



6-1-1965

Growth and Consequences of Judicial Discretion in Sentencing

Robert H. Vasoli

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Robert H. Vasoli, *Growth and Consequences of Judicial Discretion in Sentencing*, 40 Notre Dame L. Rev. 404 (1965).

Available at: <http://scholarship.law.nd.edu/ndlr/vol40/iss4/3>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

GROWTH AND CONSEQUENCES OF JUDICIAL DISCRETION IN SENTENCING

Robert H. Vasoli*

No task confronting the criminal court judge is more of an enigma than that of sentencing the convicted offender. Trying a case, one English jurist put it, "is as easy as falling off a log. The difficulty comes in knowing what to do with a man once he has been found guilty."¹ If anything, the problem of sentencing has grown all the more vexing since Justice McCardle coined this pithy comment. Stated broadly, this state of affairs is an outgrowth of a marked trend toward greater flexibility in sentencing, a trend that appeared when classical penology began to lose its grip as a primary motivational force in the decisions of sentencing judges. The aim here is to outline the key long-term structural changes that account for the rise of discretion in sentencing. Since we are concerned with broad institutional patterns, no attempt will be made to cite particular statutory landmarks in the growth of judicial discretion. However, certain statutes will be discussed in dealing with the reaction to that growth.

One of the hallmarks of classical penology was its opposition to arbitrary sentencing powers vested in the judiciary. Accordingly, the appropriate punishment for an offense was to be calculated by legislative bodies rather than by individual judges. The task of the latter was to dispense punishment with uniformity, without regard for the offender's social class, his mental state or the circumstances surrounding his unlawful deed. Above all, it was to be meted out according to the terms of the statute violated, and not according to the judge's interpretation of how the law should be applied. Thus the tenets of classical penology narrowly circumscribed the sentencing prerogatives of the criminal court, and in jurisdictions where this philosophy held sway, judicial discretion in sentencing was minimal or altogether absent.

Given articulate and persuasive formulation by theorists like Beccaria and Bentham, classical penal philosophy and the sentencing policies that flowed from it enjoyed considerable vogue in Europe and America during the nineteenth century. But this doctrine was undermined by a variety of erosive forces well before the twentieth century. Probably the most damaging attack was delivered by the Lombrosians, who insisted that the proper object of penology was the criminal rather than his crime and punishment. In due time classical penology was modified or supplanted by other ideologies of punishment or treatment, though vestiges of it are still found in legal systems the world over. Thus, despite its current disrepute among American theorists, its historical progeny — Neo-Classicism — endures as a philosophical guidepost in the administration of our criminal law. Under the terms of the revision, punishment is no longer applied with mechanical sameness to all criminals in specific offense

* Assistant Professor, Department of Sociology, Notre Dame, Indiana.

1 That this aphoristic observation has attained cliché status among judges and students of sentencing does not detract from its truth. The expression, usually attributed to Justice McCardle, is quoted in Hill, *A Judge's Guide to Sentencing*, 2 NPPA JOURNAL 308, 312-13 (1956).

categories. Instead, allowance is made for age, sanity and other mitigating conditions.

As the influence of Classical theory waned, the philosophy of individualization gained wider currency. In essence, individualization refers to efforts to make punishment, or treatment, consonant with the needs of the offender. Some writers use the term in a narrower sense, claiming that it should signify treatment rather than punishment.² In either case, it is the antithesis of the Classical view that all persons convicted of the same offense should be dealt with in precisely the same way. It is also the chief rationale behind such correctional innovations as the "indeterminate" sentence, prison classification systems, the special sentencing procedures for young offenders, the juvenile court, and presentence investigations. In the aggregate, the philosophy of individualization, along with the devices and procedures used to implement it, are often characterized as the "new penology." By and large the latter has been accorded a warm if not enthusiastic reception by criminologists and correctional practitioners alike. Indeed, some hail it as the most salutary development in the history of man's efforts to deal with lawbreakers. For all its merits, however, the "new penology" created manifold problems in the sentencing of offenders. Basically these problems derive from the fact that the shift from uniform to individualized sentencing restored to the trial judge an appreciable measure of the discretionary power previously stripped from him by the tenets of classical doctrine.³ Resumption of this power, it is well to note, did not lead to unbridled judicial despotism. Curbs on the trial judge's sentencing authority were still exercised by the criminal code, as well as by the more diffuse forces of public opinion. Conviction for crimes still carrying mandatory penalties allowed the judge no leeway whatever; in some states the punishment for certain offenses was determined by the jury. Penalties light or severe to the extreme were often prevented by the threat of public protest. Such limits on judicial sentencing prerogatives notwithstanding, the trend has been to widen the sphere of action marked off by those limits.

