Criminal Law -- The Rehabilitative Ideal Activated by the Sentencing Process

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upheld as a reasonable exercise of official discretion, though perhaps infringing on the student's constitutional right of privacy. In balancing the "gravity of the 'evil'" with the restraint on the right of privacy and possible first amendment intrusions, courts will uphold, as a reasonable exercise of official discretion, school regulations intended to avert potential sources of harm. The source of harm need not in fact be realized in the particular case for the regulation to be upheld. The court in Ferrell may have adopted this position to discourage students from testing these ad hoc rules at school, and subsequently in court, and to insure an efficient education for a majority of students, though curtailing a right of others. Adherence to such a policy will build fences amounting to a corral for the "mustangs and mavericks" wishing to attend public school.

JOHN E. BUGG

Criminal Law—The Rehabilitative Ideal Activated by the Sentencing Process

INTRODUCTION

All too often the concept of rehabilitation within the criminal process is embraced by the academic community, but spurned by the black robes of the judiciary. Archaic myths and prejudices, interwoven into the purposes and goals of the criminal law, have resulted in an "antiquated criminal code, which is riveted together by outworn tradition like the iron cuff about the ankle of a chain gang prisoner," and beyond which the judiciary, historically, has failed to see.

In the case of People v. Jones, an Illinois Appellate Court clearly recognized the rehabilitative ideal within the criminal system and applied it to a twenty year old high school boy. The defendant had been convicted of involuntary manslaughter and sentenced to the state penitentiary for not less than six nor more than ten years. The trial court found that the

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392 F.2d at 702.
3 ILL. ANN. STAT. ch. 38, §9-3(c)(1) (Smith-Hurd 1964) reads as follows: "A person convicted of involuntary manslaughter shall be imprisoned in the penitentiary from one to ten years."
accidental death of the defendant's friend had occurred while these two and others were engaged in boyish horseplay involving a revolver that discharged, critically wounding the deceased. Defendant cooperated fully with the arresting officers. An aggravation and mitigation hearing by the trial court disclosed that the defendant was a lifelong resident of Chicago, single, a high school student, of the Baptist faith, and had no previous criminal convictions, although he had been arrested on several misdemeanor charges. The defendant appealed, contending that the sentence, although within the statutory limits, was excessive. In considering all the relevant factors, the appellate court said,

This is not the picture of a person beyond the reach of the rehabilitative processes. The judge's explanation that: "We have had too many of these accidents" evidences a failure to give proper weight to the individual circumstances of the defendant. We feel that setting the minimum sentence at six years and the maximum at ten years is not in the best interest of either the community or the defendant.

The judgment was accordingly modified to a minimum sentence of three years and affirmed as modified.

In any other jurisdiction the Jones case might well have been a landmark decision. In Illinois it is simply another stage in the long trend of cases that clearly pay more than lip service to the goal of rehabilitation of the individual offender.

THE REHABILITATIVE IDEAL

This nation's penal system of justice and correction has developed more from accretion than from any dynamic process or innovation. New ideas were tacked onto the pre-existing structure with no effort to relate the old to the new or to eliminate incompatible elements. Thus, the evolving system became a paradoxical and inconsistent phenomenon working "in ways that are unintended toward goals that are neither simple nor

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4 ILL. ANN. STAT. ch. 38, § 1-7(g) (Smith-Hurd Supp. 1967) reads as follows: For the purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender and may consider such evidence in aggravation or mitigation of the offense.

5 — Ill. App. 2d at —, 235 N.E.2d at 381.

precise.” Though many of the non-utilitarian concepts, which were once historically significant, have given way to modern methods and new ideas, their presence, even within the shadows, tends to distort and confuse the overall goals of the criminal process. Concepts of vindication, retribution, and penitence have been superseded by concepts of neutralization, reformation, and re-socialization; but the lingering presence of the former has significantly allied with concepts of deterrence and prevention to weaken the latter. “It is far simpler to receive without challenge the traditional philosophies and to employ well-established techniques. When called upon, one may speak piously of the protection of society or individualized rehabilitation, but these are bones without flesh.” Inevitably, a balance is struck among the competing social interests on scales which our criminal system calls justice.

