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SECTION 1: EXPERTS' PAPERS

The Judge's Role in Sentencing: Basic Considerations for Effective Sentences

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Judges in Asia and the Far East, along with their counterparts in the Western nations, share a common goal: to achieve fairness and effectiveness in sentencing. While the dimensions of the problems of crime and indeed the sophistication and effectiveness of the criminal justice apparatus may differ among countries, nevertheless in their efforts to reach wise, just and appropriate sentencing decisions all judges face common problems. The heterogeneity of judicial structures among Asian and Far Eastern nations, and the vast differences in the amount of financial and institutional resources allocated to the apprehension, trial and treatment of the offender do not obscure the fact that all judges seek to dispense justice and maintain security by their sentencing.

In virtually all countries efforts to cope with antisocial behavior, and to reduce its size and magnitude, has a high priority. Lawlessness and crime threaten the well-being of a nation. If personal security against crimes which threaten the personal safety and property of its citizens is not provided, then few societies can carry out their essential functions. Accordingly, substantial sums of money are allocated to crime control which are distributed among numerous criminal justice agencies. At the same time, sizable sums of money are allocated to health and welfare services devoted to maintaining the economic and social well-being of its citizens, and whose effectiveness or lack thereof will be reflected in the size of the delinquency and crime problem.

The criminal justice system is a continuum and many crucial decisions are made throughout the entire criminal justice

process which affect the ultimate outcome of an individual's case, namely, whether or not to arrest; if arrested, whether or not to detain the person in a holding facility pending trial; whether or not to prosecute; and finally, if the case has been brought to trial and the defendant is convicted, whether to commit the offender to prison, or to impose some other sentence.

Understandably, society's attention is focussed on the judge's sentence, for it is at this point in the criminal justice process that the State's power is exercised and the crucial decision is made concerning the defendant's punishment. Simultaneously in imposing that sentence, society hopes that it will serve a deterrent purpose and will discourage potential offenders from committing similar offenses. Accordingly, it is a responsibility which is not taken lightly, and the conscientious judge often faces it with concern, consternation and on occasion, with some anguish.

While sentencing procedures vary to some degree among countries and while the range of dispositional alternatives available to judges also differs, all societies strive to achieve several fundamental objectives by their sentences. It is these goals as well as the fundamental judicial and social considerations of sentencing which comprise the principal focus of this paper.

Purposes and Goals of Sentencing

As one of society's entrusted agents for maintaining social order and security, the sentencing judge is concerned with carrying out public policy when he renders his sentence. This policy is part of a larger outline of social purpose, for sentencing without relationship to specific social goals is sentencing without purpose. Thus, it is extremely important and fundamental to

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the entire discussion to ask what objectives, goals and purposes are to be served in sentencing the individual transgressor against society's social standards and rules. In general, the fundamental purposes and goals of sentencing are fourfold: retribution, deterrence, isolation and restraint of the offender, and finally, rehabilitation.

A. Retribution

Society's contempt, disdain, and often anger at the transgressor's socially deviant and harmful behavior which threatens the moral fiber, strength and health of the society, are manifestly expressed in the sentencing process. And while it is non-utilitarian, retribution is one of the obvious and fundamental social purposes of sentencing. We punish to vindicate a moral sense; we make the offender suffer for his having made the victim of his crime suffer. While it may make society and the individual victim feel better, retribution by itself serves no useful purpose. Nevertheless, while it may not be utilitarian, as a fundamental tenet of criminal law it is necessary, because most societies believe it is right.

Some people challenge the concept that retribution serves no utilitarian purpose. It is argued that retribution is important because it forces the offender to think about the consequences of his behavior. However, in so arguing, actually one conceptualizes retribution as effectuating deterrence, or perhaps even rehabilitation, rather than punishment for retributive purposes alone.

There are many problems with retribution. First of all, most societies dilute their punishment. Thus, if an offender committed a very heinous crime in which he inflicted great bodily injury or harm on the victim, most societies do not attempt to inflict the same degree of pain and suffering on the offender. We may sentence the criminal to prison and isolate him from society for a number of years, but we usually do not attempt to exact pain and suffering equal to that which he may have produced by his criminal act. Thus real retribution, or "an eye for an eye, and a tooth for a tooth," as proscribed in the Judeo-Christian Bible, is seldom imposed. Most societies dilute their retri-

butive acts for practical as well as moral reasons.

Another problem is that retribution is quite expensive, both in terms of the actual costs of maintaining the prisoner as well as in human suffering. To house and detain an individual for 10 years is costly because society has to feed, clothe, and protect him against harm by other prisoners and often has to provide economic support for his family while he is languishing in custody. While retribution may be necessary as a form of social expression against offenders, it is by no means inexpensive.

Finally, the more one is familiar with the facts and circumstances of the offender's background and the societal forces which may have been the impetus for his antisocial behavior, the less retribution seems to be in order. Let me illustrate this point. If a criminal entered your home and stole your precious belongings, you would be upset and you might demand a severe sentence for the offender. However, if you knew that the offender committed the crime as an act of desperation because his family was starving, the chances are that you would demand far less retribution than if you had no knowledge of the offender's extenuating personal circumstances.

For this reason, the judge who presides at the trial, and who, in the course of the proceedings, becomes familiar with the offender's background, often opts for less retribution than the policeman who might have risked life and limb to apprehend the offender, or the public whose knowledge of the case is based on an abbreviated newspaper account of the case without being aware of the significant mitigating factors.

As a personal observation, very few people believe they should have to suffer for their wrongdoings. As a general rule, we believe in retribution for strangers, but not for ourselves.

