SOME ASPECTS OF JUDICIAL SENTENCING POLICY

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By providing the link between criminal law and the penal system proper, courts fulfill the key function of relating offenses in general to the punishment of particular offenders. Sentencing policy is therefore a subject of great concern to the criminal lawyer and criminologist alike. Since, in one article, no more than a few aspects of sentencing can be treated, I must restrict this survey of the subject. Very regretfully, I have excluded altogether all those immensely difficult philosophical problems which are customarily dealt with under the headings of "justice" and "objects of punishment." On a more technical level, I have also omitted such controversial matters of first-rate importance as the indeterminate sentence, the treatment tribunal (adult and youth authority), and the effect of prediction studies on sentencing,¹ all of which would require separate analysis. So, in a way, this Article must be considered a study of the torso of an ancient Greek statue—with a realization, that is, that many essential parts are missing. What remains is, both in scope and complexity, still more than can be adequately treated in one article. The literature, even if the survey is limited to American, British, French and German sources, is enormous, and the immensity of the case material staggering. In two of these four countries notable contributions to the legislative side of the problem have been made in recent years: in the United States in connection with the work of the American Law Institute on the draft of their Model Penal Code;² in West Germany in the preparation of the Official Draft Penal Code.³ With respect to Germany, one should bear in mind that, except for intervals enforced by the two world wars and political upheavals, work on a new penal code has been going on for more than half a century.

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1. See MANNHEIM & WILKINS, *PREDICTION METHODS IN RELATION TO BORSTAL TRAINING* (1955).

2. MODEL PENAL CODE (Tentative Draft No. 2, 1954).

3. 1 MATERIALIEN ZUR STRAFRECHTSREFORM, GUTACHTEN DER STRAFRECHTSLEHRER; 2 *id.*, Allgemeiner Teil, RECHTSVERGLEICHENDE ARBEITEN (1954).

This paper, then, deals with sentencing policy in its narrowest sense—the manner in which the courts when sentencing an offender use the discretion left to them by the law. Where the law provides only an absolute penalty, of course no room remains for discretion; all the court can possibly do is evade legislative barriers by, *praeter legem*, applying a legal provision which it should not have applied—for example, by accepting a plea to a lesser charge. Having a sentencing policy means, however, not merely using one's discretion but using it in a specific and consistent manner, with some ultimate object in view. Taken in a formal way, this need not imply more than consistency alone. Focused on the individual offender, this object of sentencing aims, first, at the most appropriate sentence—whatever that may be—for each of his offenses taken in isolation and, second, at the most appropriate treatment—whatever it may be—for the whole of his criminal activities, stretching perhaps over the larger part of his life. Focused on the criminal population as a whole, the concept of a sentencing policy means that there should be a consistent correlation—of whatever kind it may be—between the treatment allotted to one offender and that allotted to others. Whether this relation is or should be one of equality or something else is not implied in the neutral concept of a sentencing policy; rather, this is a philosophical-ethical and penological question of first importance. Of course, consistency is not enough for a good sentencing policy; a system of more than formal values is also needed.

The possibility has already been suggested that the law may completely deprive the courts of any discretion in sentencing. Such cases are rare, however, under modern legislation. Much more often, judicial discretion is limited by statutes which, for example, establish maximum or minimum penalties; make increased penalties mandatory for recidivists; prohibit the use of imprisonment for offenders under a certain age; permit the use of certain penalties such as preventive detention only for offenders with specified previous convictions; or prohibit the use of probation or suspended sentences for certain categories of offenders.⁴ Some of these provisions, maximum sentences in particular, are necessary for the protection of the individual offender. Others, such as those prohibiting the use of probation or the suspended sentence for certain categories of offenders—for first offenders in California, for instance, when charged with the possession of narcotics—have often been severely criticized.⁵ Although opinion differs on the wisdom of providing minimum sentences, they still occur even in some of the most recent criminal codes—in the Yugoslav Code of 1951, occasionally in the Danish Penal Code of 1930, and very frequently and with high minima in the Cuban Code of 1936. English criminal statutes contain no such minima, and I am not yet fully con-

4. See, e.g., GERMAN PENAL CODE § 23 (1950). Many of the individual states of the United States follow this practice. See the survey in MODEL PENAL CODE 13 (Tentative Draft No. 2, 1954). The draft itself is against all such restrictions, but provides instead a guide to the courts. *Id.* § 7.01.

5. See BOARD OF CORRECTIONS, NARCOTICS AND HYPNOTICS IN CALIFORNIA, REPORT 18 (1953).

vinced that they are really indispensable. Much will depend on the object which the legislator has in mind and his resourcefulness in finding less undesirable alternatives. If the object is simply to force the courts to impose long sentences for the sake of deterrence, its wisdom is doubted. If, however, constructive alternatives such as probation are provided and the object of having minimum sentences is merely to make the courts think twice before ordering imprisonment, perhaps the technique is acceptable. In any case, careful research would be needed to confirm the real effect of such a system, for the probation alternative might be used only in exceptional cases and the main effect of the minimum sentence might be to increase unnecessarily the length of prison sentences.

In addition to the above, rather rigid, restrictions, a host of more elastic legislative devices exists to guide the exercise of judicial discretion. Different scales of penalties may be set forth for cases with aggravating or mitigating circumstances; the courts may be directed to consult the penal administration, psychiatric or other experts, or to consider the reports of preliminary investigations by probation officers; or the use of a certain penalty, such as imprisonment, may be permitted only "if no other method of dealing with the offender is appropriate,"⁶ or if the offender has acted from "infamous" motives.⁷

Illustrations are unnecessary for each of these various possibilities in different jurisdictions but some mention must be made of the "lists of factors" included in many European penal codes.⁸ The Swiss Federal Penal Code of 1937, for example, which gives the courts fairly wide freedom of discretion while retaining minimum penalties for a number of offenses, contains a special section on sentencing—*Strafzumessung*.⁹ The Code first establishes the general principle that the judge has to select the sentence in accordance with the guilt of the offender, considering motives, previous history and personal circumstances.¹⁰ In addition, the court has power, in its discretion, to impose a more lenient penalty than the one ordinarily provided if the offender has acted from respectable motives, in great distress or under heavy threats; or at the instigation of a person to whom he owed obedience or upon whom he depended; or if he had been seriously provoked by the victim; or if he had been swayed by anger or serious pain at some grievous wrong; or if he had shown sincere remorse and had made good the damage as far could in fairness be expected of him; or if a comparatively long interval had elapsed subsequent to the offense and he had conducted himself well in the meantime. The Swiss Code has no corresponding list for aggravating factors. The position is similar

6. See Criminal Justice Act, 1948, 11 & 12 GEO. 6, c. 58, § 17, for treatment of persons under twenty-one.

7. The "*ehrlöse Gesinnung*" of GERMAN PENAL CODE § 20 (1950).

8. For a wealth of interesting comparative material see 2 MATERIALIEN ZUR STRAFRECHTSREFORM, *op. cit. supra* note 3, at 85, 89.