As the criminal process has evolved, two major social goals have become predominant: the protection of society and the preservation of human dignity via the rehabilitative ideal. Since the innovation of probation over a century ago, modern correctional attitudes and ideas have slowly generated change in the philosophy of penology, introducing such concepts as the indeterminate sentence, parole, half-way houses, work-release, and furloughs. In the years after the first world war the social sciences began applying behavioral disciplines to areas of correction. These behavioral science contributions were expressed in a new concept. “Inasmuch as there is no single cause of crime, there can be no single cure of criminal behavior. Therefore, correctional treatment must be individualized and based on the diagnosis of the individualized problems and needs.” Thus, the concept of rehabilitation focuses on the individual as a quality control mechanism within a dynamic society to screen out defective elements, rechannel them to be properly remolded, and provide for their re-entry into society.

Even after spanning the gaps in the concepts of criminal law to rec-

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9 P. TAPPAN, CONTEMPORARY CORRECTION 3 (1951).
12 Id. at 5.
13 Id. at 4. See also Penegar, supra note 10, at 204.
ognize rehabilitation as a dominant goal, however, there are problems inherent within the concept itself. All too often "individualization in practice reflects more clearly the differences in the judges than in the convicted offenders." Another problem is that emphasis on individualization focuses attention on the individual and away from the offense. There is always the danger to the individual "that he will be punished for what he is believed to be, rather than for what he has done. The danger to society is that the commands of the criminal law will be weaker."

The purposes and goals of the criminal process can be considered at three levels: the legislative level of creation, the judicial level of imposition, and the administrative level of execution. While the legislature must incorporate within the sentencing structure the values held by society and the goals of the system, it is the judiciary which functions in the all-important role of individualizing the abstractions of the law to the offender for societal good. It is the judiciary that bears the burden of activation of the rehabilitative ideal to the individual offender. The trend of recent decisions, however, indicates that the judiciary has largely failed to fulfill its obligation in the implementation of the major goals of the criminal process.

GUIDELINES

In light of the many variables involved, perhaps the greatest need of the trial court is for sentencing guidelines. Sentencing measures and alternatives run the gauntlet from the suspended sentence, probation, and fines, to long term imprisonment, sterilization or castration, and death. Within the criminal process there exist numerous mitigative devices,

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14 P. Tappan, supra note 9, at 13.
15 Hart, supra note 8, at 407-08.
16 This note will discuss only the judicial level of imposition.
17 Penegar, supra note 10, at 224.
18 See generally P. Tappan, supra note 7, at 422-26.
19 Id. at 375. These devices are recognized:
   (a) Police and prosecutor may discharge the accused after preliminary hearing.
   (b) The examining magistrate may discharge the accused after preliminary hearing.
   (c) The Grand Jury may refuse to indict.
   (d) The prosecutor may decide to enter a nolle prosequi.
   (e) The prosecutor or the court may agree to accept a plea to a lesser offense than that originally charged.
   (f) The trial jury may bring in a verdict of not guilty or convict for a lesser crime.
   (g) Discretion may be exercised in sentencing to apply a lenient sentence, whether it is probation or brief imprisonment.
the indeterminate sentence being the most crucial. With the two major
goals of the criminal process clearly in mind, a trial court judge must
impose the harsh realities of a sentence, yet counterbalance the necessity
for the sentence to express adequately the community's view of the gravity
of the offense against the necessity of a sentence that will be favorable in
rehabilitating the defendant. Other than from the statutory provisions,
few trial courts have available any concrete guidance in the development
of criteria that, when applied to each offender, will best promote the goals
of the criminal law. Only in those states which allow appellate review of
legal but excessive sentences is there a higher authority to provide guide-
lines to the trial judge in this crucial role of individualizing the criminal
process.

In the majority of jurisdictions, a sentence within the statutory limits
for a proven offense is normally within the discretion of the trial court
and not subject to appellate review. To allow appellate review would be
to allow a higher court to pass judgment on a factual decision of the trial
court. It has been said that "an appellate judge could never get the true
picture of a defendant and his sentence proceeding from the mere reading

(h) Sentence may be reduced in some jurisdictions through an appeal or
motion in mitigation of sentence.

(i) The convicted and incarcerated offender may be released on parole at
some time short of the expiration of his maximum sentence.

(j) A pardon may be secured from the executive.

