THE SENTENCING FUNCTION IN SELECTION FOR PROBATION

Thesis for the Degree of M. S.
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IN
SELECTION FOR PROBATION

by

ELEFTHERIOS SOTIRIOU KANELLAKIS

AN ABSTRACT

Submitted to the
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CHAPTER I

INTRODUCTION

Massachusetts has been known as the "cradle of probation " since John Augustus began his bold experiment in human rescue work there in 1841. Since then probation has been well recognized and relatively successfully developed in the United States, the United Kingdom, and many continental countries. Today, probation as a method of treating juvenile and adult offenders on an individualized basis has become an important phase of the process of criminal justice. In the sheer number of persons under supervision and treatment, probation has become the most important correctional activity.

It is generally recognized that any effective system of probation requires provision for two essential functions: a proper selection of offenders for probation and adequate supervision and treatment. The selection of offenders deemed suitable for probation is the crucial function. Probation, as a method of individualized treatment, is no panacea for every offender or for groups of criminals or types of offenders in general. Therefore, efficiency, effectiveness, and future development of probation depend to a great extent on the proper selection of individual probationers. Poor selection can render supervision and treatment ineffectual.

Since probation is a matter of judicial discretion, the problem of selecting offenders for probation is a part of the

wider sentencing function of the courts. Judicial sentencing policy is an essential factor in the administration of criminal justice which recently has received great international attention.[1]

The problem, therefore, of sentencing offenders to probation raises the questions: What factors affect the judicial sentencing? What are the most effective devices through which the judge can exercise his disposition on probation? What criteria should affect the selection of offenders for probation?

The present study represents an attempt to answer these questions through a review of the pertinent literature and analysis of relevant contemporary scientific knowledge. It will merely try to demonstrate what can and should be done in order to place the granting of probation on a sounder basis.

It is the purpose of this study to present in the second chapter the framework of probation: (a) the basic legal and social changes in which probation has been developed and (b) the present state of probation in the United States and in selected European countries. The development of probation and its present status are prerequisites for this study. Within the scope of Chapter II, however, it is possible to present only a general outline of the more important features and tendencies.

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[1]International Association of Penal Law (8th Congress in Lisbon, September 1961): Methods and Technical procedures employed in elaboration of the penal sentence; also in International Congress on Social Defense in Stockholm, 1958.

Chapter III describes the sentencing function and analyzes the sentencing problem in regard to the court's disposition on probation. The selection process for probation and the devices for improving judicial discretion, (presentence investigation, prediction tables, legislative and administrative guides), represent the main subject of its discussion.

Chapter IV deals with the criteria of selection for probation as a court disposition. The conclusions and recommendations drawn from the study constitute Chapter V.

CHAPTER II

PRINCIPLES AND PRESENT STATUS OF PROBATION

I. The Framework and Basic Principles

Historical Background. The stream of enlightenment and humanitarianism which sprang out from the brilliant thoughts of the eighteenth century's philosophers[2] was widened and extended by the contributions of the great reformers of the existing criminal systems: S. Romily (1757-1818), W. Blackstone (1723-1800), C. Beccaria (1733-1794), Paul J. Feuerbach (1775-1833), Alp. M. Th. Berenger (1785-1866), and others.

In the second half of the nineteenth century, the evolution of the criminal law and the emergence of criminology, under the influence of positivism and the development of the physical sciences, broke down the barriers of the rationalistic dogma of the classical school. The dawn of a new era of penal reforms arose with the doctrinal movement of the positive school which shifted the emphasis from the crime to the criminal and gave unprecedented impetus to the scientific study of the criminal. The man, rather than the offense, became the center of interest. The struggle for the individualization of treatment on the basis of the offender's character and personality instead of the nature of his offense is one of the most dramatic struggles in the history of the criminological thought.

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[2]Montesquieu, Voltaire, J. Jacques Rousseau, Diderot, Turgot, Adam Smith, Th. Paine.

The modern trend and all the innovations in the field of penology started with the "golden age" (1870) of America.[3] This trend and innovation have been based on the offender's motivation. It has been in the direction of positivism (suspended sentences, probation, indeterminate sentences, parole good times laws).[4]

Thus, the last fifty years have seen the widespread acceptance of three legal inventions of great importance: Probation, Juvenile Court,and Parole. Probation was closely associated in its development with the Juvenile Court and in many countires grew up together. Probation has been a decisive step in the administration of criminal justice which, first taken in the United States, has been extended to almost all the civilized world.

Prevention of Crime and Delinquency. The violations of the rules of a community are as old as the human being,or "social animal"[5], beginning to live in organized groups. Crime has been in all periods and kinds of society's life. Throughout the ages there have been many attempts to find a general explanation of the reasons why people commit crime and how they do it. The factors contributing to crime and delinquency are varied and complex. Today, in spite of the research conducted

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[3]Declarations of Principles Adopted by the Congress of Correction in 1870 in Cincinnati. This gave birth to the idea of an international congress London, 1872.

[4]Clarence R. Jeffery, "The Historical Development of Criminology," Journal of Criminal Law, Criminology and Police Science, 50:14, May-June, 1959. Jerome Hall, General Principles of Criminal Law (Indianapolis: The Bobbs-Merril Co, 1947) p.50 et seq. Thorsten Sellin, "Enrico Ferri," J. of Cr. Law, Crimin & P. Sci., 49:481-2, 490-1, Jan Feb,1958.

[5]According to Aristotle.

in the United States and abroad, a universal or a completely acceptable explanation of criminal behavior is not possible.

Perhaps it is a mistake to seek a general cause or process for it.[6] It seems that sometimes the roots of crime extend deeper and further than the particular social circumstances show. But there is no doubt that crime and delinquency are social phenomena. Crime and delinquency must be considered as the product of many factors in the criminal's and society's life.

At the present time crime and delinquency are increasing in almost every country.[7] The problem and the challenge of crime and delinquency is definitely and substantially a problem of youth. Many criminologists have pointed out that the seeds of criminal careers are often sown during the early years of unprotected childhood. Studies have indicated that statistics on arrests, convictions, probation, and commitments reveal that persons below the age of 25 represent the largest group of the apprehended offenders.[8] Although the juvenile delinquent has been carefully considered by the community, the youthful offender has not yet been credited with the same interest. If

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[6]George Vold, Theoretical Criminology (New York: Oxford Univ. Press, 1958), pp. 40 & 314. Edwin H. Sutherland and Donald S. Cressey, Principles of Criminology (fifth edition; New York: Lippincott & Co, 1955), pp. 19-20. Ruth S. Cavan, Criminology (second edition; New York: Thos. Y. Crowell Co, 1958), p. 704.

[7]Manuel Lopez-Rey, "Some Misconceptions in Contemporary Criminology", Essays in Criminal Science, G. Mueller, editor, (New Jersey: Fred B. Bothman & Co., 1961), p. 5. United Nations, New Forms of Juvenile Delinquency (New York, 1960).

[8]Attorney General's Survey on Release Procedures (Wash., D.C.: U.S. Dept of Justice, 1939), II-367. National Probation & Parole Association, Guides for Sentencing (New York, 1957),p.37.

crime is to be prevented, the many influences and conditions which predispose to criminal behavior must be controlled and corrected.

Prevention of crime and delinquency with the ultimate aim of protecting society is generally accepted as the key-note of an effective crime control. This could be achieved by: (a) the method of prevention as an effort to forestall first crimes by preventive control programs and measures and (b) the method of reformation or the effort to prevent recidivism by legal and social measures.[9] The prevailing principle of natural causation and individualization of treatment has become the cornerstone of the prevention of crime and delinquency.

The actual prevention of crime and the protection of society against crime are extremely complex and important objectives of causation and penology. Crime and delinquency affect all groups, agencies, and the whole community. It is hoped that a many-sided attack on the factors commonly found in the careers of offenders would reduce the number of new criminals. Probation is one instrumentality in the inventory of devices society has evolved to control crime.

Concept of Individual Prevention. In the recent decades, stimulated both by an advancing crime rate and by the results of careful studies, a more fundamental approach to the question of crime has emerged: the individual prevention. This emphasis

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[9]Sutherland & Cressey, Principles of Criminology, p. 590.

upon prevention and socialized policy for treating the criminal has been conducive to the study of the various factors underlying delinquency and has resulted in the utilization of this knowledge in the prevention of delinquency and in the rehabilitation of those already convicted.

These studies, with the corresponding enlightened attitude toward motivation, have resulted in a new judicial and social treatment of the offender, especially the juvenile. The rise of the rehabilitative ideal has had great impact upon modern law and correctional administration. At the present time, the main principle of any penal and corrective treatment is to prevent repeated crime through individual prevention. The prevention of recidivism--reformation or secondary prevention--has been regarded as the treatment of offenders with satisfactory adjustment to a law abiding and a socially accepted life in the community, and it is beginning to refer exclusively to non-punitive efforts to the rehabilitation of the "criminal."[10] Rehabilitation of offenders within the prison walls and/or under supervision in freedom has become the principal aim of criminal law administration. Changing the frame of mind and heart of a maladjusted person is necessary for the correction of the behavior patterns toward

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[10]American Correctional Association, Manual of Correctional Standards (New York: The Amer. Correctional Assoc, 1959), p. 26. Sutherland & Cressey, Principles of Criminology, p. 590. Robert G. Caldwell, Criminology (New York: The Ronald Press Co., 1956), p. 429.

society and its laws. Rehabilitation implies the removal of the reasons which cause a person to behave as a criminal. Motivations and attitudes must be considered as well as the circumstances of the social environment.

The reduction of the high rate of recidivism requires great efforts from all the community's available resources and human knowledge to apply rehabilitative and reformative measures for the individualization of treatment. Criminal justice through the means of police, prosecution, courts and corrections, as inseparable links of each penal system, plays a crucial role in preventing and controlling crime and delinquency.

The new approach is to redirect and readjust the offenders to a normal social life. Under the modern principle of individual prevention have been inspired both legislation and judicial practices from which have sprung and developed the legal institution of probation as well as parole. Today, these play a significant role in the international effort to eliminate crime and to treat the criminal.

Criminal Law and Objectives of Sentencing and Correction. A penal code specifically defines crimes and sets forth the kind of punishment under the fundamental principle of the Anglo-American and Civil-Law systems: nullum crimem, nulla poena, sine lege (no crime, no punishment, without a law). Thus, crime and punishment are closely tied together. Whatever may be or ought to be its methods and process--punitive or other preventive--the purpose of criminal law is prevention of crime. It has as its primary function the protection of society against

the infringement of rights of person, state and property. Punishment as vengeance or retribution belongs to a penal philosophy that seems to be discredited by history and the experience in England, America and the Continent.[11] Penologists in the United States today are generally agreed that the prison serves most effectively for the protection of society against crime when its major emphasis is on rehabilitation.[12] But retribution, though persistently criticized by modern penologists, continues to be a major ingredient of penal law and the correctional system.[13] The punitive reaction to crime is still popular.

The subject of the deterrent effect of punishment is a controversial subject and a large one for adequate discussion here. Both these theories have the authority of antiquity: (a) Plato's axiom that punishment, justly imposed, is always corrective.[14] This theory shifted from academic penologists to the concept that punishment never has any beneficial effect. (b) Aristotle advocates the struggle against the crime might be more effective if the law used two weapons: the general prevention by deterrence and the measures of individual

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[11]Plato's philosophy that punishment must have a prospective utility and can be justified only if it furthers the ends of society is today the dominant philosophy. But some people still believe in a punishment per se, moral responsibility and punitive theory of Kant and Hegel.

[12]Austin McCormick, "The Prison's Role in Crime Prevention," Journal of Criminal Law & Criminology, 41:36-43, 1950.

[13]Paul W. Tappan, Crime, Justice, & Correction (New York: McGraw-Hill, 1960), p. 241. Hans Toch, Legal & Criminal Psychology, (New York: Holt, Rinehart & Winston, Inc, 1961), p. 181.

[14] Punishment is a measure of individual prevention (punitur ne peccetur). Plato: Gorgias 478 d:"correct adjust to the laws and medical cure is the purpose of the trial."

prevention of correctional treatment.[15]

It is scarcely disputed that the criminal law reflects a moral quality and represents a strong social control. Law and morality function together to discourage anti-social behavior and criminality especially in the home, school, neighborhood, church, and community. The criminal law should undoubtedly include an element of deterrent and intimidation which is essential to the protection of society.[16] The varying impact of treatment penalties or punishment may be more effective for first offenders. If one assumes that the ultimate purpose of punishment--any harm or loss inflicted on an offender--is prevention of crime, then its operation must be prompt, certain and efficient. This is the best way to protect the society. The severity of punishment is not an adequate deterrent.

Criminologists and experienced penologists emphasize the idea of rehabilitative treatment, but they do not dismiss the idea of punishment under certain circumstances. Punishment has evident values, although limited, but punitive methods are relatively inefficient.[17] Punishment and treatment must be given a place in modern penology.[18] The problem is how to balance and harmonize these objectives to achieve the ends of justice and correction. Not one of the major goals, general

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[15]Aristotle, Retoric, Ch. 10, "Punishment is different from treatment; treatment is because of the sick and punishment is imposed to offender as a retribution."

[16]Jerome Hall, Studies in Jurisprudence & Criminal Theory, (New York:Oceana Publications, Inc., 1958), p. 244. Hall defends a third theory with the elements - justice, deterrence, and reformation.

[17]Sutherland & Cressey, Principles of Criminology, p. 326.

[18]. Caldwell, Criminology, p. 429

or special deterrence, incapacitation, individual intimidation, and reformation can be adopted to the exclusion of the others if the purpose is to protect society full.[19]

The recent tendency of legislation and courts and correctional agencies' practice is to think in terms of "treatment" rather than punishment for the individual offender.[20] The conception of treatment does not exclude punishment as an essential element of reformation and as a means of criminal justice. Punishment as an instrumentality should not be used blindly but in the light of scientific knowledge. Since probation involves limitations of the offenders liberty, it is a punitive form of extra-mural treatment rather than a nonpunitive form of remedial treatment.[21] It proceeds from the assumption that the end of criminal law ought to be the protection of society by preventing crime. The philosophy of probation is based upon the idea that the principle deterrent effect lies not in the severity of the punishment but in the swiftness and certainty of apprehension and the disgrace of conviction.

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[19] Paul W. Tappen, Crime, Justice & Correction, p. 241 and 271. Herbert Wechsler, "Sentencing, Correction and the Model Penal Code," Penna University Law Review, p. 468, Feb, 1961.

[20] Lionel W. Fox, "English Prisons Since the War," The Annals of the American Academy of Political & Social Science 293:119, May 1954.

[21] Donald E. Taft, Criminology (New York: The MacMillan Co., 1956), p. 447. Mabel Elliott, Crime in Modern Society (New York: Harper & Brothers, 1952), p. 575. Sutherland & Cressey, Principles of Criminology, p. 421. Contra English Criminal Justice Act, 1948. United Nations, Probation & Related Measures (New York: 1951, pp. 6, 215, 220.

The basic conflict between the classical and positive school concerning the attitude toward crime is still present in the contemporary criminal law. However, from the "mitigating circumstances" of the neo-classical school, the reaction to crime was no longer punitive. The recent trend lies toward laws of indeterminate sentences of the "security measures" under the movement of "social defense" applicable to special categories: insame or mental defective, hardened criminals with many convictions, juvenile offenders, abnormal offenders.[22] Many authors agree that if Classicism is a thesis and Positivism is an antithesis, then "social defense" may be considered as a synthesis of both.[23]

Finally, it may be emphasized that the most significant contribution to the modern penology is the idea of individualization of punishment to fit the offender rather than the offense.[24] This could carry into effect through the probation, indeterminate sentence and parole.

Individualization of Criminal Justice. About two centuries ago the idea of equal punishment according to the offense was hailed as a great step forward in the administration of criminal

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[22]United Nations, The Indeterminate Sentence, (New York: 1954), p. 63 ff.

[23]J. M. Canals, "Classicism, Positivism. and Social Defense", J. of Crim. Law, Criminol. & P. Sci, 51:541, 1960.

[24]Raymond Saileilles, The Individualization of Punishment, trans. R. S. Jastrow (Boston: Little, Brown & Co., 1911), pp.220, 237, 295 et seq. This, in a broad sense, is legal, judicial, and administrative.

justice. The primary function of the courts is to establish guilt and impose punishment as a form of retribution, or in other words, to look at the crime, but be blind to the individual. In recent decades the new concept of "individualized justice" has been rapidly gaining acceptance. It means that instead of seeking to make the punishment fit the crime, we seek to make the penal treatment fit the offender according to his needs. He is considered as a concrete human being and not in terms of an abstract offender.[25] The individualization of justice transfers much of the emphasis from what he has done to why he has done it and what we should do for him. For this end, the cooperation of judges, experts, and all community agencies and resources are indispensable. The main steps which represent the origin and development of individualized justice in the United States are probation, juvenile court, indeterminate sentence and parole.

Probation and juvenile courts broke away from the traditional idea of administering evenhanded justice toward the modern philosophy of individualized justice. Judges gradually are coming to discard the theories of vengeance and retribution and are striving to protect society by individualized correctional treatment which helps the offender to adjust himself into a useful and law-abiding citizen.

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[25]Roscoe Pound, "The Rise of Socialized Criminal Justice", National Probation & Parole Association Yearbook 1942, p. 5 and "The Future of Socialized Justice", Yearbook 1946,

Place of Probation in the Administration of Criminal Justice. Probation has been strictly and universally a matter of judicial function and discretion. Its legal preoccupation is with social case work treatment and rehabilitation. But in the criminal court probation is an individualization of treatment to a reasonable degree. Probation has its place, and a significant one, within a differentiated system of penal and corrective methods. Because of its increased use, probation has been regarded as one of the most significant achievements in society's efforts against criminality and has become an important phase of the administration of justice. The value of probation as a constructive method of dealing with offenders in the present day penal system is best illustrated by the practical and social results in the survey of the following section. In the United States as well as in European countries there are more offenders under supervision of probation officers than prisoners in custody. Probation as a method of crime prevention has accomplished an important role in the administration of criminal justice. In spite of its shortcomings, especially in adequate and qualified personnel, it restores a significant proportion of selected offenders to a law-abiding status within the community in its task of human salvage.

"Probation is based on the same framework as our society itself--respect for the individual--and today society deals with human beings who err, not by 'coddling' them, but by trying to

see to it that they receive individualized justice."[26] In his address to the annual meeting of the American Law Institute in May, 1955, the Chief Justice of the United States emphasized the importance of probation in the Federal system, saying, "The public and even our own profession know altogether too little about it as a factor in the administration of criminal justice."[27] And, there are other worthwhile studies by the social scientists on whose advice and counsel we are slowly but surely learning to rely. All of this indicates an aroused interest in the problem confronting a judge charged with the responsibility of imposing sentence after guilt has been established.

Scientific and Individualized Treatment of Offenders. The individualized treatment of offenders on probation is not fundamentally different from the more general concept of individualized or socialized justice. It is a treatment process selectively applied by looking at each offender's individual problem and needs as unique.

In view of the complexity of factors which enter into the commission of crimes, individualization of treatment must be recognized as indispensable. Effective individualization must be based upon as complete a study understanding of each offender as modern science will permit. Psychiatry, psychology, social

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[26]Frank T. Flynn, "Probation and Individualized Justice," Federal Probation, 14:76, June, 1950.

[27]Earl Warren, "Probation in the Federal System of Criminal Justice," Federal Probation, 19:4, 1955. (Address to the Annual Meeting, American Law Institute, Washington, D.C., May 13, 1955 by Earl Warren.)

case work and all sciences concerned with the problems of human motivation and behavior must be drawn into the program for administering criminal justice.[28] The trend of individualization is universally accepted. It is sometimes referred to as individualization of punishment, i.e., type and the severity of punishment should be adapted to the individual.[29]

The cornerstone of probation is scientific study and individualization of treatment of each offender through presentence investigation. Each case should include expert study, diagnosis and therapy as criminal medicine.

If the values of probation are to be fully realized, each probationer must be selected individually on a basis on a diagnostic evaluation and planning treatment. It will also produce better results if the procedures are flexible and adaptive.[30] Finally, it is obvious that the efficiency of an individualized treatment depends greatly on the number and quality of the expert personnel and the scientific knowledge of predictability of human behavior.

Probation within the Trilogy of Correctional Process. Today the theory of trilogy of correctional process (probation, institution, parole) is to be a continuum of social treatment of offenders. It represents the stages of legal supervision

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[28]Sheldon Glueck, Crime & Correction: Selected Papers (Cambridge, Mass.:Addison-Wesley Press, Inc., 1952) pp. 81-82.

[29]Sutherland & Cressey, Principles of Criminology, p. 320.

[30]Luther M. Swygert, "Individualized Treatment in Probation," Federal Probation, 20:18-19, March 1956.

and gives meaning and an incentive to each other. It serves the same correctional objective: "to prevent recidivism by preparing men for release from all legal supervision as rapidly and economically as possible, as useful, law-abiding, sefl-supporting, self-sufficient, independent citizens who will not contribute to the commission of crime by others."[31] Probation, therfore, should be considered as a link of the correctional chain which begins with the arrest or conviction and ends with the final discharge or release from all legal supervision.to the community.

Neither probation nor parole will be any more effective than the weakest element in the cycle. Where the court does not make proper dispositions on probation, its success will be seriously handicapped. When the prison does not prepare the inmate for community living, then parole is faced with a most difficult and often impossible task. When the community is unwilling to accept the probationer or parolee after he has been "treated," then the task of these services is made immeasurably more complex.

At any rate, there is consensus that the correctional process should include the segregation or known criminals

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[31] Alfred Schnur, "Current Practices in Correction: A Critque", Legal and Criminal Psychology, Hans Toch, editor (New York: Holt, Rinehart, and Winston, 1961), pp. 294 and 299. Alfred Schnur, "Pre-Service Training," J. of Crim Law, Criminol & P. Sci., 50:27 & 29, 1959.

(non-reformable) from society for so long a time as they continue to be potentially dangerous. This minority in the light of existing knowledge and facilities cannot be treated effectively.

Probation within a single and integrated system of corrections and a unified treatment process might be more effective. The Federal correctional system today functions with a unified treatment process and common policy and practice by virtue of an integrated theory of corrections. The Federal system can be justly proud of the progress made in recent years of raising standards and coordinating the work of probation within the three interrelated services.

In general, the treatment of juvenile, youth and adult offenders should be a wider continuum process in which police, judicial, correctional and social agencies and the whole community play a significant role and share responsibility.

II. The Present Status of Probation

Nature and Philosophy of Probation. The term "probation" is derived from the Latin "probare". Its root means a period of testing or proving.[32] Probation is used as a substitute to discharge or an alternative to imprisonment, implying personal care and supervision for the convicted offender.

