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Book Review

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BOOK REVIEW

GUIDES FOR SENTENCING. By Advisory Council of Judges of the NPPA. New York: Carnegie Press, Inc., 1957. Pp. v, 99. $2.00.

The National Probation and Parole Association has been working for over 35 years to improve the administration of justice and in the publication of "Guides for Sentencing" it has provided one of its most important services to judges who are charged with the administration of criminal justice and to juvenile and domestic relations courts. The book is the first of a series of practical manuals for all of the above named courts and it is the result of the combined labors of 37 specially selected United States, state and juvenile judges for a period of about five years. Bolitha J. Laws, Chief Judge, United States District Court, District of Columbia, was the chairman of this group of judges, known as "The Advisory Council of Judges, National Probation and Parole Association." This is no ordinary book. It is at least five books rolled into one and there is sufficient material contained therein from which any judge charged with the administration of criminal justice, in any of its aspects, can gain new insights, new material for research and new hope for the dawning of that better day in dealing with those charged with crime, juvenile delinquency and quasi-criminal matters arising in courts of domestic relations.

The book challenges the attention of jurists to the importance of "individualizing" the application of legal rules so as to take account of the concrete circumstances of particular cases. The need for such individualization has long been recognized in some parts of the law. All "standards" of conduct; for instance, "fairness," "good faith" in equity and "reasonableness" at common law involve individualization, for the court must weigh the specific circumstances in each case in applying the standard. So, also, the discretion of the judge as to the probation, parole, or suspended sentence in criminal cases is a mode of individualization. The tendency which heretofore existed to regard the law of sentences as general rules to be uniformly applied, overlooked the need in many cases for flexibility in making the existing law yield just results in particular cases. The need for this in criminal law had always been recognized by the reserve power of pardon lodged either in the President of the United States for the violation of federal laws or the governors of the respective states for the violation of state laws.

When it is once stated and recognized that in many instances the probelm of those convicted of crime is a social one and its solution and rehabilitation can be achieved only by the combined and intelli-

gent efforts of all classes of society, which includes those professionally trained people who work for the promotion of the common good, we can readily see that the heretofore reserve pardoning power to a President or governor would accomplish very little, if anything, in the way of rehabilitation for the prisoner or good for society in general. The government, state or federal, has a duty not to sacrifice society to law, for law is but a means to achieve the purposes of society. All of this has been recognized in other fields of the law—the development of social security, social insurance legislation, workman's compensation acts, public education, public parks, public recreation centers, public library facilities, the prohibition of child labor, hospitals for the treatment of the mentally ill and many other legal humanitarian endeavors and clearly referable to the claim that the best should be made of the human resources available.

The book, "Guides for Sentencing," contains five chapters and they are as follows:

1. Criminal Justice: Objectives and Setting
2. Dispositions Available to the Court
3. The Pre-sentence Investigation and the Disposition
4. Factors Affecting the Disposition
5. Selecting the Disposition

The book points out that ordinarily the court has a choice of four dispositions or combination of them, to take in criminal cases—probation, imprisonment, fine and suspended sentences, and it clearly points out that for certain types of offenders commitment to an institution is the most appropriate disposition. In many instances, where the defendant is inextricably involved in criminal behavior and undesirable associates or if his personal pattern of living holds no promise of recovery in the community, even if he is helped, then commitment is necessary to break the associations and in time, to modify the antisocial attitude and tendencies; and in cases where the defendant may be a dangerous individual, one whose personality has a basic criminal pattern and whose behavior cannot be controlled by the type of supervision offered through probation. There was a time when the prison walls were high enough—not only to keep the inmates housed therein from climbing over it, but they were high enough to insulate its inhabitants successfully from any solicitation on the part of the public in general. Convicted persons went to prison to be forgotten, to be punished, to be cleansed from their sins; but it was not much of our business. They would be there for a long time and when they came out, we could avoid them somehow or other—nobody would have to employ them, the state would give them a few dollars upon their release; and the police would watch them carefully and perhaps some

would be arrested again for another offense and would be off our hands for still a longer period of time.