There exists at least one minimum mandate that guides every sentencing judge.
The eighth amendment of the U.S. CONSTITUTION requires that punishment can
be neither cruel nor unusual. Several recent cases have more precisely defined the
meaning of these terms. In Robinson v. California, 370 U.S. 660 (1962), the court
decided that classification as a criminal and punishment by prison sentence of a
person suffering from an illness—narcotic addiction—was cruel and unusual punish-
ment. In Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968), a state court
of appeals held that confinement of a juvenile, convicted of rape, to prison for life
without privilege of parole constituted cruel and unusual punishment. See also
Beard v. Lee, 396 F.2d 749 (5th Cir. 1968); Black v. United States, 269 F.2d 38
(9th Cir. 1959), cert. denied, 361 U.S. 938 (1960); Edwards v. United States, 206
F.2d 855 (10th Cir. 1953); Hemans v. United States, 163 F.2d 228 (6th Cir. 1947).

See, e.g., State v. Davis, 243 N.C. 754, 92 S.E.2d 177 (1956). See
Hall, Reduction of Criminal Sentence on Appeal, 37 COLUM. L. REV. 521,
522 (1937); Mueller, Penology on Appeal: Appellate Review of Legal But Exces-
sive Sentences, 15 VAND. L. REV. 671, 677 (1962); Note, Appellate Review of
Primary Sentencing Decisions: A Connecticut Case Study, 69 YALE L.J. 1453,
1452 (1960); Note, Statutory Structure For Sentencing Felons to Prison, 60
COLUM. L. REV. 1134, 1162 (1960).

of a cold record, any more than he could learn how to milk a cow from reading a book." Even so, fifteen American jurisdictions have either specific statutes authorizing modification of legal but excessive sentences, or precedents which have established such a procedure. An examination of appellate decisions from each of these jurisdictions, however, has failed to reveal any clear guidelines for the judge involved in the sentencing process. Despite the importance and complexity of their decisions, the appellate courts have set few standards for the trial court to measure the appropriateness of its dispositive action. Appellate courts usually fail either to articulate reasons for sentence reductions or to formalize criteria amenable to rational analysis.

State Appellate Decisions

Many appellate courts have found it impossible to set guidelines and standards, or have simply refused to do so. In Commonwealth v. Cater, the Pennsylvania Supreme Court stated: "This court has said time and again that there are no fixed and immutable standards to be established to guide trial courts in exercising their discretion." In State v. Douglas, the Arizona Supreme Court said that the trial judge "is to pass a value judgment upon a human being for the society which he represents; he is to sit as the conscience of the community. In the performance of this duty, the trial judge is—to a certain extent—deprived of any set standards or legal guideposts." Thus, the machinery of appellate review of sentences has not been employed as a possible means of establishing any general sentencing policy. Appellate courts all too often reverse excessive legal sentences using, as sole criteria, phrases such as "after a careful consideration of the facts," or "when justice and right require," or "when the furtherance of justice requires."

In a few jurisdictions the trial court receives some minimum basic guidance. A close scrutiny of several appellate decisions reveals certain

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25 Id. at 88.
26 Mueller, supra note 23, at 677, 688; Note, Statutory Structures For Sentencing Felons to Prison, 60 COLUM. L. REV. 1134, 1162-64 (1960). These jurisdictions include: Arizona, Arkansas, Connecticut, Hawaii, Idaho, Iowa, Massachusetts, Nebraska, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, and in the federal system, the Seventh Circuit Court of Appeals.
28 Id. at 179, 152 A.2d at 263.
30 Id. at 188, 349 P.2d at 625.
33 State v. Ramirez, 34 Idaho 623, 634, 203 Pac. 279, 283 (1921).

purposes of the sentencing process and criteria for individualization.\textsuperscript{84} In \textit{Davis v. State},\textsuperscript{85} the Florida Supreme Court said that "[r]esponsibility should be the basis of punishment, and individualization the criterion of its application; such is the formula of modern penal law."\textsuperscript{86} In \textit{State ex rel. Shock v. Barnett},\textsuperscript{87} the Washington Supreme Court said that "[i]t is contemplated that, in fixing of punishment, the trial court must maintain a due regard for the dignity of the law, the protection of society, the reformation of the offender, and other considerations."\textsuperscript{88} In \textit{State v. Wilson},\textsuperscript{89} the Idaho Supreme Court said,

Whether the appellant was a good risk or a poor risk for probation is not in itself decisive of the issues and possible rehabilitation is not the controlling consideration. In cases of crimes committed against society, the trial court must consider the protection of society, the deterrence of the individual and the public generally, the possibility of rehabilitation and punishment for wrongdoings.\textsuperscript{90}


\textsuperscript{85}123 So. 2d 703 (Fla. 1960). The defendant pleaded guilty to rape of an eleven year old girl and received the maximum penalty, death. An appeal for mercy was denied by the sentencing judge in light of the circumstances and brutal nature of the crime. The decision was affirmed on appeal.

