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SENTENCING ALTERNATIVES TO FINE AND IMPRISONMENT

FRANCIS J. MERCERET*

After reviewing the sentencing process from sentencing by the judge through appellate review, this commentary focuses on possible solutions to current problems. The commentator suggests several changes that should result in more uniform application of sentencing. Also, several alternative processes are reviewed and recommended for adoption.

I. INTRODUCTION

The system by which criminal defendants in the United States are sentenced is rigid and undisciplined. In imposing sentences, the options of a trial judge are limited to fine, imprisonment, probation, or, at times, medical treatment. Within those options, however, trial judges have almost full discretion.

This article focuses on various aspects of the sentencing system. The options open to the sentencing judge, the process of selecting a sentence and appellate review, lack of uniformity, judicial discretion, and probation in Florida are discussed. The final portion attempts to highlight some of the factors which serve to detract from the effectiveness of probation and then offers suggestions for reform.

II. THE JUDGE'S OPTIONS

A. The Statutory Sentence

The most obvious sentence which a judge may impose on one convicted of violating a criminal statute is the sentence, if any, specified in the statute itself. The statutory penalty may be speci-
fied directly\(^1\) or indirectly.\(^2\) Statutory sentences are almost exclusively fine, imprisonment, or both. Other alternatives are quite rare. Where alternatives exist they supplement rather than replace fine or imprisonment. Additional penalties may include forfeiture of contraband,\(^3\) loss of a position of trust,\(^4\) payment of the costs of

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2. "Violation of this section shall be a crime of the nth degree," where the punishment for such crimes is specified in a general punishment statute. Typical of general punishment statutes are the following:

1. A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

2. In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

3. A person who has been convicted of any other designated felony may be punished as follows:
   - (a) For a life felony, by a term of imprisonment for life or for a term of years not less than 30;
   - (b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment;
   - (c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years;
   - (d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

4. A person who has been convicted of a designated misdemeanor may be sentenced as follows:
   - (a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;
   - (b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

5. Any person who has been convicted of a [non-criminal] violation may not be sentenced to a term of imprisonment nor to any other punishment more severe than a fine, forfeiture, or other civil penalty, except as provided in chapter 316, Florida Statutes, or by ordinance of any city or county.

6. Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law, except as provided in subsection (1).

7. This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

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\(^{\text{FLA. STAT. \$ 775.082 (1975) (footnote omitted).}}\)


prosecution, or injunction against continuing the unlawful activities. Such penalties are often considered civil in nature and sometimes are imposed in a separate proceeding.

B. Suspension of Sentence

A judge may suspend the imposition of sentence in many states, or he may suspend its execution or both. At least one state permits adjudication of guilt to be withheld entirely so that the question of formal sentencing is never reached. In many jurisdictions the power to suspend is limited by statute when certain crimes or defendants are involved. Typical restrictions are those which forbid the suspension of sentences of capital offenders, or "habitual criminals," but there are many local peculiarities with which courts must contend.

C. Probation

When a sentence has been suspended or an adjudication withheld, the defendant may simply be released. Frequently, however, the defendant is placed on probation. Some states make probation mandatory if the defendant is not to be imprisoned or punished entirely by fine. Probation is defined in a variety of ways by the various jurisdictions, but their common theme is supervision by a probation department of some kind. One of the more concise statutory definitions is that used in Illinois: "'Probation' means a sentence or adjudication of conditional and revocable release under the supervision of a probation officer." The states generally do not

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5. E.g., MINN. STAT. ANN. § 631.48 (1964).
7. FLA. STAT. § 775.04 (1975) defines violation of a statute punished by statutory payment of damages or reparation to the victim to be no crime at all.
10. ALASKA STAT. § 12.55.080 (1972); ARK. STAT. ANN. § 43-2324 (1964); DEL. CODE ANN. tit. 11, § 4204 (1975); KANSAS STAT. ANN. § 62-2239 (1964).
11. FLA. STAT. § 948.01(3) (1975).
12. E.g., ALA. CODE tit. 42 § 19 (1958); ARK. STAT. ANN. § 43-2331 (Supp. 1975); MISS. CODE ANN. § 47-7-33 (1972); NEV. REV. STAT. § 176.185 (1975).
14. E.g., LA. REV. STAT. ANN. § 14:62.1 (West 1974) bars probation or suspension of sentence for one convicted of burglary of a pharmacy, but there is no bar to such relief for more serious offenses. ILL. REV. STAT. ch. 38 § 1005-5-3(d) (1973) forbids suspension of sentence for marijuana offenders.
15. See, e.g., FLA. STAT. § 948.01(5) (1975).
distinguish between a suspended sentence and probation because the terms are often used together. The term "probation" will be used here to imply suspension of sentence, or where appropriate, withholding of adjudication.

Every state has a probation statute as does the federal government. Also, all of America's Territories, Trusts, Commonwealths and zones have probation statutes. Some of these


statutes are vague and provide little or no guidance to the court in administering them. While others go into minute detail. All of these statutes indicate that probation is a conditional privilege for which the court sets the conditions. The language of 18 U.S.C. section 3651 is typical. It permits probation “upon such terms and conditions as the court deems best.” Certain conditions are used so widely that they have become “boiler plate” in state statutes and on various probation offices’ forms. In addition to these boiler plate conditions, the courts can apply specialized conditions tailored to the defendant’s particular situation.

The conditions which may be imposed are limited by the federal constitution, by state constitutional provisions (where applicable), and by statute. The statutory limitations are simplest—they generally constrain only the period of probation. Constitutional restraints are more restrictive. Federal courts must stay within the bounds of the fifth and eighth amendments to the Constitution of the United States, as must state courts by reason of the fourteenth amendment. Due process and the prohibition of cruel and unusual punishment have been held to impose restrictions on probation conditions. Courts have held that a condition must be related to the

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24. E.g., Statutes of Michigan, Missouri, and New Mexico.
25. E.g., Statutes of Arizona, California, and Illinois.
26. An example of possible terms and conditions is United States Probation Office Form 7 which reads

CONDITIONS OF PROBATION

It is the order of the Court that you shall comply with the following conditions of probation:

(1) You shall refrain from violation of any law (federal, state, and local). You shall get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.
(2) You shall associate only with law-abiding persons and maintain reasonable hours.
(3) You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work you shall notify your probation officer at once. You shall consult him prior to job changes.
(4) You shall not leave the judicial district without permission of the probation officer.
(5) You shall notify your probation officer immediately of any change in your place of residence.
(6) You shall follow the probation officer’s instructions and advice.
(7) You shall report to the probation officer as directed.

rehabilitation of the defendant\textsuperscript{30} and to his crime,\textsuperscript{31} must be medically reasonable,\textsuperscript{32} and financially practical.\textsuperscript{33} The theories behind these constitutional restraints are not clear or consistent, and evaluation of the validity of a particular probation condition may be difficult.

Most courts express the idea that since probation is a privilege rather than a right, the only fundamental limitation is that the sentencing court may not abuse its discretion.\textsuperscript{34} However, the problem lies in defining what constitutes such abuse. It is agreed that the discretion is quite broad, either because probation is an “act of grace”\textsuperscript{35} or on the contractual theory that since the defendant can refuse probation he signifies his acquiescence to the conditions by accepting probation subject to them.\textsuperscript{36} It must be noted that the trial court’s discretion “is not boundless.”\textsuperscript{37} While some courts have held probation proceedings exempt from the eighth amendment as being an avoidance of punishment,\textsuperscript{38} the general rule is a common sense application of the fifth, eighth, and fourteenth amendments to vacate unreasonable conditions while upholding reasonable ones. State constitutional provisions are similarly applied.\textsuperscript{39} Since there is no coherent theory to expound, the limits generally imposed may best be understood by a series of examples.