32- . Caldwell, Criminology, p. 431. Henry E. Barnes and Negley K. Teeters, New Horizons in Criminology (New Jersey:Prentice-Hall, Inc., 1960), p. 553.

Probation is a form of the court's disposition but it is also a correctional process. This study is concerned with the former.

Probation has been defined many times. According to a generally accepted definition:

> "Probation consists of the conditional suspension of punishment while the offender is placed under personal supervision and is given individual guidance and treatment."[33]

More comprehensively probation may be defined by the Standard Probation and Parole Act:

> "Probation is a procedure under which a defendant, found guilty of a crime upon verdict or plea, is released by the court, without imprisonment, subject to conditions imposed by the court and subject to the supervision of the protection service."[34]

The theory behind the practice of probation is that rehabilitation of the offender may be affected through means other than institutionalization. It has been determined, through the use of probation, that some offenders will progress through the stages of rehabilitation at a much faster rate more easily and more surely by permitting them to remain a member of the community and to take a normal part within it under the supervision and guidance of a probation officer. The underlying philosophy of probation is based on the same

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[33]United Nations, Probation, p. 4.

[34]National Probation & Parole Association, Standard Probation and Parole Act, (New York:1955), p. 2.

framework of American democratic society, i.e., respect for the individual.[35]

Probation consists of four essential elements:[36] (a) it is a method of dealing with specially selected offenders whose guilt has been established; (b) it is an individualized method of treatment which is applied on a selective basis; (c) probation involves the conditional suspension of punishment (institutionalization) and (d) probation involves supervision and treatment.

Probation, according to Sutherland, represents a kind of compromise between the punitive and treatment reaction of crime and is defined:

> "The status of a convicted offender during a period of suspension of the sentence in which he is given liberty conditioned on this behavior and in which the state by personal supervision attempts to assist him to maintain good behavior."[37]

A suspended sentence not providing assistance and supervision for the offender is not probation; it is a method or an act of mercy or judicial leniency which allows "hopeful cases" or first offenders "another chance."[38]

The most traditional conception which still insists in the courts, is that probation involves an idea of leniency for "hopeful cases" or first offenders. Probation, however, is not a mitigating device or "another chance" or judicial

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[35]Frank T. Flynn, "Probation & Individualized Justice", p.76

[36]United Nations, Probation, pp 4-7.

[37]Sutherland & Cressey, Principles of Criminology, p. 421.

[38] . Cavan, Criminology, p. 522-523.

clemency. It is a considered judicial disposition on the basis of individualized treatment in freedom. Probation is to provide the offender some supervision and assistance to adjust in the community. This is a technique of treatment in freedom and a positive method of dealing with the offender.[39] Probation, juvenile or adult, permits a more normal social experience than institutionalization.[40]

The opinions that regard probation wholly as a punitive or leniency measure or a legal disposition have found little acceptance. Whether probation can be regarded as a form of punishment rather that a form of remedial treatment remains an open question although doctrinal. In some cases which involve restrictions upon freedom and other requirements, probation cannot be considered as non-punishment because it is more than imprisonment and fine. The review of the literature and the practice of the past thirty years conducted by Professor Lewis Diana "reveals the predominance of the view that probation is a process of case work 'treatment' or 'administration or a combination of the two'".[41]

Probation is non-institutional treatment, "treatment in the open" by casework methods, though with the power of the

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[39]Lewis Diana, "What is Probation?", J. of Crim Law, Criminol., & P. Sci, 51:189-208, July & August, 1960.

[40] . Taft , Criminology, p. 447 & 448.

[41] Diana , "What is Probation?", p. 196.
Edwin J. Cooley, Probation and Delinquency: The Study and Treatment of the Individual Delinquent (New York: Thomas Nelson and Sons, 1927), p.22-23.

court and the law behind it or "casework in an authoritarian setting."[42] Probation is actually a constructive and rehabilitative penal and correctional treatment. Finally, in the legal sense probation is suspension of imposition of the sentence, during a treatment period outside the walls in the community, on condition of law-abiding and good behavior.

Probation, parole, and the suspended sentence as methods of treating offenders are different from one another, and the terms should never be used interchangeably. There is widespread popular confusion between the terms "probation", "parole" and "pardon".

Parole is related to probation but should be distinguished from it. Parole, like probation, has made a definite break with the classical theory of criminal law, since both systems attempt to implement the treatment reaction to crime and criminality. The main difference lies in the fact that parole is a conditional release from prison granted by the parole board after the prisoner has served part of his sentence in confinement; probation is a conditional suspension of the sentence granted by the court in lieu of institutionalization. The probationer is under the supervision of a probation officer and has a suspended sentence as long as he abides by the conditions of the court. The parolee is also supervised, but not by the court; he is supervised by the parole board after his release

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[42]United Nations, Selection of Offenders for Probation (New York:Dept of Economic & Social Affairs, 1959) p. 9. . Caldwell, Criminology, p. 450. . Diana, "What is Probation?", p. 197.

from prison and until his sentence expires. Parole is less "purely" treatment than probation. Probation and parole both as companion services have as their primary objective the protection of society through the rehabilitation of the offender. In most respects, they are alike, cooperating and intertwined, and in both the same methods and techniques are used during the supervision and guidance of probationer and parolee.

Origin and Development in the United States. Probation in reality is an American innovation. It was an outgrowth of the methods for suspended sentence in England and America: benefit of clergy and judicial reprieve or suspension of sentence or release on recognizance.[43] John Augustus, the first probation officer, has been credited with introducing the practice in 1841 as well as the term "probation." He was friendly toward and interested in the violators of the law (drunken men and wayward girls) and bailed many of them out of jail and provided them with sympathetic supervision. The first probation law was passed in 1878 in Massachusetts.

The early achievements of the experiment of probation were encouraging and enlightening to many judges who recognized its values and limitations. Men had been trained in social therapy, and the public had been aware of the economic benefits of probation.

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[43] Diana, "What is Probation?", p. 189. Tappan, Crime, Justice & Correction, p. 539-540.

Probation is substantially a modern method for the treatment of offenders. It is rooted in the social, cultural and legal trends of the modern era. The origin of probation was rather the result of a gradual growth, an almost unconscious modification of existing legal practices.[44]

Modern probation was first used in criminal courts, and it was an established method in dealing with children when the juvenile court was making its appearance in 1899. Probation grew up out of the judge's power to suspend sentence and the necessity for some method of supervision. The development of probation was greatly speeded up by juvenile court philosophy. Most of the probation statutes have been passed since 1916. Adult probation laws exist in all states. There is a variety of legislation governing probation among the states. The Federal government passed a probation law in 1925, although Federal judges previously had been placing offenders on probation.[45] Today, juveniles may be placed on probation in all states, the District of Columbia, the territories, and the Federal judicial system. Juvenile probation has received greater attention and its development has been greater than adult probation.

The present feature of probation in the United States is characterized by its three-level administrative organization

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[44]United Nations, Probation, p. 15-16.

[45] . Caldwell, Criminology, p. 433. Attorney General's Survey of Release Procedure, p. 27.

and the variable extent of its application. Probation in the United States is administered under varying state laws and systems, and federal probation is under a national system. The three types of organization most used are: (1) local or county units with appointment of probation officers by judges or local authorities, (2) state-wide administration as a part of a state department or the state welfare department, (3) a state-wide administration with probation and parole combined under one head. The trend is toward the second and third systems with state control and the combining of probation and parole. About half of the states provide certain state-wide adult probation services, frequently integrated with parole and sometimes integrated with juvenile probation; the number is increasing. This system has the advantage of making a uniform and centrally effective probation program. The National Council on Crime and Delinquency (formerly the National Probation and Parole Association) is making great efforts to promote interstate cooperation and efficiency.

Various legal limitations are imposed upon the use of probation by the statutes of states which are indications "of a conflict between the punitive and treatment reactions to crime."[46]

Probation according to law may be granted to adults prior to conviction in five states; however, this is rarely done.

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[46]Sutherland & Cressey, Principles of Criminology p. 424.

In juvenile courts the granting of probation without formal finding is sometimes the practice.

There is little statistical information on probation on a nation-wide basis by a public or private agency. The need for a centralized statistical agency is emphasized.[47] While national statistics on dispositions are not available, it is estimated that the rate of use of probation is higher than thirty percent in felony cases. In misdemeanor cases probation is granted to less than ten percent. In 1945, for 25 states in courts of general jurisdiction, 31.6 percent were placed on probation or given suspended sentences. In general, it is indicated that about one-third of all offenders convicted by state and federal jurisdiction are placed on probation or given suspended sentences.[48] The Federal courts are granting probation to about two out of five cases as indicated in Table I (page 28).

In California, trends in criminal court convictions and percentage of probation disposition for the years 1948, 1953-1958 are shown in Table II (page 29). The rate for the superior courts has been between 40.2 and 50.7 percent; for the lower courts 28.1 and 33.1 percent. These figures indicate generally that the percentage has remained relatively constant in recent years. In Michigan, data from the past thirty years

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[47]John W. Mannering, "Probation Statistics", American Correctional Association Proceedings, 1957, pp. 93-94. Raymond C. Davinson, "Probation & Parole Statistics", National Probation & Parole Association Journal, July 1957, p. 265.

[48]Attorney General's Survey of Release Procedure, p. 38. U. S. Bureau of Census, 1945.

TABLE I

FEDERAL·COMPARATIVE TABLE OF PROBATION DISPOSITION
OF CONVICTED OFFENDERS IN UNITED STATES COURTS
DURING THE FISCAL YEARS 1945, 1950 TO 1960

Year	Total Convicted	Imprisonment	Probation		Suspended Sentence & fine	Disparity of Sentences			
			Number	% of total conv.		Minimum Circuit	%	Maximum Circuit	%
1945	42,496	18,630	23,866	56.2	-	Tex. Western	8.7	N.H.	85.7
1950	26,161	16,196	9,965	38.1	-	N.M.	4.5	Penn. Middle	83.3
1951	26,190	16,956	9,234	35.3	-	Tex. Western	4	Penn. Middle	81.7
1952	26,501	17,166	9,335	35.2	-	Tex. Southern	7.9	R.I.	73.1
1953	27,257	17,904	9,355	34.3	-	Tex. Southern	7.9	Alas. 3rd Div	9.5
1954	30.005	20,601	9,404	31.3	-	Alas. 3rd Div	2.9	R.I.	74
1955	28,564	18,705	9,859	34.5	-	Tex. Western	8.4	N.C. Eastern	62
1956	25,596	14,783	10,813	42.2	-	Alas. 3rd Div	12.8	N.H.	63.6
1957	26,624	15,476	11,148	41.9	-	Tex. Western	15.3	Penn. Eastern	65.5
1958	27,172	15,946	11,226	41.3	-	Alas. 1st Div	11.8	Penn. Eastern	68.5
1959	27,152	16,440	11,219	40.6	-	Alas. 3rd Div	9.9	Penn. Eastern	65.5
1960	28,421	14,294	10,558	37.1	3,569	V.I.	3.9	S.C. Eastern	67

Source: Annual Reports, Federal Bureau of Prisons

TABLE II

CALIFORNIA
CRIMINAL COURT DISPOSITIONS (1948, 1953-1958)

Year	Superior Court					Lower Court			
	Total Convictions	Probation		Prison	Jail & Other	Total convictions	Probation or Suspended Sentence		Other
		Number	%				Number	%	
1948	13,308	5,739	43.0			233,016	26,664		
1953	15,864	6,376	40.2	28.2	31.6	441,097	140,270	31.8	68.2
1954	17,359	7,815	45.0	28.2	26.8	449,699	184,771	33.1	66.9
1955	15,236	6,734	44.2	27.2	28.6	469,640	136,762	29.1	70.9
1956	16,875	7,348	43.5	30.3	26.2	507,435	142,527	28.1	71.9
1957	17,434	8,670	49.7			542,073	163,412	30.2	69.8
1958	20,625	10,457	50.7						

Sources: The Special Study Commission on Correctional Facilities and Services, Probation in California, Sacramento, Cal., December, 1957; Delinquency and Probation, Table 1956-1958.

indicate the trend of a great increase of probation disposition by the courts in contract to imprisonment. The courts, from a 26.8 percent for the year 1930 to 47.6 for 1960, have increasingly made the choice in favor of probation instead of institutionalization (Table III, page 31).

When Will Turnbladh was Executive Director of the Probation and Parole Association, he stated that within many states the rate of use of probation ranges from 10 to 70 percent in different jurisdictions, depending on the attitudes of judges and the existence and the quality of the probation service. He said:

> "Nationally, less than one-third of our criminal courts have probation service which could be considered adequate or nearly so. Approximately one-third of criminal courts have no probation service of any kind. The balance have available to them only token probation service."[49]

This statement has been repeated since 1954, and it is still estimated that the courts which serve approximately one-third of the population do not have any probation service.[50] The recommended standards of work load of probation workers by the National Probation and Parole Association (50 cases of supervision or 10 presentence investigations) are rarely attained. It is estimated that the average adult case load

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[49]Will C. Turnbladh, "Substitutes for Imprisonment," The Annals, American Acadmey of Political & Social Science, May, 1954, p. 114.

[50]Austin H. MoCormick, "The Potential Value of Probation," Federal Probation 21:6, March 1955. Bolitha J. Laws, "Criminal Courts and Adult Probation", National Probation & Parole Journal 3:357, 1957. . Caldwell, Criminology, p.436.

TABLE III

MICHIGAN
TREND DATA IN ADULT CORRECTION (1930-1960)

Year	Total Convictions	Probation		Prison		Parole		Population
		Number	%	Number	%	Number	%	
1930	13,061	3,500	26.8	7,711	59.0	1,850	14.2	4,842,000
1935	13,875	3,900	28.1	7,487	54.0	2,488	17.9	
1940	15,051	4,400	29.2	7,731	51.4	2,920	19.4	
1945	16,188	5,330	32.9	7,508	46.4	3,352	20.7	
1950	19,022	6,666	35.0	8,589	45.2	3,797	19.8	
1955	23,650	10,065	42.5	9,751	40.5	4,014	17.0	
1960	28,417	13,545	47.6	9,622	33.9	5,250	18.5	7,823,000

Abstracted: Michigan Department of Correction
June 1, 1961.

throughout the country is at 250 probationers.[51]

"Success" of Probation. Probation can be effective for the reformation of the offender, when it involves (a) an adequate presentence investigation, (b) a careful decision by the court and (c) a systematic supervision of the probationer by a qualified person without a heavy case load.[52] Frequently mentioned advantages of probation are: (a) the offender remains in the community where he can live a normal life as a law-abiding member of society; (b) the probationer can carry on with his family and community relations, his job, and his obligations (restitution or reparation); (c) the probationer has the opportunity to readjust to the surrounding in which he will live after his sentence is served; (d) the individual has the opportunity for another chance, to carry on a constructive life within the community; (e) the offender is not exposed to the stigma of a prison sentence which not only affects him, but also his whole family; (f) it costs the state less to keep a man on probation than to maintain him in an institution.[53] The true value of the probation, however, should be measured by its rehabilitative effects.

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[51]Austin H. McCormick, "The Potential Value of Probation", p. 6.

[52]There is wide variation in recommended case loads: N.P.P.A. and Federal Probation recommend 50 work units; Taft, Criminology, p. 459, case load of 25; Barnes & Teeters, New Horizons, p. 560, case load of 75; Max Grunhut, Penal Reform, (London: Oxford Univ. Press, 1948) p.297, case load of 50.

[53]The annual cost of probation has been usually estimated as one-tenth than that of prison expense. However, probation would cost more if properly implemented (Caldwell, Criminology, p. 437; Taft, Criminology, p.448). A Wisconsin study found a small difference in the cost of the 3 correctional services.

There is much controversy about the "success" of probation.[54] Probation departments' reports annually show that more than 70 percent succeed on probation. Professor Sutherland estimated it at about 75 percent.[55]

In the Attorney General's Survey of Release Procedures, 61 percent proved successful and 39 percent violated probation; of these who violated, 18 percent committed new crimes, and 21 percent violated the probation regulations.

In Sheldon and Eleanor Gluecks' studies, of 1000 delinquent boys studied over 15 years, 20.3 percent were successful, 22.8 percent partially successful, and 56.9 percent failed.[56] A study of 500 criminal men for 15 years found 92 percent failure. Common criticism is that many of the men in this study were recidivists and cannot be taken to evaluate probation performance. Of federal cases on probation during the year 1954, only 16 percent were violators.

In 1951 M. Caldwell conducted a study in the northern district of Alabama.[57] A sample of 403 probationers who had successfully completed probation was selected for follow-up

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[54]The variation of the definition of "success" or "practical results" of probation explains largely the difference of findings. The need for some measure of probation effectiveness led to the wide adoption of the revocation as criterion.

[55]Ibid, p.437. Caldwell, Criminology, p. 453.

[56]Sheldon Glueck and Eleanor T. Glueck, One Thousand Juvenile Delinquents (Cambridge, Mass:Harvard Univ. Press, 1934); Later Criminal Careers (New York: The Commonwealth Fund, 1937); Juvenile Delinquents Grown Up (New York: The Commonwealth Fund,1940)

[57]Morris G. Caldwell, "Review of a New Type of Probation Study made in Alabama", Federal Probation 15:3-11, June 1951.

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post-probation study. It was the product of an analysis of 1,862 federal probationers whose terms had been terminated before December 1942. While 45.2 percent had had previous criminal records, only 18.1 percent violated probation and were committed to a correctional institution. Four percent violation probation conditions but were not committed. During the period of 5½ years to over 11 years since the termination of their probation, only 16.4 percent were convicted for another crime.

Ralph England made a similar research study in the eastern district of Pennsylvania of 490 Federal offenders who had successfully terminated probation and had been discharged before December 31, 1944. In this sample of ex-probationers, 17.7 percent were convicted during the follow-up period of six to twelve years, while 37.6 percent of them had been convicted of crimes before the offense for which probation was granted.

One much more elaborate study was made on the effects of supervision at the Essex County Probation Office in New Jersey.[58] In 1948, Jay Rumney and J. Murphy investigated 1,000 probationers who had been placed on probation in 1937. They re-interviewed them in order to discover the adjustment of these offenders in domestic lives, in economic affairs, and to observe their physical and mental abilities, i.e., "the effective

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[58]Jay Rumney and Joseph P. Murphy, Probation and Social Adjustment (New Brunswick: Rutgers University Press, 1952).

functioning of the individual in society." As a general result, one-fourth of the former probationers did not change in their state of social adjustment, and two-thirds changed slightly, if at all. Twenty-six percent showed marked improvement, and eight percent marked deterioration. In spite of the handicaps, inadequate personnel and case load, 73 percent of the 1,000 probationers had been discharged "with improvement", that is, as successful cases. The importance of this study seems to lie rather in the methodological outlook and not in the statistical significance of certain factors and relationships.[59] Social adjustment includes more aspects of the probationer than a mere absence of crime. The study was criticized with regard to the "adjustment" definition, and it told very little about the probation practices or about the treatment.[60]

Studies by correctional researchers and criminologists disclose an average revocation rate of about 25 percent for a wide range of probation departments in the United States. Recent research projects on probation outcome showed more or less permanent social adjustment ranging from 60 percent to 90 percent. Among 11 studies of outcome during the probation

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[59]United Nations, Practical Results & Financial Aspects of Adult Probation in Selected Countries (New York: Dept. of Social Affairs, 1954), p. 74.

[60]Tappan, Crime, Justice & Correction, p. 581.

period, four found successes in from 80 to 89 percent of the cases, 5 in from 70 to 79 percent and 2 in from 60 to 69 percent. Eleven studies that explored adjustment of no reconviction during post-probation period included 4 with successful rate from 80 to 89 percent of the cases, 4 with a range from 70 to 79 percent, and one each in the class intervals from 60 to 69, 50 to 59, and 40 to 49 percent.[61]

Brief Comparative Survey:[62] Probation in the United Kingdom. The Probation of Offenders Act, 1907, was the first statute in the regulation of the existing practice of probation in the United Kingdom. It has exercised a great influence on the development of probation in the countries of the British Commonwealth.

The principal changes in the probation system in England were brought about by: (a) The Criminal Justice Act, 1925, which created the general pattern of the organization and the administration of the probation service; (b) The Criminal Justice Act, 1948, which makes important modification in the power of the courts as well as in the administration of the probation system;[63] and (c) the Probation Rules, 1949.

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[61] Ralph England, "What is Responsible for Satisfactory Probation and Post-Probation Outcome?", J. of Crim. Law, Criminol. & P. Sci, 47:667-676, March-April, 1957.

[62] Probation and related measures spread also in New Zealand, Australia, Canada, the Union of South Africa, twelve Latin American countries, Egypt, Japan, Thailand, Iran, India, Pakistan, Ceylon, Philippines, China, Israel(1933, 1944), Ethiopia (1959). United Nations, Probation, 1951, pp. 51-63, 87-93, 130-139. Infra Footnote 69 & 74.

[63] A.C.L. Morrison & Edward Hughes, The Criminal Justice Act 1948 (London: Butterworth & Co., 1952).

Probation in England and Wales is developed and applied generally under the form which is prescribed in the precedent sections. The statute traces its elements:

> "Where a court by or before which a person is convicted of offense is of opinion that having regard to the circumstances, including the nature of the offense and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years." [64]

The extent and variation of the use of probation between 1938 and 1958 in the United Kingdom is shown in Table IV (page 38). For 1954, the proportion of male offenders put on probation varied between 41 percent for juveniles and 8 percent for adults; of females between 55 percent for adolescent girls and 18 percent for adults. About 20 percent of the probationers failed. The higher courts placed on probation some 15-20 percent.

Professor M. Grunhut in his book Juvenile Offenders Before the Courts, notes a trend toward a decreasing use of probation and an increasing use of fines, while the general trend in English juvenile court policy within the periods 1936-38 and 1948-50, shows an increasing use of fines--14 percent against 6.4 percent--at the expense of probation--45.6 percent against 52.7 percent.[65] A distinctive positive correlation emerges between high delinquency

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[64]English Criminal Justice Act, 1948, Part I, Section 3.

[65]Max Grunhut, Penal Reform, pp.83 and 117.