9. SWISS FEDERAL PENAL CODE arts. 63-69 (1937).

10. *Id.* art. 63.

in another modern penal code, that of Denmark of 1930.¹¹ By way of comparison, the penal code of a country slightly more to the east (but not quite within the Iron Curtain)—the Yugoslav Penal Code of 1951—differs principally in that it requires the seriousness of the consequences of the offense to be considered,¹² an element not present in the Swiss Code. Where Yugoslav law so provides, higher penalties may be imposed for serious offenses which appear to be particularly dangerous in view of the determination, persistence, or recklessness of the offender and which had especially grave consequences or were committed under aggravating circumstances. Extending the inquiry behind the Iron Curtain to the Czechoslovak Penal Code of 1950, we find a somewhat different atmosphere.¹³ In addition to traditional considerations such as the offender's degree of guilt, personality and corrigibility, a few politically flavored factors have been added, notably whether the offender had, through the offense, expressed his hostility to the people's democracy or endangered the political, military or economic interests of the republic.¹⁴ Needless to say, similar politically flavored factors are also included in the Soviet Penal Code.¹⁵

In a recent comparative survey carried out by the Institute of Foreign and Comparative Criminal Law of the University of Freiburg, within the framework of the preliminary studies for the preparation of the new West German Penal Code,¹⁶ an attempt has been made to distinguish three groups of legal systems: first, those which provide only one general rule for the guidance of the courts; second, those which add to this general rule a number of more or less detailed, specific lists of aggravating and mitigating circumstances; and, finally, those where there are no such rules whatsoever.¹⁷ Great Britain and the United States are the only countries included in the third group, and the author stresses that here the study of court practice becomes all the more important as the only source from which any clue can be obtained to the general principles governing the administration of criminal justice in these countries. It is of course not entirely true to say that there is a complete absence of this type of rule in the Anglo-American legal systems. What is true of English law is that in the absence of a penal code there is no place where such general rules could appropriately appear, and consequently, the legislator has to be content with a few directives scattered through the statute book in a rather casual fashion. At least one provision in English law, however, though

11. DANISH PENAL CODE arts. 80-91 (1930). The Danish, Yugoslav and Czechoslovak penal codes are here quoted from the German translations, published in SAMMLUNG AUSSERDEUTSCHER STRAFGESETZBÜCHER (Institute of Foreign and Comparative Criminal Law, University of Freiburg 1952).

12. YUGOSLAV PENAL CODE art. 38 (1951).

13. CZECHOSLOVAK PENAL CODE arts. 19-21 (1950).

14. *Id.* art. 20.

15. SOVIET PENAL CODE art. 47 (1926).

16. Special reference should be made to the two contributions on legislative problems of sentencing in 1 MATERIALIEN ZUR STRAFRECHTSREFORM, *op. cit. supra* note 3, at 1-28.

17. See 2 *id.* at 89.

limited to juvenile courts, contains the rudiments of a general philosophy for the guidance of these courts. This is the provision in the Children and Young Persons Act which directs that the juvenile courts, in dealing with a defendant, "shall have regard to his welfare."¹⁸ Similar provisions can be found in American juvenile court laws.¹⁹ In spite of the seemingly clear wording of the English act, however, whether considerations of deterrence have to be excluded altogether remains in doubt, and in practice these considerations are sometimes given weight.

A point of controversy for many years in the literature on criminal law has been whether statutory directives on sentencing are necessary, or even advisable at all, and whether they achieve their intended effect. Fairly strong arguments on either side have emerged, for example, from recent discussions on the American Law Institute's Tentative Draft. Against any general formulas, the argument is made that, ordinarily, they are nothing but pious platitudes which every trained judge and even every lay magistrate of average intelligence will know and apply anyhow, and that their omission avoids the danger of occasional misinterpretation. In their favor, on the other hand, is the fact that lay magistrates in actual practice have occasionally ignored or misunderstood even the most obvious principles of sound sentencing. During the last war, for example, a bench of English lay magistrates solemnly stated that their tariff for a certain traffic offense was a fine of a stated amount, regardless of the means of the offender, since anything else would be against the principle of equal treatment; and they applied this principle until forcibly reminded by the Lord Chief Justice that, under the Criminal Justice Administration Act of 1914,²⁰ they were legally obliged to consider the offender's financial position. Even to learned judges, however, explicit instructions will often be useful as to which of the various penal philosophies they are expected by law to apply in their judicial work—whether, for example, as provided in the Swiss Code, the subjective element of guilt should take precedence over objective factors such as the harm done by the offense. As will be suggested later, quite a number of factors can actually be dealt with in very different ways in sentencing practice depending upon the underlying philosophy or penological theory; and, unless the legislator provides some specific guidance, chaos will almost inevitably be the result. I am not saying, of course, that where such provisions do exist there will not be confusion; but it will be less frequent. Thus it is essential that the legislator make his position clear about certain questions. Does he believe in retributive punishment or in a modernized *lex talionis* as the supreme object of criminal justice; or does he prefer to pursue the object of protecting society by means of prevention in its various forms? Within the framework of prevention, does he seek the deterrent or the re-educative and socializing effect? Should the sentence take into account solely

18. Children and Young Persons Act, 1933, 23 & 24 GEO. 5, c. 12, § 44.

19. See COSULICH, *JUVENILE COURT LAWS OF THE UNITED STATES* 109 (2d ed. 1939).

20. Criminal Justice Administration Act, 1914, 4 & 5 GEO. 5, c. 58, § 1(b)-1.

the character of the offender or, as the American Law Institute has proposed, the seriousness of the offense as well? After these fundamental issues have been clarified, guidance is still desirable on some perhaps slightly less fundamental but equally important practical issues, for example, the legislator's attitude toward recidivism and toward certain personal factors such as the social position of the offender. More detailed guidance of this sort assists an appellate court in altering sentences imposed by lower courts. This view seems to be shared by Judge Gerald F. Flood, who writes about these provisions of the Draft Model Code of the American Law Institute:

"When the Judge has such criteria before him on the bench in the form of a statute as he sentences, his sentencing will be better done, I am convinced, and these criteria will tend to make sentencing more uniform and more rational."²¹

He complains, though, that the criteria used in the Draft Code are "all qualitative, not quantitative," making their application more difficult.