A number of influences came into existence to change this attitude. Riots, disturbances and killings took place in the prisons and these things forced themselves upon the attention of the public. Scientists, social welfare workers, criminologists, and sociologists called the attention of the public to the fact that punishment by imprisonment did not seem to have the reliable effect upon human conduct that most people supposed it would have; that the human personality was a thing of infinite variety and what was good in the case of one individual was harmful in another; that there was no standard prescription to be taken, in large or small doses, dependent upon the name of the crime or the individual who committed it, that could be guaranteed to cure such a deplorable situation.

We had also learned that severity of punishment by imprisonment or death was not the solution for the problem, because in England, during the early Eighteenth Century, there were no less than 160 crimes that were made capital cases or offenses. The one great lesson of criminal history is that severity of punishment is not an adequate deterrent. A far greater deterrent is the positive knowledge upon the part of the convicted person that some absolute certainty of punishment in a penal institution awaits him, if the law and the facts justify his imprisonment in some institution. Further than this, if a prison is to be of any value in the social protection of the public, it must do more than merely retain those sent to its confines and turn them back at the end of a stated period. The social conditions which produced the prisoner and which remain in suspension only while he is locked up and wait to react upon him immediately upon his release, are bound up with the success or failure of the prisoner as a social instrument. Important as is the prompt administration of punitive justice, illustrations could be multiplied to prove that punishment by confinement in many cases, no matter how just and prompt, cannot and has not, solved one of the most interesting and difficult problems which confront the nation, each of the states and all of the inhabitants thereof.

Bearing all of this in mind, the probation system was devised to allow persons guilty of anti-social conduct to continue at large, but under appropriate safeguards. The hope of the system is that the probationer will derive encouragement and cooperation in his endeavors to remain in society and will never serve a day in prison. The fulfillment of such hope rests largely on the efficiency of the probation system, which, in turn, depends upon a sufficient number of well trained and skilled probation officers.

The definition of probation is a testing of character, a probing, or

the act of testing. We are told by the courts that probation is "A system of tutelage under the supervision and control of the court which has jurisdiction over the convicted defendant, has the record of his conviction and sentence, the records and reports as to his compliance with the conditions of his probation, and the aid of the local probation officer under whose supervision the defendant is placed." Further, we know that probation is concerned with rehabilitation; that it comes as an act of grace to one convicted of a crime; and that it was designed to aid the rehabilitation of a penitent offender, to take advantage of an opportunity for reformation which actual service of the sentence might make less probable.

Probation is really an experimental device, serving both society and the defendant, and it adds a means for exercising wisely that discretion which, within appropriate limits, is given to certain courts.

We may well, at this point, reflect for a moment upon some of the general aspects of the probation system. The qualifications and duties of the probation officer and his relationship to the court, is outlined in "Guides for Sentencing." In considering the matter there naturally come to mind two broad general divisions into which the customary work of probation officers fall: Presentence investigation and supervision. Assuming that the probation officer must be very competent and well qualified, the success of the probation system is assured when there is a realization that each defendant must be treated as an individual case. In Chapter 3 of this book—The Pre-sentence Investigation and the Disposition, it is pointed out that a judge arrives at a disposition of a convicted offender by the way of one of two systems—the "hunch system" and the "pre-sentence investigation," and in defining the former system, it is said: "Some judges have the idea that by looking at the accused, they could tell what should be done . . ." Nothing could be farther from the truth. Many defendants, especially those who are first offenders, are in a frenzy of fear when they appear before a court. The more hardened type, such as confidence men, appear at ease. It is obvious that in neither case will the appearance nor the statements serve as a reliable guide to the disposition of the case."