TABLE IV

ENGLAND AND WALES
PERCENTAGE OF ALL COURT DISPOSITION
(INDICTABLE OFFENSES) ON PROBATION

Year	Courts of Summary Jurisdiction		Quarter Sessions and Assizes
	Excluding Juvenile Courts	Juvenile Courts	
1910	11.3	25.7	7.3
1928	20.1	53.4	16.3
1938	22.2	50.8	10.5
1946	11.0	41.9	14.8
1947	10.4	41.9	14.5
1948	12.3	41.7	15.3
1949	13.1	41.8	16.6
1950	11.8	40.8	17.2
1951	10.9	40.6	17.9
1952	11.7	40.4	17.2
1953	12.5	40.0	17.1
1954	13.3	40.6	16.7

TREND IN THE GRANTING OF PROBATION

Year	High Courts			Magistrate Courts			
	Under 17 years	17-21 Yrs age	Age 21 & over	Under Age 14	Age 14-17	Age 17-21	Age 21 & over
1938	48	36	13	50	51	45	16
1958	45	37	16.4	35	34	22	11

Sources: United Nations, New Forms and Juvenile Delinquency, 1960 and Practical Results, 1954.

areas and an increasing imposition of fines and, on the other hand low delinquency areas and more frequent use of probation. There is no evidence, however, to justify the conclusion that greater utilization of probation was responsible for the rate of delinquency. A number of explanations might be given for the general decline in the use of probation in post-war England.[66]

Data from England on the basis of no reconvictions showed that 70 percent of a large sample of probationers did not commit any indictable offense during a three year follow-up period subsequent to their discharge.[67] Success rates were high for those 21 years and over (87.5), though probation was given more often to juveniles under 17, whose recidivism is rather high.

Also during one to three years of supervision and three years of follow-up thereafter, probation is credited with 74 percent success for adults and 62 percent for juveniles. Even where probation was granted to persons having two or more previous convictions, adults had 52 percent success and juveniles 42 percent. The latter had only 35 percent success if prior commitment was to a Borstal, but for adults it made little difference what the prior commitments were. However, all categories of offenders had markedly higher failure rates if required to reside in a specific home or institution as a

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[66]Herman Mannheim, "Some Aspects of Judicial Sentencing Policy", The Yale Law Journal, pp. 961-981, May, 1958. It is due chiefly to the increase of delinquency and inadequacy of the probation staff.

[67]United Nations, Practical Results, p. 13.

condition of probation.[68]

The Suspended Execution of the Sentence in the Continent. Probation, as applied in the United States and England, may be defined for comparative purposes, as composed of two essential elements: suspension of punishment and personal care and supervision.

The continental countries followed the two existing systems: (a) The Belgium (1888) and French (1884-1891) precedents of sursis , the suspended or conditional execution of the sentence with the condition that no further offense is committed within a prescribed period, and (b) the German (1895) system of suspension of the sentence execution by pardon. The most continental countries adopted the 'sursis , originated from the American-English probation.

In most continental countries, probation and related measures, developed in connection with the legal institution of suspended sentences, are a substitute for short term sentences.[69]

Differences Between Probation and 'Sursis'. The essential differences between the suspended sentences as is in force in most continental countries and probation are: (a) it is not the pronouncement of the sentence after conviction which is suspended, but the execution of a sentence already imposed. The

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[68]Leon Radzinowicz, The Results of Probation, a report of the Cambridge Department of Criminal Science, Vol. X, London, 1958.

[69]French Code de procedure penal, 1959 (art.734 "sursis simple" or "sursis a l'execution."); German Penal Code (#23, "Bedingte Strafersset Zung" or "Bedingter Straferlass"); Italian Penal Code (art. 163, "sospensione conditionalle della pena" or "condamna conditionale"). United Nations, Probation, pp163-181. Helen Silving, "Rule of Law in Criminal Justice", Essays in Criminal Science, ed. G. Mueller (F. Rothman & Co., 1961) p 111.

sursis is granted only if the suspended sentence imposes less than one year or a certain period of imprisonment;[70] (b) there is not any supervision and guidance of the person placed on sursis; (c) investigation of adult offenders is not frequently conducted; (d) "conditions" are not imposed and the revocation of the suspended sentence occurs automatically upon a new sentence. The conditional suspended sentence sursis is, therefore, probation without the element of personal care and fundamental supervision. The sursis never lost its character as an act of leniency, granted to offenders who deserved it in exceptional circumstances. It is not probation and "treatment". The opinion that probation is not a punishment, but rather "treatment in freedom" of the individual can almost be applied to sursis.

The Suspended Sentence ("Sursis") in Greece.[71] By 1911 the Greek legislation introduced the Franco-Belgium system of conditional suspension of sentence. The new penal code (1950) has not changed this legal regime. According to articles 99-102 of the penal code, conditional suspension of the sentence can be granted under the following limitations: (a) the accused has not previously been sentenced to imprisonment for a crime or misdemeanor, (b) the accused is sentenced to

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[70] Not more than one year of imprisonment provided by Finland (Penal Code 1940), Switzerland (Federal Penal Code 1937 art. 41). Italy (art. 163), Sweden (Act of 1939), Spain (Penal Code 1944 art. 93), Greece & others; not more than 9 months by Germany (#23 Penal Code); not more than 2 years by Belgium (Penal Code 1947 art.26); not more than 5 years by France (Code of Penal Procedure, arts 734 & 738). Suspension of fines also is provided by France, Denmark, the Netherlands, Norway, Austria & Italy.

[71] K. Gardicas, Criminology, Vol. III (Athens, Greece, 1955) pp. 419-445.

imprisonment for not more than one year, (c) the court considers that the execution of the sentence (imprisonment) "is not needed to prevent the offender from committing further offenses." Its justified decision should be based upon the circumstances of the offense "specially the causation, the previous life and the personality of the convicted."

The suspended sentence is revoked if the offender commits an offense and is sentenced for a crime or misdemeanor, during the trial period of three to five years fixed by the court. If the trial period has been successful, the sentence is held as null and void; otherwise, both sentences are executed concurrently. The juvenile courts can place juvenile delinquents under protective supervision. Tables V and VI (pages 43 and 44) give a general picture of sentencing and correction data in Greece for the years 1956, 1957, 1958, and 1959.

Suspension with Protective Supervision of Juveniles, (liberte, surveillee, Schutzaufsicht). The protective supervision granted by juvenile courts is widely used.[72] The protective supervision, the social inquiries, and presentence reports were primarily developed in most continental countries for minors' cases during the last decades. Tentatively are

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[72]The introduction of probationary supervision for juveniles was often a by-product of the juvenile court: Norway (1896), Sweden (1902), Denmark (1905), Portugal (1911), France (1912), Spain (1918), Austria and Poland (1919), the Netherlands (1921), Germany (1923), Italy (1929), and Greece (1931).

TABLE V

GREECE
COURTS DISPOSITION [1]

Year	Population	Total convictions[2]	Prisons Proportion of 100,000	Number	Percent	Conditional suspension of execution[2] percent	Fines and other percent
1956	7,636,801			10,823			
1957		85,827	1,118	10,356	12.08	9.00	78.92
1958		77,446	1,012	10,078	13,01	10.79	76.20
1959	8,300,411	117,629	1,416[3]	12,758	10.85	11.10	78.05

1. For any felony and misdemeanor.

2. This includes orders of protective supervision for juveniles.

3. (a) Violations of special laws (civil obligations etc), 465; (b) Offenses against property, 245; (c) offenses against honor (insult, defamation, etc.), 203; (d) offenses of bodily harm, 197; (e) homicide, 9, etc.

Sources: Ministry of Justice data.

TABLE VI

GREECE
DISTRITUBTION AND RELEASE OF PRISONERS

Years	Prison Population: From Last Year	Until three months	Three mos.- 1 yr.	Over One Year	Death	Total Number	Released: Con-ditional	Altern. Fines	Work Time	Pardon Escape Death	Sentence Expira-tion	Other reasons (appeal aq. etc)	Per-cent
1956	7,456	7,590	2,265	951	22	18,284	971	3,502	665	19	5,324	963	63
1957	6,840	7,448	2,009	841	26	17,198	869	3,557	682	15	5,200	956	66
1958	5,919	7,206	1,993	744	16	15,997	695	3,740	694	12	4,538	929	66
1959	5,389	9,658	2,178	869	20	18,147	560	4,201	714	27	6,318	1,114	71

During 1959 there were in function in Greece: 15 Criminal Prisons (Confinement more than 5 years), 45 Penitentiaries, 3 Farms and 2 Institutions for Juveniles.

SOURCE: Ministry of Justice.

mentioned:[73] The French juvenile courts have the power (acts of 1912, 1945 and June 2, 1951) to order "liberte surveillee" protective supervision as a non-punitive educational measure for juvenile delinquents and waywards. The supervisor "delegue," however, was concerned until 1956 with presentence investigation and reports (Table VII, page 46). The German juvenile courts (1923, 1943 and 1953 Juvenile Court Acts) have the choice among educational or disciplinary measures of probation and punishment. The German juvenile court is a court of criminal jurisdiction over juveniles between fourteen and eighteen years of age and adolescents between eighteen and twenty-one. Protective supervision remains as educational and preventive measures in the hands of the guardianship judge. The juvenile court is now helped by the juvenile court probation officer (until 1958 were 196). In the Federal Republic of Germany the application of probation to juveniles and adolescents is constantly rising. Probation can generally be granted only in connection with a suspended sentence (Table VIII, page 47).

No Scandinavian country has a juvenile court. Maladjusted and delinquent juveniles up to fifteen years of age in Sweden and Denmark and up to fourteen in Norway are under control of municipal Child Welfare Councils. Juveniles over this age are under the concurrent jurisdiction of courts and Child Welfare

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[73]Netherlands (Penal Code 1886-1929); Denmark (Penal Code 1930 in force 1933); Switzerland (Fed. Penal Code 1937 arts 96, 97); Finland (Act of Young Offenders 1940 in force 1043); Austria (Juvenile Law Act 1928); Luxembourg (1939).

TABLE VII

FRANCE
DISTRIBUTION OF COURTS DISPOSITION: PROTECTIVE SUPERVISION (1956) & ADULT PROBATION (1959,1960)

1. Protection supervision ordered in addition to certain other measures of the Juvenile Courts, 1956.

	BOYS		GIRLS		Both Sexes
	Number	Percent	Number	Percent	
Recommitted to the family	8,919		1,109		
Supervision.	2,932	33.0	473	45.9	
Committed to an institution	1,792		449		
Supervision	447	24.9	124	27.5	
Suspended fine	199		24		
Supervision					12
Fine not suspended	373		41		
Supervision					60
Suspended prison sentence	461		55		
Supervision					171
Prison committal	234		21		
Supervision					29

2. Probation First Results in France 1959, 1960.

1. Placed on Probation

Year	Number	First Offenders Number	First Offenders Percent
1959	881	589	66.8
1960	2,156	1,754	81

2. Age Distribution of 1,065 Probationers (1960)

Age	Number	Percent
18-21 yrs.	385	36
21-25 yrs.	164	15.3
25-30 yrs.	167	15.6
30-40 yrs.	98	9.2
50-60 yrs.	27	2.5
over 60 yrs.	11	1

Sources: Ministry of Justice, 1957; United Nation, Selection, p. 59; Pons, infra footnote 76, 1961.

TABLE VIII

FEDERAL REPUBLIC OF GERMANY
DECISIONS GRANTING SUSPENSION OF PUNISHMENT AND ORDERING SUPERVISION (1956)

	Suspension of imposition of sentence			Suspension of execution of sentence		
		With supervision			With supervision	
	Number	Number	Percent	Number	Number	Percent
Adjudicated according to juvenile law						
Juveniles: 14-18						
Boys	629	542	86.0	1,760	1,578	89.6
Girls	28	21	75.0	56	46	82.1
Adolescents: 18-21						
Boys	415	358	86.2	1,661	1,472	88.7
Girls	37	33	89.2	94	80	85.1
Adjudicated according to adult criminal law						
Adolescents: 18-21						
Boys	-		-	5,074	1,112	21.9
Girls	-		-	486	102	20.9
Adults: 21 and over						
Men	-		-	51,337	842	1.8
Women	-		-	6,211	108	1.7

In 1954, the percentage of probation orders for juveniles and adolescents was 41.04, in 1955 it was 47.84, in 1956 it was 51.08 and in 1957 it was 61.08.

Sources: Bundesministerium der Justiz, Bewährungshitfestatistik, 1957, tables 7 & 14; United Nations, Selection, p. 53. Second United Nation Congress on the Prevention of Crime and Treatment of Offenders, London, August 1960, p. 93.

Councils; the prosecuting authority may waive court proceeding (Table IX, page 49).

Probation for juveniles in the Netherlands takes three forms: (a) supervision as a measure, (b) conditional suspension of criminal proceeding with supervision, and (c) conditional suspension of the sentence with probationary supervision.

In Greece the juvenile courts have the power (laws 1931, 1940 and code of procedure 1950) to place the juvenile offenders (7-17 years) under supervision among other reformative and therapeutic measures (articles 121-128). The juvenile delinquent may be placed under the supervision of a voluntary case worker or member of an after-care society of probation officers (1957) at the disposal of the court.

Recent Trends Toward Adult Probation. Sweden was the first civil law country which gave the courts the alternative of suspending either the imposition or the execution of a sentence combined with personal supervision (an act of 1939 brought into force in 1944). Denmark and Norway have two forms of suspending punishment in conjunction with personal supervision. Probation may be applied before conviction by suspension of criminal prosecution and after sentence by suspension of its execution. Probation was introduced in Finland by the Act of Young Offenders (1940-1943) as a measure supplementary to the conditional supervision.

Since World War II, tendencies in continental legislation indicate that the American and English model of probation has

TABLE IX

NORWAY, SWEDEN, DENMARK
PROSECUTION SUSPENDED AND SUSPENSION OF SENTENCES

1. NORWAY

Decisions of Prosecution Suspended and Suspension of the Sentence with or without Supervision

Year	Prosecution Suspended			Suspension of execution		Suspension with Supervision	
	Under 21 Years	21-24 Years	25 yrs & over	First offenders	Repeaters	Under 21 yrs	21 yrs & over
1933				73.9	8.2	43	7.8
1935				73	7	44	6.4
1939	57.5	12.6	4.7		8.2		
1946				68.6	10.7	31	4.2
1948	57.4	14.5	5.9	74.0	10.9	31	4.2
1949	61.3	12.6	7.0	76.8	11.1		
1950	63.1	18.7	7.8	76.8	11.1	33	5.4

2. SWEDEN

In 1955, out of 5,991 persons sentenced to imprisonment with forced labour, 45.2 percent had their sentences suspended, and out of 6,203 sentenced to simple imprisonment, the proportion of suspended sentences was 26.2.

3. DENMARK

Up to the recent times 30-35 percent of all convicted offenders had their sentences suspended, and out of those 40-50 percent were put under supervision.

Sources: United Nations, Practical Results, 1954, and Selection, 1959.

been followed more closely. Great volumes of publications by criminologists and penologists suggest the introduction of probation within the continental legislation.[74]

Belgium has provided (1952 and 1956) a suspension of the sentence after presentence reports and supplementation by the supervision of professional workers at the disposal of the court. Switzerland since the law of October 5, 1950 introduced adult probation (sursis, subject to supervision). Swiss Federal Penal Code (art. 379) does not permit the supervision by police. The Netherlands, since 1952, have added the practice of supervision as a form of non-institutional treatment to a mere suspension of punishment. The courts make an extensive use of social inquiries and presentence reports. In 1953 Germany introduced suspended sentences for adult offenders and provided a new service for supervision under the control of the court. The court may suspend a sentence imposing imprisonment

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[74]United Nations, Probation; Practical Results; and Selection. United Nations, European Seminar on Probation, New York, 1952. American Academy of Political & Social Science Annals, Prison in Transformation, Reform Abroad, May 1954. Thorsten Sellin, "Probation and Parole in Sweden", N.P.P.A. Yearbook 1948, p. 243 et seq. Manuel Lopez-Rey, "United Nations Activities and International Trend in Probation", The Howard Journal, 9:346, 1957. Alfons T. Wahl, "Probation and Parole in Germany", Federal Probation, 18:38-41, September 1954. M. Angel, "L'Institution de la mise à l'épreuve", Revue Intern. droit compare, 1954, p. 405 et seq. J.P. Beguet, "La Mise à l'Epreuve Surveillee", Revue sc. crim. et droit pen. comp., 1950, p. 222 et seq. Y. Marx, Le systeme de probation anglais et le sursis continental (Geneve, 1953). H. Poupet, La probation des delinquants adultes en France, (Paris, 1955). Silving, "Rule of Law", pp. 111-112. M. Angel, Les Codes Pénaux Europeans (Le Centre Francais de droit Comparé) Vol. I, II, III, 1958.

of not more than nine months (in juveniles 1 year). There are, however, the following limitations under which probation is not granted: (a) previous period of imprisonment for more than six months within five years, (b) execution of a sentence in confinement through probation or by clemency, during the five years prior to the offense, and (c) public interest demands execution of the sentence by confinement.

In the Federal Republic of Germany, probation after conviction without imposition of sentence seemed to be such a revolutionary innovation that the legislators limited its application. Probation, however, is no longer regarded as exceptional signs of leniency or modification of the application of punishment, but is accepted as a corrective measure with possible effect upon certain offenders deemed suitable for treatment in freedom. The new idea gradually is gaining ground within a penal system primarily legalistic and rather retributive.

The French Penal Code of Procedure (1959) has introduced probation (suspension of execution with probation, sursis avec mise à l'epreuve-articles 738-747). The court may order suspension of the execution of sentence with supervision and assistance for a period from three to five years. This adult probation, however, shall not be granted to the defendants sentenced to imprisonment for more than five years for the instant offense or to defendants who previously have been sentenced to more than six months imprisonment.

A new category of judges in charge of supervising the execution of the sentences was created.[75] Such a judge may order modification or termination of probation conditions. At the expiration of the term, if no reconviction has taken place, the sentence is held as null and void. The code requires that the magistrate order an investigation of the personality, family and social background of the offender. Probation first results in France are encouraging (Table VII, page 46).[76] However, since trained probation officers are not as yet available in sufficient number to carry out these inquiries, they are, at present, usually conducted by the judiciary police.[77]

III. Critical Evaluation

General. The foregoing observation shows that in the United States and in most western European countries probation has become a recognized feature of the penal system and the administration of criminal justice.

Under the general principle of individual prevention, legislation, judicial, and correctional practices have been inspired, from which the legal institution of probation has sprung in the second half of the last century. This is a

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[75]The functions of the "juge de l'application des peines" are similar to Italian "giudice di sorveglianza" (supervisory judge) and the Portugese "court for the execution of punishment".

[76]Silving, "Rule of Law", p. 112. Louis Pons, "Les debuts dela probation en France", Review penitentiaire et de la droit penal, Juillet, Sept. 1961, pp. 607-631.

[77]The Yugoslav Penal Code (1951) does not provide for the system of probation; it provides for the conditional sentence. United Nations, European Seminar, p. 225. The new Russian Criminal Code (1961) has only provision of conditional sentence, remission of part of punishment and conditional release (arts 44,53-56) Ivo Lapenna,"The New Russian Code", International Comparative Law Quarterly, Vol 10, July 1961, pp. 426-442.

diamond decorating the American and English criminal systems which serve as shining examples for the legal systems of continental countries.

Probation and the juvenile court, innovations both originating from the United States, have made great contribution to the administration of criminal justice during the last decades. In their development they were closely associated and grew up together in many countries, chiefly in the continent. The universal movement of juvenile court and probation made legislators and judges aware of the individual need and social problems behind the legal concepts or crime and punishment. Today judicial and correctional practice is seeking to find the best methods of selection and treatment of offenders.

There is a recent trend among the continental countries to adopt a system closer to the American and English system of probation and parole in the sense of supervised in individualized treatment. Although there are many differences probation and parole are not entirely foreign to the judicial traditions and practices. They are compatible with present day realities in the continental legal systems. Gradually the reluctance of continental legislators who feared that a liberal grant of statutory authority from the traditional system might endanger the administration of criminal justice disappeared. Germany, the country of doctrinal legalism, has introduced probation into their penal system. France and Belgium, who both shared the honor of sursis , have opened the door recently to adult probation as a measure of treatment.

Thus, today probation has been accepted and practiced in many continental countries as an ordinary treatment method among the penal and correctional instruments. It is hoped that the remaining countries one after another will soon follow the same way toward the probation.

Common Law Countries. In the United States approximately one-third of major criminals are released immediately on probation or suspended sentence after conviction, without serving a term in correctional institutions.[78] Since about 95 percent of adult prisoners return to the community, probation can be an effective method of treatment for certain types of offenders and can reduce the prison population in coordination with more frequent use of suspension of sentence and fines.[79] Probation permits a normal life in the community, under assistance and guidance, and avoids the bad effects of prison. Probation according to the opinion of many authorities offers the greatest hope for the rehabilitation of the great majority of delinquents and criminals. "Even when the reaction to crime is punitive, it has some advantages."[80] Barnes and Teeters state:

> "Regardless of the reactionary attitudes of some judges and other critics of probation, we are convinced that it is the only completely promising reformative technique."[81]

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[78]Cavan, Criminology, pp. 373 & 352. Laws, op.cit., p. 358.

[79]Caldwell, Criminology, p.436. Cavan, Ibid., pp 442, 523. Laws, op.cit., pp. 357-358.

[80]Sutherland & Cressey, Principles of Criminology, p.442.

[81]Barnes and Teeters, New Horizons in Criminology, p.565.

In fact probation has become the best solution for the young offenders and for the first offenders, who are not a threat to society.[82] The percentage of probation results in the United States and England seem to shed a favorable and satisfactory light on probation. Research, although not uniform and complete, shows that probation has become an effective peno-correctional device as measured by revocations and by subsequent convictions. From comparative international data the usual success rate of probation in most countries seems to lie between 70 and 80 percent of the cases.[83]

Today, although the shortcomings of probation are not in its philosophy, probation seems to be in a state of transition. Probation, even in the United States, is not used enough. Its whole potential value is not shown. There are variations in the administration of probation and in the quality of personnel; there are not enough probation officers. Case loads are excessive. Judges should use probation where it is advisable to do so.

Many penologists and wardens advocate that the use of probation can be safely increased from the present average of about 35 percent to about 75 percent of convicted adults with adequate probation services.[84] It is concluded, therefore, that considerable room for extension of probation exists. In lieu of

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[82]Mabel Elliot, Crime in Modern Society (New York: Harper & Brothers, 1952) p. 562.

[83]United Nations, Practical Results, p. 82.

[84]Will C. Turnbladh, "Substitutes for Imprisonment". Austin McCormick, "The Potential Value of Probation", p.114. Laws, op.cit., p. 358.

institutionalization probation, supervision and assistance should be given to an even larger proportion of offenders. But this goal primarily requires a sound sentencing philosophy and policy in order to extend the use of probation to its right amount. To improve the quality of probation selection, more use of contemporary scientific knowledge and the correctional and community resources is needed. Thus, probation for juvenile and adults which plays a major role in the administration of criminal justice can be proved a more effective instrument of crime and delinquency prevention and control.