Once the principle is accepted that some sort of legislative guidance is desirable, a further question is, how detailed should it be. A characteristic feature of English criminal law is that in those infrequent instances in which it provides any guidance, it couches this guidance in more general and vague terms than does the legislation of other countries. It is interesting, for example, to compare the provision of section three of the 1948 Criminal Justice Act, with its very general phrase that the courts, instead of sentencing the offender, may make a probation order if, "having regard to the circumstances, including the nature of the offense and the character of the offender, it is expedient to do so," with the corresponding section of the American Law Institute's Tentative Draft, where to the same general considerations a list of eight specific "grounds" is added, each of which might justify the court's view that a prison sentence is "unnecessary for the protection of the public."²² Legislative efforts to guide judicial discretion have in some cases produced absurdities, as with the lists of mitigating and aggravating circumstances in the Cuban Criminal Code of 1936, occupying four pages in print and culminating in the provision of article seventy-five, according to which the court in cases showing both mitigating and aggravating factors has to "balance one against the other in proportion."²³ Regrettably, no reliable research techniques seem to be available at present for examining the effect on sentencing policy of differences in the wording of this type of legal provision.

So far, only legislative devices which are intended to influence judicial sentencing policy have been mentioned. Certain types of legislation also exist which can have an unintended effect on that policy or even consequences contrary to the objectives of the lawgiver. If a penal code, yielding to the thoroughly justified recommendation of modern penologists that the use of

21. Flood, *Sentencing Function of the Judge*, 45 J. CRIM. L., C. & P.S. 531, 532 (1955).

22. MODEL PENAL CODE § 7.01 (Tentative Draft No. 2, 1954).

23. See also CUBAN CRIMINAL CODE arts. 37-41 (1936).

very short prison sentences be further restricted, should prohibit all sentences of, say, less than three or six months, the courts, as already mentioned, could easily impose the minimum permissible prison sentences even in cases in which it was the real intention of the legislature that a form of punishment other than imprisonment be selected.²⁴ Or, if a statute provides absolute or minimum penalties which are regarded as too harsh, the courts can either convict of a lesser charge or disregard the scale of penalties and stick to the legal minimum without regard for the varying gravity of individual cases.²⁵ In one of the most recent and most detailed studies of the problem,²⁶ the author, a former city court judge in Copenhagen, expresses the view that the fixing of maximum sentences by law has almost no practical significance because judges rarely use the upper range of penalties provided. On the other hand, in the recent English report of the so-called Wolfenden Committee on Homosexual Offences and Prostitution,²⁷ the view is taken that "as long as the law provides the maximum penalty of life imprisonment for buggery without any regard to the circumstances in which the offence is committed," the courts will inflict heavier sentences for this crime than for indecency; in other words, the legal maximum does matter.

In sum, we are faced with the universal, centuries-old and still-unsolved problem of how much discretion should be left to the courts by the legislator.²⁸

Commentators agree that the gravity of a certain offense as such—manslaughter, for example—should play no part in judicial sentencing policy since it has already found its expression in the legal scale, and that all that the court should do is evaluate specifically the individual case, of say, manslaughter, in question. This view has been explicitly stated in the resolutions of the German Penal Code Reform Commission.²⁹ The same reasoning may be extended to aggravating circumstances, such as recidivism, which make it mandatory for the court to apply higher penalties. In actual practice, double-

24. See MANNHEIM, GROUP PROBLEMS IN CRIME AND PUNISHMENT 251 (1955).

25. See Mannheim, *Über Gleichmässigkeit und Systematik in der richterlichen Strafzumessung*, 42 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 40, 47 (1921).

26. See VAN EYBEN, STRAFUDMALING (1951), reviewed by Andenaes in 6 BRIT. J. DELINQ. 152 (1955).

27. REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION 34 (1957).

28. This problem was discussed at the Seventh International Congress on Penal Law, which met at Athens in the fall of 1957, under the heading *La controle du pouvoir d'appréciation du juge dans la détermination des peines et des mesures de sûreté*. See Symposium, 26 REVUE INTERNATIONALE DE DROIT PÉNAL 221 (1956); German reports submitted to the Congress in *Deutsche Beiträge zum VII. Internationalen Strafrechtskongress*, SONDERHEFT DER ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 99-147 (1957). See also general report by Gafos in LES QUATRES RAPPORTS GÉNÉRAUX PRÉSENTÉS AU CONGRÈS D'ATHÈNES (1957).

29. Dreher, *Die erste Arbeitstagung der Grossen Strafrechtskommission*, BEILAGE ZUM BUNDESANZEIGER 176. See also ENTWURF DES ALLGEMEINEN TEILS EINES STRAFGESETZBUCHS § 62 (1958).

counting of the same considerations is difficult to prevent unless this reasoning is made explicit.

Of course, many other ways, apart from those hitherto mentioned, may be found to influence judicial sentencing policy, and only a brief enumeration of these techniques, with no consideration of the influence of political pressure, will be attempted here. Both prosecution and defense may have a prominent place in determinations of sentence. The prosecutor, especially if permitted or required by law to propose the specific penalty to be imposed, can exert a strong influence on the court. And where, as on the European Continent, he is a member of a highly centralized civil service, he can also exert influence in favor of greater uniformity of sentencing. In Scotland, the public prosecutor even supplies the court with a list of sentences imposed by other courts for similar offenses.³⁰

Similarly, preliminary investigations made by probation officers into the offender's personality and background have an ever-increasing effect on the work of the courts, regardless of whether or not probation officers are allowed to express their personal views in such reports or to make recommendations regarding sentence. In English magistrates' courts, since most of the magistrates are laymen, the clerk to the justices also may play an important part in the selection of the sentence.

Although the English Home Office strongly disclaims any intention of wishing to influence the magistrates, official circulars and speeches drawing attention to certain abuses, such as excessive leniency or severity of the sentences imposed for certain types of offenses, can hardly fail to affect magisterial sentencing policy, usually in the desired, occasionally, perhaps, in the opposite direction. The former Home Secretary, Mr. Gwilym Lloyd George (now Viscount Tenby), in his address to the thirty-sixth annual meeting of the Magistrates' Association in October 1955, said:

"It is not for me to tell the courts how to enforce the law; but the statistics for 1953 show that in 80,000 convictions for speeding there were only 200 disqualifications . . . and the average fine imposed was about £2 10s; two thirds of those convicted in the magistrates' courts of reckless or dangerous driving were not disqualified These are figures which provide a good deal of food for thought and suggest that some courts at any rate should consider whether their practice is appropriate in the light of current conditions."³¹

Remarks of this sort before a large gathering of magistrates could hardly fail to influence their sentencing policy and, of course, in the right direction. The same influence can be found in the views expressed by leading judges in England, especially by the Lord Chief Justice, in statements to the Magistrates' Association or to regional meetings of magistrates or in press inter-

30. See Keedy, *Criminal Procedure in Scotland*, 3 J. CRIM. L. & CRIMINOL. 834, 844 (1912-13).

31. 11 MAGISTRATE 141, 142 (1955). Similar views were expressed a year later by the Lord Chancellor. *The Times* (London), Oct. 20, 1956, p. 2, cols. 11-12.

views. Addressing the thirty-seventh annual meeting of the Magistrates' Association in October 1956, the Lord Chief Justice confessed his surprise at "how frequently shoplifting cases, in which magistrates have taken a severe line and passed a sentence of imprisonment, are interfered with in some courts of quarter sessions and the sentence altered to a fine."³²