There is a temptation to view the expansion of judicial discretion in sentencing as scarcely more than a consequence of the decline in reliance on sentences fixed by statute and a concomitant rise in the use of the "indeterminate" sentence.⁴ That these two phenomena are functionally related is undeniable,

2 SUTHERLAND & CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 320 (6th ed. 1960).

3 Sellin, *The Trial Judge's Dilemma: A Criminologist's View*, in *PROBATION AND CRIMINAL JUSTICE* 99, 102 (Glueck ed. 1933).

4 What is ordinarily called an *indeterminate* sentence would be more accurately designated an *indefinite* or a *limited indeterminate* sentence. In practice, however, these terms are often used interchangeably. As used here, an indeterminate sentence is one that entails a penalty ranging from zero days (or suspension of sentence) to life. A sentence with minimum and maximum limits that falls within the extremes of the indeterminate sentence will be considered an *indefinite* sentence. With both types, the precise amount of punishment (or treatment) the offender ultimately receives is not preordained when the judge pronounces sentence. Sentences whose exact length is set at the time of imposition will be called a *fixed* or *definite* sentence. Cf. Schnur, *Current Practices in Correction: A Critique*, in *LEGAL AND CRIMINAL PSYCHOLOGY* 300-01 (Toch ed. 1961). Frequently encountered in the literature on sentencing is the flat assertion that nowhere in the United States is there an indeterminate sentence law. While it is true that no jurisdiction relies mainly or exclusively on this mode of sentencing, a bona fide though optional indeterminate sentence statute which may be

but the "indeterminate" (*i.e.*, indefinite) sentence alone is not responsible for the regeneration and growth of judicial discretion. According to one survey of indefinite sentencing from the mid-twenties until about 1940, the percentage of commitments to federal and state prisons and reformatories on this type of sentence declined, then showed an increase that has persisted to the present.⁵ No corresponding fluctuations occurred in the sentencing powers of the trial judge during that same interval. If discretion in sentencing and reliance on the so-called indeterminate sentence varied independently, it is necessary to seek still other factors to account for the expansion of judicial discretion.

How Judicial Discretion Grew

Turning from its ideological wellspring — the broad trend toward individualization — to the area of procedure, there were three developments chiefly responsible for the revival and extension of judicial discretion. First, there was an increase in the types of alternatives simultaneously open to the court at pronouncement of sentence. By sentencing alternative is meant a discrete disposition category which, in turn, may embrace a number of subalternatives. Thus, a capital offender can be executed in any one of several ways (*e.g.*, gas chamber, electrocution, gallows, etc.), each falling under a single major alternative — the death penalty. Relying on federal criminal procedure for illustrations, convicted offenders may be disposed of by: (a) the death penalty; (b) imprisonment; (c) fines;⁶ (d) probation; (e) deportation;⁷ (f) vacating a judgment of conviction and granting a new trial if it is determined that the offender was mentally incompetent during his trial;⁸ and (g) judgment of acquittal.⁹ Impressive as this inventory may seem, in no court can these alternatives be indiscriminately imposed on any offender. The death penalty cannot be invoked for misdemeanants; probation cannot be granted to capital offenders; an offender with legitimate citizenship cannot be deported. Indeed, it would be difficult to imagine even a hypothetical case in which the entire range of these alternatives might apply. There is no gainsaying the fact that many of these alternatives, to say nothing of still others no longer considered acceptable (*e.g.*, corporal punishment), were used in the past. In terms of judicial discretion, however, what is unique about the present state of affairs in sentencing is not so much the mere availability of additional alternatives but the fact that more alternatives are *simultaneously* available. Previously the range of major sentencing alternatives at the court's disposal *at a given time* and for a given case was comparatively narrow.

Second, the increase in the number of alternatives simultaneously open to

invoked for certain types of sex offenders was enacted by the State of New York in 1950. N.Y. PENAL LAW § 690; see also Note, *New York's New Indeterminate Sentence Law for Sex Offenders*, 60 YALE L.J. 346 (1951).