\textsuperscript{86}Id. at 711.

\textsuperscript{87}42 Wash. 2d 929, 259 P.2d 404 (1953). Defendant was convicted of a felony —taking indecent liberties with a minor female—and sentenced to the penitentiary. The court on appeal denied a request for probation and affirmed the judgment.

\textsuperscript{88}Id. at 933, 259 P.2d at 406.

\textsuperscript{89}78 Idaho 385, 304 P.2d 644 (1956). Defendant, an adult, was convicted of committing a "crime against nature" with a boy, fourteen years old. A pre-sentence report indicated that the defendant was an habitual, persistent homosexual offender. The trial court refused to hear testimony as to state facilities for treating the defendant, prescribing an active sentence. The decision was affirmed in light of the nature of the crime and character of the offender.

\textsuperscript{90}Id. at 388, 304 P.2d at 646,
All of these decisions clearly evidence a rehabilitative goal recognized by the appellate courts, but one which truly is "bones without flesh" for lack of any appropriate guiding criteria for individualization. A decision handed down by the Connecticut Sentence Review Division is one of the first to attempt the heretofore indefinable:

The sentencing problem is not one that yields to exact analysis, although a proper sentence is desirably one that fits both the crime and the individual. Such a sentence must of necessity take in many variables, including the gravity of the crime, both as to the particular circumstances of the offense charged, and the place of that crime in our social order, the prior record of the defendant, the recidivistic factor and the deterrent effect sought with reference to the commission of that crime by others.

Over a period of four years prior to the decision in the Jones case, the Illinois Appellate Courts have handed down at least seven decisions, which in view of the case analysis of all other jurisdictions, puts the state years ahead in both recognition and application of the rehabilitative goals of the criminal process. Appellate opinions have actually become working tools for trial court judges. In People v. Evrard, the appellate court said,

The court must strive to render a judgment which will adequately punish the defendant for his misconduct, safeguard the public from further offenses, and reform and rehabilitate the offender into a useful member of society. In order to select an appropriate sentence, it is

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41 P. TAPPAN, supra note 9, at 3.
42 State v. Kelii, 26 Conn. Supp. 215, 216 A.2d 849 (Sen. Rev. Div. 1965). The defendant was convicted of manslaughter and sentenced to not less than seven nor more than fifteen years in prison. In a fit of rage he killed a man with whom his wife was having an affair and who was mistreating the defendant's children under the guise of discipline. The defendant's background included honorable service and discharge from the coast guard and the national guard; an excellent employment record; no previous criminal record; no evidence of any recidivistic tendency; a reliable, cooperative, and even-tempered character; and evidence of strong love toward his family, regardless of the constant infidelity of his wife. The appellate court reduced the minimum sentence to five years.
43 Id. at 218, 216 A.2d at 850.
44 See note 6 supra.
45 55 Ill. App. 2d 270, 204 N.E.2d 777 (1965). The defendant was convicted of taking indecent liberties with a girl of 15 and sentenced to from one to three years in prison. The defendant was 30 years of age, the father of two, and gainfully employed. He was intoxicated at the time of the incident. The appellate court affirmed the conviction but remanded for re-evaluation of sentence, requiring the trial court to hear all pertinent evidence as to the defendant's past history. The court felt that the present record evidenced no recidivistic tendencies and that probation would be adequate.
essential that the court be in possession of the fullest possible information concerning the defendant's life and characteristics.\(^4\)

The court is thus required to consider evidence of the defendant's "moral character, life, family, occupation and criminal record"\(^5\) in aggravation or mitigation of sentence. In *People v. Nelson*,\(^6\) the appellate court held that where the record failed to show the education, family situation, background, or employment record of the defendant to any appreciable extent, the sentence would be vacated and the cause remanded to the circuit court for sentencing based upon the fullest information relevant to the defendant. In *People v. Lillie*,\(^7\) the appellate court said,