The position of the Court of Criminal Appeal in England, that of the supreme courts of continental countries or that of the various American appellate courts is a most interesting chapter in itself which would require some special treatment in a separate paper.³³ Only one point should be mentioned here: the English Court of Criminal Appeal, especially under the present Lord Chief Justice, Lord Goddard, not only occasionally makes substantial changes in the sentences imposed by the lower courts, but also through its decisions has altered the range of certain penalties provided by the Criminal Justice Act of 1948. This act fixes the minimum period of corrective training at two years.³⁴ In a case in 1951, *Rex v. Grant*, Lord Goddard quite rightly observed: "A sentence of three years corrective training which means two years, is the least sentence which is likely to be of any use."³⁵ Consequently, the Commissioners of Prisons were able to report in 1952 that the number of such sentences of under three years had fallen from more than a quarter in 1950 to one eighth in 1951; and in 1956 it was only one fourteenth of the total.³⁶ Similarly, while the legal minimum for sentences of preventive detention is five years under the same act, the Court of Criminal Appeal declared in 1950 that "seven years at least is the irreducible minimum, and it should be generally eight years or even longer."³⁷ The result has been a striking decline in sentences of preventive detention of under seven years and an almost complete predominance of sentences running from seven to ten years.³⁸ The court justifies the imposition of a longer sentence explicitly by reference to the curtailment effect of the one-third remission which, under the rules, every prisoner "earns" unless he misbehaves.³⁹ In this way, rightly or wrongly, the administrative system of remission is, through the sentencing policy of the courts, deprived of its practical meaning. In a similar vein, the Court of

32. 12 MAGISTRATE 137, 138 (1956).

33. On American law, see ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939); Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521, 762 (1937); PFERSICH, *DIE STRAFZUMESSUNG IM LICHT DER MODERNEN AMERIKANISCHEN SCHULE* 71, 118 (1956). On German law, see VON WEBER, *DIE RICHTERLICHE STRAFZUMESSUNG* (1956); MANNHEIM, *BEITRÄGE ZUR LEHRE VON DER REVISION WEGEN MATERIELLRECHTLICHER VERSTÖSSE IM STRAFVERFAHREN* c. 3 (1925).

34. Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 21.

35. [1951] 1 K.B. 500, 504.

36. REPORT OF THE COMMISSIONERS OF PRISONS FOR THE YEAR 1951, 28 (1952); REPORT OF THE COMMISSIONERS OF PRISONS FOR THE YEAR 1956, 77 (1957).

37. *Rex v. Sedgwick*, 34 Crim. App. R. 156, 157 (1950).

38. See Edwards, *A New Doctrine in Criminal Punishment*, 72 L.Q. REV. 117, 120, 122 (1956).

39. See Fox, *THE ENGLISH PRISON AND BORSTAL SYSTEMS* 166, 314 (1952).

Criminal Appeal has made it clear that, while the Act of 1948 stipulates no upper age limit for sentences of corrective training, "corrective training should not be given to a person over 30 years of age, and certainly not to a person over 35."⁴⁰

Reluctantly, we shall probably have to agree with Professor Lester B. Orfield that the problem of sentencing is "not soluble by an appellate court."⁴¹ One of the most serious weaknesses of the appellate system is that it can operate only if one of the parties is willing and also entitled by law to lodge an appeal. Whether or not a *reformatio in peius* is permitted plays an important part in this connection. Different legal systems show widely varying degrees of willingness to encourage appeals, and the whole subject is full of intricate procedural problems. In any case, it is not surprising that in some legal systems there have been tendencies to make revision of a sentence by a higher court possible without an appeal. The American Law Institute's Draft Code proposes to give the commissioner of corrections power in certain circumstances to petition the court to resentence the offender.⁴² This seems to be a proposal worthy of the most serious consideration.

A final influence on sentences is an unexpected newcomer—research into sentencing policy. Though still in its initial stages, such research has in the past thirty years grown fairly steadily in magnitude and refinement. The day may not be too far distant when it will present judges and magistrates a mirror which will faithfully reflect the weaknesses and inconsistencies of their sentencing policies, a mirror which will give the judiciary growing insight into its work and, perhaps, even into its own personalities, eventually leading to required changes in policy.

With some oversimplification, research on sentencing can be divided into the following categories. First, analysis may be made of the general principles underlying selected judgments in individual cases, relating the judgments to the various theories of penal philosophy to see whether such judgments can be regarded as expressions of retributive concepts or of ideas of general or special prevention, and so on. This might be called the philosophical approach to sentencing policy, and does not require research based on large numbers of cases selected according to rigid statistical sampling procedures. Rather, it is best confined to comparatively few representative decisions by eminent judges like Justices Holmes and Cardozo and Lord Chief Justice Goddard. An important feature of such an analysis of general principles will be an examination of the specific factors which should be taken into consideration in evaluating actual court practice in accordance with the basic philosophy of the law concerned.

40. The Times (London), Oct. 14, 1952, p. 11, cols. 13-14.

41. ORFIELD, *CRIMINAL APPEALS IN AMERICA* 117 (1939).

42. See also Ploscowe, in *CONTEMPORARY CORRECTION* 57 (Tappan ed. 1951) (proposal to establish a court of sentence adjustment). The system adopted in Massachusetts in 1943 of establishing an appellate division of the superior court for the review of sentences seems to have worked well; it has recently been recommended in Connecticut, with some improvements. GOVERNOR'S PRISON STUDY COMMITTEE, *FIRST INTERIM REPORT* 8 (1956).

This feature suggests a second technique: statistical analysis of the penalties imposed in selected samples of cases, with attention to the nature of penalty, length of detention, amount of fine, relative frequency of imprisonment, probation, and so on. Attention must also be given to statistical comparisons of local, regional and national variations, of differences between various periods of time and of differences in penalties imposed for the same or for different types of offenses. Differences may also exist between individual benches or judges; and the judgments of criminal appellate courts should be scrutinized to see whether or not they are reluctant to interfere with the sentencing policy of the lower courts and in what directions they are inclined to interfere. Moreover, some study of the kind of factors usually considered as mitigating or aggravating is helpful. The list may of course be extended, but it is enough to suggest a third focus for research.

This may consist of sociological and psychological studies of the background of judicial sentencing, attempts to supplement and interpret the statistical findings through detailed individual case studies plus more refined statistical analyses of the social, psychological and political backgrounds of individual judges and magistrates, their age, sex, economic and social background, religion, race, education, marital status, professional or lay status. Investigations of sentencing policy may be centered on attitudes and beliefs held by various groups regarding the severity of specific types of offenses and of individual offenses, and on the sociological and ecological backgrounds of the communities concerned and the state of crime within them.