As a final note, the public often argues that there is a need for retribution because of the harm done to the victim. That argument would be appropriate if there was some way to help the victim by imposing retribution on the offender. Unfortunately, that is not the case. There simply is no way to help the victim by

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retributive action against the offender. The reason is obvious: there is no way to undo the harm which has already taken place.

Finally, we must recognize that retribution not only exists, but will continue to exist as one of the purposes of the criminal law irrespective of whether or not it is utilitarian. It exists because it provides justification for our behavior as a society by attributing to retribution some social good or purpose which it may or may not serve.

B. Deterrence

It is generally agreed that the major justification for the criminal law is not retribution but deterrence. By enacting criminal statutes, society hopes to deter future criminal action by specifying the types of behavior which are against the social standards and by imposing penalties when those social standards are violated. By punishing the offender, we hope to teach him a lesson and thereby deter him from committing further antisocial acts. Finally, by imposing criminal sanctions on the offender, we also hope to deter others from committing similar offenses.

Over the years there has been considerable debate in academic circles as to whether punishment or the threat of punishment deters offenders. This has produced polarized comments, with adherents firmly taking positions on both sides of the question. In my judgment, and I believe that this would be shared by most people, the answer is that it deters some persons, and doesn't deter others.

Certainly, if punishment, *per se*, deterred all offenders, then we would not have any recidivism. As you are well aware, this is not the case. Offenders exposed to the criminal justice system, and especially those who have served time in prison, have a relatively high rate of recidivism. The only punishment which can guarantee no subsequent criminality is the imposition of the death penalty. To be sure, punishment accompanied by the helping hand of rehabilitative services results in the social reformation of many offenders; however, for many others, the desired goal is not achieved.

By and large, the main purpose of punishing the convicted offender is to

deter others by making an example of him. In other words, you tell potential offenders that if they commit similar acts then they too are likely to be punished and restrained. In this way, the offender serves a more general social purpose.

Let me draw your attention to the editorial from Taiwan appended to this paper. In an effort to reduce the incidence of robberies, which according to the officials in Taiwan had reached dangerous proportions, they decided to execute, by firing squad, those convicted of that offense. Not only was there widespread publicity about the sentence, but furthermore, in an effort to broaden its impact, they televised interviews with the offenders before they were marched off to face the firing squad. Thus, these young criminals were called upon to serve a greater public purpose, namely to deter potential offenders from similar acts of robbery. The first question is: Will this particular use of the death penalty be effective in deterring others? That remains to be seen since the incidence of robbery following the execution of these young men has not been established yet. Most people, however, deplore the use of this extreme punishment to control and curb crime. However, let us assume that this use of the ultimate social sanction was effective. The next question is whether or not this is an appropriate way to control the incidence of crime in a modern civilized society. While no one condones robbing people, in most Western and Asian societies, such extreme punishment would not be tolerated. The reason is simple: the punishment is disproportionate to the social harm of the crime. That does not mean that robbers would or should be dealt with lightly in Western and Asian nations; that is not the case. In California, for instance, many convicted robbers receive prison sentences of five years to life under our indeterminate sentence laws. Thus a robber could conceivably spend the rest of his life in prison for his offense, although that does not generally occur. But the death penalty is not viewed as an appropriate social sanction for either this offense or others in which a life has not been taken.

As was true with retribution, deterrence also is expensive. Putting people in prison is costly, as is the expense of supporting

their dependents while the wage earner is confined. Worst of all, in a specific sense as we noted earlier, it may not actually deter the offender. Indeed, it may make him bitter, and may label him a social outcast forever, and consequently he may decide to pursue a life of crime rather than seek to enjoy freedom as a non-criminal, albeit at a more modest standard of living.

Without indulging further in the debate, and indeed there is a school of thought among psychologists and criminologists that offenders do not act voluntarily and therefore deterrence is a false goal, nevertheless most people agree that punishment deters some persons from committing offenses.

Before we depart from this subject, two other observations are worth mentioning. First, in a rational sense, some offenders evaluate the risks and the potential penalties involved in getting caught and many decide to commit the offense anyway. We have observed this phenomenon with many white-collar criminals and with habitual offenders. Second, increasing the penalty is one of the traditional ways that society attempts to improve the deterrent effectiveness. Taiwan, with its use of the death penalty for robbers, is an excellent example. However, as a general rule, in most Western societies increasing penalties have seldom produced the desired results. There are many reasons for this: first, juries and judges are reluctant to convict a minor offender if there is an inordinately lengthy sentence for the offense. Secondly, the deterrent effect of punishment seems to work best with traditionally law-abiding citizens, but works poorest with the lawless, antisocial element in our society. Otherwise we would not have to endure further criminal behavior by ex-offenders.

We must also recognize that in some instances the imposition of criminal sanctions is almost useless. We observed this during the 1920's in the United States when a constitutional amendment outlawing the use of alcohol was approved. Since this amendment did not enjoy a genuine public consensus, violations were wholesale, and very few people were prosecuted.

Of more serious consequence, the law had many adverse effects because it contributed to mass corruption, pay-offs to police, and to sizable sources of illegiti-

mate income for the gangster element in our society. It was wisely repealed in the early 1930's, not because the government felt that alcoholic consumption on a wide scale was desirable but because the law was a totally ineffective and inappropriate way to control its use and abuse.