Advances in the fields of psychology, psychiatry and sociology have contributed to a greater understanding of the motives underlying the commission of criminal offenses, and the techniques and methods which are of value in the rehabilitation of offenders. The hope of earlier release is a great incentive to a prisoner to participate in the educational and rehabilitative programs provided in modern penal institutions. Excessive minimum sentences, imposed by the courts, may defeat the effectiveness of the parole system by making mandatory the incarceration of a prisoner long after effective rehabilitation has been accomplished.\(^8\)

**Federal Appellate Decisions**

It has long been a uniform policy of federal appellate courts not to consider a sentence within the statutory limits.\(^9\) The United States Su-
preme Court itself refused to "enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment," stating that "[t]his court has no such power." Although appellate review of criminal sentences in the federal courts has been proposed in Congress, the Judicial Conference of the United States has refused to recommend the adoption of such a procedure. However, the federal judiciary and Congress have not failed to envision a need for the evaluation of sentence disparities and the promulgation of sentencing criteria.

**Federal Institutes**

In August of 1958, a statute was enacted to authorize the establishment of joint councils and institutes on sentencing under the auspices of the Judicial Conference of the United States. The purposes of the institutes were for study, discussion, and formulation of objectives, policies, standards, and criteria for sentencing in federal courts. Since the pilot institute, there have been fifteen additional sentencing institutes bringing together not only distinguished jurists, but also penologists and educators as well. Out of these institutes have come enlightened ideas toward criteria for sentencing standards. Many of the policies and standards of one circuit have been accepted by other circuits. In November of 1960, the control of the district court, in aid to its appellate jurisdiction.” United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960).

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"United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960)."

"Gore v. United States, 357 U.S. 386, 393 (1958)."

"Id."


"28 U.S.C. § 334 (1964). The Institutes are called at the request of the Attorney General or the Chief Judge of each circuit."

"Y. Youngdahl, Development and Accomplishments of Sentencing Institutes In Federal Judicial System, 45 Neb. L. Rev. 513, 514-15 (1960)."

"The ninth circuit in 1960 accepted "Policies and Standards for Sentencing" set by the District of Columbia Circuit Sentencing Institute of 1960. These standards are set out in Appendix E of Sentencing Institutes, the Circuit Conference of the Ninth Judicial Circuit, 27 F.R.D. 293, 389-91 (1960) and read as follows:"

1. The purpose of a sentence combines community protection, correction, rehabilitation, deterrence and punishment. The sentencing judge must determine the proportionate worth, value and requirement of each of these elements in imposing sentence in each case.

2. The prime consideration in proper sentencing is the public welfare. Two major problems in sentencing are:

   (a) to what extent and for what time does the community welfare require protection from this offender, or others, with respect to this offense; and

   (b) in the light of the answer to the first problem, what sentence will permit this offender to take his place in society as a useful citizen at the earliest time consistent with protection of the public.
3. A proper sentence is a composite of many factors, including the nature of the offense, the circumstances—extenuating or aggravating—of the offense, the prior criminal record, if any, of the offender, the age of the offender, all with reference to education, home life, sobriety, and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the current community need, if any, for such a deterrent in respect to the particular type of offense involved.

4. The protection of the community from confirmed and habitual criminals not reasonably susceptible of rehabilitation as useful citizens requires the incarceration of such offenders, for maximum periods. The protection of the community also requires that, to the extent a given sentence may be expected to serve as an effective deterrent to the commission of similar offenses by others, this element should be given great weight in the determination of the proper sentence. The public welfare also requires, in general, the maximum use of probation and institutionalized training in respect to offenders who are not confirmed criminals and who manifest capacity for probable return to the community as useful citizens.

5. There is little, if any, disparity in the sentences imposed by individual judges in this circuit for violations of the same statute when all elements of the offence and the offender are considered, as outlined in paragraph 3, supra. Despite seeming differences in specific cases, careful evaluation of the cases discloses that the variables in each case, including the defendant's prior criminal record, his background, educational and social status, his marital status, the number of his dependants, the condition of his health, the prospect of rehabilitation and various other elements, readily explain apparent differences in so-called similar cases.