A considerable amount of overlapping and combination between these different approaches is inevitable and all to the good. What is regrettable is that research workers using one technique are too often indifferent to, or completely ignorant of, the others. Here, as elsewhere, constant synthesis and teamwork are needed between the lawyer and legal philosopher, the penologist and statistician, the sociologist and psychologist. Of equal importance is a truly international outlook, a sincere determination to keep abreast of contemporary developments in other countries, even in legal systems of an entirely different structure.

At this point, I must mention a few, probably too obvious, formal points in connection with these suggested lines of research. Of course, much study has already been devoted to the examination of the philosophical principles underlying judicial sentencing and their bearing on actual court decisions. But it should never be assumed that any sentencing policy can be explained solely in terms of the specific penal philosophy to which the judges concerned adhere. This essential proviso has to be made, because no penal philosophy can today be based upon one single idea, be it retribution, prevention or whatever; rather will it be a somewhat dubious mixture of heterogeneous elements, perhaps with one element predominating in the mind of judge *A*, another in the mind of judge *B*. Moreover, this hybrid penal philosophy will often have to give way to the stark realities of life: orders to an approved school or probation

orders cannot reasonably be made if no vacancies exist in such schools or if the probation officers concerned are already too overworked to look after another case. An order to a detention center obviously will not be made if the district in question does not possess such an institution. Financial considerations, practical availability and quality of the treatment concerned will often enough be stronger determinants than philosophical conceptions and, as one jurist rightly says: "The judge should constantly ask himself the question 'What is the quality of the available service' . . . ?"⁴³

Moreover, for reasons other than the practical availability of certain penal or reformatory measures, the sentencing policy of the courts cannot always be a simple reflection of traditional penal philosophy. In 1950, a case came before a London court in which ten gasworkers were fined for their part in a strike, although the Attorney General at that time, Sir Hartley Shawcross, was reported to have stated that "the criminal law was a quite ineffective weapon for the settlement of trade disputes."⁴⁴ Everyone is aware of the limited value of penal action in cases of mass strikes. Nevertheless, in this case it brought the gasworkers strike to an end, probably not because of any retributive, deterrent or reformatory effect that modest fines could possibly have on strikers, but because it was regarded as an authoritative declaration, which brought home the illegality of their action. In other words, judicial sentencing may sometimes have no punitive object but merely a declarative one, as in cases in which the interpretation of a criminal statute is in doubt and a clarification can be obtained only by a criminal trial.

With respect to analyzing specific factors, as soon as an attempt is made to get away from empty commonplaces, the task becomes most intricate. Here, the necessary examination involves the degree to which matters actually considered by the courts are the same as those included in the list of the various penal codes, and whether they are given the same weight. To illustrate, the fact that defendant is a woman may influence the court. Yet, apart from the former English "presumption of subjection," abolished in 1925, and the Infanticide Acts of 1922 and 1938, I do not know of any statute entitling the female sex to special treatment by English courts. Nevertheless, women are known to be accorded greater leniency than men in court practice. In 1940, I wrote: "Speaking generally, the percentage of women decreases in conformity with the severity of the particular method of penal treatment."⁴⁵ And that able advocate of the female offender, Professor Mabel Elliott, observes that in the United States in 1946, 10.3% of male offenders received serious sentences as against 5.7% of women.⁴⁶ The same picture emerges from the most recent English criminal statistics, according to which probation

43. Hill, *A Judge's Guide to Sentencing*, 2 N.P.P.A.J. 308, 313 (1956).

44. The Times (London), Oct. 10, 1950, p. 3, col. 3. See also MANNHEIM, CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION 175, 178 (1946).

45. MANNHEIM, SOCIAL ASPECTS OF CRIME IN ENGLAND BETWEEN THE WARS 343 (1940).

46. ELLIOTT, CRIME IN MODERN SOCIETY 204 (1952).

is used more than twice as frequently and prison about one third less frequently for women than for men.

A second illustration is found in the difficult problem posed by recidivism, which was the central topic at the Third International Congress of Criminology in London in 1955.⁴⁷ While probably most penal codes, even the more recent ones, regard recidivism as a factor making mandatory the imposition of more severe sentences, the London Congress expressed itself against any automatic increase in the length of sentence for each new offense.⁴⁸ The most categorical refusal to impose more severe sentences has come recently from an English High Court judge, Mr. Justice Donovan, who, in one of the trials connected with the notorious Jack Spot case, is reported to have said: "I am not going to punish you for your criminal records; you have been punished for your past crimes, and it would be unfair to punish you again."⁴⁹ There is hardly any need to add that some eminent psychiatrists, Dr. Edward Glover among them, favor the complete abolition of the term recidivism as an unwarranted "tendency to get angry with refractory cases" and to assume that "because an offender has been given a prison sentence . . . he really should not commit the same or any other crime again."⁵⁰ In view of such wide differences of opinion, the safest approach would seem to be to give the courts fairly wide discretionary power to deal with recidivists either by more severe penalties or, better, by more effective methods of diagnosis and treatment. Most important of all, improved training for judges, magistrates and correctional staffs should be provided. Neither the rigid techniques of old-fashioned penal laws nor the categorical refusal of Mr. Justice Donovan to be "unfair" to the recidivist would seem to be adequate in itself.

A third illustration may be taken from the delicate question, to what extent should a confession or a plea of guilty be considered as a mitigating factor. In former days, an admission of guilt reduced the sentence almost as a matter of course. Such an admission is still explicitly mentioned in some penal codes as a potentially mitigating factor, though usually with appropriate safeguards like the requirement that the offender must have given himself up voluntarily before criminal proceedings were to his knowledge begun against him.⁵¹ Generally speaking, however, we have become too aware of the great variety of psychological situations—conscious or unconscious motivations—behind such

47. See Note, 6 BRIT. J. DELINQ. 222 (1956); Mannheim, *Introduction*, in TRANSACTIONS OF THE CONGRESS (1957).

48. See TRANSACTIONS OF THE CONGRESS, Resolution of Section V(2) (1957); Mannheim, *Introduction*, in *id.* at 20; Ancel, *Le Recidivisme en Droit Comparé*, 26 RÉVUE INTERNATIONALE DE DROIT PÉNAL 14 (1955).

49. The Times (London), June 16, 1956, p. 6, col. 7.

50. Glover, *Prognosis or Prediction: A Psychiatric Examination of the Concept of "Recidivism"*, 6 BRIT. J. DELINQ. 116 (1955).

51. See, e.g., DANISH PENAL CODE art. 84, § 9 (1930); CZECHOSLOVAK PENAL CODE art. 21(h) (1950); CUBAN PENAL CODE art. 37, § D(2) (1936); SPANISH PENAL CODE art. 9, § 9 (1928).

confessions, and the potential procedural dangers connected with them, to be satisfied with any such simple solutions. In particular, we feel no need to include confessions in a list of mitigating circumstances. As experience shows, and as an illuminating survey by the *Yale Law Journal* recently demonstrated, judges are likely to be influenced in favor of the accused by a plea of guilty in any event.⁵² The danger exists that police and public prosecutors may make improper use of this judicial tradition (as it can safely be called). The Yale survey rightly stresses the fact that a plea of guilty could be regarded as a symptom of remorse only if it were not treated as a mitigating factor by the law and judicial practice.