To some degree, the same situation prevails in America with regard to controlling the widespread use of marijuana. Despite the potentially heavy penalties for marijuana possession, thousands of college students and other young people indulge in its use. The wholesale violations of this statute, as well as basic changes in public attitude, led to a revision in 1975 of California's marijuana statute substantially reducing the penalties for possession of the drug. I want to make it perfectly clear that I am not recommending that Japan or other countries undertake similar modifications of their drug control laws, especially if current laws seem to be effective in deterring narcotic indulgence. I am simply pointing out the limited deterrent effect of specific criminal statutes when they conflict with a prevailing countervailing among the people.

There are two enlightened and valuable books on the issue of deterrence, "Deterrence, the Legal Threat in Crime Control," by Franklin E. Zimring and Gordon J. Hawkins, and "Punishment and Deterrence," by Johannes Andenaes, the noted Norwegian law professor who is now a justice of the Norwegian Supreme Court. In the first mentioned book, the authors make some cogent comments and observations concerning the debate over the deterrent effect of punishment. They say:

"On the one hand, there is a potent, ubiquitous, seemingly irrefutable thesis that attaching unpleasant consequences to behavior will reduce the tendency of people to engage in that behavior... Moreover, despite fashionable skepticism about the efficacy of legal controls there is in some areas impressive evidence of the effectiveness of criminal law enforcement as a means of social defense.

"On the other hand, there are areas in which attempts to control or suppress behavior by means of threats of punishment seem, to many observers, to be

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hopeless failures...the application of criminal enforcement and penal sanctions in the field of drug control is often said to have met with similar lack of success. Thus, the President's Crime Commission Task Force on Narcotics and Drug Abuse reported that despite the application of increasingly severe sanctions to marijuana the use and traffic in that drug appears to be increasing...

"But the truth is that, like so many dialectical arguments, the antithesis upon which this one rests is false. It is a matter of common observation that men seek to avoid unpleasant consequences and that the threat of punishment tends to be deterrent. It is equally indisputable that not all criminal prohibitions are completely effective. But these propositions are not mutually exclusive or contradictory."¹

Professor Andenaes, whose essays on deterrence are very perceptive, also adds much enlightenment on this essential question. In his book, "Punishment and Deterrence," he observes:

"We can say that punishment has three sorts of general preventive effects: it may have a *deterrent* effect, it may strengthen *moral inhibitions* (a moralizing effect) and it may stimulate *habitual law-abiding conduct*. I have reason to emphasize this, since many of those who are most skeptical of general prevention think only of the deterrent effect. Even if it can be shown that conscious fear of punishment is not present in certain cases, this is by no means the same as showing that the secondary effects of punishment are without importance. To the lawmaker, the achievement of inhibition and habit is of greater value than mere deterrence. For these apply in cases where a person need not fear detection and punishment, and they can apply without the person even having knowledge of the legal prohibition.

"By individual prevention we mean the effect of punishment on the punished. At best this results in genuine moral improvement or in the acquisition of pro-social habits. Here the contrast to general prevention is quite clear...

When a motorist is fined \$5.00 for illegal parking he is neither improved nor rendered harmless, but he will be presumably more careful the next time he parks. Thenceforth the motorist's thinking in such situations will be influenced both general-preventively and individual-preventively. The deterrent effect which the law by itself has on every citizen will be strengthened in his case by the fact that he knows from personal experience that the law means what it says.

"The disagreement over the importance of the general prevention is of course largely due to the fact that its effectiveness cannot be measured. We do not know the true extent of crime...We know still less about how many people would have committed crimes if there had been no threat of punishment."²

C. Isolation, and Restraint of the Offender

There is a rational basis for isolating, or restraining the offender, namely that the offender may be too dangerous to be allowed to roam the streets, and is likely to produce injury and bodily harm to others if not restrained.

Everyone recognizes that there are many dangerous people who commit crimes and who often act without feeling or concern for their fellow man. Whatever label we apply to this group, whether it be sociopath, psychopath or some other label, most people agree that banishment, incapacitation and isolation for them are appropriate. The fact that they may create problems in prisons for their fellow prisoners is worrisome, but society is more concerned with its own protection than those of incarcerated offenders.

At the same time, there is a whole spectrum of criminal behavior which basically occurs only once in a person's life. For example, the man who breaks down under strain and injures or kills members of his family is not likely to repeat the offense. Similarly, most white-collar offenders, such as trusted employees who embezzle funds from their companies, seldom recidivate. Actually, prison officials are aware that the lowest rate of recidivism

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occurs with persons convicted of murder or manslaughter. Follow-up records of their subsequent behavior have repeatedly substantiated this fact. Still society insists that we incarcerate such offenders.

Obviously, restraint and isolation are expensive social instruments of control because they require confinement, often for long periods of time. And similarly they involve decisions about future behavior which are based on admittedly imprecise predictive measures. While research may indicate that a significant proportion of certain types of offenders are likely to commit further crimes and therefore need restraint and isolation, many other offenders with almost identical personal characteristics and criminal histories will not commit additional crimes. Accordingly, if you impose isolation and restraint on the basis of gross predictions for a class of offenders, you may unnecessarily imprison many persons who would not commit offenses. In other words, because current crime prediction formulas and measures are imprecise, you may overpredict and needlessly imprison many offenders.

D. Rehabilitation

Rehabilitation manifestly constitutes one of the important goals or purposes of punishment. As a society we would like the correctional experience to be beneficial and hope that it will bring the offender to his (or her) senses and act to resocialize and rehabilitate him. After all, punishment alone is not enough. If the offender emerges from prison more dangerous than when he entered, then admittedly we have produced a socially counterproductive result.