Restitution is a widely used condition of probation. As such it is an ideal point at which to begin. Restitution is a manifestly just condition of probation in most cases, and it provides one of the few examples in which the criminal justice system demonstrates any real concern for the victims of crime. The perpetrator of a corporate fraud may, for instance, be required to restore to his victims damages to be determined in a civil suit.\textsuperscript{40} This is true even though the


\textsuperscript{31} Porth v. Templar, 453 F.2d 330 (10th Cir. 1971); Karrell v. United States, 181 F.2d 981 (9th Cir. 1950); People v. Mahle, 57 Ill. 2d 279, 312 N.E.2d 267 (1974); People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957).

\textsuperscript{32} Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965); see Robinson v. California, 370 U.S. 669 (1962).

\textsuperscript{33} United States v. Taylor, 321 F.2d 339 (4th Cir. 1963).

\textsuperscript{34} See, e.g., Burns v. United States, 287 U.S. 216 (1932).


\textsuperscript{36} State v. Smith, 233 N.C. 68, 62 S.E. 2d 495 (1950); see State ex rel. Morris v. Tahash, 262 Minn. 562, 115 N.W. 2d 676 (1962).

\textsuperscript{37} People v. Dominguez, 256 Cal. App. 2d 623, 64 Cal. Rptr. 290, 293 (1967).

\textsuperscript{38} Springer v. United States, 148 F.2d 411 (9th Cir. 1945).


\textsuperscript{40} Gross v. United States, 228 F.2d 612 (8th Cir. 1956).
existence of a pending civil suit may ultimately lead to double recovery by the victim. The existence of civil liability is not a prerequisite to the imposition of restitution as a probation condition. For example, violation of a statute against issuing worthless checks may not require the fraudulent intent necessary for civil recovery, but restitution is still a valid probation condition.

Restitution becomes invalid when it is no longer truly restitution, but rather a private fine. Examples include cases where restitution is directed toward persons not victims of defendant’s crime or where it is assessed in fixed dollar amounts unrelated to damages actually ascertained to have occurred. The basic test in this regard has been one of due process. Where the criminal trial or a parallel civil suit has included a hearing on the amount of damage suffered by the victim, restitution up to that amount has been held valid. The court may exercise discretion in determining the financial practicality of any such condition, however. Where the defendant has been given no opportunity to contest the amount of damages, award of restitution is a denial of due process. Restitution seems to be the only area of probation conditions which rests on a rational foundation.

Other frequently used conditions of probation have been those which order the probationer to avoid the “occasions of sin.” The thief who specializes in hauling his loot away by automobile has been forbidden to operate a vehicle. The woman beater has been barred from employing a woman in his business and from allowing a woman to reside on any farm controlled by him unless she is with “mentally competent male members of her family.” One convicted of fortune telling and aiding prostitution has been forbidden to allow persons to congregate in her house after dark for those purposes. The bookmaker has been prohibited possession of a telephone.

43. Karrell v. United States, 181 F.2d 981 (9th Cir. 1950); People v. Mahle, 57 Ill. 2d 279, 312 N.E.2d 267 (1974).
45. See notes 40-42 supra and accompanying text.
46. See note 33 supra and accompanying text.
pornography star has been ordered out of the movie business. A "headbuster" in a labor dispute has been forbidden to hold union office. A pediatrician convicted of lewd and lascivious behavior toward a 10-year-old patient has been ordered to refrain from the practice of medicine.

Similar reasoning has resulted in conditions such as periodic imprisonment, avoidance of gambling, disclosure of narcotics source and even the sexual sterilization of a syphilitic rapist in order to stop the spread of disease and prevent the birth of diseased children.

Conditions which are vindictive or the result of a personal quirk of the trial judge are often struck down. Banishment is not permitted, nor the compulsory giving of blood. Likewise sterilization as a criminal punishment is forbidden precluding its use as a probationary condition. The court may not be permitted to condition a female robber's probation on her having no more illegitimate children, nor may it make the author of a false report of police brutality write an essay setting forth the reasons why the police department is entitled to the respect of the citizenry. The key is probably reasonableness under the circumstances. Further, if the behavior barred is otherwise legal and not a direct ingredient of the crime for which the probationer was convicted, the condition should be held unreasonable on appeal.

51. People v. Bowley, 230 Cal. App. 2d 269, 40 Cal. Rptr. 859 (1964). This decision may be subject to criticism on first amendment grounds.
54. United States ex rel. Spellman v. Murphy, 217 F.2d 247 (7th Cir. 1954) (larceny).
55. Barnhill v. United States, 279 F.2d 105 (5th Cir. 1960) (evasion of federal gambling taxes).
56. Kaplan v. United States, 234 F.2d 345 (8th Cir. 1956) (sale of narcotics).
59. Springer v. United States, 148 F.2d 411 (9th Cir. 1945).
62. Butler v. District of Columbia, 346 F.2d 798 (D.C. Cir. 1965). Despite the seeming reasonableness of the condition under the circumstances, the court held that it had "no basis in our law." Id. at 799.
63. The probation revocation of one convicted of conspiracy to disturb the peace because of violation of an ordinance which prohibited certain sign posting was held unreasonable and ordered reversed. This ordinance was regularly and generally neglected by the police department. Therefore, a violation of this ordinance by the probationer could not constitute a violation of the probationary condition that the probationer conduct himself in a law-abiding manner. Swan v. State, 200 Md. 400, 90 A.2d 690 (1952).
D. Medical Treatment

The term "medical treatment" as used here encompasses psychiatric and drug detoxification treatment as well as conventional medical care. Many jurisdictions, by statute, require medical treatment in particular situations. The most typical statutory cases are those in which the defendant is found not guilty by reason of insanity, or in which a narcotics violation or sex offense is involved. All jurisdictions permit medical treatment to be made a condition of probation and some make it mandatory for narcotics addicts. Federal law gives the district court the discretion to offer an addict the choice between indefinite commitment for treatment (up to 36 months) or jail. The defendant is then given 5 days in which to make his decision.

Since medical treatment is a civil sanction many of the protections of the Bill of Rights are inapplicable. The eighth amendment has repeatedly been held inapplicable to medical commitment because the purpose is treatment rather than punishment. While equal protection requires that criminal commitment proceedings satisfy the same standards as civil commitment proceedings, the resulting use by criminal courts of civil proceedings in such cases may make the fifth and sixth amendments inapplicable. While indefinite commitment of an incompetent defendant pending trial must be accomplished by civil proceedings, such commitment

64. While commitment of such defendants is optional in many jurisdictions, some make it mandatory. CAL. PENAL CODE § 1026 (West Supp. 1976); DEL. CODE ANN. tit. 11, § 403 (1974); GA. CODE ANN. § 27-1503 (1972); N.Y. CRIM. PRO. LAW § 330.20 (McKinney 1971); OKLA. STAT. ANN. tit. 22 § 1167 (Supp. 1975). This may seem facially incongruous if the defendant was insane during the crime but has fully regained his sanity by the time of trial—especially if his trial is delayed until he regains competency.


