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A Judge's Personal Perspective on Criminal Sentencing

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A JUDGE'S PERSONAL PERSPECTIVE ON CRIMINAL SENTENCING

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The difficulty of the sentencing decision is due in part to the fact that criminal law enforcement has a number of varied and often conflicting goals: The rehabilitation of offenders, the isolation of offenders who pose a threat to community safety, the discouragement of potential offenders, the expression of the community's condemnation of the offender's conduct, and the reinforcement of the values of law abiding citizens.[1]

I. THE PROBLEMS OF THE SENTENCING PROCESS

No other area of our system of justice affects so many people and has so important a role in shaping the nature and quality of lives as the enforcement of our criminal laws. Without courts to mediate the disputes between the alleged offenders and organized society, individuals would soon resort to a system which left to each person the task of righting for himself real or fancied wrongs. Courts are necessary to apply the criminal codes which supply the standards and the moral values holding civilized communities together.

The imposition of sanctions on convicted offenders is a principal vehicle for accomplishing the goals of the criminal law. An appropriate sentencing disposition is as important to the integrity of our system of justice as is the just determination of guilt. Yet the problems, questions, frustrations and self-analysis involved in the sentencing process are complex and heavy burdens. Each judge required to impose a criminal sentence is faced with the difficult tasks of determining the future life of the individual before him or her, balancing the impact on the individual with the needs of society, and drawing

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1. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 14 (1967).

the line between the rights of the individual and the interests of the State. The judge must recognize that the consequences of every sentence pronounced extend far into the future and affect the defendant, his family, and society.

A. Disposition of the Offender

Sentencing statutes in Washington allow a judge the narrow choice of either committing an offender to a state institution or placing him on probation.[2] Once an offender is committed to a state institution, all judicial "control" over the individual's future ceases.[3] The distinction between parole and probation must also be borne in mind. Release from a state institution prior to completion of the maximum term is parole. During the remainder of the noninstitutional term, the parolee is under the immediate charge of a parole officer, with ultimate responsibility for supervision vested in the Board of Prison Terms and Paroles.[4] A sentencing judge also has the power to impose probation, *i.e.*, a penalty other than commitment to the State Department of Institutions. The offender is responsible to a probation officer and the ultimate supervisor is the court.

B. Alternatives to Institutionalization

The public tends to equate probation with leniency. Yet the constraints, obligations, and requirements imposed upon an offender's conduct as conditions of probation may often be more onerous than serving a term in a state institution. The decisions which the offender must make to cope with life in the community can be more painful and difficult than submitting to a regimented prison existence.

Probation is not antithetical to any concept of punishment as a deterrent in the criminal law process. In many respects, adherence to probationary conditions can be much more punitive than "doing time" at Shelton Corrections Center, Monroe State Reformatory, or Walla Walla State Penitentiary. Generally, conditions are attached to

2. *See* WASH. REV. CODE §§ 9.92.010–.030, 9.92.050–.060, 9.95.200 (1974).
3. *See* WASH. REV. CODE ch. 9.95 (1974).
4. *See* Johnson, *The Board of Prison Terms and Paroles: Criteria in Decisionmaking*, 51 WASH. L. REV. 643 (1976).

any probation granted. These conditions may require, for example, spending one year in the county jail, a year and a half or two years at the Sexual Psychopath Program at Western State Hospital, or six months to two years in residence at an alcoholic treatment, drug treatment, or vocational center.[5] Probation can also be conditioned upon the payment of fines, making restitution, or requirements of community service. It involves supervision for the entire term of probation, which can extend anywhere from one year to the maximum term.

In its comprehensive studies, the National Advisory Commission on Criminal Justice Standards and Goals stated:[6]

> Figures on recidivism make it clear that society today is not protected—at least not for very long—by incarcerating offenders, for many offenders return to crime shortly after release from prison. Indeed, there is evidence that the longer a man is incarcerated, the smaller is the chance that he will lead a law-abiding life on release.
>
> There is also evidence that many persons in prison do not need to be there to protect society. For example, when the Supreme Court's *Gideon* decision[7] overturned the convictions of persons in the Florida prison system who had not had an attorney, more than 1,000 inmates were freed. Such a large and sudden release might be expected to result in an increase in crime. To check this hypothesis, two groups of inmates released at the time were matched on the basis of individual characteristics. The one significant difference was that one group of prisoners was released as a result of the *Gideon* decision and the other group of prisoners was released at the expiration of their sentences. Over a period of 2½ years, the *Gideon* group had a recidivism rate of 13.6 percent, and the other group had almost twice that rate, 25.4 percent. Commented Louie Wainwright, director of Florida's corrections system:
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> > The mass exodus from prison may prove that there are many inmates presently in prison who do not need to be there in order to protect society. It may prove that many more people can be safely released on parole without fear that they will commit new crimes. This may well be the most important lesson we can learn from the *Gideon* experience.
>
> It also seems clear that many persons can serve their sentences in the community without undue danger to the public.