6. Sentences which are merely mathematically identical for violations of the same statute are improper, unfair, and undesirable. Indeed, mathematically identical sentences may be themselves disparate. Each defendant's case must be considered upon its highly individualized basis and a sentence imposed which is tailored to fit that case. Sentencing judges must in all instances consider all of the factors in each case, giving appropriate weight to each factor, and impose a sentence which is just to the defendant and just to the community.

7. The public need for sentences which serve as deterrents to crime may vary from time to time and by type and frequency of offence.

8. A sentencing judge must determine in each case the deterrent effect which the sentence in that case may have upon the offender. The deterrent effect of a sentence upon the other potential offenders with respect to the possible commission of similar crimes and in respect to the commission of crime generally is subject to different and varying viewpoints. It is clear, however, that the most effective deterrent is certainty and swiftness of punishment.

9. The use of the facilities provided by the Youth Correction Act in proper cases appears to be most effective in the guidance, training and supervision of youthful offenders and their restoration to useful life in the community.

10. It is proper, and often desirable, that a sentencing judge explain to an offender in open court the purposes and meaning of a sentence about to be imposed, especially when probation is granted.

11. Equal justice in sentencing is achieved by an experienced objective consideration by the sentencing judge of all of the individual factors in each case weighed in relation to the sentences imposed by other experienced and objective judges in cases which are similar in respect to the
judges of the U.S. District Court of the Eastern District of Michigan instituted new procedures for sentencing.\textsuperscript{58} These procedures require that prior to sentencing all trial judges must discuss proposed sentences with other members of the court in an informal panel meeting. Prior to the meeting, each judge on the Council receives a pre-sentence report and fills out his recommendations on a chart. Awareness by the sentencing judge that his thought processes will be exposed to the critical gaze of colleagues should encourage more objective and principled attitudes towards sentencing. The Council has tended to create consensus among the judges as to the relevance and weight of factors in sentencing.\textsuperscript{59} The President's Commission on Law Enforcement and the Administration of Justice endorses sentencing institutes and conferences and urges each state to instigate such programs on their own initiative.\textsuperscript{60}

Pre-Sentence Reports

Perhaps the most helpful tool ever devised for a sentencing judge is the pre-sentence investigation report. Such a report is required in every federal case, “unless the court directs otherwise.”\textsuperscript{61} The federal pre-sentence report contains the defendant’s prior criminal record, information concerning his character, financial condition and the circumstances affecting his behavior, and such other information as the court may require.\textsuperscript{62} In 1960 of all persons convicted of federal offenses, eighty-six percent were investigated and pre-sentence reports were prepared on their backgrounds. Of these eighty-six percent, forty-two percent received probation.\textsuperscript{63}

The report of a pre-sentence investigation is made mandatory in some circumstances by statutes in at least thirteen states.\textsuperscript{64} Even where no such statutory authority exists, the majority of courts, at least in felony cases,

\textsuperscript{59} \textit{Id.} at 505.
\textsuperscript{60} \textit{President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society} 145 (1967).
\textsuperscript{61} \textit{Fed. R. Crim. P.} 32(c)(1), (as amended 1966).
\textsuperscript{62} \textit{Id.} at 32(c)(2) (as amended 1966).
\textsuperscript{63} \textit{See M. Paulsen and S. Kadish, Criminal Law and Its Processes} 168 (1962).
\textsuperscript{64} Note, \textit{Statutory Structure For Sentencing Felons to Prison}, 60 \textit{Colum. L. Rev.} 1134, 1135 & n.4 (1960). The states include: California, Colorado, Connecticut, Hawaii, Massachusetts, Michigan, Nebraska, Nevada, New Mexico, New York, Rhode Island, Virginia, and New Jersey.
may require such a report. The purpose of the investigation is to glean, from the defendant's past and present circumstances, information that might indicate a potential for rehabilitation or show a definite propensity toward crime. Many reports include an analytical summary of the subject's history and problems, with a recommendation to the court as to his disposition. The President's Commission on Law Enforcement and Administration of Justice recommends that all courts require a pre-sentence report for all offenders.

**Model Codes**

Even absent beneficial appellate guidelines, there are other available institutions that offer sound sentencing guides. The American Law Institute has proposed a Model Penal Code which includes the following:

- A statement of the purposes of punishment and treatment,
- A statement of criteria for withholding a prison sentence and placing an offender on probation,
- A statement setting forth criteria for imposition of extended

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66 See generally 2 THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 156 (1939); P. TAPPAN, supra note 7, at 556-57 & n.50.

