another age.

The implications are discouraging because, after all, the test of any society’s system of institutions comes not during the halcyon days of quiescence but rather in the days of social change that produces stresses. Anglo-American lawyers have long prided themselves on the resiliency of the legal institutions which are our common heritage. But *resiliency* connotes temperance as well as strength. There is no doubt but that our institutions can withstand rebellion and insurrection. But in treating peaceful protest as the

⁶⁴ Similarly the absence of *any* conditions in cases where commitment may be ordered at any time within five years may effectively prevent the defendant from exercising such rights for fear of having the sentence executed. Such a “sentence” suggests the complete abandonment of any rationality between the sanction and the crime. See note 3 *supra* and accompanying text.

first spark there is revealed an intolerance to dissent which is self-defeating.

In choosing to forego active restraint by the law in cases where actual violence has occurred, the decision-maker is impliedly saying (in the context of stressful, changing times) that he equates the bombings of private homes with the political-social agitation of the civil rights workers.⁶⁵ In other words the one was begotten by the other; hence "we'll impose a return to the *status quo ante*." In fairness it should also be said that the judge was enough shaken by those crimes to declare that more of the same would not be tolerated; but the intimidation of those working lawfully for social change had been accomplished by just that much.

It seems equally clear that in the street sit-in cases the sentencing judge is impliedly telling the defendants, and of course anyone else so motivated, that their protests were unwelcome and distasteful (and not just that in this instance they are illegal)—so distasteful in fact that there are no mitigating circumstances (peacefulness, first offense, or what have you) which call for any sanction less than substantial periods of confinement. At least this was so for the leaders of the sitters-in, and it is to the judge's credit that he did not send a score or more others off to prison as well.

It is easy enough to criticize. Constructive recommendations are something else again. But it is not the purpose of this brief comment to suggest appropriate restorative strategies in the individual cases or to meet the challenge to our institutions revealed in the predispositions of these sentencing judges. In a free society there is never any *guarantee* against the public effect of private subjectivities. There are ways, however, of minimizing this effect, of regulating, or controlling it. The whole history of our government under law attests to this—from Magna Carta to the Madisonian model of checks and balances under a divided sovereign (legislature, executive, and judiciary) to the reporting of appellate case decisions. Inasmuch as these cases do bear upon the structuring and institutionalizing of the criminal sanctioning process, to that extent is it appropriate here to make some long-range recommendations. Accordingly three proposals are suggested. They all relate in varying degrees to the problems discussed herein and at the same time arise

⁶⁵ The Mississippi judge gave as a reason for his unorthodox sentence that he considered the defendants "unduly provoked" by the civil rights workers. N.Y. Times, Oct. 24, 1964, p. 1, col. 4.

out of practices in part mentioned earlier in the paper. First, it seems desirable to call on the General Assembly to review existing prescriptions relating to sentencing with a view to formulating more explicit and fuller guidelines to sentencing judges, perhaps in some such way as suggested by the precedents of Illinois, the New York Commission and the Model Penal Code. Secondly, and this is addressed not alone to the legislature (although ultimately that may be the necessary forum for decision), it seems desirable to suggest that judges assign reasons to their sentences and make them part of the public record. The judicial conference may, furthermore, deem it desirable to have judgments of trial judges published as some jurisdictions do.⁶⁶ Thirdly, the scope of appellate review could be expanded to include a review of the sentence imposed in criminal cases⁶⁷ (delimiting the field, perhaps, at the start by excluding convictions in which there was no extended supervision either by the court, as in probation for longer than a year, or by imprisonment for longer than ninety days). Although the majority of American jurisdictions do not repose such powers in their highest courts, English and Scottish courts have long exercised the power to revise a sentence (both "upwards" and "downwards"). And while this procedure is generally thought of in connection with possible remedies for disparities in sentences,⁶⁸ it seems equally appropriate to and a corollary for other efforts designed to bring about a full, fair, and rational consideration of the complex and vital question of what disposition to make in cases where guilt has been determined.*

⁶⁶ Equally desirable and useful would be a regular statewide survey of sentencing practices such is now for the second year available with regard to the federal courts. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS* (1964).

⁶⁷ This is currently being tried in Connecticut and Massachusetts. CONN. GEN. STAT. §§ 51-194 to -197 (Supp. 1959); MASS. ANN. LAWS ch. 278, §§ 28A-28D (1956).

⁶⁸ See Comment, 69 YALE L.J. 1453 (1960).

* After this was written, the celebrated Berkeley sit-in cases at the University of California were tried and sentences awarded. In no case was the period of confinement longer than four months; and this was resorted to only because the defendants would not consent to probation condition of no sit-ins or unlawful demonstrations. N.Y. Times, Aug. 6, 1965, p. 28, col. 1.