5. *See* WASH. REV. CODE § 9.95.210 (1974).
6. NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 113 (1973).
7. Gideon v. Wainwright, 373 U.S. 335 (1963) (footnote and citation added).

> There is substantial evidence that probation, fines, public service requirements, and restitution are less costly than incarceration and consistently produce lower rates of recidivism after completion of sentence.

Although some offenders may require imprisonment as part of their rehabilitation, research appears to indicate that comparatively few need to be incarcerated to protect society. As the aftermath of *Gideon* suggests, it is not necessarily true that placing more offenders on probation than in prison will result in a higher risk to the public.

More importantly, the empirical data show two or three times as many repeaters resulting from prison sentences as from probation. The scientific studies and analyses, though involving difficult variables, substantiate the practical findings of a much higher rate of recidivism after a prison sentence than after a probationary alternative.[8] Further success in this area can be achieved by effectively utilizing community services, resources, money, manpower, and ingenuity.[9]

8. *See, e.g.*, CALIFORNIA YOUTH AUTHORITY, THE COMMUNITY TREATMENT PROJECT AFTER FIVE YEARS (1966); CALIFORNIA YOUTH AUTHORITY, COMMUNITY TREATMENT PROJECT, AN EVALUATION OF COMMUNITY TREATMENT FOR DELINQUENTS, FIFTH PROGRESS REPORT (CTP Research Rep. No. 7, Aug. 1966); CALIFORNIA YOUTH AUTHORITY, COMMUNITY TREATMENT PROJECT, AN EVALUATION OF COMMUNITY TREATMENT FOR DELINQUENTS, SIXTH PROGRESS REPORT (CTP Research Rep. No. 8, Sept. 1967); L. Empy, The Provo Experiment: A Brief Review (Youth Studies Center, University of California, Los Angeles, 1966); M. Levin, The Impact of Criminal Court Sentencing Decisions and Structural Characteristics (Nat'l Technical Information Service, Mar. 1973); Babst & Mannering, *Probation versus Imprisonment for Similar Types of Offenders—A Comparison by Subsequent Violations*, 2 J. RESEARCH IN CRIME & DELINQUENCY 60 (1965); Shoham & Sandberg, *Suspended Sentences in Israel—An Evaluation of the Preventive Efficacy of Prospective Imprisonment*, 10 CRIME & DELINQUENCY 74 (1964).

9. A few statistics support my view of the efficacy of probation. I have reviewed every felony sentence imposed by me from my appointment on June 1, 1961, through June 15, 1975. The resultant data are:

Cases Examined	730	100 %
Number sentenced to Dep't of Institutions	167	22.9%
Number granted probation	563	77.1%
Probation granted	563	100 %
Probation not revoked	453	80.5%
Probation revoked	76	13.5%
Bench warrant issued because of failure to locate or other reason	34	6.0%

My files containing this information are open to any qualified researcher for evaluation.

The attacks on the concept of probation and treatment were given impetus by the publication of Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974). This article is a summary of the complete study by D. LIPTON, R. MARTINSON, & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975). It is difficult to

C. *Sentencing Objectives*

It becomes apparent that if any sense is to be made out of the sentence, if there is to be a justification for the disposition made, the judge must have certain goals and objectives. Among those objectives possible are: vengeance, retribution, punishment, satisfaction of public emotions, making the punishment fit the crime, removal from society, protection of society, deterrence, rehabilitation, or treatment. The problem for a judge faced with these goals is determining which take priority.