If every convicted offender sentenced by a judge, irrespective of the nation in which the criminal proceeding took place, was deterred from further offenses and emerged a more socially responsible person, then the criminal law would indeed have fulfilled its purpose. But unfortunately, this outcome is not always the case.

Few people will dispute that rehabilitation is a desired goal. As a matter of fact, it humanizes the punitive process if we provide treatment programs in an attempt to achieve the offender's rehabilitation. The problems with rehabilitation are not

its goals but the unfortunate consequences that flow from well-motivated efforts to achieve this lofty purpose. Under the guise of rehabilitation, we needlessly confine many offenders for unnecessarily long periods of time.

In the United States as well as in European and many Asian countries, we provide many rehabilitative services in prisons. However, despite many years of rehabilitative efforts, the results have not been encouraging. Follow-up studies disclose that the proportion of offenders committing further crimes has not changed significantly over the years, despite vast investments in rehabilitative efforts. Objective evaluations of the results of American prison treatment programs have not demonstrated that they are effective.³

Rehabilitation also has the potential for abuse because it gives prison officials almost unlimited control over the offender and frequently, many unwarranted actions take place. For example, most American states have indeterminate sentence provisions whose theoretical basis is a medical model whereby the prisoner is released when he is ready to go back to society. Unfortunately, experience has shown that longer terms are served under the indeterminate sentence law. Furthermore, prison release dates are not based on objective standards but are frequently determined by political pressures and considerations. This not only makes for unjustifiably longer prison terms but contributes to considerable unrest and resentment within the prison as well.

We also have to understand that under the guise of rehabilitation we may in fact unintentionally perpetrate more harm than good. There is no guarantee that applying a particular cure will make the patient better; it may make him worse. Righteousness and purity of purpose, in and of itself, are not sufficient to insure a favorable result. Historically, more social harm and injury has been wrought upon individuals by well-meaning people who were certain that their cause was right and just than was perpetrated by those with evil designs. The mass slaughter of hundreds of thousands of non-Christian disbelievers during the time of the Crusades by religious zealots is only one of many examples from history.

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The rehabilitation and treatment model is currently being subjected to greater criticism and scrutiny than ever before by American and Western criminologists. Many claim that it is based on untenable factual assumptions and disturbing value judgments. Here are some of the criticisms of these assumptions:

1. Social factors largely produce crime. Without changing the social pathology which encourages a criminal culture, the relevance of individualized treatment may be negligible.
2. We know little of the individual causes of crime. The studies to date have disclosed little of scientific value in this area, and hence it is inappropriate to embrace a treatment ideology without first establishing the scientific validity on which it is based.
3. In the absence of scientific data on cause and cure of criminality, correctional treatment programs are based mainly on speculation and invalid assumptions.
4. The discretionary power extended to criminal justice officials in such a system is awesome and uncontrollable. No specific standards exist to govern individual decisions and thus they are not subject to the restraining hand of appeal to the courts.

A more balanced view is offered by Norval Morris, first Director of UNAFEI, and currently dean of the University of Chicago's prestigious School of Law. In his recent book, "The Future of Imprisonment," Morris deals with the question of rehabilitation and offers the following observations:

"Rehabilitation, whatever it means and whatever the programs that allegedly give it meaning, must cease to be a purpose of the prison sanction. This does *not* mean that the various developed treatment programs within prisons need to be abandoned; quite the contrary, they need expansion. But it does mean that they must not be seen as *purposive* in the sense that criminals are to be sent to prison for treatment. There is a sharp distinction between the purposes of incarceration and the opportunities for the training and as-

sistance of prisoners that may be pursued within those purposes. The system is corrupted when we fail to preserve this distinction and this failure pervades the world's prison programs."¹

Joining many others, Morris asserts that an inmate's prison behavior is not an adequate or accurate predictor of his behavior in the community. He maintains that we can't predict the likelihood of criminal behavior following release by the prisoner's response to prison treatment and training programs, and questions the efficacy of psychological treatment in a coercive prison setting.

As a final observation, rehabilitative efforts are relatively expensive. If the results are questionable, the opponents insist that rehabilitation is insupportable on a cost effective basis alone.

Notwithstanding the current assault on prison treatment and rehabilitation efforts, few would disagree that if an offender's reform could be achieved without the accompanying liabilities and disadvantages, then manifestly it should be sought. It may be that prisons are not the appropriate institutions to achieve this goal.

Conflicts Inherent in Sentencing

Having briefly described some of the major purposes and goals of sentencing, as well as their limitations, we turn to the conflicts which face judges in carrying out their sentencing responsibilities. Admittedly judges are not totally independent agents who can act in complete disregard of and without relationship to prevailing community attitudes or standards. If judges are to be effective, to some extent they must reflect community standards and attitudes because in effect, they are society's spokesmen concerning the particular offender and his offense.

While a judge is an exponent of the community's moral response to crime, to fulfill his role properly he must render a rational decision as a detached interpreter of social policies. He can't bow to the weight of compassion or pity alone, for that is not enough. Nor can he ignore the needs of society and its protection. At the same time, he has to strive to select a

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sentence which offers the best chance of producing a chastened and rehabilitated offender. Trying to satisfy these diverse objectives is a problem of substantial dimensions because many of the goals are mutually antagonistic. For example, satisfying society's retributive mandates may produce a bitter, hardened individual with a strong sense of vengeance on a society which has singled him out for punishment. Being thus embittered, the offender is not likely to emerge from prison a better, wiser and more socially oriented person. Similarly, failing to punish the guilty offender may give him a false sense that he need not feel guilt or remorse for his crimes, and thus may encourage him to commit further transgressions against the law. The conflicts posed by these and other antithetical goals are not readily resolved and the conscientious judge is often faced with moral dilemmas and difficult, imperfect choices in his sentencing.

