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James Benton Parsons

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## THE PERSONAL FACTOR IN SENTENCING

JAMES BENTON PARSONS

IN LAW the professional determination is at once both adversary and judicial: adversary because it is made from the perspective of an intrustment; judicial because it weighs with an eye toward the ultimate good of all. For the defense attorney the determination is difficult because it must be made early in the lawyer-client relationship when confidences have yet to grow; for the judge in a criminal case it is difficult because, though the making of it comes late in the acquaintanceship, there is never a sufficient acquaintance to permit the most reliable determination.

The layman is intrigued by the idea of the *professional* determination. Given a few moments with a defense attorney invariably he inquires, "If you know the accused to be guilty, would you represent him for a fee; and if so would you try to get him off?" Given almost as little time with a judge the layman inquires, "How do you decide what sentence to give?" It seems to me that it is unprofessional for the lawyer to answer, "Every person has a right to counsel, and, in our adversary system, his counsel should work for his complete freedom." It also seems to me that the answer of the judge should not be, "I let the punishment fit the crime but temper justice with mercy." Properly determining the sentence requires even more. While justice, evenness, fairness, mercy and compassion-kindness must help guide the judge toward his determination, it is most important that when he assigns a lesser or greater term, he does so because it is the wisest thing to do. Justice weighs the record; wisdom cannot be so limited. Moreover, it involves a *personal factor* that defies delineation.

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*United States District Judge for the Northern District of Illinois. B.A., 1944, James Milliken University; M.A., 1946, University of Chicago; J.D., 1949, University of Chicago.*

The new judge seeks with frustration among the traditional considerations for a mechanical guide in exercising this *personal factor*, and I doubt that the experienced judge, who knows well their implications and the weights to give them, ever feels confident that he has full command of it. Still it is this *personal factor* which lies at the base of our problem.

#### THE PROBLEM

During the early years of our nation, punishment was fixed in firm terms by statute, this being a protection of the people against the cruelties of punishment under the common law.<sup>1</sup> This was true even in the federal jurisdiction. Three forces eventually brought about a transfer to the judiciary of varying degrees of sentencing discretion: (1) public awareness that there were varying degrees of culpability involved in violations of the same crime; (2) an increased interest in reformation of the prisoner as against the deterrent effect of punishment; and (3) revolt of the judiciary against fixed penalties by using the judicial power to stay the execution of a sentence in order to effect leniency where the statute would not permit it. Around the change of the century, the exercise of judicial discretion in sentencing became a modern trend, and by the time of the revision of the Federal Code in 1909, most federal criminal statutes had followed the trend. With the change, came a change in the problems of prison administration that has resulted in untold difficulties. Where before all persons imprisoned for the same crime had the same terms to serve, with the change came variations in prison terms for the same offense. To the extent these variations did not reflect variations in culpability, they became the source of prison unrest.

Today there is no question about the fact that disparity of sentences in all jurisdictions has become a sore spot in criminal administration and justifiably has come under fire. In the federal jurisdictions it has been challenged for at least 25 years. Each Attorney General since Homer S. Cummings has reported to Congress the serious prison problems which have resulted from sentence inequalities. The situation was dramatically stated in the *Introduction to the Report on the Seminar and Institute on Disparity of Sentences for the Sixth, Seventh and Eighth Judicial Circuits*, in the following words:

During those years (1956 through 1960), for example, the proportion of defendants placed on probation varied widely among the Federal Courts. In

<sup>1</sup> Cf., PERRY & COOPER, *SOURCES OF OUR LIBERTY*, 235-38 (1952).

Western Tennessee only 15.7 per cent of all convicted defendants received probation, but in Utah, eastern North Carolina, and eastern South Carolina the proportion went as high as 54.2, 59.8 and 64.5 percent respectively.

During the same period the average length of the terms imposed upon those defendants who went to prison varied equally widely. In Northern New York the terms averaged only 11.7 months, but in Northern Indiana and Southern Iowa they averaged 51 and 52 months respectively.

New Hampshire during these years sent 15 defendants convicted of Dyer Act (18 U.S.C.A. § 2311 et seq.) violations to prison with average sentences of 12 months and Western Pennsylvania 140 similar offenders with average sentences of 15.8 months. But Western Michigan sent 101 of these offenders to prison with average terms of 38.8 months and Northern Oklahoma 145 offenders with average terms of 43.8 months.