67. See note 65 supra.


after trial may be ordered by the trial judge. State statutory procedures providing for such commitment have been found to meet the requirements of equal protection and due process.73 One of the New York supreme courts has gone so far as to hold that "[w]here immediate action is necessary . . . for the welfare of the alleged addict," due process does not require a hearing prior to commitment.74

The courts appear to handle the medical treatment cases as administrative law decisions rather than as criminal due process decisions. In Buchanan v. State75 the court held that denying a jury trial for an involuntary commitment hearing for a sexual offender (while allowing it in all other cases) did not deny the defendant equal protection. The court accepted the state's rationale that in other cases, commitment was for the protection of the individual being committed but in sexual offense cases it is society whose protection is sought. This was found to be a rational relationship sufficient to support the classification adopted by the legislature. Due process was not denied by the court, for among other reasons defendant Buchanan was permitted to have experts testify on his behalf. The court was more direct in People ex rel. Blunt v. Narcotic Addiction Control Commission.74 The court upheld New York's involuntary addict commitment program on the ground that the proper procedures in such matters was for experts to decide, not for the courts. As long as procedures were established and published and some sort of hearing held before or after commitment, there was due process. The details were properly left to medical experts and to the legislature. This reasoning was followed in Sas v. Maryland77 where the court expressly used the police power test and held that due process does not require any particular process so long as there is a hearing.

The potential for abuse is enormous. In Sas78 the brief for the state argued that the purpose of the Maryland Defective Delinquent Act79 was to confine people who are legally sane for periods longer than the statutes otherwise permit for the crime committed, and

73. Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964); Buchanan v. State, 41 Wis. 2d 460, 164 N.W. 2d 253 (1969). At least one state statute has not met these requirements. Spect v. Patterson, 386 U.S. 605 (1967).
75. 41 Wis. 2d 460, 164 N.W.2d 253 (1969).
76. 58 Misc. 2d 57, 295 N.Y.S.2d 276 (Sup. Ct. 1968).
77. 334 F.2d 506 (4th Cir. 1964).
78. Id.
that many of the inmates will be effectively confined for life. The Fourth Circuit cited this passage with approval.80 One would think that the rationale of Jackson v. Indiana81 requiring that pre-trial commitment proceedings adhere to standards as strict as those of civil commitments would also apply to post-conviction situations, thus barring results like the one in Sas. Regardless of the verbiage used by the courts, the end result is forcible confinement and administration of medication. In either case the confinement is for the defendant’s benefit, or for that of society. If it is for the defendant’s benefit, then it is civil in nature, and the full protection of civil commitment law should be available throughout the process. If it is for society’s benefit, then it is criminal in nature and the full benefits of the criminal law, including the fifth and eighth amendments, should apply. In either case, the casual police power language, appropriate to zoning violation hearings, is completely out of place. Hopefully, the Supreme Court will eventually extend the reasoning of Jackson to cases like Sas. In the interim, the lower courts seem to prefer the reasoning of Sas.

In a subsequent section82 it will be shown that the situation gets worse rather than better when the defendant attempts to appeal an order of commitment which he claims may have been proper when issued, but has since become unconstitutional.

III. Selecting the Sentence

When a defendant goes to trial the evidence presented is probably the most vivid influence on the trial judge, though it may not be the most important. Whether or not a defendant goes to trial83 the trial court often hears pieces of the State's case during pre-trial motion practice. Material presented at a hearing on a motion to suppress evidence can be especially influential since the use of such a motion can make it seem as though a clearly guilty defendant seeks to avoid punishment through a “trick.” If the “trick” works, the defendant is ahead—but if he is found guilty anyway he may pay for the attempt at sentencing. Judges prefer contrition, even if feigned, to open connivance.84

80. 334 F.2d at 513.
82. Section IV.
83. Most defendants do not go to trial—they plead guilty, usually as a result of a plea bargaining agreement. See, e.g., L. Hall, Y. Kamisar, W. LaFave, J. Israel, Modern Criminal Procedure, ch. 20 (3d ed. 1969).
84. Interviews with Florida Parole and Probation Commission Investigators. [Hereinafter PSI Interviews]. See note 175 infra. The author wishes to thank the Commis-
After a verdict of guilty the judge is confronted with the task of sentencing the offender. To announce an appropriate sentence in every case is difficult. To facilitate this process the court should have the benefit of total informational input. The current devices available to the court for this purpose include: the sentencing council; recommendations from the adversaries; and the pre-sentence investigation.

The sentencing council has been adopted experimentally by some federal and state courts. The sentencing council permits judges to exchange ideas on the significance and implications of the information compiled concerning various defendants prior to sentencing. This technique has not been widely adopted, nor have its statutory and constitutional limitations been fully explored.

Recommendations as to the sentence to be imposed are often made by the prosecution and defense at the sentencing hearing. Often these recommendations are not weighed heavily by the sentencing judge because they tend to consist of rather automatic calls for “toughness” or “mercy.” In some cases, however, well thought out suggestions by counsel may be effective, if only because of their novelty.

Many jurisdictions require that a pre-sentence investigation (PSI) be completed prior to sentencing. The PSI involves a thor-
ough investigation of the background of the defendant and the crime. Where used, it is often the most important influence on the court's sentencing decision. For example, in the federal courts, the recommendation of the investigating probation officer is followed about 80 percent of the time. However, the PSI also involves potential for abuse. No rules of evidence govern the contents of the report. Furthermore, the defendant does not have a constitutional right to cross-examine witnesses nor even to see the report.

In Florida the PSI is conducted by the Parole and Probation Commission. The report is mandatory in Florida for felony convictions, but optional for lesser crimes. A short discussion of the Florida PSI will serve to illustrate the nature of the report.

The report begins with a discussion of the offense charged, and contains both the official version of what occurred, and the defendant's version of the same events. The status of co-defendants is also described, as is the defendant's prior criminal record.

The report then provides a comprehensive personal history of the defendant. The defendant's family history, marital status, education, religious background, military service, and current employment are included. The report also discusses the defendant's economic status, health, and social behavior, including alcohol and drug use. Also, evaluations of the defendant by various persons connected with the offense and the legal system (victim, prosecutor, defense attorney, law enforcement personnel, etc.) are included.

Finally, the report includes the probation officer's evaluation of the overall picture and his recommendations, if any, as to sentence and to conditions of probation. There is also a confidential evaluation to the judge. Its confidentiality is an important reason for its significance.


92. The absence of limitation is often provided by statute. 18 U.S.C. § 3577 (1970) provides:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

93. Such rights, however, may be conferred by statute. E.g., Fla. R. Crim. P. 3.713(b) (1972) requires disclosure of all factual material in the PSI to both defendant and the state.

94. PSI Interviews, supra note 84.


96. See note 101 infra, and accompanying text.
The foregoing suggests several questions. How is the information obtained and, more importantly, how are the subjective "analyses" and "evaluations" made? What information does the probation officer use and how does he get it? What are defendant's rights in the matter? Having no rules of evidence to constrain it, a PSI resembles a police investigation. Parole and Probation aides do much of the legwork. Aides question relevant sources and compile the information. Sources are often unidentified in the report, and hearsay is used frequently.\(^7\) The officers try to confirm the information, but errors are unavoidable; sometimes even malicious misinformation from enemies of the defendant finds its way directly into the report or indirectly into the evaluations.\(^8\) The degree to which information is verified depends on the investigating officer's caseload. Often verification is marginal or non-existent.\(^9\) The only protection a defendant has against serious mistakes during the PSI is access to the report before the sentencing hearing so that errors may be corrected and reported to the court.