67 President's Commission, supra note 60, at 144.


69 Id. § 1.02(2).

The general purpose of the provisions governing the sentencing and treatment of offenders are:

(a) to prevent the commission of offenses;
(b) to promote correction and rehabilitation of offenders;
(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
(d) to give fair warning of the nature of the sentences that may be imposed on conviction of the offense;
(e) to differentiate among offenders with a view to a just individualization in their treatment;
(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;
(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of the offenders;
(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction.

70 Id. § 7.01.

1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:
(a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
(c) a lesser sentence will depreciate the seriousness of the defendant's crime.
(2) The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favor of withholding sentence of imprisonment:
(a) the defendant's criminal conduct neither caused nor threatened serious harm;
(b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;
(c) the defendant acted under a strong provocation;
(d) there were substantial grounds tending to excuse the defendant's criminal conduct, though failing to establish a defense;
(e) the victim of the defendant's criminal conduct induced or facilitated its commission;
(f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;
(g) 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;
(h) the defendant's criminal conduct was the result of circumstances unlikely to recur;
(i) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;
(j) the defendant is particularly likely to respond affirmatively to probationary treatment;
(k) the imprisonment of the defendant would entail excessive hardship to himself or his dependents.

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.
The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two misdemeanors committed at different times when he was over (insert Juvenile Court age) years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public. The Court shall not make such a finding unless the defendant is over the age of twenty-one and:
(a) the circumstances of the crimes show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or
(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

\[\text{\textsuperscript{Id.}} \text{\textsuperscript{\$7.03.}}\]
the extended imprisonment of habitual misdemeanants,\textsuperscript{72} and a section recommending pre-sentence investigation.\textsuperscript{73} Also, the National Council on Crime and Delinquency, through their Advisory Council of Judges, has developed a Model Sentencing Act.\textsuperscript{74} This Act provides for a pre-sentence investigation,\textsuperscript{75} sets forth criteria for sentencing standards,\textsuperscript{76} and provides a requirement that the trial court judge make a brief statement of his basic reasons for the sentence that he imposes.\textsuperscript{77}

**Prediction Methods**

There exists still another source of guidance for the sentencing judge. By the use of prediction methods, a judge is able to arrive at some estimate of the defendant’s post-correctional conduct. Considering the statistical experience of the community in sentencing particular classes of defendants to prison or placement on probation, the judge’s intuitive process of predicting the defendant’s subsequent behavior can now be developed into a more rational process of analysis and into more precise, concrete terms.\textsuperscript{78}

In the Glueck study\textsuperscript{79} of five hundred criminals in a Massachusetts reformatory over a period of five years, social factors and behavioral patterns of each offender were analyzed from childhood through parole. Correlation tables were made and validation studies run. The Gluecks came up with five factors\textsuperscript{80} that showed the highest correlation to post-parole conduct. These were given relative weights and incorporated into a table. From such a table it is now possible to predict post-release behavior prior to sentencing.\textsuperscript{81}

The Research Division of the California Department of Correction

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\textsuperscript{72} Id. § 7.04.
\textsuperscript{73} Id. § 7.07. Few states have adopted the provisions in the sections above. Some of the more progressive states have enacted similar kinds of provisions, though none are as extensive as those of the model code. See Cal. Pen. Code § 1203 (West Supp. 1967); Ill. Ann. Stat. ch. 38, §§ 1-2, 117-1 (Smith-Hurd 1964); N.Y. Pen. Law §§ 1.05 & 70.10 (McKinney 1967).


\textsuperscript{75} Id. art. 2, § 2.
\textsuperscript{76} Id. art. 3, § 5.
\textsuperscript{77} Id. art. 3, § 10.

\textsuperscript{78} J. Conrad, Crime and Its Correction 191 (1965).


\textsuperscript{80} Id. at 472. The factors are: (1) seriousness and frequency of pre-reformatory crime, (2) arrest for crimes preceding the offense for which sentence to the reformatory had been imposed, (3) penal experience preceding reformatory incarceration, (4) economic responsibility preceding sentence to the reformatory, and (5) mental abnormality.