While such statistics of course were recognized as not completely satisfactory in demonstrating the sentence disparity problem since they tended to flatten out the extremes in leniency or severity, they did indicate the need for agreeing upon the principles which should underlie sentencing. An examination of individual cases also illustrates the wide differences in judicial point of view with regard to specific crimes. In 1960, for example, a first offender was committed for a term of 15 years for cashing a check in the amount of \$58.50; this violation occurred at a time when the defendant and his wife were in desperate economic circumstances. The sentence given this offender contrasts sharply with the average of 23.2 months given to all committed check forgers during the five-year period ending 1960.

In 1961 two bank embezzlers were committed to the same Federal institution from the same district within the same week. The backgrounds and offenses of both men were virtually identical. Yet, sentenced by different judges, one received a term of six months, to be followed by eighteen months probation, and the other received a term of 15 years.<sup>2</sup>

Only two areas have been open to authorities for bringing about some equality in sentences. One is exercised by prison authorities themselves in managing some permissive reduction of actual time spent in prison.<sup>3</sup> The other is exercised by the Attorney General, who makes recommendations to the President for commutation of sentences. A great many of these recommendations have been made because of patent unjustifiability of the sentences. As Attorney General Robert Kennedy stated in his address to the Highland Park Seminar of Judges, October 13, 1961:

In May of this year, for example, I was given the case of a lawyer who had been convicted of conspiring to smuggle parrots into the United States from Mexico. He had never been in trouble before. He had a loyal and honest family. He still suffered from injuries received in the Southwest Pacific during the war. The judge, however, felt he was arrogant and rude and gave him eleven years for the parrot smuggling.

<sup>2</sup> 30 F.R.D. 401, 414-15 (1961).

<sup>3</sup> 18 U.S.C., ch. 301-17.

The Pardon Attorney's investigations indicated that this man's prison record was particularly outstanding. He had already served three years. Other favorable information was made available to me. At my recommendation the President cut the sentence to five years. The man was paroled last August and returned to his family.

Only two months ago, the Pardon Attorney brought to my attention another case, this one involving a 20-year-old man. The youth lived in Los Angeles with a wife and two children. Although he came from a broken home, he had never been in trouble. But after acid was sprayed in his face in an industrial accident, he became blind. His wife divorced him and took custody of the children, saying she wouldn't spend the rest of her life with a blind man. The young man recovered his eyesight. Desperate for money with which to try to get his family back, he went to Georgia and robbed a bank of \$5,000 at gunpoint. He mailed the money to himself in California. But when he returned to California, he became remorseful and turned himself in to the F.B.I. and pleaded guilty at his trial. His sentence? Forty years.

There is no question but that this youth's offense was extremely serious, and required punishment despite his past misfortunes. But a sentence of 40 years seemed out of line with that of other offenders convicted of similar offenses. Bank robbers during the same year received sentences averaging less than 13 years. I learned also that this youth had an excellent institutional record, had become a skilled surgical nurse and technician, and had benefited emotionally from counseling he had received. He already had served more than nine years when this case was brought to my office. At my recommendation, the President reduced the sentence to 15 years, so as to bring it into line with others similarly convicted. This meant that with credit for good time, the man qualified for release.<sup>4</sup>

#### FEDERAL SENTENCING ALTERNATIVES

Federal statutes provide an amazingly wide range of sentencing alternatives. Title 18, which deals exclusively with crimes and criminal procedure, contains approximately 500 sections, each of which establishes one or more particular modes of punishment for one or more particular crimes. The remainder of the United States Code contains approximately 100 additional sections setting forth a variety of penalties. While a few of these 600 odd provisions allow little flexibility in sentencing, the great majority prescribe a wide area within which a judge may act. Approximately 85% of all penalty provisions in the United States Code provide that upon conviction the defendant shall be imprisoned for *not more than* a specified number of years or fined *not more than* a specified amount of money, *or both*.<sup>5</sup> There are,

<sup>4</sup> 30 F.R.D. 401, 424-25 (1961).