Since the PSI is part of the sentencing process rather than the trial process, the defendant has no constitutional right to disclosure or cross-examination.\(^10\) Whatever rights the defendant may have in this regard derive from statute or rule of court. The usual rule is that the court may disclose all or part of the PSI report to defense counsel, and if it does so then it must reveal the same material to the state.\(^11\) The general practice is that the court will, on request of counsel, give a copy of the PSI to both sides prior to the sentencing hearing except for the confidential report which is not disclosed by the court. Defense counsel is thus given the opportunity to confirm the factual matter in the report and may be given some hint as to the probation officer's sentencing recommendations.

The sentencing hearing is the point at which the sentencing process reaches its conclusion.\(^12\) At this time the judge has before him the information from trial, briefs by counsel, and the pre-sentence investigation. He then hears arguments from the lawyers and the defendant's statement, if any,\(^13\) before pronouncing the sentence. The sentencing hearing is a record hearing\(^14\) but it is not

\(^{97.}\) PSI Interviews, supra note 84.
\(^{98.}\) Id.
\(^{99.}\) Id.
\(^{101.}\) See, e.g., Fed. R. Crim. P. 32(c); Fla. R. Crim. P. 3.713(a).
\(^{102.}\) Unless a sentencing council is convened before the hearing. See notes 85-87 supra, and accompanying text.
\(^{103.}\) See, e.g., Fed. R. Crim. P. 32(a)(1).
\(^{104.}\) See, e.g., Fla. R. Crim. P. 3.721.
an adversary hearing in the traditional sense since there is no right to cross-examine, no rules of evidence to limit the content of statements made at the hearing, and no limitation upon ex parte communications which are allowed to influence the outcome (e.g., the PSI). Counsel for the defense often uses the hearing to reinforce favorable PSI recommendations or to counter unfavorable ones. The State's Attorney rarely takes an active part in the sentencing hearing since he has already had substantial input into the trial and the PSI. He may attempt to counter new defense arguments but will do little else. Defendant rarely exercises his "right of allocution" absent special circumstances, unless it is to make an apology for the trouble he has caused. If the defendant finds the imposed sentence unfavorable his only remedy is appeal.

IV. APPELLATE REVIEW

The general rule is that sentencing is within the discretion of the trial court. After conviction, the defendant has no constitutional right to cross-examine witnesses in a sentencing hearing and the court is not restricted to information received in open court. The trial judge need not gather any further information about the defendant than is available in the trial record. There is no constitutional right to a pre-sentence investigation. The convict has no right to anything less than the statutory maximum penalty. Probation or a suspended sentence are thus an "act of grace." Except in those few states allowing more general review of sentences, the only question entertained on appeal is whether the sentencing judge abused his discretion.

As noted, a judge's discretion is not boundless. The "abuse of discretion" formula does permit some appellate review of sentences where probation conditions are concerned. Apparently it has

110. See notes 113-27 infra, and accompanying text.
111. E.g., Burns v. United States, 287 U.S. 216 (1932).
112. See notes 58-63 supra, and accompanying text.
113. See generally Comment, supra note 106.
not been held that a judge abuses his discretion by denying proba-
tion altogether and ordering instead another statutory penalty or
treatment. The practical result is that any sentence, however inap-
propriate or unfair, is unchallengeable except under the most outra-
geous circumstances unless imposed in a jurisdiction offering
broader review.

A few states have permitted appellate review of sentencing de-
cisions for appropriateness as well as for abuse of discretion. These
states include Alaska, Connecticut, Maine, Maryland, and Massa-
chusetts.

In response to the problem evidenced in Bear v. State the
Alaska legislature enacted appellate review legislation effective
January 1, 1970. The new law allows appeal by the defendant to
the supreme court of the state from sentences exceeding 1 year on
the grounds that the sentence was excessive, or by the state on the
grounds that it was too lenient. The appeal is a matter of right and
waives the double jeopardy defense as to resentencing. Superior
courts of the state were granted similar jurisdiction over defendants’
appeals from misdemeanor sentences exceeding 180 days.

The Connecticut law establishes a special division of the supe-
rior court to hear appeals from sentences exceeding or equal to 1
year. The authority is used frequently but carefully.

Until 1965, Maine permitted review of all sentences as part of
the general appeals process in criminal cases. Now there is a spe-
cial appellate division of the Supreme Judicial Court which has
authority to review prison sentences. It is unclear whether sen-
tences other than prison sentences may be reviewed. The special
court is a three-judge panel selected from the members of the Su-
preme Judicial Court. No judge may review a sentence which he
imposed.

Maryland formerly permitted review as part of the general

116. S.L.A. § 5, ch. 117 (1969), amending Alaska Stat. §§ 22.05.010, 22.05.020(a),
22.15.240(b), adding Alaska Stat. § 12.55.120.
117. See Rehbock, Sentence Appeals in Perspective: The Alaskan Way, 54 Judicature
156 (1970).
118. In an appeal taken by the state the reviewing court is confined to an expression of
approval or disapproval. It may not increase the sentence. Alaska Stat. § 12.55.120(b) (1972).
120. Compare State v. Johnson, 21 Conn. Sup. 381, 158 A.2d 746 (1958) with State v.
Rivera, 21 Conn. Sup. 421, 158 A.2d 748 (1958).
123. Id.
appellate review and did not distinguish sentence-based appeals from verdict-based appeals.\footnote{124} Now the law requires that a sentence be unconstitutional or illegal under statute or common law before it can be set aside.\footnote{123} This approach resembles an "abuse of discretion" standard.

Massachusetts allows appeal to the Superior Court of a district court sentence. A recent amendment also permits the defendant to appeal to a six person jury.\footnote{126} In either case, the appeal takes the form of a trial de novo.\footnote{127}

The federal rule regarding review of sentences is found in Fed. R. Crim. P. 35,\footnote{128} and in 28 U.S.C. section 2255 (1970). Rule 35 also allows reduction of sentence by the trial court within 120 days after receipt of a mandate affirming the judgment, dismissal of the appeal, or denial of review or upholding the judgment by the Supreme Court. Section 2255 allows an appellate court to set aside or correct an illegal or illegally imposed sentence. Amendments to these provisions are under consideration.\footnote{129}

If the situation is grim when appellate review of a punitive sentence is sought, it is worse when review of medical commitment or compulsory treatment is requested. Of course, if one can prove that he was sentenced to medical treatment as a punitive measure, he is entitled to the same rights of appeal as one sentenced in a more conventional manner.\footnote{130} It is difficult, though, to prove that medical confinement is punitive. In \textit{People ex rel. Blunt v. Narcotic Addiction Control Commission} it was held that incarceration of a misdemeanant for longer than the statutory term because he was an addict was "treatment" even though no treatment in the conventional sense of the word was given\footnote{132} and though he was housed in a penal facility with non-addicts rather than in a medical facility. The mere fact that he was convicted under the New York Mental Hygiene Law\footnote{133} was sufficient to make the commitment therapeutic.