5 SUTHERLAND & CRESSEY, *op. cit. supra* note 2, at 552.

6 Payment of court costs might also be included here, inasmuch as the intention of the court in the issuance of the order is at times manifestly punitive.

7 A sentencing option restricted to aliens, whether they have violated the immigration laws as such or have committed some other type of crime.

8 18 U.S.C. §§ 4244-46 (1958).

9 FED. R. CRIM. P. 29(b):

the court has been paralleled by an increase in the ways in which they can be combined into a single disposition. Imprisonment coupled with a fine has probably been the most prevalent form of "mixed sentence" over the years. More recently, a variation of this pattern has begun to emerge. California and the federal government now have "split-sentence" laws which provide for imprisonment followed by probation. "Mixed" and "split" sentences are indicative of the drift toward incorporating more different alternatives into a particular disposition. It is not unusual for a "mixed" sentence to include imprisonment on one count, and probation or a fine on another. In any event, the ability to fuse discrete alternatives into unitary sentences served to widen the court's area of choice.

Third, relatively recent innovations in sentencing procedures have given the trial judge more opportunity to exercise choice *within* certain sentencing alternatives. Let us examine how this can happen when imprisonment is the alternative in question. In most jurisdictions the prison terms imposed on convicted felons are set by the court, within limits defined by statute.¹⁰ This means that the judge, in the process of pronouncing sentence, is ordinarily compelled to make a minimum of *two* choices. He must select at least one sentencing alternative permitted by law—imprisonment in this case—then ascertain the degree to which that alternative is to be implemented. Neither of these choices is present when the offense calls for a mandatory sentence.¹¹ But mandatory sentencing, as noted above, has been giving way to less rigid sentencing procedures, with the indefinite sentence often cited as the foremost example of this new flexibility. Since mandatory sentencing and judicial option are mutually exclusive, a seemingly valid inference is that the trend toward indefinite prison commitments automatically enlarged the sphere of judicial discretion. Such logic, however, oversimplifies what actually happened, and exaggerates the significance indefinite sentence statutes had for the discretion of the court. The fact of the matter is that indefinite sentences, when analyzed with the judge and not the offender as the point of reference, can be either mandatory or permissive. It depends on the jurisdiction in question. Moreover, this is also true of so-called definite sentences, and could just as easily be extended to the indeterminate sentence if ever it became something other than a statutory rarity.

If a motion of judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty. . . . If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal.

Clearly, this alternative can apply to convicted offenders.

10 According to Tappan, this system prevails in twenty-seven states, in the federal courts and in the District of Columbia. Actually, this tally understates the true extent of judicial discretion involved here, for in most of the nine states in which the jury sets the prison term, the judge may veto its decision. Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528, 532 (1958).

11 This type of sentence may be mandatory in either or both of two ways: positively, the judge must impose an alternative to a predetermined degree; negatively, he is prohibited from recourse to certain alternatives. Injunctions of this sort are found in such measures as the recently amended federal statute for narcotics offenders which provides, among other things, that a second offender *must* be given 5-20 years, and that he *must not* be regarded as eligible for probation. INT. REV. CODE OF 1954, §§ 7237 (a), (d).

Judicial Discretion and Type of Prison Sentence

In indefinite sentence jurisdictions judicial discretion in establishing the length of incarceration can occur in a number of ways. In some jurisdictions the judge can set the minimum, in others the maximum, and in still others he is authorized to set both minimum and maximum.¹² No matter which method prevails, the limit(s) he chooses cannot exceed the limit(s) stipulated by law. What is especially relevant here is that the trial judge, if vested with this power, can exercise at least one choice over and above his selection of imprisonment as the sentencing alternative. On the other hand, in some indefinite sentence jurisdictions the minimum and maximum are determined by law. If the judge decides for imprisonment, he has no second choice; he must impose a term with predetermined upper and lower limits. Thus in Indiana, an indefinite sentence jurisdiction, the judge who commits a convicted second-degree burglar to prison must pronounce the 2-5 year sentence fixed by law.¹³ In at least three other so-called indefinite sentence jurisdictions the court merely chooses to send the offender to prison, and the exact period of confinement is determined by an administrative agency such as California's Adult Authority. In Georgia, the limits of indefinite sentences may be set by the jury.¹⁴ Plainly, then, for each of these jurisdictions the indefinite sentence adds little to the court's discretion in the imposition of prison terms.