<sup>5</sup> E.g., 18 U.S.C. §§ 471 (1948), 641 (1948), 1001 (1948), 1708 (1952), 2312 (1948), 2382 (1948). One provision provides specifically that the offender shall be imprisoned "at hard labor." 38 U.S.C. § 3405 (1958). Another provision provides a maximum prison sentence but leaves the imposition of a fine in any amount entirely within the discretion of the court. 22 U.S.C. § 253 (Derivation 1790).

of course, many variations of this type of penalty provision. At least 14 sections provide merely for imprisonment for not more than a specified number of years.<sup>6</sup> Nothing is stated concerning a fine. At least 50 sections provide only that the defendant shall be fined not more than a specified amount of money.<sup>7</sup> Nothing is stated concerning imprisonment. (18 USC § 3565 would seem to imply that a judge in all criminal cases in order to enforce payment of the fine might direct imprisonment until it is paid). Several sections still provide for a determinate penalty precluding the exercise of discretion.<sup>8</sup>

A few sections retain the sentence within both a maximum and a minimum penalty. Variations on this form include (1) imprisonment for not less than, nor more than, a specified number of years *and* a fine of not more than a specified amount;<sup>9</sup> (2) a fine of not less than a specified amount of money, nor more than a specified amount of money, *and* imprisonment for not more than a specified number of years, or both;<sup>10</sup> (3) a fine of not less than a specified amount of money and not more than a specified amount of money.<sup>11</sup>

In at least 58 instances an increase in the penalty is provided where aggravating circumstances are proven, such as where life and limb were placed in jeopardy, where the defendant is a second offender, where the violation was willful, or where a substantial amount of money was involved.<sup>12</sup> In at least 55 instances forfeiture of property or certain rights and interests is provided for.<sup>13</sup>

As the severity of the offense increases, so does the possible maximum penalty. Except in five instances involving piracy where the

<sup>6</sup> *E.g.*, 18 U.S.C. §§ 3 (1948), 1072 (1948), 1660 (1948), 1792 (1948), 2032 (1948), 2111 (1948).

<sup>7</sup> *E.g.*, 18 U.S.C. §§ 243 (1948), 431 (1951), 475 (1951), 1694 (1951), 1713 (1951), 2075 (1951).

<sup>8</sup> *E.g.*, 18 U.S.C. §§ 1083 (1949), 1160 (1948), 1651 (1948), 1652 (1948), 1653 (1948), 1655 (1948), 1661 (1948).

<sup>9</sup> *E.g.*, 18 U.S.C. § 1403 (1956), 26 U.S.C. § 7237 (1956), 21 U.S.C. §§ 174 (1956), 176a (1956), 184a (1956). Why Congress imposed a minimum sentence in those cases where probation is permissible is rather unclear.

<sup>10</sup> *E.g.*, 47 U.S.C. § 409 (1961), 49 U.S.C. § 46 (1893).

<sup>11</sup> *E.g.*, 49 U.S.C. § 1472 (1962). (One interesting section provides that an offender *shall* be fined *not more than* \$1,000 and *may* be imprisoned *not less than six months*. 47 U.S.C. § 13.)

<sup>12</sup> *E.g.*, 18 U.S.C. §§ 35 (1961), 597 (1948), 641 (1948), 832 (1960), 1154 (1949), 1461 (1948).

<sup>13</sup> *E.g.*, 18 U.S.C. §§ 43 (1960), 201 (1962), 437 (1948), 543 (1948), 751 (1948), 3611 (1948).

penalties are mandatory life sentences,<sup>14</sup> the scope of a judge's discretion remains broad. In at least two instances the offender may be imprisoned for any term of years or for life.<sup>15</sup>

At least 14 sections provide for the death penalty at the discretion of the judge or jury, though in no case is it mandatory. As an alternative to the death penalty, the provisions vary in allowing life imprisonment or imprisonment for any term of years (which term is to be determined by the judge and in some instances must be within certain prescribed limits) or a minimum fine.<sup>16</sup>