\begin{footnotes}

\footnote{127} Id.
\footnote{131} 58 Misc. 2d 57, 295 N.Y.S.2d 276 (1968).
\footnote{132} With the exception of a weekly 2-hour "group therapy" session of no medical significance.
\footnote{133} N.Y. Mental Hygiene Law (McKinney 1972).
\end{footnotes}
unless the court could say that the entire mental hygiene program was utterly without merit.\textsuperscript{134}

The consequences of a sentence being deemed therapeutic are severe. Not only does the inmate lose important constitutional protections,\textsuperscript{133} but he may lose what few common law rights on appeal he might otherwise have retained. In \textit{Sas v. Maryland}\textsuperscript{134} the Fourth Circuit denied habeas corpus relief to a prisoner interred under the Maryland Defective Delinquent Act.\textsuperscript{137} The court refused to consider the substantive question of defendant's sanity holding that in such cases they may only review the procedures used to commit him. This decision is all the more remarkable since Maryland was a jurisdiction having, at the time, a broad scope of appellate review of sentencing.\textsuperscript{138}

One may argue that judgments of sanity (or drug addiction) are medical judgments requiring professional expertise and should be made under administrative procedures with limited judicial review. This certainly seems to be the predominant practice, but it is extraordinarily dangerous. How long is the step from eccentricity to insanity? From political nonconformity to eccentricity? The danger is not so much that we will imitate the Soviet Union by committing large numbers of political dissenters,\textsuperscript{138} but that we have already imitated them by committing a few,\textsuperscript{139} and that the present limitations on appeal have made it all too easy to do.

\textsuperscript{134} The problem is not due entirely to the courts. S. Halleck, \textit{Psychiatry and the Dilemmas of Crime} at 239 (1967) states:

> There is an unfortunate tendency in psychiatry and correctional administration to refer to anything that is done to offenders, even obvious punitive acts, as treatment. For example, the author once heard a perfectly sincere correctional administrator refer to the pleasant pastel shades that had been painted on the walls of an isolation cell as an example of "color therapy." Since the offender is an unsophisticated person who usually believes that treatment implies something that is good for him, such misrepresentation is a serious form of dishonesty. To tell an offender that coercive actions are taken for his own good when it is obvious that they serve only the needs of an institutional system or society is to treat him like a sub-human creature to be stripped of all rights and dignity.

> It is difficult to overestimate the mischief and damage that are created by professional dishonesty in the field of criminology. The "double-binded" offender cannot help but experience rage, distrust and despair, feelings that will perpetuate his criminal behavior. It is not only the criminal who is misled. The public assumes that when the correctional workers talk about treating the criminal, something is being done to make him a better and happier citizen.

\textsuperscript{135} See notes 64-81 supra, and accompanying text.

\textsuperscript{136} 334 F.2d 506 (4th Cir. 1964); see notes 77-80 supra, and accompanying text.

\textsuperscript{137} Md. Ann. Cone art. 31B.

\textsuperscript{138} See note 124 supra, and accompanying text.


\textsuperscript{140} See, \textit{e.g.}, the case of Mary Kimbrough Jones, a "whistle blower" in the Billie Sol
Sentencing Alternatives

V. Sentencing Uniformity: The Practice

Sentences handed down by criminal courts are notoriously varied.\textsuperscript{142} Orland and Tyler\textsuperscript{143} point out what they call the "five disparities" in sentencing: (1) disparity from judge to judge; (2) disparity from defendant to defendant; (3) disparity from offense to offense; (4) disparity from jurisdiction to jurisdiction; and (5) disparity from federal to state.\textsuperscript{144} To these might be added: (6) disparity from day to day.\textsuperscript{145}

Beginning with the most crucial issue, it is not surprising that judges differ in their sentencing policies. What is disturbing is that the differences are so radical and irrational. Frankel\textsuperscript{146} devotes a whole chapter to "individualized judges" and gives therein a number of unpleasant examples, one of which should suffice to demonstrate the problem.

The broad experience of former Prison Director Bennet merits [quotation]. Take, for instance, the cases of two men we received last spring. The first man had been convicted of cashing a check for $58.40. He was out of work at the time of his offense, and when his wife became ill and he needed money for rent, food, and doctor bills, he became the victim of temptation. He had no prior criminal record. The other man cashed a check for $35.20. He was also out of work and his wife had left him for another man. His prior record consisted of a drunk charge and a nonsupport charge. Our examination of these two cases indicated no significant differences for sentencing purposes. But they appeared before different judges and the first man received 15 years in prison and the second man 30 days.\textsuperscript{147}

\textsuperscript{141} Estes case related N. Kittrie, The Right To Be Different: Deviance and Enforced Therapy 53-54 (1971). Kittrie also describes a case involving the leader of a political fringe group where an Arlington, Virginia Mental Commission did not permit commitment, but where the mere raising of the question of commitment posed serious threats to the vitality of the first amendment in what he calls "The Therapeutic State." Id. at 75-77. Other examples may be found throughout Kittrie's book.

\textsuperscript{142} See generally K.C. Davis, Discretionary Justice (1969).

\textsuperscript{143} Several newspaper accounts related in K. Menninger, The Crime of Punishment 222-24 (1972) demonstrate that even the general public must have some idea how uneven the system is.

\textsuperscript{144} Orland & Tyler, Justice in Sentencing (1974). This is the report and proceedings of the sentencing institute of the First and Second Circuits as authorized by 28 U.S.C. § 334 (1970).

\textsuperscript{145} Id. at 21-22.
A Law Enforcement Assistance Administration (LEAA) study showed prison sentence rates (as opposed to probation) for dangerous drug offenses in Los Angeles County, California, ranged from 8 percent to 54 percent and prison rates for robbery ranged from 7 percent to 57 percent depending on the judge sitting. James Bennett, former Director of the Federal Bureau of Prisons, testifying before the United States Senate said "some judges are arbitrary and even sadistic . . . by reason of senility or a virtually pathological emotional complex . . . ." This seems incompatible with the concept of equal justice under the law. The Fourth Circuit apparently agrees. In reviewing a bank robbery sentence which it vacated for reconsideration but reluctantly concluded it could not modify, the court said "[i]t is perplexing that in the same district another more violent bank robber and a second offender are treated more leniently than [defendant]."

The disparity from defendant to defendant needs little documentation. Practicing lawyers are familiar with judges who are biased racially, politically, religiously, and otherwise. It should be unnecessary to give examples. It is necessary to do something about the problem.

The disparity from crime to crime is large but not necessarily a problem. There may be considerable justification in sentencing armed robbers more severely than marijuana smokers. The task is to ensure that the disparity is a reasoned response to the disparate crimes and not an emotional peculiarity of the judiciary.

The disparity among jurisdictions is also well documented whether within a state, between states, or between state and federal courts. The Fourth Circuit has noted "that the Courts of the Eastern District of Virginia are consistently more severe than any other Fourth Circuit court averaging offense by offense a full year above

150. The court here inserted a footnote which is worthy of inclusion in full. Since the note relates more closely to the disparity among jurisdictions, it is cited below. See note 154 infra, and accompanying text.
152. At least one circuit has made a small step in the correct direction. In United States v. Wiley, 278 F.2d 500 (7th Cir. 1960) the United States Court of Appeals for the Seventh Circuit held it a denial of equal protection to sentence a minor to a heavier sentence than his adult codefendants when no discernable difference in their prior records or participation in the crime could be found.
153. The study by GREENWOOD, supra note 148, shows prison rates ranging from less than 1 percent (marijuana) to 26 percent (robbery) for Los Angeles as a whole.
the standard circuit sentence." Similar findings result from studies of state systems.