By way of contrast, there are so-called *definite* sentence jurisdictions where the court's discretion is scarcely impaired. There was a time when a definite sentence was identical to a mandatory sentence, with the judge constrained to impose the penalty set forth in the law. Mississippi is probably the only jurisdiction where definite sentences of this sort still prevail.¹⁵ At present a definite sentence usually means one in which the minimum and maximum coincide. It need not be mandatory, for often the term of imprisonment *may* be set initially by a judge, a jury, or an administrative body, as well as by statute. Along with the federal government, some seventeen jurisdictions rely chiefly on some modern version of definite sentencing. In eight of these jurisdictions it is the prerogative of the trial judge to fix, within legal limits, the precise term of incarceration.¹⁶ As a result, in these eight jurisdictions the definite sentence, considered solely from the standpoint of the court's discretionary power, is anything but definite until *after* the court has expressed its will. Even then the sentence is not necessarily definite in an absolute sense, since it is subject to review or revision by a parole board, an appellate court, the state executive and, in some instances, by the judge who originally imposed it.

We have seen thus far that analysis of sentencing procedures, an enterprise difficult in its own right, is made all the more forbidding by the ambiguous terminology surrounding the topic. A sentence may be indefinite from the

12 A survey of the variations found in the United States is found in Orfield, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 558-60 (1947); see also Ploscowe, *The Court and the Correctional System*, in *CONTEMPORARY CORRECTION* 51, 54-55 (Tappan ed. 1951).

13 *IND. STAT. ANN.* tit. 10, § 701 (b) (1956).

14 Tappan, *supra* note 10, at 532.

15 Most jurisdictions do not rely on one mode of sentencing to the exclusion of all others.

16 Tappan, *supra* note 10, at 532.

vantage point of the law, the offender and the parole board, yet quite definite as far as the judge is concerned. More important, it is all too evident that merely fixing a "definite," "indefinite" or "indeterminate" label to a sentence does not *ipso facto* clarify its significance with respect to judicial discretion. The presence or absence of the latter hinges primarily on the extent to which these types of sentences are mandatory or optional.

Judicial Discretion and Other Sentencing Alternatives

Discussion of the relationship between the indefinite sentence and judicial discretion has been, up to this point, largely confined to the question of prison terms. Indeed, this relationship is almost invariably examined in this narrow context. Frequently overlooked, however, is the fact that the principle of flexibility inherent in the indefinite sentence has been extended to facets of sentencing other than the setting of minimum and maximum limits on incarceration. Even when the judge elects to imprison an offender there usually remains an impressive number of residual options he may invoke. He might impose a fine, consecutive or concurrent terms, or later choose to modify his sentence. Particularly with such sentencing alternatives as probation and the fine, the degree of latitude at the court's command is extensive. On balance, then, the influence of indefinite prison sentences on judicial discretion probably has been neither as great nor as direct as is commonly assumed. But the principle of flexibility that underlies indefinite sentencing has enlarged the area of option within certain other sentencing alternatives.

By virtue of the simultaneous availability of more alternatives, heightened opportunity to combine alternatives, and mounting flexibility within alternatives, judicial discretion has grown dramatically. Some appreciation of the resulting profusion of choices can be obtained by examining some of the options present in sentencing a federal offender. It will suffice to limit the example chiefly to probation, the sentencing alternative second only to imprisonment in frequency of use in the federal courts.¹⁷ To avoid overstating the case for the growth of judicial discretion, certain precautions are in order. First, probation permits more choices than any of several other alternatives combined. Second, the size of the federal system, its commitment to individualization, and its concededly progressive rules of criminal procedure have fostered a degree of flexibility not found in many state jurisdictions. Accordingly, despite many similarities among federal, state and local criminal procedures, one must exercise care in generalizing from the former to the latter.