At the other extreme, except where an offense is punishable by death or life imprisonment, or where probation is specifically precluded,<sup>17</sup> a judge may suspend the imposition or execution of a sentence and place the defendant on probation for such period, not to exceed five years, and upon such terms and conditions as the court deems best.<sup>18</sup> Certain of the conditions may require the payment of a fine, the making of restitution to the aggrieved party, or the rendering of support to any person for whose support the defendant is legally responsible. *Or*, upon entering a judgment of conviction of any offense which is probationable and not punishable by death or life imprisonment, and provided the maximum punishment established for such offense is more than six months, the court may impose a sentence in excess of six months and provide that the defendant be confined in a treatment or jail-type institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.<sup>19</sup> The court is in any case empowered to change the period of probation or to revoke it and impose any sentence which might have originally been imposed.<sup>20</sup>

The courts are also granted wide latitude in fixing the time of eligibility for parole. Thus, in any case, except perhaps when a mandatory provision for life imprisonment is involved, where a court is of

<sup>14</sup> 18 U.S.C. §§ 1651 (1948), 1652 (1948), 1653, (1948), 1655, (1948), 1661 (1948).

<sup>15</sup> 18 U.S.C. §§ 1111 (1948) (murder), 2272 (1948) (destruction of vessel).

<sup>16</sup> *E.g.*, 18 U.S.C. §§ 34 (1956), 1716 (1958), 794 (1954), 1201 (1956), 2113 (1959), 2381 (1956). 142 U.S.C. §§ 2272 (1954), 2275 (1954), and 2276 (1954) provide examples of rather strange sentencing provisions. They allow punishment by death or imprisonment for life [upon the recommendation of a jury only] or by a fine of not more than \$20,000 or imprisonment for not more than twenty years, or both.)

<sup>17</sup> *E.g.*, 26 U.S.C. § 7235 (1956).

<sup>19</sup> 18 U.S.C. § 3651 (1958).

<sup>18</sup> 18 U.S.C. § 3651 (1958).

<sup>20</sup> 18 U.S.C. §§ 3651 (1958), 3653 (1949).

the opinion that the defendant should be sentenced to imprisonment for more than one year, the court may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.<sup>21</sup>

Special statutes have been enacted for the benefit of youthful offenders and juvenile delinquents. In the case of young adult offenders and youth offenders the court is empowered to place the individual on probation, to impose the penalty otherwise provided by law, or to sentence the offender for treatment.<sup>22</sup> If the latter avenue is followed the offender is allowed *either* a conditional release on or before (in the discretion of the Youth Correction Division of the Board of Parole) the expiration of four years from the date of conviction and an unconditional release on or before six years from the date of conviction *or* a conditional release not later than two years before the expiration of a term authorized by law for the offense of which the defendant stands convicted, and an unconditional release on or before the expiration of the maximum sentence imposed.<sup>23</sup> Either of these two methods of release may be specified by the sentencing judge.

In the case of juvenile delinquents the court may place the offender on probation for the period of his minority or commit him to the custody of the Attorney General for a like period but in no event for a period greater than that which might have been imposed otherwise.<sup>24</sup>

Thus it is obvious that federal criminal penalties viewed as a single concept in criminology do not reflect a single plan or program or reason. With the enactment of each new criminal penalty Congress has sought faithfully to relate it into what pattern can be ascribed to the whole, but until the whole is reorganized to effect the diagramming of a program and philosophy, the sentencing judge, surrounded by them, will remain without a basic guide in the use of them.

The problem of disparity of sentences is not only that of wide

<sup>21</sup> 18 U.S.C. § 4208 (1958).

<sup>22</sup> 18 U.S.C. §§ 5010 (1950), 5011 (1950), 4209 (1958).

<sup>23</sup> 18 U.S.C. § 5017 (1950).

<sup>24</sup> 18 U.S.C. § 5034 (1952).



variations in sentences for the same or similar offenses, but as well that of variations between different offenses where in the over-all view of things there seems to have been no accounting.

#### SENTENCING PHILOSOPHY

It properly has been the purpose of the federal government to insure the imposition of wise sentences by allowing broad areas for the exercise of judicial discretion. But if there is to be uniformity in sentencing, there must be an uniformly applied philosophy of sentencing. In the absence of a prescribed philosophy there are as many philosophies as there are sentencing judges, for the *personal factor* makes for a myriad of variations upon the several commonly advanced considerations: public accountability, community protection, deterrence, reformation, rehabilitation, treatment, guidance.<sup>25</sup> Misinformation, arbitrariness, biases, favoritism, temperamentality and dramatics in judicial performance may account for a small number of sentencing extremes, but, I am convinced, most divergences from reasonable uniformity result from differences in sentencing philosophies. It may be that occasionally a consistently light sentence in a particular offense is the result of a feeling of guilt, or a consistently heavy sentence in another offense would not have resulted but for an unhappy experience in the life of the sentencing judge. It may be that here and there a defendant receives a lengthy sentence because counsel irritated the court. But on the whole these instances do not describe the day to day performance of our federal courts.