Finally, human variability being what it is, a given judge cannot be expected to be unaffected by his state of health and his state of mind. It is unreasonable to expect a judge who recently has been involved in an accident with a drunken driver to sentence a defendant who drove under the influence in the same way as he might have prior to his accident. None of us, not even the best of judges, responds to a given stimulus identically each day.

VI. SENTENCING UNIFORMITY: THE PROSPECTS

What then can be done to secure some semblance of "equal justice under law"? There are techniques which may help.

Federal law provides that annual sentencing institutes be held by each circuit. The circuit's trial judges and correctional officers join legal scholars in discussing problems of sentencing. The purpose is to encourage judges to develop and exchange views on deliberate and objective sentencing policies. These institutes have no binding authority over any judge but have been of some value nonetheless. The principal value is the exposure each judge gets to the difficulty he may be creating by his sentencing practices. Occasionally a judge may be persuaded to alter his practices toward the mean, or at least to make them more internally consistent. Every state should require frequent attendance at similar institutes for all criminal trial court judges.

Of much greater impact, where it has been used, is the sentencing council. Unlike the institute, a sentencing council is not an academic exercise. Real cases are decided and real sentences imposed according to the decisions. A sentencing council is a meeting of all the criminal trial judges of a jurisdiction for the purpose of collectively discussing the sentences to be imposed in pending cases.

155. See, e.g., Greenwood, supra note 148.
157. M. Frankel, supra note 146, passim; see Dressler, Practice and Theory of Probation and Parole 33-35 (2d ed. 1969) for a description of the proceedings of a similar institute in California.
158. See notes 85-87 supra, and accompanying text. Both sentencing institutes and sentencing councils have the support of the President's Commission on Law Enforcement and Administration of Justice and the ABA. The Challenge of Crime in a Free Society, Report, President's Comm'n on Law Enf. and Admin. of Justice 145 (1969); ABA Standards Relating to Sentencing Alternatives and Procedures §§ 7.1, 7.2 (Approved Draft 1968). The ABA Standards go on to suggest that judges regularly visit penal facilities in their jurisdictions to see what they are really doing to those they sentence. Id. § 7.4. The idea is an excellent one.
Case files are exchanged and each defendant's case is discussed by the group. The trial judge has the final say, but he is strongly influenced, even pressured, by his fellows on the bench. Sentencing uniformity, if not fairness, is usually achieved throughout the jurisdiction.\(^\text{159}\) A particularly valuable function of sentencing councils is the breaking-in of new judges who may have little or no experience in criminal law and corrections.

It has been suggested that sentencing be taken out of the hands of judges altogether and given to administrative sentencing boards.\(^\text{160}\) The proposed boards would include psychologists, sociologists, and other professionals whose backgrounds purportedly give them expertise relevant to the sentencing process. A modified version of this is in effect in California and Washington. In those states the judge may order probation or a prison sentence, but if he chooses prison the effective length of the sentence is selected by an administrative board.\(^\text{161}\) In practice this has worked no better than the present system for many of the same reasons.\(^\text{162}\) Board members, like judges, feel constrained by custom and precedent to follow existing patterns even when they are counterproductive.

Whether sentencing is done by a single judge, a council of judges, or an administrative board, written reasons should be given for every sentence. This suggestion, usually credited to Professor Davis,\(^\text{163}\) has a variety of benefits to support it. The mere act of writing the argument should tend to make judges more deliberate about sentencing. If one can not justify what one is doing one should not be doing it. The need to think things through for the purpose of writing an opinion may make a difference in the outcome of the case. Second, the expectation that one's judicial peers will hear about and perhaps even read the opinions will give a judge some pause before he openly acts in an arbitrary manner. Perhaps the most important reason for written opinions is the guidance they could give to appellate courts on review.

Appellate review of sentences is not a widespread practice in the United States,\(^\text{164}\) but it should be. Sentencing councils can promote uniformity within a district and institutes can encourage a

\(^{159}\) M. Frankel, supra note 146, at 70; Levin, Toward a More Enlightened Sentencing Procedure, 45 Neb. L. Rev. 499 (1966).


\(^{162}\) See generally Mitford, Kind and Unusual Punishment in California, Atlantic Monthly, March 1971, at 45.

\(^{163}\) See K. C. Davis, supra note 141.

\(^{164}\) See note 106 supra, and accompanying text.
circuit to adopt uniform policies, but only appellate review can ensure uniformity on a truly universal basis. It has been argued that the judicially created rule which bars review of sentences is of questionable legitimacy but it seems nonetheless that legislative action will be required to break the barrier. The Fourth Circuit noted wistfully that congressional attempts to enact review statutes have not yet succeeded. The Supreme Court of Alaska openly requested the legislature to create a sentence review body. The Judicial Council of Alaska recommended to the legislature a proposal based on a United States Senate Bill introduced by Senator Hruska. The result was the enactment of a statute expanding the jurisdiction of the Alaska Supreme Court to allow appeal from sentences exceeding 1 year by defendants on the grounds that the sentence was excessive or by the state on the grounds that it was too lenient. The appeal is a matter of right. Perhaps the Alaskan experience is an indication that the Fourth Circuit is correct. Judicial encouragement for legislative action in this area should continue. The scope and standards for review may be initially established by statute, but will surely evolve with the case law.

VII. Administering the Alternatives

The only significant alternative to fine, imprisonment, or medical commitment, is probation, hence this section might well have been called administering probation. The principles adduced here, however, probably would be applicable to any foreseeable alternative system.

The problem is enormous. Each year about 1 percent of the population of the United States is sentenced to prison or probation. When probation is imposed it must be administered. Alfonso Sepe has called the probation department the “key to rehabilita-
tion of the criminal justice system."\textsuperscript{174} Are probation departments up to the task? The question will be approached through examination of the Florida Parole and Probation Commission.\textsuperscript{175}

The theory of probation in Florida is rehabilitation through the use of community resources.\textsuperscript{176} The practice is surveillance and deterrence.\textsuperscript{177} The workload is heavy.

The various duties of a probation officer may include conducting felony and misdemeanor PSI's (the former for circuit courts only, the latter for all courts); pardon and pre-parole investigations; and post-sentencing investigations for the Parole Board. Other responsibilities include administering Florida placement examinations for nonresident convicts relocating therein and investigations of Florida offenders seeking permission to change their county of residence. Probation officers generally conduct other investigations as requested by courts and other agencies. Of course, the constant supervision of probationers is also required.\textsuperscript{178} An officer typically carries a load of about 100 cases. Because of the large number of cases there simply is not time to do much rehabilitation. With their numerous duties and heavy caseload, the officers freely admit that it is impossible to meet Parole Commission standards.\textsuperscript{179}

Even when time permits a probation officer to attempt to work with his probationers in a constructive way, the resources available to him are meager. Drug rehabilitation programs are used as they become available, but there is no central clearing house for program information. Each officer keeps his own private file which goes with him when he leaves. Turnover is high due to low morale, the reasons for which will be discussed below. Financial aid for probationers is nonexistent. The Dade County officer of the Probation Commission once had an employment counselor, but he was promoted to supervisor and not replaced. Legal aid is left to the Bar Association or Legal Aid Society. The Commission does act as a referral service to vocational rehabilitation programs, but the lack of a centralized source of information limits the effectiveness of this function.