Civil Law Countries. After World War II a significant feature of the contemporary penal reform was the widespread use of probation and the strengthening of its methos.

It is obvious that today in the administration of criminal law and justice of continental countries that some radical changes are taking place. The tidal wave that after the war marked the beginning of individual prevention and individualized treatment is generally emphasized today. The movement of social defense with the security measures has gained ground. But the old punitive philosophy and the concept of general prevention by deterrence among legislators, the general public, and judges have deep roots. However, a reform movement is in slow progress.

Today the tendency in many countries is toward probation and more "personal care and supervision" of probationers preferably by professionally trained and skilled personnel. Many legislative, judicial, and financial problems have to be solved during the further development of probation. It is not yet

possible according to the civil law criminal systems for the courts to place an offender on probation to suspend the imposition of sentence. This form of probation between conviction and sentence is admissible only for juvenile offenders according to the German, Swiss and Austrian law. The legal limitations on sentences, often not more than one year imprisonment, are narrow. There is opposition to make a person convicted for any crime for which imprisonment of more than five years is imposed eligible for probation. The same opposition occurs for offenders with serious previous criminal records. There are insufficient facilities. There is a great lack of well-trained professional personnel. Most important of all, requirements for an individualized judicial sentencing and corrective treatment do not exist.

It is necessary to prepare judges and correctional personnel for their new task of probation as a measure of rehabilitative treatment. In general, it is obvious that the new institution, in order to be feasible, must not disregard the national realities and needs and must find its development through gradual modifications of the existing judicial and penal systems.

CHAPTER III

SENTENCING FUNCTION AND DEVICES TO EXERCISE THE PROBATION DISPOSITION

I. Sentencing Function

Definition. The judicial function is the exercise of the duties and powers which under a democratic constitution are vested in the courts, as distinguished from the legislative and executive departments of the government. The judicial function is the power of a court to decide and to pronounce a judgment and to carry it into effect.

Historically, the function of imposing sentence was exclusively that of a judge, and this system still remains in the majority of countries. Courts fulfill the key function between the criminal law and the particular offender. Sentencing function therefore is a subject of great importance which attracts a good deal of attention, as evidenced in the extensive literature relating to it. Broadly the sentencing policy is related with the general subject of justice, objectives of sentencing and penal system (security measures, indeterminate sentences, effects of prediction studies in sentencing).[85]

Specifically, sentencing function consists of the court's exercising its discretion in imposing punishment or treatment

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[85]Herman Mannheim, "Some Aspects of Judicial Sentencing Policy", pp.960-961., The Yale Law Journal, May,1958.

upon an offender as prescribed by the law. The judicial discretion must be distinguished by the legislative and administrative (correctional) discretion.

The sentencing functions are crucial to the administration of justice and prevention of crime. Sentencing is vital because it signalizes the end of the trial phase and marks the threshold of the treatment phase.

Historic Development. Throughout legal history there has been a back and forth movement between law and discretion in the judicial process. The law provided absolute penalties when no room remained for discretion or more or less limited judicial discretion.

The institution of judicial discretion seems to be relatively new in the history of criminal law. It appeared in the 16th century. During the 19th century judicial discretion became the rule becuase imprisonment was introduced as a legal penalty to reform the law violator. Nevertheless, in the laws of Greece and Rome, traces of judicial discretion are found. Alternatives of money compensation are introduced to take the place of severe and absolute penalties. In Greece with regard to public trials, the penalties of death, slavery, infamy, and confiscation of real property were absolute. In Rome, during the period of emperors, judicial discretion was recognized through the idea of extraordinario cognitio. Later, as a result of such great judicial discretion, the law for practical purposes was abolished.

In the Middle Ages there was no question of judicial discretion because the penalties of death and corporal punishment could not be subject to measurement. Clemency as a judicial function was the only remedy to the rigid and harsh penalties. History indicates that the use of arbitrary sentences by the judiciary during the Middle Ages and early modern times led to a revolt against judicial authority which grew out of the Beccaria penal philosophy. In the penal code of the French Revolution (1791) the discretion was eliminated by absolute fixed penalties, including imprisonment. During the eighteenth century, discretion in the administration of justice was held to the narrowest limits.For the judge to act other than the defined limits of law was considered dangerous. The pendulum swung back and the court consequently became largely a fact-finding agency. Once the guilt of a defendant had been established, the law prescribed his punishment in definite terms. The extreme egalitarian philosophy permitted little attention to the individual criminal. At the end of the eighteenth century, in the light of scientific progress, the philosophy of individualization of treatment was born. The modern industrial revolution and the complexity of society led to the recognition of more and more judicial discretion within legal limits as an essential element of sentencing function.

As a historical tradition, today's judge presides at a trial which decides guilt or innocence and must guard the rights of the individual and his freedom. He must enforce the rules of evidence and keep the precedents of the law and jurisprudence.

But he is bound always by the exactness of the letter and spirit of the criminal law.

Systems and Extent of Judicial Discretion. The contemporary sentencing system, created by existing penal legislations, combines the "legal penalties", limited by statutes with absolute penalties (death, life imprisonment). Two legal systems can be distinguished: first, those which provide a number of more or less detailed lists of aggravating and mitigating circumstances, (Penal Code of France, Switzerland, etc); second, those which provide only a general rule for the guidance of the judge or no such rules. The United States and Great Britain are included in the second group.[86]

Quite often judicial discretion is limited by statutes which establish maximum or minimum penalties.[87] Unlike most continental codes English statutes contain no minimum penalties. The criminal law has generally a long series of mitigating devices for introducing discretion.

In common law, the court has a wide discretion as to sentence, and often as to suspension or mitigation of sentence. To these, probation has been added in recent years.[88]

How much discretion should be left to the courts by the

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[86]In a recent comparative study for the preparation of the new West German Penal Code an attempt has been made to distinguish three groups of legal systems. Mannheim, Ibid, p.964.

[87]Mannheim, Ibid, p. 964.

[88]Roscoe Pound, Jurisprudence, Vol. IV (St Paul, Minn: West Publishing Co., 1959) p. 29.

legislators? This is an old universal problem which is related to the administration of criminal law and justice in every penal system and one which is still unsolved.[89] The maxim nullum crimem nulla poena sine lege has lost its absolute force and application because of the relativity of criminal law. It has become flexible chiefly by the introduction of probation, suspended sentences, fines, and parole. If the law provides rigid and detailed descriptions of elements of crime and absolute penalties, the judge's decision might be mechanical and its result to the axiom summum jus summa injuria. On the contrary, if the judge has very wide and unlimited judicial discretion, tyranny could result. Consequently, the judicial discretion must have a range of alternatives within reasonable legal limits.

In all modern societies today, the court is invested with a considerable discretionary power in most cases to determine punishment or treatment. This power is within wide limits fixed by the criminal law reflecting general prevention. Each penal law is a central source for the type of sentences that the court imposes. The law usually limits both the form and the range of sentence according to the seriousness of the offense.

Also the jurisdiction of the court (superior, jury, etc.) depends on the usual classification of felonies and misdemeanors.[90]

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[89]This subject was discussed at the 7th International Congress of Penal Law (Athens, 1957).

[90]In the continental penal codes usually the offenses are felonies, high misdemeanors (maximum of five years imprisonment) and petty offenses.

Limits are placed upon the exercise of judicial discretion by the penal code of any country. Usually a maximum penalty is provided, and occasionally, minimum penalties are prescribed. In addition, a host of more elastic legislative devices exists to guide the exercise of judicial discretion.[91]

Disposition Available to the Court. Usually the law provides an alternative or combination of the following penalties: suspended sentence, probation, fine, and imprisonment. During the present century a trend away from the death penalty has occurred.[92] The importance of the process of sentencing is closely related to its forms. The community treatment may take any one of the forms of suspended sentence, deferred sentence, fine, and probation. A fine may be used alone, with probation, or with commitment. A fine may involve imprisonment as an alternative, or the defendant may be granted time to pay it in installments without being committed. He may have the

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[91]Mannheim, "Some Aspects of Judicial Sentencing", p.962. Tappan, Crime, Justice & Correction, p. 421.

[92]More than twenty countries have abolished it. In most countries it is limited essentially to the crime of murder. This seems to be the current trend with the decreasing use of capital punishment. In the United States nine states do not permit the death penalty (Michigan, Wisconsin, Maine, Rhode Island, Minnesota, North Dakota, Delaware, Alaska, and Hawaii); in forty it is permissive and in one mandatory. In Western Europe all but four countries have abolished it. In England it is permissive in four grave offenses and it is excluded in juveniles under 18 years of age. In France it is limited to a few serious crimes, but in 1950 it was extended to grave property crimes. In Spain it is permitted in limited crimes. In Greece it is mandatory in treason and permissive in murder or robbery involving death or aiding the enemy or spies in wartime. Half the countries in Central and South America do not have the death penalty. In Canada and New Zealand it still remains. Finally, it must be noted that all military codes have provision of death penalty.

choice of a suspended sentence with or without probation, probation alone, a fine or costs or both, and restitution.

The practice in some jurisdictions of combining probation with a period of imprisonment is condemned. "The purpose of probation is to avoid, where it is feasible, the impact of institutional life."[93] The supervision distinguishes probation as a court disposition from the suspended sentence. For felonies, the ordinary term is for a period of five years or less but in some states the term may be as long as the statute maximum. For misdemeanors, probation terms are usually for one, two, or three years.

One of the most important problems in the administration of criminal justice is that involved in the imposition of the sentence. In many cases, the judge may impose a sentence of imprisonment, or suspend the execution or imposition of sentence, or grant probation, or impose a fine. After conviction a court must make a basic determination: shall the convicted person be sentenced to a prison term, or shall he receive probation or a suspended sentence? What objectives should the sentence serve? The decision lies within the statutes in the discretionary power of the court which should consider many factors. At the present time, this function is not a simple process, as it was under the influence of classical penology.

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[93]National Probation & Parole Association, Standard Probation and Parole Act (New York: N.P.P.A., 1955) p. 2.

Modern criminal law appears to be placing in the hands of trial courts more and more discretion in the choice of sentences. The conscientious judge constantly faces the dilemma of how to use this discretionary power wisely.[94]

While the judge has the final responsibility, he should not have to exercise it alone. The principal and indispensable tool enabling him to discharge his sentencing function adequately is the probation service. It brings to him the essential information from various sources and experts and enables him to choose intelligently among a multiplicity of treatment alternatives. It is evident that the judge must have a wide knowledge of the law and its aims and a profound appreciation of the value of these various forms of penal treatment upon different types of individual human beings.

Certain characteristics of criminal justice, of the community and of offenders have an important bearing upon the form and length of the sentence. These will be analyzed below in greater detail.

Sentencing in Operation. In the United States the criminal courts are dealing with about a million adult and young offenders every year. The trial judge has two duties: to preside at the trial and to impose sentences on those persons found guilty.

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[94]Thorsten Sellin, "The Trial Judge's Dilemma: A Criminologist's View," Probation and Criminal Justice, ed. S. Glueck (New York: The McMillan Co., 1933), pp. 99-109.

Present sentencing practices vary widely in different states. In twelve states the jury is required or allowed to assess the penalty after conviction and the courts have no discretion whatever. "Jury sentencing" has been subject to criticism as an "archaic procedure" which is unable to utilize a presentence investigation.[95] There are merits and demerits to the whole jury system. From the time of Ferri until today, there is a trend toward the elimination of juries.[96] The main objection to the jury as a sentencing agency is its lack of capacity, adequate training and experience to carry out this duty. The sentencing function is better placed in the hands of the judge or group of judges.

At the present time, in the matter of criminal procedure, unlike the substantive criminal law, there are remarkable differences between the Anglo-American rules of evidence and the continental codes of procedure. It is useful to mention here briefly the essentials which affect the sentencing practice:

(a) The sentencing function in the continental courts is administered by appointed career judges. Usually the court

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[95]National Probation & Parole Association Advisory Council of Judges, Guides for Sentencing (New York: N.P.P.A.), p. 27. N.P.P.A., Standard Probation and Parole Act, p. 21. The 12 states are: California, Idaho, Indiana, Iowa, Kansas, Michigan, Nevada, Ohio, Utah, Washington, West Virginia and Illinois. Roy Moreland, Modern Criminal Procedures (Indianapolis: The Bobbs-Merril Company, Inc., 1959), Chapter 20, pp. 284-285.

[96]Barnes & Teeters, New Horizons in Criminology, pp. 280 & 626. Jeffery, op.cit., p. 14. In some countries the jury system is abolished (Netherlands, U.S.S.R., Denmark, Japan, etc.). However, the jury system in countries remains in force because of constitutional provisions and tradition. (Code of penal procedure: French, 1959; Greek, 1950). At the present the prevailing criminological thinking is not to abolish the jury system, but rather to replace it by a body of judges and laymen competent for the conviction and the sentencing.

consists of three judges who determine the sentence.

(b) The accusatory nature of Anglo-American preliminary and trial system and the inquisitorial character of the continental system still remain the rule.

(c) The American judge "is a mere umpire during the trial" and "acts as a referee to insure that the rules of the game are observed."[97] The best opinion of the day seems to be toward an expansion of his powers at the trial, as in England. The judge of the continental countries directs and controls the trial and his action is final unless he abuses his discretionary power or acts against the law.

(d) In the civil law countries the judge, according to the principle of "moral or intime evidence", is not obliged to follow evidential rules.

(e) The defendant does not testify under oath; he is not excused from answering a question upon the ground that he might incriminate himself. His confession can be evaluated by the court. He does not have the right to plead guilty. The

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[97]Caldwell, Criminology, pp. 339-340. This is called by the authority Dean Wigmore the "sporting theory" of justice. There was a proposal of the American Law Institute's Model Code of Criminal Procedure to restore the judge's discretionary power as directing and controlling the conduct of the trial. In spite of the desirable reforms in criminal procedure, it was not generally accepted. Barnes & Teeters, New Horizons in Criminology, p. 279.

procedure of pleading guilty is unknown in the civil law countries.

(f) A dichotomy between conviction and sentence is not recognized by the codes of procedure.

The administration of criminal justice, especially in Western Europe, is at the crossroads between the old rigid concept of justice as equality in a formalistic sense to a new concept of sentencing. The judicial sentence should be viewed as a legal framework of balance between the present day ideas of social interests and individual prevention and treatment. A sentence will have to be adapted to the individual offender's personality for treatment rather than be merely the execution of a legal sentence.

The object of attention has shifted from the crime to the offender. The principle of individualization has become the modern basis of sentencing. The judge must study the entire character and personality of the particular offender. The judge must also consider the different methods of dealing with the offender according to modern standards. This process, based on social, psychological, and psychiatric knowledge of complex human nature, renders the performance of the sentencing function extremely complex and difficult. Thus, the sentencing function has been a subject of much controversy.[98]

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[98]Sutherland and Cressey, Principles of Criminology, pp. 381-384. Caldwell, Criminology, p. 339.

A comparison of sentences between the courts of the United States and Europe with regard to the length and the type of crime, shows many similarities. The statement is often made that sentences in Europe are much shorter than the sentences in the United States.[99] Without available statistics, however, a fair comparison is difficult. There is some indication that the sentences for felonies are shorter in Europe.[100] European countries, however, give long sentences to habitual criminals and recidivists through either preventive detention, (England, France, Germany) or security measures. The current trend toward greater use of fines is apparent in all countries.[101] In the continental countries conditional releases with suspended sentences or probation are widely used. There is also a tendency to increased use of probation in the United States and England. Mannheim and Grunhut point out that during and after the war period, in England there was a shift of emphasis from probation to fines in relation to

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[99]Cavan, Criminology, p. 618. The statistics indicate that the European courts, in general, are faced with the same types of offenders with the exception of less organized crime than the United States.

[100]Herman Mannheim, "Comparative Sentencing Practice," Law and Contemporary Problems, Vol. XXIII, Summer 1958, pp. 557-582. Mannheim, "Some Aspects of Judicial Sentencing," pp. 976-977.

[101]Sweden 90 percent, United States 75 percent (Sutherland & Cressey, Principles of Criminology, p. 276), England 90 percent of all adult guilty of non-indictable offenses, The Netherlands 63 percent (Mannheim, "Comparative Sentencing Practice," p. 561 et seq), Greece 78 percent.

indictable offenses.[102]

II. Judicial Approach and the Sentencing Problem

Judicial Approach. The judge represents the judicial branch of the government which is more grounded in tradition and less flexible than the executive branch. Because of the punitive purpose of most criminal law, judges are trained in law schools and in the tradition of their profession. Their training holds closely to the ideal and absolute conception of law that is often found in the role of administrator of retributive justice. However, the current situation is characterized by considerable changes which affect the judicial approach and its philosophy.

First, the complexity of modern life has created a large number of new conventional crimes and new forms of juvenile delinquency. The social adjustment of the individual lawbreaker has become more difficult under rapidly changing conditions and the number of offenders and cases is increasing. A weakness is creeping into the social controls exercised by family, school, church, and community on one side and by law, police, prosecution, courts, and corrections on the other side.

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[102]Herman Mannheim, "Das English Probation Sustem vom Standpunkt des Gesetzebers und Richters," Bewährungshilfe, Oct. 1956, p. 110. Max Grünhut, supra p37.This situation seems to be bound up with the shortage of probation staff.

These problems are created more rapidly than solutions can be found and demand a new philosophy and methods against the crimes.

Secondly, criminal law and procedure are subject to a gradual and uniform improvement universally. Third, the sciences of psychiatry, psychology, and sociology are throwing new light on human criminal behavior and are offering new penal methods of treatment in place of punitive methods.

The judiciary today has to administer his task in the middle of inconsistencies. Common philosophy for law enforcement and corrections does not exist. As judges impose the penalties described by law, they are a part of society's punitive machinery. As they use probation and clinical services, exploring the offender's potentialities to be salvaged, they represent a part of society's modern machinery of correction.[103]

Both law enforcement and correctional workers are sometimes prone to disregard the complexity of the judge's duty. The police and the prosecution have the primary purpose of preserving law and order. Correction represents a more modern field less bound by legal tradition. It is experimental in nature focusing on the treatment of the offender rather than on the committed crime. An accepted philosophy and approved methods must be the goal for all those engaged in dealing with

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[103]Austin MacCormick, "The Prison's Role in Crime Prevention," p. 45.

crime and criminals.

Lack of Uniformity in Sentencing. In general, the Judge is not in a position to perform, satisfactorily, the function of imposing sentences. In the usual conviction on a plea of guilty he does not even have the facts from the trial at his disposal. No matter how wise and honest he may be, he cannot determine on the basis of these facts, the proper treatment for the individual. Sentencing based upon thorough study of all the relevant facts must replace the mere guess. This is the principal reason for the existing lack of uniformity in sentencing. Professor L. Orfield said:

> "...studies of the sentencing process show that there is no uniformity of approach among trial judges. Some tend to give the maximum penalty and some the minimum. Some penalize certain types of crime severely, while others may do the opposite. Some place many defendants on probation, while others seldom provide the probation ....Individual judges often have no consistent policy of their own as to the cases they pass on. Often, there is no thorough and scientific analysis of the behavior problems of individual offenders. Judges are often pressed for time, and receive little assistance from social workers and probation officers."[104]

In fact, studies prove that there is "inequality and disparity" between sentences imposed in different districts and even in the same community.[105] The lack of established sentencing

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[104]Barnes & Teeters, New Horizons in Criminology, p. 265.

[105]Attorney General R. Jackson, Annual Report, 1940. Sheldon Glueck, "The Sentencing Problem," Federal Probation, 20:17, December 1956 and "Further Comments on the Sentencing Problem", Federal Probation, 21:47, December 1957. Sol. Rubin, "Sentencing Goals: Real & Ideal," Federal Probation, 21:52, June,1957. Caldwell, Criminology, p. 340.

standards and criteria to guide the courts in the selection of sanctions is one of the causative factors of disparity.[106]

The divergence of thought among judges toward the law's aims and forms or treatment is also a reason in explaining the lack of uniformity in disposition. Indeed, unlike others, some judges make frequent use of probation. Finally, one or more of the factors pulling for severity or leniency in the disposition may be coordinating causes of the problem.

The lack of uniformity in sentencing is neither new nor limited to courts of one state or nation. It seems to be universal although it is subject to little research. Statistical studies, most of them done in the United States, have indicated the divergence of penalties imposed.

The first study in sentencing practice has demonstrated the following sentences imposed in Essex County Court, New Jersey.[107]

	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Judge 6
Imprisonment. .	35.6%	33.6%	53.3%	57.7%	45.0%	50.0%
Probation . . .	28.5	30.4	20.2	19.5	28.1	32.4
Fined	2.4	2.2	1.6	3.1	1.9	1.9
Suspended . . .	33.4	33.8	24.8	19.7	25.0	15.7
No of Cases . .	1235	1693	1869	1489	430	676

The sentencing practice in the federal courts during the last decade is reflected in Table I. In the important choice

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[106]Richard F. Doyle, "A Sentencing Council in Operation", Federal Probation, 25:27, September, 1961.

[107]Gaudet, Harris and St. John, "Individual Differences in the Sentencing Tendencies of Judges," Journal of Criminal Law and Criminology, 23:811 et seq, 1932-33.

between probation and imprisonment by various districts there is considerable disparity. In a recent study in England it is suggested as a fact that the existing variations in sentencing and treatment policy cannot be wholly explained by differences in the type of offenders dealt with.[108]

In Germany Franz Exner demonstrates striking contrasts in penalties imposed under the penal code of 1871 by courts of different districts. This disparity was due to the diverse views of the judges arising from their different local traditions and habits of leniency or gravity.[109] In Denmark W.E. v. Eyben criticizes the inconsistency of judicial policy and recommended the abolition of statutory minimum and maximum as useless in practice.[110] Also, a recent study of sentencing in Israel indicates that there is great variation between judges in their method of sentencing and their degree of severity. This fact cannot be attributed altogether to the offense and offender, but must be due to the individual judge, namely, his sentencing attitude and disposition.[111]

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[108]Leslie T. Wilkins, "A Small Comparative Study of the Results of Probation", The British Journal of Delinquency, Vol. VIII, pp. 201-207, 1957-1958.

[109]Franz Exner, Strafzumessungspraxis der Deutschen Gerichte, 16 Kriminalistisch Abhandlungen, 1931.

[110]The Assesment of Punishment, 1953. See Mannheim, "Comparative Sentencing," p. 561.