On the whole federal judges work hard at the job of sentencing. Generally they follow a common pattern in sentencing. Before sentencing they learn all they can about the offense and the offender. They investigate the aggravating and mitigating circumstances attending the crime. They consider the following factors thoroughly: the nature of the offense committed; whether it was major or minor; whether it was against person or property; whether force was involved; whether there were complicating circumstances which suggest deep-seated personality problems; whether there were extenuating circumstances tending toward some justification or explanation of the crime; and whether the defendant entered a guilty plea. They examine the offender's prior criminal record to see if there has been

<sup>25</sup> See: Legislative Views on the Importance of the Sentencing Institute, an address of the Hon. Emanuel Celler, Chairman, House Committee on the Judiciary, Seminar and Institute on Disparity of Sentences, 30 F.R.D. 471, 473 (1961).

either a pattern of offenses or whether the kind or frequency of offenses relates to a particular environmental setting. They check the offender's prior behavior pattern, his military record, his marital history, the neighborhoods he lived in, his roots to the immediate community, the composition of his family group, his friends, the places he frequented for amusement, the importance of religion to him, and his relationships and reactions to authority. They study carefully his employment history, his ability to make restitution, his health and physical problems; and they think over and over again about his age and its relationship to both cause and treatment. Far ahead of sentencing they seek some conclusions about the offender's personality and mentality—his intellectual opportunity—his responsiveness to treatment—and the probabilities of his rehabilitation.

In doing these things the sentencing judge is not left solely dependent upon the prosecution, the defense counsel and the defendant. Rule 32 of the Federal Rules of Criminal Procedure provides for a presentence investigation by a United States Probation Officer, who reports fully and in confidence to him on these matters. If the judge desires more detailed information, he is empowered to commit the offender for a period of intensive study prior to final sentencing, except where a mandatory sentence is required.<sup>26</sup> Moreover, the judges are using this power more than ever before.

Generally, before going on the bench for the sentencing ceremony and during the ceremony, the sentencing judge reviews again and again in his mind the offense and the offender. He thinks of the kind of conduct that was involved in the crime, whether it was *pretending*, *cheating*, *appropriating*, *corrupting*, *resisting*, *forcing*, or *destroying*,<sup>27</sup> not only in terms of personality disorders involved and treatment time indicated, but also in terms of the impact which that kind of criminal conduct currently is having upon the immediate community. In this respect he usually is without reliable assistance, so he must depend heavily upon his own awareness.

During the first part of the sentencing ceremony, he asks questions and does a great deal of listening while he is trying to come to a con-

<sup>26</sup> 18 U.S.C. §§ 4208 (1958), 5010 (1950), 5034 (1948).

<sup>27</sup> It has always seemed to me that most federal crimes can be catalogued under these seven general headings reflecting as they do increasingly anti-social types of conduct. A charting of statutory maximum sentences would follow somewhat this same pattern. On the other hand quantitative involvement in therapeutic measures needed generally in disentangling personality problems common to many offenses cannot be measured by this pattern.

clusion or to feel reaffirmed in a conclusion he has already made. Somewhere along the way a ray of light must flow through his mind, to illuminate his problem within one cubicle of the pattern of life, society, national problems and human beings, in which pattern he believes. The great misgiving he has during and after sentencing is the pattern. He could more often be certain that his was a wise determination, if he were certain the pattern was correct. He hopes that if the pattern was wrong and the determination unwise, somewhere along the way, before injury, the mistake may be corrected.