Supervision of individual probationers can be close or very

\textsuperscript{174} Address by Judge Sepe, University of Miami School of Law, Sept. 9, 1974. See also ABA STANDARDS, PROBATION (Approved Draft 1970).
\textsuperscript{175} Material for this section was gathered during a series of interviews with Commission officers and employees. The cooperation of the Commission is gratefully acknowledged. [hereinafter cited as Interviews].
\textsuperscript{177} Id., ch. XI.
\textsuperscript{178} Interviews, supra note 175.
\textsuperscript{179} Id.
loose. A probation officer has almost a free hand in handling each case. One officer remarked, "I am appalled at how much discretion I have." Due to some of the technical requirements of probation, for example, the periodic filing of certain documents, many probationers (some of whom may be illiterate) fall into technical violation of probation conditions. The officer may overlook these violations or pursue them as the mood strikes him. Even major violations such as leaving the jurisdiction of the court without permission may be overlooked in some circumstances. When a violation is reported to the court, the officer's recommendation of revocation, modification, or restoration of probation weighs heavily with the court. A probationer does well to keep on the good side of his probation officer, and there is substantial potential for abuse. Under these circumstances, the apparent absence of widespread abuse is a tribute to the high quality of professional conduct of the department's field personnel.

The system ultimately relies on the training, integrity, and morale of its officers. While their candor during interviews was refreshing, and the probation officers demonstrated a real concern for their work, there were disturbing questions raised about the levels of training and morale, at least in Dade County. Generally probation officers are required to have a degree in criminology, sociology, or psychology, or 3 years of counseling experience. These requirements are often waived. Most of the probation officers interviewed did not meet the official standards. On the job training is the rule—there is apparently insufficient time and manpower to provide formal training for new probation officers.

Working conditions lead to low morale and high turnover. The hours are often long and irregular. The clients are often less than endearing. The paperwork is staggering. A supervisor lamented that his probation officers often spent an hour or more of their all too precious time waiting for a judge to sign an urgently needed form. Much of this paperwork may be unnecessary. An experimental project supported by the LEAA concluded that so-called "short-form" pre-sentence reports were as efficient in misdemeanor cases as full scale reports, yet were much less time and resource consuming to prepare. Many of the forms are redundant. Much of the tabulation and record keeping could be handled by computers to free human hands for more human tasks.

180. Id.
Internal conditions are not the only reasons for morale problems. Unenforceable probation conditions frustrate the Commission’s work. White probation officers may be expected to supervise and rehabilitate “ghetto” blacks whose culture is foreign to the supervising officer. The answers may in part lie in the use of more people, especially paraprofessionals indigenous to the offender's community. The “half-way house” institutional program may be an appropriate and effective alternative to conventional probation or imprisonment to control objectionable behavior and change the lifestyle of offenders who, without such programs, would return to prison or training school. The inability to find jobs for their probationers is particularly frustrating to conscientious probation officers. Jobs are a major key to successful rehabilitation and yet it is often government action which makes it difficult for the probationer to find work. In many cases, restrictive occupational licensing requirements bar offenders from procuring employment and thus function to encourage probationers to return to the criminal milieu. A Department of Labor research project directed at 16-26 year old defendants charged primarily with economic offenses showed that job finding services could reduce recidivism by more than 50 percent. These services included bonding, job placement assistance, group and individual counseling and remedial education. However, legislative policy of support for such programs is usually minimal.

There is much housecleaning to be done. Thus far focus has been on the probation officer as the most critical link in the chain of administration of alternative sentences. The probation officer's status merits attention. However, he is not alone. Judges, prosecutors, police, and defense attorneys affect the administration of criminal justice as well as performing in their more visible non-administrative roles.

Judges affect the administration of probation by both action and inaction. Judges rarely follow-up their cases to see whether the probation conditions they impose are practical and beneficial.
The result is that probation conditions are imposed that are impossible to supervise or which have no useful effect on the probationer. One judge forbade a defendant to associate with anyone who rode a motorcycle. The defendant’s probation officer pointed out that to enforce this he would have to institute full time surveillance on the defendant to determine each of his associates, and then put full-time surveillance on each associate to see if he ever rode a motorcycle. “Without full-time surveillance, I couldn’t do it, and I simply couldn’t spare the time from my other cases.”

At least judges are guilty only of benign neglect. Police are rewarded for felony arrests. Whenever there is a choice between charging an individual with either a felony or with a misdemeanor, the pressure is on to charge the felony. Prosecutors are under similar pressures regarding felonies, and have their won-lost record to defend. The situation has been so bad as to result in the following bizarre occurrence: A probation officer sought out a prosecutor to gather information prior to filing for an arrest warrant for a felony probation violator. The prosecutor begged the probation officer not to seek the warrant because the violator was not really guilty of the felony for which he was being probated! The probation officer was torn between his statutory duty to seek the warrant and his sense of justice which told him to let the matter drop. It is no wonder that many probation officers become discouraged and look for other types of work.

A further conflict facing the probation officer is the probation of an “honest” citizen who has committed a technical felony which he would not have committed had he known of its illegality. Typical cases involve carrying a concealed firearm or the improper use of force or booby-traps in defense of property from malicious trespassers. Such cases are rarely appealed because of the light sentences imposed, and remain unreported and unremembered except by the “criminal.” These persons are often not in need of rehabilitation or supervision, yet they clutter the caseload of the probation department.

The system is understaffed and overburdened. Its task is unpopular and expensive. Those who know its workings often have vested

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190. Interviews, supra note 175.
191. Id.
192. Where the citizen is unaware of what constituted “carrying” or “concealed,” especially in cases involving transportation of a weapon in a vehicle this is applicable.
193. These constitute an assault upon the trespasser.
interests in it, while reformers are often visibly ignorant of the working constraints on the materials at hand for reform.\textsuperscript{194}

\section*{VIII. Commentary}

The sentencing aspect of the criminal justice system leaves much to be desired. There are five major areas in which improvement can be made: (1) eliminating unnecessary inputs to the system; (2) rationalizing sentencing provisions and procedures; (3) efficiently reorganizing and upgrading the administration of sentences; (4) making medical commitment a safer, more effective tool; and (5) implementing widespread judicial review of sentencing. With the exception of the first\textsuperscript{195} and the last,\textsuperscript{196} each of these areas of improvement will be discussed in detail.

Statutory sentencing provisions, and judicially and legislatively established procedures need rationalizing. Legislatures can begin by purusing the statutes and deleting all but \textit{malum in se} crimes from the ranks of felonies\textsuperscript{197} and repealing all criminal penalties that do not directly benefit society.\textsuperscript{198} For those acts which remain criminal, there should be a wide range of alternatives to incarceration or prolonged probation.\textsuperscript{199} Alternatives might include corporal punishment,\textsuperscript{200} reparation and multiple damages,\textsuperscript{201} assign-
ment to a “half-way” facility,\textsuperscript{202} or release in the custody of a bonded guardian. These should be accompanied by the repeal of laws divesting convicts of their civil rights, especially those rights pertaining to securing licenses for employment. Potential employers could be protected in this regard if the nature and purpose of the employment of licensed personnel demanded disclosure of the employee’s criminal record.\textsuperscript{203} Multiple or violent offenders might be barred from professions requiring possession and use of firearms. Otherwise there should be as few restrictions as possible.\textsuperscript{204}

In the same manner, the legislature should encourage judges to sentence merely technical offenders, who are good risks based on the pre-sentence investigation, to unsupervised probation. This should be done even in felony cases if the crime is truly technical in nature and the defendant has strong ties to the community, indicating the likely success of such a course of action. This avoids burdening the probation officer with unnecessary supervisory and surveillance work, and frees resources to deal with serious offenders requiring closer attention.