Let us assume that an offender, convicted on a one-count indictment for forgery, is about to be sentenced. Prior to pronouncing sentence, the judge *must* decide which alternative best suits the offense, the offender, and the safety of society. He *may*, if he sees fit, settle on a disposition involving more than one alternative. However many alternatives he finally selects, he must then

¹⁷ During most of the years since the end of World War II, at least forty per cent of all offenders convicted and sentenced in district courts were probationed. Annual Reports of the Director of the Administrative Office of the United States Courts, 1946-1963 (Washington, D.C.).

decide the degree to which the alternative(s) shall be applied, or waive this prerogative to the Board of Parole. Since in this case the court decides for probation, it may at one time or another be confronted with the following questions:

1. Should imposition or execution of sentence be suspended?
2. Should all or part of the maximum 5-year probation term be imposed?
3. Should probation be combined with another alternative?
 - a. Should there be a fine and in what amount?
 - b. Should there be an order to pay court costs?
 - c. Should there be a prison term (*i.e.*, "split-sentence")?
4. What shall the conditions of probation be?
5. Should the probationer, if later brought before the court for a revocation hearing, be continued on probation or declared a violator?
6. If the probationer adjusts well to supervision, should he be formally discharged from probation, merely released from active supervision, or continued on probation until his expiration date?
7. If the probationer fails to adjust, should supervision be extended or revoked? (If originally set for less than 5 years, the term may be extended to that maximum or some fraction thereof.)
8. Shall the probationer be allowed to transfer to another district? If so, should jurisdiction as well as supervision be shifted to the receiving court?

Though probably not exhaustive, this list amply demonstrates the breadth of the district court's discretionary power in but one sentencing alternative. Should probation be revoked, numerous additional options may present themselves to the judge. This is especially true if he had previously suspended imposition rather than execution of sentence. When execution of sentence is suspended, the judge limits the choices that present themselves at revocation. He may not, for example, impose a sentence more severe than the one initially suspended. Though other alternatives may be invoked, more often than not revocation usually entails the imposition of a prison term. All of these choices, it will be recalled, are predicated on a one-count conviction. If the number of counts in the conviction is increased, the number of options before the court increases almost geometrically.

Nowhere is flexibility within a sentencing alternative more evident than with the conditions of probation—a veritable key to the Pandora's box of judicial discretion. According to the federal probation statute, the court "may suspend . . . sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best."¹⁸ Given so broad a mandate, the court can specify practically any conceivable condition—from temperance and avoidance of disreputable persons and places to writing weekly self-appraisals for the probation officer. By no means is it unusual for probation to be conditioned on a large array of rules over and above the ever-present injunction to abide by the law.¹⁹

¹⁸ 18 U.S.C. § 3651 (1958).

¹⁹ During the early 1950's, the United States District Court for the Southern District of Texas ordered each probationer to avoid: breaking any law; all manner of contact with alcoholic beverages and narcotics, including steering clear of places where they are kept or

Plight of the Trial Judge

As previously pointed out, the statutes and procedures which produced increments in judicial discretion were inspired mainly by the ideology of individualization. Since the principal concern of individualization has consistently been the rehabilitation of the offender, most of the innovations it produced were conceived of and enacted to improve his lot and not that of the trial judge. Despite notable exceptions, such as the recent federal statute permitting a tentative sentence until the offender has undergone study by the Bureau of Prisons,²⁰ whatever benefits accrued to the court through expansion of its discretion were more or less adventitious. Indeed, there is good reason to believe that the rebirth of judicial discretion, its derivative benefits notwithstanding, made the task of sentencing more difficult than ever.

Not unexpectedly, the increase in discretionary power of the judge was accompanied by other changes in the nature of his role. In the past, when mandatory punishment was the rule, sentencing entailed little more than routine application of the law. The judge's major function was to preside over the trial. But now sentencing enjoys near parity with the business of running the trial, and the latter function has, if anything, receded in importance. This is partly due to the decline in mandatory sentences and partly to the fact that most convictions are obtained on pleas of guilty, thereby obviating the need for a trial. During the fiscal year ending June 30, 1963, for example, 75 per cent of the 34,845 defendants who appeared in the federal district courts were convicted on pleas of guilty or *nolo contendere*.²¹ Thus officiating at the trial is no longer the central obligation it once was for the simple reason that the proportion of offenders brought to trial has been drastically reduced.

Perhaps there was one way in which the older system of rigidly applied penalties posed a special problem for the trial judge. If, as often happened, the penalties were especially harsh, a judge disposed to leniency might have found them at odds with his humanitarian attitudes. Still, the psychic discomfort could be salved by the reminder that duty impelled him to apply the law dispassionately. As judicial discretion grew, the judge's role in sentencing became more personalized, and psychological refuge was harder to find. No longer could his influence on sentences be so readily exorcised by recourse to the unswerving dictates of the penal law. Simultaneously he was now confronted by an often bewildering array of choices hitherto unknown. The clear cut alternatives once provided by the criminal code were now blurred by doubts arising from a maze of options. It was in this way that judicial discretion, theoretically the boon of the offender, became the bane of the trial judge.

sold; gambling and places where it is carried out; "bookies"; voluntary idleness; associations with "criminals, lewd persons, narcotics addicts, and persons and places of bad character." Quite likely this list of conditions is none too atypical.