No legislature has formulated criteria and standards for sentencing to guide the judiciary. In Washington, various statutes: (1) authorize the judiciary to grant probation; (2) provide for maximum and minimum terms; and (3) under some circumstances, impose mandatory sentences.[10] Washington law does not permit formal appellate review,[11] and no common law principles have developed to aid a trial

understand the ready acceptance and wide publicity given to this study. It is neither original research nor based on empirical data. It relates to an eclectic selection of programs within the community and prisons between 1945 and 1967. Most of these programs were experimental and lacked sufficient funding, expertise, and background knowledge. Furthermore, they operated at a time when probation was not readily accepted. Those programs that demonstrated success, despite the above-mentioned difficulties, were cavalierly dismissed by Dr. Martinson as being focused on a special group of offenders or depending for their success upon extraordinary expertise of those delivering services or unusual efforts and performance by probation officers—all essential ingredients of good program services in any event.

It is this author's opinion that Martinson started his study with a preconceived thesis: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." Martinson, *supra* at 25 (original in italics). The raw data presented above, however, seem to indicate that probation does work. *See also* Flynn, *Turning Judges into Robots?*, 12 TRIAL, Mar., 1976, at 17.

10. WASH. REV. CODE § 9.95.200 (1974) gives the court the authority to grant probation and *id.* § 9.95.010 gives the court authority to fix maximum sentences. Illustrative of the mandatory sentence statutes are *id.* §§ 9.92.090 (habitual criminal) and 9.41.025 (firearm possession).

11. Although Justice Hale's dissenting opinion in State v. Williams, 78 Wn. 2d 459, 460, 475 P.2d 100, 101 (1970), contended that appellate courts lacked the power on review to revise a sentence if it is within statutory limits, there has been a general form of appellate review of sentencing in Washington without explicit legislative authorization. As early as 1911, when the Washington State Supreme Court in State v. Douglass, 66 Wash. 71, 118 P. 915, declared that it would not interfere with the imposition of a sentence unless the trial judge grossly abused his discretion, Washington appellate courts sub silentio have been reviewing sentences on the basis of this abuse of discretion analysis. *See* State v. Potts, 1 Wn. App. 614, 464 P.2d 742 (1969); State v. Todd, 78 Wn. 2d 362, 474 P.2d 542 (1970); State v. Hurst, 5 Wn. App. 146, 486 P.2d 1136 (1971); State v. Derefield, 5 Wn. App. 798, 491 P.2d 694 (1971); State v. Birdwell, 6 Wn. App. 284, 492 P.2d 249 (1972); State v. Withers, 8 Wn. App. 123, 504 P.2d 1151 (1972); State v. Langford, 12 Wn. App. 228, 529 P.2d 839 (1974); State v. Bresolin, 13 Wn. App. 386, 534 P.2d 1394 (1975).

judge in an appropriate sentencing disposition under a specific set of circumstances.

Recognizing these problems, many attempts have been made to formulate criteria which could be enacted by legislatures. Over a decade ago the American Law Institute drafted model sentencing statutes in its *Model Penal Code*.[12] In 1961 the American Bar Association embarked upon a project to formulate standards for criminal justice. To date 18 separate standards have been approved by the House of

12. Article 7 of the Code deals with the authority of the sentencing court. Its first section provides:

Section 7.01. Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation.

(1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

(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.

(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 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 excessive hardship to himself or his dependents.

(3) When a person who has been convicted of a crime is not sentenced to imprisonment, the Court shall place him on probation if he is in need of the supervision, guidance, assistance or direction that the probation service can provide.

ALI MODEL PENAL CODE § 7.01 (Proposed Official Draft, 1962).

Delegates, including the *Standards Relating to Probation*[13] and *Sentencing Alternatives and Procedures*.[14] The Governor's Task Force on Decision-Making in Corrections has worked for several years in Washington attempting to draft a sentencing act. Its report, representing a broad consensus of workers in the criminal justice system, was presented to the 1975 legislature, but no action was taken.[15] I

13. Two of the standards provide:

1.2 Desirability of probation.

Probation is a desirable disposition in appropriate cases because:

(i) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of law;

(ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts;

(iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community;

(iv) it greatly reduces the financial costs to the public treasury of an effective correctional system;

(v) it minimizes the impact of the conviction upon innocent dependents of the offender.

1.3 Criteria for granting probation.

(a) The probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or

(ii), the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.

(b) Whether the defendant pleads guilty, pleads not guilty or intends to appeal is not relevant to the issue of whether probation is an appropriate sentence.

ABA STANDARDS RELATING TO PROBATION, Nos. 1.2 & 1.3 (Approved Draft, 1970).

14. Two of the standards provide:

2.2 General principle: judicial discretion.

The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.