It is further stated that the "hunch system" of sentencing offenders cannot be justified as a substitute for a thorough study of the individual characteristics and problems of the prisoner. With this statement, I thoroughly agree, for I know that pre-sentence investigation and supervision are both indispensable to the proper functioning of a probation system, as I know it, and that they complement each other. Information obtained by pre-sentence investigation induces a proper exercise of the discretion of the court in granting probation; and

supervision has well been denominated as the heart of any probation system. The case of supervision is proved or disproved by the adequacy or inadequacy of those systems of probation which provide or fail to provide the exercise of proper supervision. Proper supervision by qualified probation officers is so important and so replete with opportunity for rehabilitation that the day may not be far distant when convicted persons, unconfined by prison walls, may well represent the next step which will be taken in the constant and continuing effort of society to enforce the sanctions of its penal laws properly in many, many cases. Society might discover that such a system would result when reference to an unbelievably high percentage of convicted persons who would qualify for such treatment in an enormous advantage to society itself, to the prisoner, his family and the government. All of this, of course, necessarily presupposes a complete pre-sentence report of the probation officer, which, in turn, is dependent upon the training and qualifications of a competent, well trained, fully compensated and adequate probation officer's staff.

To exercise proper discretion, it is necessary in all cases for the court to rely heavily upon the pre-sentence report of the probation officer. The securing of pertinent information requires qualities of mind and heart which will enable an efficient officer to picture in his report to the court facts relevant to the determination of whether the best interest of society and the defendant will be served by the granting of probation, rather than a sentence of confinement. This duty, relating as it does to the evaluation of facts, circumstances and conditions of humanity, individualized in the person then subject to the orders of the court, cannot be properly discharged on a mere basis of age, occupation, number of brothers and sisters, and the presentation to the court of the equivalent of a stereotyped set of facts, unless prepared by a competent and understanding person. These facts, while helpful to a degree, will overlook some element of the offense or some trait or attitude of the defendant, which would be of material aid in assisting the court to reach a proper determination of the matter.

Following the "hunch system" or obtaining information by probation officer from a convicted defendant in the court room, as a basis for probation by the court, should never be allowed.

A probation officer, discussing the problem face to face with the defendant, members of his family and other interested persons, has a better opportunity to evaluate all human factors than does a judge in open court. Further than this, the probation officer should be assisted by the attorney-general or prosecuting attorney, and the defendant's counsel, in the investigation, supervision, oversight and control of persons granted probation, as provided for in Chapter No. 490 of the

Private Acts of 1947 (Davidson County) of the General Assembly of the State of Tennessee, which also provides: "Said probation officer shall, under the direction of said judges and District-Attorney General, investigate and make reports to said officials as to the circumstances, history, criminal record, social, physical and mental condition of persons who apply to be released. . . ."

The Act further provides: "That the parole officer, after making a full investigation, as aforesaid, shall file a written report, setting out in detail the results of said investigation, and that a copy of said written report shall be furnished to the Judge and the District Attorney-General."

The Act further provides: "That no petition for probation shall be considered by the court until such written report of the probation officer has been filed, both with the court and with the District Attorney-General."

This Act is also complete in every detail as to the supervisory duties of the probation officer "to the end that said persons shall become and remain law-abiding citizens."

Stepping outside of the book, "Guides for Sentencing," (I believe that a review of a book should be more than a mere summary of the contents of the book itself), I deem it proper to call the attention of interested persons to the basic suspension of sentences, probation and parole laws of the State of Tennessee, which is found in Chapter No. 76 of the Public Acts of Tennessee for the year 1931, now TENN. CODE ANN. §§ 40-2901-08. Since the authors of "Guides for Sentencing" have, in numerous instances, related their personal experiences and the experiences of their fellow judges in regard to probation, I do not feel it amiss to state that, as a presiding trial judge for practically three decades, I helped to bring about the enactment of both of the laws, above set forth, and have been called upon in hundreds of cases to invoke the authority vested in me because of their enactment. The probation law in Tennessee can be improved upon in many ways, but especially in removing the limitation of the five-year maximum sentence, beyond which Tennessee judges cannot invoke the terms of the probation law. We now have on probation in Davidson County Criminal Courts 325 persons and at no time have revocations exceeded 15 per cent of those on probation. The general national average is about 24 or 25 per cent.