These three illustrations may suffice to show how confused are the factors underlying sentencing policy—especially the relationship between law and practice. In one instance, recidivism, statutory law may try to afford some guidance, but the guidance is only inadequately related to criminological and penological thought. In another instance, confession and plea of guilty, the law sometimes gives a direction which may be misleading or even dangerous. In a third instance, sex of the offender, the statutes are silent, and the courts often solve the problem in an oversimplified fashion by giving more lenient sentences to females regardless of the merits of the case. No real integration has as yet been achieved between theory and practice, between law, criminology and penology.

Statistical studies of penalties imposed have been made for approximately forty years, beginning in the United States, probably with the work of Everson in New York.⁵³ With a few notable exceptions in Germany, Austria, Denmark and several recent studies in England, most of the subsequent work has also been done in the United States, culminating in the *Attorney General's Survey of Release Procedures*.⁵⁴ Since a few good surveys of American literature on the subject are available, no point is served by duplicating them here.⁵⁵ Attention might better be directed to one or two studies written in languages other than English and therefore perhaps less widely known, and to work which has recently been done or is awaiting completion in England.

First on any list is Franz Exner's famous book of 1931 *Studien über die Strafzumessungspraxis der deutschen Gerichte*, probably the first competent statistical investigation of criminal penalties published on the Continent.⁵⁶

52. Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 206 (1956).

53. Everson, *The Human Element in Justice*, 10 J. CRIM. L. & CRIMINOL. 90 (1921).

54. ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939).

55. The most recent survey is in German. PFERSICH, DIE STRAFZUMESSUNG IM LICHT DER MODERNEN AMERIKANISCHEN SCHULE 111 (1956). For surveys in English, see Gaudet, *The Sentencing Behavior of the Judge*, in ENCYCLOPEDIA OF CRIMINOLOGY 449 (Branham & Kutash ed. 1949). See also Hill, *A Judge's Guide to Sentencing*, 2 N.P.P.A.J. 308 (1956); Glueck, *Sentencing Problem*, 20 FED. PROB. 15 (1956).

56. Exner, *Strafzumessungspraxis*, 16 KRIMINALISTISCHE ABHANDLUNGEN (1931). The German literature on the subject has been reviewed in Spindel, *Zur Lehre vom Strafmaß*, 10 FRANKFURTER WISSENSCHAFTLICHE BEITRÄGE (1954).

His principal findings relate, first, to the growing leniency of judicial sentencing in Germany under the Penal Code of 1871: the percentage of fines for felonies and misdemeanors, for example, rose from 25% in 1882 to over 50% in 1911 and to 70% in 1928, and was accompanied by a corresponding fall in sentences of penal servitude. Second, the legal minima and maxima seemed to mean very little to the courts; in some instances offenses with higher maxima received, on an average, more lenient penalties than offenses with lower maxima, and legally aggravating circumstances were occasionally even treated as mitigating factors.⁵⁷ This was a clear showing that the views of judges were often different from those expressed in the penal code. Mitigating circumstances, Exner states, were found not because they were actually present, but because the judges were determined to impose a more lenient penalty. Third, Exner demonstrates very striking contrasts in the penalties imposed by courts in different districts, contrasts which, he says, were due not to local variations in criminality but to the diverging views of the judges arising from their different local traditions, especially from habits of leniency or severity which had been traditional in different parts of Germany before the passing of a Uniform Penal Code in 1871. Closely connected with this, the whole "ethnological, social and religious atmosphere" from which the individual judges came influenced the peculiarities of their respective sentencing policies.⁵⁸ Altogether, Exner stresses that changes in sentencing are due not to rational calculations and to a conscious *Kriminalpolitik* on the part of the judges, but solely to irrational elements. He admits, however, that the trend towards leniency might possibly also have its explanation in the fact that crime had shown no permanent increase in Germany even following the upheaval of the first World War and its aftermath.⁵⁹

In Roland Grassberger's detailed analysis of various statistical aspects of Austrian crime, especially recidivism, comparatively little attention is paid to the relation between criminality and sentencing.⁶⁰ Nevertheless, he does show that recidivism was treated as an aggravating factor in Austrian practice much more in cases involving offenses against property than in cases of offenses against the person. This difference in evaluation was, however, in harmony with the clearly expressed tendency of the penal code. On the other hand, early onset of criminality, universally regarded by criminologists as indicating the likelihood of persistent recidivism, was not adequately taken into consideration by the courts.

The studies recently made in England can also be classified as investigations of changes over a period of time on the one hand, and comparisons between regions or courts on the other. A few studies combine both aspects,

57. Exner, *op. cit.* *supra* note 56.

58. *Id.* at 54.

59. *Id.* at 28-29.

60. GRASSBERGER, DIE LÖSUNG KRIMINALPOLITISCHER PROBLEME DURCH DIE MECHANISCHE STATISTIK 104 (1946).

and one or two others deal with more specific questions such as the problem of very short prison sentences.

With regard to changes over time, the same tendency towards ever-increasing leniency noted by Exner in Germany is also observed by Leon Radzinowicz in England in a paper dealing with the period 1900 to 1936.⁶¹ He finds a decline in the proportion and length of sentences of penal servitude and imprisonment for indictable offenses from 49.4% in 1900 to 28% in 1924 and 18.2% in 1936. This trend, however, was not, as in Germany, accompanied by a corresponding increase in fines; their percentage remained fairly constant, with 22.2% in 1900 and 19.3% in 1936, but "release with or without conditions"—a form of sentence which may include probation—rose from 17.1% in 1900 to 46.6% in 1924 and 55.5% in 1936. Probation orders, as a consequence of the enactment of the Probation of Offenders Act of 1907, rose from 39.8% in 1910 to 52.4% in 1936. Moreover, sentences of penal servitude became not only much rarer, but also much shorter during that period, with sentences of over five years declining from 15.1% in 1900 to 4.1% in 1936; there was also considerable decline in very short sentences of up to two months—47.3% in 1936 against 78.2% in 1900. On the other hand, an increase took place in the percentage of prison sentences imposed by magistrates' courts running between two and six months (52.7% in 1936 against 21.8% in 1900); and "medium-term detention"—sentences of imprisonment of over six months and up to two years—increased from 39.6% to 58.9% at the assizes and quarter sessions. Radzinowicz offers a brief explanation of this marked trend towards greater leniency. As Exner had done some fifteen years earlier in Germany, he too refers to the stable and in no way disquieting character of crime in England during that period. On the whole, however, his emphasis falls more on such factors as relatively high prosperity, national security, improved social services, public confidence in the police and increasing knowledge of the causes of crime and the effects of traditional punishments.