[111]Shlomo Shoham, "Sentencing Policy of Criminal Courts in Israel", J. of Cr. Law, Crimin. & P. Sc, 50:327-337, Nov-Dec,1959.

Approaches to the Problem. About forty years ago an attack on the sentencing procedure and practices of the courts in criminal cases began.

The chief criticisms of sentencing have been that the sentencing is "too hasty and haphazard", that "most judges are not trained in the sciences of human behavior", and that "criminal justice is disintegrated."[112] Since that time, the use of probation and presentence investigation have developed. The steps which are chiefly needed now are the improvement of these processes and techniques in order to achieve the rehabilitation of those convicted of crime. One of the most current criticisms is the wide disparity of sentences existing, not only from one state to another, but within the same state for the same type of offense.[113]

The causes and the nature of the sentencing problem are not difficult to state. The solution is difficult. Many approaches over the years have been suggested. In the present chapter the improvement of sentencing is approached in several ways. Scientific study, individualized treatment (presentence investigation), legislative guides and other devices were examined.

Today absolute uniformity and equality of sentences is not possible or desirable. The principal goal of penology is

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[112]Sheldon Glueck, 'Book Review', 56 Harvard Law Revue, 1943, pp. 839-840.

[113]James V. Bennett, in the United Nations Report to the Second U.N. Congress, August 1960, p. 56.

no longer uniformity; it is rather individualized treatment. The major problem in sentencing is to achieve individualization within a framework of individualized justice. This is possible only through study of the offender and reasonable discretion of the judge.

Sentencing Boards. As a remedy to the inadequacy of sentencing, the proposal has been made repeatedly in the last thirty years, that the sentencing function should be removed partly or entirely from the courts and be transferred to a sentencing board. This board would be composed of specialists in human nature, such as a psychologist, psychiatrist, sociologist, social worker, and educators.[114] Once the guilt of the defendent has been established, the court would refer him to some other administrative board, which would possess diagnostic facilities for studying him and determining what particular form of treatment best serves the ends of justice.

It has been alleged that almost all criminal cases involve difficult problems of social and psychological diagnosis. The legal guilt can be determined by the traditional means, but the prescription of treatment must be a matter of experts.

A scheme, with modification of the plan for a Youth Correction Authority proposed by the American Law Institute

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[114]Sutherland & Cressey, Principles of Criminology, p. 383. Cavan, Criminology, pp. 666-667. Barnes & Teeters, New Horizons in Criminology, p. 265. Morris Ploscowe, "The Court and the Correctional System", Contemporary Correction, Paul Tappan, editor (New York: McGraw-Hill Co., Inc., 1951), p. 51. Glueck, "The Sentencing Problem", p. 53.

in 1940, was carried into effect by a number of states including California, Wisconsin, and Minnesota.[115] The California Youth Authority had jurisdiction over the juvenile. The California legislature also set up an Adult Authority in 1944 which acts in a limited measure as a disposition agency after the court determines probation, fine or imprisonment. Thus California has adopted a modified treatment tribunal plan, and other jurisdictions, such as Minnesota, are working in this direction.

Under the Federal Youth Corrections Act (1950-1953) special provisions have been established for sentencing and treatment of young offenders up to the age of 26 (1958). The court may sentence an offender to imprisonment up to four years in a specialized treatment institution.[116] Also in effect as treatment tribunals are the Scandinavian Child Welfare Councils and Finland treatment tribunal.

The proposal that the law may completely deprive the courts of any discretion in sentencing has not met with much acceptance. The proponderent opinion is that the sentencing

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[115]Massachusetts, Texas, Illinois, Kentucky.

[116]Under the Federal statute the sentencing remains to the judge who makes the ultimate decision after a specific recommendation by the board. Under the Model Penal Code of the A. L. I., are provisions for special sentencing of young adult offenders with the alternative of committing to a youth correction division to receive individualized correctional and rehabilitative treatment. It appears that the power to probate was also left in the board authority.

responsibility should not be taken away from the judge in view of judicial opposition;[117] it is rather to improve the sentencing in order that the convicted can be observed and studied. The sentencing function should rather remain with the judge where it has traditionally rested. The opposite suggestion is a radical change. It is evident that sentencing boards, in order to make wise decisions, should have the same characteristics as top-quality judiciary sentencing: character and integrity to resist public and political pressure, high salaries, etc.[118] The conscientious, trained judge is in a better position than a sentencing board to make difficult decisions on the basis of of the best expert information available. The judge is judicial in his training, mentality, and prestige. It is doubtful on the other hand that the disparity problem can be solved by removing sentencing authority from judges. James Bennett states recently,

> "The federal judiciary has made an excellent start within the past two years toward its goal of reducing the problem of sentencing disparity to reasonable proportions... The Congress in August 1958 recognized that despite present shortcoming the function of sentencing was inherently judicial and should remain in the hands of judges."[119]

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[117]James V. Bennett, "Countdown for Judicial Sentencing", Federal Probation, 25:22-26, September, 1961.

[118]Norman S. Hayner, "Sentencing by an Administrative Board", Law and Contemporary Problems, Vol. XXIII, p. 493, 1958.

[119]Bennett, "Countdown", p. 26. James V. Bennett, "Of Prisons and Justice", 1961, pp. 5-6.

It must be recognized, for the near future, at least, that the sentencing function will remain in the discretionary power of courts and that the improvement of sentencing processes must be the objective.

Judges should work along with social workers and criminologists to study the criminals as maladjusted persons needing the entire understanding and help of specialists in case work, psychology, and psychiatry.

The present situation of the criminal judge is increasingly close to this picture. The extensive increase in the use of probation reflects widespread judicial satisfaction and cooperation. Professor Mannheim states:

> "American penal administrators and judges have shown remarkable open-mindedness in not only tolerating but actively encouraging scientific investigations which were likely to, and actually did, result in reports highly critical of their own work."[120]

Professor Hans Toch recently says:

> "Fortunately, our courts have not been blind to new scientific techniques and ever increasing areas of knowledge ....."[121]

In almost all the European countries, the traditional role of judge has been regarded as the greatest guarantee of

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[120]Herman Mannheim, Group Problems in Crime and Punishment and Other Studies in Criminology and Criminal Law (London: Routledge & Kegan Paul Limit, Broadway House, 1955), p. 194.

[121]Hans Toch, Legal and Criminal Psychology(New York: Holt, Rinehart and Winston, Inc., 1961), p. 73.

public and individual liberties against arbitrary administrative and even legislative acts. Particular confidence is placed in judges because of their independence, career training, and the guarantees of the court disposition and the reviewability of sentences. Most of the public and many of the judges believe in their traditional authority as sacrosanct. The experiments of the "treatment tribunal" of Finland and the "adult authority" of California have few adherents. Consequently, there is no question of depriving the courts of the power to impose the sentences provided by the law.[122] The trend toward a "socialized" criminal justice does not yet meet great acceptance. However, the development represented by the scientific examination of juvenile offenders and adults for probation has made great progress.[123] The utility and necessity of the presentence investigation is generally recognized. It is expected that the improvement and "individualization" of criminal justice will limit the disparity and other defects in sentencing practice.

Indeterminate Sentences. The indeterminate sentence is another matter which is receiving considerable attention. It

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[122]On the respective powers of judicial and administrative agencies to supervise the execution of sentence, see: Silving, "Rule of Law", p. 152 proposal of American "courts of sentence execution", Max Grunhut, Penal Reform, p. 115, and Italian and French judge supervising the execution, supra p. 51

[123]Congresses of London (1925) and Hague (1950).

is a relatively new way in which the judge wisely exercises his discretion and facilitates the use of scientific methods of rehabilitation. The indeterminate sentence implies that the court imposes a penalty or measure without finally determining its duration at that time. Some judges are unwilling to relinquish their sentencing power.

The sentence is in reality indefinite or relatively indeterminate when the court imposes minimum and maximum limits of the penalty and when the time of release is determined by competent authority. The release time of a prisoner may be determined by the legislature or the court or by an administrative board.[124] It was in the United States in the famous Elmira Reformatory where the indeterminate sentence took effective roots. The first legislative action in America on indeterminate sentence was taken by Michigan in 1869.

At present, all but nine states and the federal system have some form of the indeterminate sentence.[125] A recent study found that the indefinite sentence has been adopted exclusively in eight states.[126] No states have sentences that are absolutely indeterminate, and the practice is to call these indefinite sentences indeterminate.[127]

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[124]In most continental countries by the courts.

[125]Barnes & Teeters, New Horizons in Criminology, p. 570.

[126]Tappan, Crime Justice & Correctionp. 437. Arizona, Colorado, Michigan, Nevada, New Hampshire, Pennsylvania, Washington, and Wyoming.

[127]Sutherland & Cressey, Principles of Criminology, p. 550-551.

The question whether indeterminateness should be absolute or relative has aroused much controversy. The former has been recommended by many criminologists since the past century as a method to resolve the problems of treatment.[128] It seems that in modern penology and practice, relative indeterminateness prevails in all systems. The absolute indeterminate sentence is generally rejected except for psychotic and feeble-minded offenders. These types require medical treatment and long term custody.[129] Sometimes absolute indeterminateness may be concealed behind the appearance of relative indeterminateness.[130]

The indeterminate principle is sound. It is based on the notion of individual prevention. It constitutes a further departure from the theory of conditional release to the extent that it represents an effort to rehabilitate the offender or at least to make him no longer dangerous. At present, the prevailing tendency is definitely toward relative indeterminate or partially indefinite sentences with statutory maxima and minima within the various judicial and penitentiary systems.[131]

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[128]There are arguments against the absolute indeterminate sentence, and in some states it is a question of constitutionality. The general public, as well as the criminals, have in mind a system of fixed penalties and have not appreciated the concept of indeterminate sentence. However, it is generally held that "indeterminate sentence and parole are fundamental unity in principle and successful practice." It is logical also to have absolute indeterminate probation, with no fixed term. Barnes & Teeters, New Horizons in Criminology, p. 570. Sutherland & Cressey, Principles of Criminology, p. 562. Caldwell Criminology, p. 646.

[129]Tappan, Crime Justice & Correction, p. 436.

[130]Donnedieu de Vabres, Traité elémentaire de droit criminelle et de legislation penal comparee, 3rd ed. 1947, p. 751-3.

[131]United Nations, The Indeterminate Sentence (U.N. Dept. of Social Affairs, 1954), p. 64.

Wider acceptance of the system of indeterminate sentences is evidenced by the increasing number of penal systems that have introduced it. It is generally considered as applicable to three special categories of offenders: juvenile offenders, hardened criminals,and abnormal offenders.[132]

The underlying philosophy and methods of the "social defense" movement is based essentially upon indeterminateness. Most modern penal codes are modified and open the door to this trend by "security measures" and "preventive detention",[133] The United States is the best place to observe social defense in action.[134]

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[132]Abnormal offenders are dealt with by indeterminate detention in the United States (New York, Massachusetts, and Pennsylvania), Denmark, Germany, the Netherlands, Norway, Sweden, United Kingdom, Switzerland, Italy and Greece. In most cases the sentences might be absolute indeterminate. In Greece it is combined absolute and relative indeterminateness. (art. 39, 69, 70 Penal Code 1950).

[133]"Social defense" laws of "security measures" have been widely introduced in continental countries. Among them in Belgium, Law of Social Defense (4/9/1930). In Germany, law of juvenile delinquents (2/16/1923) and law of habitual criminals and security measures (11/24/1933). In Holland, law of recidivists and professional criminals (1924). In Finland (1936). In Greece Penal Code (1950). The system of "security measures" aims to protect society from the insane, abnormal or dangerous criminal committed in special institution under indeterminate sentences and to prevent juvenile delinquency. These are measures of individual prevention, therapy and rehabilitative treatment. The preventive detention is a correctional measure for habitual and incorrigible criminals in England, Germany, and France. The American Model Penal Code provides for preventive detention - extended term. The American Law Institute, Model Penal Code, Tentative Draft No. 4, April 25, 1955, pp.49-51.

[134]The system of indeterminate sentences as applied in the United States in combination with parole can be considered as equivalent and more advantageous and successful.

III. Selective Process

The Judge's Role and Discretionary Power. The judge in sentencing a convicted person or one who has pleaded guilty has a complex duty to perform and a variety of responsibilities. The selection of an appropriate sentence is as important to the administration of justice as the determination which is always a legal question. The sentence the judge imposes, particularly probation or imprisonment, affects the individual offender, his family, and indirectly, society. The judge has the greatest part of the responsibility for dealing adequately with the endless lines of law breakers who differ widely in their characteristics and personalities.

In sentencing, the judge must try to provide the best sentence for the individual, who, according to the weight of the potentials, may be able to adjust to the free community with or without legal supervision. He also has the responsibility of protecting society and determining what disposition will prevent recurrence of the criminal behavior in the individual. Judges try to act wisely but often have little background to impose the best sentence.

Their work in criminal and juvenile cases is more demanding and specialized than in civil cases. It demands of them not mere knowledge of the law but of the sciences of human behavior, of criminology and penology.

Since the status of probation is recognized as an integral part of the administration of justice, it is the judge's duty to demand the staff needed for the probation service. Staff

is the keystone of sentencing structure.[135]

An offender placed on probation remains the judge's responsibility beyond the day of the sentence. This is the beginning of his duty, and the discharge of probation is the end of his judicial function.

The role of the judge in crime prevention is a crucial one. The success of any rehabilitative program depends upon the coordination and cooperation between police, prosecution, judge, correction, community's agencies, and resources.

Almost uniformly the probation statutes set forth the general and permissive terms for the grant of power to the courts.

Whether or not probation shall be granted in a certain case lies in the discretionary power of the court. The court has the legal authority to grant probation. The only legal limitations are the statutory restrictions and prescriptions. Regardless of the recommendation for probation of the officer or the verdict of juries, the judge makes the final decision. This great responsibility emerges as a leading principle in the selection of offenders deemed suitable for probation as a form of individualized treatment. The judicial decisions determine whether or not the convicted person has the potential for reformation. The court has the final decision and should

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[135]Will C. Turnbladh,"Half Justice", N.P.P.A. Journal, Vol. 2, No. 4, pp. 305-307, October 1956. One of judge's most important duty is ordinarily the selection of probation officers. Sometimes this duty is not assigned to him.

consider many factors.

Eligibility for Probation. The eligibility of offenders for probation in adult cases is determined by statutory provision in most states. They vary greatly.

The probation laws of many states, after a statement as to the general guides in the selection of offenders, list certain crimes, which bars the defendant from receiving the benefits of probation. These include the following groups: (a) crimes of violence, e.g., rape, kidnaping, burglary, arson; (b) crimes involving use of deadly weapons; (c) crimes against morals, particularly sex crimes; (d) mercenary crimes; (e) crimes against government, treason, election laws; and (f) certain felonious crimes carrying a serious penalty.

The legal restrictions which reveal great inconsistencies are in two main categories: (1) those excluding probation for specified offenses and (2) those denying probation because of previous criminal record. A summary of that situation is given in the following data.[136]

(1) Today only four states impose no statutory restrictions in the application of probation.[137]

(2) Nineteen states including Federal have restrictions based on the offense punishable by death of life imprisonment.[138]

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[136]Tappan, Crime, Justice and Correction, p. 553. Charles L. Chute and Marjorie Bell, Crime, Courts and Probation (New York: The MacMillan Co., 1956) pp. 86-87. David Dressler, Practice and Theory of Probation (New York: Columbia University Press, 1959) p. 34.

[137]Maryland, New Hampshire, Vermont, and Wisconsin.

[138]Arizona, Arkansas, Delaware, Florida, Georgia, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, New York, North Carolina, Rhode Island, South Carolina, South Dakota, Utah, Wyoming.

(3) Twenty three jurisdictions bar the use of probation where specific felonies have been committed.[139]

(4) Twenty have restrictions of the basis of prior criminal convictions and three on the basis of prior imprisonment.[140]

(5) Three exclude crimes punishable by more than specific period of imprisonment.[141]

It is noted that eleven states forbid probation upon a second conviction of felony, three after a previous imprisonment and two upon a third conviction.

In practice the second restriction is of slight importance numerically. There are four other states with unimportant or minor restrictions. Theoretically, each law seeks to make those convicted for most serious crimes ineligible. But these provisions can be considered as inconsistent, unrealistic and unnecessary.

In European countries, in general, there are statutory restrictions on elegibility for probation. These are related

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[139]California, Colorado, District of Columbia, Idaho, Illinois, Indiana, Iowa, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Maryland, New Hampshire, Vermont, and Wisconsin.

[140]Alabama, California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Minnesota, Missouri, New Mexico, New York, Oklahoma, South Dakota, Texas, Virginia, Washington, and West Virginia; Montana, North Dakota,and Pennsylvania exclude on the basis of prior imprisonment.

[141]Alabama (10 yrs), Tennessee (5 yrs), and Texas (10 yrs).

to either personal or non-personal criteria. The personal criteria usually used are the age and the criminal record of the offender. The experience in the United Kingdom has not indicated a need for the introduction of restrictions in terms of criminal records.

The principal non-personal criteria used are the judicial nature or the legal sanction of the offense. In England this restriction applies only to "the offenses for which is fixed by law" a mandatory sentence to death or imprisonment for life.[142]

Under the Franco-Belgian type of conditional sentence, the restriction on the duration of imprisonment is narrow. A general tendency is to exclude only serious offenses punishable by death or life imprisonment.

The soundest solution to the probation elegibility problem is that which grants broad discretion to the court. Such discretion, however, should be exercised only in the light of the findings of proper investigation. The door to probation should not be closed by rigid and unrealistic restrictions on eligibility. This tends to exclude large numbers of offenders who may be amenable to successful treatment of probation if carefully selected.

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[142]United Nations, Probation, pp. 223-238. Criminal Justice Act, 1948, s.3 (1).

The Attorney General's Survey concludes:[143] "In the light of the findings, there seems to be no particular justification for the statutory provisions excluding persons convicted of certain offenses from probation." The legislature excludes certain categories of offenders with previous criminal record. The presumed dangerousness of the offender to society, general prevention, the belief that such offenders would not be amenable to successful treatment on probation seems to explain the acts of the legislature. Only the last consideration has any relationship to the character of probation. It is doubtful if it is possible to delimit this category of offenders.[144] It must be concluded, therefore, that statutory restrictions on the basis of previous criminal records should not make a person unfit for probation. Probation, however, does require special care in the selection of suitable cases among such persons.

IV. Devices for Improving Exercise of Judicial Discretion

Presentence Investigation. The principal requirement for any rational and hopeful decision for regarding the use of probation is in a particular case a social investigation and complete presentence data. This "thorough study" is one of

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[143]Attorney General's Survey, pp. 122 and 400.

[144]United Nations, Probation, pp. 225-226.

probation's major contributions to the administration of criminal justice. A presentence investigation report by a well-trained probation officer "is the judge's most valuable guide to a proper sentence."[145] A report of all relevant data on the offender's personality, social, and personal history is most essential.

The probation officers provide the factual basis and the need and perspective of individual treatment of the offender. The effectiveness of the selection process depends primarily, of course, upon the thoroughness and reliability of the presentence report and the ability and objectiveness of the judges. The presentence report is the first specific step toward the individualization of treatment in probation. The decision to grant or deny probation should be based upon the individual facts of each case.

The presentence investigation ideally covers such things as: (a) offense and the defendant's attitude toward it; (b) prior record, (c) personal history; (d) family; (e) home, neighborhood, and other group associations; (f) education; (g) employment and resources; (h) physical and mental health, (i) religion; (j) interests and activities including alcohol and drugs in particular; (k) the individual's interests in community's agencies and (l) the defendant's own attitude

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[145]National Parole & Probation Association, Guides for Sentencing, p. 26.

toward the complainant. A summary, diagnosis, possible program and recommendation of a treatment plan should also be included![146]The presentence investigation is not a collection of stereotyped data with the emphasis on external factors. It is a study and searching mirror of the offender himself.[147] The whole psychological examination and social inquiries should bring to light the facts and the entire picture of human personality.

An adequate presentence investigation is not only essential for effective court action but it is also essential, effective, and constructive for correctional work.

The report must be the reflection of a factual and diagnostic study of the offender's personality. As a model guide rule 32 (c) (2) of the Federal Rules of Criminal Procedure provides:

> "The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court."

The Model Penal Code of the American Law Institute, in a similar

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[146]Caldwell, Criminology, pp. 433 & 445. Cooley, Probation and Delinquency. Chute and Bell, Crime, Courts and Probation, pp. 145-146. Sutherland & Cressey, Principles of Criminology, pp. 427-428. David Dressler, Probation and Parole, (New York: Columbia University Press, 1951) pp. 43-44. Paul W. Keve, The Probation Officer Investigates (Minneapolis: University of Minnesota Press, 1960), Ch. 19, pp. 147-161. Edmond Fitzgerald, "The Presentence Investigation", N.P.P.A. Journal 2:321-336, October, 1956.

[147]Chute & Bell, Crime, Courts and Probation, p. 144. Keve, "The Probation Officer", p. 64.

attempt to spell out in some detail the various matters which should be included in such a report, provides with more particularity that:

> "The presentence investigation shall include an analysis of the circumstances attending the commission of the crime, the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, and personal habits and any other matters."[148]

The value of the presentence investigation is high and is the best device and answer, at present, in the sentencing problem. It is mentioned in the laws of more than two-thirds of the states. In a few states it is mandatory. It is now being used generally in juvenile cases and in most jurisdiction in adult cases.[149] In the Federal Courts 89 percent of those convicted in 1959 have had presentence investigations.[150] In European countries it is also being used increasingly.[151]

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[148]The American Law Institute, Model Penal Code, p. 55.

[149]The presentence investigation is used before release on probation in all felony cases in Illinois, Arkansas, Idaho, New Hampshire, New York, Kentucky, Louisiana, North Carolina, Ohio, and South Carolina; it is used in all felony cases before sentence in Michigan, California, Colorado. Chute & Bell, Crime Courts and Probation, p. 139. United Nations, Probation, p.237. Taft, Criminology, p. 451.

[150]Irving R. Kaufman, "Sentencing: The Judge's Problem", Federal Probation 24:6, March 1960.

[151]The presentence investigation is used in England for all cases before granting probation; in Sweden for cases of youths and adults before probation; in Denmark and the Netherlands for all cases before conditional sentence; in Germany and France before probation. Chute & Bell, Crime, Courts and Probation, p.140. United Nations, Probation, pp. 80, 81, 160, 174, & 237 supra I (2).