He knows that within 60 days he can reduce a sentence, but he can never increase it.<sup>28</sup> He knows further that those considerations which underlie his uncertainty will probably remain unchanged in 60 days. He washes away his doubts with concern in his next case. Then when he later reviews his work and compares it with the records of other judges, he finds pronounced differences between his and their sentences. I believe that most sentencing judges feel that sentencing would be less exacting if there could be some truly competent post-sentence check, not only to reduce the widespread disparity of sentences, but also to make doubly sure the sentence to be served reflects the wisest determination. The big question, of course, is whether there can be a post-sentence check that truly would be competent.<sup>29</sup>

#### PROPOSED CHECKS ON SENTENCING

A great deal of interest has developed in academic and judicial circles in the question of what checks can be placed on the sentencing judge to prevent inequities and reduce disparities. While I suggest that this interest is justified, I hasten to observe that the problem is not a world-shaking one, and we should not be so eager to effect changes that we act improvidently.

One proposal receiving great consideration is that of requiring the trial judge to assess the indeterminate sentence of the statute and then direct the offender to a *sentencing agency* which would determine the sentence to be served. In California all offenders are committed to the Adult Authority, which then decides both on the time to be served and the prison in which it will be spent. The Authority determines when a prisoner shall be released, the conditions of parole,

<sup>28</sup> FED. R. CRIM. P. 35.

<sup>29</sup> In the responses to a questionnaire forwarded to the district and circuit judges of the Second Judicial Circuit, 38 of the 44 responses indicated belief that there should be some type of review of sentences. See 32 F.R.D. 319-321 (1963).

whether parole shall be revoked, and the remaining time to be served.<sup>30</sup> This system would permit expertise in sentencing which could rarely be acquired by a sentencing judge, but it seems to me that it would have no deterrent effect on potential offenders except with relation to minor offenses for which substantial prison time might result. In addition, it is obvious that this system would tend to increase unwarranted use of probation, since the judge's discretion is limited primarily to whether or not to grant probation.

A variation of the California program is that of the *truly indeterminate sentences* followed in Oregon in which the sentencing judge must assess the maximum and the offender is immediately thereafter eligible for parole.<sup>31</sup> The parole board assumes the breadth of authority of the Adult Authority in California. Probation and parole are a single program of administration. It seems to me that under either system full opportunity for judicial review is necessary, because only through the judiciary itself can there be escape from the arbitrariness not unusual to quasi-judicial bodies with administrative functions.

It has been suggested that sufficient control would lie under our federal system in expanding the scope of executive clemency. Although executive clemency serves to cure the extreme cases, it would fail to reach the greater problems of disparity, and, as suggested by the Chairman of the House Committee on the Judiciary, it "fails to recognize the judiciary's responsibility to achieve a more perfect justice."<sup>32</sup>

Representative Celler accounts for another proposal which fails to answer the problem presented here because, as he stated, it "does not attempt to weigh the justice of the original sentence, but rather seeks to assure that worthy individuals do not serve an excessive period of time. . . ."<sup>33</sup> This is the system followed in the District of Columbia, wherein the *Parole Board is authorized to petition* the trial court for a reduction of sentence.

As an alternate to appellate review of sentences, it often is proposed that there be appeal from the trial court's sentence to a panel of trial

<sup>30</sup> Hayner, *Sentencing by an Administrative Board*, 23 LAW & CONTEMP. PROB. 477 (1958).

<sup>31</sup> See *Statutory Structure for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960).

<sup>32</sup> *Checks and Balances on Sentencing Discretion*, a Statement by Representative Emanuel Celler, September 24, 1962, 32 F.R.D. 307 (1963).

<sup>33</sup> *Supra* note 32, at 311.

judges of the same district. The proposal varies from a panel of three judges which would include the sentencing judge to one made up of all the judges of the district except the sentencing judge. The advantages found in this proposal are lost in the obvious question, "If three trial judges can sentence better than one, why not have the defendant elect a panel before he is sentenced in the first place?" And, of course, for all practical purposes this proposal would be workable only in large judicial districts such as Chicago, where there are assembled under one roof a substantial number of judges of the district.

Appellate review of sentences has had the most substantial consideration of any proposed check. A number of bills relating to appellate review of sentences have been introduced in Congress in recent years.<sup>34</sup> Generally they would authorize the federal appellate courts, on appeal *by a defendant*, to review any sentence in a criminal case (except where mandatory under law) where the sentence seems excessive or improper under the circumstances of the case—even though it was within statutory limits. Several bills propose that the appellate courts should have power to raise *or* lower sentences; some bills would only permit the appellate courts to lower them.