20 18 U.S.C. §§ 4208(b)-(c) (1958).

21 Of these, 10.7% had their cases dismissed, 7.3% were acquitted or convicted by a jury. Annual Report of the Director of the Administrative Office of the United States Courts 240 (1964).

Coping With the New Discretion

How well has the trial judge handled the flexibility in decision-making brought on by the forces of individualization? The typical judge, it is generally conceded, officiates over the trial with competence. But his performance in dealing with his sentencing function is suspect, a target for a steady flow of criticism. Such is the content of modern legal training, some critics hold, that judges are characteristically ill-prepared to master the intricacies of the art of sound sentencing. In this view, competence in sentencing requires as much study in the behavioral sciences as in law.²² Training of this sort is unlikely to become part of the average law school curriculum, if only because the number of law students destined to become trial court judges is minute. Indeed, many law schools provide only rudimentary training in criminal law and criminology, much less training in behavioral science. Additional bases for the critics' charges are supplied by the abundant evidence of disparities in sentencing.²³ Besides pointing to sentencing variations of striking magnitude in different jurisdictions, it also indicates much the same situation among judges sitting in the same court and handling similar types of offenders. Small wonder, then, that detractors of contemporary sentencing charge that it is all too often an erratic interplay of hunches, intuition, moods and bias.

The portrait that emerges when these criticisms are arranged into a composite whole is none too flattering to the trial judge. Among other things, it depicts him as ill-trained, given to inconsistency, and prey to his own prejudices. If the average trial judge's sentencing is as maladroit as some critics contend, perhaps the administration of criminal law would be enhanced by forfeiture of his sentencing function. Precisely such a proposal has been made by two eminent criminologists, who point out:

[M]any persons . . . are convinced that the sentencing power should be shorn from our judges and handed over to a board of scientists, known as a diagnostic clinic. In fact, some enlightened judges have recommended such an innovation. They see their task as one of interpreting the law in the courtroom, and seeing to it that the rules of procedure are scrupulously adhered to. This is a big enough responsibility for them and it should cease after the jury has brought in its verdict. . . . The diagnostic clinic would be staffed by a group of persons skilled in the fields of human behavior . . . a psychiatrist, a social worker, a psychologist, and other persons noted for their knowledge of human behavior.²⁴

22 One of the resolutions on sentencing passed by the Second Section of the Eighth Congress of the International Association of Penal Law, convened in Lisbon in September, 1960, includes the following clause: "The scientific training of the penal judge should be undertaken in a way adequate to ensure that he have the necessary learning in the various human sciences which will enable him to exercise his power of individualization in conjunction with experts." See *Sentencing Methods and Techniques in the United States*, 26 *FED. PROBATION* 40 (1962).

23 See, e.g., Gaudet, *Individual Differences in the Sentencing Tendencies of Judges*, 230 *ARCHIVES OF PSYCHOLOGY* (1938); Lane, *Illogical Variations in Sentences of Felons Committed to Massachusetts State Prison*, 32 *J. CRIM. LAW & CRIMIN.* 171 (1941); Davis, *Variations in Sentencing*, 2 *NPPA JOURNAL* 385 (1956); Glueck, *Predictive Devices and the Individualization of Justice*, 23 *LAW & CONTEMP. PROB.* 461, 462-66 (1958); Green, *Sentencing Practices, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION* 69 (Johnston, Savitz & Wolfgang eds. 1962); and Ploscowe, *supra* note 12, at 56-58.

24 BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 263-64 (3d ed. 1959).

Probably the closest approximation to the diagnostic clinic can be found in the operations of the California Youth Authority.

However plausible the arguments advanced by its critics, whether present day sentencing is an ineffective anachronism is still open to debate.²⁵ The superiority attributed to sentencing by experts recruited from the behavioral sciences has yet to be demonstrated empirically. Given our present state of knowledge, measures like the diagnostic clinic suggest a somewhat sanguine, if not utopian, trust in the remedial powers of applied social science, psychology and psychiatry.