2.3 Sentences not involving confinement.

. . . .

(c) A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.

ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, Nos. 2.2 & 2.3(c) (Approved Draft, 1968).

15. Unpublished report on file in the Governor's Office, State of Washington, submitted to the Senate and House Judiciary Committees of the 1975 Washington Legislature for study.

Most trial judges in this state generally apply criteria, whether articulated or not, which follow the *ALI Model Penal Code* and *ABA Standards* for sentencing by con-

have recommended to the Washington State Supreme Court the adoption by rule of the American Bar Association standards.[16] These standards constitute the most recent and concise expressions of criteria by which the judiciary and the bar could be readily governed in criminal sentencing. Articulation of standards and goals would help supply public understanding of judicial sentencing decisions.

II. PERSONAL REFLECTIONS ON THE JUDICIAL SENTENCING ROLE

> Probation is a preferred disposition and should be considered as a possibility in almost every case.[17]

Upon assuming the bench it became necessary for me to construct a functional philosophy of sentencing. I looked to what I viewed as the essential purposes of criminal punishment. It is my opinion that revenge is not an object of punishment. Society should not let emotions, anger, or a desire for revenge govern the nature of punishment imposed by judges. Too often, however, an emotional appeal founded upon society's need for a purgative revenge will demand the most violent punishment possible. If drastic punishment is not imposed, society is "coddling the criminal." A judge, however, must hold vengeance and punishment for its own sake irrelevant to the more basic task which confronts him.

There are three primary objectives in imposing sentences. First, society must be protected—is society safe if the offender is not placed in custody? The safety of the community must be considered not only the day sentence is imposed, but in the future, when the defendant's term expires and he or she is released. Prison is a protection only for the period of incarceration. Studies show that the longer the prison

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sidering probation as the preferred sentence. The supreme court should promulgate standards and criteria for sentencing through the exercise of its rulemaking power without waiting for the legislature to act.

In Washington State during 1974 there were 5,663 adult offenders adjudged guilty of felonies. Probation dispositions (4,387) comprised 77.5% of the total, and commitments to institutions (1,276) made up the remaining 22.5%. In King County during this period, 82.4% (1,389) of all adult felons were sentenced to probation while 17.6% (297) were sent to correctional institutions. 1974 WASH. HUMAN RESOURCES AGENCIES REPORT 43.

16. *See* notes 13 & 14 and accompanying text *supra.*

17. COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR SENTENCING 23 (2d ed. 1974).

sentence, the more likely an inmate is to return to criminal behavior upon release.[18]

The second objective in sentencing is deterrence of the sentenced individual. The focus here is on the convicted individual since psychiatrists, penologists, sociologists, and other authorities generally agree that the imposition of severe penalties does not deter *others* from the commission of antisocial acts.[19] Many persons commit crimes for the very purpose of being imprisoned.[20] Speedy apprehension, an expeditious trial, public shame, and economic loss—these do have a deterrent effect. Furthermore, during the time the offender is in custody he is effectively prevented from committing other crimes. These advantages are lessened, however, by the fact that the individual may become even more skilled as a criminal while in custody.

The third objective, and the most important to me, is to direct the sanctions of the law toward the rehabilitation and treatment of the offender. If a program can be devised which will accomplish this goal, all purposes of sentencing have been served: (1) society is protected; (2) the offender is deterred, and others may profit by the example; and (3) a human being has been returned to take his place in the community—hopefully to the benefit of society.

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18. *See* note 6 and accompanying text *supra*.

19. *See, e.g.*, J. ANDENAES, PUNISHMENT AND DETERRENCE (1974); CAPITAL PUNISHMENT (T. Sellin ed. 1967); THE DEATH PENALTY IN AMERICA (H. Bedau ed. 1964); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); Doleschal, *The Deterrent Effect of Legal Punishment*, 1 CRIME & DELINQUENCY LITERATURE, June 1969, at 1; Morris, *Thoughts on Capital Punishment*, 35 WASH. L. REV. 335 (1960). For a review of literature on deterrence see F. ZIMRING, PERSPECTIVES ON DETERRENCE (Public Health Service Pub. No. 2056, 1971).

20. *See* B. Glueck, *Analytic Psychiatry and Criminology*, in THE PROBLEMS OF DELINQUENCY 98 (S. Glueck ed. 1959).