After the court determines whether probation should be granted a convicted defendant there follows, as to those granted probation, the consequent and most important responsibility of proper supervision. It is the function and duty of the probation officer to supervise the tutelage of the probationer and effect his rehabilitation. This requires not only ascertainment of compliance with and obedience to those

conditions imposed by the court and inherent in the grant; but likewise requires sympathy, understanding, judgment and firmness, all combined with a genuine, intelligent desire to effectuate the rehabilitation of the offender and his restoration as a useful member of society. It must be borne in mind that, as well stated by the courts, "one on probation is not at large nor at liberty, except within the circumscribed limits permitted by his probation. He is in law and in fact in the custody and under the control of the court of his probation," and that probation "is an authorized method of mind and ambulatory punishment, the probation being intended as a reforming discipline. The probationer is not a free man, but is subject to surveillance, and to such restrictions as the court may impose." It follows, in effect, that one on probation is in actuality committed to the custody of the probation officer of the court, and the court, of necessity, expects the conditions of probation to be met. If the probationer shows a tendency toward anti-social conduct, the court expects the probation officer to be capable of correcting such tendencies, or, failing in this, that the officer will move to bring the matter to the attention of the court.

These responsibilities and their proper discharge require a person of the highest type, with adequate training, and with inherent capabilities which are difficult to define, yet are well understood by those with experience in such matters. It may be stated again as to this feature of the probation work that efficient supervision cannot be satisfactorily accomplished as the result of the mere mechanics of visits or the securing of reports. Here, as is likewise true in the matter of presentence reports, there comes into play the human element, both in the work of the probation officer and in the conduct and situation of the probationer. Both aspects also demand, for their proper discharge, the service and intelligent application of effort by a probation officer who is not only well equipped and qualified from the standpoint of education and training, but likewise qualified as one dedicated to his work and who recognizes its importance to society, to the promotion of the welfare of the individual probationer, and the discharge of his obligation as the representative of the court.

Furthermore, being so intimately concerned and involved in the administration of the law which seeks to ameliorate the harshness of penal procedure of the past, probation officers need to study all aspects of crimes and their punishment with a mind single to constant improvement in the administration of punishment for crime, in the full knowledge that their experiences and observations arising in the day-to-day discharge of their duties might furnish grounds for some substantial progress on this vital subject. And at the same time properly qualified probation officers can and should educate the public

generally to the virtues of the system and correct any misinformation existing as to its true purpose and operation.

The prison has three purposes: To protect, to deter and to improve. It has succeeded in the first two in some degree. It is the accomplishment of the third purpose that most prisons fall short of expectations.

Great strides in recent years in attaining what we sometimes call the modern system for the treatment of offenders against criminal laws have been made, yet, no experienced judge who observes the flow of defendants through the courts from day to day and year to year can say that we have even approached possible perfection; on the contrary, the problem is so vast, the elements so mixed, confused and confusing—relating as they do to human beings and human affairs, that we cannot state with any degree of certainty, sufficient to foreclose further consideration of the problem, that this, that, or the other method of imposition of penalties for criminal offenses is the one proper method to be employed in any specified class of offenses or offenders.

Probation is not granted out of a spirit of leniency, nor is it turning criminals loose on society, but it is the administrative act of a judge, placing an offender under the supervision of a probation officer and the judge himself for a specific period of time.

Probation offers many and varied advantages: It enables the offender to reshape his life in the framework of normal living conditions; it preserves family life and other normal social relationships; it enables the offender to carry out his responsibilities by supporting himself and his family; it avoids imprisonment's stimulation of hatred of law-abiding society; it avoids the shadowing impact of imprisonment on personality; it avoids the stigma attached to imprisonment; and to all of these human values, it can safely be asserted that probation is far less expensive than imprisonment.

The *most important advantage* of probation is that it offers a more individualized approach and treatment program than any penal institution heretofore has, or can now, accomplish.

This review is concluded with what the Wickersham Commission said in 1931, which is equally true today:

> "No man should be sent to a penal institution until it is definitely determined that he is not a fit subject for probation. To this end it is urged that every effort be made to broaden probation and provide more and better probation supervision. With adequate probation staffs the number of persons who might be placed on probation with success can be materially increased."

—Charles Gilbert*

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* Judge Division Two, Criminal Court of Davidson County, Tennessee.