Determining the Sentence: Useful Background Information

In addressing UNAFEI participants, I am well aware of the diversity of criminal statutes and designated penalties for various offenses which exist in countries throughout Asia and the Far East. At the same time we are equally cognizant of the fact that most judges would prefer to have available, in an organized format, appropriate information concerning the defendant's background, prior criminality, and other significant facts to assist him in his sentencing decision. This is the practice in some Asian and European countries as well as in the United States. Despite differences in the sentencing options which are available and the degrees of freedom a judge has in sentencing, in other words, whether prison sentences are mandatory or whether other optional sentences are available, when a sentence has to be imposed, all judges need the best possible information concerning the defendant.

This issue is not novel or new. Much thought has been given to it in America and several basic informational requirements have been identified as being helpful in arriving at the fairest, wisest and

hopefully, the most effective sentencing decision.

First, it is the consensus that the report need not and indeed should not deal with the question as to whether or not the defendant was guilty of the offense. That is the function of the trial court process, and while everyone recognizes that occasionally an innocent person is wrongfully convicted on weak, erroneous or perjured evidence, in the majority of cases—actually, the overwhelming majority of cases—the defendant's culpability in the offense is proven beyond any reasonable doubt.

Returning to the contents of the report itself, the standard informational requirements of the presentence reports desired by judges in the United States include narratives under the following headings: Official version of the offense as well as the defendant's statement and version; a recapitulation of the defendant's prior criminality and delinquency; a brief report on the family history including whether siblings or parent have had any criminal records; some discussion of the type of home and neighborhood in which the defendant lives; a brief discussion of the educational achievements and employment record of the defendant; some reference to religious affiliation and involvement; defendant's military service history; the physical and mental health of the defendant; his interests, hobbies, and financial status; and finally, an evaluation of the defendant and his prognosis for successful rehabilitation. In addition, these reports invariably contain the probation officer's advisory recommendation concerning an appropriate sentence and conditions thereof. Since the probation officer's recommendation is advisory, the judge can either adopt or disregard the recommended disposition. However, in most courts there is a fairly high correlation between the probation officer's recommendation and the actual sentence imposed by the judge.

The Judge's Sentencing Decision: Criteria and Standards

Having briefly discussed the purposes and goals of sentencing as well as some of the information which would prove useful to the judge in helping him choose

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an effective and fair sentence, we now turn to the decision itself, namely whether to impose imprisonment for a short or brief period, whether to place the offender on probation (in countries where such systems exist), whether to order a fine and restitution, whether to commit the offender to a psychiatric facility or hospital for treatment, whether to simply admonish the defendant and release him back to the community, or whether to impose some other sentence.

At this point, the question of available penal and treatment resources becomes crucial to the discussion as does the extent to which mandatory penalties are prescribed in the various penal codes of countries represented by UNAFEI participants. Obviously, if the criminal code of a country specifies that persons convicted of certain offenses must be committed to prison, then the only discretion available to the judge may be in deciding the length of that confinement. Similarly, long standing tradition may dictate the nature of the sentence. For example, if suspended sentences are usually imposed for first offenders of minor crimes, most judges will use this form of sentence rather than the more traditional punitive forms of legal sanction. Obviously, most courts have a number of long standing sentencing traditions, and as a rule they carry great weight.

At this point, it might be useful to examine the distribution of sentences for persons convicted of serious crimes, in

California, the largest and most populous state in the United States, and one with which I am obviously quite familiar.

In 1971, over 56,000 persons were convicted of felonies in California's superior courts, and seven thousand less, about 49,000 were convicted in the following year, 1972. About 10 percent received prison sentences in 1971 and almost 12 percent in 1972. The remaining dispositions were as follows: 39 percent received probation compared to 36 percent in 1972; 32 percent received probation following a jail sentence of less than a year in 1971 while in 1972, 35 percent received this sentence; 10 percent received sentences to jail of less than a year without probation in 1971 compared to 8 percent in 1972; 1 percent received fines in both years; 3.5 percent were committed to the California Youth Authority as young offenders in 1971 and slightly less, 3.1 percent in 1972; and about 5 percent received commitments to the California Rehabilitation Center for Narcotic Addicts in both years. The data for both 1971 and 1972 is shown in Table 1.

As a world of explanation, attention is directed to the wide range of dispositions available to California's courts in cases involving serious offenses. This extensive latitude in sentencing options may not be comparable to the sentencing alternatives available in many Asian countries, but is included to reflect the degree of flexibility in sentencing which exists in the California judicial system. To understand the

Table 1: Disposition of Convicted Felony Defendants—California
Superior Courts 1971-72

Disposition	1971		1972	
	Number	Percent	Number	Percent
Total Persons Convicted	56,018	100.0	49,024	100.0
Sentences				
Prison (more than one year)	5,408	9.7	5,664	11.6
Youth Authority	1,973	3.5	1,515	3.1
Probation	21,738	38.8	17,606	35.9
Probation and Jail	17,703	31.6	17,318	35.3
Jail (less than one year)	5,771	10.3	4,062	8.3
Fine	704	1.3	436	0.9
Commitment to Narcotic Facility	2,721	4.8	2,423	4.9

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data, one must also have an appreciation of the role of plea bargaining, whereby an agreement to plead guilty is reached between prosecutor and defense counsel in exchange for a favorable sentence. This practice heavily influences the disposition of cases in the United States since as many as 75 percent of the cases are disposed of by guilty pleas. Since most judges will accept the agreed upon sentencing compromise, on the theory that the State interests are being adequately protected by the Prosecuting Attorney, in one sense their sentencing options are restricted.