\textsuperscript{81} Id.
has developed a system of base expectancies that are applicable to various correctional populations.\textsuperscript{82} Equations were developed to differentiate risks according to similar kinds of demographic attributes, with twelve factors incorporated into a base expectancy table.\textsuperscript{83} The judge might then weigh the risk of recidivism against the hazard of the kind of crime to be expected. "A thirty percent prospect of homicide must be viewed in a different light than an equal prospect of shoplifting. Nothing in sight offers the judge complete relief from the burden of the risk-laden decision."\textsuperscript{84} It is the aim under this new system to cut imprisonment or commitment to state institutions by twenty-five percent with a savings extended over a decade of one hundred million dollars, without compromising public safety.\textsuperscript{85}

CONCLUSION

In relation to judicial activation of the rehabilitative ideal through individualization, sentencing is presently still "the most neglected part of the most neglected field of the law, criminal law."\textsuperscript{86} Even recognizing a rehabilitative ideal predominant within the criminal process, only a few courts have taken any modern, realistic approach in applying the ideal through the sentencing process. Trial judges must be apprised of the fact that individualization can be achieved only through systematic analysis of crucial criteria relevant to each offender. The rehabilitative ideal must be recognized and supported at the legislative level; but, individualization

\textsuperscript{82} J. Conrad, supra note 78, at 185-89.
\textsuperscript{83} McGee, Objectivity in Predicting Criminal Behavior, 42 F.R.D. 175, 195 (1966). The factors and their weights are:

<table>
<thead>
<tr>
<th>Factor</th>
<th>Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>An arrest-free period of five years or more</td>
<td>12</td>
</tr>
<tr>
<td>No history of opiate use</td>
<td>9</td>
</tr>
<tr>
<td>Two or less jail commitments</td>
<td>8</td>
</tr>
<tr>
<td>The charge is not checks or burglary</td>
<td>7</td>
</tr>
<tr>
<td>No family criminal record</td>
<td>6</td>
</tr>
<tr>
<td>No alcohol involvement related to offense</td>
<td>6</td>
</tr>
<tr>
<td>Not first arrested on auto theft</td>
<td>5</td>
</tr>
<tr>
<td>Six or more consecutive months of work for one employer</td>
<td>5</td>
</tr>
<tr>
<td>No aliases</td>
<td>5</td>
</tr>
<tr>
<td>First imprisonment under this serial number</td>
<td>5</td>
</tr>
<tr>
<td>Favorable living arrangements</td>
<td>4</td>
</tr>
<tr>
<td>Few prior arrests (zero, one or two)</td>
<td>4</td>
</tr>
</tbody>
</table>

A score of 53 or higher gives the defendant a seventy-five percent chance of success.

\textsuperscript{84} J. Conrad, supra note 78.
\textsuperscript{85} McGee, supra note 83, at 185.
can only be activated by the judiciary through the sentencing process. Failure here weakens the rehabilitative ideal. The judiciary must recognize its crucial role within the criminal process before this ideal can be transformed into reality.

Donald W. Stephens

Evidence—Lay Opinion as to Whether a Person is Under the Influence of Narcotics

In State v. Cook\(^1\), defendants appealed from a conviction of possession of a quantity of barbiturates without a prescription.\(^2\) One of the defendants' objections related to the admission of the testimony of a police officer that, in his opinion, based on his observation, the defendants were under the influence of narcotics.\(^3\) Apparently, the officer was not qualified as an expert. The court, however, did not feel this necessary. Relying on a long line of North Carolina cases\(^4\) allowing a lay witness to give his opinion when, by reason of better opportunities for observation, he is in a better position than the jury to make a judgment, the court stated: "Seeing defendants in their drugged condition and observing their manner of speech and movement, the witness was better qualified than the jury to draw inferences and conclusions from what he saw and heard."\(^5\) A rule permitting admission of lay opinion regarding people under the influence of narcotics ventures beyond the limits

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\(^1\) 273 N.C. 377, 160 S.E.2d 49 (1968).
\(^2\) N.C. GEN. STAT. § 90-113.2(3) (1965).
\(^3\) He testified that defendants were "sleepy ... had glassy dilated eyes..."
\(^4\) He was in a stupor ... mumbling ... staggering." 273 N.C. at 381, 160 S.E.2d at 52. He also mentioned the fact that there was no odor of alcohol about them. Id. This last fact implies that his opinion was at least partially arrived at by the process of elimination (i.e., since they were not drinking, their conduct could be explained only by drugs). The accuracy of this method, standing alone, seems doubtful.

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