Considerable changes in English sentencing policy have taken place in the period following the one to which Radzinowicz's study refers. Such a comparison is not easy because of the legal changes introduced by the Criminal Justice Act of 1948, but the following figures taken from the annual reports of the prison commission are not without significance.⁶² Very short prison sentences continue to decline, but from three months upward there is a sharp rise, particularly for sentences of eighteen months to ten years. While in 1938 only 373 men received sentences between three and ten years, the figure for 1954 was 1,672, more than four times as many. Here is an explanation for the fact that, although the annual number of men committed to prison had risen only from some 26,000 in 1936-40 to 31,000 in 1954, the average

61. Radzinowicz, *The Assessment of Punishments by English Courts*, in *THE MODERN APPROACH TO CRIMINAL LAW*, 4 *ENGLISH STUDIES IN CRIMINAL SCIENCE* c. 8 (1945).

62. PRISON COMMISSION, *ANNUAL REPORT* 40 (1955). The above figures refer to men only.

daily population had more than doubled.⁶³ If, in addition, we consider that between 1938 and 1955 the percentage of male persons fined for indictable offenses rose from 15 to 36 in the age group seventeen to twenty-one and from 27 to 45 in the age group twenty-one and over, and that, on the other hand, the percentages of males placed on probation for such offenses fell from 42 to 26 in the age group seventeen to twenty-one and from 18 to 12 in the age group twenty-one to thirty, we are justified in calling this an almost wholesale change in sentencing policy since the beginning of the last World War.⁶⁴

In a more recent English study by Max Grünhut, *Juvenile Offenders Before the Courts*, the long overdue attempt is made, at least for the limited field of juvenile delinquency, to examine statistically the relationship between variations in delinquency and variations in magisterial policy.⁶⁵ Is this policy merely a faithful reflection of the diverse patterns of delinquency? Certain links are in fact established between the two sides of the subject. While the general trend in English juvenile court policy within the periods under review in Grünhut's book, 1936-38 and 1948-50, shows an increasing use of fines—14% against 6.4%—at the expense of probation—45.6% against 52.7%—a distinctive positive correlation emerges between high delinquency areas and increasing imposition of fines and, on the other hand, low delinquency areas and more frequent use of probation.⁶⁶ There is no evidence, however, to justify the conclusion that greater utilization of probation was responsible for the low rate of delinquency. All one can say is that it produced no increase. Moreover, no conclusive evidence emerges from this study to show what would be the best treatment policy for serious forms of juvenile crime.⁶⁷ A number of explanations might be given for the general decline in the use of probation in post-war England, but shortage of space prevents further discussion.

A simultaneous but less extensive study was recently made of the work of the eight London juvenile courts in order to discover a rational explanation for their differences in policy.⁶⁸ With regard to a sample of 400 boys between fourteen and seventeen who appeared before these courts during 1951-52 charged with larceny, very striking differences were found in the use of probation, which varied from 9% to 33%. The study sought to discover whether there was consistency in these varied adjudications, a conclusion which would have meant that they could be explained in terms of certain relevant characteristics of the boys, their criminal and family backgrounds, areas of residence, social status, offenses and so on, or of a few obvious characteristics of the

63. *Id.* at 31, 33, 44.

64. CRIMINAL STATISTICS, ENGLAND AND WALES, 1955, xxiv-xxv (1956). The author hopes to deal with these developments at greater length in another paper.

65. GRÜNHUT, *JUVENILE OFFENDERS BEFORE THE COURTS* (1956).

66. *Id.* at 83.

67. *Id.* at 117.

68. Mannheim, Spencer & Lynch, *Magisterial Policy in the London Juvenile Courts*, 8 BRIT. J. DELINQ. 13, 119 (1957).

magistrates themselves, such as sex or the amount of preliminary information which they had obtained before deciding. This study comes perhaps nearest of all English investigations to the well-known American work of Everson and Gaudet, with the difference that, since cases had not been assigned to the London magistrates on a rotational basis, the possibility had to be considered that the issues that they had to deal with differed in character. The hypothesis of consistency was not supported by the evidence, nor could any other rational explanations be found for differences in magisterial policy. Admittedly, however, official knowledge of the personal characteristics of the magistrates concerned was extremely scanty. A study such as this, based mainly on the court records of these 400 cases, could not possibly unearth certain elements, in particular, the personal impression on the magistrates made by the boys and their parents, a factor which, though not appearing in the records, might have been decisive. Here again, the individual idiosyncrasies of the magistrates were unknown. Naturally enough, the conclusion was that more intensive research should be made into the attitudes of individual magistrates.

In a recent comparison of English and Scottish criminal statistics,⁶⁹ the finding was made that about five times as many sentences of imprisonment without option of a fine were imposed in England and Wales as in Scotland, and that the mean length of such sentences was three-and-a-half months in Scotland and eight to nine months in England. Sentences for housebreaking in 1954 were about three-and-a-half times as long in England and Wales as in Scotland. One possible explanation of the latter difference was that housebreaking is tried in England and Wales by the higher courts, whereas in Scotland it can be dealt with by magistrates' courts.

Closely connected with this problem is a study of local differences in which I am presently engaged at the London School of Economics on behalf of the Home Office and the Nuffield Foundation. The Home Office has for some time been concerned over differing uses of prison sentences by magistrates' courts. During 1951 to 1954, for example, the percentage of such sentences imposed on male offenders over twenty-one for indictable offenses ranged from a minimum of 7.8% to a maximum of 47.3% of all sentences. I was invited to undertake a closer study of these local variations and to see whether any rational explanations could be found.⁷⁰ The study is still in progress and has already produced some interesting material. In connection with this, I have just embarked upon a special investigation into the problem of very short prison sentences. Although, as previously mentioned, sentences of less than one month or five weeks have greatly declined in England in the course of the present century, sentences of less than six months are still more than two-thirds (67.8%) of the total for men.⁷¹ The Home Secretary

69. Lodge, *A Comparison of Criminal Statistics*, 7 BRIT. J. DELINQ. 50 (1956).

70. See Note, 13 MAGISTRATE 7 (1957).

71. PRISON COMMISSION, ANNUAL REPORT 40 (1955); see MANNHEIM, GROUP PROBLEMS IN CRIME AND PUNISHMENT c. 11 (1955).

recently asked his Advisory Council on the Treatment of Offenders to examine these trends and to make recommendations regarding suitable alternatives. This committee has now reported,⁷² and in connection with its report a field study is being made of a sample of short-term prisoners to see what their attitudes were toward their sentences, what effect these sentences had had on their lives and whether any of the alternatives proposed by the committee might have served the purpose better than the prison sentence. This procedure, however, leads us beyond the field of mainly statistical inquiries and into the field of psychological and sociological studies.