Proponents of appellate review of sentences argue that although we permit appellate review as of right, to assure safeguarding of the defendant's rights at every stage of the trial before verdict, we offer no review of the ultimate disposition of his case. One eminent jurist has pointedly observed that what happens at the time of sentencing depends largely on the judge's conscience or the state of his digestion.<sup>35</sup> It is true that nine out of ten defendants plead guilty without trial. For them, punishment is the only issue. If a judge makes a mistake of law, he can be reviewed and corrected by an appellate court. If he makes a mistake in sentencing, little can be done about it.<sup>36</sup>

This view argues well the need for some type of check on sentencing, but it neglects the serious problem of how to effect the wisest sentence in the first instance. Besides, appellate courts will be flooded with contrived criminal appeals, impairing the sound administration of justice. That the reviewing court has not observed the defendant

<sup>34</sup> *E.g.*, H.R. 4930, 84th Cong., 1st Sess.; H.R. 4932, 84th Cong., 1st Sess.; S. 1480, 84th Cong., 1st Sess.; H.R. 270, 85th Cong., 1st Sess.; S. 3914 (86th Cong., 1st Sess.); S. 1692, 87th Cong., 1st Sess.; S. 2879, 87th Cong., 2d Sess.

<sup>35</sup> Sobeloff, "The Sentence of the Court: Should There Be Appellate Review?" 41 *A.B.A.J.* 13 (1955).

<sup>36</sup> See note 35, *supra*.

and often is distantly removed from the scene of the crime are considerations which must be given great weight. Such appeals also would be especially cumbersome and would foster delay and frustrate rehabilitation. Finally, appellate review will set a "safe pattern" for sentences and thereby encourage among trial judges sterile uniformity in the imposition of sentences.<sup>37</sup>

#### CONCLUSION

All the foregoing proposals merit study and evaluation, but it seems that none of them approach directly the problem presented by the assertion that the *personal factor* in sentencing lies at the heart of sentence disparity. At the same time, the *personal factor* is fundamental and cannot be eliminated. Wisdom in every instance of the exercise of this great judicial determination is that for which we must strive, and uniformity will follow. Checks should be devised to eliminate abuses of the judicial responsibility and to level severe excesses, but there is no substitute for a wise determination made pursuant to a good statute by the judge who personally can get closest to the offender, the offense, and the community in which it was committed. It seems to me that if there is a reliable answer to the problem, it involves for the trial judge a careful and intensive program of education and training.

Congress already has addressed itself to this point through a joint resolution authorizing the Judicial Conference of the United States to establish institutes and programs on sentencing for the purpose of "studying, discussing and formulating the objectives, policies, standards and criteria for sentencing those convicted of crimes and offenses in the Courts of the United States."<sup>38</sup> Under this authority several sentencing institutes have been held, and most judges have had an opportunity to attend at least one. I found the Highland Park Institute especially provocative and informative because workshop sessions were set up in such a way as to enable each judge to discuss each problem case in a small group of changing membership. But the experience was brief and without a follow-up. The need for field trips to federal correctional institutions was particularly apparent. The need for instruction and discussion in fields related to criminology,

<sup>37</sup> *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249 (Sept. 24, 1962).

<sup>38</sup> Pub. L. No. 85-752, 85th Cong., 2d Sess. (August 25, 1962).

sociology, psychology, history of criminal administration, problems of urbanization, trends in crime, statistics on rehabilitation—and many others—was apparent. The certain course of progress toward achieving uniformity in sentencing will be through expansion and intensification of these seminars and institutes. Annually every trial judge should have an opportunity to attend a protracted institute of this nature, and preferably on the national level. In addition, circuit institutes and district institutes should furnish follow-up study of sentencing problems.<sup>39</sup>

Our system can be improved and it will be improved. There is no reason to change it.

<sup>39</sup> A special committee of the Judicial Conference of the United States (the Youngdahl Committee) is working energetically on the problem of setting up sentencing institutes. The Seventh Judicial Circuit is seeking a follow-up program on the Highland Park Institute. And the Northern District of Illinois has set up a bi-council program among its ten judges for studying sentencing on an oftener than monthly basis.