Administration of sentences needs to be efficiently reorganized and upgraded. The paperwork blizzard must be dissipated. Use of short forms where possible, or even no forms in some cases, is advisable. Files and record keeping should be computerized. Passwords and other forms of file protection can assure confidentiality to a degree greater than that possible with hard copy records.\textsuperscript{205} The computer also can be used to service a centralized clearinghouse for

\textsuperscript{201} The most familiar damages statute may be 15 U.S.C. § 15 (1970), the antitrust, treble damages section. This is denominated “civil,” but the label does not change its substance or utility. See generally 24B C.J.S. Criminal Law § 2007 (1962). See also, Fogel, 


\textsuperscript{203} The legend on a security guard’s license might include a notation to the effect that the licensee had been convicted of robbery on (date) and had finished serving his sentence on (date).

\textsuperscript{204} This specifically includes the practice of law. There is no reason to suppose that a truly reformed ex-convict would be less fit to practice law than someone selected at random from among the members of the bar.

\textsuperscript{205} The computer systems literature is rich with various methods of preserving system security, and with analysis of costs of the respective methods. For example, both technical details and economic analysis of several schemes may be found in a collection of three back-to-back papers in 17 COMMUNICATIONS OF THE ASSOCIATION FOR COMPUTING MACHINERY 437-49 (1974).
community service and employment information.

The procurement information of a high-speed disk memory and time-shared remote terminal system would furnish every probation officer in the department with ready access to a full library of community resource information indexed by location, function, special requirements, and even by success rate. The cost of an equivalent measure—hiring additional staff—would be prohibitive, whereas the cost of a proper data handling system would be quite practical.

The use of indigenous and other paraprofessionals, especially ex-convicts, should be expanded. These people may be able to help bridge the wide cultural gap that exists between the literate, educated probation department staff and the often illiterate, unschooled, but streetwise probationer. Where volunteer probation counsellors have been used, results have been mixed. Some studies report reductions in institutionalization and repeat offense rates, while other studies have failed to detect any statistically significant effect. The studies generally have not dealt with paraprofessionals having formal probation training. Thus, it would seem reasonable to conclude that better results should be expected when trained personnel are used. Junior college programs in criminology might be profitably expanded to include penology. This would permit generation of a community pool of trained paraprofessionals.

As the probation department's capabilities are enlarged through the addition of personnel and hardware, legal and economic aid programs for probationers should be developed. Keeping first offenders out of further trouble is often a matter of keeping them out of the situation that first got them into trouble. Quite often such a situation is a financial or minor legal problem like a domestic squabble. If the probationer knows there is help available from the probation office, there will be less temptation for him to seek extra-

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207. See President's Comm'n on Law Enforcement and the Administration of Justice, Report, Science and Technology 68-79 (1967) for a discussion of uses, costs, and potential problems of automated criminal justice information systems.


legal solutions to his problems.

The development of new programs should be accompanied by careful evaluation of each program. Computer facilities will allow sophisticated statistical techniques to be used to determine the effectiveness of each program. These same techniques should be applied to probation conditions judicially imposed. The results should be used to guide the probation officer in making his recommendations in the PSI report. Annual summaries of these results (omitting judges' names) should be presented to the legislature and to any sentencing institutes or councils convened in the probation department's jurisdiction. Finally, it must be recognized that not all offenders need rehabilitation. The marijuana smoker may need education about the possibly dangerous effects of drug usage, but he is not necessarily antisocial and probably does not require counseling. Unsupervised probation would often be an appropriate sentence. If society insists on stopping the use of marijuana, then it may need to provide surveillance—but not rehabilitation. The same is true of the conscientious draft dodger, some tax evaders, homosexuals, many regulation violators, and technical criminals. There is no sense spending a counselor's time with these offenders when there are others on probation more in need of help.

Medical commitment has great potential for good and for evil. This paradox involves taking advantage of the good while forestalling the evil. If medical treatment is not used to defeat the constitutional and statutory rights of certain individuals, and becomes a safeguarded alternative for truly therapeutic purposes, good will naturally follow. The thrust of this examination is to suggest safeguards which are readily created.

The first safeguard should be that mentally competent defendants not be forced to take treatment of any kind. The state

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211. The value of research findings in improving the success rate in probation is discussed in Dressler, supra note 157, at 152-58.
212. See, e.g., N. Kittrie, supra note 140, at xviii.
213. Mental health law is a complicated field which is obviously beyond the scope of this comment; however, an overview is necessary.
214. See notes 78-80 supra, and accompanying text. See also Wexler, Therapeutic Justice, 57 Minn. L. Rev. 289, 295 (1972).
215. For a commentary which argues that involuntary treatment has no place whatsoever in a free society, see Szasz, The Danger of Coercive Psychiatry, 61 A.B.A.J. 1246 (1975).
216. The term "readily" does not imply political feasibility but only technical feasibility. Some psychiatric professionals see legal due process as a medical inconvenience and might well make it difficult to pass the needed legislation however much it is needed. See, e.g., the discussion in N. Kittrie, supra note 140, at 79-95. Safeguards generally are discussed in N. Kittrie, at 307, 362 et seq. and 400 et seq.
may isolate them\textsuperscript{217} or imprison them for the statutory period for their crimes, but it may not forceably treat them.\textsuperscript{218} The second safeguard should be the appointment of a legal guardian in a civil proceeding for mentally incompetent defendants. The guardian's written consent would be required before any treatment could be given the defendant. Furthermore, the guardian should be legally liable, as a fiduciary, to the defendant for the consequences of the treatment. The third safeguard should be the abandonment of the proposition that medical commitment is not akin to imprisonment. The Bill of Rights should apply in full to all criminal proceedings, whether punitive or therapeutic. The critical thing to remember is that the awesome power of a modern government is being focused to confine one of its citizens against his will. What the process is called is immaterial.\textsuperscript{219}

If improvement can be made in the five areas set out at the beginning of this section by the means suggested or by any other practical means, society will benefit. Lower cost and lower crime rates are desirable goals for the criminal justice system, and upgraded sentencing mechanisms are essential to those goals.

\textsuperscript{217} E.g., to prevent the spread of a communicable disease.

\textsuperscript{218} Indeed, the dichotomy between traditional institutional "treatment" and "no treatment" may be false. Therapeutic use of "half-way" and "community" facilities during probation can be quite valuable. See \textsc{N. Kittredge, supra} note 140, at 163-64, regarding this technique as applied to juveniles.

\textsuperscript{219} This reasoning was essentially followed in regard to the rights of juveniles in juvenile court proceedings. \textit{In re Gault}, 387 \textsc{U.S.} 1 (1966). The medical community can also do its share by adopting upgraded ethical standards. See \textsc{Halleck, supra} note 134, at 238-44 for suggested standards and the reasons for them. See also \textsc{Jackson v. Indiana, 406 \textsc{U.S.} 715} (1972); \textsc{Schwitzgebel, Limitations on the Coercive Treatment of Offenders, 8 \textsc{Crim. L. Bull.} 267} (1972).