It is significant to observe that only a minority of convicted defendants receive prison sentences in excess of one year. In fact, of the 56,000 convicted defendants in 1971, slightly more than 10,000 were confined in penal institutions for more than one year, or 18 percent. There include the number sentenced to adult prisons, as well as the number sentenced to youth institutions and to narcotic offender facilities.

When the number sentenced to jails which are local correctional facilities used for sentences of less than one year's con-

finement is added to the total sentenced to adult prisons, youth institutions or narcotic facilities, then 60 percent of the convicted defendants in California were sentenced in 1971 to serve time in either local or state correctional institutions. In 1972, the proportion sentenced to local or state penal institutions was even higher, 63 percent. Thus a fairly high proportion of those convicted for felonies in California have to serve local or state prison sentences despite the vast number of compromised sentences negotiated through the widespread use of plea bargaining.

In Japan, while a very high proportion of persons convicted of serious offenses receive prison sentences, many do not serve terms because of the liberal use of the suspended sentence. For example, of more than 18,000 persons convicted in 1973 of ten serious offenses somewhat equivalent to felonies in the United States, all but one percent received prison sentences. However, only 53.4 percent of all offenders had to actually serve prison sentences, while 45.6 percent had their prison sentences suspended.

Almost 38 percent of the total number

Table 2: Japan District Courts, 1973—Sentences of Offenders Convicted of Selected Serious Offenses*

<i>Disposition</i>	<i>Number</i>	<i>Percent</i>
Total Persons Sentenced	18,080	100.0
Prison Sentences Suspended	8,244	45.6
With probation supervision	1,726	9.5
Without probation supervision	6,518	36.1
Prison Sentences Not Suspended	9,650	53.4
Less than one year	2,800	15.5
One year or more	6,850	37.9
Fine	186	1.0

*Data is for persons convicted of the following offenses: arson, forgery, counterfeiting securities, official corruption, homicide, larceny, robbery, bodily injury, death or wounding through robbery or other offenses, and fraud. Although the number of defendants receiving prison sentences was known, the number who received sentences of less than one year and one year or more had to be estimated. In deriving the figures, the following estimates were used: slightly less than 50 percent of those sentenced to prison terms of less than one year and 56 percent of those sentenced to one year or more would actually serve their terms.

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actually served prison sentences of one year or more. This data reflects the liberal use of discretion to suspend prosecution by Japan's able Public Prosecutors a consequence of which is that only the more serious offenders are brought to trial. Therefore, a significant proportion of those convicted receive prison sentences of one year or longer. The specific data is shown in Table 2 below.

Sentencing Criteria: Decision to Sentence Offender to Prison

As a rule, a fairly small number of case factors play a particularly significant role in determining the offender's sentence, namely, the nature of the offense, the defendant's prior record of delinquency and criminality, an assessment of the danger the defendant poses to society, and finally, the particular legal mandates of the criminal law regarding prescribed penalties for specific offenses. Although supplemental information on the defendant's social history and background may be crucial in determining the sentence in an individual case, in most instances the nature of the offense and the defendant's prior record are pivotal factors. The consensual criteria generally relied upon in deciding whether or not to impose a prison sentence are as follows:

1. *The defendant's crime is serious and he has a fairly lengthy record of prior offenses.*

The past record of criminal and anti-social behavior is as reliable an indicator of potential future criminal conduct as any single factor. Accordingly, persons who commit serious crimes and who have fairly extensive records of criminal behavior usually are imprisoned in order to protect the public. The fact that the defendant has failed to respond to previous court sanctions may be discouraging but it also is one of the most important considerations in determining whether or not to impose a prison sentence. In order to protect the public, such offenders are considered to be appropriate candidates for commitment to a penal institution by most judges.

Many defendants with long records are in a sense professional criminals in that they depend on illegal activities for a major portion of their livelihood. Often those who are successful in criminal endeavors have sizable resources which can not be accounted for by earnings from gainful employment. In addition, they usually have a strong identification with the criminal subculture and express disdain for those who conform to society's rules of appropriate conduct. As a result of their frequent exposure to the criminal justice system, these offenders are very knowledgeable about the workings of the judicial system and it is not unusual for them to attempt to manipulate the sentencing decision to achieve a lighter sentence.

2. *The defendant is a dangerous person whose behavior poses a threat to society.*

Judges and prosecutors everywhere have encountered the sociopathic offender who vents his anger with displays of needlessly brutal personal attacks on innocent victims. This assaultive, sadistic criminal often acts without remorse or a sense of shame about the pain and suffering he causes by his wanton conduct, and therefore poses a serious threat and danger to society. Accordingly, his confinement is almost a matter of necessity if the public is to be safeguarded from unnecessary injury. While the causes of such behavior may lie deeply rooted in the unwholesome nature of the offender's deprived upbringing, most judges, and certainly the public, find it difficult to feel sympathetic or sorry for such defendants.