Sentencing Aids Now Available

Not even the most unbending apologist for current sentencing methods is likely to claim that the charges outlined above are utterly baseless. Judges themselves are hardly oblivious to the blind spots in contemporary sentencing or to the complexities in dealing with the convicted offender.²⁶ At the same time, contrary to the opinion of most outspoken critics, the typical judge is not necessarily a lonely confused figure who has been thrust into a situation that is beyond his capabilities. Without minimizing the extent of his burden, it is well to point out that trial judges at every jurisdictional level have at their disposal a battery of aids for grappling with the problem of sentencing — a problem rendered all the more perplexing by the growth of judicial discretion. Although our discussion of these aids will center once more on the federal courts, this is not to suggest that similar props are not present in state trial courts.

No matter how inadequate the federal trial judge's knowledge of behavioral science may be, he nonetheless has recourse to considerable expertise in that area. Most obviously, perhaps, prior to imposition of sentence he can avail himself of consulting psychiatrists if there is reason to believe that the offender is mentally incompetent.²⁷ It is almost superfluous to add that this is not done with all offenders, as some critics of current sentencing methods would prefer. An even more convenient source of counsel in behavioral science is the court's probation officer. He is, at the very least, counterpart to the social worker who would help staff a diagnostic clinic. This is attested to by the rising proportion of federal probation officers with advanced degrees in social work or allied fields. The chief instrument by which the probation officer conveys his knowledge to the judge is the presentence investigation. In addition, the judge may solicit his advice in the courtroom during disposition or, on other occasions, summon him to the court's chambers for ad hoc conferences relating to certain offenders. By virtue of such contacts, the presentence investigation in particular, the probation officer can be of incalculable assistance in efforts to formulate an appropriate disposition. If both critics and defenders of current sen-

25 Similar outcries, often emanating from the same sources, have been aimed at prisons, yet intensive research on the federal correctional system demonstrates that prisons probably have far greater rehabilitative impact than is generally believed. See GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* (1964).

26 One, for example, asserts that a national poll of his colleagues would find the vast majority admitting that sentencing presents their greatest challenge. Kaufman, *Sentencing: The Judge's Problem*, Fed. Prob., March 1960, p. 3.

27 18 U.S.C. § 4244 (1958).

tencing methods agree on any one thing, it would probably be the indispensable value of the presentence. Besides giving the judge a capsule social history of the offender, it can also provide him with an analysis of the factors leading to the offense and a prognosis for the offender's response to different sentencing alternatives. It may also contain supplemental diagnostic material obtained from clinicians and social agencies that previously dealt with the offender. Thus, it is not unusual for a comprehensive presentence to incorporate summaries of prior psychiatric evaluation, psychometric data from the offender's educational and vocational records, and case-history material secured from social and correctional agencies that once handled him. Although this material is often piecemeal when it reaches him, a skilful probation officer can blend it into a cohesive and valuable whole. He may, in addition, append a sentencing recommendation to the presentence report. Precisely how many federal judges solicit such recommendations is not known, nor are we sure of the extent to which judges rely upon them when they are made. But it is safe to assume that in many district courts the recommendation of the probation officer is an important influence on the judge. The judge, then, through his probation officer and other auxiliary services of the court, has access to a "nominal" group well-versed in the study of human behavior. Few would pretend that this "group" can be equated with a bona fide diagnostic clinic. Yet however unsystematically these sources of aid may be utilized, the fact is that sentencing in its present state offers many parallels to the features of the diagnostic clinic.

Statutory Sentencing Aids

Two statutes enacted in 1958 allow the federal judge to redistribute or delegate a major portion of the burden of his sentencing function. Under one of these laws the judge may tentatively impose the maximum allowable penalty, then commit the offender to the custody of the Attorney-General for study. The study is conducted at a federal correctional facility. Upon receipt of the findings the court can affirm, modify, or suspend the sentence originally imposed.²⁸ A similar provision was written into the Federal Youth Corrections Act some eight years before,²⁹ though this statute contains the added stipulation that the Youth Correction Division of the Board of Parole can be assigned the task of deciding, within six years after the date of conviction, the release dates of "youth offenders."³⁰ The second 1958 law empowered the judge to apply measures found in the FYCA — previously restricted to offenders under 22 years of age — to "young adult offenders" (22-25 years old). As a result of the 1958 statute, federal offenders in all age brackets may be referred to the Attorney-General for study over and above that which was already performed by the probation service and by the various collateral sources the court can tap. Presumably this would further enlarge the expertise fund at the court's disposal when it attempts to work out an appropriate disposition. Thus while these more recent statutes add new dimensions to the judge's discretionary power,

28 18 U.S.C. § 4208 (1958).