Since 1950 the Hague International Penal and Penitentiary Congress, the presentence investigation has been adopted in five other international congresses. There is evidence that the presentence investigation is a successful device for sentencing on probation. It will probably be continued and universally extended. The American Law Institute states that "the use and full development of this device appears to us to offer the greatest hope for the improvement of judicial sentencing."[152]

An excellent and useful addition to each report would be a physical and mental examination of the offender. Such examination as a part of a psychological study, is rarely included in presentence investigations at the present time, but there is a trend and it is believed that in the near future every defendant will have that benefit.[153]

A well-trained probation staff in sufficient numbers is of paramount importance. The success of probation depends greatly upon the professional and in-service training of the probation officer as well as his ability. He must maintain objective attitudes toward the offender and delinquent and be able to distinguish between psychological, physiological, and social needs and how to treat them. "Probation work is as broad as the range of human personalities and as deep as the

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[152]American Law Institute, Model Penal Code, Draft No 2, Rule 7.07 (3) Comment, p. 53.

[153]Judge Casper Platt, "The Judge and the Probation Officer - A Team for Justice", Federal Probation 16:6, December, 1952.

mysteries of human conduct."[154] The exactness and the objectivity of his investigation is extremely important to the judge, the individual, and the community.

Legislative Guides.

(a) Statute directives. The primary responsibility for setting the probation system is in the legislature, and it carries out this responsibility in the laws it makes. The base for probation selection are the laws giving judges the power to determine in an individual case what is the best for society and for the individual. Specific eligibility provisions in probation statutes are frequently supplemented by various general considerations as guides to the court in selecting offenders on probation. These general provisions are rarely mandatory.

The device of directing courts to have special regard to certain general factors in the selection of probationers has been adopted in a large number of probation statutes.[155]

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[154]Elliott, Crime in Modern Society, p. 562.

[155]California: "If it shall determine that there are circumstances in mitigation of punishment prescribed by law, or that the ends of justice would be subserved by granting probation to the defendant, the court shall have power in its discretion to place the defendant on probation as hereinafter provided." Minnesota: "Whenever the court is of the opinion that by reason of the character of the person, of the facts, or circumstances of the case, the welfare of society does not require that he should suffer the penalty imposed by law, so long as he is thereafter of good behavior." The Swiss Fed. Penal Code of 1937 was the first in the Continent to establish the general principles that the judges have to select the sentence in accordance with the guilt of the defendant, motives, previous history and personal circumstances (art. 63).

In addition to the considerations of the triviality of the offense and the age of the offender, various statutes specified character, mental condition, health, conduct, and associations of the offender; extenuating circumstances and motives; a voluntary confession; restitution; the prospect of the reform of the offender without punishment; the public interest in the infliction of the punishment, etc.

The legislative directives to guide the exercise of judicial discretion should be considered as an advisable and necessary technique. But as discussed before, while the legislator should make clear which guiding principles should be followed, the question of degree of details is open to controversy.

It must be noted that the specified directory considerations, to which the court should have regard in selecting offenders for probation, should not be detailed beyond general principles and should not confine the judicial discretion. The great variety of life and the wide differences in mental and emotional ability of men are considerations impossible to express in detailed legal criteria. Any such attempt is doomed to failure.[156] The problem is for the legislature to provide a technique where judicial discretion shall be allowed to be be creative.

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[156]The detailed criteria of the Italian Penal Code (1930) and the Swiss Penal Code (1942) have been subject to such criticism.

On the other hand, these techniques should be directly related to the essential purpose of probation, For example, appropriate criteria seem to be the amenability of a particular offender to successful treatment on probation or considerations of individual or general prevention.[157]

(b) Ferri's Project. The Italian Penal Code project (1921) of Professor Enrico Ferri prescribes an elaborate scheme of "conditions of dangerousness" and "conditions of less dangerousnes" to be applied by the judge. It listed seventeen "circumstances" of "greater dangerousness" in the offender and eight circumstances of "less dangerousness."[158]

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[157]United Nations, Probation, p. 231.

[158](1)Honesty of prior personal, family and social life; (2) having acted from excusable motives or motives of public interest; (3) having acted in a state of excusable passion or of emotion through intense grief or fear or impulse of anger unjustly provoked by others; (4) having yielded to a special and transistory opportunity or to exceptional and excusable personal or family conditions; (5) having acted in a state of drunkeness or other form of intoxication not be be foreseen by the offender, through transistory conditions of health or through unknown material circumstances; (6) having acted through suggestion coming from a turbulent crowd; (7) having used spontaneously and immediately after having committed the offense, all exertion to diminish the consequences or to make good the damage even in part, if it be done with sacrifice of one's own economic condition; (8) having in repetance confessed the offense not yet discovered or before being interrogated by the judge, or having in repetance presented oneself to the authorities immediately after the offense (art. 20-22).

Ferri's code set down in advance provisions in terms of the dangerousness and the length of sentence by which the judge is mechanically bound. It provides a system of sanctions (among them, suspension of execution of sentence) which the court should apply in connection with the conditions of dangerousness or less dangerousness.

Such detailed legislative prescription of criteria adopted for the guidance of judges constitutes a confusing solution of the problem of judicial discretion. Ferri's system is complicated and mechanical and greatly restricts judicial discretion.[159] It was exemplified in simple forms in some penal codes such as the penal codes of Argentina (1921), Columbia, Peru, U.S.S.R. (1927), and Mexico (1929). The Ferri project is still helpful, as containing academic directives to judges.

(c) Model Penal Code of the American Law Institute. The American Law Institute has been engaged for many years in the attempt to formulate a Model Penal Code. Its tentative drafts include provisions governing, under multiple objectives, the sentencing and treatment of offenders.[160] The Code in Section 707 prescribes the criteria that should be followed by the court in withholding a sentence of imprisonment. Before sentencing the court shall regard the nature and circumstances

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[159]Glueck, Crime and Correction, pp. 86-101.

[160]Tentative Draft No. 4, 1955. The section is quoted as revised and approved by the council of the Institute in March 1958. It differs substantially from the original.

of the crime along with the history, character and condition of the defendant. The court shall conclude whether or not his imprisonment is necessary for protection of the public on one or more of the prescribed grounds.[161]

The code also sets forth a check list of factors which, while not controlling the discretion of the court, should be accorded weight in favor of withholding sentence of imprisonment and the granting of such sanction as suspension through probation, fine or fine, in combination with probation.[162] Suspension or probation may be used in any case without limitation.

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[161] American Law Institute, Model Penal Code, Draft 1955 as revised in 1958. Section 7.01(1):"(a)There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or (b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution or (c) a lesser sentence will depreciate the seriousness of the defendant's crime."

[162] American Law Institute, Model Penal Code, Draft 1955 as revised in 1958. Section 7.01(2): "The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:
(a) the defendant's criminal conduct neither caused nor threatened serious harm;
(b) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;
(c) the defendant acted under a strong provocation;
(d) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
(e) the victim of the defendant's criminal conduct induced or facilitated its commission;
(f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;
(g) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
(h) the defendant's criminal conduct was the result of circumstances unlikely to recur;
(i) the character and attitudes of the defendant indicate that

In recent discussions of the tentative draft, it has been argued that embodying these criteria within the statute is in principle erroneous and that these criteria should be developed administratively or unofficially.[163] This argument seems untrue, since such criteria not established by law are changeable. The argument also that the judicial discretion must have "freedom in decision" and not be limited and confined too much by the legislature is a generally accepted principle. However, legal indicative and elastic directives are desirable since magistrates in practice have occasionally ignored or misunderstood even the most obvious principles of sound sentencing.[164] Many authors believe that these criteria of the Model Penal Code for selecting probationers offer about all that can be suggested at the present time. These criteria are based on research and study by members of the Institute.[165]

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he is unlikely to commit another crime;
(j)the defendant is particularly likely to respond affirmatively to probationary treatment;
(k)the imprisonment of the defendant would entail escessive hardship to himself or his dependents."

[163]Sol. Rubin, "Sentencing and Correctional Treatment under the Law Institute's Model Penal Code," American Bar Association Journal 994, 1960. Herbert Wechsler, "Sentencing, Correction and the Model Penal Code," University of Pennsylvania Law Review 109:465-493, 1961.

[164]Mannheim, "Some Aspects of Judicial Sentencing", p. 965-966. Wechsler, Ibid, p. 488

[165]Moreland, Modern Criminal Procedure, p. 317.

Indeed these sections represent one of the most significant contributions of the Model Penal Code of the American Law Institute. It is felt that judges tend, at present, to take into actual consideration these directory guides. Unlike the situation under the Ferri Code, freedom of judicial discretion remains unhampered.[166]

Appellate Review. The disposition process could also be improved by establishing the appellate review. This system has been tried with success in some states and in the court of Criminal Appeal in England. In America there is a trend toward setting nominal sentence and leaving the discretion or form of penal treatment to an administrative board. Also added to the mitigating devices are systems of parole, executive commutation, and pardon.[167]

The state should have the right to appeal to correct errors in the lower court proceeding. The common-law rule denying an appeal to the state in criminal cases is considered as outmoded. An appeal should be open to both parties. Criminals, like the innocent, are entitled to all protections of due process but they are not entitled to escape the penalty for their crimes by reason of outmoded rules.[168] Procedural defects should not be an obstacle to criminal justice. The

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[166] Sheldon Glueck and Eleanor Glueck, Predicting Delinquency and Crime (Cambridge, Mass.: Harvard University Press, 1959) p. 11.

[167] Pound, Jurisprudence, p. 31.

[168] Moreland, Modern Criminal Procedure, p. 282. Thirty-nine states and the Federal do not authorize appellate review of sentences.

American Law Institute with an elaborate model code of procedure leads the way. The federal rules of criminal procedure (1938) are and will continue to be a model for practice reform.

Guides for Sentencing. In 1957 the Advisory Council of Judges of the National Probation and Parole Association published the booklet, Guides for Sentencing.

With the cooperation of the National Council of Juvenile Court Judges the same council has also published the booklet, Guides for Juvenile Court Judges.

The Guides for Sentencing, emphasizing that only the protection of society justifies sentencing to probation or imprisonment, accepts the crucial significance of careful selection of offenders.[169] It includes factors, affecting the disposition, to be taken into account by the judge in assessing an appropriate sentence in the individual case. The guides provide some helpful hints: some of these are similar to the factors which have been proved in follow-up and predictive research to be relevant to expectable postsentence behavior.

Undoubtedly, these books employing "knowledge" and "accumulated experience" from scores of judges represent a considerable contribution to the "complex and sensitive problem" of the sentencing function. Both are concise and realistic.[170]

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[169]Robert M. Hill, "A Judges Guide to Sentencing", N.P.P.A. Journal, 2:308-314, October, 1956.

[170]Gluecks, Predicting Delinquency and Crime, p. 11.

They might be valuable tools to the judges. These publications are also a contribution to the advancement of judicial education.

Prediction Tables.

(a) Prognosis of recidivism. During the last three decades social scientists and criminologists in the United States, chiefly, have conducted a considerable amount of research with the purpose of transforming past experience into prognosis devices for the guidance of the sentencing courts, the parole board, probation and parole officers, and similar agencies. The prediction of recidivism is an essential feature of the selection process involved in deciding what method of treatment will be accorded offenders.[171] The results of prediction studies have been reduced to the form of actuarial prediction tables.

It has been suggested that statistical prediction tables or experience tables, based on actuarial studies of past experience with the several forms of treatment, provide a sounder guide.[172] It is argued that these tables should enable judges to individualize "in terms of objectified, systematized and relevant experience," and to make the most effective choice among the sentencing alternatives. The available techniques

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[171]Elio D. Monachesi, "The Prognosis of Recidivism: American Studies", The Midwest Sociologist, Vol. XX, No. 1, p. 1, December 1957.

[172]Experience Tables (Oh lin, Mannheim)

for improving exercise of judicial discretion, presentence investigation, legislator's or jurisprudence guides, are not sufficient. The judge has no way of knowing the weight of the factors in relation to various types of expectable postsentence behavior to help him choose the most suitable alternative of probation or commitment for the individual offender.[173]

(b) Brief review of prediction studies. Most of the prediction studies published in the past 39 years in the United States and Europe are concerned with parole and only a few with probation.[174]

Sam. B. Warner, in 1923 made an attempt to determine the degree to which recidivism is related to certain background characteristics of criminals. The first significant prediction study, incorporating the suggestions made by Hornell Hart, was made by Ernest W. Burgess, published in 1928.[175]

Earnest W. Burgess' and Sheldon and Eleanor Glueck's studies represent the first comprehensive attempts made in America toward the prediction of recidivism.[176] They developed

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[173]Gluecks, Predicting Delinquency, p. 12.

[174]See: Critical summary of prediction studies in H. Mannheim and L. T. Wilkins, Prediction Methods in Relation to Borstal Training, 1955, Ch. I, reproduced in Gluecks, Ibid, p. 153. Monachesi, "The Prognosis" and "American Studies in Prediction of Recidivism", J. Cr. Law, Crimin. & P. Sc. 41:268-289, 1950. M. Hakeem, "Prediction in Criminality," Federal Probation, Vol. 7, July Sept., 1943.

[175]S. B. Warner, "Factors Determining Parole from the Massachusetts Reformatory" Journal Cr. Law & Crimin. 14:172-207, 1923. H. Hart, "Predicting Parole Success", Journal Cr. Law & Crimin. 14:405-413, 1923. A.A. Bruce, A.J. Harno, E. W. Burgess, and J. Landesco, "Parole and Indeterminate Sentence", 1928.

[176]Sheldon Glueck and Elea nor Glueck,"Predictability in the Administration of Criminal Justice", Harvard Law Review 42:

two prediction techniques. Burgess used 21 predictive factors without weighting, and the Glueck technique employed a small number of select factors and a weighting system. Numerous scientific studies have been made of parole outcome and prediction. The literature is replete with the principal prediction studies: Walter W. Argow, Attorney General's Survey of Release Procedure, Michael Hakeem, Gluecks, John L. Gillin, Ferris F Laune, Lloyd Ohlin, Barkev S. Sanders, Alfred C. Schnur, Clark Tibbits, Richard E. Thompson, A. H. Weeks, G. B. Vold, and many others.

In Europe (Germany) prediction research was initiated by Franz Exner after his visit in the United States and the publication of the first Gluecks' studies. Other studies have been conducted by Gerecke, Kohnle, Mannheim, Maywerk, Erkki Saari, R. Schiedt, Schwaab, Erwin Frey, Trunk, Leslie Wilkins and others. In the field of probation Monachesi was the first who published an elaborate prediction study in 1932.[177] He undertook to establish factors with predictive relevance for the possibility of satisfactory or unsatisfactory conduct of probationers. "Prediction Factors in Probation," a total of 1515 closed probation cases, adults and juveniles, handled by Ramsey County Probation Office in the State of Minnesota during the years 1923 to 1925, were analyzed. The information found in the records

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300-329, 1929 and 500 Criminal Careers, (New York: Knopf, 1930).

[177]Eleo D. Monachesi, Prediction Factors in Probation (Hanover, N. H.: The Sociological Press, 1932).

was reduced to 50 factors for the juvenile and 34 for the adult group. Following Vold's technique, the classification of certain "highly conceptual" items, such as "social type" (Burgess), was rechecked for a small sample of the cases and the agreement between the first and second entries checked by means of three statistical measures of reliability. Also in conformity with Vold, the group of "pre-probation" factors was treated in the same way as the rest. Comparisons were made between prediction according to the Burgess and the Glueck techniques. The two techniques furnished approximately the same results. Prediction tables were constructed.

Sheldon and Eleanor Glueck designed prediction tables in their three follow-up studies in the field of juvenile delinquency. They studied former prisoners of the Massachusetts State Reformatory. The five selected factors for predicting probation behavior are: family relationships, education of parents, church attendance, age of first delinquency, and number of children in the family.[178]

Morris G. Caldwell, of the University of Alabama, published the results of another follow-up study of 1862 federal probationers (July 1, 1937 and December 31, 1942). The factors most significantly related to their outcome were: age at the

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[178]Sheldon Glueck and Eleanor Glueck, Criminal Careers in Retrospect (New York: The Commonwealth Fund, 1943) p. 237. Gluecks, Predicting Delinquency, pp. 62, 190-205.

beginning of probation, occupational status, number of criminal offenses, number of commitments to correctional institutions and length of probationary supervision. No prediction tables were published.

Albert L. Reiss, developed prognostic instruments to predict the recidivism of a sample of 736 juvenile delinquents placed on probation in the years 1943 and 1944 by the Juvenile Court of Cook County, Illinois.[179] A follow-up sample of 374 cases was used to test the validity of the prediction instruments. He selected, out of a total of 20 unfavorable factors found to be significant, the following five as "stable" predictors: (a) economic status of family: dependant; (b) truancy: usually truant; (c) deportment record in school: poor or very poor; (d) adequacy of personality controls: relatively inadequate ego and super ego controls; (e) recommendations for treatment: place delinquent in adequate community environment or closed institution or psychotherapy.

J. Rumney and J. Murphy in their study (New Jersey) rely for prognosis of future conduct of former probationers on a judgment of the individual's total situation in the various "provinces" of social adjustment.

A few studies have been made to determine the validity

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[179]Albert J. Reiss, "The Accuracy, Efficiency, and Validity of a Prediction Instrument", American Journal of Sociology, 56:1951 pp. 552-561.

of such prognostic instruments.[180] Monachesi tested the accuracy of probation prediction made by the Burgess method on a group of 120 juveniles placed on probation in 1939-1940.[181] The results indicated that the predictors employed permitted acurate prediction for individuals falling at the extreme ends of prediction scores distribution.

Two validation studies have been made with the Gluecks' prediction material.[182] R. E. Thompson's study suggests that a prognosis based upon examination of comprehensive factual information proved accurate to the same degree as prediction, but that prediction appeared more to the point in sorting out those boys who did not become delinquents in a group of difficult boys. It was found that while the tables made a correct prediction of subsequent delinquency or non-delinquency in 91 percent of the cases, the three clinicians were successful in only 54 percent, 56 percent, and 62 percent of their prediction respectively.

Ohlin and Duncan showed that the difference in accuracy, expressed in percentage reduction in error, between prediction

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[180]Even on the accuracy of parole prediction, only a handful of studies are available.

[181]Elio D. Monachesi, "A Comparison of Predicted with Actual Results of Probation", American Sociological Review 10: 26-31, February, 1945.

[182]Sheldon Glueck and Eleanor Glueck, After Conduct of Discharged Offenders (London: MacMillan Co., 1945). Richard E. Thompson, "A Validation of the Glueck Social Prediction Scale for Proness to Delinquency", British Journal of Delinquency 3:239 et seq, 1953.

and the expression based on relevant delinquency rates is still rather moderate.[183] The objective which was expected to be achieved by the utilization of systematic prognostic devices in the administration of criminal justice is still beyond reach.

Mannheim and Wilkins, who constructed a table for the prediction of response to Borstal treatment, similarly found the table to be significatnly more reliable than the judgment of Borstal staff members.[184]

Recently the Gluecks published evidence concerning the usefulness of the tables in predicting the behavior of 500 delinquent boys (probation tables V-1 to V-6).[185] These prediction tables in all categories of treatment were also subject to criticism.[186] It seems that they make a negligible contribution to accuracy of prediction. There is no evidence of any official practical acceptance and application of the prediction tables in the courts or probation offices. The Illinois Division of Correction, which for the past 25 years has been using the "experience" table from the parole board,

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[183]L. E. Ohlin and Otis D. Duncan, "The Efficiency of Prediction in Criminology", American Journal of Sociology, pp. 441 and 445, March,1949.

[184]Herman Mannheim and Leslie Wilkins, Prediction Methods in Relation to Borstal Training (London: H. M. Stationary Office, 1955).

[185]Gluecks, Predicting Delinquency, pp. 190-205.

[186]Charles Hanley, "The Ganging of Criminal Predispositions-The Glueck Prediction Tables", Legal and Criminal Psychology, Hans Toch, editor (New York: Holt, Rinehart and Winston, Inc., 1961), pp. 237-239.

seems to have found little success as yet. The accurary of prediction is increased 36 percent.[187]

It may be indicated from the precedent brief of the prediction tables that, in spite of the considerable amount of research and the relative progress of prediction techniques, they are still far from being complete. The results achieved when predicted behavior is compared with actual behavior are rather moderate and not consistently encouraging.

(c) Objections to Predictive Device. Certain objections or reservations have been raised to the employment of prediction tables that can briefly be described here.[188]

Prediction tables transfer experience of the past to the assessment of possible careers of future generations of offenders. They fail to take account of the reality of change in personal and social conditions which affect the administration of criminal justice in a particular community. This is one of the greatest shortcomings of prediction and strikes at the actuarial principle. Probabilities based upon past experience are a rather unsure guide for an uncertain future. The man as a spiritual and psychological value is often forgotton. Gluecks

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[187]Lloyd Ohlin, Selection for Parole (New York: Russels Sage Foundation, 1951). Mannheim and Wilkins, Prediction Methods, p. 170. Gluecks, Predicting Delinquency, pp. 171 & 181.

[188]Gluecks, Predicting Delinquency, pp. 143-150. United Nations, Practical Results, pp. 91-98. Lopez-Rey, "Some Misconceptions in Contemporary Criminology". Jean Pinatel, La Criminologie (S.P.E.S., 1960). G. Heuger, Review Penit. et de droit pénal, 1961, pp. 101-105.

and others contend that predictive devices will have to be modified from time to time to take account of changing conditions. Existing predictions, therefore, are far from being ideal. The existing prediction devices do not predict very well. No one has been completely successful in handling the dynamic character of human behavior. Statistical prediction is based on material collected with regard to the proportion of successes and failure among a certain group of probationers. The true objective, therefore, of these methods is the predicting for aggregates. Since prediction tables deal with individuals as statistical types, they cannot truly "individualize." This success is only in the aggregate, and there will always be a percentage of difficult cases in which a table is certain to fail if it is applied automatically. For this reason, prediction experts do not consider the prediction tables as absolute and recommend that they should be used as an adjunct to, rather than a substitute for, judicial or administrative experience.

It is said that prediction is based upon almost a rigid deterministic sequence of cause and effect in human affairs in violence of a "free will." But nobody, in the long history of philosophy, has been able to find an answer to the problem of freedom or determinism. Since it is impossible to measure the degree of freedom, the factor of free will cannot be used in a prediction table. Other factors which have a considerable relationship to subsequent human conduct may usefully be employed

as a prognostic instrument.[189]

A major criticism also is that the prediction techniques do not provide a selection standard. They only give information regarding the chances of success.[190]

There are some other reservations related to the efficiency of established prediction instruments. It is suggested that accuracy in prediction is necessarily dependent on the quality of the information utilized as predictors of behavior. The reliability of information from officials' files and even the subjective judgment of investigators remains an open question. Greater objectivity of facts and data is needed for prediction studies. As recent investigations have shown, the primary need of the research worker is for quality in data rather than for quantity.[191] Prediction tables are concerned only with statistical associations. Simple correlations are superficial in their analysis of factors and results.