3. *There is a strong likelihood that the defendant will commit another crime unless he is confined in a penal institution.*

While defendants of this nature have been partly described in some of the preceding sections, nevertheless it is listed as a separate criterion because it is an important consideration in deciding whether or not a prison sentence is to be imposed. Assuredly, such defendants usually have considerable prior criminal histories, for the more extensive the prior record the

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greater the likelihood of their committing further offenses. This criterion may also apply to persons with less extensive criminal histories, particularly those who have strong negative attitudes towards conforming to society's demands for lawful behavior, or who have no moral support forthcoming from family or friends. Certainly the offender with a poor work history and a record of alcohol, and perhaps drug abuse as well, and who is a drifter without firm social roots stands a greater chance of committing further crimes than the offender who has a more stable, supportive background. A judicial decision to keep the offender in the community rather than send him to prison must be based upon favorable facts and circumstances. If such a basis does not exist, then prison confinement may be necessary, especially if he has committed a serious offense.

4. The seriousness of the defendant's crime will be depreciated by a lesser sentence.

In most societies a number of serious offenses are committed by persons who neither have a strong criminal identification, nor are likely to repeat their offenses, nor are dangerous to society. Many examples come to mind: the white-collar criminal who violates his trust as a public official, or the bank employee who embezzles funds, or the situational offender who may have killed someone in a fit of anger or passion. Despite the fact that they are not likely to repeat their offenses, society usually demands that they be imprisoned both as an object lesson to others, and in recognition of the seriousness of their crimes. They usually are compliant, well-behaved prisoners, and after release, they seldom have further contact with the law. However, their imprisonment is still necessary because of the serious nature of the offense.

Sentencing Criteria: Decision Not to Impose Sentence of Imprisonment

As a general rule, only a minority of offenders are sentenced to serve lengthy prison terms. In the United States and

Japan, most offenders either receive prison or jail terms of less than one year, suspended sentences or probation. While obviously there is great variation in the number of alternatives to imprisonment available among countries, as a rule in almost all jurisdictions a portion of convicted offenders either receive suspended sentences or some kind of informal or formal probation supervision.

The criteria for withholding imprisonment embrace judicial evaluations of the seriousness of the offense, an assessment that further transgressions against society are less likely to be committed, the fact that serious harm may not have been caused or threatened by the offender's criminal conduct, and recognition that there may have existed strong grounds which provided limited, although not complete, justification for the behavior. Accordingly, the following factors might apply in determining that prison confinement was not necessary or appropriate:

1. The defendant is neither a confirmed criminal, nor does he have a lengthy history of criminality.

2. In committing his offense, there were many mitigating circumstances to justify his conduct, although his guilt was established beyond a reasonable doubt.

3. The offender neither threatened nor caused serious harm to the victim(s) in committing his offense.

4. There were circumstances to suggest that there was strong provocation for the offense, and the victim's conduct might have helped induce the criminal act.

5. The defendant is willing to provide restitution for any damage or injury to the victim and his property.

6. There is no evidence to suggest that the defendant is likely to commit further offenses, or that his criminal conduct is likely to recur.

7. His imprisonment would be counterproductive and would impose unnecessary hardships on both his family and himself without satisfying the needs of society.

8. His background suggests that he is likely to respond affirmatively to either probation supervision or a suspended sentence.

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These factors, either applied individually or cumulatively, would serve as a justifiable basis for imposing a sentence other than imprisonment in most circumstances. Experience suggests that many of these types of offenders can be safely returned to the community under some form of informal or formal supervision.

These criteria imply that the defendant possesses a set of positive personal attributes whose application involves a judicial prediction that the defendant's future behavior will be socially conforming. Inasmuch as the social consequences of imprisonment are quite serious, not only involving isolating the defendant from society but placing him in close proximity with experienced and often hardened criminals, prison sentences should not be imposed too readily. Instead, they should be reserved for the small number of offenders who possess extensive criminal histories or whose offenses are dangerous or serious in nature.

Offenders who lack criminal sophistication or whose offenses contain mitigating circumstances are appropriate candidates for sentences which will keep them in their communities. Many such offenders are confined prior to their trials, and therefore by the time their cases are tried, they actually have served short sentences. Thus even if they are returned to their families and homes after conviction, they have, in effect, served a prison sentence. Research studies in Western nations have repeatedly shown that many defendants who receive such sentences do not recidivate.

Conclusion

As is true in many parts of the world, numerous courthouses are adorned with a statute representing the universal and classical symbol of justice: a blindfolded lady with a pair of scales in one hand and a sword in the other. This statuesque symbol stands as a mute expression of the antithetical and delicately balanced forces impinging on our system of justice and implies that a judge's decisions will neither be blinded by personal prejudice nor excessive vengeance and baseless bias.

While each sentencing decision involves an assessment of the unique circumstances

in an individual case, judges nevertheless should strive to reduce gross disparity of sentences for offenders with similar social and criminal backgrounds. Otherwise, the ends of justice are not served. Over the years many proposals have been offered to reduce disparity in sentencing. These have ranged from schemes to facilitate appellate review of sentences to proposals transferring the judge's sentencing responsibilities to a lay board of behavioral experts. It is likely that some disparity in sentencing will always exist because sentencing is not a science involving the use of absolute criteria but an attempt to accommodate many diverse and conflicting individual and social objectives. In my judgment, an effective way to reduce unwarranted and indefensible disparity is to give judges the responsibility to develop a set of acceptable sentencing standards, criteria and guidelines, which all of them would then be obliged to honor and observe. This is not to suggest that assistance from nonjudicial experts should be disdained or discouraged, for wisdom in sentencing can never be the exclusive province of any one or a limited number of persons. Rather this is to observe that such criteria have to represent a true consensus of those who carry out the actual sentencing responsibilities, namely the judges themselves. At the same time, it is helpful for judges to share insights and experiences on the many questions involved in sentencing as is done in sentencing institutes and in UNAFEI courses.