It has been my observation in juvenile court that a high proportion of the offenders are voicing a cry for help and rescue from an intolerable family or social situation by engaging in criminal activity. Older offenders may be adult chronologically, but many are emotionally and psychologically immature, acting on the same level and for the same reasons as juveniles.

Numerous defendants have appeared before me where the circumstances and manner in which the offense was committed make it clear that apprehension was a foregone conclusion. I recall one 60-year-old parolee who had spent most of his life in prison. Upon his release he worked a short time in a restaurant. After a few drinks one evening, he walked into the same restaurant without disguise, carrying a firearm, and robbed the cashier who knew him well.

It is, of course, inaccurate to speak of but one cause for criminal activity. The variety of causes is well summarized by Dr. Seymour Halleck, a noted psychiatrist: "Criminality can thus be viewed as a legally punishable action which an individual takes as a means of adapting to biologically, psychologically and sociologically stressful occurrences in his past life and present circumstances." S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME 8 (1967).

The courts and society have been confronted with grave dilemmas arising from the obvious fact that prison and our correctional system are not working. There is hope, however, that despite our groping we are finding acceptable ways of controlling and changing the behavior of individuals. If offenders can be persuaded to accept psychological or medical treatment, family and individual counselling, vocational and academic training, and if their socioeconomic status can be improved, then changes in behavior will result.[21]

At the time of sentencing, with the defendant before me, the philosophy must be applied. I have obtained the presentence reports and recommendations of the prosecuting attorney, the defense counsel and the probation department. All aspects of the offense and the character of the defendant have been reported to me; any other information deemed necessary for my consideration has been submitted by the prosecuting attorney or defense counsel. The responsibility here is awesome. Each objective must be borne in mind. In determining which one has priority and how to balance each, the following factors are considered.

The peculiar characteristics of the defendant are important. What is his legal and personal history? What of his family? Are the causes for the commission of the offense attributable to his childhood, too much maternal protection, a drunken father, alcohol, lack of motivation, lack of vocational training, lack of education, other emotional or physical disability? I study his history and that of his family. I evaluate his education, his training and employment, the emotional and physical health of his family, and the nature of his prior conduct. I have the statements of the victims, of friends and relatives, of priests and ministers, of social workers and marriage counselors, of the police, of the prosecutor and defense counsel. I must consider the impact which the sentence may have upon his wife and children or perhaps his mother and father. What are the concerns of the victim?

Only the judge under our system can make this determination by resolving all the conflicting factors and reconciling the inconsistencies. The judge must balance the needs and requirements of the public with

21. *See generally* Boroch, *Offender Rehabilitation Services and the Defense of Criminal Cases: The Philadelphia Experience*, 7 CRIM. L. BULL. 215 (1971); Elliott, *The Enigma of Sentencing—The Individuality of Man*, 6 MUN. CT. REV., Apr. 1966, at 27; Field, *Custom Made Remedies in Criminal Cases*, 36 CHI. B. RECORD 369 (1955).

the special problems of each individual defendant, and, if the judge is not satisfied with the information he has received, he must ask for additional data such as medical or psychological studies, reports from employers, prospective employers, friends, neighbors, and information from the victim and the victim's family.

After I have determined what ought to be done I must then inquire whether it can be done. If incarceration is indicated, what will it achieve? Is psychiatric care or vocational education available? Schooling may be required because the offender cannot read and write. Will commitment to an institution be a welcome release to the defendant, allowing him to avoid responsibilities to his family and to society? In the event that the care, treatment, education, and supervision which the convicted criminal needs can best be given outside the walls of an institution, I must balance the risks to society with his needs. Conversely, while it may be entirely safe for him to be at large and the risk to society will be minimal, the restraints, the limits, and the rules by which he must learn to live may not be available outside an institution. I must be aware of what can and cannot be done at the state institutions such as the reformatory, the penitentiary, the mental hospitals, and the work and forest camps. I must know what agencies, public and private, are ready to take on some of the burden of rehabilitation, guidance, and treatment; I must be aware of the policies followed by the Department of Institutions and the parole board and of the scope and limits of probationary and parole supervision.

All these factors are considered in the application of my learning, education, experience, philosophy, and assessment of the judge's role in the sentencing process dealing with an offender. I try to render judgment based on the facts and the law, objectively and fairly, without passion or prejudice, sympathy or indignation. I apply as best I can my skill, experience, and ability to the function delegated to me as a judge, by a free and orderly society.