The results achieved from any form of treatment may be partly the result of the response of the criminal. Prediction tables have not yet taken into account variation in the quality of probation supervision.

(d) Third International Congress on Criminology (1955). The above reservations were maintained when the question of the

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[189]Gluecks, Predicting Delinquency, p. 144.

[190]Sutherland & Cressey, Principles of Criminology, p. 582 et.seq.

[191]Mannheim, Group Problems, p. 7.

"Prognosis of Recidivism" was discussed at the Third International Congress on Criminology, held in London in 1955. According to the resolutions, the development of prognostic devices including predictive tables, should be adopted and should be encouraged. It was also noted that the validation of predictive methods is an indispensable aspect of any improved prognostic technique.[192] It suggested further that it might be dangerous to place a prediction table in the hands of judges, who might be tempted to rely on it too exclusively. It should instead be provided as an aid for the professional workers employed by the court to study the case.

V. Concluding Remarks

Several proposals and approaches have been made to solve the sentencing problem. They are not mutually exclusive. Many criminologists insist that the answer to the selection of probation disposition lies in further development and application of statistical prediction methods. At present the prediction methods, while sound in principle, feasible and useful, still have certain limitations and need further refinement. The application of the prediction tables to present day cases for the selection of offenders for probation cannot be expected to lead automatically to an efficient prognosis of the

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[192]Third International Congress on Criminology, Summary of Proceedings, published by the British Organizing Committee, London, 1957 (not unanimously).

probationer's future conduct. Even with the perfection of predictive devices, prognosis of recidivism does not completely solve the problem of selection of an individual offender. The prediction tables are one of the several aids in supporting for the process of the individualized justice. It has been frequently advocated that they are not intended to be substitutes for the fund of knowledge and experience.[193] They should never be used as the only tool to anticipate criminal behavior or as a substitute for the careful study of the individual case. Statistical prediction methods, however, offer clues and determine the risk incurred in a decision granting probation to a particular type of offender. They provide an answer to the question who can be put on probation, but not who ought to be.

Research and experimentation on the prognosis of criminal and delinquent behavior is in process in the United States and abroad.[194] It should be further continued, provided that the assumptions and techniques presently used are modified and improved.[195]

Of all the administrative aids available to the judge, an adequate, comprehensive, and complete presentence investigation

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[193]Alfred C. Schnur, "Predicting Parole Outcome", Focus May,1949, p. 70. Gluecks, Predicting Delinquency, p. 146.

[194]The methods used in prediction of recidivism are far less subject to reservation than the methods used for forecasting delinquent behavior.

[195]Lopez-Rey,"Some Misconceptions", p. 29. Gluecks, Predicting Delinquency, pp. 149-150.

is the best guide to intelligent sentencing at the present time.[196] For making the most effective choice between probation or imprisonment, the major remedy at the moment is to supply the judge with adequate presentence investigation and diagnostic service.

The trend is toward a "presentence clinic", perhaps even a "diagnostic clinic", for the sentencing study and individualization of treatment of each convicted offender.[197]

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[196]Judge William J. Campbell, "Developing Systematic Sentencing Procedures", Federal Probation, p. 4, Sept.,1954. N.P.P.A., Guides for Sentencing, p. 29.

[197]Barnes & Teeters, New Horizons in Criminology. Caldwell, Criminology, p. 340. Since the International Congress in Hague in 1950, the idea of the necessity of scientific examination of an offender, either for the purpose of sentencing him or for the purpose of his treatment has been affirmed in almost all the consequent international conventions .

CHAPTER IV

SELECTION CRITERIA FOR PROBATION AS A COURT DISPOSITION

I. Research on Selection and Preliminary Remarks

It has been indicated in the preceding chapter how difficult it is to find any general scientific method and principle of sentencing for probation, although they are particularly important. The selection and treatment of an offender on probation must be based on a diagnosis and prognosis that is analogous to medical treatment. However, since human behavior and social adjustment are such complex processes, the need for reliable selection methods is even greater than the need for medical diagnosis, prognosis, and remedies.

Completed research in statistical prediction methods is suggestive, feasible and useful. Prediction tables offer guidance, in the broadest sense of the term, to the judge and probation officer for the selection of probationers. In the field of parole there is a great volume of scientific studies on the parole outcome and prediction, but few on validation. In the field of probation there are only a few studies concerned with prediction of outcome during or after probation.[198]

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[198]Studies on probation: Joseph Murphy, "A Case Study to Test the Efficiency of Probation Treatment", Catholic Charities Review (Buffalo, 1921). Fred. Moran, Probation in New York State (Albany, New York, 1923). Alice Menkin,

What criteria have emerged from research that can be offered to the courts and probation offices for selection of probationers? The problem of selecting probationers is in most cases similar to that of selecting parolees. Both of these two-fold services, probation and parole, use the same methods and techniques in supervision and in the prediction of recidivism. It is assumed, therefore, that the results and conditions related to parole outcome can also be utilized in probation with some modifications.[199]

"Rehabilitation of the Moraly Handicapped", J. of Crim. Law & Crimin., 1924, pp. 147-154. Report of the Commission of Probation (Massachusetts, 1924). Fred. Johnson, Probation for Juveniles and Adults (New York, 1928). Monachesi, Prediction Factors in Probation. "Can We Predict Probation Outcome?", Federal Probation 3:15-18, Aug. 1939;"A Comparison of Predicted with Actual Results of Probation", "Prediction of Criminal Behavior". Belle Boone Beard, Juvenile Probation (New York: American Book Co., 1934). Irving Halpern, A Decade of Probation, Court of General Sessions (New York, 1937). The Probation Service, its Objects and Organization, (H. M. Stationery Office, London: 1938). The Attorney General's Survey. John Gillin and R. Hill, "Success and Failure of Adult Probation in Wisconsin", Rural Sociology, Vol 5, Sept 1940. E. W. Hughes, "An Analysis of the Records of some 750 Probationers," British Journal of Educ. Sociology, 1943. Morris G. Caldwell, "Review of a New Type of Probation Study". Jay Rumney and Jos. Murphy, Probation and Social Adjustment. William Speck, "The Federal Probationer", Fed. Probation, 16:21-23, June 1952. Ralph W. England, "A Study of Post-probation Recidivism Among 500 Fed. Offenders," Fed. Probation, 19:10-16, Sept. 1955. "What is Responsible for Satisfactory Probation and Post-probation Outcome?". Daniel Glasser, "Predicting the Adjustment of Federal Probationers, N.P.P.A. Journal , July 1958, pp. 258-267. Gluecks, Predicting Delinquency,

[199]Taft, Criminology, p. 467. Charles L. Newman, Sourcebook on Probation, Parole and Pardon (Springfield, Ill.: Ch. Thomas, 1958). Dressler, Practice and Theory, p. 114.

The prediction studies on parole and probation outcome are not reviewed here since the criteria and factors which are derived from these studies are applied to selection for probation in the following sections.

The prevailing principle for the selection of offenders for probation is the idea of individual prevention. The probation disposition must serve, within the framework of the law, the goals of protection of society and the rehabilitation of the offender. The determination of selection for probation should be based: (a) on the offender's prospect of remaining law abiding under probation supervision and guidance and (b) on the prospects for his rehabilitation through treatment in the free community.[200]

Therefore, probation should be extended to those with the most promising prospects for readjustment and to the least dangerous offenders who are willing to accept probation conditions as an alternative to institutionalization. Probation is not merely for those who would do well only while they are on probationary oversight.[201] Selection criteria do not apply to abstract legal categories. They only make sense in respect to concrete individuals and circumscribed forms of treatment.

Probation, as a method of individualized treatment, is not for every offender, or for a defined group of offenders

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[200]National Probation and Parole Association, Standard Probation, p. 21; and Guides for Sentencing, p. 49.

[201] Dressler, Practice, p. 103. Gluecks, Predicting Delinquency, p. 147. United Nations, Selection, p. 9.

or types of offenses in general. There can be no fixed legal formula for appropriate selection. Each case involves study upon an individual basis and should be disposed according to its own merit. Different individual offenders are in need of different treatment. The idea is erroneous that probation is a method of treatment applicable only or mainly to young, or first offenders. Probation is not a mere substitute for short-term sentences. All short-term sentences are undesirable and an extended use of probation as an alternative deserves special attention.[202]

In spite of the recent emphasis on treatment research, a solution has not yet been found to the problem of "differential response" of offenders to various forms of penocorrectional treatment.[203] Therefore, more and better research is needed in probation selection and treatment.

The selection criteria are related to four basic factors: the offender, the offense, the community, and the judge. These factors play a significant role in any sentence granting probation.

The make-up of the offender and the offense are the central factors from which the judge must evolve the granting or denial of probation. The presentence investigation and the other

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[202]United Nations, Department of Economic and Social Affairs, Second United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Report Prepared by the Secretariat (New York, 1960) p. 63.

[203]United Nations, Selection, p. 63.

devices are the judge's selective tools in determining who will be sentenced to probation. From the four basic factors it is possible to enumerate specific factors (criteria) which are associated with probation outcome.

There can be no simple definitive guide to the determination of the selection of a particular offender for probation. Individuals present a wide variety of combinations of personal, psychological, and social traits. No single factor along may be important in determining probation behavior. Outcome of probation may depend upon the accumulative effect of all pre-probation factors.[204]

II. The Offense

The nature and the circumstances of the offense committed may be a clue to the whole personality of the individual. This serves as one important means to make the picture of the offender's personality. In relation to this factor the specific statute provision and penalty prescribed for the committed offense must be considered along with : (1) the aggravating or mitigating circumstances of the offense, and the actual harm or damage caused or threatened by it; (2) absence of premeditation or deliberation; (3) whether the offender was a leader or follower;[205] (4) intoxication; (5) no resistance to arrest;

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[204]Monachesi, Prediction Factors, p. 110.

[205]Monachesi, Prediction Factors, p. 46:"Individuals who planned their particular offenses in advance were relatively poor probation risks." The so-called "lone wolf" is more apt to violate probation than the individual who has accomplices.

(6) cooperation with authorities in identification of confederates or in recovering proceeds of crime; (7) apparent and sincere repentance; (8) whether the offense was an isolated act and not a series establishing behavior pattern; (9) whether or not there was provocation, real or imagined, or consent; (10) the harm that the offense is likely to cause the victim or the public or the general security; (11) whether or not the offense involves danger of human life; (12) whether or not the offense was against the person and involved the use of weapons and violence; (13) the extent of victims' injuries; (14) whether or not the offense was against property, whether or not there was a violation of trust or professional ethics; (15) the amount of loss or damage of property and the extent to which restitution can be or has been made.

The nature of the offense committed seems to be of little importance.[206] No fairly consistent connection could be established between the nature of the offense and outcome of probation. In the light of the finding, there is no valid evidence for holding the belief that the perpetrator of one type of offense is eo ipso not amenable to probationary treatment or a poorer risk than one who committed another kind of crime. There is, however, indication that property offenders

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[206]Attorney General's Survey, pp. 398, 409 & 468. Other studies found the nature of the offense committed as significant factor: Rumney and Murphy, Probation & Social Adjustment, p. 234; Speck, "The Federal Probationer", pp. 21-23; Sanders, Testing Parole Prediction,. Proceeding of the Sixty-fifth Annual Congress of American Prison Association, 1935, pp. 222-233. The nature or type of offense is a main factor in the prediction tables of Burgess, Tibbitts,and Vold.

are markedly less successful that those whose crimes were against persons.[207] The forger is a poor risk. Individuals convicted of drunkenness and non-support violate probation less frequently than those individuals with a previous criminal record and those convicted of felonies such as forgers and auto thieves.[208]

Knowledge of the offense is only one consideration. By itself the offense criteria are insufficient as a basis for granting or denying probation.

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[207]Probationers in the burglary and larceny groups had worse behavior records during probation than other offenders (Attorney General's Survey, p. 398). Property offenders such as burglars, pick-pockets, shoplifters, and forgers are markedly less successful on parole than those whose crimes were against persone, for example, murderers and sex offenders. Robbers, whose crime is against person but for the purpose of obtaining property, are about average parole risks. Experience also indicates that those who commit frauds have poorer parole records that those committing robbery, burglary, and larceny. N.P.P.A., Parole in Principles and Practice, pp. 103-104). Among serious crimes homicide alone has a lower rate of recidivism.

[208]Gillin and Hill,"Success and Failure", p. 811. United Nations (Grünhut), Practical Results, p. 84 suggests a scheme of offenses for probation and further case studies. In Federal courts offenses showing higher than average use of probation are: Liquor tax laws, Fraud and other Theft, and Juvenile Delinquency Act (Speck, "The Federal Probationer", p. 21); The Judicial Criminal Statistics, 1945, indicate the use of probation in Automobile Theft 43.7%, Receiving Property 43.6%, Embezzlement and Fraud 41.9%, Larceny 39.7%, Forgery and Counterfeiting 35.7% (Cavan, Criminology, p. 531). In England (1951) placed on probation were Burglary, House and Shopbreaking 28.5%, Larceny and Embezzlement 24.8%, and Frauds 22.65% (Grünhut in United Nations, Selection, p. 42).

III. The Offender

The most important guide to wise sentencing on probation is the character and personality of the offender. Along with other facts the presentence investigation should present the offender's entire personality in relation to his social environment. A picture of his total outlook and personality traits is the basis for the decision. The offender's ability to adjust to community life and his attitude towards probation and its conditions are decisive criteria for selection. General patterns and standards of behavior are more significant than single incidents. Does the offender's conduct justify real hope that he will never be a menace to society? Is he amenable to reformation?

Accidental or occasional offenders who would not have been expected to commit crimes in the first place have the best chances. Distinction should be made between this type of offender and the professional or habitual or chronic criminals.[209] Prediction tables show occasional offenders to be better risks. Manny attempts have been made to classify the criminals since the positive school of criminology. Since human behavior and causation is so complex and since human knowledge is not yet complete this problem of classification remains unsolved at

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[209] In view of the classification of the International Unit of Penal Law: Occasional and Habitual Criminals (incorrigible or amenable to punitive measures). Stephan Hurwitz, Criminology (Copenhagen, Denmark: G.E.C., 1952), p. 405.

this time. Every one of the currently used classifications have value for their own purpose; none of them is adequate or based upon stable criteria. While some are extremely important in practice this classification problem burdens the sociologists, psychiatrists, psychologists, and penocorrectional administrators in their research.[210]

Race, Nativity, Sex. Race and nativity bear no universally significant relationships to outcome on probation.[211] These criteria can scarcely be validly considered per se. However, there is indication that the adults of foreign born parents are poor probation risks, and children of foreign born parents are much better probation risks than those of native born parents.[212] The native born may constitute more serious risks than the foreign born. The foreign born are less given to crime. In any event there is no evidence to support the thesis that the foreign born or Negroes are less deserving of probation than the native born.[213]

Criminal statistics the whole world over show a smaller amount of criminality among women than men, varied at between one-fifth and one-tenth. It has suggested that this difference

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[210]Sutherland & Cressey, Principles of Criminology, pp. 16-18. Cavan, Criminology, pp. 21-29. Barnes & Teeters, New Horizons in Criminology, pp. 52 et seq. Caldwell, Criminology, pp. 30-33. Pauline V. Young, Social Treatment in Probation and Delinquency (New York: McGraw-Hill Book Co., Inc., 1952).

[211]Attorney General's Survey, p. 338 & 408. N.P.P.A., Guides for Sentencing, p. 37.

[212]Monachesi, Prediction Factors, p. 30-50.

[213]Dressler, Practice, p. 121.

is more apparent than real. Women are less likely to be charged and are more likely to be acquitted or placed on probation by the courts than men.[214] Women, white and Negro, made better records on probation than men. Adult females are better probations risks than juvenile females. Monachesi found that female juveniles are extremely poor probation risks.[215]

Age. The criterion of age has often been found to be of great significance in various follow-studies. The outcome of youthful offenders on probation is uniformly worse than the outcome of more mature individuals. The younger the offender is the less his chances are for success on probation. Success rates both during and after probation increase with higher age groups, Both American and foreign research on probation successes reveal that older offenders, although they are given probation much less often, have considerably better performance on probation.[216] Probationers who have passed the age of 35 are less inclined to probation violation that are younger offenders. Probationers under 25 years of age violate more frequently than individuals over 35.[217] Those under 20

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[214]Grünhut, Penal Reform, pp. 411-412. English experience suggests that conditions are more favorable for women probationers. In Sweden four out of five women sentenced to simple imprisonment received suspended sentences.

[215]Monachesi, Prediction Factors, pp 30 and 50.

[216]Monachesi, Prediction Factors, pp. 30, 51, 52. Attorney General's Survey, p. 408. Gillin and Hill, "Success and Failure" p. 829; Studies in England and the Netherlands, United Nations, Practical Results, p.83.

[217]Attorney General's Survey, pp. 367, 377 and 403. Monachesi, Prediction Factors, pp. 30 and 52.

have even more violations. Probationers 48 years of age or older are better risks than any other group.

Probation is in practice considered particularly applicable to the young offender. Indeed, youthfulness, taken in consideration along with other factors, may offer better chances for rehabilitation before bad habits become deep-seated. Youthfulness, however, when associated with destructive factors may lead to recidivism more often that does maturity.

More significant than age itself, of course, is the date when the criminal career first began. Most studies and informal experience of judges and correctional authorities recognize that the individual, whose first involvement in crime came late in life as a mature adult, is more likely to succeed on probation than one who began at an early age and has continued in criminal behavior ever since then.[218]

Marital Status. Marital status appears to be a fairly consistent criterion related to probation outcome. Generally married life exerts a stabilizing influence and the presence of dependents usually seems to contribute to a more responsible and law-abiding conduct. Therefore, married individuals and those with dependents are more successful than those who are unmarried or without dependents. Most studies have established

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[218]Gluecks, Predicting Delinquency, pp. 12,82 & 83. Dressler, Probation, p. 68 and Practice, p. 120. N.P.P.A., Guides for Sentencing, p. 38.

the fact that married persons on probation are better risks than the single, separated, divorced, or widowed.[219]

Previous Record. Absence of previous criminal record, especially of previous incarceration, is a highly significant criterion.

Recidivists, defined to include those individuals who had served at least one period of imprisonment in any institut ion, are less responsibe to probation. Probationers who had not previously been incarcerated had a uniformly better outcome on probation than offenders who had already served one or more terms in a penal or correctional institution.[220]

All studies show that a first offender generally is a better probation risk than those with a record of conviction or commitment to an institution. Monachesi's study showed first offenders to be the best probation risks. All probationers with pre-probation criminal records had higher rate of failure than the average. Those with major criminal records had still higher rate of violations than those with minor records.[221] Careful examination might point out that officially the first offender had prior unknown delinquency or cimre. The criterion

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[219]Attorney General's Survey, pp 387 & 408. Monachesi, Prediction Factors, p. 60. Caldwell, "Review of a New Type of Probation", p. 11. Studies in the Netherlands, United Nations Practical Results, p. 85. Hurwitz, Criminology, p. 437.

[220]Attorney General's Survey, pp. 392 and 467.

[221]Monachesi, Prediction Factors, p. 61. Saginaw (Michigan) Project 1954-1960.

of officially unknown previous delinquency or crime frequently has predictive value in probation selection.

A defendant with one or more prior offenses might still be a safe risk on probation especially if they were minor offenses or offenses against property that involved no violence. On the other hand, an individual without a previous record or with just one prior offense could be a bad choice for probation if the total picture of his conduct is of an impulsive, aggressive and violent pattern.

In many instances offenders granted probation with previous criminal records were rehabilitated and became good citizens.[222]

The Attorney General's Survey states:[223]

> "Even under present methods of selection and supervision many recidivists have good behavior records while on probation."

Recidivists, therefore, should be eligible for probation under certain circumstances. It is a sad but inescapable fact that the professional and the specialist type of offender can rarely be expected to respond to probation. Bad records do not always indicate bad character.[224] The intelligent employment of probation is never indiscriminate. Special care in the selection

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[222]Rumney and Murphy, Probation & Social Adjustment, pp. 179-182.

[223]Attorney General's Survey, p. 123.

[224]Walter Raeburn, "Probation Was Made for Man", Federal Probation, 21:25, March, 1957.

of the suitable offender is always required. The court should watch the pattern of the offender's conduct and offenses to see whether they show a deliberate system or seem to be unconnected and occasional. Recidivists need constructive and special supervision and guidance if they are to be placed on probation. Sweden was somewhat successful with selected ex-prisoners placed on probation.[225]

Special attention is called to the fact that individuals who have been placed on probation previously are generally poor probations risks. Adults and juveniles with a previous probation record had a comparatively high violation rate.[226] Recidivists seem unable to respond when again placed on probation. This does not mean, of course, that a previous failure on probation necessarily renders an offender ineligible and unsuitable for probation.

Physical, Emotional, and Mental Conditions. The offender's emotional and mental conditions are perhaps of greater importance than physical defects. There is an intimate relationship between physical and emotional health. A psychiatric interview or psychological test should be a part of every presentence investigation. A physical examination should at least be required for selected offenders. A sound disposition on probation must be based on a careful study of the offender's

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[225]United Nations, Practical Results, p. 85 and Probation, p. 151.

[226]Monachesi, Predition Factors, pp. 45 and 60.

situation, problems and needs. Is he emotionally and mentally capable of adjusting in the community under supervision? With the help of a complete and thorough presentence investigation, the judge is better able to find an answer to this critical question.

There is conflicting evidence about the correlation of intelligence with the success of probation and parole. Most studies agree that intelligence, as reflected in test scores, has little or no predictive value. The very bright and the very dull appear about equally successful on probation and parole.[227]

Intelligence is measured more frequently than other criteria. More revealing research is needed since it may be an important criterion.

Family Background and Relationships. The family's criminological importance as a great instrument of social control is generally acknowledged. It provides the individual with his psychological and sociological environment during his formative years and exercises tremendous influence throughout his life. Research affirms the fact that homes broken by divorce, desertion, and death produce individuals who are poor

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[227]Dressler, Practice, p. 122. Tibbitts concludes that those of inferior or very inferior intelligence were the worst parole risks. Those of superior intelligence were less likely to violate parole. "Success or Failure on Parole Can be Predicted", Journal of Crim. Law and Crimin., Vol XXII, No. 1, May, 1931, pp. 11-50.

probation risks.[228] Criminologists have emphasized the relation that exists between "broken homes" and high rates of delinquency. Children who come from abnormal homes or who had difficulties at home are usually probation violators. Individuals from families with records of crime and vice are, in general, poor probation risks.