Finally, we are badly in need of further research—a curious plea in this age of extensive research support and the proliferation of professional publications—to ferret out the effectiveness and appropriateness of various alternative sentences so that judges will have the benefit of more scientifically and empirically tested bases of information with which to make their sentencing decisions. Significant research along this line has already begun particularly in the areas of parole decisions and predictions of delinquent behavior. Utilizing sophisticated mathematical techniques and advanced research methods, numerical values were developed for selected social, criminal and vocational characteristics from which scores were derived, related to the probability of success or failure

on parole. While these first efforts have been promising, it is important to understand that they do not guarantee fail-safe, no risk certainty in decision making. In other words, such research can not tell us—or the sentencing judge for that matter—precisely which individual offenders will succeed on parole and which ones will fail. What it provides is a quantitatively expressed probability relating to parole success or failure. Accordingly a defendant with a specified set of characteristics, such as no prior criminality, the fact that he held a job for an extended period of time, that his marriage was intact, a limited pattern of mobility, who had no use of drugs or no history of alcoholism, and other vital indicators, would have a high probability of success, expressed much like a set of betting odds in a horse race. While applying such formulas may indicate that 75 percent of defendants with a particular set of characteristics are likely to succeed on parole or probation as based on past experience, it is important to recognize that 25 percent actually do not succeed upon release. Accordingly, the grossness of current predictive devices is, in essence, one of the limitations of such classification methods. Nevertheless they are useful because they replace subjective hunches and guesswork with empirically derived data. Research offers few, if any, guarantees of absolute certainty and infallibility in rendering decisions, but with the help of additional knowledge, it is possible to reduce judgmental errors and improve the effectiveness and appropriateness of the sentence.

As a final concluding comment, it is important to reiterate that societies everywhere impose upon judges an enormous responsibility, namely helping to make their respective nations safe from crime. In every nation throughout the world, judges face numerous challenges in meeting this goal. The extent to which the judicial system effectively carries out its share of this responsibility largely dictates how well the society is able to curb and control the threat posed by crime and thereby insure domestic peace and tranquility. It is a challenge that must be met.

REFERENCES

1. Franklin E. Zimring and Gordon J. Hawkins: *Deterrence, the Legal Threat in Crime Control* (1973), pp. 3-5.
2. Johannes Andenaes: *Punishment and Deterrence* (1974), pp. 8-9.
3. See Martinson, "What Works—Questions and Answers about Prison Reform," *The Public Interest* (Spring, 1974).
4. Norval Morris: *The Future of Imprisonment* (University of Chicago Press, Chicago, 1974), pp. 14-15.

EDITORIAL

China Post 英文中國郵報

More About Young
Criminals

During the last few days two groups of armed robbers, the first consisting of four youths and the second totaling three, were executed by a firing squad following the Ministry of Defense's approval of the verdict of death handed down in each case by a military court. Only a very short period of time elapsed between the military trial and the execution of the criminals. This is certainly swift justice and, as we have pointed out in these columns before, it is the only way to strike terror into the hearts of all those who are prone to commit the most serious crimes such as murders, armed robberies and criminal assaults on women.

Most of our readers may be aware that there was an innovation in the handling of the aforesaid two executions by the authorities concerned. The innovation consisted in the fact that the scene showing the criminals shortly before the execution was televised. On the TV screen we could see the expression of hopelessness on the faces of the youthful criminals. They were tightly bound with ropes so that they could not freely move their arms. But they were all permitted to enjoy(?) a last meal. A small amount of wine was poured into their mouths. Chicken legs were also held close to their mouths to let them take a few bites. Then they were

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taken to the execution ground.

To telecast the scene described above cannot but make a deep impression on all people, especially would-be criminals. It is bound to have a deterrent effect on every youth who is contemplating the commission of a serious crime, either singly or together with other accomplices. Any youth planning to commit such a crime will have to think more than twice before he takes action. Ordinary news stories of executions of criminals cannot produce a similar effect.

To let criminals about to be executed have a last meal is an old practice in China. In the past they were usually given a large amount of wine and a sumptuous meal. This was an act of mercy intended to give them courage before facing the firing squad or having their heads chopped off. Sometimes hardened criminals showed no fear at all. Instead they boastfully declared: "After 20 years I'll be a big fellow again." That, of course, was mere wishful thinking since they couldn't be sure they would be reborn as human beings.

In our previous discussions of this question we have stressed the role which should be played by all families and the schools. The failure of parents to give their children family education and the inadequate moral training given their pupils by the schools must be considered as

the chief factors responsible for juvenile delinquency. Some people, however, have chosen to put the blame on "society."

What do they mean by "society?" They mean that in the social environment there are influences which tend to make some people pursue a criminal career. In our opinion, this is only partly true. Why is it that some people are never affected by these so-called bad influences? They may be poverty-stricken, but they will never think of "getting rich quick" by resorting to illegal means. They would rather starve to death than become criminals. They would never make criminal assaults on women no matter how strong the temptation is.

On the other hand, there are people who simply cannot resist the temptation. The Italian criminologist Lombroso's theory that some people are "born criminals" is decidedly wrong. But we cannot deny that there are people born with criminal propensities. Such being the case, we can hardly tell where the blame should be placed. At any rate, we have to face the facts as they are. All criminals should be duly punished, and there are certain crimes which must be considered as punishable with death. For ensuring the security of law-abiding citizens there is really no other way out.

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END