Such studies have so far been very rare; not unreasonably, a distinguished American sociologist, Professor Arnold M. Rose, has chided his fellow social scientists for not paying enough attention to this important field of research.⁷³ Among the points on which he thinks information is insufficient is the effect of judicial decisions not only on the criminal himself, but also on the public. What feeling toward the courts and the law are created by harsh and by lenient sentences? To what kind of outside pressures—social, political, religious and racial—is the judge exposed in his sentencing? Questions of this kind are not new, of course, but, whereas in former days the technical equipment needed to do research on them was lacking, now at least some of the tools, though by no means perfect, seem to be available. No doubt, as experience has shown, the difficulties arising outside the research laboratory are still too formidable to attract many recruits to this field of investigation. Rose himself has set an example, however, by conducting a small but interesting “study in social valuation”—not the first of its kind, by the way⁷⁴—to test the hypothesis that some significant discrepancies exist between, on the one hand, the penalties provided by the criminal law for certain offenses and, on the other, the sentences actually imposed for such offenses by the courts and popular views as to how such offenses should be punished.⁷⁵ Welcome as this study is at a time when undertakings of its kind are still rare, it suffers from two shortcomings. First, the individuals taken as representing public opinion were, as usual, students, a group whose representative character is always doubtful. Second, these students were asked to give their views of the respective gravity of the offenses, not on the strength of concrete case histories, but merely according to legal classifications such as cruelty to children (“father has seriously beaten four-year-old child”), bigamy (“subject has married a second time while knowing that his first wife is alive and undivorced”), and so forth. These two weaknesses, which deprive the study of some of its potential value, could be eliminated in future research.

72. ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS, *ALTERNATIVES TO SHORT TERMS OF IMPRISONMENT* (1957).

73. ROSE, *THEORY AND METHOD IN THE SOCIAL SCIENCES* 235 (1954).

74. See Simpson, *Attitudes of Teachers and Prisoners Towards Seriousness of Criminal Acts*, 25 J. CRIM. L. & CRIMINOL. 76 (1934-35).

75. Rose & Prell, *Does the Punishment Fit the Crime? A Study in Social Valuation*, 61 AM. J. SOCIOLOGY 247 (1955).

Even with these weaknesses, a few of the results are worth quoting. First, the evaluation of the students, taken as representative of views current in present-day society, differed from the scales of penalties provided by the more old-fashioned lawmaker. "Child-beating by father," which ranked very low on the legislative scale of penalties, was regarded by the students as the most serious of the thirteen types of offenses represented on the list. The result is probably indicative of the growing respect for the rights and integrity of the child in modern society. Another conclusion is perhaps more relevant to the present topic: no positive correlation was found between the severity of the sentences actually imposed and the views of the students. The sentences for such emotionally colored offenses as child-beating in particular were invariably much too lenient in the eyes of the students. Differences in viewpoint also arose which reflected the sex and social background of the student-judges. Imperfect as this kind of research still is, it at least represents a step in the right direction—toward the study of values and attitudes as a foundation not only for a new substantive criminal law⁷⁶ but also for a new sentencing policy.⁷⁷

CONCLUSION

Earlier in this paper the view was expressed that, while the legislator should make clear which guiding principles should be followed in sentencing, the question of degree of detail is open to doubt. In fact, many of the legislative lists of mitigating and aggravating factors seem at the same time too long and too short. As the authors of the Tentative Draft of the American Law Institute have seen quite clearly, and as the various prediction tables of the Gluecks have also shown, the same factor may have a different meaning in relation to different methods of treatment. The financial position of the offender, for example, has to be taken into account in a way which is fairly straightforward when he is fined. Society wants him to feel the loss in approximately the same way whether he is rich or poor and wants him to pay the fine instead of going to prison—objects best achieved through a system like the Swedish day-fine.⁷⁸ When we decide to send an offender to prison, however, his financial position may have to be considered in an entirely different manner. Have we any right to argue today, as Jeremy Bentham did

76. See MANNHEIM, *CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION* 3 (1946).

77. An interesting illustration of the uncertainty of judgment prevailing in our present society has recently been provided by a correspondence initiated by the Warden of All Souls College, Oxford, severely criticizing a sentence of six months imprisonment imposed by a London magistrate on "an old gentleman of 66" who, when sitting in a park and being annoyed by a puppy jumping at him, kicked the puppy and stamped on it with his foot. *The Times* (London), Sept. 30, 1957, p. 9, col. 6. Of course, it is usually inadvisable to criticize a sentence merely on the strength of a newspaper report; but a press correspondence of this kind may provide useful, though not always representative, material on basic attitudes on sentencing.

78. For a recent and authoritative statement of Swedish law on the subject, see SELLIN, *THE PROTECTIVE CODE: A SWEDISH PROPOSAL* 26-27 (1957).

150 years ago, that because this man is well-off and a "gentleman," even the shortest prison sentence will be a terrible ordeal to him, and therefore he should not go to prison at all; or if he has to go, the sentence should be only for a token period? Or, should he rather be treated in accordance with the principle of *noblesse oblige*? Surely, if a legislator wishes to provide some guidance for judicial discretion, it is on just such matters. We are at present in a period of transition from the old, rigid concept of justice as equality in a primitive, formalistic sense to a new concept of equality which will have to be reconciled somehow with present-day ideas of social obligation on the one hand, and individual needs, treatment and prevention on the other.

Whatever analysis of judicial sentencing may be made by research workers and laymen, it can and will be met by the argument that no research, however elaborate, and no press reports, however detailed, can do justice to intangible factors such as, among others, the personal impression made by the offender, which cannot be reflected in case records. The argument is important, but courts owe it to themselves and to the community which they serve to state in writing their full reasons for imposing a given sentence. Justice must not only be done; in a democracy it must also be explained to the people to whom it is no longer simple and self-explanatory. While I am under no illusion that such written reasons will always be very illuminating, no one will dispute that judgments are more thoroughly considered and less liable to error and emotional bias if their reasoning is set forth in writing. The process of articulation may even lead to the discovery that some of those "intangible" factors which were thought so decisive are in fact unable to stand the test of reason.

Improvements in sentencing can be brought about mainly by more knowledge, first of the individual case, to be obtained through better pre-sentence investigations and, second, through better understanding by judges and magistrates of the sentencing process itself, taken in the widest possible sense of the term—understanding which in its turn can be gained only by means of the fullest co-operation with experts in various other fields. Statisticians must work out prediction tables and show the trends in the sentencing policies of various courts over a period of time; clinical psychologists and psychiatrists must explain the unconscious factors involved in judicial sentencing; social psychologists and sociologists must study the attitudes and prejudices toward crime and punishment prevailing within the different sections of the community. Surely, it is not easy for those who are the actors in the judicial sentencing process to co-operate enthusiastically in such an autopsy, but progress in this field can hardly be made without their wholehearted co-operation.