The offender whose parents, brothers, and sisters have respected society's demands of law and order, whose family life demonstrates mutual love and consideration, whose par ents have given him reasonable and consistent discipline, and whose family members are eager to help him, has been found a better probation risk than one who does not have these advantages. Undesirable and unstable homes are related to high violation rates. Delinquents from families with unfavorable moral ideals are more recidivistic than delinquents from families with favorable moral ideals.[229]

Also among the influences associated with juvenile delinquency are unsatisfactory discipline, disharmony in the family and the fact of having previously been treated as a delinquent. Research studies and experience in Denmark and

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[228]Monachesi, Prediction Factors, p. 36. In general, individuals who came from broken homes were found to be poor parole risks. George Vold, Prediction Methods & Parole, p 40. Albert Reiss, "Delinquency as a Failure of Personal and Social Controls", American Sociological Review, Vol 16, pp. 196-207, 1951.

[229]Sheldon Glueck and Eleanor Glueck, Prediction Table derived from Unraveling Juvenile Delinquency (New York: The Commonwealth Fund, 1950), pp. 260-262. N.P.P.A., Guides for Sentencing, pp. 38 and 39. Reiss,"Delinquency as a Failure", p. 199.

Sweden confirm this statement.[230]

Adult probationers with five or more children are the most likely to succeed on probation. Monachesi found that adult probationers with both parents dead were ever more successful than probationers with both parents living together. However, juvenile probationers with both parents living together made a much better record on probation than did juvenile probationers with both parents dead.[231]

The higher the rank of the individual birth order within the family, the poorer he is as probation material. The so-called "only child" as an adult is not as poor a probation risk as he is as a juvenile.[232] No definite conclusion can be made in regard to the relation of the outcome of probation and the occupation of fathers for the adults. It appears that the lower one goes in the occupational scale, the higher the violation rate goes. Juveniles whose fathers were farmers were found to have a low violation rate.[233] Finally studies suggest that the higher the socio-economic status of the probationer's family, the better his chances are to succeed. The child of the economically dependent family constitutes a significantly poorer probation risk than the child of a family with earned

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[230]United Nations, Practical Results, p. 85. Hurwitz, Criminology, p. 327 et seq.

[231]Monachesi, Prediction Factors, pp. 53 and 31-32. The findings of Vold and Monachesi are at variance on the question as to which parent contributes more to probation or parole adjustment. The Monachesi study showed that both juvenile and adult probationers were better risks when the father, rather than the mother was living.

[232]Monachesi, Prediction Factors, pp. 37 & 52.

[233]Monachesi, Prediction Factors, p. 52

income.[234]

Home circumstances for juvenile offenders are of primary importance. Unfavorable home surroundings reduce considerably the chances for probation success especially if the offender is left in his previous home environment. The personal family history together with the offender's interests and attitudes contribute to the total make up. It reveals the environment in which the offender has been reared and aids in the evaluation of his possible success on probation. The offender's social rehabilitation is closely connected with his family relationship and home circumstances.

Socioeconomic Status. Social adjustment may be measured in several areas such as education, church, social group activities, employment,and military service.

The evidence about education as a predictive criterion is not consistent. Monachesi's study suggested that the best probation risks were those with no education, those who had completed no more than the first to the fourth grade, and those who had finished college. The Gluecks found that those who did well on probation had had more schooling than those who did not.[235] The level of educational attainment and

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[234]Reiss,"Delinquency as a Failure", p. 198.

[235]Monachesi, Prediction Factors, pp. 40 and 55. Gluecks, Criminal Careers, pp. 89 et seq. Also they found that there was no difference between the poorly and the better educated persons on parole outcome.

success on probation could be indirectly related. A successful educational record may be a significant criterion of adjustment if it is recent and reflects positive traits. The educational background in connection with the mental capacity serve to determine the proper conditions for probation.

There is an indication that both adult and juveniles who do not attend church are poor probation risks. Participation in community activity is a criterion of adjustment. Also, previous adjustment to military laws and regulations is a significant index of social adjustment. The training and discipline which the offender has received in service should give him more respect for a law-abiding and a useful citizen's life in society. A high rate of probation violations are found among probationers who had immoral associates.[236]

Employment habits prior to conviction have been found significantly associated with outcome on probation. A previous record of irregular work has undavorable significance.

Steadiness of employment during the probation period is the most important criterion in its bearing on probation outcome.[237] Suitable and regular employment during and after the probation period is one of the major factors in the offender's rehabilitation and in the regaining of his lost

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[236] Sutherland & Cressey, Principles of Criminology, p. 427. N.P.P.A., Guides for Sentencing, p. 39.

[237] Attorney General's Survey, pp. 400, 406 and 407.

position in society. A favorable employment record indicates the offender's economic stability and demonstrates whether or not he has the earning capacity to support himself and his family on probation. The importance of the steadiness of employment in adult probation is emphasized by the fact, revealed by Danish experience, that the influence of other factors, which are usually associated with juvenile delinquency, recedes among probationers of higher age groups.[238]

Studies indicate that those individuals who were constantly moving from place to place have an unusually high violation rate.[239] Those who have residence prior to probation in economically deteriorated areas have high violation rates.

Synopsis of Findings Regarding Offenders in General.

Monachesi in his study concluded that: Those who come from favorable social backgrounds and have had no previous criminal record are the most successful on probation. Where factors of previous criminality, low economic status, poor work record, low occupational level, bad neighborhood, bad family history, continual mobility, and irregular contact with school and church apply, the violation rates are high.

The Attorney General's Survey seems to point to the general conclusion that steadiness of employment and social relations along with the absence of a history of previous

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[238]United Nations, Practical Results, p. 85.

[239]Monachesi, Prediction Factors, p. 40.

incarceration tend to be conducive to a favorable outcome of probation.

Sutherland summari zing the results of three first intensive studies states that:

> ".....the highest rates of violations or probation are found among the probationers who had previous criminal records, previous records of irregular work,low economic status, low occupational level, previous institutional placement, residence in deteriorated or commerical areas, families with records of crime or vice, immoral associates, great mobility in residence and a few or irregular contacts with school or churches."[240]

J. Gillin found that the following factors are of some importance in determining success or failure of probationers:[241] age at conviction, marital status, socioeconomic factors of employment and occupation, previous criminal record, treatment by the court, and occupational and residential mobility while on probation.

According to the M. Caldwell study, factors contributing most to adjustment after probation were:[242] high occupational skill, full time employment with adequate income, home ownership, marriage, and children. Probation could be a stimulus for a man who has a family, a home of his own, and a good job to make an adjustment. Possibly these socioeconomic factors are the most important in human life.

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[240]Sutherland & Cressey,Principles of Criminology, pp. 427-428. Taft, Criminology, p. 467. Elliott, Crime in Modern Society, p. 561. United Nations, Probation, p. 239.

[241]Gillin and Hill, "Success and Failure", p. 811.

[242]Caldwell,"Review of a New Type of Probation Study", p. 11.

In the J. Rumney and J. Murphy study, it is suggested that a large majority of those who were not adjusted "to a number of basic areas of social life" came from broken, unhappy homes and were economically and socially underprivileged. The particular offense was not found to be a major factor in determining outcome, but the criminal record before probation was found to have an important bearing on it.[243]

W. Speck's study of federal probationers shows that by and large the character of the offense is the most important factor influencing the number of convicted persons placed on probation and the relative distribution according to sex, race, and age of the probationer. Second in importance appears to be the character of the population from which the offenders are drawn, and third is the urban character of the district. The use of probation for violators of the liquor laws is extensive.[244]

England's study of probation recidivism found that characteristics significantly associated with recidivism appeared to be: previous criminal records, youthfulness, unstable personality, and lower level urban socioeconomic backgrounds. White-collar offenders had the lowest failure rate.[245]

In the light of the foregoing studies it seems that

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[243]Rumney and Murphy, Probation and Social Adjustment, p. 185.

[244]Speck, "The Federal Probationer", p. 23.

[245]England, "What is Responsible for Satisfactory Probation", p. 16.

a combination of personal, social, occupational, and economic criteria in connection with the absence of a previous criminal record, constitutes the successful probationer.

Special Types of Offenders. Sometimes the sentencing court is confronted with special types of offenders: the alcoholic, the narcotic addict, the mentally deficient, the psychopath, and the sex offender. The judge should know from a thorough presentence investigation whether he is dealing with a relatively stable individual or with a type of offender who presents special problems and needs special kinds of treatment or institutionalization. It is argued frequently that alcoholics, drug addicts, psychopaths, sex offenders, and offenders with long criminal records are among those who may be poor risks on probation.[246] Probation at present can do little for persons with mental or other special problems which imply changing basic personality traits and attitudes of the probationer.[247] It is necessary, therefore, to present some observations upon these well known special offenders.

An alcoholic may be defined as an individual unusually sensitive to alcohol, in whom alcohol produces character and personality changes. The alcoholic should not be confused with the immoderate social drinker or neurotic drinker.[248]

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[246]John Reinemann, "Principles and Practices on Probation", Federal Probation, 14:26-31, Oct-Dec 1950. Attorney General's Survey, p. 122. Cooley, Probation, p. 32, wrote: courts should not place on probation drug addicts, confirmed inebriates, habitual offenders or the feeble-minded with fixed anti-social habits.

[247]Rumney & Murphy, Probation & Social Adjustment, p. 245.

[248]Rumney & Murphy, Probation & Social Adjustment,, p. 256. Manly B. Root, "What the Probation Officer Can Do for Special

Originally probation was principally concerned with the reclamation of offenders charged with drunkeness or offenses resulting from the abuse of liquor. Today the alcoholic, presents one of the most distressing problems for law enforcement and probation. Probation may be an appropriate disposition when the alcoholic is not a menace to his home and community and shows promise of adjustment through care and treatment in the community.

Alcoholism may be an emotional sickness which requires medical diagnosis and proper treatment. Offenders addicted to alcohol need a different type of probationary supervision. They should be handled by specialist probation officers who cooperate with groups interested in the problems of alcoholism. Treatment through specialized institutions in the community may be required.

The narcotic addict presents a different problem than the peddler or the incidental user of narcotics. Addiction has a terrible result on the human personality. The drug addict is a sick person. So far as is possible, he should be

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Types of Offenders," Federal Probation, 13:36-46, December,1949. N.P.P.A., Guides for Sentencing, pp. 57-58. Harvey Treger, "How You Can Help the Alcoholic Offender", Federal Probation, 22:24-30, March,1958.

treated as one in need of medical and psychological help.[249] The drug addict must be excluded from probation if he has a background of criminality or if the addiction resulted in serious antisocial habits and criminal conduct. Ordinarily the addict is in need of hospitalization or institutionalization under medical supervision. On probation he has peculiar difficulties.

The mentally deficient offender, i.e., a person with seriously subnormal intelligence, is primarily a subject for medical, not judicial, diagnosis and treatment in a specialized institution or hospital. If he is an accidental or first offender who would not be a menace to the community he should be considered for probation treatment. Although probation for the mentally deficient person involves serious difficulties many can and do adjust well in the community.[250]

The "psychopathic" personality presents a great medico-legal dilemma. Legal procedure at present regards them as sane and responsible. In general they need institutionalization and commitment to a special hospital for an indefinite period. Many of them, however, can be helped better through probation treatment. Psychiatric care, of course, is extremely important.

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[249]J. D. Richard, "The Role of the Probation Officer in the Treatment of Drug Addication," Federal Probation, 6:15-20, Oct-Dec 1942. Root, "What the Probation Officer Can Do", pp. 39-40. N.P.P.A., Guides for Sentencing, p. 60. Bennett, Of Prisons, p. 2.

[250]N.P.P.A., Guides for Sentencing, pp. 61-62. Elliott, Crime in Modern Society, p. 572.

Suitable treatment may enable some of these offenders to take their places in society.[251]

The sex offender, i.e., person with wrong or abnormal sexual expression, is believed to be incorrigible and dangerous. Careful studies, however, show that sex offenders have one of the lowest rates as "repeaters" of all types of crime. Only seven percent of those convicted of serious crimes are arrested again for a sex crime. Those who recidivate are characteristically minor offenders--such as peepers, exhibitionists, homosexuals--rather than criminals of a serious proportion. This minority, which is composed of compulsive sex deviates or aggressive sexual psychopaths, is highly recidivistic.[252] Probation may be a sound disposition if it is based on a careful and thorough study of the individual's problems, treatment needs, and available facilities.

IV. Community

The community's sense of justice and the degree to which it possesses a sound and enlightened attitude toward the offense and the offender are factors the judges must weigh in granting or denying probation. They should consider

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[251] Ralph S. Banay, "Therapeutic Experience with Adult Offenders", National Probation Association Yearbook, pp. 234-244, 1944, 1945. Elliott, Crime in Modern Society, p. 571. Root, "What the Probation Officer Can Do", pp. 40-41. Psychopatic personalities are the crux of any treatment and the unwelcome trouble-makers in prison, United Nations (Grünhut), Selection, p. 66.

[252] New Jersey State Commission on the Habitual Sexual Offender, Root, "What the Probation Officer Can Do", pp. 41-43. Dressler, Practice, p. 121. Edwin H. Sutherland, "The Sexual Psychopath Laws", J. of Crim Law and Crimin. 40:543, Feb 1950.

treatment in the community program. "Probation is designed for men who do not need the treatment resources of a correctional institution."[273]

The proper disposition for probation as a selective method of individualized treatment can be analyzed in respect to three characteristics: (a) Is the defendent safe to be loose in the community? (b) Does probation help him more than institutionalization toward rehabilitation? and (c) Is the community ready to receive him?

The Advisory Council of Judges has suggested that the juvenile courts should follow five mandates basic to the disposition of delinquency cases:

1. "Individualize the child."
2. "Have an awareness of how the child views himself."
3. "Weigh the past in terms of the future."
4. "Do not tie your hands with cliches like, 'Probation is for first offenders only,' or 'only one chance on probation'."
5. "Determine the type and quality of treatment services available and select what is needed."[274]

All five mandates are actually principles of individualization that constitute a prelude to the selection of the proper disposition. These mandates have a certain value for

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[273]Schnur, "Current Practices in Correction: A Critique", p. 304.

[274]These five mandates are titles of sections in: Advisory Council of Judges of the National Probation and Parole Association, in cooperation with the National Council of Juvenile Court Judges, Guides for Juvenile Court Judges, (New York: N.P.P.A., 1957), pp. 70-82.

adults as well. Individualization in sentencing is to differentiate the specific defendant in terms of his personality, his character, his social background, the entire make-up, the nature, and the motivation of his offense, and his particular potentialities for rehabilitation.

The complete presentence investigation gives the picture of the defendant, his behavior and his needs along with the society's resources. This is the best guide for the judge. He must carefully weigh in the balance the future course of life of the particular offender and the protection of society. In light of the facts, there are many questions that the judge must ask himself:

1. Is the probation disposition based upon the law and facts about the offender, and is it free of prejudice?

2. Among the questions relating to the individual that he must consider are these: (a) Is probation the better possible disposition of leading the offender back to a law-abiding and socially acceptable life? (b) Does the defendant have the potential to adjust and become a better individual? (c) Does this offender need assistance and supervision in adjusting to the community? Will the available resources and supervision be adequate for him? (d) Is he emotionally and mentally capable of profiting from probation treatment? Does the disposition constitute a realistic and hopeful treatment program with an imposed constructive, formal or pecuniary condition?[275]

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[275] The appropriate conditions should be reasonable flexible and adjusted to each case. Usually the offender is placed on probation for a specific period of time within limits set by the laws. Experienced officials believe that the period of

(e) Is probation a constructive substitute of institutionalization in view of the available correctional institutions and their value of inside-the-wall treatment for the particular individual? (f) Is the offender "socially dangerous"? and (g) Will probation prevent the offender from committing other offenses?

3. Among the questions relating to society that he must consider are these: (a) Will the society benefit if the defendant is placed on probation? (b) Does the sentence protect the public from property loss and personal injury? (c) Does the defendant's attitude toward probation and society justify the probation instead of imprisonment? (d) Is he safe in the community, and does he have a suitable home environment and sufficient economic security, during the period of trial in his treatment freedom?[276]

A proper balancing of each individual case, within the goals of societal's protection and rehabilitation of the offender, necessitates a diagnosis and study. A variety of constellations of personal and social criteria should be considered in making the ultimate decision to place a particular offender on probation. It is in this matter that the analysis in the preceding sections has been addressed.

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probation should be from eighteen months to two years in length. The Juvenile Court Standards recommends a period from six months to one year for juvenile delinquents. Caldwell, Criminology, p. 451.

[276]Dressler, Probation, p. 40. Dressler, Practice, p. 105. N.P.P.A., Guides for Sentencing, p. 53.

Disposition on probation is determined also by a variety of other factors as already pointed out: (a) the place and value of probation within the system of penal and corrective system; (b) statutory limitation; (c) the attitudes of judges; (d) the seriousness of criminality and the prevailing climate of opinion toward the nature of the offense and the type of offender in the particular jurisdiction; (e) the quality of case work methods, the adequacy of probation service and community's resources; (f) the quality and the variety of institutional facilities. All these factors play an important role in sentencing on probation concerning the individual and the community.

It is concluded that selection for probation asthe court's disposition should be based upon a multiplicity of factors. All the factors must be weighed together. However, the criteria of protection of society and the likelihood of the offender to respond positively are of primary consideration. Here it is emphasized that selecting the probation disposition demands from the judge the very best that he has in knowledge, experience, and insight both as a legal scholar and as a human being.

He has to be both judge and prophet in his prognosis of the offender's rehabilitation. Selection on probation implies prediction of future human conduct which is uncertain to a degree.[277] Probation should never be just an act of

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[277]Probation and all reform devices--juvenile court, indeterminate sentence, classification, parole, and correctional authority systems--depend largely, for their efficiency, on the reasonable predictability of human behavior under certain circumstances, supra Chapter III, pp. 89 et seq.

mercy. If it turns out to be a merciful act in some cases, that should be purely incidental. Mercy must never be the determining factor in a particular decision. "The judge, in balancing probation versus imprisonment as means of readjustment for the individual defendant before him, must use his head rather than his heart, and the harder that head is the better for society and the offender too."[278]

Juvenile Court. Probation in a juvenile court is similar to adult probation except that less formal and non-criminal procedures are involved.[279] The juvenile court is a court of individualized or socialized justice. It operates on the philosophy and in the spirit of helping, correcting, curing, and healing. The judge, the center of any juvenile court, must have a flexible mentality and a working knowledge of social case work, child psychology, the elements of psychiatry, and the other sciences of human behavior. The basic goals of the juvenile court disposition and treatment are the protection of the community, the rehabilitation of the delinquent child, and the protection of the neglected or dependent child.[280] Their purpose is therapeutic and preventive rather than punitive. The court is interested

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[278]Ulman, "The Trial Judge's Dilemma", p. 111.

[279]Taft, Criminology, p. 447

[280]N.P.P.A., Guides for Juvenile Court Judges, pp. 69 and 125.

in the protection and welfare of the child. His offense is regarded as a symptom of a more basic problem. The adoption of a flexible plan of treatment for each individual offender is one of its essential principles. As a method of treatment, probation is one of the indispensable instruments of the juvenile court. Therefore, it is not surprising, that the rapid spread of the juvenile court throughout the country and the world has constituted a tremendous force in the further development of probation.

In juvenile cases, there usually are no legal limitations on eligibility for probation. Probation is the most frequent disposition that the juvenile court uses under varied general and special conditions.[281] The wide alternative of disposition and treatment available to juvenile court impose a tremendous responsibility. The selection of the proper disposition on the basis of a thorough pre-hearing report presupposes chiefly: the exploration of the real causative factors of each case and the proper use of the available community resources and treatment facilities. In the selection of the probation disposition the above mentioned five basic mandates must be utilized. These mandates are, of course, actually encompassed in the first: individualize the child. The choice of probation treatment must be based on the personality in relation to the social environment. Home background seems to be of

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[281]N.P.P.A., Guides for Juvenile Court Judges, p. 89.

primary importance.[282]

Military Court. Studies have indicated that military justice in the United States handles one-ninth of the nation's potential crime and is the largest single system of criminal justice.[283] Under the present conditions of the cold war in all countries of NATO military courts dealing with youthful offenders must be regarded as a vital means not only for maintaining of military discipline but also for controlling crime and delinquency in the society.

The American Uniform Code of Military Justice (1951) has no provision for probation. The suspension of sentence is actually very similar to probation or parole in civil life.[284] In England the Criminal Justice Act 1948 does not include among the courts granting probation the court-martial.[285] There is provision for the conditional suspension of the sentence by military courts in Greece, Belgium, and France.[286]

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[282]International Union of Child Welfare (Rome, 1952). United Nations, (Grunhut), Selection, p. 12; supra 107-123.

[283]Delmar Karlen and Louis Pepper, "The Scope of Military Justice", J. of Crim Law, Crimin. and P. Sci., 43:285-298, 1952. A total of 187, 171 cases are tried before court-martials during the year 1957.

[284]J. Holland and W. Luski, "Special Supervision for Military Offenders", J. of Crim Law, Crimin. and P. Sci., 49:444, 1959. Uniform Code of Military Justice, art. 71-74.

[285]The Criminal Justice Act, 1948, s. 80.

[286]Greek Military Code (1941, art. 2). French Military Codes (Army and Air Force), art. 150, amen. Dec. 23, 1958, Navy, art. 265, amen. Dec. 23, 1958).

Probation provisions are advisable, at least in those countries where the military courts have exclusive jurisdiction over all military persons. It is desirable for persons convicted by court-martial for offenses under civil law.

Selecting Misdemeanants for Probation. "At the adult level, there has been a sad neglect of the important field of probation for the misdemeanant. Obstacles here have been public ignorance and apathy."[287] The great majority of crimes committed are misdemeanors. A felony is no more dangerous than the misdemeanant; the opposite is sometimes true. Quite often they are at the beginning of criminal careers. The sentencing judge, in most misdemeanant cases, has the same power of probation disposition as in felony courts. However, the heavy case load, and the lack of sufficient probation personnel precludes the general use of probation in misdemeanant courts.[288]

In determining whether or not a misdemeanant should be referred for presentence investigation the following factors must be considered: (a) seriousness and frequency of previous criminal acts; (b) employment record; (c) family association; (d) mental capacity, and (e) attitude.

It is obvious that probation for the misdemeanant is an area that requires further development. Full use should be

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[287]Taft, Criminology, p. 460

[288]Thomas Herlihy, "Sentencing for Misdemeanant", N.P.P.A. Journal, 2:361-369, October, 1956.

made of presentence investigation in all cases of maladjusted individuals before these courts.

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