29 18 U.S.C. § 5017(c) (1958).

30 18 U.S.C. § 5010(e) (1958).

they simultaneously equip him with procedural tools for delegating portions of his sentencing power, or for making more knowledgeable use of that power. Whether by accident or design, these statutes are among the few instances in which sentencing legislation has benefited the judge as well as the offender.

Somewhat more remotely, the parole board is yet another agency to which the judge can delegate his sentencing power. This, of course, stems from the board's power to set release dates which, in effect, permits it to modify sentences imposed by the court. This prerogative ordinarily shifts from the court to the board once sentence has been imposed. At all events, the board can rectify errors in judgment made by the sentencing court or make adjustments according to the offender's response to correctional treatment. But such adjustments are in one direction only — toward reducing the length of prison sentences — inasmuch as the board lacks the power to extend a sentence beyond the maximum imposed by the court. Moreover, the power of the board relates chiefly to the sentencing alternative of imprisonment.

Two other recent developments in the federal judiciary deserve mention because of their possible impact on sentencing procedure. One was the Pilot Institute on Sentencing conducted in 1959, and attended by fifty-five federal judges and by representatives of various legislative, administrative and enforcement agencies with a stake in the topic. Such a gathering can, among other things, provide a forum for airing the problems inherent in sentencing, permit an exchange of viewpoints, and perhaps work toward standardizing sentencing practices throughout the federal system.³¹ Similar institutes may well be convened periodically in the future. The second development of note has been the limited experimentation with sentencing by teams of judges. This form of sentencing, which is not uncommon in Europe, is all but alien to American jurisprudence. Since 1960 a procedure that simulates panel sentencing has been under test in the United States District Court for the Eastern District of Michigan. Participating judges, after having studied digests of presentence reports, meet to offer their views on sentences suitable to the offenders in question. Final determination of sentences is, in contrast to the procedure followed abroad,³² solely the responsibility of the judge who actually presided over the trial. His disposition need not follow the recommendations of his colleagues, but it is likely to reflect his participation in the group discussion. This, too, might serve to standardize sentencing norms in a particular district, but it might also create an unwelcome tax upon the individual judge's time, an element already in short supply.³³

Evaluating Modern Sentencing Procedures

By now it should be clear that the federal judge is not impelled to drift

31 See Sharp, *The Pilot Institute on Sentencing*, Fed. Prob., Dec. 1959, p. 9.

32 See George, *Comparative Sentencing Techniques*, Fed. Prob., March 1959, pp. 27-29.

33 Greater consensus among judges on sentencing criteria would reduce sentencing disparities. The latter, however, inevitably accompany individualization; only a return to the uniform sentencing of classical penology would eliminate them. This simple fact, curiously enough, is often overlooked by some who, while they favor individualization, oppose the inequitable aspects of differential sentencing.

aimlessly and unaided on a sea of bewildering choices. Instead, he has within reach a variety of procedural lifelines, many of which are shared by state and local courts. All the same, sterner critics of judicial sentencing, especially those who would divest judges of the power to sentence, probably regard such measures as sentencing panels, sentencing institutes, occasional solicitation of advice from behavioral scientists, and perhaps even the presentence investigation, as makeshift tools at best. Even when these are available, there is no assurance that judges will use them; when used, there is no guarantee that the use will be systematic; and, finally, even when these are used systematically, we cannot be confident that they will work.

There are, to be sure, elements of truth in these misgivings. But in at least one important respect they lack relevance, since the crux of the matter is not that these measures are ineffective, since we know virtually nothing about their efficacy — or lack of it. On the whole, attempts to assess these devices have been more impressionistic than empirical. Ironically, this applies with equal force to the instrument often recommended to displace them — the diagnostic clinic.

Sentencing, like the prison, has long been a favorite whipping boy among many correctional theorists. But instead of summarily dispensing with contemporary sentencing procedures, common sense directs that we first learn whether they work. This would be a truly formidable undertaking, yet one that cries for attention if we are to make our desire to improve the administration of criminal law something more than a hollow one.